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## Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals

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DOUBLING DOWN ON RACIAL  
DISCRIMINATION: THE RACIALLY  
DISPARATE IMPACTS OF  
CRIME-BASED REMOVALS

*Kevin R. Johnson*<sup>†</sup>

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## INTRODUCTION

Deadly encounters of people of color with law enforcement regularly make the national news. Just in recent memory, the string of deaths of young African American men at the hands of police officers, which led to civil unrest in cities across the United States, has attracted the attention of the nation.<sup>1</sup> Although perhaps less well-known among the general public,<sup>2</sup> police officers at various times also have stood accused of using excessive deadly force against Latina/os.<sup>3</sup>

Immigrants of color also have been subject to abuse by local law enforcement officers. For example, in 1999, New York City Police Department officers shot and killed Amadou Diallo, an unarmed immigrant from Guinea, in a hail of bullets; two years earlier, officers literally tortured Abner Louima, an immigrant from Haiti, in a Brooklyn police station.<sup>4</sup> Both Diallo and Louima were black. Their race undoubtedly

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1. See “*Black Lives Matter*” Protests, CNN (Oct. 15, 2015, 2:44 PM), <http://www.cnn.com/2014/12/13/us/gallery/black-lives-matter-protests> [<http://perma.cc/N3LF-66QM>] (depicting through a slideshow protests of alleged police abuses of African Americans in New York, Seattle, Chicago, Oakland, and Washington); L. Song Richardson, *Police Racial Violence: Lessons From Social Psychology*, 83 *FORDHAM L. REV.* 2961, 2961 (2015) (“The recent rash of police killing unarmed black men has brought national attention to the persistence of policing and racial violence.”); Frances Robles, *A Florida Killing like Many, Disputed and Little Noticed*, *N.Y. TIMES* (May 31, 2015), <http://www.nytimes.com/2015/05/31/us/a-florida-police-killing-like-many-disputed-and-little-noticed.html> [<http://perma.cc/KB4S-MMRY>] (“From Ferguson, Mo., to Baltimore to Cleveland, the nation seems awash in disputed, high-profile cases of police violence.”).
  2. Some commentators have claimed that the mainstream news media tends to ignore police brutality directed at Latina/os compared to the widespread attention paid to that suffered by African Americans. See Nicole Santa Cruz, Ruben Vives & Marisa Gerber, *Why the Deaths of Latinos at the Hands of Police Haven’t Drawn as Much Attention*, *L.A. TIMES* (July 18, 2015, 4:00 AM), <http://www.latimes.com/local/crime/la-me-0718-latino-police-20150718-story.html> [<http://perma.cc/BBE5-MXA4>]; Britni Danielle, *There’s a Reason You Haven’t Heard About the “Latino Lives Matter” Movement*, *TAKEPART* (Mar. 28, 2015), <http://takepart.com/article/2015/03/28/why-you-probably-havent-heard-about-latino-lives-matter-movement> [<http://perma.cc/7R2X-6RR3>].
  3. See, e.g., Mary Romero, *State Violence, and the Social and Legal Construction of Latino Criminality: From El Bandido to Gang Member*, 78 *DENV. U. L. REV.* 1081, 1081–85 (2001) (analyzing the killing of a Latino youth by Phoenix police officers); Samantha Masunaga, *Protests Mount in Northwest Police Shooting*, *L.A. TIMES*, Feb. 15, 2015, at A18 (reporting on protests in response to a fatal police shooting of a Mexican immigrant in Pasco, Washington).
  4. See Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 *BUFF. L. REV.* 1275, 1284–86 (1999) (recounting police abuse of Diallo and Louima).

contributed to the circumstances culminating in their brutal interactions with police. Federal immigration enforcement officers also regularly find themselves accused of physically abusing Latina/o immigrant—at times with deadly consequences.<sup>5</sup>

In less spectacular fashion, police departments across the United States engage, on a daily basis, in racial profiling in traffic stops.<sup>6</sup> African Americans, Latina/os, and other minority groups are profiled by law enforcement.<sup>7</sup> As these descriptions of law enforcement abuse suggest, the racially disparate consequences of law enforcement are widely considered to be a most serious national criminal justice problem.

Many Americans support heightened immigration controls. Such support is reflected in the popularity of high removal numbers and symbolized in physical form by the steady lengthening of the wall along the U.S./Mexico border.<sup>8</sup> Mass deportations of “criminal aliens,” who President Obama has referred to with the racially-charged phrase “gang

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5. See HOMELAND SECURITY ADVISORY COUNCIL, INTERIM REPORT OF THE CBP INTEGRITY ADVISORY COUNCIL (2015) (documenting, among other problems, physical abuse of Latina/o and other immigrants by U.S. Customs and Border Protection officers); Nigel Duara, *Border Patrol Agent is Indicted in Fatal Shooting of Mexican Teen*, L.A. TIMES (Sept. 24, 2015, 3:49 PM), <http://www.latimes.com/nation/nationnow/la-na-nn-border-patrol-agent-indicted-20150923-story.html> [<http://perma.cc/Y3PB-22J3>] (reporting on the indictment of a Border Patrol officer for the murder of a Mexican national at the U.S./Mexico border); Garrett M. Graff, *The Green Monster: How the Border Patrol Became America's Most Out-of-Control Law Enforcement Agency*, POLITICO (Nov./Dec. 2014), <http://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220#.VQiROGTF880> [<http://perma.cc/Y4PJ-9496>] (describing violent behavior of some Border Patrol agents).
  6. See *infra* Part I.A. (examining the legal decisions in effect authorizing racial profiling among law enforcement in the United States).
  7. *Id.*
  8. See Pratheepan Gulasekaram, *Why a Wall?*, 2 U.C. IRVINE L. REV. 147 (2012) (analyzing the political and symbolic significance of the “border wall” between the United States and Mexico, which has been extended in recent years). The emergence of Donald Trump as a leading contender for the Republican nomination for President suggests the general popularity of immigration enforcement with some segments of the American public. Charging that the Mexican government sends its nation’s criminals to the United States, Trump called for expanded border security, extension of the U.S.–Mexico border fence, and mass deportations of undocumented immigrants. Shortly after making such extreme claims, Trump surged to the lead of the Republican candidates in public opinion polls. See Raf Sanchez, *Donald Trump Uses Killing of US Woman by Illegal Immigrant to Justify Mexican “Rapists and Criminals” Claim*, TELEGRAPH (July 6, 2015, 5:21 PM), <http://www.telegraph.co.uk/news/worldnews/us-election/11721409/Donald-Trump-uses-killing-of-US-woman-by-illegal-immigrant-to-justify-Mexican-rapists-and-criminals-claim.html> [<http://perma.cc/AD9M-BW3K>].

bangers,<sup>9</sup> have served as the cornerstone of the current administration's immigration enforcement strategy.<sup>10</sup> For a variety of reasons, the targeting of criminal noncitizens for removal has proven to be popular with the general public. Most notably, public safety concerns arguably weigh in favor of allocating limited federal immigration enforcement resources toward efforts to remove noncitizens convicted of crimes from the United States.

The political process often punishes noncitizens with criminal problems. Noncitizens are a particularly vulnerable group in the political process.<sup>11</sup> First off, they lack the right to vote and thus do not possess formal political power through the ballot box to protect themselves from punitive measures. As a consequence, immigrants in general have been subject to discrimination at various times in U.S. history.<sup>12</sup>

Moreover, immigrants with criminal problems are among the most disfavored of the generally disfavored group of noncitizens in the political process. Relatively few contemporary immigrant rights advocates expend much political capital seeking to defend immigrants convicted of crimes in immigration law and policy debates.<sup>13</sup> Consequently, the law and its enforcement over the years has increasingly targeted—some critics might contend consciously punished—noncitizens who have had virtually any brushes with the criminal justice system.<sup>14</sup>

The Obama administration has strived to prove to the public and policy-makers its firm commitment to vigorous enforcement of the immigration laws.<sup>15</sup> Well-publicized increases in the number of immigrant removals have been the centerpiece of nothing less than a sustained political campaign to convince Congress to enact comprehensive immigration reform,<sup>16</sup> for which the President has repeatedly expressed

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9. Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Records Show*, N.Y. TIMES (Apr. 6, 2014), <http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html> [<http://perma.cc/JEH7-YYSZ>] (quoting President Obama).
  10. *See infra* Part II.
  11. *See generally* KEVIN R. JOHNSON, *THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS* (2004) (analyzing the history of discrimination against various minority immigrant groups under the U.S. immigration laws and their enforcement).
  12. *Id.*
  13. *See infra* Part III.A.
  14. *See infra* Part II.
  15. *See infra* notes 92–99.
  16. *See* Thompson & Cohen, *supra* note 9 (exploring deportation for minor crimes and its importance as a political issue).

support.<sup>17</sup> The conventional wisdom has been that a firm commitment to aggressive border enforcement will ultimately help to persuade Congress that the time has come to enact immigration reform. The Obama administration's dedication to enforcement can be seen in the much-criticized mass detention and removal of thousands of women and children fleeing widespread violence in Central America in 2014.<sup>18</sup>

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17. See, e.g., *President Obama on Immigration Reform: "I Am Not Going to Give Up This Fight Until It Gets Done,"* WHITE HOUSE BLOG (Oct. 3, 2014, 4:41 PM), <https://www.whitehouse.gov/blog/2014/10/03/president-obama-immigration-reform-i-am-not-going-give-fight-until-it-gets-done> [http://perma.cc/P8GR-HPXG] (featuring a video of President Obama speaking on immigration with a summary of his remarks). Most comprehensive immigration reform proposals would provide some combination of the following: (1) a path to a durable legal status for certain categories of undocumented immigrants, often championed as a path to legalization or derided as an "amnesty"; (2) expanded avenues for lawful immigration to the United States through, for example, guest worker programs; and (3) bolstered enforcement of the immigration laws. For a review of various possibilities for immigration reform, see Kevin R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L. REV. 1599 (2009) (outlining principles that should guide immigration reform); Kevin R. Johnson, *Possible Reforms of the U.S. Immigration Laws*, 18 CHAP. L. REV. 315 (2015) (examining the impact of contemporary immigration laws and exploring possibilities for reform); see also Angélica Cházaro, *Beyond Respectability: Dismantling the Harms of "Illegality,"* 52 HARV. J. ON LEGIS. 355 (2015) (criticizing various legalization proposals based on the claim that they will increase the vulnerability of noncitizens who are not eligible for relief).
18. See *Flores v. Lynch*, No. CV 85-04544 DMG (Ex), 2015 U.S. Dist. LEXIS 112911 (C.D. Cal. Aug. 21, 2015) (denying a motion to reconsider a ruling that the U.S. government's immigration detention and other responses to the 2014 increase in the migration of Central American minors to the United States violated a consent decree); Scott Rempell, *Credible Fears, Unaccompanied Minors, and the Causes of the Southwestern Border Surge*, 18 CHAP. L. REV. 337 (2015) (analyzing the response of the Obama administration to the increase in the number of Central American women and children coming to the United States); Margaret H. Taylor & Kit Johnson, "Vast Hordes . . . Crowding in Upon Us": *The Executive Branch's Response to Mass Migration and the Legacy of Chae Chan Ping*, 68 OKLA. L. REV. 186, 192-207 (2015) (analyzing President Obama's mass detention and rapid immigration processing of Central American women traveling with children); Mariela Olivares, *Intersectionality at the Intersection of Profiteering and Immigration Detention*, NEB. L. REV. (forthcoming 2016) (unpublished manuscript) (on file with the author) (describing the mass detention of Central American women and children by the Obama administration); see also Daniel Kanstroom & Jessica Chicco, *The Forgotten Deported: A Declaration on the Rights of Expelled and Deported Persons*, 47 N.Y.U. J. Int'l L. & Pol. 537, 538 (2015) ("The allure of deportation for governments is apparent, as it serves many diverse goals, including most obviously extended border control, interior immigration enforcement, national security, criminal law enforcement, labor market regulation, and various other forms of social control.") (footnote omitted); Marcia Zug, *The Mirage of Immigration Reform: The Devastating Consequences of Obama's Immigration Policy*, 63 KAN. L.

Not surprisingly, focusing deportation efforts on noncitizens who encounter a criminal justice system well-known for racial bias has had racially disparate impacts on the removal of noncitizens from the United States. Specifically, racial profiling in criminal law enforcement—including but not limited to that widely employed by law enforcement in the “war on drugs,” combined with removal efforts increasingly directed at noncitizens who have had encounters with the criminal justice system—has had devastating effects on immigrants of color across the United States.<sup>19</sup> These systems, operating in a coordinated fashion, have contributed to the fact that today *more than 95 percent of the non-citizens removed annually from the United States are from Mexico and Central America.*<sup>20</sup> That incredibly high percentage represents a much larger percentage than the Latina/o composition of the nation’s overall immigrant—both legal and unauthorized—population.<sup>21</sup>

Unfortunately, racially discriminatory immigration laws and their enforcement have a long tradition in the United States. The U.S. government has targeted Latina/o immigrants for presumptive removal from the country for most of the twentieth century.<sup>22</sup> Before that, the law expressly made immigrants from Asia the primary focus of exclusion and discriminatory enforcement.<sup>23</sup> Other immigrant groups at various times in U.S. history have been subject to scorn and harsh treatment through restrictive immigration laws and their enforcement.<sup>24</sup>

Today’s racially disparate removals of Latina/os are entirely consistent with the widespread popular belief that Mexican immigrants as a group are predisposed to criminal activity. Well-known public figures, such as 2016 candidate for the Republican nomination for president

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REV. 953, 953–54 (2015) (examining the punitive nature of the Obama administration’s immigration policies).

19. *See infra* Part I.B.2.

20. *See infra* notes 97–99 and accompanying text.

21. *See* Kevin R. Johnson, *Racial Profiling in the War on Drugs Meets the Immigration Removal Process: The Case of Moncrieffe v. Holder*, 48 U. MICH. J.L. REFORM 967, 976–77 (2015) (citing sources with statistical data supporting this assertion).

22. *See generally* ALFREDO MIRANDÉ, *GRINGO JUSTICE* (1987) (analyzing the history of racial disparities in U.S. immigration enforcement and law enforcement).

23. *See, e.g.*, *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (upholding a law allowing for the deportation of Chinese noncitizens); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889) (rejecting constitutional challenges to law requiring the exclusion of Chinese noncitizens from the United States).

24. *See generally* JOHNSON, *supra* note 11 (analyzing the history of discrimination against various minority groups under the U.S. immigration laws and their enforcement).

