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Shadow Immigration Enforcement and Its Constitutional Dangers

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CRIMINAL LAW

SHADOW IMMIGRATION ENFORCEMENT AND ITS CONSTITUTIONAL DANGERS

MAUREEN A. SWEENEY*

This Article introduces the concept of "shadow immigration enforcement"—that is, the increasingly common and troubling phenomenon of improper involvement in federal immigration enforcement by state and local law enforcement officers.

Shadow immigration enforcement occurs when state or local police officers with no immigration enforcement authority exercise their regular police powers in a distorted way for the purpose of increasing federal immigration enforcement. Shadow enforcement typically involves the disproportionate targeting of vulnerable "foreign-seeming" populations for hyper-enforcement for reasons wholly independent of suspected involvement in criminal activity as defined by state or local law. At best, the state officers use the enforcement of laws within their mandate (criminal or traffic laws) as a pretext for targeting those suspected of having unlawful immigration status, often based on observable ethnic or racial characteristics.

This shadow enforcement raises qualitatively different civil rights and constitutional concerns from those that arise in immigration enforcement carried out by Department of Homeland Security officers. On the one hand, the overlap of the targeted population with identifiable racial minorities (most notably Latinos) raises special constitutional concerns. On the other, the "under the table" nature of the enforcement incentives,

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confusion over enforcement authority, and the utter lack of accountability are also extremely troubling. Moreover, the usual constitutional safeguards that seek to protect the public from biased and distorted policing—specific regulations, training and discipline of officers, and using the exclusionary rule in court proceedings—do not serve as effective protection against, or deterrents to, shadow enforcement, because existing accountability structures do not adequately account for this type of enforcement.

This Article explores the specific constitutional dangers created by shadow immigration enforcement by state and local officers and proposes strategies for responding to those dangers.

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INTRODUCTION

> The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.[1]
>
> —Justice Potter Stewart

The last thirty years have seen an important shift in the federalism of immigration law, as the federal government has gradually enlisted state and local law enforcement officers as "force multipliers"[2] in its enforcement of our nation's immigration laws, and our systems of criminal and immigration enforcement have gradually converged. Police and sheriffs' deputies throughout the country now routinely participate in federal immigration enforcement through a variety of programs that involve them in the day-to-day mechanics of checking immigration status and communicating that information to federal authorities. In some limited circumstances, these local officers may have been delegated authority to investigate immigration status,[3] but the much more common and troubling phenomenon occurs when officers gather immigration information through their regular law enforcement duties and communicate that information to the Department of Homeland Security (DHS) as an informal way of assisting the agency. This kind of communication has escalated sharply in recent years and, having been sanctioned by the Supreme Court in *Arizona v. United States*,[4] is unlikely to lessen anytime soon.

While the sharing of information itself seems unobjectionable, this informal and unregulated collaboration between federal, state, and local

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[1] Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973).

[2] *See, e.g.*, *Examining 287(g): The Role of State and Local Law Enforcement in Immigration Law: Hearing Before the H. Comm. on Homeland Sec.*, 111th Cong. 1 (2009) (statement of Rep. Bennie G. Thompson, Chairman of H. Comm. on Homeland Sec.) (describing 287(g) agreements as allowing ICE to utilize state and local officers as force multipliers in both task forces and detention facilities); *New "Dual Missions" of the Immigration Enforcement Agencies: Hearing Before the Subcomm. on Immigration, Border Sec., and Claims of the H. Comm. on the Judiciary*, 109th Cong. 5 (2005) (testimony of Michael Cutler, former Immigration and Naturalization Service (INS) Senior Special Agent). The idea of the force multiplier has been promoted by Kris Kobach, among others. *See, e.g.*, Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 181 (2006); Jeff Sessions & Cynthia Hayden, *The Growing Role for State and Local Law Enforcement in the Realm of Immigration Law*, 16 STAN. L. & POL'Y REV. 323, 327 (2005).

[3] *See infra* text accompanying notes 27–33.

[4] Arizona v. United States, 132 S. Ct. 2492, 2508 (2012) (emphasizing the importance to the immigration system of consultation between federal and state officials).

officers with differing enforcement mandates has a number of serious but generally unintended negative consequences. Many of these consequences coalesce in what I term "shadow immigration enforcement" by state and local officers.

Shadow immigration enforcement is the distorted exercise of regular policing powers by a state or local officer who has no immigration enforcement authority for the purpose of increasing immigration enforcement. In a regular law enforcement environment, shadow enforcement involves the disproportionate targeting of vulnerable "foreign-seeming" populations for hyper-enforcement for reasons wholly independent of suspected involvement in criminal activity as defined by state or local law. Shadow enforcement occurs at the margins of regular police work, external to the enforcement mandate of state troopers, local police, and sheriffs' deputies. In the vast majority of cases, these officers have no training, mandate, or authority to enforce federal immigration law. Their involvement in the routine communication of immigration information to federal authorities, however, can create strong and sometimes perverse incentives that distort the ways in which they carry out their mandated policing duties. The lure of possible immigration checks, for example, can influence the officers' choice of targets for traffic enforcement or whether to merely cite people for offenses or to arrest them (and thus bring them into the station for fingerprint checks that can reveal immigration status).[5] This dynamic generally goes unacknowledged and unregulated within regular police structures. It operates under the table, in the shadows. The effects of shadow immigration incentives are widespread and profound for the relationship between local law enforcement and the broad communities they serve, especially with regard to community trust and guarantees against biased policing based on race or national origin.

A few concrete illustrations help to describe the phenomenon of shadow enforcement and to highlight its dangers. The U.S. Department of Justice (DOJ) Civil Rights Division recently conducted a number of investigations of biased policing that revealed compelling evidence of shadow immigration enforcement, which both distorted the conduct of regular policing in local jurisdictions and resulted in rampant civil rights violations. One of these investigations focused on the sheriff's office in

[5] For example, DOJ's investigation of racially biased policing in Alamance County, North Carolina, revealed that the sheriff there had instructed his officers to arrest, rather than merely cite, Latino drivers (but not other nationalities). The sheriff said: "If you stop a Mexican, don't write a citation, arrest him." Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice, Civil Rights Div., to Clyde B. Albright, Cnty. Att'y, Alamance Cnty., & Chuck Kitchen, Turrentine Law Firm 5 (Sept. 18, 2012) [hereinafter DOJ Letter to Alamance County], *available at* http://goo.gl/vovKgM.

Alamance, North Carolina. After an exhaustive two-year investigation that included statistics and records review; review of policies, procedures, and training materials; and over 125 interviews, DOJ concluded that the sheriff's office engaged in a pervasive pattern or practice of biased policing targeted against Latinos.[6] Among other problems, DOJ found that Latino drivers were targeted for traffic enforcement at a rate between four and ten times greater than non-Latino drivers.[7] Notably, DOJ found that many of the deputies' discriminatory practices were specifically intended to facilitate immigration checks on the targeted Latinos, thus connecting the racially targeted policing to shadow immigration enforcement.[8]

Another illustration of these dynamics in a different context can be seen in the recent investigations of Transportation Security Administration (TSA) officers at various airports.[9] The officers in question were specially trained "assessors" as part of a model behavior detection antiterrorism program tasked with detecting unusual behavior in passengers that could indicate a security threat. But officers reported that managers in Boston, anxious to boost numbers and justify their program, pressured their assessors to meet certain threshold numbers for referrals to other law enforcement agencies, including the state police and immigration officials. To meet those thresholds, significant numbers of officers explicitly targeted blacks and Latinos in the hope that searches would yield drugs or immigration problems.[10] In the words of an attorney who interviewed eight officers who complained about the rampant practice, "Selecting people based on race or ethnicity was a way of finding easy marks."[11] Officers reported that as many as 80% of passengers searched during certain shifts were minorities and that so many minorities were referred to the state police that officers there questioned why minorities represented such a disproportionate number of those referred.[12] In Newark, New Jersey, the racial profiling of Mexicans and Dominicans was so blatant that fellow TSA officers called that airport's behavior detection group "the great Mexican hunters."[13] Officers reported that the direction for these practices came to them from their superiors who conveyed that they were "to go look

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[6] *Id.* at 2.

[7] *Id.* at 3.

[8] *Id.* at 6.

[9] *See, e.g.*, Michael S. Schmidt & Eric Lichtblau, *Racial Profiling Rife at Airport, U.S. Officers Say*, N.Y. TIMES, Aug. 12, 2012, at A1; Steve Strunsky, *Racial Profiling at Airport Revealed*, STAR-LEDGER (Newark, N.J.), June 12, 2011, at 1.

[10] Schmidt & Lichtblau, *supra* note 9.

[11] *Id.*

[12] *Id.*

[13] Strunsky, *supra* note 9.

for illegal aliens and make up behaviors" with which they could justify and document a referral to immigration authorities.[14]

Finally, there are instances when even this thin veneer of regular law enforcement disappears, leaving a state officer with absolutely no justification for an arrest other than immigration enforcement that is wholly outside his authority. Recently, in Maryland, a Latino man was called to the scene of a traffic stop to recover his car, which someone else had been driving. When he arrived at the scene (at the officer's request and having committed no violation of traffic or other state law), he was immediately questioned by the officer about his immigration status; had his keys taken; and was removed from the car, handcuffed, taken to a holding cell, and held for approximately two hours for purposes of "immigration investigation" before he was turned over to Immigration and Customs Enforcement (ICE).[15] The state officer had no delegated federal authority to conduct civil immigration enforcement, and he did not have authority under state law to detain or arrest this man for a (nonexistent) state crime or for a federal administrative violation. When the officer was questioned in immigration court about the legal basis for his actions, he acknowledged that he had no authority to enforce federal civil immigration violations and explained that this was why he had merely "detained," rather than arrested, the man.[16] He further explained that he was not required to inform the man of his right to remain silent under *Miranda* or to comply with other arrest procedures because the man was not being accused of a crime.[17] In other words, precisely because the officer was acting without legal authority, he took the position that the usual legal limits to his authority did not apply, leaving him free to act without constitutional justification.

These examples demonstrate how the lure of the easy, collateral immigration arrest has proved to be strong for officers in a variety of contexts. In some cases, politically accountable enforcement policymakers, such as sheriffs, encourage officers to be tough on immigration and to increase immigration-related arrests. In others, officers seem to internalize and respond to rhetoric that has increasingly cast unlawful immigration as a

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[14] *Id.*

[15] Transcript of Removal Proceedings Hearing at 100, 106, 117–18, 121, [name and case number redacted] (U.S. Immigration Ct., Baltimore, Dec. 9, 2009) (on file with the *Journal of Criminal Law and Criminology*) [hereinafter Transcript of Removal Proceedings Hearing]; *see also* Oral Decision of the Immigration Judge at 4–5, [name and case number redacted] (U.S. Immigration Ct., Baltimore, Feb. 21, 2013) (on file with the *Journal of Criminal Law and Criminology*) [hereinafter Oral Decision of the Immigration Judge]. This description of events is based on the officer's own sworn testimony and the immigration judge's findings of fact from the hearing.

[16] Transcript of Removal Proceedings Hearing, *supra* note 15, at 117, 126.

[17] *Id.* at 126.

law-and-order issue rather than a response to a complex web of influences such as family, economics, politics, and opportunity.[18] As a result, many officers have come to understand immigration enforcement as part of their general duty to enforce the law. They may experience satisfaction in making more immigration arrests, even if those arrests are not part of their law enforcement mandate.

This motivation to carry out their duties so as to maximize immigration arrests takes a toll on these officers' primary law enforcement focus. The officers in the above examples were mandated to carry out a specific task—to screen for terrorism, or to enforce the criminal and traffic laws of the state. Instead of focusing on those tasks, however, the lure of the "easy mark" led them to distort (or ignore) their primary jobs in favor of increasing immigration apprehensions. In the process, of course, they also engaged in wholesale violations of the constitutional rights of those subjected to race-based stops, searches, and interrogations.[19]

When the evidentiary fruits of such arrests are passed from state officers to federal authorities, they routinely become the basis for removal proceedings in immigration court. The perversity of allowing DHS to prosecute removal proceedings by relying on evidence unconstitutionally seized by state officers has been pointed out.[20] This practice represents a revival of the "silver platter doctrine," which, prior to the 1960 Supreme Court case of *Elkins v. United States*,[21] allowed federal criminal authorities to rely on evidence illegally seized by state officers, even though that evidence could have been excluded if seized by federal officers.[22] The Court struck down the silver platter doctrine in *Elkins* and held that allowing federal courts to "profit" from evidence that was illegally seized by state officers created perverse incentives by tacitly approving illegal policing by state officers and discouraging close collaboration by state and federal officers.[23] These same dynamics and incentives exist in contemporary shadow immigration enforcement when neither DHS nor the arresting officers are held accountable for constitutional violations.

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[18] *See infra* text accompanying notes 153–58.

[19] TSA has been subjected to at least one formal complaint and investigation, Schmidt & Lichtblau, *supra* note 9, and Alamance County faces the prospect of either a consent agreement or litigation with DOJ's Civil Rights Division, DOJ Letter to Alamance County, *supra* note 5, at 10–11.

[20] David Gray et al., *The Supreme Court's Contemporary Silver Platter Doctrine*, 91 TEX. L. REV. 7, 32 (2012).

[21] Elkins v. United States, 364 U.S. 206, 208 (1960).

[22] Gray et al., *supra* note 20.

[23] *Elkins*, 364 U.S. at 221–22.

Shadow enforcement raises qualitatively different civil rights and constitutional concerns from those that arise in immigration enforcement carried out by DHS officers. On the one hand, the overlap of the targeted population with identifiable racial minorities (most notably Latinos) raises special constitutional concerns. On the other, the "under the table" nature of the enforcement incentives, confusion over enforcement authority and the utter lack of accountability are also extremely troubling. Moreover, the usual constitutional safeguards that seek to protect the public from biased and distorted policing (such as specific regulations; training and discipline of officers; and using the exclusionary rule in court proceedings) do not serve as effective protection against or deterrents to shadow enforcement because existing accountability structures do not adequately account for this type of enforcement.

The goal of this Article is to explore the constitutional dangers created by state and local officers conducting shadow immigration enforcement and to propose strategies for responding to those dangers. Part I of the Article describes how state and local police and sheriffs have become shadow immigration enforcers and provides the concrete constitutional context of this enforcement. Part II analyzes the uniquely heightened constitutional risks of shadow enforcement. Finally, Part III identifies some steps that can be taken to safeguard against those pressures.

I. STATE AND LOCAL POLICE AS SHADOW IMMIGRATION ENFORCERS

A. THE GROWTH OF SHADOW IMMIGRATION ENFORCEMENT

The past two decades have seen a sea change in the role and participation of state and local officers in the enforcement of federal immigration law. The plenary power of the federal government over immigration policy and enforcement, unquestioned in the case law for a century,[24] has been steadily eroded from within by growing practical, day-to-day coordination between federal and local jurisdictions on immigration enforcement. This coordination is one aspect of a widely noted and progressive convergence of criminal and immigration enforcement—what

[24] Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893) ("The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, [is] an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare . . . ."); *see also* Peter H. Shuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 57 ("Probably no principle in immigration law is more firmly established, or of greater antiquity, than the plenary power of the federal government to regulate immigration. Equally canonical is the corollary notion . . . that . . . the states may not exercise any part of it without an express or implied delegation from Washington.").

has come to be known as "crimmigration."[25] In a host of ways, state and local officers now participate in gathering and sharing information about the immigration status of individuals they encounter, and when DHS may have enforcement interests, they facilitate detention and transfer.[26] Much of this participation is through a constellation of federal programs designed to tighten the connections between the criminal and immigration enforcement systems.

The most direct federal endorsement of state and local involvement in immigration enforcement is the 287(g) program, which authorizes DHS to deputize state and local police and sheriffs to enforce federal immigration law.[27] Congress authorized this program in 1996,[28] but it was not implemented until 2002 under the George W. Bush Administration. Under its statutory provisions and the terms of the Memoranda of Agreement signed by participating jurisdictions, federal agents must train and supervise the local officers, who are then authorized to carry out the same enforcement duties as federal immigration officers.[29] The 287(g) program has been controversial, and advocates in a number of jurisdictions have complained about a lack of supervision of and abuses by 287(g) deputized officers.[30] The DHS Office of the Inspector General (OIG) has reviewed

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[25] Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006).

[26] For a detailed description of the growth of coordination between federal, state and local authorities, see Maureen A. Sweeney, *Fact or Fiction: The Legal Construction of Immigration Removal for Crimes*, 27 YALE J. ON REG. 47, 71–78 (2010).

[27] The program takes its name from its authorizing statutory provision, § 287(g) of the Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, § 287, 66 Stat. 163, 233 (codified as amended at 8 U.S.C. § 1357(g) (2012)).

[28] Illegal Immigration Reform & Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

[29] 8 U.S.C. § 1357(g)(2) (2012) ("An agreement under this subsection shall require that an officer . . . performing a function under the agreement shall have knowledge of, and adhere to, Federal law relating to the function, and shall contain a written certification that the officers . . . have received adequate training regarding the enforcement of relevant Federal immigration laws."). For a description of how the program functions, see Carmen Gloria Iguina, Note, *Adapting to 287(g) Enforcement: Rethinking Suppression and Termination Doctrines in Removal Proceedings in Light of State and Local Enforcement of Immigration Law*, 86 N.Y.U. L. REV. 207, 217–19 (2011).

