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ARTICLE

THE NATURAL PERSISTENCE OF RACIAL
DISPARITIES IN CRIME-BASED
REMOVALS

CARRIE L. ROSENBAUM*

ABSTRACT

This Article† suggests that the replacement of Secure Communities with the Priority Enforcement Program (PEP) did not, and would not have ameliorated the problem of disparate criminal immigration deportation of Latina/o noncitizens. It explores the implications of de-coupling criminal and immigration enforcement and gives theoretical consideration to the value of equality principles in criminal immigration enforcement.

One of Secure Communities' many critiques was that it resulted in disproportionate removal of minor offenders—minor offenders who were disproportionately Latina/o noncitizens. PEP created procedural fixes, but the latent, deeper substantive problems of Secure Communities, its predecessor, remained. Intractable racial disparity persisted within criminal immigration policing, in spite of PEP's changes. PEP's failure in addressing this problem in fact shed light on the deeper, more fundamental problem of criminal-immigration enforcement itself. In a time where race-based “stop and frisk” policing may be resurrected, grappling with the failures of the Obama Administration's changes, namely PEP, illustrate the need for consideration of systematic change.

This Article helps initiate the next generation of criminal immigration enforcement discussion by considering whether PEP's failure necessitates an equality principles analysis that moves from procedural to deeper, more

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systemic, substantive considerations. Rather than confining discussion to narrow questions such as preemption, equality principles reach the roots of racially-biased criminal immigration policing. This deeper understanding allows better crafting of methods to prevent and counteract such practices.

INTRODUCTION

Immigrants and immigrant rights advocates have criticized the Department of Homeland Security's (DHS) and Immigration and Customs Enforcement's (ICE) Secure Communities program for multiple reasons, including the problem of racially disparate criminal immigration enforcement. The Obama Administration acknowledged the potential for a perception of bias or actual bias with respect to Secure Communities. It replaced Secure Communities with the Priority Enforcement Program (PEP), but this move was more symbolic, and did not end disparate criminal immigration enforcement.

Communities and immigrant rights advocates' argument that the burden of criminal immigration policing falls most heavily on the Latina/o community is borne out, at least in part, by the DHS's own data—over ninety percent of those deported through criminal immigration policing are Latina/o, whereas Latina/o immigrants make up only fifty percent of the United States' immigrant population.¹

While PEP may have resulted in procedural reforms, deeper, substantive challenges were exposed as a result of the relationship between immigration enforcement and the criminal justice system. The similarity between PEP's persistent problems and the well-established problems with the war on drugs, namely, disparate impact on minor offenders of color, may be more apparent. Along the same lines, the reforms proposed to address the problem of racial disparities in the criminal justice system had implications for shortcomings in changes to criminal immigration enforcement *vis-à-vis* PEP.

This Article will make three contributions to existing scholarship. First, it will consider the likely shortcomings of PEP in reversing the trend of disproportionate removals of noncitizen Latina/os. Second, it will explore the deeper, substantive reasons why PEP continued to mirror the criminal justice system's failure to address racial disparities and historical racial bias in policing. Third, and perhaps the most novel contribution to

1. Specifically, people from Mexico and the Northern Triangle (Guatemala, Honduras, and El Salvador) accounted for 92.5% of all Criminal Alien Program removals between 2010 and 2013, even though, collectively, nationals of those countries account for forty-eight percent of the noncitizen population in the United States. Guillermo Cantor, Mark Noferi & Daniel E. Martínez, *Enforcement Overdrive: A Comprehensive Assessment of ICE's Criminal Alien Program*, AM. IMMIGR. COUNCIL 3 (Nov. 2015), https://www.americanimmigrationcouncil.org/sites/default/files/research/enforcement_overdrive_a_comprehensive_assessment_of_ices_criminal_alien_program_final.pdf.

existing scholarship, this Article will consider the role of equality principles in addressing criminal immigration policing in an attempt to break the perpetuation of inherently racialized but colorblind rhetoric of exclusion, difference, and demonization.

Specifically, Part I will provide a brief overview of Secure Communities, including critiques as well as the changes made by PEP. Part II will consider the substantive problems revealed by the attempts at reform. Part III will outline the systemic nature of criminal immigration bias and underscore the significance of bias in criminal law in criminal immigration outcomes. Part IV will consider the potential relevance of immigrant equality in addressing the problem of disparate criminal immigration enforcement.

I. SECURE COMMUNITIES

ICE launched Secure Communities in 2008 to help facilitate the use of state and local law enforcement agents (LEAs) as force multipliers in immigration enforcement.² While the program may have accomplished this goal by significantly increasing deportations, it also resulted in the disproportionate deportation of noncitizens with minor or no criminal offenses. As is the concern of this Article, Secure Communities came with specific racial or ethnic implications. Enforcement fell most heavily on Latina/o noncitizens.³

Secure Communities was designed primarily as an information-sharing system in which the fingerprints obtained as a result of criminal arrests by state or local police were transmitted to ICE.⁴ ICE agents could then check

2. See *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENF'T, <http://www.ice.gov/secure-communities> (last visited Apr. 5, 2015); U.S. IMMIGR. & CUSTOMS ENF'T, FACT SHEET: SECURE COMMUNITIES (2008), www.aila.org/content/default.aspx?docid=25045 [hereinafter *SECURE COMMUNITIES FACT SHEET*]; see also MICHELE WASLIN, AM. IMMIGR. COUNCIL, *THE SECURE COMMUNITIES PROGRAM: UNANSWERED QUESTIONS AND CONTINUING CONCERNS* (Nov. 2011), https://www.americanimmigrationcouncil.org/sites/default/files/research/SComm_Exec_Summary_112911.pdf.