Donald Trump and flamboyant conservative political pundit Ann Coulter, forcefully express these views.<sup>25</sup> Such incendiary charges feed into the widespread presumption that all persons of Mexican ancestry, U.S. citizens and noncitizens alike, are subject to deportation from the United States. In contrast to the exaggerated claims that the nation is being overrun by criminals from foreign lands, social science research has found time and time again that immigrants—including those from Mexico and the rest of Latin America—are on average *more*, not *less*, law-abiding than U.S. citizens.<sup>26</sup>

The growing confluence of criminal law and immigration law has garnered considerable scholarly attention. The last few years have seen the emergence of a vibrant body of what has been dubbed “cimmigration” law scholarship. Generally speaking, this “scholarship describes and critiques the way that immigration and criminal law interact.”<sup>27</sup> It specifically questions the ever-tightening relationship

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25. See, e.g., ANN COULTER, ¡ADIOS, AMERICA!: THE LEFT’S PLAN TO TURN OUR COUNTRY INTO A THIRD WORLD HELLHOLE (2015) (contending that Mexican immigrants pose a greater public safety risk to the United States than Muslim terrorists); Sanchez, *supra* note 8 (reporting on Donald Trump’s statements about the criminal propensities of Mexican immigrants). See generally Romero, *supra* note 3 (considering the impacts on the law and its enforcement of the popular stereotype that Latina/os are criminals); Deborah Weissman, *The Politics of Narrative: Law and the Representation of Mexican Criminality*, 38 FORDHAM INT’L L.J. 141 (2015) (analyzing in detail the influence of stereotypes of Mexican criminality on American law and policy).
26. See Emily Ryo, *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*, 62 UCLA L. REV. 622, 624–28 (2015) (observing that the great weight of empirical data demonstrates the falsity of the recurring claim that immigrants are particularly prone to criminal activity). For a recent analysis of the data, which is consistent with a string of previous studies, finding that immigrants (including Mexican immigrants) are less prone than U.S. citizens to engage in criminal activity, see WALTER A. EWING, DANIEL E. MARTÍNEZ & RUBÉN G. RUMBAUT, AMERICAN IMMIGRATION COUNCIL, *THE CRIMINALIZATION OF IMMIGRATION IN THE UNITED STATES* 4–9 (2015), <http://immigrationpolicy.org/special-reports/criminalization-immigration-united-states> [http://perma.cc/V54N-N575].
27. Daniel I. Morales, *Crimes of Migration*, 49 WAKE FOREST L. REV. 1257, 1260 (2014) (footnote omitted). The growing body of scholarship focusing on the relationship between criminal law and immigration enforcement includes, among many articles: Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613 (2012); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105 (2012); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 83–86 (2005); Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006). See generally GOVERNING IMMIGRATION THROUGH CRIME: A READER (Julie A. Dowling & Jonathan Xavier Inda eds., 2013) (collecting articles analyzing



between immigration law and criminal law, which results in harsh consequences for immigrants, their families, and the greater community.<sup>28</sup>

This Article agrees with the fairness critique of crimmigration scholars of the growing link between the criminal justice system and immigration removals. It contends, however, that the criticism has failed to sufficiently scrutinize the glaringly disparate impacts of tying removals to alleged criminal activity on immigrants of color. Specifically, the emerging crimmigration scholarship generally fails to analyze in depth the systematic and institutionalized role of race in modern criminal law enforcement. Moreover, for the most part the scholarship ignores how those racial impacts are magnified by the operation of a federal immigration removal process that through a variety of programs targets “criminal aliens.”<sup>29</sup>

The general public enthusiastically embraces mass removals of non-citizens with criminal entanglements.<sup>30</sup> The truth of the matter is that the removal of thousands of noncitizens of color who have encountered the criminal justice system is unlikely to generate significant public controversy, much less meaningful political resistance. Indeed, the public appears for the most part ready and willing to support the removal of large numbers of Latina/o immigrants from the United States. The fact that the group of people most directly affected by the removals are a discrete and insular political minority—noncitizens of color who

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the use of criminal laws to enforce immigration laws). The CrImmigration blog, managed by Professor César Cuauhtémoc García Hernández, provides updates on developments in the law concerning reliance on the criminal law in immigration enforcement. CRIMMIGRATION, <http://crimmigration.com/> [<http://perma.cc/5UL7-927Y>] (last visited Apr. 24, 2016).

28. See Katherine Beckett & Heather Evans, *Crimmigration at the Local Level: Criminal Justice Processes in the Shadow of Deportation*, 49 LAW & SOC'Y REV. 241, 274 (2015) (concluding that changes in immigration enforcement “appear[] to have transformed the criminal process for non-citizens in state and local justice systems in ways that enhance the pain associated with criminal punishment” and that, “[g]iven the large number and growing number of non-citizen residents of the United States and the unprecedented magnitude of the U.S. criminal justice system, the impact of immigration law and enforcement on the criminal process can no longer be ignored”).
29. See Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1531–34 (1995) (analyzing the impact of the negative perception of “criminal aliens” on American immigration laws and their enforcement); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L.J. 599, 640–50 (2015) (evaluating the evolution of the conception of the “criminal alien” under the U.S. immigration laws). For sustained criticism of the focus of modern removal efforts on “criminal aliens,” see Angélica Cházaro, *Challenging the “Criminal Alien” Paradigm*, 63 UCLA L. REV. 594 (2016).
30. See *supra* text accompanying note 8.

cannot vote—thus far has tended to dampen political opposition to the removals.<sup>31</sup>

Part I of this Article considers parallel developments in the law that contribute to what can be characterized as the emergence of nothing less than a Latina/o removal system. It first considers the Supreme Court's implicit sanctioning of race-conscious law enforcement in the United States, with the centerpiece of this symposium, *Whren v. United States*,<sup>32</sup> perhaps the most well-known example. Second, it summarizes the trend over the last twenty years toward greatly increased cooperation between state and local law enforcement agencies and federal immigration enforcement authorities. Part I proceeds to analyze how and why an increasing number of state and local governments through what are popularly known as “sanctuary laws” have rejected unrestricted cooperation by law enforcement with federal immigration authorities. Despite the “sanctuary” moniker attached to these laws, effective policing—even though influenced to a certain extent by sympathy for the devastating impacts of removals on the lives of immigrants—is the policy rationale most commonly embraced by local political leaders and law enforcement officers for these laws and policies.<sup>33</sup>

Part II demonstrates how local criminal arrests and prosecutions influenced by police reliance on race inexorably contribute to the racially disparate removal rates experienced in the modern United States. To their credit, scholars have begun to engage with the racial impacts of linking removals of immigrants to interactions with the criminal justice system.<sup>34</sup> Yolanda Vásquez, for example, has thoroughly documented

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31. *Id.*; see *infra* Part I.B.2.

32. 517 U.S. 806 (1996).

33. See *infra* Part I.B.2.

34. See, e.g., Mary Fan, *The Case for Crimmigration Reform*, 92 N.C. L. REV. 75, 89–100 (2013) (contending that the increase in the Asian and Latina/o populations in the United States transformed the nature of the debate over immigration reform and making the case for reform of the criminal removal provisions of the immigration laws); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1461–67 (acknowledging the disparate racial impacts of the criminal justice system on modern federal immigration enforcement); Katarina Ramos, *Criminalizing Race in the Name of Secure Communities*, 48 CAL. W. L. REV. 317, 337–38 (2012) (criticizing the racial impacts of the operation of the Secure Communities program); Carrie L. Rosenbaum, *The Role of Equality Principles in Preemption Analysis of Sub-Federal Immigration Laws: The California TRUST Act*, 18 CHAP. L. REV. 481, 492–98 (2015) (criticizing the central role of race in the operation of the Secure Communities program); Maureen A. Sweeney, *Shadow Immigration Enforcement and Its Constitutional Dangers*, 104 J. CRIM. L. & CRIMINOLOGY 227 (2014) (analyzing the increasingly common phenomenon of state and local law enforcement involvement in federal immigration enforcement and the resulting negative impacts on minority communities);

the adverse impacts on Latina/os resulting from the fact that contemporary removals are largely based on the criminal activities of non-citizens; she concludes that the general color-blind approach toward removing criminals present in U.S. immigration law has undisputable anti-Latina/o impacts.<sup>35</sup> Scholars in disciplines other than law also have begun to critically assess the devastating impacts of criminal removals on Latina/os.<sup>36</sup>

Part III of this Article concludes by contending that law- and policy-makers should devote greater attention to the racially disparate impacts of tightly linking removals of immigrants to a racially suspect criminal justice system.<sup>37</sup> It sketches a number of possible reforms—some that are relatively small and incremental in nature, others more far-reaching—to the U.S. immigration laws that would tend to blunt, rather than exacerbate, the anti-Latina/o impacts of the modern American immigration state.<sup>38</sup>

## I. RACIAL PROFILING AND CONTEMPORARY DEVELOPMENTS IN CRIME-BASED REMOVALS

This Part of the Article first considers the Supreme Court's endorsement of racial profiling in ordinary criminal law enforcement and the enforcement of the immigration laws. Two important decisions operate together to systematically shape contemporary interactions of law enforcement officers with communities of color across the United States

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*see also* Rebecca A. Hufstader, Note, *Immigration Reliance on Gang Databases: Unchecked Discretion and Undesirable Consequences*, 90 N.Y.U. L. REV. 671 (2015) (demonstrating the disparate racial consequences of the reliance by federal immigration enforcement authorities on state and local gang databases).

35. Vázquez, *supra* note 29.

36. *See, e.g.*, TANYA GOLASH-BOZA, DEPORTED: POLICING IMMIGRANTS, DISPOSABLE LABOR AND GLOBAL CAPITALISM (2015); Tanya Golash-Boza & Pierrette Hondagneu-Sotelo, *Latino Immigrant Men and the Deportation Crisis: A Gendered Racial Removal Program*, 11 LATINO STUD. 271 (2013) (exploring the disproportionate targeting of Latino men in U.S. deportations); Doris Marie Provine & Roxanne Lynn Doty, *The Criminalization of Immigrants as a Racial Project*, 27 J. CONTEMP. CRIM. JUST. 261, 261 (2011) (arguing that contemporary immigration policies “reinforce racialized anxieties”).

37. Along similar lines, “[c]riminal law scholars have emphasized race and class inequality in the criminal justice system *yet have not given non-citizen defendants any special analytical attention based on their alienage.*” Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1284–85 (2010) (emphasis added).

38. *See infra* Part III.B.

and contribute to the fact that removals overwhelmingly fall on Latina/o immigrants.<sup>39</sup>

Part I next summarizes the movement toward a greater state and local law enforcement role in federal immigration enforcement. That development has been fueled in no small part by emerging fears generated by changes brought by the much-publicized growth of the Latina/o population, even though that growth has slowed in the last few years.<sup>40</sup> Antipathy for immigrants and Latina/os also has helped to generate support for these laws and policies.<sup>41</sup> As implemented at the ground level, enhanced state and local immigration enforcement measures that feed into the federal removal machinery have had nothing less than devastating impacts on Latina/o immigrants and U.S. citizens.<sup>42</sup>

Working together, these parallel developments have helped contribute to a pattern of racially disparate removals of noncitizens from the United States. Latina/os have specifically borne the brunt of the record-setting numbers of removals during the Obama presidency.<sup>43</sup> The fact that the immigration removal system results in the removal of noncitizens who are virtually all Latina/o contributes to the perception among a large number of Americans that the modern U.S. immigration

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39. See *infra* Part I.A.B.

40. See, e.g., Jens Manuel Krogstad & Mark Hugo Lopez, *Hispanic Population Reaches Record 55 Million, but Growth Has Cooled*, PEW RES. CTR. (June 25, 2015), <http://www.pewresearch.org/fact-tank/2015/06/25/u-s-hispanic-population-growth-surge-cools/> [<http://perma.cc/R2FC-HYTC>] (providing information about growth of the Latina/o population in the United States). The latest research shows that more Mexican citizens are leaving, not migrating to, the United States. See Ana Gonzalez-Barrera, *More Mexicans Leaving Than Coming to the U.S.*, PEW RES. CTR. (Nov. 19, 2015), <http://www.pewhispanic.org/2015/11/19/more-mexicans-leaving-than-coming-to-the-u-s/> [<http://perma.cc/F9GZ-4UX2>] (noting that “the overall flow of Mexican immigrants between the two countries is at its smallest since the 1990s). In the long run, the changes in immigration may affect the U.S. labor markets. See Karthick Ramakrishnan, *Mexican Migrants are Heading Back Home—and That’s Bad News for the U.S. Economy*, L.A. TIMES (Nov. 27, 2015, 5:00 AM) <http://www.latimes.com/opinion/op-ed/la-oe-1127-ramakrishnan-net-outflow-20151127-story.html> [<http://perma.cc/JZT9-9A9H>] (arguing that “[w]ith the wave of baby boom retirements growing each year, demand for immigrant workers will only increase”).

41. See *infra* text accompanying note 127 (discussing the impact of antipathy for immigrants and Latina/os on law and policy).

42. See *infra* Part I.B.; see also Daniel N. Ramirez & Peter G. Dawson, “*CrImmigration Law*” and its Relation to America’s Hispanic Population, 40 T. MARSHALL L. REV. 8 ONLINE, no. 3, 2015, at 3 (“[F]oreign national members of the U.S. Hispanic population face far more severe consequences in relation to common criminal matters than their U.S. citizen counterparts.”).

43. See *infra* text accompanying notes 92–99 (presenting data on the Obama administration’s removals).

removal system discriminates, perhaps even intentionally, on the basis of race.<sup>44</sup> One might not expect such an outcome from an administration led by a president who has expressed a firm commitment to immigration reform and was elected with the support of the overwhelming majority of Latina/o voters.<sup>45</sup>

A. *The Supreme Court's Authorization of Racial Profiling  
in Law Enforcement*

In two critically important decisions, the U.S. Supreme Court has encouraged, or, at a minimum, failed to affirmatively discourage, law enforcement officers' reliance on race as a core investigatory tool in the enforcement of both the criminal and immigration laws. These decisions deeply embed race in modern criminal law enforcement and immigration removal operations in the United States.