[30] Advocates have complained of abuses in numerous 287(g) jurisdictions, most famously in Maricopa County, Arizona. Federal officials revoked their Memorandum of Agreement with Maricopa County on December 15, 2011, after they found evidence of discriminatory policing practices against Latinos by the sheriff's office and its deputized 287(g) officers. *See* Press Release, U.S. Dep't of Homeland Sec., Statement by Secretary Napolitano on DOJ's Finding of Discriminatory Policing in Maricopa County (Dec. 15, 2011) [hereinafter Napolitano Press Release], *available at* http://goo.gl/qq6jJJ. For complaints about other jurisdictions, see generally *Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws: Joint Hearing*

the program and found significant problems with oversight.[31] The program has only been implemented in a limited number of jurisdictions nationwide,[32] and the Barack Obama Administration announced its intention in early 2012 to begin shutting down the part of the program involving street-level enforcement.[33] As of November 2013, the ICE website listed only thirty-six active 287(g) jurisdictions, all of which were limited to enforcement through local jails.[34]

While 287(g) has grabbed more than its share of headlines, however, a number of quieter changes have resulted in the implementation of programs that have had a much broader impact, routinely drawing state and local jurisdictions into immigration enforcement. In fact, ICE operates a whole network of programs under the umbrella of ICE ACCESS, a program designed to serve as a comprehensive "toolbox" to help integrate state and local police and correctional practices with federal immigration

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Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec. & Int'l Law, and the Subcomm. on the Const., Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary, 111th Cong. 11–19 (2009) (testimony of immigrants detailing abuses); AM. CIVIL LIBERTIES UNION FOUND. OF GA., THE PERSISTENCE OF RACIAL PROFILING IN GWINNETT: TIME FOR ACCOUNTABILITY, TRANSPARENCY, AND AN END TO 287(G) (Azadeh Shahshahani ed., 2010), *available at* http://goo.gl/3mQ0KE; AM. CIVIL LIBERTIES UNION FOUND. OF GA., TERROR AND ISOLATION IN COBB: HOW UNCHECKED POLICE POWER UNDER 287(G) HAS TORN FAMILIES APART AND THREATENED PUBLIC SAFETY (Azadeh Shahshahani ed., 2009), *available at* http://goo.gl/qq6jJJ; AM. CIVIL LIBERTIES UNION OF N.C. ET AL., THE POLICIES AND POLITICS OF LOCAL IMMIGRATION ENFORCEMENT LAWS: 287(G) PROGRAM IN NORTH CAROLINA (2009), *available at* http://goo.gl/4k4AIf; Ryan Gabrielson & Paul Giblin, *Reasonable Doubt*, EAST VALLEY TRIB. (Ariz.) (2009), http://goo.gl/fkqPZk; Daniel Hernandez, *Pedro Guzman's Return*, L.A. WKLY. (Aug. 7, 2007), http://goo.gl/qq6jJJ (discussing a developmentally disabled U.S. citizen who was mistakenly detained and deported to Mexico by officers working under 287(g)).

[31] *See generally* OFFICE OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., OIG-11-119, THE PERFORMANCE OF 287(G) AGREEMENTS FY 2011 UPDATE (2011); OFFICE OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., OIG-10-124, THE PERFORMANCE OF 287(G) AGREEMENTS REPORT UPDATE (2010).

[32] The American Immigration Council reported that as of October 2012, DHS had Memoranda of Agreement with fifty-seven states and localities. IMMIGRATION POLICY CTR., AM. IMMIGRATION COUNCIL, *The 287(g) Program: A Flawed and Obsolete Method of Immigration Enforcement* (Nov. 29, 2012), http://goo.gl/qq6jJJ. The ICE website indicates that as of October 2, 2012, Memoranda of Agreement had been signed with sixty-three jurisdictions. Of those, thirty-five involved officers authorized to carry out their duties solely within the jurisdiction's jails. *See Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, ICE.GOV, http://goo.gl/e6yWtS (last visited Apr. 16, 2014) [hereinafter *Fact Sheet*].

[33] *See* Alan Gomez, *Immigration Enforcement Program to Be Shut Down*, USA TODAY (Feb. 17, 2012, 3:25 PM), http://goo.gl/tASPhZ.

[34] *Fact Sheet*, *supra* note 32.

enforcement efforts.[35] Among the tools in the box is the Criminal Alien Program, which identifies deportable noncitizens in federal, state, and local jails and prisons throughout the country.[36] The Law Enforcement Support Center also provides 24/7 immigration status information to local jurisdictions in response to officers' inquiries,[37] largely through access to the National Crime Information Center[38] databases, which now contain that information.[39] The National Fugitive Operations Program further has the mission of pursuing known at-large criminal aliens and fugitive aliens.[40]

The Secure Communities program, another tool which has also had its share of controversy,[41] mandates that whenever a state or local jurisdiction submits an arrestee's fingerprints to the FBI, those fingerprints will also be run through the DHS database to check for immigration violations.[42] In response to whatever information results, ICE can take enforcement action by placing a detainer on the individual.[43] The Secure Communities

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[35] "ACCESS" stands for "Agreements of Cooperation in Communities to Enhance Safety and Security." *ICE ACCESS*, ICE.GOV, http://goo.gl/6hjAGd (last visited Apr. 16, 2014); *see also* Julie L. Myers, *ICE ACCESS: A Partnership Approach to Fighting Crime*, 75 POLICE CHIEF 16, 16 (2008) (written by the former assistant secretary of Homeland Security for ICE).

[36] *See Criminal Alien Program*, ICE.GOV, http://goo.gl/zsF2Tq (last visited Apr. 16, 2014).

[37] *Law Enforcement Support Center*, ICE.GOV, http://goo.gl/vG9mll (last visited Apr. 16, 2014).

[38] *See National Crime Information Center*, FBI.GOV, http://goo.gl/ZAuoWx (last visited Apr. 16, 2014).

[39] *See Law Enforcement Support Center*, *supra* note 37.

[40] *Fact Sheet: ICE Fugitive Operations Program*, ICE.GOV (July 2, 2013), http://goo.gl/dMDujl. The National Fugitive Operations Program (NFOP) has been criticized for ignoring its mandate and targeting noncitizens indiscriminately. MARC R. ROSENBLUM & WILLIAM A. KANDEL, CONG. RESEARCH SERV., R42057, INTERIOR IMMIGRATION ENFORCEMENT: PROGRAMS TARGETING CRIMINAL ALIENS 1, 27 (2012). Of those arrested by Fugitive Operations Teams (FOT) between 2003 and 2008, 73% had no criminal convictions. MARGOT MENDELSON ET AL., MIGRATION POLICY INST., COLLATERAL DAMAGE: AN EXAMINATION OF ICE'S FUGITIVE OPERATIONS PROGRAM 11 (2009).

[41] *See, e.g.*, Kitty Felde, *Secure Communities: Controversy Rages Over How Deportation Program Affects Public Safety*, 893 KPCC S. CAL. PUB. RADIO (June 7, 2011, 5:35 AM), http://goo.gl/2yXBJZ; Gretchen Gavett, *Controversial "Secure Communities" Immigration Program Will Be Mandatory by 2013*, PBS.ORG (Jan. 9, 2012, 3:01 PM), http://goo.gl/bPfF3N; Elizabeth Llorente, *Coast to Coast, Unrest over Secure Communities*, FOX NEWS LATINO (May 14, 2012), http://goo.gl/qoFSen.

[42] *Secure Communities*, ICE.GOV, http://goo.gl/6CE2sv (last visited Apr. 16, 2014). For a good step-by-step explanation of the Secure Communities process, see U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-708, SECURE COMMUNITIES: CRIMINAL ALIEN REMOVAL INCREASED, BUT TECHNOLOGY PLANNING IMPROVEMENTS NEEDED 7–9 (2012).

[43] For a practical description of how immigration detainers are used to secure individuals' transfers from state to federal custody, see PAROMITA SHAH, NAT'L IMMIGRATION PROJECT OF NAT'L LAWYERS' GUILD ET AL., UNDERSTANDING IMMIGRATION

program is now activated nationwide,[44] and in 2011 and 2012, it accounted for roughly 20% of the approximately 400,000 DHS removals for those years.[45] Since 2008, ICE has spent more than $750 million on Secure Communities and identified more than 692,000 individuals for deportation through the program.[46] Each year, a growing percentage of removals are attributed to Secure Communities.[47] Since fiscal year 2004, ICE has spent about $3.3 billion on efforts to identify and remove individuals with convictions.[48] In fiscal year 2011, funding for these efforts was $690 million.[49]

In addition to these information sharing and enforcement programs, state officers also participate directly with federal officers in joint arrest and investigative operations. Officers sometimes support ICE operations, assisting in the execution of a search or arrest warrant. They also work with federal officers in joint task forces targeting drug or gang activity.[50]

In recent years, of course, a number of states have also passed their own legislation to regulate immigrants within their borders.[51] Many of

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DETAINERS: AN OVERVIEW FOR STATE DEFENSE COUNSEL (2011), *available at* http://goo.gl/EWVFd9.

[44] ACTIVATED JURISDICTIONS, IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC. (Jan. 22, 2013), http://goo.gl/GsYqTH.

[45] GAO-12-708, *supra* note 42, at 14 & 15 t.2; *see also* News Release, FY 2012: ICE Announces Year-End Removal Numbers, Highlights Focus on Key Priorities and Issues New National Detainer Guidance to Further Focus Resources, U.S. Immigration & Customs Enforcement (Dec. 21, 2012), *available at* http://goo.gl/Y2Ymku (indicating 409,849 removals for fiscal year 2012); *Secure Communities: Monthly Statistics Through September 30, 2013*, ICE.GOV, http://goo.gl/uLixRJ (last visited Apr. 16, 2014) (indicating 83,815 removals in fiscal year 2012 resulting from Secure Communities).

[46] OFFICE OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., OIG-12-64, OPERATIONS OF UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT'S SECURE COMMUNITIES 1 (2012).

[47] GAO-12-708, *supra* note 42, at 14. ICE attributes the following percentages of yearly removals to Secure Communities: FY 2009 (4%), FY 2010 (13%), FY 2011 (20%), first half of FY 2012 (21%). *Id.* at 15.

[48] OIG-12-64, *supra* note 46, at 2.

[49] *Id.*

[50] *See* United States v. Oscar-Torres, 507 F.3d 224, 226 (4th Cir. 2007) (involving a joint ICE and local police initiative targeting gang and immigration violations); Martinez-Camargo v. INS, 282 F.3d 487, 489 (7th Cir. 2002) (discussing an INS agent and local police officers working together in an INS task force); United States v. Gutierrez-Daniez, 131 F.3d 939, 941 (10th Cir. 1997) (noting a joint INS and local police task force was created to target drug crimes and immigration violations); GUIDANCE ON STATE AND LOCAL GOVERNMENTS' ASSISTANCE IN IMMIGRATION ENFORCEMENT AND RELATED MATTERS 1, U.S. DEP'T OF HOMELAND SEC., http://goo.gl/ZnoGVM (last visited Apr. 16, 2014).

[51] On the factors leading to increased state efforts to regulate immigration, see Marisa S. Cianciarulo, *The "Arizonification" of Immigration Law: Implications of* Commerce v. Whiting *for State and Local Immigration Legislation*, 15 HARV. LATINO L. REV. 85, 86–89 (2012). For an example of a state law, see Beason-Hammon Alabama Taxpayer & Citizen

these laws have sought to enlist the state's law enforcement officers in investigating and reporting immigration status.[52] For example, the part of Arizona's S.B. 1070 that the Supreme Court let stand in 2012 requires state officers to investigate the immigration status of any person subject to a lawful stop or detention if the officers have reason to suspect that person may be an immigrant unlawfully present in the United States.[53] Since Arizona's law was passed in 2010, five states have passed similar laws, and similar bills have been introduced but not passed in thirty-one other states.[54] In 2012, state lawmakers in forty-six states, the District of Columbia, and Puerto Rico introduced 983 bills and resolutions related to immigrants and refugees. Approximately 17% of the proposed bills addressed law enforcement issues.[55]

The cumulative effect of all of these developments has been to integrate enforcement of federal immigration law into the day-to-day activities of state and local police. Furthermore, federal authorities have

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Protection Act, ALA. CODE §§ 31-13-1 to 31-13-35 (2011) (including a requirement that employers check immigration status, prohibiting them from hiring undocumented immigrants, and prohibiting undocumented immigrants from enrolling in postsecondary education in the state).

[52] *See, e.g.*, H.B. 11-1107, 68th Gen. Assemb., Reg. Sess. (Colo. 2011) (including proposals to allow law enforcement to make warrantless arrests if they have probable cause to believe the subject is removable); S.B. 590, 117th Gen. Assemb., Reg. Sess. (Ind. 2011) ("A committed offender shall, within a reasonable time, be evaluated regarding . . . the citizenship or immigration status of the offender by making a reasonable effort to verify the offender's citizenship or immigration status with the United States Department of Homeland Security . . . ."); H.B. 801, 195th Gen. Assemb., Reg. Sess. (Pa. 2011) (proposing to require officers to investigate the immigration status of arrestees whom they suspect of being unlawfully present and permitting officers to make warrantless arrests if they suspect an individual of a crime that would make the individual removable); S.B. 20, 119th Gen. Assemb., Reg. Sess. (S.C. 2011) ("If a law enforcement officer of this State or a political subdivision of this State lawfully stops, detains, investigates, or arrests a person for a criminal offense, and during the commission of the stop, detention, investigation, or arrest the officer has reasonable suspicion to believe that the person is unlawfully present in the United States, the officer shall make a reasonable effort, when practicable, to determine whether the person is lawfully present in the United States, unless the determination would hinder or obstruct an investigation.").

[53] ARIZ. REV. STAT. ANN. § 11-1051(B) (West 2012); *see also* Arizona v. United States, 132 S. Ct. 2492 (2012).

[54] Alabama, Georgia, Indiana, South Carolina, and Utah passed similar legislation in 2011; all have been challenged in court and the states have been prevented from implementing the laws in full. A. ELENA LACAYO, NAT'L COUNCIL OF LA RAZA, THE WRONG APPROACH: STATE ANTI-IMMIGRATION LEGISLATION IN 2011, at 14, 16–17 (Jan. 10, 2012), http://goo.gl/DRTTse.

[55] Allison Johnston & Ann Morse, *Immigration-Related Laws and Resolutions in the States (Jan.1–Dec. 31, 2012)*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://goo.gl/5tuRXp (last visited Apr. 16, 2014) (presenting detailed accounting on the subject).

shown a willingness to use these programs to identify and arrest large numbers of individuals who have little or no serious criminal involvement (despite protestations that the programs are designed to target dangerous criminals who threaten communities).[56] For example, 28% of Secure Communities removals for fiscal year 2010 involved individuals with no criminal record whatsoever.[57] As a result, state and local police have come to realize that even minor traffic violations can now serve as the precondition for a possible immigration arrest. Under the Fourth Amendment case *Whren v. United States*, officers are permitted to engage in pretextual traffic enforcement with the purpose of pursuing some other law enforcement goal so long as they have probable cause for the traffic stop.[58] In the immigration context, this opens the door for police to use traffic or other low-level crime enforcement to provide the pretext for inquiries into individuals' immigration status.

These developments have both encouraged state and local police to identify civil immigration violations and allowed them to achieve that shadow law enforcement goal, in part, through the shadowy pretext of traffic or criminal enforcement.

In *Arizona v. United States*, the Supreme Court clearly stated its approval of free information sharing between federal and local authorities regarding individuals' immigration status, as sanctioned by Congress.[59] This ensures that programs like Secure Communities and CAP will persist, and it represents an important line-crossing in our understanding of the proper federalism balance in our immigration scheme. Local officers are now involved, albeit indirectly, in federal civil immigration enforcement as a routine part of their duties. Evidence has begun to mount that this shift has also opened a Pandora's box of incentives for unconstitutional and racially biased law enforcement.

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[56] The government's own numbers show that 37% of Secure Communities arrests in fiscal years 2011 to 2012 were based on traffic offenses. GAO-12-708, *supra* note 42, at 23. In fiscal year 2010, 28% of individuals removed through Secure Communities had no criminal convictions, and 49% had been convicted of a Level 2 or 3 offense (misdemeanor). MICHELE WASLIN, AM. IMMIGRATION COUNCIL, ICE'S ENFORCEMENT PRIORITIES AND THE FACTORS THAT UNDERMINE THEM 9 (2010), http://goo.gl/hqYx8K. Only 23% had been convicted of a Level 1 offense (aggravated felony or two or more crimes punishable by more than one year). *Id.*

[57] *Id.* at 9.

[58] 517 U.S. 806, 812–13 (1996).

[59] 132 S. Ct. 2492, 2508 (2012) ("Consultation between federal and state officials is an important feature of the immigration system.").

B. THE CONSTITUTIONAL CONTEXT OF SHADOW ENFORCEMENT

1. *Equal Protection Under Law as a Fundamental American Value*

The rule of law and the nondiscriminatory administration of justice are bedrock values of our American system of justice. They are expressed in our laws repeatedly in varied ways.[60] The Constitution promises the equal protection of laws to all persons in both the Fifth and the Fourteenth Amendments, and caselaw establishes that laws categorizing people by race are subject to strict scrutiny and must be justified by compelling state necessity.[61] State laws that discriminate on the basis of nationality are likewise subject to strict scrutiny.[62] The post-Civil War civil rights statutes codified at 42 U.S.C. § 1981 represent another expression of our strong federal policy against nationality discrimination.[63] Numerous other federal laws enshrine the same principles of nondiscrimination, including the Voting Rights Act,[64] the Fair Housing Act,[65] and Title VI of the Civil Rights Act,[66] among others.

This combination of Supreme Court jurisprudence and federal law represents strong expressions of our ongoing and formative national struggle to fulfill the promises of equality in our founding documents. While our national history has been far from smooth and unblemished in this regard, the struggle to ensure the full protections and benefits of law to

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[60] *See, e.g.*, Lucas Guttentag, *Discrimination, Preemption, and Arizona's Immigration Law: A Broader View*, 65 STAN. L. REV. ONLINE 1, 3 (2012) (describing 42 U.S.C. § 1981 as reflecting an "entrenched" federal norm against discrimination).

[61] *See, e.g.*, Adarand Constr., Inc. v. Pena, 515 U.S. 200, 227 (1995) ("[W]e hold today that all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.").