3. AARTI KOHLI ET AL., CHIEF JUST. EARL WARREN INST. ON L. AND SOC. POL'Y, *SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS* (Oct. 2011), http://www.mygreencard.com/downloads/SecureCommunities_February2012.pdf (noting a significant increase in prosecutions and deportations since the Obama Administration's implementation of Secure Communities); AM. IMMIGR. COUNCIL, *THE GROWTH OF THE U.S. DEPORTATION MACHINE: MORE IMMIGRANTS ARE BEING "REMOVED" FROM THE UNITED STATES THAN EVER BEFORE* 6 (Mar. 2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_growth_of_the_us_deportation_machine.pdf (citing the U.S. Government Accountability Office, which stated that "from October 2008 through March 2012, Secure Communities led to the removal of about 183,000 aliens." In the first three years of the program, from 2008–2011, ninety-three percent of removable noncitizens apprehended via Secure Communities were Latino, while only seventy-seven percent of the undocumented population was Latino. One scholar, however, has characterized critiques of Secure Communities as the result of the bad timing of its launch and "mistakes in implementation," but those explanations do not respond to the specific critiques of disparate impacts); David A. Martin, *Resolute Enforcement is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 J.L. & POL. 411, 438 (2015).

4. SECURE COMMUNITIES FACT SHEET, *supra* note 2, at 5.

immigration databases to determine whether a particular individual was potentially subject to adverse immigration action.⁵ The information-sharing component of Secure Communities remained in place under its replacement program, PEP.⁶

The detainer component of Secure Communities permitted ICE to instruct local law enforcement agents to hold or further detain a noncitizen *after* completion of any authorized criminal confinement, to facilitate ICE's assumption of custody.⁷ After the noncitizen was transferred to ICE custody, an ICE agent would consider initiation of immigration removal proceedings.

A. *Critiques of Secure Communities*

Secure Communities was examined by scholars⁸ and criticized by communities and immigrant rights advocates. Both advocates and scholars criticized the program for further eroding the relationship between communities and sub-federal law enforcement agents,⁹ for promoting racial profiling in criminal arrests and relatedly, racially skewed deportations,¹⁰ and for casting too wide a net, manifesting in a disproportionate number of deportations stemming from minor offenses such as traffic violations.¹¹

Secure Communities, as a part of the criminal immigration system, uses law enforcement agents at multiple levels (street-level police officers, criminal prosecutors, jail administrators) as *de facto* immigration agents.¹²

5. *Id.*

6. *Priority Enforcement Program*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/pep#tab0> (last visited June 11, 2017).

7. To initiate the process of taking someone into immigration custody, ICE lodges a detainer by sending a completed Form I-247 to a prison or jail. See Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149 (2013) (providing an overview of detainer program and Tenth Amendment issues); Christopher N. Lasch, *Litigating Immigration Detainer Issues*, in 2 IMMIGR. LAW FOR THE COLORADO PRAC. § 34 (Nancy B. Elkind et al. eds., 2013); Christopher N. Lasch, *Federal Immigration Detainers After Arizona v. United States*, 46 LOY. L.A. L. REV. 629 (2013) (considering the implications of *Arizona v. United States* for the legal constitutional viability of immigration detainers).

8. Juliet Stumpf, *D(e)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259, nn.15–18 (2015) (citing scholars' studies of Secure Communities addressing the program's legality amongst other concerns).

9. For a thoughtful analysis of the relationship between the community and police, see Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245, 281–87 (2016) (specifically looking, in part, at the possible contradiction between community and community policing). See also Angélica Cházaro, *Challenging the "Criminal Alien" Paradigm*, 63 UCLA L. REV. 594 (2016) (questioning whether there was ever trust and taking a deeper, broader approach to the question of community trust in police); Maurice R. Dyson, *Excessive Force, Bias, and Criminal Justice Reform: Proposals for Congressional Action*, 63 LOY. L. REV. 27 (2017) (describing a "national epidemic of targeted harassment and killings" by police of people of color, including Blacks and Latinos).

10. See, e.g., sources cited *infra* note 121.

11. See Cházaro, *supra* note 9, at 644–47.

12. Eagly, *Immigrant Protective Policies in Criminal Justice*, *supra* note 9, at 247 (citing Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1350 (2010)).