At the outset, it is worth mentioning that a glaring divide exists between the legal and public discourses about the appropriate role of race in criminal law enforcement. On the one hand, the law, as it has developed, effectively authorizes race-conscious law enforcement and imposes sanctions on only the most glaring incidents of racial misconduct.<sup>46</sup> On the other hand, although support exists in some quarters for racial profiling,<sup>47</sup> a vocal segment of the public condemns in rather un-forgiving fashion police reliance on racial stereotypes in the enforcement of criminal law.<sup>48</sup>

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44. See *infra* Part I.B. (analyzing the relationship between race and the modern U.S. immigration removal system).
45. See *supra* text accompanying notes 15–18.
46. See *infra* Part I.A.1–B. (examining the ways in which law enforcement can discriminate based on race).
47. Although much criticized, racial profiling of Arabs and Muslims is a popular component of various governmental measures directed at preventing terrorism. See, e.g., Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185 (2002).
48. See, e.g., Jesse L. Jackson Sr., *Baltimore: We Have Been Here Before*, PHILADELPHIA TRIB. (May 1, 2015, 3:00 AM), [http://www.phillytrib.com/commentary/baltimore-we-have-been-here-before/article\\_324427c8-0052-5c66-945c-5d270a6d5cc4.html](http://www.phillytrib.com/commentary/baltimore-we-have-been-here-before/article_324427c8-0052-5c66-945c-5d270a6d5cc4.html) [<http://perma.cc/B9KL-69U4>]. “Before September 11, national polls showed such overwhelming public opposition to racial profiling that both [former] U.S. Attorney General John Ashcroft and [former] President George W. Bush felt compelled to condemn the practice. *There was a strong belief that racial profiling was inefficient, ineffective, and unfair.*” Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576 (2002) (emphasis added) (footnotes omitted).

1. *Whren v. United States*

In *Whren v. United States*,<sup>49</sup> the landmark 1996 criminal procedure decision that is the focal point of this symposium, the Supreme Court held that a stop of a motor vehicle did not run afoul of the Fourth Amendment's prohibition of unreasonable searches and seizures so long as the police had probable cause to believe that a traffic infraction had been committed—even if the officers admittedly employed the violation as a pretext to stop a vehicle because of the race of its occupants.<sup>50</sup> The decision effectively authorized traffic stops by police based on the race of the occupants of a motor vehicle. It, therefore, contributes to the prevalence of racial profiling in the modern United States.

The *Whren* decision “launched a firestorm of virtually unanimous [academic] criticism.”<sup>51</sup> That criticism stems from the fact that the decision in effect authorizes racial profiling in run-of-the-mill traffic stops, a common modern law-enforcement technique. By many accounts, racial profiling currently is routine among state and local police in jurisdictions across the United States.<sup>52</sup> It has become an integral tool

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49. 517 U.S. 806 (1996); see Kevin R. Johnson, *The Story of Whren v. United States: The Song Remains the Same*, in RACE LAW STORIES 419 (Rachel F. Moran & Devon Carbado eds., 2008) (analyzing the factual background of the Supreme Court's decision in, and the impacts of, *Whren v. United States*).
50. See *Whren*, 517 U.S. at 816–19 (“For the run-of-the-mine case, which this surely is, we think there is no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure.”).
51. Margaret M. Lawton, *The Road to Whren and Beyond: Does the “Would Have” Test Work?*, 57 DEPAUL L. REV. 917, 917 (2008); see, e.g., Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 GEO. WASH. L. REV. 882, 887 (2015) (“Scholars have been overwhelmingly critical of *Whren*.”) (footnote omitted); Lewis R. Katz, “*Lonesome Road*”: *Driving Without the Fourth Amendment*, 36 SEATTLE U. L. REV. 1413, 1414 (2013) (criticizing the marginalization of “the Fourth Amendment's core value of preventing arbitrary police behavior”). See generally Devon W. Carbado, *[E]Racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002) (exploring in detail the racial dimensions of the modern Supreme Court's body of Fourth Amendment jurisprudence).
52. Critical analysis of racial profiling in criminal law enforcement is voluminous. See, e.g., Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651 (2002) (discussing problems with racial profiling by the Maryland State Police); David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265 (1999) (analyzing data supporting the claims of racial profiling of African Americans); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 342 (1998) (arguing that the current Fourth Amendment framework under *Whren* “does not stop arbitrary seizures because it fails to consider that police discretion, police perjury, and the mutual distrust between blacks and the police are issues intertwined with the enforcement of traffic stops”); Floyd Weatherspoon, *Ending Racial Profiling*

employed in the much-maligned, yet nevertheless aggressively enforced, “war on drugs.”<sup>53</sup> Profiling is a well-known component of a criminal justice system that critics contend is, at bottom, racially biased.<sup>54</sup>

The Court in *Whren v. United States* explained in conclusory fashion that any claim of racial discrimination by the police fell outside the purview of the Fourth Amendment, but is properly brought under the auspices of the Equal Protection guarantee of the Fifth and Fourteenth Amendments.<sup>55</sup> What the Court wholly failed to acknowledge, however, is that Equal Protection claims are notoriously difficult to prove and thus cannot reasonably be relied upon to serve as an effective deterrent to excessive police reliance on race in traffic stops.<sup>56</sup> Indeed, the decision in *Whren* serves to create strong, if not almost irresistible, incentives for police officers to manufacture reasons other than race to justify a stop—even if race in fact was the true reason for the stop.

Under current Supreme Court precedent, a plaintiff seeking to establish an Equal Protection violation must prove by a preponderance of the evidence that the police acted with a discriminatory *intent*, not simply that the action, practice, or policy had a discriminatory *impact*

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*of African-Americans in the Selective Enforcement of Laws: In Search of Viable Remedies*, 65 U. PITT. L. REV. 721 (2004) (identifying existing approaches to addressing racial profiling and analyzing the various alternatives).

53. See Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1045–75 (2010) (noting that, despite similar rates of drug use between individuals of different races, the impact of the “war on drugs” has been particularly devastating in minority communities); see also *infra* text accompanying notes 70, 99 (analyzing the concerns with the prevalence of racial profiling of Latina/os by state and local police officers).
54. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (documenting the re-emergence of a caste-like system in the United States resulting from the incarceration of millions of African Americans, effectively relegating them to a permanent second-class underclass status in American society); DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999); RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1998); KATHERYN K. RUSSELL, *THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS* (1998).
55. See *Whren*, 517 U.S. at 813 (making that observation and further noting that “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis”).
56. See *infra* text accompanying notes 57 and 58 (discussing the difficulty in proving Equal Protection claims).

on racial minorities.<sup>57</sup> Plaintiffs rarely can produce the evidence necessary to establish a culpable state of mind by state actors; officers generally can easily defeat a charge of discriminatory intent by pointing to a race-neutral pretext, such as a minor traffic violation, for the stop.<sup>58</sup>

In any event, even if one is successful in proving an Equal Protection claim, that would not disturb a criminal conviction resulting from a traffic stop that in reality was based on race. That conviction, in turn, could well lead to incarceration, and possible removal, of a noncitizen.

## 2. *United States v. Brignoni-Ponce*

More than twenty years before it decided *Whren v. United States*,<sup>59</sup> the Supreme Court authorized a form of racial profiling by immigration enforcement officers making stops in ordinary enforcement operations. In *United States v. Brignoni-Ponce*,<sup>60</sup> the Court held that race alone could not serve as the sole basis for an immigration stop of a motor vehicle under the Fourth Amendment.<sup>61</sup> At the same time, however, the Court stated that “Mexican appearance” could be one factor among others justifying a stop. In the Court’s words, “[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make

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57. See *Washington v. Davis*, 426 U.S. 229, 240–42 (1976) (holding that, to prevail on an Equal Protection claim, a plaintiff must establish a “discriminatory intent” by a state actor, not simply the disparate impacts of a law, policy, or practice). For the leading criticism of the discriminatory intent requirement in modern Equal Protection doctrine, see Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (reviewing modern racial discrimination and proposing a “cultural meaning” test to address such discrimination).

58. See, e.g., *United States v. Armstrong*, 517 U.S. 456, 470 (1996) (refusing to find that, despite overwhelming statistical evidence of racially disparate impacts on African Americans of crack cocaine prosecutions, the plaintiffs had failed to establish an Equal Protection claim); *McCleskey v. Kemp*, 481 U.S. 279, 298–99 (1987) (rejecting the Equal Protection claim of an African American facing the death penalty despite strong evidence of racially disparate impacts of imposition of the death penalty); *Brown v. City of Oneonta*, 195 F.3d 111 (2d Cir. 1999) (rejecting an Equal Protection challenge to local police questioning of virtually all African American males (and one woman) in a small town after a victim reported that the perpetrator of the crime was black).

59. 517 U.S. 806 (1996).

60. 422 U.S. 873 (1975).

61. *Id.* at 885–87; see *United States v. Martinez-Fuerte*, 428 U.S. 543, 562–63 (1976) (refusing to find a violation of the Fourth Amendment based on an immigration officer’s decision to refer a motor vehicle to secondary inspection at an immigration checkpoint miles away from the Mexico–United States border based on the “apparent Mexican ancestry” of the occupants of the vehicle). The stop in *Brignoni-Ponce* led to a criminal prosecution for the knowing transportation of undocumented immigrants. *Brignoni-Ponce*, 422 U.S. at 875.



Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.”<sup>62</sup>

Put differently, the Court in *Brignoni-Ponce* found that an immigration stop based on “Mexican appearance,” even though that description is vague, ambiguous, and overbroad (i.e., it includes U.S. citizens and lawful immigrants as well as undocumented ones),<sup>63</sup> is permissible so long as combined with other factors.<sup>64</sup> To exacerbate matters, the Supreme Court has further emphasized that immigration officers can consider a multitude of factors in immigration stops and emphasized that courts generally should defer to the officers’ judgment in decisions to make a stop.<sup>65</sup>

Commentators have criticized modern racial profiling in immigration enforcement.<sup>66</sup> The criticism, however, has not changed the fact

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62. *Brignoni-Ponce*, 422 U.S. at 886–87.
63. See Kevin R. Johnson, “Melting Pot” or “Ring of Fire”?: *Assimilation and the Mexican-American Experience*, 85 CALIF. L. REV. 1259, 1291–93 (1997) (noting great variation in physical appearance among persons of Latina/o ancestry).
64. See, e.g., *United States v. Manzo-Jurado*, 457 F.3d 928, 935 n.6 (9th Cir. 2006) (holding that Hispanic appearance might be a legitimate factor in an immigration stop near the Canada–United States border). *But see* *United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000) (en banc) (distinguishing *United States v. Brignoni-Ponce* and holding that Hispanic appearance could not be a factor justifying an immigration stop in the Mexico–United States border region because significant numbers of persons in the general population in that part of the country with that general appearance are U.S. citizens and lawful immigrants).
65. See, e.g., *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (reversing a decision finding that a stop violated the Fourth Amendment and stating that “[w]hen discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the ‘totality of the circumstances’ of each case to see whether the detaining officer has a ‘particularized and objective basis’ for suspecting legal wrongdoing”) (citation omitted).
66. See Johnson, *supra* note 53, at 1009–45 (analyzing in detail how the Supreme Court in *United States v. Brignoni-Ponce* effectively authorized a form of racial profiling in immigration enforcement); Sweeney, *supra* note 34, at 234–53 (reviewing critically the important role of race in both ordinary law and immigration enforcement); see also Jennifer M. Chacón, *Border Exceptionalism in the Era of Moving Borders*, 38 FORDHAM URB. L.J. 129, 134–53 (2010) (analyzing the expansion of “border exceptionalism” in the application of the Fourth Amendment and related constitutional doctrines permitting practices in immigration enforcement that generally are not permitted by the Constitution in other areas); Christian Briggs, Note, *The Reasonableness of a Race-Based Suspicion: The Fourth Amendment and the Costs and Benefits of Racial Profiling in Immigration Enforcement*, 88 S. CAL. L. REV. 379 (2015) (assessing critically the relative costs and benefits of racial profiling in immigration enforcement). For criticism of the role of race in immigration enforcement under modern constitutional doctrine, see Devon W. Carbado &

that race remains a frequently considered factor in modern immigration stops.<sup>67</sup>

As is the case with allegations of racial profiling in traffic stops, an Equal Protection claim may be brought challenging an immigration stop for being exclusively based on race. Such a claim, however, is extremely difficult to prove<sup>68</sup> and, in any event, would generally not defeat a removal order.<sup>69</sup> Such claims therefore cannot be expected to serve as a meaningful deterrent to racial profiling in the enforcement of the immigration laws.

Courts today routinely rely on *Brignoni-Ponce* to justify immigration stops in cases in which immigration enforcement officers consider the “Hispanic appearance” of the occupants of a motor vehicle, so long as combined with other seemingly race-neutral (and possibly pretextual) factors.<sup>70</sup> The Supreme Court’s decisions in *Whren* and *Brignoni-Ponce* together have made it possible for modern law enforcement

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Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1547–48 (2011) (arguing that “Fourth Amendment jurisprudence . . . facilitates both the idea that Latinos are presumptively undocumented . . . and the practice of detaining Latinos because of that presumption,” and noting that “for the most part, criminal procedure scholars have not engaged this racial dynamic”).

67. Importantly, the exclusionary rule barring admission of evidence secured in violation of the Fourth Amendment in criminal proceedings does not generally apply to removal proceedings, which the courts have classified as civil, not criminal, in nature. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1040–50 (1984) (“In these circumstances, we are persuaded that the . . . balance between costs and benefits comes out against applying the exclusionary rule in civil deportation hearings . . .”); *see also* Jason A. Cade, *Policing the Immigration Police: ICE Prosecutorial Discretion and the Fourth Amendment*, 113 COLUM. L. REV. SIDEBAR 180 (2013), [http://columbialawreview.org/policing-the-immigration-police\\_cade/](http://columbialawreview.org/policing-the-immigration-police_cade/) [<http://perma.cc/9GHN-NPPK>] (discussing the adverse impacts of the Supreme Court’s holding in *INS v. Lopez-Mendoza* that, except in egregious circumstances, the exclusionary rule does not apply to removal proceedings).
68. *See, e.g., infra* note 161 (providing an example of an extreme pattern and practice of racial discrimination violations by local law enforcement agency in criminal and immigration law enforcement).
69. *See supra* text accompanying notes 57 and 58 (illustrating the difficulties in prevailing on an Equal Protection claim).
70. *See* Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 696–707 (2000) (reviewing the many cases permitting the use of “Mexican” and “Hispanic appearance” as one factor considered by the Border Patrol in an immigration stop); *see, e.g., United States v. Zapata-Ibarra*, 212 F.3d 877, 881–84 (5th Cir. 2000) (looking at the totality of the circumstances in analyzing the specific facts of the case); *United States v. Telles-Montenegro*, No. 8:09-CR-502-T-17TGW, 2010 U.S. Dist. LEXIS 17259, at \*11–20 (M.D. Fla. Feb. 4, 2010) (same).

officers in the United States to rely heavily upon race.<sup>71</sup> As a result of those two decisions, law enforcement agencies frequently employ race as a central investigatory tool in contemporary criminal and immigration enforcement.<sup>72</sup>

At the same time, the allegedly impermissible consideration of race is at the core of many high-profile public controversies over abuses of authority by law enforcement officers with adverse impacts on racial minorities.<sup>73</sup> Although authorized by law, the public, as well as political leaders across the ideological spectrum, frequently condemn the use of racial profiling in ordinary criminal law enforcement.<sup>74</sup> Such criticism, however, is somewhat muted when it comes to reliance on race in immigration enforcement. In that context, the consideration of race is often treated as normal, natural, and thus justified, with the immigration status of Latina/os routinely considered to be suspect.<sup>75</sup>

*B. Increased State and Local Involvement in Immigration Enforcement*

Criminal law enforcement and immigration enforcement historically have operated as separate and independent systems housed in different parts of the federal, state, and local law enforcement bureaucracies.<sup>76</sup>

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71. See César Cuauhtémoc García Hernández, *La Migra in the Mirror: Immigration Enforcement and Racial Profiling on the Texas Border*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 167, 184 (2009) (“The significance of the language in *Brignoni-Ponce*—‘Mexican appearance’—and *Martinez-Fuerte*—‘of apparent Mexican ancestry’—cannot be overstated.”) (footnote omitted); Lupe S. Salinas & Fernando Colon-Navarro, *Racial Profiling as a Means of Thwarting the Alleged Latino Security Threat*, 37 T. MARSHALL L. REV. 5, 8–17 (2011) (analyzing the adverse impacts of the racial profiling of Latina/os in law enforcement). See generally Johnson, *supra* note 53 (identifying the deep and enduring impacts of *Whren* and *Brignoni-Ponce* on encouraging law enforcement reliance on racial profiling as a tool in criminal and immigration enforcement in the modern United States).
72. See *supra* text accompanying note 70 (providing examples of frequent reliance on race in investigations by law enforcement).
73. See *supra* text accompanying note 1 (noting several high-profile examples).
74. See *supra* text accompanying notes 51 and 52 (describing the widespread criticism of racial profiling in law enforcement investigations).
75. See *supra* text accompanying notes 22 and 25 (discussing the racial disparities in U.S. immigration enforcement and the support for these discriminatory practices in some areas of public discourse).
76. For analysis of the civil rights implications of state and local police involvement in federal immigration enforcement before the recent increase in state and local immigration enforcement efforts, see Linda Reyna Yañez & Alfonso Soto, *Local Police Involvement in the Enforcement of Immigration Law*, 1 HISP. L.J. 9, 12 (1994) (arguing that “unguided police action in the immigration field has the potential for infringing on the rights of U.S. citizens, lawful residents, and aliens”).