[62] *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 372 (1971) ("[State] classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."); Hernandez v. Texas, 347 U.S. 475, 479 (1954) (excluding Mexican-Americans from jury service because of ancestry or national origin violated the Fourteenth Amendment). In contrast, federal laws may discriminate among individuals on the basis of nationality due to the federal government's plenary power over immigration and nationality. *See* Mathews v. Diaz, 426 U.S. 67, 86–87 (1976).

[63] Guttentag, *supra* note 60, at 4–5. Section 1981 provides that "all persons" shall have the same contractual rights and enjoy the "full and equal benefit of all laws and proceedings" as white citizens, thus outlawing discrimination based on both race and nationality. 42 U.S.C. § 1981(a) (2006). In *Graham*, the Court struck down a state law denying welfare to lawful permanent resident immigrants on equal protection grounds but also on the grounds that the state law conflicted with the nondiscrimination principles of § 1981. 403 U.S. at 365, 377–78, 380.

[64] Voting Rights Act, 42 U.S.C. §§ 1973–1973bb-1 (2006).

[65] Fair Housing Act, 42 U.S.C. §§ 3601–3619 (2006).

[66] Equal Employment Opportunities Act, 42 U.S.C. §§ 2000e–2000e-17 (2006).

all persons is a crucial part of our national identity. It has been forged through the struggles of native peoples, through the Civil War and the end of slavery, through the women's suffrage movement, through the civil rights movement, through the efforts to obtain restitution for Japanese-Americans interned during World War II, and through the ongoing struggle to balance security and individual civil rights in the wake of the terrorist attacks of September 11, 2001. This commitment to the full, nondiscriminatory rule of law—and the ongoing struggle to bring that ideal to fruition—are central to who we are as a nation. It is precisely the threat to that ideal which creates the heat in the heart of the controversy over Arizona's state law, S.B. 1070. While it was enacted to address immigration, S.B. 1070 has been opposed as a law that fosters discrimination on the basis of race and national origin.[67] The controversy over S.B. 1070 highlights many of the concerns raised more generally by the participation of state and local law enforcement in immigration enforcement.

2. *The Explicit Use of Race and National Origin in Immigration Enforcement*

Immigration enforcement engages issues of race and apparent nationality in ways that are nuanced, different from criminal law, and not widely familiar to law enforcement officers. The use of race—even in criminal enforcement—is far from a simple matter, and courts use varied approaches in how they describe the propriety of identifying suspects by race. Courts do allow police officers to consider race in certain circumstances—for example, when a racial descriptor is used to describe a suspect in a police bulletin. In those circumstances, police are permitted to use race as a factor in stopping possible suspects.[68] By the same token, it is widely accepted that law enforcement officers may not explicitly use an individual's race *itself* as a factor that directly raises suspicion of criminal behavior.[69] The Supreme Court has never recognized the use of race as a

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[67] *See generally* Gabriel J. Chin et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47, 68 (2010) (explaining that S.B. 1070 may actually require racial profiling); Gabriel J. Chin & Kevin R. Johnson, Op-Ed., *Profiling's Unlikely Enabler: A High Court Ruling Underpins Ariz. Law*, WASH. POST, July 13, 2010, at A15 (analyzing concerns with racial profiling in the implementation of S.B. 1070); Russell Pearce, *Arizona Takes the Lead on Illegal Immigration Enforcement*, 20 THE SOCIAL CONTRACT 244, 244 (Arizona State Senator—and S.B. 1070 coauthor—Russell Pearce calls the concerns of the "open-border, pro-amnesty crowd" concerns of "racial profiling").

[68] *See, e.g.*, United States v. Jones, 535 F.3d 886, 890 (8th Cir. 2008) (upholding probable cause where suspect met a description, including a racial identification).

[69] *See, e.g.*, Washington v. Lambert, 98 F.3d 1181, 1190–91 (9th Cir. 1996) (vigorously rejecting an implication of criminality in the presence of two black men in an area at night).

legitimate factor for assessing under the Fourth Amendment whether there is a particularized and objective basis for suspecting the particular person stopped of criminal activity. Myriad lower courts have flatly rejected race as a relevant indicator of criminal behavior.[70]

The same cannot be said categorically with regard to immigration enforcement; the law does allow the explicit use of race or apparent nationality to establish suspicion in certain circumstances. In the 1975 case of *United States v. Brignoni-Ponce*,[71] the Supreme Court held that "apparent Mexican ancestry" could be a relevant factor, among others, in developing reasonable suspicion of unlawful immigration status in a stop near the Mexican border. Relying on census statistics showing the numbers of citizens and noncitizens of Mexican descent in the area of the arrest, the Court said, "The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor . . . ."[72] The Court acknowledged at the same time the burden this placed on native-born and naturalized citizens who have those same characteristics, and warned that even the plenary power of Congress over immigration matters "cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens."[73]

While *Brignoni-Ponce* held that the sole factor of "apparent Mexican ancestry" could not by itself support reasonable suspicion of alienage,[74] the Court has never disavowed its statement that Mexican appearance could be a relevant factor. As a result of the tension between this statement and courts' concerns about targeting "foreign-seeming" citizens and lawfully present noncitizens, the Supreme Court and lower courts have struggled to

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[70] *See, e.g.*, Farag v. United States, 587 F. Supp. 2d 436, 465–68 (E.D.N.Y. 2008) (citing, *inter alia*, United States v. Montero-Camargo, 208 F.3d 1122, 1131, 1135 (9th Cir. 2000) (rejecting the use of race as not probative of criminality and as inappropriate, and tracing history of state and federal court rejection of race as a factor); *see also* United States v. Clay, 640 F.2d 157, 159 (8th Cir. 1981); United States v. Ruiz, 961 F. Supp. 1524, 1532 (D. Utah 1997); United States v. Hayden, 740 F. Supp. 650, 653 (S.D. Iowa 1989) *aff'd sub nom.* United States v. Jefferson, 906 F.2d 346 (8th Cir. 1990); People v. Johnson, 478 N.Y.S.2d 987, 993 (N.Y. App. Div. 1984).

It is important to note that racial profiling is still widely practiced in criminal law enforcement, for some of the reasons discussed below. *See, e.g.*, Brown v. City of Oneonta, 235 F.3d 769, 771 (2d Cir. 2000) ("For better or worse, it is a fact of life in our diverse culture that race is used on a daily basis as a shorthand for physical appearance. This is as true in police work as anywhere else."); *see also infra* Part I.B.3.

[71] 422 U.S. 873, 873, 886–87 (1975).

[72] *Id.* at 886–87.

[73] *Id.* at 884.

[74] *Id.* at 885–86.

set meaningful and consistent standards for when and how race can be properly considered in immigration enforcement.[75]

The year after its decision in *Brignoni-Ponce*, the Supreme Court approved the use of "apparent Mexican ancestry" as a principal criterion for secondary inspection referrals at fixed border patrol checkpoints.[76] Since then, however, many appellate and other lower courts have distinguished or questioned the continuing viability of *Brignoni-Ponce*. The result is a confused and inconsistent state of the law. For example, twenty-five years later, the Ninth Circuit (whose earlier decision the Supreme Court upheld in *Brignoni-Ponce*) distinguished the demographic and statistical conclusions of *Brignoni-Ponce*. Based on the growth of the Hispanic population in the Southwest, the Court wrote:

> [W]e conclude that, at this point in our nation's history, and given the continuing changes in our ethnic and racial composition, Hispanic appearance is, in general, of such little probative value that it may not be considered as a relevant factor where particularized or individualized suspicion is required. Moreover, we conclude, for the reasons we have indicated, that it is also not an appropriate factor.[77]

Demonstrating the confusion in the state of the law, however, the Ninth Circuit later held in a case that arose in Montana that Hispanic appearance *could* be a relevant factor because of the relative scarcity of Hispanics in that region.[78]

Other courts have also called *Brignoni-Ponce* into question or limited its applicability. The Fifth Circuit has repeatedly refused to acknowledge any meaningfully probative relationship between Hispanic appearance and

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[75] Scholars have also widely criticized *Brignoni-Ponce* for legitimizing and fostering racial profiling in the immigration context. *See, e.g.*, Brian R. Gallini & Elizabeth L. Young, *Car Stops, Borders, and Profiling: The Hunt for Undocumented (Illegal?) Immigrants in Border Towns*, 89 NEB. L. REV. 709, 731–32 (2011); 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, 180–81 (2009); 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, 1012, 1025 (2010) (pointing out, among other things, that *Brignoni-Ponce* itself demonstrates the imprecision of "apparent Mexican ancestry" in the fact that two of the three individuals so identified in the case were, respectively, a U.S. citizen of Puerto Rican origin and a Guatemalan woman).

[76] United States v. Martinez-Fuerte, 428 U.S. 543, 563–64 (1976).

[77] United States v. Montero-Camargo, 208 F.3d 1122, 1135 (9th Cir. 2000); *see also* Hernandez, *supra* note 75, at 184–85 (describing the number of indicators of "suspiciousness" displayed by his own U.S. citizen and lawfully resident Mexican-American family on a recent trip).

[78] United States v. Manzo-Jurado, 457 F.3d 928, 935 n.6 (9th Cir. 2006).

unlawful behavior or status.[79] Likewise, the Second Circuit noted in dicta that a stop based on race ("or some other grossly improper consideration") could qualify as an egregious violation of the Fourth Amendment.[80] The tone of a judge in the U.S. District Court for the District of New Mexico conveys the dismissiveness of these courts toward *Brignoni-Ponce*: "Parenthetically, Agent Torres also testified that the occupants of the vehicle 'appeared to be Hispanic.' This factor, while not unusual in New Mexico, or anywhere in the United States for that matter, certainly is not indicia of criminal conduct. Many citizens of the United States 'appear to be Hispanic.'"[81]

Courts have thus held race to be a sometimes-appropriate proxy factor in immigration enforcement. At the same time, they have hesitated to rely on it due to its limited probative value and the concerns it raises about the Fourth Amendment constitutional burden borne by lawfully present or citizen members of targeted racial groups. Nonetheless, *Brignoni-Ponce* has never been overturned, and it is widely stated that race is an acceptable explicit factor in determining suspicion for purposes of immigration enforcement.[82] Even more importantly, as a matter of practical reality, race continues to be commonly used as an identifying characteristic for immigration enforcement. Often, however, it appears as a wolf in reasonable suspicion's clothing.

The job of an officer enforcing immigration law is to identify and monitor noncitizens with regard to whether they have lawful permission to remain in the United States. Unfortunately for authorities, immigration status is an invisible quality and not something that an outside observer can objectively perceive at a distance. This invisibility distinguishes

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[79] *See, e.g.*, United States v. Chavez-Villarreal, 3 F.3d 124, 127 (5th Cir. 1993) ("Further, we accord . . . very little [weight] to [the defendant's] Hispanic appearance; his license plates indicate that he was from a state with a substantial Hispanic population."); United States v. Orona-Sanchez, 648 F.2d 1039, 1042 (5th Cir. 1981) ("Nor is there anything vaguely suspicious about the presence of persons who appear to be of Latin origin in New Mexico where over one-third of the population is Hispanic.").

[80] Almeida-Amaral v. Gonzales, 461 F.3d 231, 235 (2d Cir. 2006).

[81] United States v. Abdon-Limas, 780 F. Supp. 773, 778 (D.N.M. 1991). Of course, many citizens of the United States in fact *are* Hispanic, and certainly more so now than in 1975 when *Brignoni-Ponce* was decided. The Hispanic population as of April 1, 2010 was 50.5 million, comprising 16.3% of the nation's total population. U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN 4 (2011). Most Latinos are native-born Americans; 74% are U.S. citizens. *20 FAQs About Hispanics*, NAT'L COUNCIL OF LA RAZA, http://goo.gl/uSy9PT (last visited Apr. 21, 2014).

[82] *See, e.g.*, Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1570–78 (2011); Kristin Connor, *Updating* Brignoni-Ponce*: A Critical Analysis of Race-Based Immigration Enforcement*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 567, 614 (2008); Johnson, *supra* note 75, at 1030.

warrantless immigration enforcement in an important way from the typical warrantless traffic or criminal arrest, which is based on an officer's observation of prohibited behavior.

As a result, immigration enforcement agents commonly rely either on circumstantial evidence or on proxy characteristics to support reasonable suspicion that individuals are (1) non-U.S. citizens, and (2) do not have legal permission to be in the United States. In *Brignoni-Ponce*, the Supreme Court listed the types of circumstantial factors that can give rise to reasonable suspicion of unlawful presence,[83] including characteristics of the area of the encounter,[84] driver behavior,[85] and characteristics of an individual's vehicle.[86] In nontraffic cases, courts have also considered such factors as association with a known employer of unauthorized workers.[87]

More subjective—but nonetheless common—is the use of personal behavior as a circumstantial indicator of unlawful status. In reality, these behaviors often can be indicators of nervousness, used as a proxy for indicators of unlawful status. Some courts have held that nervousness should not be given much weight as such a proxy.[88] Some courts have simply addressed the indicators of nervousness individually, and the

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[83] United States v. Brignoni-Ponce, 422 U.S. 873, 884–85 (1975) (citing numerous cases that included the listed factors).

[84] *Id.*; *see also* United States v. Garcia, 942 F.2d 873, 876–77 (5th Cir. 1991) (approving the use of the stop's proximity to the border and the fact that a highway was commonly used in smuggling as factors); United States v. Manzo-Jurado, 457 F.3d 928, 935 n.6 (9th Cir. 2006) (noting the relative scarcity of Hispanics in the region).

[85] *Brignoni-Ponce*, 422 U.S. at 884–85; *see also* United States v. Quintana-Garcia, 343 F.3d 1266, 1273 (10th Cir. 2003) (allowing driver's reduced speed and act of pulling over before border patrol had turned on his patrol lights as factors); United States v. Montero-Camargo, 208 F.3d 1122, 1130, 1138 (9th Cir. 2000) (U-turn on a highway after passing sign indicating upcoming border checkpoint); United States v. Rodriguez-Sanchez, 23 F.3d 1488, 1493 (9th Cir. 1994) (abrupt exit from border checkpoint and weaving in and out of lanes); *Garcia*, 942 F.2d at 875–76 (high-speed attempt to evade officers).

[86] *Brignoni-Ponce*, 422 U.S. at 885 (stating that "officers say that certain station wagons, with large compartments for fold-down seats or spare tires, are frequently used for transporting concealed aliens" and "[t]he vehicle may appear to be heavily loaded, it may have an extraordinary amount of passengers," or the officers may observe people hiding); *see also* United States v. Chavez-Chavez, 205 F.3d 145, 149 (5th Cir. 2000) (approving agents' use of van types commonly used in smuggling as a factor).

[87] *See, e.g.*, Lee v. INS, 590 F.2d 497, 502 (3d Cir. 1979); *see also In re* King & Yang, 16 I. & N. Dec. 502, 504–05 (B.I.A. 1978).

[88] Gonzalez-Rivera v. INS, 22 F.3d 1441, 1446 (9th Cir. 1994) (disregarding nervousness as factor for suspicion); United States v. Hernandez-Alvarado, 891 F.2d 1414, 1418–19 (9th Cir. 1989) (finding no reasonable suspicion where one of the factors was "nervous demeanor of both the defendant and his passengers as they sat in the truck"); United States v. Ortega-Serrano, 788 F.2d 299, 302 (5th Cir. 1986) (stating that nervousness is "not unusual").

meaning attributed to them has varied. For example, courts have found the failure to make eye contact to be a reasonable basis for suspicion,[89] while others have refused to consider that a reliable indicator of unlawful behavior.[90]

Finally, and most problematically, officers often use physical or linguistic characteristics of the person as a direct proxy for "foreignness"—that is, for noncitizen status.[91] This assumes, of course, a certain understanding of what characteristics are "foreign," a problematic concept, especially from the viewpoint of citizens who maintain physical, linguistic, and cultural ties to their countries of ancestry. The other consistent problem with the use of race or apparent nationality as a proxy for citizenship status is that it fails to address the second part of the required reasonable suspicion: unlawful status. The simple fact that an individual may be a noncitizen does not indicate whether that person is lawfully in the United States, and lawfully present noncitizens are as burdened by race-targeted enforcement as are citizens.[92]

3. *The Persistence of Race as a Factor in Law Enforcement*

It is difficult to know exactly how often race and language motivate a law enforcement stop. As noted above, few judges seem comfortable upholding such a basis for suspicion of unlawful behavior or status, even in immigration proceedings. Officers often give other reasons for stopping an individual, even where that individual alleges that the motivation was

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[89] *E.g.*, *Montero-Camargo*, 208 F.3d at 1136 (calling the consideration of eye contact "highly subjective" (quoting United States v. Robert L., 874 F.2d 701, 703 (9th Cir. 1989)).

[90] *Ortega-Serrano*, 788 F.2d at 302 ("No weight whatsoever attaches to the rear passengers' refusal look at [the officer]." (citing United States v. Pacheco, 617 F.2d 84, 86 (5th Cir. 1980)); *see also* United States v. Olivares-Pacheco, 633 F.3d 399, 403 (5th Cir. 2011) (giving the passengers' avoidance of eye contact no weight).

[91] Scholars have noted a "historical feature of U.S. immigration law—the government's explicit employment of race as a proxy for citizenship." Carbado & Harris, *supra* note 82, at 1545; *see also* Farm Labor Org. Comm. v. Ohio State Highway Patrol, 308 F.3d 523, 540 (6th Cir. 2002) (finding that the inability to speak English may be an acceptable reason for suspicion of alienage).