Criminality has long been used as a determiner of desirability for noncitizens seeking integration into the United States polity, one that has somewhat successfully masked racialization.¹³ Despite criticism of Democratic presidential candidate Hillary Clinton's use of the term "super predator,"¹⁴ and President Donald Trump's blatant racism when talking about Latina/o immigrants as criminals,¹⁵ the myth of the interconnectedness between race, criminality, and immigrants persists. More concretely than the metaphoric criminalization of communities of color and immigrants, Secure Communities and criminal immigration enforcement necessarily perpetuates racially disparate policing by replicating the systemic racial bias endemic in the criminal justice system.¹⁶

The federal government's marketing of Secure Communities suggested concerns about fairness, racial neutrality, and protecting communities from dangerous individuals.¹⁷ However, implementation, including commence-

13. See, e.g., César Cuauhtémoc García Hernández, *The Perverse Logic of Immigration Detention: Unraveling the Rationality of Imprisoning Immigrants Based on Markers of Race and Class Otherness*, 1 COLUM. J. RACE & L. 353, 354–56 (2012) (discussing the use of race, class, and criminal records in immigration law enforcement to delineate between desirable and undesirable immigrants); Rebecca Sharpless, "Immigrants Are Not Criminals": *Respectability, Immigration Reform, and Hyperincarceration*, 53 HOUS. L. REV. 691, 732–33 (2016) (citing MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 57–58, 217–24 (2010)) (explaining in part by reference to Michelle Alexander's work that incarceration has created a racialized caste system that claims to be colorblind); Marc Mauer & Meda Chesney-Lind, *Introduction, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS INCARCERATION* 1, 5 (Marc Mauer & Meda Chesney-Lind eds., 2002) ("[I]t is understood that crime has become a code word for race in American political life, and therefore 'tough' talk on crime is a proxy for criminal justice policies that disproportionately control and police African-American communities."); see also MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* 167–70 (1995) (considering the socio-cultural consequences of imprisonment of African Americans); Carroll Seron & Frank Munger, *Law and Inequality: Race, Gender . . . and, of Course, Class*, 22 ANN. REV. SOC. 187 (1996) (discussing relevance of class and its potential use in contemporary socio-legal research about race and gender).

14. Michelle Alexander, *Why Hillary Clinton Doesn't Deserve the Black Vote*, THE NATION, (Feb. 29, 2016), <https://www.thenation.com/article/hillary-clinton-does-not-deserve-black-peoples-votes/>.

15. See, e.g., "Drug dealers, criminals, rapists": *What Trump thinks of Mexicans*, BBC NEWS, (Aug. 31, 2016), <http://www.bbc.com/news/world-us-canada-37230916>.

16. See *infra* Part III.

17. See *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/secure-communities#tab1> ("FACT: Secure Communities was designed to reduce the potential for racial profiling"). Note that among the broader concerns about Secure Communities included the fact that approximately seventy-nine percent of deportees identified pursuant to Secure Communities had no criminal record or entered the immigration removal system as a result of arrests for low-level offenses. "ICE reports that, in 2014, roughly half of the convicted noncitizens who were deported were Level 2 (one felony or three or more misdemeanors) or Level 3 (one misdemeanor) offenders, and about half of this group had only been convicted of a single misdemeanor." Sharpless, *supra* note 13, at 730. ICE reported that 43,897 of the convicted criminals removed were Level 1 offenders, 22,191 were Level 2 offenders, and 20,835 were Level 3 offenders. U.S. IMMIGR. AND CUSTOMS ENF'T, ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT: FISCAL YEAR 2014 10 (2014), <https://ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf>. Level 2 offenders include any person convicted of a felony or three or more misdemeanors and Level 3 offenders include any person convicted of any crime punishable by less than a year

ment in heavily Latina/o communities rather than in those with higher crime, was viewed as inconsistent with policies intended to avoid racial bias.¹⁸ This method of implementation and the outcome of the policy itself substantiated concerns about profiling of Latina/os and a betrayal of stated objectives.¹⁹

Secure Communities was also criticized for diminishing trust and undermining the relationship between community and police. As scholar Angélica Cházaro explains, the community-police relationship in low-income communities of color—those most heavily policed—has historically been problematic.²⁰ A trust deficit is not new, as has been highlighted by the increased attention to police killings of people of color.²¹ The roots of community distrust in police hint at the more substantive nature of the problem of racial bias, a problem left unsolved by PEP.²²

imprisonment. MICHELE WALSHIN, *ICE'S ENFORCEMENT PRIORITIES AND THE FACTORS THAT UNDERMINE THEM* 9 (2010), http://immigrationpolicy.org/sites/default/files/docs/ICE_Enforcement_Priorities_110910.pdf.

18. See, e.g., Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 115 (2013) (explaining that “the selection of counties appears more consistent with the desire to target immigration violators generally—rather than just those engaged in serious criminal activity—because early activations targeted counties close to the border and counties with a high proportion of noncitizen and Hispanic persons in the population.”); Thomas J. Miles & Adam B. Cox, *Does Immigration Enforcement Reduce Crime? Evidence from Secure Communities*, 57 J.L. & ECON. 937 (2014) (discussing empirical data demonstrating that immigrants do not commit crimes more than native-born people).

19. See Cox & Miles, *Policing Immigration*, *supra* note 18, at 102, 118 (2013) (presenting empirical evidence on how immigration enforcement officials use their wide discretion); see also Eagly, *Immigrant Protective Policies in Criminal Justice*, *supra* note 9, at 285; see also SECURE COMMUNITIES FACT SHEET, *supra* note 2.