Law enforcement authority traditionally has been distributed in a relatively clear-cut fashion, with those agencies operating for the most part independently of one another. In the American federalist system, state and local authorities are the primary enforcers of criminal law. At least since the late nineteenth century, immigration enforcement has been in the near-exclusive hands of the federal government.<sup>77</sup>

Strong law enforcement policy considerations favor the separation of criminal law and immigration enforcement functions. Few knowledgeable observers disagree that local police agencies are able to most effectively combat crime when all residents of the community, including lawful and undocumented immigrants (as well as minority communities generally), trust the police.<sup>78</sup> A relationship of trust appears considerably less likely if immigrants fear possible deportation if they report a crime to the police, cooperate as witnesses in police investigations, or otherwise interact with law enforcement officers.<sup>79</sup> In addition, palpable fears of deportation and separation from family, friends, and community, may lead to dangerous—even deadly—situations for police, crime suspects, and the general public when noncitizens seek to evade or resist arrest. Consequently, a number of police chiefs of major metropolitan areas with large immigrant populations have expressed the opinion that the cooperation of immigrant residents of the community, without fear of possible removal, is essential to effective criminal law enforcement.<sup>80</sup>

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77. *See Arizona v. United States*, 132 S. Ct. 2492, 2499–500 (2012) (noting the extensive and complex nature of federal regulation of immigration).

78. *See infra* note 80.

79. *See* Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 604–05 (2008) (offering policy reasons that cities pass sanctuary laws); Rose Cuison Villazor, *What Is a “Sanctuary”?*, 61 SMU L. REV. 133, 148 (2008) (“With the threat of deportation taken out of the picture during police and immigrant encounters, police officers have stated that immigrants are more willing to report crimes.”); *Developments in the Law: Policing*, 128 HARV. L. REV. 1706, 1784–85 (2015) (“Latino communities trust police less now that police increasingly perform the functions of federal immigration officers.”).

80. *See* Sandy Fitzgerald, *San Francisco County Sheriff Defends Sanctuary Law After Shooting*, NEWSMAX (July 7, 2015, 9:57 AM), <http://www.newsmax.com/Newsfrom/San-Francisco-Ross-Mirkarimi-sheriff-sanctuary/2015/07/07/id/653782/> [<http://perma.cc/3S7U-5A7W>] (noting the San Francisco sheriff’s continuing support for the city’s “sanctuary ordinance” despite a murder allegedly committed by an undocumented immigrant released under the law); *LAPD’s Special Order 40 on Immigrants Upheld by Court*, L.A. TIMES (June 17, 2009, 4:51 PM), <http://latimesblogs.latimes.com/lanow/2009/06/appeals-court-upholds-lapd-policy-on-illegal-immigrants.html> [<http://perma.cc/U9YX-M79P>] (stating that a series of chiefs of the Los Angeles Police Department “have said [that Los Angeles Police Department Special Order 40, which limits police inquiry into immigration status (*see infra* text

To build trust and cooperation between immigrants and local police, a number of police departments affirmatively prohibit officers from making general inquiries into the immigration status of crime victims, witnesses, and others with whom they come into contact. The Los Angeles Police Department (LAPD), not particularly known for being soft on crime or especially proimmigrant, is a prominent example. In effect since 1979, LAPD Special Order 40 provides that “officers shall not initiate police action with the objective of discovering the alien status of a person.”<sup>81</sup> This policy seeks to “increase cooperation between the undocumented community in Los Angeles and the LAPD, reduce crime, and produce a better standard of living for both undocumented immigrants and for the rest of the city’s population.”<sup>82</sup>

The simple law enforcement rationale behind the LAPD policy, and similar laws and policies of other localities, is to decrease fear among immigrants that interactions with police officers might result in possible removal from the United States. By diminishing fears of removal, these laws and policies aim to promote the trust of the immigrant community in law enforcement officers and gain their cooperation with the police in law enforcement activities.

Some localities further restrict local cooperation with federal immigration authorities in the detention of noncitizens who are arrested for violation of the criminal laws.<sup>83</sup> These laws and policies find support among law enforcement agencies as another way to build trust and cooperation among immigrant communities as well as to reduce the substantial costs of detention.

Despite the legitimate law enforcement aims underlying policies that limit state and local police cooperation with federal immigration enforcement, the laws are often referred to generically, and, at least in

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accompanying note 81)] . . . encourages undocumented immigrants who witness crimes to assist police without fear of being deported”).

81. Special Order No. 40 from LAPD Police Chief Daryl F. Gates (Nov. 27, 1979), [www.lapdonline.org/assets/pdf/SO\\_40.pdf](http://www.lapdonline.org/assets/pdf/SO_40.pdf) [<http://perma.cc/6EXB-CSQE>].
82. Theodore W. Maya, Comment, *To Serve and Protect or to Betray and Neglect?: The LAPD and Undocumented Immigrants*, 49 UCLA L. REV. 1611, 1613 (2002); see *Sturgeon v. Bratton*, 174 Cal. App. 4th 1407 (2009) (rejecting legal challenges to Los Angeles Police Department’s Special Order 40). See generally Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247, 297–308 (2012) (articulating effective policing and other policy reasons for the various state and local “sanctuary” laws and policies).
83. See *infra* text accompanying notes 110–115 (discussing the national controversy generated by a highly publicized case involving the release of an undocumented immigrant under the San Francisco “sanctuary ordinance” who later allegedly committed a murder).

some quarters, disparagingly, as “sanctuary laws.”<sup>84</sup> That moniker contributes to the widely held perception that cities with policies limiting the extent of cooperation with federal immigration authorities provide illegitimate refuge to immigrants and thus represent a form of defiance of the federal immigration laws. The designation of these laws as “sanctuary laws” in effect obfuscates the legitimate law enforcement justifications for the policies.

A number of contemporary developments have eroded the traditional separation of law enforcement and immigration enforcement authority in the United States and dramatically increased the role of state and local law enforcement agencies in federal immigration removal. All are designed to bolster immigration enforcement and increase noncitizen removals. All negatively impact Latina/o immigrants.

1. Section 287(g) Agreements

Contrary to the long historical practice, recent years have seen a dramatic increase in direct state and local involvement in the enforcement of the federal immigration laws.<sup>85</sup> A major erosion of the wall of

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84. See Villazor, *supra* note 79, at 148–50, 155–56 (describing the variety of “sanctuary laws” and the negative connotation of the term “sanctuary”). For a review of the evolution of state and local “sanctuary” laws, see Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 735–43 (2013); see also Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1388–91 (2006) (summarizing various types of state and local laws limiting cooperation with federal immigration enforcement authorities); Natasha Tidwell, *Fragmenting the Community: Immigration Enforcement and the Unintended Consequences of Local Police Non-Cooperation Policies*, 88 ST. JOHN’S L. REV. 105 (2014) (examining the consequences of local policies restricting police cooperation with federal immigration authorities); Stephanie M. Gomes, Note, *Building TRUST in Our Communities: States Encourage Their Residents to Speak Up in the Wake of the Federal Government’s Silence*, 33 QUINNIPIAC L. REV. 715 (2015) (calling for the reduction of state and local law enforcement involvement in federal immigration enforcement); *infra* Part I.B.2. (discussing the increase in state and local government resistance to cooperation with federal immigration enforcement authorities).

85. See Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1579–98 (2010) (analyzing various programs that have increased the cooperation between federal, state, and local governments in immigration enforcement); Ming H. Chen, *Trust in Immigration Enforcement: State Non-cooperation and Sanctuary Cities after Secure Communities*, 91 CHI.-KENT L. REV. 13 (2016) (to a similar effect); Juliet P. Stumpf, *D(E)Volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259 (2015) (studying efforts through Secure Communities and other programs to redistribute immigration enforcement authority from the federal government to state and local law enforcement agencies); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557 (2008) (detailing the emergence of state

separation between state and local criminal law enforcement and federal immigration enforcement began in earnest with 1996 immigration reforms. Those reforms, designed to bolster enforcement and removals of “criminal aliens,” included the creation of a new immigration enforcement program pursuant to Immigration and Nationality Act Section 287(g).<sup>86</sup> Under what are called Section 287(g) agreements entered into by federal, state, and local governments (many if not most of which the U.S. government later cancelled), federal immigration authorities provided training in federal immigration law and its enforcement to state and local police. After receiving that training, state and local law enforcement officers were authorized to affirmatively assist federal immigration authorities in enforcing the nation’s immigration laws.

As part of its overall strategy to bolster immigration enforcement, the Bush administration entered into many Section 287(g) agreements with state and local governments.<sup>87</sup> Some observers argued that such agreements resulted in an increase in racial profiling of Latina/os as state and local law enforcement agencies aggressively sought to facilitate the enforcement of federal immigration law.<sup>88</sup>

## 2. Secure Communities, the Rise of “Sanctuary Cities,” and the Priority Enforcement Program

Moving away from reliance on Section 287(g) agreements, the Obama administration opted instead for an efficient alternative known

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and local involvement in federal immigration enforcement and the problems resulting from that development). *See generally* Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011) (assessing critically the increased state and local government involvement in federal immigration enforcement).

86. *See* Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g) (2012) (authorizing the Attorney General to “enter into a written agreement with a State” or locality to permit state or local law enforcement officers to “perform the function of an immigration officer”).
87. *See* Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1633–42 (2008) (analyzing a variety of forms of direct regulation of immigration by state and local governments); Nicholas D. Michaud, Note, *From 287(g) to SB 1070: The Decline of the Federal Immigration Partnership and the Rise of State-Level Immigration Enforcement*, 52 ARIZ. L. REV. 1083 (2010) (reviewing the evolution of the § 287(g) program and contending that deficiencies in its implementation led to the dramatic increase in state and local immigration enforcement initiatives).
88. *See, e.g.*, Carrie L. Arnold, Note, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113, 116 (2007) (“[T]he federal training provided through the [§ 287(g)] program will not prevent racial profiling by [local law enforcement] officers.”).

as the “Secure Communities” program.<sup>89</sup> Although still relying on state criminal justice systems to facilitate the removal of criminal non-citizens, that program limited state and local police discretion in immigration enforcement.

Secure Communities required state and local law enforcement agencies to cooperate with federal immigration enforcement authorities.<sup>90</sup> State and local police agencies were specifically instructed to share information with the federal government about noncitizens who were arrested. They were further required to place immigration “holds” on (i.e., detain) noncitizens so that federal immigration authorities had the time necessary, if they so desired, to take custody of the noncitizens for possible removal.<sup>91</sup>

Secure Communities facilitated the removals of large numbers of noncitizens, including both lawful permanent residents and undocumented immigrants, who had been arrested for serious and minor crimes.<sup>92</sup>

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89. For explanations about the operation of Secure Communities, see Hing, *supra* note 82 at 310–11; Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 207–08 (2013); Ramos, *supra* note 34, at 319–21; Steven Papazian, Note, *Secure Communities, Sanctuary Laws, and Local Enforcement of Immigration Law: The Story of Los Angeles*, 21 REV. L. & SOC. JUST. 283, 300–04 (2012).

90. Although initially wavering on the issue, the U.S. government eventually took the firm position that state and local law enforcement agencies were required to participate in Secure Communities. Many states and localities originally had understood that participation in the program was voluntary in nature. The difference of opinion provoked considerable controversy. See Christine N. Cimini, *Hands Off Our Fingerprints: State, Local, and Individual Defiance of Federal Immigration Enforcement*, 47 CONN. L. REV. 101, 105–11 (2014) (“Without the localities [sic] ability to formally opt-out, governmental and individual voices of resistance emerged.”); see also Trevor George Gardner, *The Promise and Peril of the Anti-Commandeering Rule in the Homeland Security Era: Immigrant Sanctuary as an Illustrative Case*, 34 ST. LOUIS U. PUB. L. REV. 313 (2015) (examining the constitutional questions raised by the efforts of the U.S. government to mandate state and local assistance in immigration enforcement).