[92] *See, e.g.*, Doris Marie Provine & Roxanne Lynn Doty, *The Criminalization of Immigrants as a Racial Project*, 27 J. CONTEMP. CRIM. JUST. 261, 269–70 (2011) (describing a disproportionate rise in arrests of lawfully present Latinos resulting from partnerships between ICE and local police); Mary Romero, *Racial Profiling and Immigration Law Enforcement: Rounding Up of Usual Suspects in the Latino Community*, 32 CRITICAL SOC. 447, 463 (2006) (describing local immigration enforcement in Arizona characterized by "(1) discretionary stops based on ethnicity and class; (2) use of intimidation to demean and subordinate persons stopped; (3) restricting the freedom of movement of Mexicans but not others in the same vicinity; (4) reinforced stereotypes of Mexican as 'alien,' 'foreign,' inferior and criminal; and (5) limited access to fair and impartial treatment before the law").

race.[93] An individual faces difficulty in proving what went on in the officer's head during the stop-and-arrest. Moreover, gathering the extensive proof needed to show definitively what is occurring in law enforcement trends is equally difficult.

Nonetheless, scholars and advocates maintain that many police and other officers consistently use race as a proxy for unlawfulness, in both the immigration and criminal contexts.[94] Recent DOJ Civil Rights Division investigations have found rampant racial profiling and biased police practices against Latinos in jurisdictions as far-flung and varied as Maricopa County, Arizona (where Phoenix is located); the town of East Haven, Connecticut; and Alamance County, North Carolina (a rural county northwest of Raleigh).[95] In all three cases, DOJ used statistical and other investigative techniques to find that Latinos were targeted because of their

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[93] *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, 136 & n.209 (2007) ("Immigration officers are familiar with the case law and are experienced enough to create prefabricated profiles that will satisfy courts that their stops were not based solely upon race or ethnic appearance." (citing cases where the recurrence of word-for-word descriptions by border patrol agents led courts to suspect a recycled profile for reasonable suspicion justifications)).

[94] *See, e.g.*, Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 698 (2000) ("Contending that the U.S. government regularly violates the wide latitude afforded it by the Supreme Court, plaintiffs in many lawsuits allege that the Border Patrol relies almost exclusively on race in making immigration stops."); *id.* at 706–07 (endorsing a 1985 observation as still accurate: "'While [immigration authorities] cannot in theory question people on the basis of racial or ethnic appearance alone, they in fact do so consistently . . . .'" (quoting ELIZABETH HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS 100 (1985)); Floyd D. Weatherspoon, *Racial Profiling of African-American Males: Stopped, Searched, and Stripped of Constitutional Protection*, 38 J. MARSHALL L. REV. 439, 439–40 (2004) ("Every African-American male in this country who drives a vehicle, or has traveled by bus or plane, either knowingly or unknowingly has been the victim of racial profiling by law enforcement officials. . . . On the basis of race and gender, governmental officials have devised a profile of the typical criminal: black and male."). *See generally* R. Richard Banks, Essay, *Racial Profiling and Antiterrorism Efforts*, 89 CORNELL L. REV. 1201 (2004) (discussing various ways that law enforcement uses race and whether those constitute profiling); Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651 (2002) (considering a statistical analysis of police records and concluding that Maryland State Police engaged in racial profiling in traffic stops on I-95 between 1995 and 2000, targeting black and Hispanic drivers).

[95] *See generally* DOJ Letter to Alamance County, *supra* note 6; Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice, Civil Rights Div., to Joseph Maturo, Jr., Mayor of East Haven, Conn. (Dec. 19, 2011) [hereinafter DOJ Letter to East Haven], *available at* http://goo.gl/Sqm2og; Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice, Civil Rights Div., to Bill Montgomery, Cnty. Att'y, Maricopa County (Dec. 15, 2011) [hereinafter DOJ Letter to Maricopa County], *available at* http://goo.gl/EqEV9y.

race for dramatically heightened traffic and other enforcement actions. DOJ concluded that Latino drivers were four to *ten* times more likely to be stopped than non-Latino drivers[96] and that the increased stops were intended to facilitate immigration enforcement.[97]

Studies of cooperative federal–state immigration programs also indicate that race continues to influence how that enforcement is conducted. The Chief Justice Earl Warren Institute on Law and Social Policy at University of California, Berkeley School of Law conducted a review of the demographics of 375 arrests in the Secure Communities program.[98] The researchers found discrepancies between the demographics of those arrested and those in the population at large, which indicate that those targeted by Secure Communities overwhelmingly fit the profile of a young Latino man.[99] For example, though previous research has shown that 57% of the undocumented population in the United States is male,[100] 93% of the sample arrested through Secure Communities was male.[101] Even assuming that men may be more likely to commit crime than women, this number far surpasses the 75% of arrests tracked by the FBI nationwide that involve men.[102] Likewise, while 77% of the undocumented population is estimated to be from Latin America,[103] 93% of the sample arrested by Secure Communities was Latino.[104] The authors also noted that, despite the government's continued insistence that the program is aimed at serious

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[96] Latino drivers in Maricopa County were four to nine times more likely to be stopped than non-Latinos, and Latino drivers in Alamance County were four to ten times more likely to be stopped. DOJ Letter to Alamance County, *supra* note 95, at 3; DOJ Letter to Maricopa County, *supra* note 95, at 3.

[97] DOJ Letter to Alamance County, *supra* note 6, at 6 ("[D]eputies understand that they should target Latinos with their discretionary enforcement actions and bring them into the Alamance County Jail to be run through immigration databases . . . ."); *id.* at 8 ("Sheriff Johnson often justifies ACSO's activities by citing his desire to combat illegal immigration . . . .").

[98] AARTI KOHLI ET AL., CHIEF JUSTICE EARL WARREN INST. ON LAW & SOC. POLICY, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 4 (2011), http://goo.gl/8AeiSj.

[99] *Id.* at 6.

[100] *Id.* at 5 (citing MICHAEL HOEFER ET AL., U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE U.S.: JANUARY 2010, at 5 (2011), *available at* http://goo.gl/WYxKP4.

[101] *Id.*

[102] *Id.* (citing FBI data on arrests from 2009).

[103] *Id.* at 5 (citing JEFFREY S. PASSEL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY 5 (2006), *available at* http://goo.gl/0PdmlI).

[104] *Id.* at 5.

criminals, only a quarter of the individuals they sampled were charged in removal proceedings with "removal based on a criminal conviction."[105]

Other reviews of Secure Communities statistics demonstrate that high percentages of the program's arrestees have little or no criminal record, raising the specter that these individuals are targeted because of their race. A recent study by the Government Accounting Office (GAO) found that 56% of those arrested nationwide through Secure Communities had either no criminal conviction or had been convicted of the lowest level misdemeanor.[106]

Some jurisdictions have particularly high rates of noncriminal deportations. In Louisiana, for example, from when Secure Communities began in November 2009 until April 30, 2011, 69.9% of arrestees had no criminal record at all, and another 15.6% were convicted of minor offenses.[107] DHS's own Office of Civil Rights and Civil Liberties (CRCL) has identified racial profiling as an area of concern for local law enforcement participating in Secure Communities; as of July 13, 2012, CRCL was preparing a training video for local officers on how to avoid racial profiling.[108] At that time, CRCL was responding to four complaints of law enforcement abuses in connection with Secure Communities. All four complaints alleged criminal arrests that served as a pretext for an immigration investigation.[109]

The 287(g) program has also been implicated in repeated complaints of racial profiling and discriminatory enforcement. Both Maricopa County and Alamance County are 287(g) jurisdictions, and the DOJ investigations in both counties found their programs to include racial profiling and race-based misuse of police power.[110] Concerns about how 287(g) agreements are implemented go far beyond these counties, however. OIG and GAO reviews of the program have found numerous problems with federal oversight of 287(g)-authorized officers. As detailed in the March 2010 OIG report, a number of the jurisdictions participating in the program had histories of racial profiling before they were approved for 287(g) delegation

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[105] *Id.* at 6.

[106] GAO REPORT 12-708, *supra* note 42, at 17 (noting that 26% had no conviction and 30% were convicted of offenses with maximum punishment of less than one year).

[107] NAT'L IMMIGRATION FORUM, SECURE COMMUNITIES 3 (2011), *available at* http://goo.gl/RH1QAG.

[108] GAO REPORT 12-708, *supra* note 42, at 38, 39 n.49 ("These materials are optional and provided free of charge, and are not required as part of state or local law enforcement training.").

[109] *Id.* at 43.

[110] Napolitano Press Release, *supra* note 30; DOJ Letter to Alamance County, *supra* note 6, at 6 (explaining the role that access to immigration databases through the 287(g) program played in the systematic racial profiling and targeting of Latinos for disproportionate arrest).

authority, and DHS had no mechanism for gathering or assessing this information when a jurisdiction applied for authorization.[111] GAO found in 2009 that more than half of the jurisdictions it contacted during its audit reported that community members expressed concerns about racial profiling in connection with 287(g) authority.[112]

Racial profiling and other abuses are also serious concerns in criminal and traffic law enforcement. The history of racial discrimination in this country has included and continues to include a long and deep story of troubled relations between members of racial minorities and law enforcement. The inherent vagueness in reasonable suspicion and probable cause standards[113] make enforcing them notoriously difficult, subjective, and susceptible to after-the-fact construction by officers who are challenged on the basis for their arrests.[114] In addition, the many exceptions to the exclusionary rule in criminal proceedings make the rule a less-than-robust Fourth Amendment defender, even where there may be impermissible factors, such as race, at play. Most notable among those exceptions is *Whren*'s approval of pretextual enforcement, which can mask nefarious motives, such as race.[115]

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[111] OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-10-63, THE PERFORMANCE OF 287(G) AGREEMENTS 22–23 (2010), *available at* http://goo.gl/JmeiTe.

[112] *Id.* (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-109, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS 6 (2009)).

[113] The Supreme Court has recognized that reasonable suspicion is "somewhat abstract," United States v. Arvizu, 534 U.S. 266, 274 (2002), and that it is an "elusive concept," United States v. Cortez, 449 U.S. 411, 417 (1981).

[114] *See, e.g.*, Johnson, *supra* note 75, at 1029 ("[O]fficers can easily strengthen their reasonable suspicion for an interrogation after they have begun talking to an individual . . . . It is easy to come up with the necessary articulable facts after the fact. . . . [This] is referred to as 'canned p.c.' (probable cause)." (quoting Edwin Harwood, *Arrests Without Warrant: The Legal and Organizational Environment of Immigration Law Enforcement*, 17 U.C. DAVIS L. REV. 505, 531 (1984))); *see also* Olmedo-Monroy v. INS, 917 F.2d 1307, 1307 (9th Cir. 1990). In *Olmedo-Monroy*, the petitioner alleging alleged that border patrol stopped him solely because he appeared to be Hispanic, but officials testified and the judge accepted as true that the officials approached him for "other reasons." *Id.*

[115] United States v. Whren, 517 U.S. 806, 813 (1996) ("We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved . . . . Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); *see also* Johnson, *supra* note 75, at 1075 ("[T]he *Whren* Court made any challenge to a pretextual stop close to impossible under the Fourth Amendment when the stop was based primarily on race."). *See generally* David A. Harris, Essay, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997) (discussing racial profiling and pretextual stops in Colorado, Florida, Illinois, and Maryland).

Scholars and advocates lament the ineffective defense of Fourth Amendment guarantees, and many assert that racial profiling is alive and well in our nation's criminal law enforcement.[116] Courts, too, recognize the ongoing problem as one of great significance. Recently, a federal district court ruled that the New York City police department's implementation of its "stop and frisk" policy, which involved over 4.4 million stops between 2004 and 2012, resulted in mass violations of the Fourth and Fourteenth Amendment rights of the city's minorities and constituted a policy of "indirect racial profiling."[117] Of those stops, more than 52% were of black people and 31% were of Latinos, while only 10% were of whites.[118] These racial disparities in the rates of citizen–officer encounters persisted, despite an earlier lawsuit settlement that required several measures designed to remedy racial profiling[119] and despite other police actions to understand and reduce race-based enforcement.[120]

DOJ's investigation of and actions against both the Maricopa County and the Alamance County Sheriff's Offices also reveal other glaring law enforcement abuses, not just in the implementing immigration related programs, but also in carrying out their general policing duties. DOJ investigators found widespread abuse, including racial profiling, unlawful stops and arrests, uses of excessive force, retaliation for complaints,

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[116] *See, e.g.*, Johnson, *supra* note 75, at 1076 ("Today, we find ourselves in a situation in which African-Americans and Latina/os, as well as Arabs and Muslims, claim that racial profiling is endemic to modern criminal and immigration enforcement."). *See generally* Gross & Barnes, *supra* note 94; Reginald T. Shuford, *Any Way You Slice It: Why Racial Profiling is Wrong*, 18 ST. LOUIS U. PUB. L. REV. 371 (1999). Amnesty International estimates that in the United States, blacks suffer racial profiling at a rate of 47%, Latinos at a rate of 23%, and Asians at a rate of 11%. AMNESTY INT'L, THREAT AND HUMILIATION: RACIAL PROFILING, DOMESTIC SECURITY, AND HUMAN RIGHTS IN THE UNITED STATES 1, tbl.1 (2004), *available at* http://goo.gl/hui2tR. For examples of community organizing against racial profiling, see *Racial Profiling*, ACLU, http://goo.gl/uHvLaA (last visited Apr. 16, 2014) ("Racial profiling continues to be a prevalent and egregious form of discrimination in the United States."); COMMUNITIES UNITED FOR POLICE REFORM, http://goo.gl/qS3vlr (last visited Apr. 16, 2014) (describing itself as a community organization dedicated to ending discriminatory policing in New York).

[117] Floyd v. City of New York, 959 F. Supp. 2d 540, 555, 562 (S.D.N.Y. 2013); *see also* Joseph Goldstein, *Judge Rejects New York's Stop-and-Frisk Policy*, N.Y. TIMES, Aug. 13, 2013, at A1.

[118] *Floyd*, 959 F. Supp. 2d at 559 The U.S. Census Bureau shows that in 2010, blacks represented 25.5% of the population of New York City, whites represented 44.0%, and Latinos represented 28.6%. *State & County Quick Facts: New York City*, U.S. CENSUS BUREAU, http://goo.gl/rKklHh (last visited Apr. 16, 2014).

[119] *See Floyd*, 959 F. Supp. 2d at 609–10.

[120] *See, e.g.*, GREG RIDGEWAY, RAND CORP., ANALYSIS OF RACIAL DISPARITIES IN THE NEW YORK POLICE DEPARTMENT'S STOP, QUESTION, AND FRISK PRACTICES (2007), *available at* http://goo.gl/q5NoMf.

discrimination against non-English speakers, and failures to investigate sex crimes.[121]

The reality of unchecked racial profiling in both criminal and immigration enforcement is an important piece of context in which we must consider the growing phenomenon of shadow immigration enforcement.

4. *The Supreme Court on State and Local Officer Involvement in Immigration Enforcement*

In this context, the Supreme Court looked at *Arizona*'s formal federal–state cooperation. That case, in turn, provides important context for considering state and local participation in shadow immigration enforcement. Though the Court encouraged information sharing between state and federal authorities, it nonetheless also clearly showed concern about the problematic edges of state and local police's participation in immigration enforcement.[122] It took pains to limit that participation and to raise some flags about possible dangers of shadow immigration enforcement.

To begin, the Court made a point of stating that state and local officers have no direct authority to enforce federal civil immigration law: "Federal law specifies limited circumstances in which state officers may perform an immigration officer's functions."[123] The Court went on to detail these limited circumstances, including under formal 287(g) agreements, an imminent mass influx of aliens off the coast, and in cases of smuggling.[124] The Court stated again, "Congress has put in place a system in which state officers may not make warrantless arrests of aliens based on possible removability except in specific, limited circumstances," and held that Arizona's attempt to give its officers the authority to make warrantless arrests for immigration violations creates "an obstacle to the full purposes and objectives of Congress."[125]

Where it declined to forbid state officers from inquiring into immigration status under the Arizona state law, the Court did so only with the limitations described in the law: in the context of a lawful detention on some other ground, *and* where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.[126] The Court further

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[121] DOJ Letter to Maricopa County, *supra* note 95, at 2–5.

[122] *See* Arizona v. United States, 132 S. Ct. 2492, 2504 (2012).

[123] *Id.* at 2496.

[124] *Id.* at 2506 (noting the authority under 8 U.S.C. § 1324 "to arrest for bringing in and harboring certain aliens").

[125] *Id.* at 2507.

[126] *Id.* at 2509.

detailed three state provision limitations, which it was willing to presume that Arizona would honor in implementing the law. Two of these limitations prohibit the improper police use of race, color, or national origin and require that the provisions be implemented in a way that is consistent with federal immigration and civil rights law.[127]

The Court also identified some possible areas of constitutional concern, including Fourth Amendment protection. It stated that "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns" and cited cases addressing the Fourth Amendment.[128] It expressed concern that officers have proper grounds for arrest: "If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent."[129] It further emphasized the importance of specific officer training on immigration enforcement, noting with approval that immigration warrants should be "executed by federal officers who have received training in the enforcement of immigration law."[130] The Court even went so far as to signal that it would entertain future challenges to the law on the basis of these concerns. It stated: "This opinion does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect."[131]

So what caused the Court to go to such lengths to express concern about state officers inquiring into immigration status? The Court mentioned the Fourth Amendment and preemption, but the heart of the controversy over state laws like Arizona's S.B. 1070 is undoubtedly the danger that they will invite the improper use of race in law enforcement and will facilitate official race-based harassment of Latinos. In short, the Court's concern flowed from the threat of policing that discriminates on the basis of race or national origin.[132]

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[127] *Id.* at 2507–08 ("First, a detainee is presumed not to be an alien unlawfully present in the United States if he or she provides a valid Arizona driver's license or similar identification. Second, officers 'may not consider race, color or national origin . . . except to the extent permitted by the United States [and] Arizona Constitution[s].' Third, the provisions must be 'implemented in a manner consistent with federal law regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens.'" (quoting ARIZ. REV. STAT. ANN. § 11-105(L) (2012))).

[128] *Id.* at 2509 (citing Arizona v. Johnson, 129 S. Ct. 781, 784 (2009); Illinois v. Caballes, 543 U.S. 405, 407 (2005)).

[129] *Id.* at 2505.

[130] *Id.* at 2506.