20. See Cházaro, *supra* note 9, at 652–53.

21. Bill Ong Hing, *From Ferguson to Palestine: Disrupting Race-Based Policing*, 59 HOW. L.J. 559 (2016). Reports of police killings of people of color seem to come on a very regular basis with the most recent report on the Immigration Professor Blog, impacting a refugee from Uganda. See, e.g., *Black Man Shot Dead By Police Near San Diego Identified as Ugandan Refugee*, LAW PROFESSOR BLOGS NETWORK: IMMIGR. PROF BLOG (Oct. 2, 2016), <http://lawprofessors.typepad.com/immigration/2016/10/black-man-shot-dead-by-police-near-san-diego-identified-as-ugandan-refugee.html>; see also Maritza Perez, *Los Lazos Viven: California's Death Row and Systematic Latino Lynching*, 37 WHITTIER L. REV. 377, 378 (2016) (comparing the modern-day state sanctioned killing of Latinos to extrajudicial lynching in 1830–1935, this is indicative of law enforcement and criminal justice system bias against Latinos, which is related to the historic trust deficit between the Latino community and law enforcement); Aura Bogado, *Death of 14-Year-Old Latino Killed by Chicago Police Kill Labeled 'Suicide'*, COLORLINES (Apr. 3, 2015, 2:30 PM), <http://www.colorlines.com/articles/death-14-year-old-latino-killed-chicago-police-kill-labeled-suicide> (police killing of civilians impacts African Americans and Latinos). Immigrants of color have also been subject to abuse by local law enforcement officers. See Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 994 (2016) (addressing racial profiling in criminal enforcement, impact on Latino noncitizens, and proposing solutions).

22. While not the subject of this paper, the author would like to speculate that while under a new or different presidential administration, the permissibility of use of racial or ethnic appearance in enforcing criminal law remains equally invalid and illegal, sub-federal measures like Arizona's SB1070 could again proliferate incentivizing criminal policing that relies on subtle forms of racial bias.

Distrust may not be the result of rogue officers abusing their power by actively engaging in racial profiling, regardless of whether or not a killing is involved, but instead the result of implicit bias and the way in which the criminal justice system has perpetuated criminalization and incarceration of low-income communities of color.²³ The “Blue Lives Matter” movement’s de-legitimization and demonization of communities of color, sanctioned by the then president-elect,²⁴ will likely continue the distrust and implicate the need for heightened attention to racial bias and equality concerns.

Resistance to Secure Communities arose in part from concerns about biased criminal immigration policing. Communities and immigrant rights advocates worked with state and local leaders to pass and implement measures to minimize sub-federal law enforcement agents’ ability to participate in enforcing immigration law pursuant to Secure Communities.

B. Sub-Federal Resistance to Secure Communities Because of Racially-Biased Criminal Immigration Outcomes

Sub-federal resistance to Secure Communities manifested itself in state laws and local ordinances, such as the California and Connecticut TRUST Acts, and California’s newer TRUTH Act.²⁵ More measures to limit the federal government’s ability to enlist states and municipalities in criminal immigration enforcement may be implemented in the near future in response to the presidential election results.²⁶ Such measures limit cooperation with federal invitation to collaborate in enforcing immigration law. They attempt to add transparency to the relationship between federal immigration law enforcement and local criminal law enforcement agencies. These measures arose and continue to arise in part out of criticisms that PEP seemed to result in higher rates of deportations of minor offenders—minor offenders who were also disproportionately Latina/o.²⁷

23. Cházaro, *supra* note 9, at 610–11.

24. Perry Bacon, Jr., *Trump and Other Conservatives Embrace ‘Blue Lives Matter’ Movement*, NBC NEWS (July 23, 2016, 4:46 PM), <http://www.nbcnews.com/storyline/2016-conventions/trump-other-conservatives-embrace-blue-lives-matter-movement-n615156>.

25. Governor Brown signed the California TRUTH Act into law on September 29, 2016. The law requires that undocumented immigrants be told of their right to an attorney (at no expense to the government) before answering federal immigration authorities’ questions, and requires annual public forums where local law enforcement are to explain their role in federal immigration policy with communities. See TRUTH Act, A.B. 2792, 2015-2016 Reg. Sess. (Cal. Sept. 28, 2016) (codified at CAL. GOV’T CODE § 7283).

26. Jeremy B. White & Alexei Koseff, *California lawmakers to Trump: ‘if you want to get to (immigrants), you have to go through us’*, SACRAMENTO BEE (Dec. 5, 2016, 2:12 PM), <http://www.sacbee.com/news/politics-government/capitol-alert/article119026153.html>.

27. See Christine N. Cimini, *Hands Off Our Fingerprints: State, Local, and Individual Defiance of Federal Immigration Enforcement*, 47 CONN. L. REV. 101, 137–47 (2014) (contending that Secure Communities created a conflict between state police power and federal plenary power to regulate immigration undermining rights); Rachel Zoghlin, *Insecure Communities: How Increased Localization of Immigration Enforcement Under President Obama through the Secure Communities Program Makes Us Less Safe, and May Violate the Constitution*, 6 THE MOD. AM.