91. See *supra* note 89 (citing authorities explaining the operation of Secure Communities).

92. See Editorial, *Immigration Bait and Switch*, N.Y. TIMES (Aug. 17, 2010), [http://www.nytimes.com/2010/08/18/opinion/18wed3.html?\\_r=0](http://www.nytimes.com/2010/08/18/opinion/18wed3.html?_r=0) [<http://perma.cc/KCV3-MMS8>] (“Immigration and Customs Enforcement records show that a vast majority, 79 percent, of people deported under Secure Communities had *no criminal records or had been picked up for low-level offenses, like traffic violations and juvenile mischief.*”) (emphasis added); Kavitha Rajagopalan, *Deportation Program Casts Too Wide a Net*, NEWSDAY (New York), June 24, 2011, at A34 (“Secure Communities purports to search for repeat illegal immigrant offenders or those charged with major crimes. *In practice, most people deported under the program have had no criminal record at all and were picked up on minor offenses, like speeding.*”) (emphasis added); Thompson & Cohen, *supra* note 9 (reviewing statistical data on the



Criminal arrests, not convictions, of noncitizens were the touchstone of the program. Aggressive implementation of Secure Communities resulted in a spike in removals to record highs of approximately 400,000 noncitizens a year in the first six years of the Obama presidency.<sup>93</sup> The administration widely publicizing the removal records.<sup>94</sup> It was much less well known that almost all of the persons removed from the United States under Secure Communities were Latina/o.<sup>95</sup>

Consider the following jarring statistics. Total removals of noncitizens by the U.S. government reached an all-time high of 438,421 in 2013, a jump of at least ten-fold from the total annual removals in the

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removal from the United States of many noncitizens arrested for minor crimes); *see also* Daniel Kanstroom, *Smart(er) Enforcement: Rethinking Removal, Structuring Proportionality, and Imagining Graduated Sanctions*, 30 J.L. & POL. 465 (2015) (contending, among other things, that the U.S. government should de-emphasize the removal of long-term lawful permanent residents).

For critical analysis of the impacts of the Secure Communities program, see AARTI KOHLI, PETER L. MARKOWITZ & LISA CHAVEZ, *SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS*, CHIEF JUSTICE EARL WARREN INSTITUTE ON LAW AND SOCIAL POLICY, UC BERKELEY (Oct. 2011), [https://www.law.berkeley.edu/files/Secure\\_Communities\\_by\\_the\\_Numbers.pdf](https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf) [<http://perma.cc/TX39-AYMP>]; Rachel R. Ray, *Insecure Communities: Examining Local Government Participation in US Immigration and Customs Enforcement's "Secure Communities" Program*, 10 SEATTLE J. SOC. JUST. 327, 337–38 (2011).

93. *See, e.g.*, Brian Bennett, *U.S. Deported Record Number of Illegal Immigrants*, L.A. TIMES (Oct. 6, 2010), <http://articles.latimes.com/2010/oct/06/nation/la-na-illegal-immigration-20101007> [<http://perma.cc/43PT-Z2CQ>] (“Of the 392,862 deportations from October 2009 through September of this year, about half were illegal immigrants with criminal records. The total was about 3,000 more deportations than the record set in the previous year.”).
94. *See, e.g.*, Julia Preston, *Deportation Up in 2013; Border Sites were Focus*, N.Y. TIMES (Oct. 1, 2014), <http://www.nytimes.com/2014/10/02/us/deportation-up-in-2013-border-sites-were-focus.html> [<http://perma.cc/3K6Y-UHSA>] (discussing the U.S. government’s annual report on immigration enforcement). In publicizing the high numbers of removals, the administration apparently acted on the belief that demonstrating a commitment to enforcement through increased removals might help convince Congress to pass comprehensive immigration reform legislation. *See supra* text accompanying notes 16 and 17 (“Well-publicized increases in the number of immigrant removals have been the centerpiece of nothing less than a sustained political campaign to convince Congress to enact comprehensive immigration reform, for which the President has repeatedly expressed support.”) (citations omitted).
95. *See* Ramos, *supra* note 34, at 328–29 (“[I]f undocumented has come to mean illegal, then illegal has come to mean Mexican.”); Rosenbaum, *supra* note 34, at 495–96 (“From the inception of Secure Communities to approximately 2011, 93% of those identified as removable through Secure Communities were Latinos, while only 77% of the undocumented population was Latino.”) (footnotes omitted).

1990s: “Mexican nationals accounted for 72 percent of all aliens removed. . . . The next leading countries were Guatemala (11 percent), Honduras (8.3 percent), and El Salvador (4.7 percent). *These four countries accounted for 96 percent of all removals.*”<sup>96</sup> Removals tended to fall primarily on male noncitizens, who accounted for more than ninety percent of all persons deported from 2003–13.<sup>97</sup> These statistics are entirely consistent with an immigration removal system that targets noncitizens who come into contact with state and local law enforcement authorities, which in turn target Latino males in criminal law enforcement efforts.<sup>98</sup> In essence, “[c]rimmigration has been responsible for the mass removal of Latinos living in the United States, most significantly poor Latinos from Mexico, Guatemala, Honduras, and El Salvador.”<sup>99</sup>

Moreover, immigrant detentions, which federal law generally requires for many noncitizens convicted of crimes,<sup>100</sup> reflect similar racial disparities. In 2013, “90% of [the immigrants detained] were from just four Latin-American countries: Mexico (56 percent), Guatemala, Honduras, and El Salvador.”<sup>101</sup> In addition, federal criminal immigration

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96. DEP’T OF HOMELAND SEC. & OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2013 6 (2014) (emphasis added), [http://www.dhs.gov/sites/default/files/publications/ois\\_enforcement\\_ar\\_2013.pdf](http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf) [<http://perma.cc/ST5B-PLYV>].
97. MIGRATION POLICY INST., MPI REPORT OFFERS MOST DETAILED ANALYSIS YET OF U.S. DEPORTATION SYSTEM UNDER DHS; EXAMINES CRIMINALITY, ORIGIN, GENDER & MORE OF DEPORTEES (2014), <http://www.migrationpolicy.org/news/mpi-report-offers-most-detailed-analysis-yet-us-deportation-system-under-dhs-examines> [<http://perma.cc/SW6Q-T562>]. Women immigrants constitute a larger portion of the overall immigrant population than their percentage of removals. See Llezlie Green Coleman, *Explored at the Intersection: A Critical Race Feminist Analysis of Undocumented Latina Workers and the Role of the Private Attorney General*, 22 VA. J. SOC. POL’Y & L. 397, 400–02 (2015) (discussing “the feminization of immigration”).
98. See Vázquez, *supra* note 29, at 646–47 (“By allowing state and local governments to be the pipeline through which federal immigration law is enforced, racial bias can manipulate the overall outcomes of those who are removed.”) (footnote omitted); see also Olivares, *supra* note 18, at 36–43 (arguing that the conception that the “immigrant [is] a person of color” has significantly influenced U.S. government’s immigration enforcement priorities).
99. Vázquez, *supra* note 29, at 654 (footnote omitted).
100. See *supra* text accompanying note 91 (“[State and local police agencies] were . . . required to place immigration ‘holds’ on (i.e., detain) noncitizens so that federal immigration authorities had the time necessary, if they so desired, to take custody of the noncitizens for possible removal.”).
101. Olivares, *supra* note 18, at 41 (footnote omitted); see Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 46 (Figure 13) (showing that detention rates of noncitizens from Latin America were by far the highest of all countries).

prosecutions, which have increased dramatically in the last decade, are overwhelmingly directed at Latina/o immigrants.<sup>102</sup>

Concerned with the overbroad impacts, negative public safety implications, and the sheer costs of detention of noncitizens for possible removal by the federal government, some states and localities began to resist full cooperation with the federal government in immigration enforcement.<sup>103</sup> Over time, increasing numbers of states and localities passed laws that restrict state and local law enforcement cooperation with U.S. immigration authorities with respect to the removal of certain nonserious criminal offenders.<sup>104</sup> One commentator observed that

*[a] remarkably large number of jurisdictions across the United States have followed some form of sanctuary policy. Jurisdictions within the United States that have, or previously had, adopted some form of sanctuary policy include: Anchorage and Fairbanks, Alaska; Chandler and Phoenix, Arizona; Fresno, San Diego, the City and County of San Francisco, Los Angeles, and Sonoma County, California; Chicago, Evanston, and Cicero, Illinois; Orleans and Cambridge, Massachusetts; Portland, Maine; Baltimore and Takoma Park, Maryland; Ann Arbor and Detroit, Michigan; Minneapolis, Minnesota; Durham, North Carolina; Albuquerque,*

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102. See Rodolfo D. Saenz, Note, *Another Sort of Wall-Building: How Crimmigration Affects Latino Perceptions of Immigration Law*, 28 GEO. IMMIGR. L.J. 477, 488–89 (2014) (citing statistics demonstrating the disparate impacts on Latina/os of federal criminal immigration prosecutions); see also Kit Johnson, *A Cost-Benefit Analysis of the Federal Prosecution of Immigration Crimes*, 92 DENV. U. L. REV. 863 (2015) (analyzing the optimal level of incarceration for federal immigration crimes).

103. See *infra* text accompanying notes 104–107 (“Over time, increasing numbers of states and localities passed laws that restrict state and local law enforcement cooperation with U.S. immigration authorities with respect to the removal of certain non-serious criminal offenders.”) (footnote omitted).

104. See, e.g., California Trust Act, A.B. 4, 2013–2014 Cal. Legis. (Cal. 2013) (enacted) (limiting state and local law enforcement cooperation with the U.S. government with respect to noncitizens arrested for minor crimes); Lasch, *supra* note 89, at 154–63 (describing the efforts of various localities to resist participation in the Secure Communities program). For analysis of state and local resistance to participation in Secure Communities, see Cimini, *supra* note 90, at 131–47 (describing methods and legal implications of local resistance to the obligation of states to comply with federal immigration detainers); Lasch, *supra* note 89, at 162–63, 207–16 (describing the purposes and legal justifications for local resistance to Secure Communities, with a focus on Santa Clara). An empirical study places in question whether the operation of Secure Communities in fact hindered state and local law enforcement efforts. See Adam B. Cox & Thomas J. Miles, *Legitimacy and Cooperation: Will Immigrants Cooperate With Local Police who Enforce Federal Immigration Law?* (Close-Sandor Inst. for Law & Econ., Working Paper No. 734, Pub. Law & Legal Theory, Working Paper No. 543, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2658265](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2658265) [<http://perma.cc/FN84-9DSM>].

Aztec, Rio Arriba County, and Santa Fe, New Mexico; Newark, New Jersey; New York City, New York; Ashland, Gaston, and Marion County, Oregon; Austin, Houston, and Katy, Texas; Seattle, Washington; and Madison, Wisconsin.<sup>105</sup>

State and local resistance to federal immigration enforcement ultimately contributed to the Obama administration's decision to dismantle Secure Communities. As Department of Homeland Security Secretary Jeh Johnson candidly explained, the abolition of the "controversial Secure Communities program" responded to "[a] rapidly expanding list of city, county and state governments" enacting laws that restricted cooperation with federal immigration enforcement.<sup>106</sup> The elimination of Secure Communities was overshadowed in the public eye by the simultaneous announcement of an expanded deferred action program that provoked a national controversy as well as legal challenges by twenty-six states that have indefinitely delayed its implementation.<sup>107</sup>

When Secure Communities was in operation, the U.S. government aggressively sought to remove small-time criminal offenders from the United States as well as noncitizens convicted of more serious criminal offenses.<sup>108</sup> Far from rubber-stamping the U.S. government's aggressive removal efforts, a relatively conservative Supreme Court has regularly—and somewhat surprisingly—rejected removal orders that it concluded were inconsistent with the U.S. immigration laws.<sup>109</sup>

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105. Michael J. Davidson, *Sanctuary: A Modern Legal Anachronism*, 42 CAP. U. L. REV. 583, 609–11 (2014) (emphasis added) (footnotes omitted).
106. Statement by Secretary of Homeland Security Jeh Charles Johnson, U.S. House of Representatives, Comm. on the Judiciary (July 14, 2015), <http://docs.house.gov/meetings/JU/JU00/20150714/103734/HHRG-114-JU00-Wstate-JohnsonJ-20150714.pdf> [<http://perma.cc/9SSV-KNDX>]; see Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem*, 104 GEO. L.J. 125 (2015) (examining demise of Secure Communities in light of constitutional concerns with the use of criminal law in immigration enforcement).
107. *See Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) (affirming a preliminary injunction prohibiting the implementation of an expanded deferred action program proposed by the Obama administration), *cert. granted*, 136 S. Ct. 906 (2016). For discussion of the legal issues arising from executive discretion in the deferred action program, see Michael Kagan, *A Taxonomy of Discretion: Refining the Legality Debate About Obama's Executive Actions on Immigration*, 92 WASH. U. L. REV. 1083 (2015).
108. *See supra* text accompanying note 92 ("Secure Communities facilitated the removals of large numbers of noncitizens, including lawful permanent residents as well as undocumented immigrants, who had been arrested for minor, as well as serious, crimes.") (footnote omitted).
109. *See, e.g., Mellouli v. Lynch*, 135 S. Ct. 1980, 1983 (2014) (setting aside a removal order following a drug paraphernalia conviction based on possession of a sock used to conceal a prescription drug); *Moncrieffe v. Holder* 133 S. Ct. 1678 (2013) (same for conviction based on simple possession of a small amount of marijuana); *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 566

In 2015, “sanctuary laws”<sup>110</sup> made the national news after the San Francisco Sheriff’s Office released an undocumented immigrant under such a law and he allegedly committed murder.<sup>111</sup> Originally passed in 1989, the San Francisco “Sanctuary Ordinance,” in relevant part, provides that:

No department, agency, commission, officer or employee of the City and County of San Francisco shall use any City funds or resources to assist in the enforcement of federal immigration law or to gather or disseminate information regarding the immigration status of individuals in the City and County of San Francisco unless such assistance is required by federal or State statute, regulation or court decision.<sup>112</sup>

Pursuant to the ordinance, the San Francisco Sheriff’s Office released an undocumented immigrant from Mexico with many criminal convictions and previous deportations and unlawful re-entries into the United States; he later was charged with the murder of a woman on the

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(prescription drug possession conviction); *Lopez v Gonzales*, 549 U.S. 47, 50 (2006) (conviction for aiding and abetting possession of drugs); *infra* text accompanying notes 141–145, 153–156 (discussing these decisions); see also Kevin R. Johnson, *Immigration in the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57 (2015) (analyzing the Supreme Court’s immigration decisions from the 2009–13 Terms and showing that immigrants prevailed in many of the cases).

In addition, the Court, no doubt influenced by a large number of appeals of removal orders based on criminal convictions, held in the landmark decision of *Padilla v. Kentucky*, 559 U.S. 356, 359–60 (2010), that an ineffective assistance of counsel claim under the Sixth Amendment could be based on defense counsel’s failure to inform a noncitizen criminal defendant of the possibility of removal resulting from a criminal conviction under a plea agreement.