[131] *Id.* at 2510.

[132] Justice Samuel Alito identified civil liberties concerns and the risk that the law would sweep too widely and lead to detentions of those lawfully in the country. *Id.* at 2529 (Alito, J., concurring) ("[T]here is no denying that enforcement of § 2(B) [mandating state officers to

II. UNIQUE CONSTITUTIONAL CONCERNS WITH SHADOW IMMIGRATION ENFORCEMENT

A. HEIGHTENED RISK OF CONSTITUTIONAL ABUSES

1. *Targeting Racial and Other Vulnerable Minorities*

Shadow immigration enforcement raises heightened civil liberties concerns because of the very significant overlap between the targeted population of noncitizens and identifiable racial minority groups, primarily Latinos and Asians. Estimates from the Pew Hispanic Center show that approximately 80% of unauthorized immigrants came from Mexico and other parts of Latin America in 2010.[133] Asians now make up approximately 11% of the undocumented population,[134] and are significantly concentrated in a few states.[135]

Because the undocumented population overlaps with easily identifiable racial minority groups, civil liberties questions are broached with extra caution. The history of race relations in the United States has been troubled, to say the least, and our equal protection jurisprudence recognizes this by subjecting categories based on race to strict scrutiny, requiring them to serve a compelling governmental purpose.[136] Given the

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investigate immigration status in some circumstances] will multiply the occasions on which sensitive Fourth Amendment issues will crop up. These civil-liberty concerns, I take it, are at the heart of most objections to § 2(B). Close and difficult questions will inevitably arise as to whether an officer had reasonable suspicion to believe that a person who is stopped for some other reason entered the country illegally, and there is a risk that citizens, lawful permanent residents, and others who are lawfully present in the country will be detained.").

[133] JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, at 11 (2011), *available at* http://goo.gl/NON1g1 (showing a total of 81%: 58% from Mexico and 23% from the rest of Latin America).

[134] *Id.*

[135] ELIZABETH M. HOEFFEL ET AL., U.S. CENSUS BUREAU, THE ASIAN POPULATION: 2010, at 8 (2012), *available at* http://goo.gl/NcvXzL (noting that nearly three-fourths of all Asians lived in ten states).

[136] Johnson v. California, 543 U.S. 499, 505 (2005) ("Under strict scrutiny, the government has the burden of proving that racial classifications are narrowly tailored measures that further compelling governmental interests." (internal quotation marks omitted)); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("[A]ll racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny."); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."); Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)

connections between immigration and race, the same history and principles support heightened vigilance with regard to civil rights concerns for immigration enforcement.

Courts have also recognized a heightened concern for discrimination by state actors on the basis of nationality, arising from the identity of noncitizens as a "discrete and insular minority" vulnerable to discrimination.[137] Though equal protection jurisprudence has given deference to distinctions made by the *federal* government with regard to noncitizens,[138] it has applied strict scrutiny to state efforts to enforce distinctions based on citizenship or nationality.[139] This is explicitly because "[a]liens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate."[140] These concerns certainly apply in the context of immigration enforcement, as the target is a subset of noncitizens.

Noncitizens, as such, are both politically and procedurally disadvantaged and therefore vulnerable. As noncitizens, they are categorically disenfranchised in our political system, which does not accord them the vote.[141] This restricts their access to the political process. Furthermore, as relative newcomers, noncitizens are less likely than U.S. citizens to be familiar with other ways to challenge abusive treatment, such as police complaint procedures, equal protection lawsuits, and the like. Finally, the very context of immigration enforcement heightens noncitizens' vulnerability as a procedural matter. Those who are picked up in immigration enforcement are subject to the significant limitations of the

("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.").

[137] Graham v. Richardson, 403 U.S. 365, 372 (1971).

[138] This deference has been grounded in the doctrine that the federal government has plenary power over matters involving immigration and immigrants. *See, e.g.*, Mathews v. Diaz, 426 U.S. 67, 81–82 (1976).

[139] *See, e.g.*, *Graham*, 403 U.S. at 372 (recognizing the federal government's broad constitutional authority with regard to immigration but striking down state attempts to limit welfare benefits on the basis of citizenship).

[140] *Id.* at 372 (citing *Carolene Prods.*, 304 U.S. at 152–53 & 152 n.4). Though heightened scrutiny has been applied directly to noncitizens who are lawfully in the country, the concerns for any foreign-born person as a member of a discrete and insular minority are the same regardless of the individual's immigration status.

[141] Simon Thompson, *Voting Rights: Earned or Entitled?*, HARV. POL. REV. (Dec. 3, 2010, 11:47 PM), http://goo.gl/vkpslF (noting that noncitizens have not been allowed to vote in the United States since Arkansas, the last state to do so, banned noncitizen voting in 1926).

civil removal process. They are often detained[142] and are put into an administrative hearing system where courts have not yet recognized any right to appointed counsel.[143] In fiscal year 2011, 49% of individuals in immigration court were not represented by counsel.[144] Furthermore, once they are detained, DHS has the discretion to transfer individuals anywhere in the country during the course of their removal proceedings.[145] These factors combine to make it very procedurally and practically difficult for individuals in removal proceedings to pursue actions challenging the circumstances of their arrests, however egregious those circumstances might be.[146]

All of these characteristics of noncitizens combine to make them a discrete, identifiable minority that is particularly vulnerable to abuse and ill-equipped to challenge mistreatment through traditional means.

2. *A Highly Charged Political Atmosphere*

Immigration is currently one of the most highly charged political issues in the United States.[147] This is perhaps not surprising in an era of

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[142] Sixty-two percent of DHS apprehensions nationwide result in detention. KOHLI ET AL., *supra* note 98, at 7 (citing DHS statistics). A study of the Secure Communities program found that 83% of those apprehended through that program were detained. *Id.*

[143] 8 U.S.C. § 1229a(b)(4)(A) (2012) ("[T]he alien shall have the *privilege* of being represented, *at no expense to the Government*, by counsel of the alien's choosing . . . ." (emphasis added)). Some federal circuits have recognized a due process right to counsel at the individual's expense; however, there is no appointed counsel for those who cannot afford an attorney. *See* César Cuauhtémoc García Hernández, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel*, 21 BERKELEY LA RAZA L.J. 17, 40 n.165 (2011) (collecting cases). Though some courts have discussed a theoretical possibility that appointment of counsel could be required to ensure fundamental fairness in a given case, no court has recognized a general right to appointed counsel. *Id.* (citing Aguilera-Enriquez v. INS, 516 F.2d 565, 568 (6th Cir. 1975). In *Aguilera-Enriquez*, the Sixth Circuit held: "The test for whether due process requires the appointment of counsel for an indigent alien is whether, in a given case, the assistance of counsel would be necessary to provide fundamental fairness—the touchstone of due process." 516 F.2d at 568 (internal quotation marks and citation omitted).

[144] EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2011 STATISTICAL YEAR BOOK, at G1 (2012), *available at* http://goo.gl/gvLQBL.

[145] *See A Costly Move*, HUMAN RIGHTS WATCH (June 14, 2011), http://goo.gl/lhYBQO (noting that in 2009, 52% of detainees were transferred at least once).

[146] *See generally* García Hernández, *supra* note 143 (discussing the full range of factors).

[147] *See, e.g.*, Cianciarulo, *supra* note 51, at 90–96 (discussing many of the arguments opposing immigration as well as states' frustration with federal paralysis on the issue); Virginia Martinez et al., *A Community Under Siege: The Impact of Anti-Immigrant Hysteria on Latinos*, 2 DEPAUL J. SOC. JUST. 101, 113 (2008) ("The intense economic pressure caused by the current recession and the lasting impact of 9/11 have created a resurgence in anti-immigrant sentiment, demonstrated by an increase in the number of hate groups."). For a more recent example of the immigration debate's prominence in politics and the media, see,

economic crisis and demographic change. Anti-immigrant sentiment is predictably high in times of economic pressure,[148] though scholars and economists debate the actual economic impact of immigration.[149] The face of the country has also changed demographically in recent decades, and many traditionally low-immigration states and localities are finding themselves host to a growing population of immigrants and second- and third-generation descendants of immigrants.[150] In 2011, for the first time, "minority," nonwhite births outnumbered white births in the United States.[151]

It is also undoubtedly true that political parties and politicians in recent years have deliberately—and perhaps cynically—used immigration to motivate their political bases and differentiate themselves from their opponents.[152] The result is that immigration has become a deeply divisive

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for example, Editorial, *Mr. Obama Feels the Heat*, N.Y. TIMES, Mar. 14, 2014, at A20 ("Republicans look at immigrants and see criminal invaders. Democrats see a promising voting bloc. Mr. Obama sees a political headache."); Emmarie Huetteman & Julia Preston, *Immigration Activists End Fast on the National Mall*, N.Y. TIMES, Dec. 4, 2013, at A22.

[148] *See generally* Jack Citrin et al., *Public Opinion Toward Immigration Reform: The Role of Economic Motivations*, 59 J. POL. 858 (1997) (discussing the connection between and history of anti-immigrant policies and economic downturns).

[149] *See, e.g.*, Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT'L L. 217, 227 (1994) ("[A] fair review of all the evidence shows that undocumented aliens are, by the most reliable studies, a net gain for the economy, even if not for the polity . . . ."); Larry J. Obhof, Comment, *The Irrationality of Enforcement? An Economic Analysis of U.S. Immigration Law*, 12 KAN. J.L. & PUB. POL'Y 163, 180 (2002) (arguing that the negative effects of immigration are "ambiguous and unsubstantiated" while the "benefits are established and substantial").

[150] *See* Bill Ong Hing, *Answering Challenges of the New Immigrant-Driven Diversity: Considering Integration Strategies*, 40 BRANDEIS L.J. 861, 862–68 (2002) (discussing how immigration, particularly that of Latino and Asian immigrants, has impacted the census).

[151] Sabrina Tavernise, *Whites Account for Under Half of Births in U.S.*, N.Y. TIMES, May, 17, 2012, at A1.

[152] *See, e.g.*, *Rubio to Latino Leaders: Immigration Issue a Divisive Political Tool*, TAMPA BAY ONLINE, http://goo.gl/sQxUfH (updated Mar. 18, 2013, 6:37 PM) (quoting Senator Marco Rubio as saying, "As long as this issue of immigration is a political pingpong that each side uses to win elections and influence votes, I'm telling you it won't get solved. There are too many people who have concluded that this issue unresolved is more powerful. They want it to stay unresolved."); *see also* Omar Baddar, *Immigration a Contentious Issue in Massachusetts*, ARAB AM. INST. (July 5, 2012, 10:13 AM), http://goo.gl/XMDzQD (describing Senator Scott Brown's accusation that candidate Elizabeth Warren wants "to make illegal immigration more attractive"); Tim Eaton, *Immigration in Spotlight in State House Race*, AUSTIN AM.-STATESMAN, http://goo.gl/LT02lY (updated Apr. 24, 2012, 5:22 AM) ("Water and transportation might be the most serious issues facing voters in western Travis County, but the challenger in the race for District 47 in the Texas House is hammering away on the more controversial topic of illegal immigration in an effort to oust the district's one-term incumbent."); Jessica Lipscomb, *Sheriff's Candidates: Illegal Immigration a 'Major Issue' in 2012*, NAPLES NEWS (July 27, 2012, 5:51 PM),

issue, tapping into wells of strongly held beliefs and feelings about the identity of our nation, our way of life, our families, our economic and social future, and, increasingly, the rule of law.

This last point is crucial to understanding the current dynamics. While immigration has traditionally been understood as a complex phenomenon resulting from a web of powerful "push" and "pull" factors—such as economics, family, political upheaval, and educational opportunities[153]—it has increasingly come to be seen in the United States through the lens of legality and law enforcement. Since the late 1980s, federal immigration law has become more focused on the (real and perceived) overlap between immigration and criminal law, leading to the "criminalization" of immigration law and procedures.[154] Since 2001, immigration violations are increasingly considered and, in many cases, prosecuted as criminal violations[155] or violations that, at a minimum, indicate the perpetrator's general lawlessness. This last attitude is well-expressed in the statement of purpose in Alabama's restrictive state immigration law, commonly known

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http://goo.gl/txjcLA (describing four Collier County, Florida candidates for Sheriff, campaigning largely on the issue of immigration enforcement)

[153] *See, e.g.*, Cecelia M. Espenoza, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986*, 8 GEO. IMMIGR. L.J. 343, 345–46 (1994) (discussing the attempt in IRCA to address the underlying causes of migration); James F. Hollifield et al., *Immigrants, Markets, and Rights: The United States as an Emerging Migration State*, 27 WASH. U. J.L. & POL'Y 7, 10, 38 (2008) (exploring the interplay of economic, sociological, and public policy factors in migration).

[154] *See, e.g.*, Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1890–91 (2000); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 471 (2007); Peter L. Markowitz, *Straddling The Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 316–20 (2008); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 305–07 (2000); Juliet P. Stumpf, *Penalizing Immigrants*, 18 FED. SENT'G REP. 264, 264 (2006); Allison S. Hartry, Comment, *Gendering Crimmigration: The Intersection of Gender, Immigration, and the Criminal Justice System*, 27 BERKELEY J. GENDER L. & JUST. 1, 7–14 (2012). *See generally* Victor C. Romero, *Decriminalizing Border Crossings*, 38 FORDHAM URB. L.J. 273, 274–76 (2010) (arguing for the decriminalization of border crossings in order to address concerns of racial profiling and the increasing stigmatization of undocumented persons).

[155] *Illegal Entry Becomes Top Criminal Charge*, TRAC IMMIGRATION (June 10, 2011), http://goo.gl/YDaoGV. In June 2011, illegal reentry (under 8 U.S.C. § 1326 (2012)) became the most frequent criminal charge filed in U.S. federal courts, accounting for 23% of all federal criminal prosecutions, just surpassing prosecutions for illegal entry (under 8 U.S.C. § 1325), the second most frequent charge. Between 2006 and 2011, the likelihood of being criminally prosecuted following an apprehension by Customs and Border Protection increased from 2% to 20%. *Decline in Federal Criminal Immigration Prosecutions*, TRAC IMMIGRATION, at tbl.1 (June 12, 2012), http://goo.gl/c3XUkL.

as H.B. 56. It begins, "The State of Alabama finds that illegal immigration is causing economic hardship and lawlessness in this state . . . ."[156] Former Arizona State Senator Russell Pearce, a proponent of strict immigration enforcement and the author of Arizona's S.B. 1070, takes the position that the lawlessness of an individual who has no legal immigration status is fundamentally at odds with what it means to be an American: "Being an American is a responsibility, and it comes through respecting and upholding the Constitution, the law of our land which says what you must do to be a citizen of this country. Freedom is not free."[157] This mindset is likewise reflected at the highest levels of our legal system, most recently in Justice Samuel Alito's concurring opinion in the *Arizona* case, in which the Justice artfully conflates the administrative question of immigration *status* with the criminal offense of entering the country without inspection.[158]

The political exploitation of this swirling stew of emotional flashpoints and the increasingly common view of immigration as a law-and-order question have combined to create an atmosphere in which there is a high level of hostility to foreigners and a strong impulse in many quarters to expel immigration violators. At the same time, there is a widely held perception that the federal government has failed in its job of expelling these violators. State and local lawmakers and other elected officials have been motivated to step into that breach, proposing many ranging solutions and making immigration a lively local political issue.[159]

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[156] H.B. 56, § 2, 2011 Leg., Reg. Sess., 2011 Ala. Acts 535.

[157] Pearce, *supra* note 67, at 246.

[158] Arizona v. United States, 132 S. Ct. 2492, 2528 (2012) (Alito, J., concurring). S.B. 1070 § 2(B) specifically charges officers with "determin[ing] the immigration status" of certain lawfully stopped persons. ARIZ. REV. STAT. ANN. § 11-1051(B) (2012). Rather than framing his discussion of this provision with a hypothetical in which that administrative status was at issue, however, Justice Alito posed the hypothetical of an officer who was pursuing reasonable suspicion that a driver entered the country illegally, "which is a federal crime." *Arizona*, 132 S. Ct. at 2528. The Justice then went on to discuss the authority of state and local officers to "make stops and arrests for violations of federal criminal laws," not their authority (or lack thereof) to enforce issues of status. *Id.* It is unlikely that Justice Alito conflated these issues unwittingly, given the pains Justice Kennedy took in the majority opinion to state clearly that "[r]emoval is a civil, not criminal, matter," *id.* at 2499 (majority opinion), and "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States," *id.* at 2505. For a similar conflation of administrative violation with criminal offense, see *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1047 (1984). The Pew Hispanic Center estimated in 2006 that as many as 45% of those without lawful immigration status had entered the country legally and then overstayed their visas. *Modes of Entry for the Unauthorized Migrant Population*, PEW HISPANIC CTR. (May 22, 2006), http://goo.gl/Gsy1v9.

[159] *See* discussion *supra* note 55 and accompanying text.

The dangers of this heated political rhetoric are particularly acute in local jurisdictions where sheriffs, police chiefs, states' attorneys, and other law enforcement policymakers are likely to hold elected, political positions. These elected officials are directly accountable to the voting majority. They are therefore both sensitive and vulnerable to immigration's highly charged politics.

3. *Law Enforcement Involvement in "Attrition Through Enforcement"*

In such a charged political atmosphere, local and state law officers have often been conscripted into assisting "attrition through enforcement" or "voluntary deportation" through state immigration laws. Law enforcement involvement in this project exacerbates both racial and political dynamics in immigrant communities' relationship with law enforcement.

The phrase "attrition through enforcement" was coined by Kris Kobach,[160] the principal author of both Arizona's S.B. 1070 and Alabama's H.B. 56.[161] Arizona's law explicitly states:

> The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona. The provisions of this act are intended to work together *to discourage and deter the unlawful entry and presence of aliens* and economic activity by persons unlawfully present in the United States.[162]

Kobach's statement of the theory behind this approach is that "ratcheting up" enforcement and simultaneously restricting access to the benefits of life in the United States (principally, employment) can convince unauthorized immigrants to leave voluntarily and remain outside the country.[163] The concept subsequently has been embellished in political rhetoric and actualized in proposed and enacted state laws in a variety of ways. These state laws restrict everything from employment,[164] to

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[160] *See generally* Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT'L L. 155 (2008).