Specifically, state and local resistance to Secure Communities began to manifest itself in about 2012.²⁸ By 2014, at least 259 localities including 26 cities and 233 counties had implemented policies in response to Secure Communities, primarily in the form of limitations or restrictions on ICE holds or transfers after initial contact with state or local law enforcement agents.²⁹

For example, California and Connecticut passed statewide resistance to Secure Communities in 2013, establishing more limited parameters for cooperation with federal immigration enforcement efforts.³⁰ The state laws were entitled “TRUST” Acts,³¹ presumably signifying intent to restore the community’s trust in local law enforcement, though they did not explicitly set forth specific ways the racially-biased impacts of criminal immigration enforcement would be alleviated.³²

In California, Governor Brown signed the Transparent Review of Unjust Transfers and Holds, or “TRUTH Act,”³³ which intended to establish more transparency and community engagement in influencing when and how localities cooperate with ICE.³⁴ The Act encourages local law enforcement to work with local elected leaders to specify the extent to which local law enforcement may collaborate with ICE in enforcing immigration law.³⁵ The TRUTH Act also includes a component to help ensure that sub-federal

20, 27–29 (making the case for potential Equal Protection violations as a result of Secure Communities enforcement techniques); *see also* Memorandum from Jeh Charles Johnson, Secretary, U.S. Dep’t of Homeland Sec., Secure Communities (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf [hereinafter Nov. 2014 Secure Communities Memo] (describing criticism of Secure Communities as “hav[ing] attracted a great deal of criticism, is widely misunderstood, and is embroiled in litigation” and that “its very name has become a symbol for general hostility toward the enforcement of our immigration laws”).

28. In 2012, there were a few dozen sanctuary cities, and now there are about 550. *See* Alex Kotlowitz, *The Limits of Sanctuary Cities*, *THE NEW YORKER* (Nov. 23, 2016), <http://www.newyorker.com/news/news-desk/the-limits-of-sanctuary-cities>.

29. Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 *CHI.-KENT L. REV.* 13, 25–26 (2016). Chen cites two sources of information about state responses to ICE requests, the ILRC map, *Immigration Enforcement*, IMMIGR. LEGAL RES. CTR., <http://www.ilrc.org/enforcement> (last visited Sept. 21, 2015) and the Catholic Immigrant Legal Network Report, *States and Localities that Limit Compliance with ICE Detainer Requests*, CATHOLIC LEGAL IMMIGR. NETWORK (Oct. 2014), <https://cliniclegal.org/resources/articles-clinic/states-and-localities-limit-compliance-ice-detainer-requests-jan-2014> (listing states and counties that limited compliance with ICE detainers as of Oct. 2014).

30. *San Francisco Officials Take Up Immigrant Sanctuary Policy*, LAW PROFESSOR BLOGS NETWORK: IMMIGR. PROF BLOG (May 10, 2016), <http://lawprofessors.typepad.com/immigration/2016/05/san-francisco-officials-take-up-immigrant-sanctuary-policy.html>.

31. *See* CAL. GOV’T CODE §§ 7282–7282.5 (2014); CONN. GEN. STAT. § 54-192h (2014).

32. Lack of legitimacy because high numbers of detained immigrants had no serious criminal convictions. *See* Chen, *supra* note 29, at 29 (regarding whether there ever was trust between communities and criminal law enforcement); Cházaro, *supra* note 9, at 618.

33. CAL. GOV’T CODE § 7283; Jon Rodney, *TRUTH Act sails through committee after emotional testimony from families hurt by deportation*, CAIMMIGRANT.ORG (Apr. 21, 2016), <http://www.caimmigrant.org/truth-act-sails-through-committee/>.

34. Chen, *supra* note 29, at 18–19.

35. *See* CAL. GOV’T CODE § 7283.1(d).

law enforcement are otherwise in compliance with existing state law, such as the TRUST Act.³⁶

Aside from calls to end Secure Communities entirely,³⁷ proposals to fix it focused on procedural defects related to implementation and enforcement, that resulted in deportation contrary to stated priorities—apprehension and deportation of more “serious” criminals, and without racial bias, and even wrongful removals and detentions.³⁸ PEP in some respects responded to the superficial procedural concerns but left unresolved the problem of racially disparate criminal immigration enforcement.

II. PRIORITY ENFORCEMENT PROGRAM AND DISPARATE IMPACTS OF CRIMINAL IMMIGRATION POLICING ON LATINA/O NONCITIZENS

There has been no clear indication that PEP eliminated or significantly decreased racially and ethnically disparate criminal immigration enforcement. Instead, PEP may have made the raced and classed nature of the criminal-removal system more apparent. While scholars have considered PEP,³⁹ this Part will specifically attempt to consider PEP through a critical race lens after briefly outlining how it differs from Secure Communities.

36. CAL. GOV'T CODE § 7283.2 (“Nothing in this chapter shall be construed to provide, expand, or ratify the legal authority of any state or local law enforcement agency to detain an individual based upon an ICE hold request.”) See also Yvette Cabrera & Nick Gerda, *Sheriff's Department Acknowledges Trust Act Violation*, VOICE OF OC (July 8, 2014), <http://voiceofoc.org/2014/07/sheriffs-department-acknowledges-trust-act-violation/>.

37. Professor Eagly highlights the way in which these groups call for such a policy builds on the immigrant equality principles and framework. Eagly, *Immigrant Protective Policies in Criminal Justice*, *supra* note 9, at 299. See also ICE out of California, ICEOUTOCA.ORG (last visited Oct. 2, 2016) (immigrant rights groups urging an end to sub-federal criminal law enforcement's involvement in immigration enforcement, particularly by asking that ICE not be permitted to have access to noncitizens detained in local jails, and further that the relationship between sub-federal criminal law enforcement and immigration enforcement end entirely—effectively ending the criminal alien model); Silicon Valley De-Bug, *No ICE, ICE, Baby! Keeping PEP COMM Out of Santa Clara County*, YOUTUBE (Aug. 25, 2015), <https://www.youtube.com/watch?v=pAyr1DygvK8>. For more background on the ICE Out of LA coalition and how its efforts are leading the national movement against local collaboration with ICE, see Victor Natto, *Should LA County's Sheriff Stop Helping Deport Undocumented Angelenos?*, LA PROGRESSIVE (Sept. 11, 2015), <https://www.laprogressive.com/ice-out-of-la/>.