110. See *supra* text accompanying note 77–81 (describing the term “sanctuary laws”).
111. See Jennifer Medina & Julia Preston, *After Killing Tied to Deported Felon, San Francisco Mayor Mulls Policy Shift*, N.Y. TIMES (July 8, 2015), [http://www.nytimes.com/2015/07/09/us/gun-used-in-san-francisco-killing-was-stolen-from-federal-agent.html?\\_r=0](http://www.nytimes.com/2015/07/09/us/gun-used-in-san-francisco-killing-was-stolen-from-federal-agent.html?_r=0) [<http://perma.cc/7LTC-XY46>] (describing the criticism of San Francisco’s sanctuary ordinance following the alleged murder of a woman by an undocumented immigrant released from police custody).
112. CITY AND COUNTY OF S.F. ADMINISTRATIVE CODE § 12H.2 (1989), [http://sfgov.org/sfc/sanctuary/index\\_1069\\_b3ff.html?page=1069](http://sfgov.org/sfc/sanctuary/index_1069_b3ff.html?page=1069) [<http://perma.cc/ZMR7-RZ3K>]. For analysis of the San Francisco ordinance, see Pratheepan Gulasekaram & Rose Cuison Villazor, *Sanctuary Policies & Immigration Federalism: A Dialectical Analysis*, 55 WAYNE L. REV. 1683, 1687–91 (2009). The ordinance’s restriction of the use of “City funds or resources to assist in the enforcement of federal immigration law” reflects San Francisco’s budgetary concerns with detaining noncitizens on behalf of the federal government.

San Francisco waterfront.<sup>113</sup> This tragedy attracted national publicity<sup>114</sup> and led to calls by members of Congress to pass legislation discouraging the passage of “sanctuary laws” by state and local governments.<sup>115</sup>

When the Obama Administration ended Secure Communities in 2014, it simultaneously announced the creation of the “Priority Enforcement Program” (PEP). The stated intent of the new program is to refocus removal efforts on the most serious criminal immigrant offenders; PEP restricts requests for immigration “holds” to noncitizens actually *convicted* of serious crimes rather than merely *arrested* for any crime.<sup>116</sup>

Although the new program is more focused than Secure Communities, the racially disparate impacts on removals of the American justice system will almost assuredly continue with the U.S. government’s reliance on criminal convictions for removals in the new PEP. This results from the fact that race thoroughly permeates the criminal justice systems of the federal, state, and local governments, and often plays a pivotal role in determining who is convicted of, as well as arrested for, crimes.<sup>117</sup>

Other federal programs viewed as protecting certain groups of immigrants also have legitimate law enforcement aims. Announced in

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113. Medina & Preston, *supra* note 111.

114. Republican presidential contender Donald Trump made headlines with claims that the incident supported his view that Mexican immigrants were committing crimes on a massive scale, which in turn required aggressive responses such as a more secure U.S.–Mexico border and otherwise more rigorous border enforcement, including mass deportations. *See* Sanchez, *supra* note 8 (“Mr. Trump called the shooting ‘a senseless and totally preventable act of violence committed by an illegal immigrant’ and said it showed the need for a wall to be built along the 2,000 mile US-Mexican border.”).

115. Editorial, *The Great ‘Sanctuary City’ Slander*, N.Y. TIMES (Oct. 16, 2015), <http://www.nytimes.com/2015/10/17/opinion/the-great-sanctuary-city-slander.html?mtrref=undefined&gwh=BB5B425A79D475469250A02C9CA97126&gwt=pay&assetType=opinion> [<http://perma.cc/2KCK-E9CL>]; Jordain Carney, *Senate Republicans Push to Punish ‘Sanctuary Cities,’* THE HILL (July 11, 2015, 4:28 PM), <http://thehill.com/blogs/floor-action/senate/247592-senate-republicans-push-to-punish-sanctuary-cities> [<http://perma.cc/C4DW-8GES>].

116. Memorandum to Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enf’t, Megan Mack, Officer, Office of Civil Rights & Civil Liberties, Philip A. McNamara, Assistant Secretary for Intergovernmental Affairs, from Jeh Charles Johnson, Secretary, U.S. Dep’t of Homeland Sec 2–3 (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_secure\\_communities.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf) [<http://perma.cc/3QMK-Q69B>].

117. *See supra* Part I.A. (reviewing developments in criminal removals with accompanying racial impacts).

2012, the Deferred Action for Childhood Arrivals (DACA) program<sup>118</sup> makes certain undocumented noncitizens without serious criminal convictions eligible to apply for a type of limited temporary relief from removal known as “deferred action,” which constitutes a form of prosecutorial discretion in deciding which noncitizens to target for removal.<sup>119</sup> One of the less intuitive rationales for the program, which some observers decried as an unlawful “amnesty” of undocumented immigrants, was to promote public safety. The program sought to remove noncitizens without significant criminal problems from the U.S. government’s removal efforts. The hope, in turn, was to allow the federal government to focus limited immigration enforcement resources on the removal of criminal offenders.<sup>120</sup> The expanded deferred action program proposed by the Obama administration in 2014, which has not yet been fully implemented, serves similar law enforcement goals.<sup>121</sup>

### 3. State and Local Immigration Enforcement Laws

Responding to the popularity of increased immigration enforcement as well as growing public frustration with federal enforcement efforts, a number of state legislatures passed laws ostensibly designed to facilitate enforcement of the U.S. immigration laws.<sup>122</sup> One of the most well-

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118. *See Consideration of the Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> [<http://perma.cc/PR4B-3ZFY>] (last updated Jan. 4, 2016) (describing DACA).

119. *See* Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of Dream Act Students*, 21 WM. & MARY BILL RTS. J. 463 (2012) (describing deferred action). *See generally* SHOBA SIVAPRASAD WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES* (2015) (analyzing the history of the exercise of prosecutorial discretion through deferred action and other mechanisms by the U.S. government in American immigration enforcement). For commentary questioning the scope of discretion exercised by the Obama administration in its deferred action programs, see Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183 (2015).

120. *See* Memorandum from Janet Napolitano, Secretary of Homeland Security, on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children 1 (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<http://perma.cc/8PRB-PGHQ>] (stating the necessity of ensuring that “enforcement resources are not expended” on “low priority cases”); *see also* Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661 (2015) (contending that the Obama administration’s deferred action programs can be properly understood as adding necessary discretion to the removal system).

121. *See supra* text accompanying note 106 and 107.

122. *See* Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577, 606 (2012) (“[W]ith the explosion of

known examples is Section 2(B) of Arizona's S.B. 1070, a tough-minded state immigration enforcement measure that commenced a trend of similar laws in other states. The law requires local police to verify the immigration status of persons who they reasonably suspect are in the United States in violation of the federal immigration laws.<sup>123</sup> Little guidance is provided about how state and local police should make that determination.

Some commentators feared that the implementation of Section 2(B) would increase the prevalence of racial profiling of Latina/os by state and local law enforcement officers in the name of immigration enforcement.<sup>124</sup> Despite those concerns, the Supreme Court declined to find that the section on its face was preempted by federal law; consequently,

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sub-federal involvement in immigration policing, it seems that states and localities, in many cases, actually exercise the discretion that definitively shapes federal enforcement.”); Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609 (2012) (considering the possible adverse civil rights impacts of state and local immigration enforcement laws). See generally STRANGE NEIGHBORS: THE ROLE OF STATES IN IMMIGRATION POLICY (Carissa Byrne Hessick & Gabriel J. Chin eds., 2014) (analyzing from a variety of perspectives the emergence and impacts of the growing number of state and local immigration enforcement laws).

123. See *Arizona v. United States*, 132 S. Ct. 2492, 2507–10 (2012) (analyzing the constitutionality of § 2(B) of S.B. 1070).
124. See, e.g., Kristina M. Campbell, *(Un)Reasonable Suspicion: Racial Profiling in Immigration Enforcement After Arizona v. United States*, 3 WAKE FOREST J.L. & POL'Y 367, 388–94 (2013) (analyzing how enforcement of § 2(B) in Arizona has increased racial profiling); Marjorie Cohn, *Racial Profiling Legalized in Arizona*, 1 COLUM. J. RACE & L. 168, 170 (2012) (explaining how the enforcement of S.B. 1070 will require racial profiling); Andrea Christina Nill, *Latinos and S.B. 1070: Demonization, Dehumanization, and Disenfranchisement*, 14 HARV. LATINO L. REV. 35, 49–52 (2011) (summarizing the nature of lawsuits claiming that the full implementation of S.B. 1070 would cause widespread racial profiling and that many people of color would be subjected to unlawful interrogations, searches, and arrests); David A. Selden et al., *Placing S.B. 1070 and Racial Profiling into Context, and What S.B. 1070 Reveals About the Legislative Process in Arizona*, 43 ARIZ. ST. L.J. 523, 525–43 (2011) (analyzing lawsuits brought over S.B. 1070 and racial profiling); see also Karla Mari McKanders, *Federal Preemption and Immigrants' Rights*, 3 WAKE FOREST J.L. & POL'Y 333, 334 (2013) (discussing the debate over whether the Supreme Court's refusal in *Arizona v. United States* to invalidate § 2(B) of S.B. 1070 will result in greater racial profiling of Latina/os); Barbara E. Armacost, *Immigration Policing: Federalizing the Local*, (Pub. Law and Legal Theory Research Paper Series, Paper No. 2014-60, 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2504042](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2504042) [<http://perma.cc/YWJ2-22LW>] (contending that the increased role of state and local law enforcement agencies in immigration enforcement results in greater racial profiling of minorities).



Section 2(B) of S.B. 1070 is currently in effect in Arizona.<sup>125</sup> A number of other states have enacted laws with provisions similar to Section 2(B), which courts have upheld.<sup>126</sup> In addition to the demand of the general public for increased enforcement of the federal immigration laws, antipathy for Latina/os and immigrants contributed to the enactment of the state and local immigration enforcement laws.<sup>127</sup>

#### 4. The Modern Criminal Removal System

One commentator aptly summarized the contemporary developments in American immigration enforcement as follows:

*[t]he deportation of “criminal aliens” is now the driving force in American immigration enforcement. In recent years, the Congress, the Department of Justice, the Department of Homeland Security, and the White House have all placed criminals front and center in establishing immigration enforcement priorities . . . . In effect, federal immigration enforcement has become a criminal removal system.*<sup>128</sup>

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125. *Arizona*, 132 S. Ct. at 2507–10. The Court left open the possibility of “as applied” challenges to § 2(B) based on allegedly impermissible discrimination in individual cases. *Id.* Despite its refusal to invalidate § 2(B) on its face, the Court held that three other core provisions of S.B. 1070 were preempted by federal immigration law. *See id.* at 2501–07.
126. *See, e.g.*, *United States v. Alabama*, 691 F.3d 1269, 1283–85 (11th Cir. 2012) (upholding a section of the Alabama immigration-enforcement law similar to § 2(B) of Arizona’s S.B. 1070); *see also* *Ga. Latino All. for Human Rights v. Georgia*, 691 F.3d 1250, 1267–68 (11th Cir. 2012) (holding the same for a Georgia immigration-enforcement law).
127. *See, e.g.*, Kevin R. Johnson & Joanna E. Cuevas Ingram, *Anatomy of a Modern-Day Lynching: The Relationship Between Hate Crimes Against Latina/os and the Debate over Immigration Reform*, 91 N.C. L. REV. 1613, 1628–29 (2013) (summarizing a contentious political campaign, with unquestionably anti-Latina/o and anti-immigrant overtones, culminating in the passage of a controversial immigration enforcement ordinance by the city of Hazleton, Pennsylvania). *See generally* Kristina M. Campbell, *A Dry Hate: White Supremacy and Anti-Immigrant Rhetoric in the Humanitarian Crisis on the U.S.–Mexico Border*, 117 W. VA. L. REV. 1081 (2015) (analyzing the history of anti-Latina/o and nativist sentiment in the Southwest border region).
128. Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1128 (2013) (emphasis added) (footnotes omitted); *see* Eagly, *supra* note 37, at 1281–82 (“The criminal prosecution of immigration—principally for illegal entry and reentry, alien smuggling, and document fraud—has reached an all-time high. . . . Immigration, which now constitutes over half of the federal criminal workload, has eclipsed all other areas of federal prosecution. Noncitizens have become the face of federal prisons.”) (footnotes omitted); *Developments in the Law, supra* note 79, at 1772 (“What was once a civil-enforcement regime has developed alongside the modern criminalization, enforcement, and incarceration regime. It is now executed by federal, state, and local officers. It is the

Concern over the growing Latina/o populations in regions of the United States that previously had seen relatively little Latina/o migration, including the South and Midwest, significantly fueled the political efforts toward increased state and local involvement in federal immigration enforcement and the emergence of the full-fledged “criminal removal system” that prevails today.<sup>129</sup> As previously discussed,<sup>130</sup> police officers routinely rely on race in ordinary criminal law enforcement. With immigration enforcement today closely tied to state and local criminal law enforcement activities, removals have fallen overwhelmingly on Latina/o immigrants.<sup>131</sup>

## II. DOUBLING DOWN ON RACE-BASED LAW ENFORCEMENT: THE MODERN CRIMINAL REMOVAL STATE

The racially disparate consequences of the modern criminal justice system<sup>132</sup> contribute to the racially disparate incidence of contemporary immigration removals.<sup>133</sup> Consistent with modern sensibilities and contemporary legal doctrine,<sup>134</sup> both systems (but especially the immigration removal system) today are in many respects facially neutral and, unlike past incarnations of immigration law, do not expressly target noncitizens of any particular race or nationality. However, both systems in operation have overwhelmingly negative impacts on Latina/os.<sup>135</sup>

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majority of federal criminal work. It shares the goals of criminal enforcement: immigration enforcement is used to manage crime, and criminal enforcement is used to manage immigration.”) (footnotes omitted).