[161] *See* Suzy Khimm, *Nativist Son: The Legal Mastermind Behind the Wave of Anti-Immigration Laws Sweeping the Country*, MOTHER JONES, Mar./Apr. 2012, at 31 ("Kobach helped Arizona lawmakers craft the infamous immigration law [S.B. 1070] that passed in the spring of 2010. He's coached legislators across the country in their efforts to pass dozens of similar measures, ranging from Alabama, Georgia, and Missouri to the small town of Fremont, Nebraska . . . ."); *see also* Editorial, *It's What They Asked For*, N.Y. TIMES, Oct. 20, 2011, at A28.

[162] S.B. 1070, § 1, 2010 Ariz. Sess. Laws 113 (emphasis added). The Court in *Arizona* cites this bill. *See* 132 S. Ct. at 2497.

[163] Kobach, *supra* note 160, at 156.

[164] S.B. 1070, § 7 (codified at ARIZ. REV. STAT. ANN. § 23-212 (2012)).

housing,[165] transportation,[166] public education,[167] and utility and water contracts.[168] Statements surrounding these laws' proposal and passage demonstrate lawmakers' purposes: to deny unlawfully present immigrants enough basic necessities and make their lives so unlivable that they will leave the jurisdiction and to deter others from entering.

A key component in each of these laws is also explicit state and local police involvement in ratcheting up immigration enforcement. Arizona's law, famously, was designed to enlist the state's officers in immigration enforcement. It requires officers to investigate the immigration status of any lawfully stopped individual (if the officer developed reasonable suspicion that the individual was in the United States illegally) and, separately, authorizes state and local officers to make warrantless arrests of those believed to have committed public offenses that would make them deportable.[169] Other states' provisions are similar.[170]

The use of law enforcement to ratchet up pressure on unauthorized immigrants is particularly troubling in a context where the group targeted for enforcement overlaps so significantly with a much larger racial group that includes citizens, permanent residents, and other individuals authorized to live in the country. This targeted enforcement jeopardizes the sense of belonging and trust in authorities that both the targeted group *and* the members of the much larger racial minority feel.[171] Many Latinos with

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[165] H.B. 56, § 13(a)(4), 2011 Leg., Reg. Sess., 2011 Ala. Acts 535.

[166] S.B. 1070, § 10 (codified at ARIZ. REV. STAT. ANN. § 28-3511).

[167] H.B. 56, § 28.

[168] *Id.* § 27.

[169] S.B. 1070, §§ 2(B), 6 (codified at ARIZ. REV. STAT. ANN. § 11-1051, § 13-3883).

[170] *See, e.g.*, ALA. CODE § 31-13-18 (2011) (requiring local law enforcement to verify legal immigration status of any person charged with a crime for which bail is required); COLO. REV. STAT. ANN. § 29-29-103 (West 2013) (requiring that local officers who have probable cause to suspect that an arrestee is an undocumented immigrant report the individual to ICE); IND. CODE ANN. § 35-33-1-1 (West 2011) (authorizing warrantless arrests by officers with probable cause to believe an individual is under a removal order by an immigration court); GA. CODE ANN. § 35-1-17(b)(2) (West 2012) (authorizing memoranda of understanding (MOUs) between state and local law enforcement and ICE; granting any officer operating under such an agreement "the power to arrest, with probable cause, any person suspected of being an illegal alien"); UTAH CODE ANN. § 76-9-1003 (West 2011) (authorizing officers to verify immigration status of arrestees); UTAH CODE ANN. § 67-5-22.7(2) (West 2009) (inviting officers from ICE and state and local law enforcement personnel to participate in a "mutually supportive, multi-agency strike force to more effectively utilize their combined skills, expertise, and resources" toward combatting major crimes associated with illegal immigration); *see also Anti-Illegal Immigration Laws in States*, N.Y. TIMES, Apr. 22, 2012, http://goo.gl/lJ48ZU.

[171] *See, e.g.*, Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639, 673 (2011); Guadalupe Vidales et al., *Police and Immigration*

legal status have felt targeted by laws designed to pressure the undocumented.[172] Others may fear for the security of noncitizen family members or friends.[173] This in turn prejudices the willingness of group members—regardless of status—to cooperate with law enforcement, which then inhibits officers' ability to do their jobs, enforce the law, and protect their communities.[174]

Enforcement: Impacts on Latino(a) Residents' Perceptions of Police, 32 POLICING: INT'L J. POLICE STRAT. & MGMT. 631, 632, 647–48 (2009).

[172] *See, e.g.*, Juan Carlos Lopez, *Looking Beyond the Debate on Immigration*, PEW RESEARCH CTR. (June 7, 2012), http://goo.gl/U6qfZq (reporting that many Latinos believe state anti-immigration laws to be aimed at Latinos in general, regardless of immigration status).

[173] *See* JOANNA DREBY, CTR. FOR AM. PROGRESS, HOW TODAY'S IMMIGRATION ENFORCEMENT POLICIES IMPACT CHILDREN, FAMILIES, AND COMMUNITIES: A VIEW FROM THE GROUND 2–3 (August 2012), *available at* http://goo.gl/79aMMi (discussing the effects on children of the fear that their parents will be deported); SETH FREED WESSLER, APPLIED RESEARCH CTR., SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 27–28 (November 2011), *available at* http://goo.gl/nP6Aiy (reporting that children in foster care in counties with 287(g) agreements are significantly more likely to have a detained or deported parent).

[174] *See, e.g.*, Radha Vishnuvajjala, *Insecure Communities: How an Immigration Enforcement Program Encourages Battered Women to Stay Silent*, 32 B.C. J.L. & SOC. JUST. 185, 202–04 (2012) (noting that immigrants in cities adopting Secure Communities are less likely to report domestic violence and other crimes); *see also* DEBRA A. HOFFMASTER ET AL., POLICE EXEC. RESEARCH F., POLICE AND IMMIGRATION: HOW CHIEFS ARE LEADING THEIR COMMUNITIES THROUGH THE CHALLENGES 22 (2010) (discussing how police are less able to establish trust and cooperation with immigrants when police are tasked with enforcing immigration laws; immigrants feared they would be disproportionately targeted by police and charged with minor crimes as a pretext for investigating immigration status); *id.* at 40 (discussing an officer who had been working in a community with a high immigrant population and "spent the first six months of the assignment . . . assuring members of the immigrant community that the Police Department was not interested in deporting them," and finding that relationships between community and police were characterized by "suspicion and mistrust"). *See generally* David S. Kirk et al., *The Paradox of Law Enforcement in Immigrant Communities: Does Tough Immigration Enforcement Undermine Public Safety?*, 641 ANNALS AM. ACAD. POL. & SOC. SCI. 79 (2012), *available at* http://goo.gl/1t41eV (arguing that recent trends toward strict local enforcement of immigration laws may actually undercut public safety by creating a cynicism of the law in immigrant communities); Victor Manuel Ramos, *LI Leads State in Undocumented-Immigrant Deportations*, NEWSDAY, Sept. 2, 2012, *available at* http://goo.gl/F76u7h (describing tension between immigrants and police following Long Island's adoption of Secure Communities); Chris Strunk & Helga Leitner, *Redefining Secure Communities*, THE NATION (Dec. 21, 2011), http://goo.gl/2RHyvu (citing sharp drops in registration for ESL classes and increasing instances in which accident victims declined to wait for police after the adoption of Secure Communities in northern Virginia). These data are supported anecdotally as well. A public defender recounted how a client called the police when he was assaulted, only to be arrested and charged himself when he showed an international driver's license as ID. In the words of the public defender, "Will any immigrant who knows someone subjected to this kind of treatment ever call the police to report a crime?" E-mail from Robert Morris, Pub. Defender, to Maureen Sweeney (Jan. 16, 2013, 9:15 PM) (on file with author and the *Journal of Criminal Law and Criminology*).

Where a group perceives that it is the target of police harassment through immigration enforcement, it becomes irrelevant whether the law or program facilitating that participation is technically authorized at the state or federal level. The simple participation of officers in immigration enforcement confirms the community's perception that the police are seeking to remove its members.[175] In fact, state and federal programs often overlap, and the motivations and perceptions of one bleed into the other. The first substantive section of Alabama's H.B. 56 provides an example, requiring the state to make efforts to enter into a 287(g) agreement with DHS so that its officers can directly enforce federal immigration law.[176] Another is in Maricopa County, where DOJ found that the sheriff department's general discriminatory practices blended seamlessly with its discriminatory misuse of the federal 287(g) program.[177]

Beyond these practical objections, though, the more profound problems with the policy of "attrition by enforcement" lie in the mechanism by which the policy is designed to work—that is, the hyper-enforcement of criminal law to ratchet up pressure on *one* segment of the population to deter *completely unrelated and noncriminal* violations by *a different group* of potential future entrants. The primary purpose of the policies as enacted in various state laws is not to deter crime or even to assist the federal government in remedying current violations of immigration law, but "to discourage illegal immigration" prospectively by creating enforcement climates that are hostile enough to dissuade potential future entrants.[178] In other words, the policies misdirect the considerable police power of states against a defined segment of the population for purposes completely unrelated to criminal enforcement.

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[175] *See* CHUCK WEXLER ET AL., HOMELAND SEC. ADVISORY COUNCIL, TASK FORCE ON SECURE COMMUNITIES: FINDINGS AND RECOMMENDATIONS 24 (2011), *available at* http://goo.gl/yQ0OSA ("When communities perceive that police are enforcing federal immigration laws, especially if there is a perception that such enforcement is targeting minor offenders, that trust is broken in some communities, and victims, witnesses and other residents may become fearful of reporting crime or approaching the police to exchange information.").

[176] H.B. 56 § 4(a), 2011 Leg., Reg. Sess., 2011 Ala. Acts 535.

[177] On December 15, 2011, DOJ released letters showing its findings of racial profiling in those counties and DHS simultaneously revoked the counties' 287(g) authority. *See* Napolitano Press Release, *supra* note 30.

[178] Though proponents may argue that the law enforcement provisions are designed to assist in remedying past or current violations, the language of the laws themselves belies that explanation. Alabama's law, for example, declares in its statement of purpose: "Therefore, the people of the State of Alabama declare that it is a compelling public interest *to discourage illegal immigration* by requiring all agencies within this state to fully cooperate with federal immigration authorities in the enforcement of federal immigration laws." H.B. 56, § 2 (emphasis added).

Enlisting law enforcement officers into the project of making life untenable for any segment of society is deeply troubling on many levels. The moral authority of the law derives from the ideal of its dispassionate and evenhanded application to all, and explicitly joining police powers with what essentially becomes a campaign of harassment offends the deepest notions of the fair use of governmental authority. It strips the law and law enforcement of their moral force and brings into direct question the constitutional promise of equal protection under the law. This is particularly the case where, as here, the boundaries of the targeted group overlap to a significant degree with identifiable racial minorities and the distinction between the two groups—lawful immigration status—is invisible to an observer. It is also particularly the case where, as here, the target group is the subject of hotly contested political debate. For these reasons alone, law enforcement officers' involvement in any state-sponsored attempts to deter or discourage future immigration are extremely worrisome.

B. INEFFECTIVE CONSTITUTIONAL SAFEGUARDS WITH SHADOW ENFORCEMENT

We have seen that a constellation of factors gives reason for special concern about abuses in the context of state and local officers' shadow immigration enforcement. This Part demonstrates how the usual safeguards against those abuses are ineffective in this context.

1. *No Effective Remedy in the Exclusionary Rule*

a. Insufficient Deterrent in the Criminal Exclusionary Rule

Although the primary job of state and local law enforcement officers is to enforce criminal law, the exclusionary rule in criminal proceedings is insufficient to deter police abuse in the context of shadow immigration enforcement. If an officer engages in pretextual enforcement of criminal or traffic laws with the true intent of acquiring an opportunity to investigate an individual's immigration status, the officer will not be concerned about the admissibility of evidence in a criminal court. The criminal exclusionary rule will not therefore serve as any kind of deterrent, because prosecution was not the goal of the stop.

Furthermore, these types of pretextual stops generally involve traffic or other minor violations.[179] Officers may forgo issuing or pursuing a criminal citation or charge altogether in favor of referring the individual to

[179] Thirty-seven percent of Secure Communities arrests in fiscal year 2012 resulted from traffic violations. GAO-12-708, *supra* note 56, at 23.

ICE.[180] Even when criminal or traffic charges are lodged, they are often not defended as vigorously as more serious charges would be. Only the extremely rare defendant will go to the trouble and expense of filing a motion to suppress for a nonjailable offense in traffic court. Fourth Amendment challenges on these charges thus provide little credible threat to officers, and the threat of excluding evidence is without appreciable deterrent value.

Finally, the simple fact of the matter is that the law of the land allows pretextual traffic stops as long as the officer had reasonable suspicion. Even if the officer stopped a driver because she was Latina and the officer hoped for an immigration arrest, if the driver had indeed failed to properly use her turn signal, the stop would withstand Fourth Amendment scrutiny and there would be no threat of exclusion in the adjudication of the traffic charge.[181]

b. No Regular Exclusionary Rule in Immigration Removal Proceedings

In 1984, the Supreme Court considered whether to allow the exclusionary rule to deter immigration enforcement abuses in *INS v. Lopez-Mendoza*.[182] The Court decided at that time that the exclusionary rule was unnecessary in immigration proceedings, in large part because immigration enforcement was conducted by one agency, the Immigration and Naturalization Service (INS). The Court determined that the agency had a "comprehensive scheme" for avoiding and punishing Fourth Amendment violations by its officers.[183] In particular, the Court relied on INS's strong, central set of regulations addressing Fourth Amendment concerns in stops, detentions, and arrests; its extensive officer training on Fourth Amendment law in the immigration context; and its procedures for internally investigating and punishing abuses.[184] This combination of clear rules, training, and oversight was considered essential by the Court to guard against and deter Fourth Amendment abuses.

Following *Lopez-Mendoza*, the exclusionary rule is generally inapplicable in removal proceedings, except where a respondent can show that the underlying Fourth Amendment violation was egregious or violated notions of fundamental fairness.[185] A "garden-variety" constitutional

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[180] Between October 2009 and September 2010, 28% of those removed through the Secure Communities program were "noncriminals." WASLIN, *supra* note 40, at 9.

[181] Whren v. United States, 517 U.S. 806, 813 (1996).

[182] 468 U.S. 1032 (1984).

[183] *Id.* at 1044.

[184] *Id.* at 1044–45.

[185] *Id.* at 1050–51; *see also, e.g.*, Oliva-Ramos v. Att'y Gen., 694 F.3d 259, 275 (3d Cir. 2012) ("[W]e reiterate today that the exclusionary rule may apply in removal proceedings

violation is insufficient to justify suppression in immigration proceedings.[186] Despite a chorus of calls to reconsider *Lopez-Mendoza*,[187] the exclusionary rule applies in immigration proceedings only when a respondent can meet the very high burden of proving an egregious Fourth Amendment violation. For this reason, very few motions to suppress are granted in immigration courts, and relatively few motions are even filed. This weak threat of a motion to suppress in removal proceedings therefore does not serve as an effective deterrent to race-based enforcement or other Fourth Amendment violations in immigration enforcement.

2. *No Controlling Regulation, Training, or Oversight for Shadow Enforcement*

As we have seen, shadow immigration enforcement occurs outside the core enforcement mandate of state and local officers. Immigration activities influence their primary duties "under the table" and go officially unacknowledged. As a result, officers generally have no direct training, regulation, or oversight of immigration-related activities, either from state or federal supervisors, despite the important ways in which immigration affects the conduct of their primary duties.

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where an alien shows egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." (internal quotation marks omitted)); *In re* Maria de Lourdes Lucero-Gomez, No. A95 180 216, 2006 WL 2008328, at *1 (B.I.A. June 1, 2006) ("The Supreme Court indicated in its decision, however, that the exclusionary rule may apply if there are egregious Fourth Amendment violations which transgress notions of fundamental fairness . . . ."). *Lopez-Mendoza* also left open the possible application of the exclusionary rule in immigration proceedings if there was reason to believe that Fourth Amendment violations were "widespread." 468 U.S. at 1050.

[186] *See, e.g.*, Garcia-Torres v. Holder, 660 F.3d 333, 336–37 (8th Cir. 2011) ("Petitioner points to nothing more than a warrantless entry of business premises and arrest, mere garden-variety error, if a Fourth Amendment violation at all. . . . [E]ven assuming that the search and seizure here constituted a violation of the Fourth Amendment, any such violation is not 'egregious.'").

[187] *See* Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1624–27 (2010); Iguina, *supra* note 29, at 209–10 (concluding that a "reexamination of the *Lopez-Mendoza* doctrine is required"). *See generally* Irene Scharf, *The Exclusionary Rule in Immigration Proceedings: Where It Was, Where It Is, Where It May be Going*, 12 SAN DIEGO INT'L L.J. 53 (2010); Nathan Treadwell, *Fugitive Operations and the Fourth Amendment: Representing Immigrants Arrested in Warrantless Home Raids*, 89 N.C. L. REV. 507 (2011); Stella Burch Elias, Comment, *"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; Matthew S. Mulqueen, Note, *Rethinking the Role of the Exclusionary Rule in Removal Proceedings*, 82 ST. JOHN'S L. REV. 1157 (2008).

a. No Controlling Regulation

No central set of regulations instructs state and local officers on the limitations of their powers when they engage in shadow immigration enforcement. In contrast, when the *Lopez-Mendoza* Court found that the INS adequately addressed Fourth Amendment concerns, it relied on a detailed set of regulations that clearly and specifically mirrored INS officers' obligations with regard to the Fourth Amendment in the context of immigration enforcement.[188] These regulations continue to serve at least two purposes for officers that come within their ambit. Most directly, the regulations help to shape agency policy and practice. They are the rules by which the officers are trained to operate. In addition, they are indirectly enforceable by the individuals they are designed to protect. Courts have terminated immigration proceedings where these regulations, promulgated for the benefit of arrestees, have been violated in ways that compromise due process or prejudice the arrestee in ways that potentially affect the outcome of the proceedings.[189] Both of these regulatory purposes increase the degree to which Fourth Amendment rights are likely to be protected. Of course, neither of these purposes applies to state and local officers who engage in immigration enforcement activities, as the regulations do not bind them.