38. Chen, *supra* note 29, at 28 (citing TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006)). Restrictionist critics had the opposite critique—that the federal government still was not doing enough to identify and deport potential noncitizens—and their resistance, too, manifested in sub-federal measures, such as Arizona's S.B. 1070; See Laura Donohue, *The Potential for a Rise in Wrongful Removals and Detention Under the United States Immigration and Customs Enforcement's Secure Communities Strategy*, 38 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 125, 132–35, 144–52 (2012) (noting differences between stated objectives of Secure Communities program and results). This Article, however, is concerned with the overlap in disproportionate impact of sub-federal immigration policing on communities of color and the significance of failure of legal remedies and deterrents to racial profiling in reforms in both the criminal justice and criminal immigration systems.

39. Chen, *supra* note 29; Martin, *supra* note 2; Barbara E. Armacost, *The Enforcement Pathologies of Immigration Policing* (Va. Pub. L. & Legal Theory, Paper No. 19, Mar. 1, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2584713 (considering racial profiling in

PEP replaced Secure Communities in July 2015.⁴⁰ The notification component of Secure Communities remained in place under the PEP, while the detainer policy changed.⁴¹ Under the PEP, noncitizens were only subject to detainers and transfer to ICE custody after conviction, rather than just after an arrest or filing of a criminal charge.⁴² In theory, convictions rather than arrests were intended to trigger immigration enforcement action. However, even absent an immigration detainer, an arrest still resulted in transmission of an individual's information to ICE. Accordingly, to the extent that arrests of noncitizens of color, particularly Latina/os, are more likely to be arrested and convicted for criminal conduct,⁴³ it appears that the change to the detainer policy did not reverse disparate criminal immigration removals.

criminal immigration enforcement and disputing claims that local police can act as immigration enforcement multipliers without adverse impacts on federal or state law enforcement priorities, in part because police will continue to use "pretextual" street and traffic stops to investigate other crimes absent probable cause, to attempt to identify immigration violators); Stumpf, *D(e)volving Discretion*, *supra* note 8 (considering the potential for PEP to have reduced low-level discretion which resulted in lack of compliance with federal immigration priorities).

40. Press Release, U.S. Immigr. and Customs Enf't., DHS Releases End of Fiscal Year 2015 Statistics (Dec. 22, 2015), <https://www.ice.gov/news/releases/dhs-releases-end-fiscal-year-2015-statistics>. The Obama Administration announced the end of Secure Communities pursuant to a memo. See Nov. 2014 Secure Communities Memo, *supra* note 27; see also Priority Enforcement Program, U.S. IMMIGR. AND CUSTOMS ENF'T., <https://www.ice.gov/pep#wcm-survey-target-id> ("PEP begins at the state and local level when an individual is arrested and booked by a law enforcement officer for a criminal violation and his or her fingerprints are submitted to the FBI for criminal history and warrant checks. This same biometric data is also sent to [ICE] so that ICE can determine whether the individual is a priority for removal, consistent with the DHS enforcement priorities described in former Secretary Johnson's November 20, 2014 Secure Communities Memorandum. Under PEP, ICE will seek the transfer of a removable individual when that individual has been convicted of an offense listed under the DHS civil immigration enforcement priorities, has intentionally participated in an organized criminal gang to further the illegal activity of the gang, or poses a danger to national security."). As of a leaked February 21, 2017 DHS Memorandum, the November 20, 2014 Memo ending Secure Communities was rescinded. See Memorandum from John Kelly, Sec'y, U.S. Dep't of Homeland Sec., Enf't of the Immigr. Laws to Serve the Nat'l Interest (Feb. 21, 2017), <http://www.aila.org/infonet/leaked-dhs-memo-implementing-president-trump>.

41. See *Priority Enforcement Program*, *supra* note 6.

42. OFFICE OF ENFORCEMENT AND REMOVAL OPERATIONS, U.S. IMMIGR. & CUSTOMS ENF'T., PRIORITY ENFORCEMENT PROGRAM (PEP) 1, https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2015/pep_brochure.pdf.

43. See, e.g., Anthony E. Mucchetti, *Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities*, 8 HARV. LATINO L. REV. 1 (2005) (describing problem of racial profiling and criminalization of Latinos); Katherine Culliton, *How Racial Profiling and Other Unnecessary Post-9/11 Anti-Immigrant Measures Have Exacerbated Long-Standing Discrimination Against Latino Citizens and Immigrants*, 8 UDC L. REV. 141 (2004) (discussing post 9/11 racial profiling of Latinos, including citizens and noncitizens); Kevin R. Johnson, *Racial Profiling in the War on Drugs Meets the Immigration Removal Process: The Case of Moncrieffe v. Holder*, 48 U. MICH. J.L. REFORM 967 (2015) (describing problem of racially disparate policing with racially disparate impacts on Latinos, by examination of *Moncrieffe v. Holder*).