129. *See supra* text accompanying note 128 (discussing the criminal prosecution of immigrants).
130. *See supra* Part I.A. (contending that the decisions in *Whren* and *Brignoni-Ponce* have contributed to law-enforcement officers’ reliance on race).
131. *See supra* Part I.B.1–3. (analyzing how policy aimed at removing “criminal aliens” had a disproportionate impact on Latina/o immigrants).
132. *See supra* Part I. (explaining how the laws and enforcement policies have created a modern criminal justice system that disproportionately affects minorities).
133. *See supra* text accompanying notes 37–48 (highlighting literature that examines the racial impacts of immigration policies).
134. *See* Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1 (1991) (examining how “color-blindness” approach to Equal Protection law contributes to the maintenance of racial inequality).
135. *See* Mary Fan, *Post-Racial Proxy Battles Over Immigration*, in STRANGE NEIGHBORS, *supra* note 122, at 229 (contending that state immigration enforcement laws serve as “a proxy to vent resurgent [racial] anxieties” in American society). *See generally* Kevin R. Johnson, *A Case Study of Color-Blindness: The Racially Disparate Impacts of Arizona’s S.B. 1070 and the Failure of Comprehensive Immigration Reform*, 2 U.C. IRVINE L. REV. 313

Through the operation of programs such as Secure Communities and the Priority Enforcement Program, the criminal justice system feeds large numbers of noncitizens into the immigration removal machinery. This exacerbates the racially disparate impacts of the criminal justice system on communities of color, especially Latina/os.<sup>136</sup> The linkage also has significantly increased the consequences of an interaction of noncitizens—who are disproportionately Latina/o—with the criminal justice system.<sup>137</sup>

One cannot deny the racial impacts of the contemporary focus of removals on noncitizens with criminal problems.<sup>138</sup> The challenges, however, by legal scholars and activists to the criminal grounds for removal and enforcement programs such as Secure Communities, have tended to focus primarily on the sheer unfairness of large-scale removals of immigrants for brushes with the law. They do not specifically challenge the racially disparate consequences of the removal efforts.<sup>139</sup> Despite the fact that Latina/os today constitute the overwhelming number of noncitizens deported, race in immigration removals is not discussed in the public debate over immigration removals in the same way that it is in connection with modern criminal law enforcement.<sup>140</sup>

A number of cases illustrate the racially disparate impacts of allowing criminal law enforcement to feed into immigration enforcement. In *Moncrieffe v. Holder*,<sup>141</sup> a black immigrant from Jamaica on a short trip to visit his daughter became caught up in what by all appearances was a local drug enforcement operation. A traffic stop while he was driving on an interstate highway in a small Georgia town, and the subsequent questioning, arrest, and criminal conviction all appear to have been influenced by the fact that the driver and passenger of the vehicle in

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(2012) (analyzing racially disparate impacts of color-blind immigration laws, such as Arizona's S.B. 1070, and their enforcement).

136. See *supra* Part I.B.2.

137. See *supra* text accompanying notes 96–102 (analyzing disparate impacts on Latina/os of immigration removals and detention).

138. See *supra* text accompanying notes 96–102.

139. See, e.g., *A Price Too High: US Families Torn Apart by Deportations for Drug Offenses*, HUM. RTS. WATCH (June 16, 2015), <https://www.hrw.org/report/2015/06/16/price-too-high/us-families-torn-apart-deportations-drug-offenses> [<http://perma.cc/5VQT-MQGS>] (discussing how immigrants are harshly affected by criminal prosecutions for drug offenses).

140. See *supra* text accompanying notes 27–31 (noting scholarship addressing immigration enforcement without focusing on racial issues).

141. 133 S. Ct. 1678 (2013).

question were black males.<sup>142</sup> Adrian Moncrieffe was ultimately convicted in Georgia state court for possession of a small amount of marijuana, which has been decriminalized in a growing number of states, and the U.S. government subsequently sought to remove him from the United States.<sup>143</sup> Finding that Moncrieffe's removal was not authorized by the federal immigration statute, the Supreme Court set aside the removal order.<sup>144</sup>

Although *Moncrieffe v. Holder* involved a black man, a significant number of similar cases involve Latina/os. That directly results from the fact that law enforcement in many parts of the country target Latina/os for criminal law enforcement activities.<sup>145</sup> Enforcement efforts include racial profiling of Latina/os in ordinary traffic stops, a phenomenon that has been referred to as "driving while brown," similar to the much-criticized practice of "driving while black" suffered by African Americans.<sup>146</sup> One observer has noted that Latinos "are especially vulnerable to arrest for minor traffic violations, such as driving without a license or driving with an expired license."<sup>147</sup> (Until recently, only a few states allowed undocumented immigrants to be eligible to obtain driver's licenses.)<sup>148</sup> Commentators have observed "that Latinos are stopped for minor traffic violations so that the officers can ascertain the

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142. See Johnson, *supra* note 21, at 984–96 (analyzing evidence that race played a significant role in Moncrieffe's interactions with the police and in his conviction).

143. *Moncrieffe*, 133 S. Ct. at 1683.

144. *Id.* at 1693–94.

145. See, e.g., Carrasca v. Pomeroy, 313 F.3d 828 (3d Cir. 2002) (reversing the entry of summary judgment in a case involving claim of racial discrimination against Latina/os by law enforcement officers in a state park). See generally LUPE S. SALINAS, U.S. LATINOS AND CRIMINAL INJUSTICE 65–85, 107–44 (2015) (analyzing the targeting of Latina/os by state and local law enforcement agencies).

146. See Kevin R. Johnson, *The Case for African American and Latina/o Cooperation in Challenging Racial Profiling in Law Enforcement*, 55 FLA. L. REV. 341, 357–63 (2003); see, e.g., Chavez v. Ill. State Police, 251 F.3d 612 (7th Cir. 2001) (addressing claims of racial profiling brought by Latina/os and African Americans); Giron v. City of Alexander, 693 F. Supp. 2d 904 (E.D. Ark. 2010) (addressing racial profiling claims by Latina/os).

147. Alia Al-Khatib, Comment, *Putting a Hold on ICE: Why Law Enforcement Should Refuse to Honor Immigration Detainers*, 64 AM. U. L. REV. 109, 161 (2014) (footnote omitted).

148. See Vallerye Mosquera, *Vehicle: Driving While Undocumented: Chapter 524 Allows Undocumented Immigrants to Apply for Driver's Licenses in California*, 45 MCGEORGE L. REV. 603 (2014) (summarizing the provisions of a recently enacted California law permitting undocumented immigrants to be eligible to obtain driver's licenses).

driver's immigration status. Recent data . . . supports the existence of racial profiling . . . nationwide."<sup>149</sup>

In addition, the U.S. government at least initially deployed Secure Communities<sup>150</sup> in predominantly Latina/o communities, instead of all communities with high crime rates as one would expect if the true aim of the program was to remove "criminal aliens" of all nationalities from the United States.<sup>151</sup> In light of these facts, it should not be a surprise that, during the Obama presidency, the vast majority of the persons removed from the country consistently have been immigrants from Mexico and Central America, comprising a significantly higher percentage than those groups' representation in the overall immigrant population in the United States.<sup>152</sup>

Two relatively recent decisions in which the Supreme Court rejected removal orders involving efforts to deport lawful permanent residents from Mexico provide a concrete indication of the disparate impacts of the state and local "war on drugs" on Latina/o immigrants leading to possible removal. In *Lopez v. Gonzales*,<sup>153</sup> the Supreme Court rejected the Justice Department's argument that a lawful resident from Mexico convicted under state drug law for aiding and abetting another person's possession of cocaine was an "aggravated felon"<sup>154</sup> under the U.S. immigration laws, requiring mandatory removal.<sup>155</sup> Similarly, in *Carachuri-*

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149. Angela M. Banks, *The Curious Relationship Between "Self-Deportation" Policies and Naturalization Rates*, 16 LEWIS & CLARK L. REV. 1149, 1188 (2012) (footnote omitted); see Brian Rodriguez, *Latinos and the Criminal Justice System: Overcoming Racial Stigma From Trial to Incarceration*, 40 T. MARSHALL L. REV. ONLINE 7 (2015) (discussing how officers intentionally pull drivers over who appear to be Latina/o).

150. See *supra* Part I.B.2. (summarizing the history surrounding the development of the Secure Communities program).

151. See Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87 (2013) (examining data showing crime rates and how Secure Communities was not initially deployed in areas with high crime rates, but in areas with large Latina/o populations); see also Thomas J. Miles & Adam B. Cox, *Does Immigration Enforcement Reduce Crime? Evidence from Secure Communities*, 57 J.L. & ECON. 937 (2014) (finding based on the empirical evidence that Secure Communities failed to reduce crime rates).

152. See *supra* text accompanying notes 20 and 21.

153. 549 U.S. 47 (2006).

154. See *infra* text accompanying notes 176–182 (discussing the repeated congressional expansion of the definition of "aggravated felony" in the U.S. immigration laws that subject noncitizens convicted of such felonies to mandatory detention and removal and rendering them ineligible for many forms of relief from removal).

155. *Lopez*, 549 U.S. at 52.

*Rosendo v. Holder*,<sup>156</sup> the Court set aside a removal order of a lawful permanent resident from Mexico who had two minor drug possession convictions, one for simple possession of a small amount of marijuana and one for unlawfully possessing a single tablet of a prescription drug.<sup>157</sup> Both cases involved efforts by the Executive Branch to remove long term lawful residents of the United States from Mexico who were what can be reasonably characterized as small time drug offenders caught up in local enforcement of the “war on drugs.”

### III. HOW TO REDUCE THE RACIAL DISPARITIES IN REMOVALS

For the time being, it appears that effective efforts to reduce racial inequality in criminal and immigration law enforcement will more likely come from legislative and policy changes than through legal challenges in the courts. This stems from the fact that the Supreme Court has in effect authorized racial profiling in both ordinary criminal and immigration enforcement efforts.<sup>158</sup> That authorization understandably limits litigation as an effective tool for deterring reliance on race by law enforcement officers.<sup>159</sup> Put differently, existing law makes it extremely difficult to successfully challenge racially discriminatory law enforcement.<sup>160</sup> The limitations on such challenges make litigation likely to put an end to only the most egregious patterns and practices of racial discrimination.<sup>161</sup>

In the historical moment in which we live, political action appears to be the most likely avenue for bringing about reform of immigration law and its enforcement. Unfortunately, immigration reform efforts have repeatedly stalled in Congress.<sup>162</sup>

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156. 560 U.S. 563 (2010).

157. *Id.* at 566.

158. *See supra* Part I.A. (explaining the Supreme Court decisions in *Whren v. United States* and *United States v. Brignoni-Ponce*).

159. *See* Stella Burch Elias, “Good Reason to Believe”: *Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza*, 2008 WIS. L. REV. 1109, 1151–54 (explaining how modern jurisprudence has diminished the constitutional rights of non-citizens); Rosenbaum, *supra* note 34 at 499–504 (discussing the limitations on successful legal challenges to racial profiling).

160. *See supra* text accompanying notes 55–58.

161. *See, e.g.*, *Melendres v. Arpaio*, 784 F.3d 1254 (9th Cir. 2015) (affirming in large part an injunction designed to end a pattern and practice of blatant discrimination against Latina/os by the Maricopa County Sheriff’s Office in Arizona, headed by controversial Sheriff Joe Arpaio, in the name of criminal and immigration enforcement).

162. *See supra* text accompanying notes 15–18 (explaining that, despite support from President Obama, Congress has failed to enact immigration reform).

This part of the Article first considers political action as a possible reform strategy and then proceeds to consider changes to the law that would tend to reduce the racially disparate impacts of the modern immigration removal system.

A. *The Potential of Political Activism*

There are indications that political action calling for criminal justice and immigration reform is a possibility for bringing about change. Political engagement, in recent memory, has significantly influenced immigration legislation and enforcement measures. For example, in 2006, thousands of people across the United States took to the streets in protest and effectively killed a punitive immigration reform bill passed by the U.S. House of Representatives.<sup>163</sup> The protesters demanded nothing less than justice for immigrants.

Similarly, the DREAMers, college students brought to this country as children, advocated for reform of the immigration laws and their enforcement, have become a powerful national political force.<sup>164</sup> Their activism helped prod the Obama administration to adopt the Deferred Action for Childhood Arrivals program (known as DACA), which since 2012 has provided limited relief to noncitizens brought to the United States as children, and to later propose an expanded deferred action program.<sup>165</sup>

In addition, state and local resistance, combined with effective advocacy by activists in opposition, to aggressive federal removal efforts without doubt contributed to the U.S. government's decision to dismantle the overbroad Secure Communities program. Such efforts also contributed to the U.S. government's decision to adopt a narrower enforcement strategy directed at noncitizens actually convicted of serious

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163. See generally Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99 (2007) (discussing the multiracial civil rights movement and its impact on immigration legislation); Sylvia R. Lazos Vargas, *The Immigrant Rights Marches (Las Marchas): Did the "Gigante" (Giant) Wake Up or Does It Still Sleep Tonight?*, 7 NEV. L.J. 780, 812–823 (2007) (explaining the impact of the marches).

164. See Mariela Olivares, *Renewing the Dream: DREAM Act Redux and Immigration Reform*, 16 HARV. LATINO L. REV. 79, 85–98 (2013) (recounting the history of the perennial DREAM Act proposals in Congress); Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757 (2009) (analyzing the complex politics of the DREAM Act and immigration reform generally). See generally JOHN TIRMAN, *DREAM CHASERS: IMMIGRATION AND THE AMERICAN BACKLASH* 91–109 (2015) (discussing the emergence of the DREAMers as a potent force in American politics).

165. See *supra* text accompanying notes 118–122 (explaining DACA).

crimes as opposed to simply being arrested for suspicion of committing virtually any crime.<sup>166</sup>

The time might be right for political action to address the racially disparate impacts of removals. Contemporary public opinion to a certain extent questions the reliance on race in law enforcement.<sup>167</sup> Such sentiment has led to a number of legal and policy pronouncements that seek to restrict racial profiling in criminal law enforcement.<sup>168</sup> Law enforcement goals in addition to racial justice priorities lend support to such efforts. Namely, racial profiling arguably serves to undermine trust and cooperation of minority communities with law enforcement<sup>169</sup> in ways similar to how police involvement in immigration enforcement may deter noncitizen cooperation with police.<sup>170</sup>

At this point in time, there appears to be little likelihood that the impacts of race can be removed root and branch from the American criminal justice system. However, political efforts can and should be made to attempt to minimize, not maximize, those racial impacts on the removal of immigrants from the United States.

A handful of relatively modest changes to the U.S. immigration laws might reduce the impacts on state and local race-conscious law enforcement on zealous federal removal efforts.<sup>171</sup> In so doing, these changes would lessen the impacts on Latina/os of the modern removal system's reliance on the criminal justice system. More far-reaching reform to the law could bring about even greater reductions in the racial disparities of immigration enforcement.

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166. See *supra* Part I.B.2. (discussing Secure Communities).

167. See *supra* text accompanying notes 46–48 (describing public condemnation of racial profiling).

168. See, e.g., Sari Horwitz, *Justice Dept. Announces New Rules to Curb Racial Profiling by Federal Law Enforcement*, WASH. POST (Dec. 8, 2014), [https://www.washingtonpost.com/world/national-security/justice-dept-to-announce-new-rules-to-curb-racial-profiling-by-federal-law-enforcement/2014/12/07/e00eca18-7e79-11e4-9f38-95a187e4c1f7\\_story.html](https://www.washingtonpost.com/world/national-security/justice-dept-to-announce-new-rules-to-curb-racial-profiling-by-federal-law-enforcement/2014/12/07/e00eca18-7e79-11e4-9f38-95a187e4c1f7_story.html) [http://perma.cc/9P5L-35EF] (explaining the Obama administration's new rules for racial profiling which apply to the Department of Homeland Security).

169. See Harris, *supra* note 52, at 298–300 (discussing “deep cynicism among blacks about the fairness and legitimacy of law enforcement and courts” due to “racially targeted traffic stops”).

170. See *supra* text accompanying notes 76–84 (stating that, to build trust with noncitizen communities, some cities prevent law-enforcement officers from inquiring about immigration status).