Where state and local law enforcement officers get involved in shadow immigration enforcement, considerable confusion often arises about what constitutional, statutory, regulatory, and administrative standards apply. This is particularly the case where a state or local officer uses traffic or other state law enforcement as a pretext to engage in immigration enforcement or where the officer acts without even a thin veil of that pretext.

Let us consider again the state trooper who arrested the Maryland man for purposes of conducting an "immigration investigation" when the man came to retrieve his car.[190] The officer, apparently aware that he had no federal or state authority to conduct such an investigation, testified that he did not need probable cause to handcuff and bring the man into the police station because he was merely "detaining him" for federal authorities. Surely, the fact that an officer acts outside his legal authority does not

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[188] *See, e.g.*, 8 C.F.R. § 287.8 (2012) (addressing, *inter alia*, proper use of force by immigration agents (§ 287.8(a)); the need for reasonable suspicion that an individual is unlawfully in the United States to detain for questioning (§ 287.8(b)); and the need for probable cause for an arrest and standards for the issuance of warrants (§ 287.8(c))).

[189] *See* Matter of Garcia-Flores, 17 I. & N. Dec. 325, 1980 WL 121881 (B.I.A. 1980); *see also* United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 268 (1954). United States v. Calderon-Medina, 591 F.2d 529, 531 (9th Cir. 1979). For an explanation of the law on motions to terminate for regulatory violations, see Iguina, *supra* note 29, at 230–35.

[190] *See supra* notes 15–17 and accompanying text.

exempt the officer from constitutional or other restrictions on his actions. Just as surely, the confusion over arrest authority and standards for lawful arrest is genuine and considerable. What rules apply to a state or local officer making an arrest for a federal administrative immigration violation? In assessing whether that officer has reasonable suspicion or probable cause, should he apply state criminal standards (in which he has been trained) or federal immigration enforcement standards (which differ in some significant ways and in which he has likely not been trained)?[191] What authority do state and local officers have to enforce federal civil or criminal immigration law,[192] and what constitutes an arrestee's admission to an immigration crime as opposed to an administrative violation? The absence of clear directives in this area opens the door for officers to apply their own "commonsense" standards and promises continued confusion, lack of clarity, and abuse.

b. No Standardized Training or Oversight

Just as no central regulations govern state and local enforcement of federal immigration law, no standardized training curriculum for, or oversight of, state and local officers exists regarding immigration enforcement or the proper sharing of immigration status information with federal authorities. Most departments likely provide no training on these aspects of the job; the peripheral nature of officers' involvement in immigration enforcement virtually ensures that departments' training and oversight will not focus specifically on immigration activities, even when shadow immigration enforcement creates particular constitutional dangers. The fact that law enforcement officials are elected in many jurisdictions where immigrants have little political voice further means that those officials have few political incentives to invest resources in vigorously protecting immigrants' civil liberties.[193]

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[191] *See supra* Part II.B.

[192] Although this question has now been answered by the Supreme Court in *Arizona*, confusion in the field will likely continue on this point. *See, e.g.*, Martinez-Medina v. Holder, 673. F.3d 1029, 1035–36 (9th Cir. 2010) (recognizing that a reasonable officer could be confused under then-existing case law about whether an arrestee's admission of unlawful presence was the admission of a crime, which would give the officer authority to arrest, or the admission of a federal administrative offense, which would not).

[193] In contrast, where immigrant communities are well-established and organized, some local officials have vigorously defended immigrants' civil rights. *See, e.g.*, Cristina Parker, *El Paso City Council Passes Immigration Resolution*, BORDER NETWORK FOR HUMAN RIGHTS (Feb. 5, 2013), http://goo.gl/3aJ5Xe (describing a unanimous resolution by the El Paso City Council advocating for immigrants' rights and "an end to enforcement against [their] border community"); Fernando Perez, *Santa Clara County Ends Collaboration with ICE*, NEW AM. MEDIA (Oct. 18, 2011), http://goo.gl/SZal98 (describing a unanimous vote by

Unfortunately, the Maricopa and Alamance County sheriff's offices again provide examples of what can happen in a local office when officers have inadequate training or politically compromised oversight on suspects' constitutional protections. Maricopa County Sheriff Joe Arpaio has made no secret of his strong political views about immigrants, and DOJ found that he had created "a general culture of bias" in the office and encouraged broadly discriminatory policing targeted against Latinos. Significantly, DOJ's investigation concluded, among its many findings, that specific failures in training and oversight allowed for and exacerbated this discriminatory culture:

> [Maricopa County Sheriff's Office] fosters and perpetuates discriminatory police and jail practices by failing to operate in accordance with basic policing and correctional practices and by failing to develop and implement policing and correctional safeguards against discrimination in such areas as training, supervision, and accountability systems.[194]

The investigation likewise found that the office retaliated directly against individuals who complained about or criticized its practices.[195] Testimony in a racial profiling lawsuit brought by private plaintiffs against the county and its sheriff's office additionally focused on deputy training and oversight.[196]

The interaction of these elements is, of course, not unique to that county but rather demonstrates dynamics that play out in perhaps less dramatic fashion in various programs and in departments all over the country. DHS's own Homeland Security Advisory Council's Task Force on Secure Communities found in September 2011 that the program's integrity suffered because state and local jurisdictions were not sufficiently accountable for civil rights abuses connected with Secure Communities.[197] The Task Force recommended reforms to the complaint process, active ICE monitoring for improper policing connected with Secure Communities, and the establishment of a pilot multidisciplinary panel to review complaints.[198] In response, ICE has developed additional training materials and has

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the Santa Clara Board of County Supervisors to cease cooperation with ICE through Secure Communities); Press Release, City of Chicago, *Mayor Emanuel Introduces Welcoming City Ordinance* (July 10, 2012), *available at* http://goo.gl/Dq6wzJ (announcing an ordinance designed to support and protect the city's immigrant communities).

[194] DOJ Letter to Maricopa County, *supra* note 95, at 4.

[195] *Id.*

[196] J.J. Hensley, *Racial-Profiling Trial: Former MCSO Deputy Testifies*, ARIZ. REPUBLIC (Aug. 1, 2012, 10:01 PM), http://goo.gl/M6llev (discussing Ortega Melendres v. Arpaio, 598 F. Supp. 2d 1025 (D. Ariz. 2010)).

[197] WEXLER, *supra* note 175, at 25.

[198] *Id.* at 26–27.

publicized its complaint procedure,[199] but it has been unable to compel state and local law enforcement to use those training materials or cooperate in investigations of abuse. In its July 2012 report on Secure Communities, GAO continued to identify as a problem for civil rights protections the lack of accountability of state and local jurisdictions.[200]

DOJ's Alamance County investigation similarly found a culture of bias that began with the sheriff and permeated the department. Specifically, it found that poor reporting of its activities made oversight of the department difficult by masking racial profiling and other discriminatory practices.[201]

3. *Impractical or Ineffective Alternative Legal Actions to Enforce the Fourth Amendment*

One reason the Supreme Court found the exclusionary rule to be unnecessary in the immigration context was because alternative remedies were available to enforce Fourth Amendment rights. The Court found that because the INS was a single agency under central control and involved in operations of a highly repetitive character, legal actions for declaratory relief represented effective means to challenge abusive institutional practices.[202] This, of course, is not true of the myriad state and local agencies whose officers participate in shadow enforcement. For example, the fact that a group of private plaintiffs and DOJ have both sued Maricopa County for declaratory relief on constitutional violations will not protect the residents of Frederick County, Maryland, or even neighboring Yavapai County in Arizona, regardless of the litigation's outcome. Whereas widespread abuses are committed by many far-flung and diverse actors, the effect of declaratory relief is localized or indirect at best.

Furthermore, bringing an equal protection or Fourth Amendment challenge in federal court takes legal resources, sophistication, and time that most victims of these abuses simply do not have. DOJ and the private plaintiffs in the Maricopa County lawsuits spent years amassing eyewitness testimony, obtaining and reviewing arrest statistics, and preparing statistical analyses to support their claims.[203] DOJ's investigation of Alamance

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[199] ICE OFFICE OF DIR., DEP'T OF HOMELAND SEC., ICE RESPONSE TO THE TASK FORCE ON SECURE COMMUNITIES FINDINGS AND RECOMMENDATIONS 8 (2012), *available at* http://goo.gl/QBlX6M.

[200] GAO-12-708, *supra* note 42, at 42.

[201] DOJ Letter to Alamance County, *supra* note 5, at 3.

[202] INS v. Lopez-Mendoza, 468 U.S. 1032, 1045 (1984).

[203] Alan Gomez, *Racial Profiling Difficult to Prove, Experts Say*, USA TODAY (July 11, 2012, 7:04 PM), http://goo.gl/53yXt5 (noting that nearly four years elapsed between the time DOJ initiated a review of Maricopa County and decided it had enough evidence to sue); J.J.

County lasted for over two years.[204] These resource and time limitations are exacerbated, of course, for individuals defending themselves in immigration removal proceedings.

III. CONSTITUTIONAL SAFEGUARDS IN RESPONSE TO SHADOW IMMIGRATION ENFORCEMENT

Shadow immigration enforcement creates heightened constitutional tensions because of the special risk that the rights of members of immigrant communities will be violated and because the usual safeguards are ineffective in protecting them. Statistical reviews of Secure Communities and 287(g) have revealed that these programs result in skewed arrest numbers, indicating overzealous enforcement against individuals who are easily targeted because of their race.[205] These numbers, in turn, support advocates' and community members' insistence that these programs encourage, or at least permit, officers to target Latinos and that such race-based enforcement is commonplace. DOJ's in-depth investigations in two especially problematic jurisdictions show in graphic detail how these programs play into race-based enforcement dynamics.[206] Investigation of TSA officers in Boston and Newark further confirm the dangers inherent in an enforcement context where meaningful protections against and remedies for Fourth Amendment violations are absent.[207] Having recognized these constitutional pressure points, it is crucial that we take a step back and evaluate what constitutional safeguards, if any, will protect the constitutional rights of both immigrants and their wider communities.

A. RECONSIDERING THE STRATEGY OF FEDERAL–STATE COOPERATION

Given the fundamental lack of accountability and the negative constitutional incentives created by state and local officers' participation in shadow immigration enforcement, the federal government should, at a minimum, rethink its promotion of programs that facilitate shadow enforcement. A clear-eyed look at the dynamics created by state and local officers' shadow immigration enforcement may show that the constitutional problems are fundamental and cannot be remedied with programmatic tinkering. Racial targeting complaints have arisen in the full range of

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Hensley, *Racial-Profiling Trial Outcome Hinges on Hard Data*, ARIZ. REPUBLIC, Aug. 4, 2012, *available at* http://goo.gl/JJ2eoj (highlighting the role of the litigants' dueling experts).

[204] DOJ Letter to Alamance County, *supra* note 5, at 1.

[205] *See supra* notes 98–112 and accompanying text.

[206] *See supra* notes 5–8 and accompanying text.

[207] *See supra* notes 9–13 and accompanying text.

programs that involve state and local officers in immigration reporting. The important facilitating role that these programs play in that targeting has been revealed by everything from broad statistical analyses of the programs, to details of how they have been exploited, to their particularly devastating effects in poorly led enforcement agencies. While DHS has insisted that these programs target the most dangerous criminals for deportation, we have seen that the government has been content to use them to identify and deport large numbers of individuals who have no serious criminal background or criminal charges whatsoever. This willingness has encouraged, or at least resulted in, race-based arrests by officers who have little or no training in immigration-related constitutional law and who know that they can get credit for immigration referrals with virtually no accountability for abusive tactics. Given the context, it might be surprising if these incentives did *not* result in officers improperly targeting those presumed to be "foreign" because of their race.

The Obama Administration has attempted to adjust these programs to address civil liberties concerns, creating a Secure Communities Task Force and revisiting 287(g) guidance in some cases. However, these attempts have not—and cannot—eliminate the fundamental program dynamics. In essence, these programs create incentives for officers to make arrests, while erecting a kind of shell game of shifting authority that protects them from constitutional accountability. Because this dynamic goes to the heart of how programs like 287(g) and Secure Communities operate, eliminating the incentives without ending or seriously rethinking and restructuring the programs will likely prove impossible. DHS's own Secure Communities Task Force, created to address community members' concerns (including racial profiling and damage to community policing), deadlocked on whether to suspend or terminate the program; approximately half of its members favored suspension or termination, and half believed the program could continue with some adjustments.[208] The Obama Administration has also announced its intention to stop promoting street-level enforcement through the 287(g) program for jurisdictions not already participating.

As we have seen, DOJ has likewise prioritized investigation of and enforcement against local jurisdictions where it has found evidence that they improperly targeted those perceived to be immigrants because of their race. Its actions, however, have been directed toward individual problematic jurisdictions and have so far stopped short of fully facing up to the dynamics of federal–state cooperation programs that both incentivize and mask racial profiling in local jurisdictions. The pervasiveness and the difficulty in remedying or preventing problems in these programs require

[208] *See* WEXLER ET AL., *supra* note 197, at 27.

the federal government to undertake a deep and searching reconsideration of these programs' overall desirability.

B. FULLY ENFORCING THE EXCLUSIONARY RULE IN IMMIGRATION COURTS

1. *Supreme Court Reconsideration of the Exclusionary Rule in Immigration Proceedings*

The constitutional tensions created by shadow immigration enforcement are different in detail, dynamic, and effect from those the Supreme Court considered in 1984 when it declined in *INS v. Lopez-Mendoza* to apply the exclusionary rule in immigration proceedings. These dynamics create their own incentives for officers and open the door to racial profiling and other abuses in the vacuum of effective remedies. A large number of immigration removal proceedings are now the product of state and local participation in shadow enforcement programs—the Criminal Alien Program, Secure Communities, National Crime Information Center checks, 287(g), joint enforcement operations, and state law initiatives. The numbers resulting from these programs, together with the incentives and lack of accountability inherent in shadow enforcement, cry out for reconsideration of *Lopez-Mendoza*. Despite its many limitations,[209] the exclusionary rule has proven to be one of the most effective mechanisms for enforcing Fourth Amendment protections against unreasonable search and seizure.[210]

When the Supreme Court declined to apply the exclusionary rule in the case of garden-variety Fourth Amendment violations, it acknowledged that if such violations became "widespread," there would be cause for reconsideration.[211] Evidence now shows that this is the case, which thus permits lower courts to apply the full exclusionary rule while also still following *Lopez-Mendoza*.[212]

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[209] *See, e.g.*, Chacón, *supra* note 187, at 1624–27 (noting the limited effectiveness of the exclusionary rule in immigration context). Chacón argues for additional reforms in immigration court procedure, in federal courts' abilities to hear pattern and practice of abuse cases, and in accountability mechanisms for ICE. *Id.* at 1623–33.

[210] *See* Elkins v. United States, 364 U.S. 206, 220 (1960) (detailing the experience of California, which adopted the exclusionary rule in 1955 after concluding that other remedies "completely failed" to secure compliance with the Fourth Amendment and whose attorney general two years later pronounced the rule's effects as "excellent").

[211] INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984).

[212] *See, e.g.*, Oliva-Ramos v. Att'y Gen., 694 F.3d 259, 275 (3d Cir. 2012) ("The IJ and the Board should have, but did not, first determine whether agents violated Oliva-Ramos's Fourth Amendment rights and second, whether any such violations implicated the *Lopez-Mendoza* exception for being widespread or egregious.").

Alternatively, the Supreme Court could revisit and overturn *Lopez-Mendoza*, acknowledging the changes in virtually every factor since nearly three decades ago when it weighed the costs and benefits of applying the exclusionary rule in immigration.

a. *Lopez-Mendoza*'s Outdated Factual Analysis

It is well-established that the Supreme Court's decision in *Lopez-Mendoza* was based on weighing factual realities about immigration enforcement as that enforcement was conducted in 1984, and that those factual underpinnings have been thoroughly undermined by immigration enforcement revolutions in the decades since.[213] The *Lopez-Mendoza* Court held that the use of the exclusionary rule could only be justified in the civil immigration context if its social benefit (that is, deterring Fourth Amendment violations by INS officers) outweighed its costs.[214] The Court found that the additional deterrent value of the exclusionary rule would be minimal, largely because the INS, then the sole agency charged with immigration enforcement, already had a comprehensive scheme for avoiding and punishing agents' constitutional violations.[215] That single, centralized enforcer, of course, is gone, and the protections for Fourth Amendment rights that the Court found in that structure have disappeared as well.

b. *Lopez-Mendoza*'s Faulty Understanding of Administrative Immigration Violations

Most recently, there has also been an important shift in the understanding of the legal context in which the costs and benefits of the rule are weighed. In 1984, the Supreme Court weighed the social costs of the exclusionary rule in *Lopez-Mendoza*. In so doing, it gave considerable, and perhaps controlling weight to its conclusion that application of the rule would "allow[] the criminal to continue in the commission of an ongoing crime."[216] The Court stated that it had never gone to the extreme of applying the rule where that would allow ongoing criminal activity.[217] In

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[213] *See supra* note 187.

[214] *Lopez-Mendoza*, 468 U.S. at 1042–43.

[215] *Id.* at 1044–45.

[216] *Id.* at 1047. The Court summarized the factors that weighed most heavily: the steps INS had taken to deter violations and the high cost of allowing criminal activity to continue. *Id.* at 1050.