Under PEP, ICE holds and requests for notification focused on so-called “priority noncitizens,” including: (1) gang members,⁴⁴ convicted felons, and national security suspects; (2) persons convicted for significant misdemeanors including driving under the influence, domestic violence, guns, drug sale, sexual abuse, burglary, other convictions carrying ninety-day jail sentence, or three or more misdemeanor convictions of any kind (except minor traffic or juvenile offenses); and (3) persons with other immigration violations where there was a final order of removal issued on or after January 1, 2014.⁴⁵

Following implementation of PEP in 2015, of the 235,413 people deported, fifty-nine percent were “convicted criminals” and ninety-eight percent otherwise corresponded to the DHS priorities.⁴⁶ To some extent, particularly if racial profiling concerns are omitted and it is accepted that the definition of “convicted criminals” includes those guilty of only immigration-related offenses, the program could be considered a success based on DHS’s criteria.⁴⁷ However, these superficial representations of the Program’s success mask the program’s failures, including racial profiling. Thus, even if PEP represented change, the categories and definitions may

44. *But see* ALEXANDER, *supra* note 13, at 137 (succinctly explaining that “the criterion for inclusion in the [gang] database is notoriously vague and discriminatory”); *see generally* Rebecca A. Hufstader, *Immigration Reliance on Gang Databases: Unchecked Discretion and Undesirable Consequences*, 90 N.Y.U. L. REV. 671 (2015) (gang databases managed by state and local law enforcement lack procedural safeguards to prevent police discretion influenced by racial bias). When DHS relies on these databases they import the “racial bias inherent in the criminal justice system to the immigration system.” *Id.* at 671. *See also* Joshua D. Wright, *The Constitutional Failure of Gang Databases*, 2 STAN. J. CIV. RTS. & CIV. LIBERTIES 115 (2005); K. Babe Howell, *Gang Policing: The Post Stop-And-Frisk Justification for Profile-Based Policing*, 5 U. DENV. CRIM. L. REV. 1 (2015) (considering the problem of the replacement of biased “stop and frisk” policies with gang databases).

45. Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t Homeland Sec., Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [hereinafter Jeh Johnson Apprehension Memo].

46. *DHS Releases End of Fiscal Year 2015 Statistics*, *supra* note 40.

47. The category for people with “serious criminal records,” includes “any migrant caught entering the country illegally after Jan. 1, 2014.” *See* Memorandum from John Kelly, *supra* note 40; Nov. 2014 Secure Communities Memo, *supra* note 27 (setting forth three descending levels of enforcement priorities: Priority 1 (threats to national security, U.S. border security, and public safety), Priority 2 (certain misdemeanors and new immigration violators), and Priority 3 (noncitizens with a final order of removal)); *see also* Julia Preston, *Low-Priority Immigrants Still Swept Up in Net of Deportation*, N.Y. TIMES (June 24, 2016), <https://www.nytimes.com/2016/06/25/us/low-priority-immigrants-still-swept-up-in-net-of-deportation.html>. Additionally, it is worth noting that PEP still designated individuals as priorities for immigration enforcement action even where the offense triggering “priority” status would not have made the individual subject to adverse immigration action. In other words, PEP priorities remain broader and more expansive than the criminal grounds of removability and inadmissibility themselves. *See* Immigration and Nationality Act, 8 U.S.C. § 1182 (2012). Thanks to Yolanda Vázquez for highlighting this incongruity between PEP priorities for criminal immigration enforcement and the criminal removability and inadmissibility grounds in the Immigration and Nationality Act.

have obscured practices that continued to fall disproportionately on minor offenders from Latina/o communities.

Other changes to PEP that may not have minimized or eliminated racial profiling include: (A) the attempt to shift the “devolution of discretion”⁴⁸ from sub-federal law enforcement agents and local ICE officers to the macro-policy level to help ensure compliance with articulated removal priorities, (B) the curtailing the detainer provisions, and (C) the increased transparency of PEP.

A. *Reversal of “Devolution of Discretion”—A Disincentive to Sub-federal Criminal Law Enforcement Agents Engagement in Profiling?*

First, PEP may not have disincentivized racial profiling by reversing the discretionary role of sub-federal criminal law enforcement agents and field-level ICE agents. PEP has been characterized as potentially undoing the “devolution of discretion,” which under Secure Communities, led sub-federal criminal law enforcement agents and low-level ICE agents to deviate from macro-policy objectives and federal immigration authorities.⁴⁹ Scholar Juliet Stumpf suggested that PEP might have allowed federal immigration authorities to regain discretion, taking it back from line-level ICE officers and sub-federal police, which could re-affirm macro-level discretion.⁵⁰ PEP’s macro-level directive requires immigration enforcement agents to “obtain clearance from a higher level of authority, such as the ICE Field Office Director” before departing from the still extensive list of prioritized categories of noncitizens who should be subject to deportation.⁵¹

However, PEP did not prevent an ICE agent’s willful violation of immigration enforcement priorities.⁵² Nor did it prevent engagement in unlawful collusion with sub-federal law enforcement agents, for example, an ICE agent who learns a noncitizen is in local criminal custody may seek to trans-

48. Stumpf, *D(e)volving Discretion*, *supra* note 8.

49. *Id.* at 1262–63, 1263 n.12 (citing Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 *UCLA L. REV.* 1819, 1842 (2011)) (suggesting Secure Communities “devolved the discretion” of enforcing immigration law from federal policymakers to “the lowest common denominator: nonfederal police officer” and optimistically proposing PEP could reverse that trend); *see also* Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 *WM. & MARY BILL RTS. J.* 577, 606 (2012) (noting that “with the explosion of sub-federal involvement in immigration policing, it seems that states and localities are, in many cases, actually exercising the discretion that definitively shapes federal enforcement.”).