171. See *supra* Part I (discussing contemporary attempts to reform the U.S. immigration law).



B. *Possible Reforms*

This Article does not contend that the removal of noncitizens based on criminal convictions should be eliminated. Rather, it initially suggests that greater attention be paid to the racial consequences of the linkage of the contemporary criminal justice and immigration removal systems. The Article calls for, as a beginning, incremental changes in law and policy. A few possibilities immediately come to mind.<sup>172</sup>

As previously discussed,<sup>173</sup> drug crimes have a well-recognized relationship to racially biased criminal law enforcement. To make matters worse for immigrants, the removal provisions based on criminal convictions for drug offenses in the U.S. immigration laws are most unforgiving.<sup>174</sup> One relatively modest reform possibility would be to return greater discretion to judges in deciding which noncitizens should be removed from the country for drug convictions and possibly other crimes. Such discretion generally existed under the law before Congress passed major enforcement-oriented immigration reforms in 1996, which made removal, and detention pending removal, mandatory for a great many noncitizens convicted of criminal, especially drug, offenses.<sup>175</sup>

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172. For possible reforms in addition to those outlined here, see HUM. RTS. WATCH, *supra* note 139, at 10–11.

173. *See supra* text accompanying notes 19–21.

174. *See, e.g.*, Immigration and Nationality Act § 237(A)(2)(b), 8 U.S.C. § 1227 (a)(2)(B) (2012) (making noncitizens convicted for virtually any drug crime subject to removal from the United States). For critical analysis of the serious adverse immigration consequences of drug convictions, see Wilber A. Barillas, *Collateral Damage: Drug Enforcement & Its Impact on the Deportation of Legal Permanent Residents*, 34 B.C. J.L. & SOC. JUST. 1, 8–19 (2014) (explaining the legislation and rise of drug-based deportations); Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Convictions*, 6 J. GENDER RACE & JUST. 253, 261 (2002) (noting that “any drug violation other than a marijuana offense can lead to deportation of a non-citizen”); *see also* Jordan Cummings, Comment, *Nonserious Marijuana Offenses and Noncitizens: Uncounseled Pleas and Disproportionate Consequences*, 62 UCLA L. REV. 510 (2015) (analyzing negative immigration impacts on noncitizens of nonserious marijuana convictions).

175. *See* Bill Ong Hing, *Re-Examining the Zero-Tolerance Approach to Deporting Aggravated Felons: Restoring Discretionary Waivers and Developing New Tools*, 8 HARV. L. & POL’Y REV. 141, 163–74 (2014) (explaining current trends in detention of noncitizens for drug offenses); Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 209–13 (2012) (analyzing the importance of judicial discretion in removal proceedings); Maritza I. Reyes, *Constitutionalizing Immigration Law: The Vital Role of Judicial Discretion in the Removal of Lawful Permanent Residents*, 84 TEMP. L. REV. 637, 655–70 (2012) (providing a history of judicial discretion in removal proceedings); Rebecca Sharpless, *Clear and Simple Deportation Rules for Crimes: Why We Need Them and Why It’s Hard to Get Them*, 92 DENV.

Legislative reform might also include changes to the immigration laws that narrow the definition of “aggravated felony.”<sup>176</sup> The current broad definition relegates noncitizens convicted of a plethora of crimes—many of which in fact are neither felonies or particularly serious—to mandatory detention and removal.<sup>177</sup> An aggravated felony conviction also renders noncitizens ineligible for most forms of relief from removal.<sup>178</sup> Narrowing the definition would help eliminate some of the excesses of the modern criminal Latina/o removal machine. To this point in time, however, Congress has consistently moved in the opposite direction and has regularly passed increasingly harsh legislation design-

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U. L. REV. 933, 959–61 (2015) (advocating the restoration of judicial discretion in removal proceedings); *see also* Jason A. Cade, *Return of the JRAD*, N.Y.U. L. REV. ONLINE (2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2669862](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2669862) [<http://perma.cc/X865-VVEJ>] (analyzing implications of renowned federal district court Judge Jack Weinstein’s recommendation, without current statutory authorization, that a lawful permanent resident not be removed from the United States for a criminal conviction).

176. *See* INA § 101(A)(43), 8 U.S.C. § 1101(a)(43) (2012) (defining “aggravated felony” for purposes of the U.S. immigration laws); *see also* Sharpless, *supra* note 175, at 957–59 (calling for reform of the immigration laws to limit removal to convictions for crimes for which noncitizen actually served more than five years in prison); Aaron Lang, Note, *An Opportunity for Change? Aggravated Felonies in Immigration Proceedings and the Effect of Moncrieffe v. Holder*, 33 B.U. INT’L L.J. 523, 541–57 (2015) (suggesting possible reforms to provisions of the immigration laws requiring the removal of noncitizens convicted of an “aggravated felony”).
177. *See, e.g.*, *Demore v. Kim*, 538 U.S. 510, 531 (2003) (holding that detaining noncitizens before their removal proceedings did not violate the Fifth Amendment); *see also* TOM K. WONG, RIGHTS, DEPORTATION, AND DETENTION IN THE AGE OF IMMIGRATION CONTROL 119–23 (2015) (summarizing modern use of detention of immigrants in the United States); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346 (2014) (contending that the modern immigration detention system is punitive in nature); Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475, 491 (2013) (“[I]mmigration detention during the pendency of one’s removal proceedings, and even throughout the appeals process, is a harsh reality.”) (footnote omitted); Mark Noferi, *Making Civil Immigration Detention “Civil,” and Examining the Emerging U.S. Civil Detention Paradigm*, 27 J. C.R. & ECON. DEV. 533 (2014) (analyzing the Obama administration’s efforts to reform the immigrant detention system). Litigation has successfully sought to ensure some judicial review of the mandatory detention of noncitizens. *See, e.g.*, *Rodriguez v. Robbins*, 715 F.3d 1127, 1136 (9th Cir. 2013) (holding that immigrants in detention must be afforded individual bond hearings). The anti-Latina/o impacts of immigrant detention are discussed *supra* text accompanying notes 100–102.
178. *See, e.g.*, INA § 240a(A)(3), 8 U.S.C. § 1229b(a)(3) (2012) (providing that a lawful permanent resident convicted of an aggravated felony is ineligible for cancellation of removal).

ed to punish “criminal aliens.” In a series of pieces of legislation, Congress has expanded the definition of an aggravated felony for purposes of removal:

When Congress first enacted the aggravated felony removal category in 1988, only three serious crimes were included: murder, drug trafficking, and firearms trafficking. The current list—now at twenty-eight offenses, some of which create further sub-categories—includes crimes that are neither aggravated nor felonies under criminal law. Misdemeanor drug possession with a one-year sentence can qualify as an aggravated felony, as does a year of probation with a suspended sentence for pulling hair—a misdemeanor under Georgia law. Convictions for selling ten dollars worth of marijuana, theft of a ten-dollar video game, shoplifting fifteen dollars worth of baby clothes, and forging a check for less than twenty dollars have all been held to be aggravated felonies. Aggravated felonies trigger mandatory detention, deportation without the possibility of almost all forms of discretionary relief [from removal], including asylum and cancellation of removal, and a permanent bar on lawful reentry.<sup>179</sup>

Because of the adverse consequences of a criminal conviction for an aggravated felony, the question whether a criminal offense falls into that category of crimes that are hotly litigated in removal proceedings. The Supreme Court has interpreted the aggravated felony provisions under immigration law on numerous occasions in recent years; as we have seen, immigrants have regularly convinced the Court to set aside removal orders based on relatively minor drug convictions.<sup>180</sup>

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179. Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1758–59 (2013) (footnotes omitted); see Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1843–50 (2007) (explaining the broadening classification of “criminal aliens”); see also Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651 (2009) (contending that the expansion of criminal removals under the immigration laws has been punitive and that the Constitution should be invoked to ensure that removals are proportional to the gravity of crimes committed); Jeff Yates, Todd A. Collins & Gabriel J. Chin, *A War on Drugs or a War on Immigrants? Expanding the Definition of “Drug Trafficking” in Determining Aggravated Felon Status for Noncitizens*, 64 MD. L. REV. 875 (2005) (criticizing the courts’ expansive interpretation of “aggravated felony” with respect to drug crimes).

180. See, e.g., *supra* text accompanying notes 141–157 (explaining the Supreme Court’s decisions in criminal removal cases).

Another minor statutory reform could reduce racial disparities in immigration enforcement. Immigrant detention, often directed at immigrants convicted of crimes, has adverse impacts on Latina/os.<sup>181</sup> Detention, which has been increasingly used as a tool of immigration enforcement,<sup>182</sup> could be reduced. To that end, congressional quotas for immigrant detentions might be eliminated. The “bed quotas” require the detention of certain numbers of immigrants and in effect mandate immigration arrests and detentions.<sup>183</sup> Elimination of the quotas could reduce the incentives to overenforce the immigration laws and tend to reduce detention resulting from racially disparate criminal law enforcement.

The possible reforms suggested above to reduce the racial impacts of the contemporary removal system are not meant to be exhaustive. Broader law and policy changes also might serve that end. One could imagine legislative prohibition of racial profiling, a common practice in modern criminal and immigration enforcement, which adversely affects minorities.<sup>184</sup> In addition, a return to the historical separation of criminal law and immigration enforcement might reduce the racial disparities in removals.<sup>185</sup>

At a more fundamental level, the current racial demographics of immigration enforcement suggest that the time is right for the United States to overhaul its immigration system in more far-reaching ways. Reformers urgently need to advocate that the law be changed to make it more enforceable and ensure that enforcement is less predisposed toward noncitizens of color.<sup>186</sup> Current law, among other things, has led to an array of disparate impacts on racial minorities, especially noncitizens from Mexico and Central America, in addition to detention and

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181. *See supra* text accompanying notes 100–103 (discussing the high percentage of Latina/os detained subject to immigrant detention).

182. *See supra* text accompanying note 18 (mentioning Obama administration’s mass detention of Central Americans fleeing violence in 2014).

183. *See* Roque Planas, *Bed Quota Fuels ‘Inhumane’ and ‘Unnecessary’ Immigrant Detention: Report*, HUFFINGTON POST (Apr. 15, 2015, 6:04 PM), [http://www.huffingtonpost.com/2015/04/15/private-prison-immigrant-detention\\_n\\_7072902.html](http://www.huffingtonpost.com/2015/04/15/private-prison-immigrant-detention_n_7072902.html) [<http://perma.cc/8JBG-4XZ3>] (explaining that private prisons have lobbied for increased bed quotas); *End the Immigration Detention Bed Quota*, DETENTION WATCH NETWORK (Feb. 2014), <http://detentionwatchnetwork.org/EndTheQuotaNarrative> [<http://perma.cc/8TBT-NT2Y>] (advocating ending the bed quota).

184. *See supra* Part I.A. (noting that the Supreme Court decisions generally permit racial profiling).

185. *See supra* text accompanying notes 76–80 (observing that criminal law and immigration enforcement were historically separated).

186. For possibilities for liberalizing admissions under the U.S. immigration laws, see KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* (2007).

removals. The law, for example, has led to the creation of an undocumented population of millions of people—a majority of who from Mexico who are presumptively subject to removal—and a racial caste system in the labor market—with undocumented workers, many of whom are Latina/o, often exploited.

### CONCLUSION

Little attention has been paid to the racially disproportionate impacts of the criminal justice system combined with the contemporary immigration enforcement focus of the federal government on “criminal aliens.”<sup>187</sup> Nonetheless, examination of the interaction of the two systems demonstrates that the reliance on the federal, state, and local criminal justice systems in immigration enforcement has glaring racial impacts. The overwhelming number of noncitizens currently deported from the United States are from Mexico and Central America.<sup>188</sup> The racially suspect criminal justice system effectively constitutes a Latina/o pipeline into removals, which is often considered to be nothing more than color-blind enforcement of the immigration laws and adherence to the “rule of law.”

Despite the undisputable racial disparities in modern immigration enforcement, the dominant critique in the scholarship analyzing the confluence of criminal law and immigration law focuses primarily on the unfairness of overbroad removals on noncitizens.<sup>189</sup> This Article builds on existing scholarship to extend the criticism and to specifically question the racial impacts of the modern American crimmigration state. It aims to more directly challenge the racially disparate consequences of excessive reliance on the criminal justice system as the basis for triggering the removal of noncitizens from the United States.<sup>190</sup>

Increasing state and local involvement in federal immigration removals has come at a time of considerable public support for immigration enforcement and a general discomfort with the changes brought about by a growing Latina/o population.<sup>191</sup> A palpable dose of anti-immigrant and anti-Latina/o sentiment influences public opinion and helps buttress support for immigration enforcement.<sup>192</sup> Consequently, removal efforts that have had dramatic impacts on Latina/os thus have

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187. *See supra* text accompanying notes 27–31.

188. *See supra* text accompanying notes 18–21, 96–102.

189. *See supra* text accompanying notes 27–29.

190. *See supra* Parts I–II.

191. *See supra* Part I.B.

192. *See supra* text accompanying note 127.

generally been popular with the public.<sup>193</sup> Responding to such concerns, state and local governments have played increasingly more significant roles in modern immigration enforcement efforts. Indeed, some states, most notably Arizona but also Georgia, South Carolina, among others, have enacted laws that affirmatively require local police to assist federal immigration enforcement.<sup>194</sup> Latina/os predominantly have suffered from the enforcement of those laws.

Relatively minor reforms to U.S. immigration law could begin to reduce the racial impacts of the reliance on the criminal justice system for removals.<sup>195</sup> This Article has sketched some possible changes to the law, including legislation narrowing the criminal removal provisions of the immigration laws and limiting the use of immigration detention as an enforcement tool.<sup>196</sup> Broader changes—such as an outright ban on racial profiling in criminal and immigration enforcement, a return to the historical separation of criminal and immigration enforcement, and reforms that allow for more liberal and realistic immigrant admissions criteria—would go far to reduce the disparate impacts on Latina/os that arise from modern immigration enforcement.<sup>197</sup>

To bring about meaningful law and policy reform, advocates should build on the public skepticism about race-based law enforcement and promote reduction of its impacts on removals as a pressing civil rights necessity, taking the moral high ground away from those who demand adherence to the rule of law. By so doing, reformers can more effectively advocate changes to federal immigration and other laws that attempt to moderate, if not minimize, the disparate racial impacts on removals resulting from reliance on contemporary criminal law enforcement.<sup>198</sup> Nothing less than a new civil rights movement, with racial justice as a fundamental tenet, can help animate and energize the immigration reform movement.

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193. *See supra* text accompanying note 29.

194. *See supra* Part I.B.3.

195. *See supra* Part III.B.

196. *See id.*

197. *See id.*

198. *See* Part II.