[217] The Court explained in a footnote its conclusion that unauthorized, unregistered presence in the United States constituted an ongoing criminal offense under 8 U.S.C. §§ 1302 and 1306 (which includes willful failure to register as an alien). *Id.* at 1047 n.3. However, the Court had no information about whether the respondent in the case had

contrast, in *Arizona v. United States*, the Court made clear that unauthorized presence in the United States is not, by itself, a criminal offense:

> As a general rule, *it is not a crime for a removable alien to remain present* in the United States. If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent.[218]

Given the importance that the *Lopez-Mendoza* Court gave to the "unique" cost of allowing a crime to continue, this shift in legal understanding fundamentally changes the balance of the factors in the decision whether to apply the exclusionary rule. While it does not change the fact that a civil immigration violation is an ongoing violation of (civil) law, it does change the weight to be given the factor.

Furthermore, the Immigration and Nationality Act (INA) itself and the implementation of immigration policy already recognize that the avoidance or remediation of past or current immigration violations may sometimes be foregone in the interest of some other value. For example, individuals who are out of valid immigration status are generally prohibited from becoming permanent residents by adjusting their status.[219] However, the law provides a number of exceptions that allow authorities to "overlook" such violations, including if a person is the immediate relative of a U.S. citizen, if she is a special immigrant juvenile, or if she qualifies as a victim of domestic violence.[220] In each of these cases, a family or humanitarian value is permitted to override the general principle that one must be in lawful nonimmigrant status to obtain permanent residence.[221]

The Obama Administration's policies encouraging prosecutorial discretion are an even better example of immigration policymaking in which humanitarian values are recognized as outweighing, in certain

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registered, and the Court failed to take into account the required element of willfulness in § 1306. *See id.*

[218] Arizona v. United States, 132 S. Ct. 2492, 2505 (2012) (emphasis added) (internal citation omitted).

[219] 8 U.S.C. § 1255(c)(7) (2012) (prohibiting adjustment of status for individuals "not in a lawful nonimmigrant status").

[220] *Id.*; 8 C.F.R. § 245.1(b)(5) (2012) (restricting adjustment for out-of-status individuals but excepting immediate relatives, special immigrant juveniles, Violence Against Women Act self-petitioners, and others); *see also* 8 U.S.C. § 1229b(b)(1) (2012) (allowing the cancellation of removal for certain out-of-status individuals whose citizen or resident family members would suffer exceptional and extremely unusual hardship).

[221] Other instances in which arrestees can obtain waivers for civil immigration violations include adjustment of status under INA § 245(i), 8 U.S.C. § 1255(i) (which waives unlawful entry or status for those with a petition filed before May 1, 2001); waivers of inadmissibility under INA § 212(h), 8 U.S.C. § 1182(h) (which waives inadmissibility where the applicant shows rehabilitation or extreme hardship to a U.S. citizen or resident family member); and INA § 212(i), 8 U.S.C. § 1182(i) (which waives an immigration fraud violation where the applicant can show extreme hardship to a U.S. citizen or resident family member).

circumstances, administrative violations of immigration law. The Deferred Action for Childhood Arrivals (DACA) initiative is perhaps the clearest illustration of the Administration's wider prosecutorial discretion policies. The DACA initiative, in essence, recognizes qualified applicants' immigration violations but reflects the Administration's policy decision to nonetheless grant deferred action, allowing them to remain in the United States and obtain work authorization.[222] This situation is even more analogous to the exclusionary rule's application, because deferred action does not change the individual's underlying immigration status, but rather leaves her without formal lawful status in continuing violation of the immigration law. It justifies doing so to preserve values of family unity and fairness to individuals who did not themselves make any decision to violate the law.[223]

Our contemporary understanding of administrative immigration violations, as *Arizona* expressed, recognizes that immigration violations are civil, and not criminal, offenses. This understanding allows for the possibility that in some circumstances, such civil violations should be waived or even allowed to continue to vindicate other important values. In the context of our Constitution's commitment to individual rights and to limits on law enforcement authority, the equal protection of the law for people of all races and nationalities seems to be just such an important value. Furthermore, overlooking an individual's civil violation by applying the exclusionary rule in immigration cases seems particularly justified when doing so would not only safeguard the individual's Fourth Amendment rights, but would also directly confront the government abuse of power that occurs when officers operating outside their lawful mandate conduct racially biased policing.

2. *Fully Applying the Existing Exclusionary Rule in Immigration Courts*

To the extent that courts and the Board of Immigration Appeals have sanctioned the use of a limited exclusionary rule in circumstances of egregious violations, the rule can and should be used by immigration judges to sanction (and thus deter) state and local officers' abuses. Though *Lopez-Mendoza* sought to preclude the exclusionary rule's use in immigration proceedings, the exception it left open for egregious violations has allowed for evidence suppression in limited circumstances in the decades since. The Board of Immigration Appeals and most of the appellate courts have at least indirectly recognized a limited rule that permits exclusion where a litigant

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[222] *See Deferred Action for Childhood Arrivals*, U.S. DEP'T OF HOMELAND SEC., http://goo.gl/eqjHhm (last visited Apr. 16, 2014).

[223] *See id.*

can prove an egregious violation of his rights or where violations are so severe as to offend due process.[224]

However, invoking the rule in immigration court remains fairly unusual, and the Board has not issued clear guidance on the limits of its proper application. As a result, "nearly three decades after *Lopez-Mendoza*, Immigration Judges still find themselves with little guidance when faced with requests for suppression."[225] Many judges are uncomfortable suppressing evidence, even when documentation indicates that a respondent's Fourth Amendment rights may have been violated in significant ways. In one recent case, for example, a well-documented motion to suppress was denied summarily with the following handwritten note by the judge on a form order:

> A removal proceeding is a purely civil action to determine a person's eligibility to remain in the United States. Various protections that apply in criminal proceedings, do not apply in civil proceeding such as removal proceedings. The mere fact of an illegal arrest, assuming that one occurred, has no bearing on a subsequent removal proceeding. INS v. Lopez-Mendoza, 480 U.S. 1032, 1038 (1984).[226]

This reductionist reading of *Lopez-Mendoza* ignores the fact that the Board indirectly recognized the potential for suppression when it established a procedural framework for adjudicating suppression cases.[227] In failing to take account of the case law following *Lopez-Mendoza*, the immigration judge acted to cut off even the limited access the Supreme Court allowed to constitutional protection.

In another case, an immigration judge held that even if an arresting state officer may have violated the Fourth Amendment, an immigration court has no authority to "impose a penalty" on a non-DHS officer by suppressing evidence that the state officer may have illegally seized.[228]

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[224] *See, e.g.*, Luevano v. Holder, 660 F.3d 1207, 1212 (10th Cir. 2011); Almeida-Amaral v. Gonzales, 461 F.3d 231, 234 (2d Cir. 2006) (applying *Lopez-Mendoza* and exploring circumstances "when an egregious violation would properly lead to the suppression of evidence in a civil proceeding"); Matter of Barcenas, 19 I. & N. Dec. 609, 611–12 (B.I.A. 1988) (establishing, without discussing *Lopez-Mendoza*, a procedural framework for adjudicating motions to suppress).

[225] Kate Mahoney, *What to Do When the Constable Blunders? Egregious Violations of the Fourth Amendment in Removal Proceedings*, 6 IMMIGRATION L. ADVISOR 1, 2 (2012), *available at* http://goo.gl/n1o2nl.

[226] Order of the Immigration Judge, [name and case number redacted] (U.S. Immigration Ct., Baltimore, Jan. 5, 2011) (on file with the *Journal of Criminal Law and Criminology*) Fortunately, this particular decision was overturned by the Board of Immigration Appeals, but, from the author's experience, many such immigration judge decisions go unappealed and become final. *See, e.g.*, *In re* Removal Proceedings, [name and case number redacted] (B.I.A. Jan. 24, 2013)).

[227] *Barcenas*, 19 I. & N. at 611–12.

[228] Oral Decision of the Immigration Judge, *supra* note 15, at 13.

These decisions essentially give state law enforcement a free pass to violate constitutional rights without fear of consequence. At a minimum, they do not represent a strategy likely to enhance constitutional compliance among either DHS or state and local officers.

By contrast, immigration judges should ensure due process in the proceedings over which they preside. They should apply the exclusionary rule to the extent they are permitted to do so to vindicate egregious Fourth Amendment rights violations, whether those violations are committed by DHS or state officers. To facilitate this robust application of existing law, the Board should issue a clear precedential decision authorizing the use of the exclusionary rule in the circumstances permitted by *Lopez-Mendoza* and delineating standards for its application. In addition, the Executive Office for Immigration Review should continue to educate judges about the current state of suppression law in immigration courts.[229]

C. PROSECUTORIAL DISCRETION

DHS should exercise its considerable power of prosecutorial discretion to make clear to its own agents and to state and local law enforcement authorities that it will not enforce the nation's immigration laws at the expense of individual constitutional rights. DHS has recently dusted off its authority to exercise prosecutorial discretion in deciding whether and how to pursue removal proceedings, taking steps to standardize the decision *not* to pursue removal in cases that do not reflect DHS's enforcement priorities.[230] Since 2010, DHS has defined low and high enforcement priorities, addressing a long list of possible factual and legal factors that affect the priority the government gives to an individual's removal.[231]

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[229] See generally, for example, the Executive Office for Immigration Review's legal updates on the exclusionary rule, including Jonathan Calkins & Elizabeth Donnelly, *Trust, but Verify: Document Similarities and Credibility Findings in Immigration Proceedings*, 5 IMMIGRATION L. ADVISOR 1, 6 (2011), *available at* http://goo.gl/2w33sH; Mahoney, *supra* note 225.

[230] For a discussion of prosecutorial discretion in immigration proceedings, see generally Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243 (2010); MARY KENNEY, AM. IMMIGRATION COUNCIL, PROSECUTORIAL DISCRETION: HOW TO ADVOCATE FOR YOUR CLIENT (2011), *available at* http://goo.gl/rQwlWQ; Memorandum from John Morton, Dir., ICE, to All Field Office Dirs. et al., Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011) [hereinafter Morton Memo on Prosecutorial Discretion], *available at* http://goo.gl/zK1PMy.

[231] These factors address, *inter alia*, pending applications for immigration relief, close U.S. citizens and resident family members, victims of serious crimes, serious health problems, criminal convictions, and, most famously and comprehensively, individuals brought to the United States as children. *See* Memorandum from John Morton, Assistant

Nowhere in this long list of factors, however, does DHS address the constitutionality of the arrests underlying individuals' removal proceedings. While one of DHS's policy memos instructs agents to give low priority to "plaintiffs in non-frivolous lawsuits regarding civil rights or liberties violations,"[232] the agency has never taken the more direct step of clearly stating a policy of refusing to "profit" from DHS's or other officers' unconstitutional enforcement behavior. Such a policy, if vigorously enforced,[233] could have a powerful deterrent effect on officers tempted to evade constitutional prohibitions in pursuit of immigration arrests or referrals. DHS should clearly communicate its commitment to protect individuals' constitutional rights in immigration enforcement by adding the constitutionality of the underlying detention and arrest to the list of factors its attorneys consider in deciding whether to pursue removal.

It appears that DHS already declines to prosecute some cases when it finds unconstitutional policing. According to an attorney who represented some racial profiling victims who participated in DOJ's investigation of the Alamance County Sheriff's Office, DHS terminated removal proceedings in some cases where litigants were prepared to fight their arrests' constitutionality.[234] DHS did not publicly acknowledge this as the motivation for terminating proceedings, however, simply indicating that the Notices to Appear initiating the cases had been "improvidently issued."[235]

Sec'y, ICE, to Peter S. Vincent, Principal Legal Advisor, ICE, & James Chaparro, Exec. Assoc. Dir., Enforcement and Removal Operations, ICE, Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions 2–3 (Aug. 20, 2010), *available at* http://goo.gl/Er9NIY; *see also* Morton Memo on Prosecutorial Discretion, *supra* note 230, at 4–5; Memorandum from John Morton, Dir., ICE, to All Field Office Dirs. et al., Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs 2 (June 17, 2011) [hereinafter Morton Memo on Victims, Witnesses, and Plaintiffs], *available at* http://goo.gl/LqswWp; Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot. et al. 1 (June 15, 2012), *available at* http://goo.gl/jUPwe6 (discussing people brought into the United States as children, specifically).

[232] Morton Memo on Victims, Witnesses, and Plaintiffs, *supra* note 230, at 2.

[233] Surveys have called into question whether DHS's rank-and-file officers and attorneys are exercising discretion to the extent directed by headquarters. *See* AM. IMMIGRATION LAWYERS ASS'N & AM. IMMIGRATION COUNCIL, HOLDING DHS ACCOUNTABLE ON PROSECUTORIAL DISCRETION 4 (2011), *available at* http://goo.gl/ANCacp (noting the lukewarm nature and inconsistency of implementation of prosecutorial discretion priorities in many ICE offices); AM. IMMIGRATION COUNCIL, PROSECUTORIAL DISCRETION: A STATISTICAL ASSESSMENT 2 (2012), *available at* http://goo.gl/sDU8G8 (reporting administrative closure rate of approximately 7% resulting from DHS's case-by-case review of removal proceedings).

[234] Telephone Conversation Between Marty Rosenbluth, Exec. Dir., N.C. Immigrant Rights Project, and Maureen Sweeney (Jan. 28, 2013) (notes on file with author).

[235] *Id.*

At the same time, ICE attorneys in other cases have declined to exercise discretion in cases where they had significant evidence of the arrests' unconstitutionality and have, in fact, indicated indirectly that the decisions to litigate the arrests' constitutionality weighed against terminating those prosecutions.[236] ICE should support its stated commitment to constitutional enforcement by clearly identifying arrest constitutionality as a factor for prosecutorial discretion and by ensuring that its attorneys and officers refuse to profit from unconstitutional policing by actually exercising that discretion.

D. CIVIL RIGHTS ADVOCACY

Perhaps the most important role in the ongoing struggle against racial profiling and unconstitutional immigration enforcement is that of individuals and advocates who must persist in challenging these practices in every conceivable forum. One lesson from the ongoing struggle against racial profiling in general law enforcement is that no single quick or easy or comprehensive strategy can defeat what remains a pervasive practice. Activists and advocates need to employ a full range of legal, political, economic, community organizing, and media strategies.[237] The political profile of Latino and other racial and ethnic minorities has risen as the demographics of many communities have changed,[238] and advocates need to translate this potential into active political clout that can challenge practices that harm their communities.

Immigration attorneys should certainly continue to raise the issue by advocating for prosecutorial discretion in individual cases and by filing suppression motions where they are warranted. They should make the case that *Lopez-Mendoza* needs to be reconsidered or is no longer controlling

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[236] In one case, the ICE Office of Chief Counsel responded to a request for prosecutorial discretion twenty-two minutes after the request was filed with the following reference to a pending motion to suppress: "I note that significant resources have already been expended in the two plus years these proceedings have been pending, and we still do not have a resolution as to even the preliminary issue of alienage." E-mail from Melody A. Brukiewa, Chief Counsel, to Laura T. Ruiz Rivera & Maureen Sweeney, Re: [name redacted] (Jan. 31, 2012, 12:27 PM) (on file with author and the *Journal of Criminal Law and Criminology*). The response did not refer to a single prosecutorial discretion factor identified in the agency memoranda. *Id.*

[237] *See, e.g.*, Johnson, *supra* note 75, at 1074.

[238] *See, e.g.*, MARK HUGO LOPEZ & PAUL TAYLOR, PEW HISPANIC CTR., LATINO VOTERS IN THE 2012 ELECTION 5 (2012), *available at* hhttp://goo.gl/LdiQ7C; Karen E. Krummy & Allison Sherry, *Changing Demographics Contributes to Democrats Win*, DENVER POST (Nov. 8, 2011, 4:34 PM), http://goo.gl/x2L4Jt; Cindy Y. Rodriguez, *Latino Vote Key to Obama's Re-election*, CNN.COM (Nov. 9, 2012, 4:42 PM), http://goo.gl/wQAC35; Donna St. George & Brady Dennis, *Growing Share of Hispanic Voters Helped Push Obama to Victory*, WASH. POST (Nov. 7, 2012), http://goo.gl/TPPRJz.

because of the widespread nature of Fourth Amendment violations.[239] In addition, though, civil rights organizations should continue to organize and advocate against race-based policing broadly, using police complaint procedures as well as the power of the media and grassroots campaigns. Perhaps most importantly, civil rights attorneys and plaintiffs need to do the hard work of suing state and local jurisdictions that racially profile Latinos and members of other immigrant communities. Hitting these jurisdictions in the pocketbook may, in the end, be the most effective way to promote the equal protection of law at the local level.

CONCLUSION

Recent years have seen the dramatic rise of shadow immigration enforcement by state and local police, troopers, and sheriffs. These officers' day-to-day involvement in ascertaining and communicating immigration information to federal authorities has significantly distorted local law enforcement, adding routine racial profiling and hyper-enforcement against Latinos and others perceived to be "foreign." Despite its pervasiveness, this distortion most often remains unacknowledged and "under the table," both because immigration arrests and referrals are not part of the explicit enforcement mandate of state and local officers, and because they are so easily masked by pretextual enforcement of traffic and other laws. It is essential that this dynamic be recognized and aggressively addressed, however, because its victims are constitutionally vulnerable and its consequences for communities and for effective law enforcement are severe. The victimization and alienation of some members of our communities prejudice law enforcement effectiveness and the sense of security we should all feel. Activists, advocates, judges, law enforcement administrators, governmental officers, and attorneys at all levels must use all tools at their disposal to defend with resolute loyalty the principle that all persons in our communities are entitled to the equal protection of the law and to fair treatment by those charged with enforcing it.

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[239] Immigration judges and lower federal courts could not, of course, overturn *Lopez-Mendoza*, but the issue must be raised there to preserve it for eventual review by the Supreme Court.