50. Stumpf, *D(e)volving Discretion*, *supra* note 8, at 1282.

51. *Id.*

52. One such immigration officer reportedly stated, “If you don’t have enough evidence to charge someone criminally but you think he’s illegal, we [ICE] can make him disappear.” Sharpless, *supra* note 13, 729 n.167; *see also* DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 22–35 (2003) (discussing how law enforcement authorities targeted Muslim noncitizens after 9/11, alleging visa violations as a proxy for national security grounds).

fer that noncitizen to ICE custody rather than wait for a conviction.⁵³ Additionally, even assuming adherence to PEP's policies, PEP maintained Secure Communities' extensive list of offenses subjecting noncitizens to "priority" categorization for deportation, such that the net was not significantly shrunk.⁵⁴

More importantly, by virtue of the implicit and explicit bias in policing,⁵⁵ criminal immigration removals remained subject to ethnic and racial bias. Even if approval was required before an ICE agent could depart from PEP's priorities, and in turn decrease the incentive for police to use racial profiling to act as de facto immigration agents, a criminal arrest still remained the gateway to immigration enforcement.

Driving under the influence is an offense-specific example because it remained a significant misdemeanor for immigration purposes; thus under PEP, a noncitizen with a significant misdemeanor is still a "criminal alien," and ICE agents remain empowered to detain and initiate deportation proceedings.⁵⁶ In this scenario, compliance with deportation priorities would have been superficial⁵⁷ and would likely fail at disincentivizing the abuses of authority that result in the racial profiling by sub-federal law enforcement agents.⁵⁸ Even under PEP, because of the well-documented phenomena of "driving while black or brown,"⁵⁹ driving-related stops still created the context for racially disparate criminal immigration policing.

All criminal policing is potentially affected by racial profiling. For this reason, even given more time, PEP likely would still have failed to reverse the disparate impacts of criminal immigration policing. Its failure in addressing the problem of racial bias underscores the need for deeper, more substantial systemic reforms. It is particularly telling that an administration considered to be relatively immigrant friendly, and cognizant of the continuing harms of racial bias in the criminal justice system, was unable to ad-

53. Cházaro, *supra* note 9, at 625.

54. *See id.*

55. *See, e.g.*, Johnson, *Doubling Down on Racial Discrimination*, *supra* note 21.

56. Cházaro, *supra* note 9, at 623, 657–58.

57. Nov. 2014 Secure Communities Memo, *supra* note 27 (emphasizing enforcement and removal priority of "threats to national security, public safety, and border security" and detailing Priority Levels 1–3).

58. *See* Johnson, *Doubling Down on Racial Discrimination*, *supra* note 21, at 994; Kevin R. Johnson, *The Case Against Racial Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675 (2000); 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 Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010); Carrie L. Rosenbaum, *What (and Whom) State Marijuana Reformers Forgot: Crimmigration Law and Noncitizens*, 9 DEPAUL J. FOR SOC. JUST., Summer 2016, at 1.

59. *See generally* Mucchetti, *supra* note 43; DAVID A. HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* 224 (New Press 2002); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CAL. L. REV. 125 (2017).

dress this problem of criminal-immigration racial bias and disparate impacts.

B. Priority Enforcement Program's Information-Sharing Component Fails to Disrupt the Causal Chain of Potentially Biased Policing

PEP's potential to decrease incentives to engage in racially-biased criminal immigration policing was compromised by maintaining the information-sharing component of Secure Communities.⁶⁰ Under PEP, an arrestee's information was still transferred to ICE at the time of arrest.⁶¹ This link between a criminal arrest and ICE notification, which prompted criminal immigration enforcement, failed to break the chain of biased policing which most heavily impacts Latina/o immigrants. PEP arrests still alerted ICE to a noncitizen's interaction with the criminal justice system, and a majority of criminal arrests still were likely to become convictions,⁶² as is particularly true in the context of misdemeanors.⁶³

PEP also lacked mechanisms to counter a purported culture of collusion between sub-federal criminal prosecution and ICE to maximize chances of deportation. For example, in some jurisdictions, particularly those lacking immigrant-protective policies,⁶⁴ ICE reportedly facilitated or participated in the training of local prosecutors to charge and plead criminal cases to maximize ICE's chance of obtaining removal, regardless of whether the initial crime deems the individual a priority for criminal immigration removal.⁶⁵ In jurisdictions lacking immigrant-protective policies, these practices are consistent with and an extension of those jurisdiction's attitudes and policies toward immigrants. However, if the information sharing component of Secure Communities is uninterrupted, PEP-like changes undermine the notion that requiring convictions, and not just arrests will

60. Notably, in response to the election of Donald Trump, cities such as San Francisco have resurrected efforts to go farther than just resisting federal immigration enforcement collaboration, including proposing measures to eliminate cooperation, to the extent possible, in transmission of information to ICE. White & Koseff, *supra* note 26.

61. Cházaro, *supra* note 9, at 625. Additionally, advocates have reported that absent the ability to hold noncitizens for forty-eight hours pursuant to former detainer policies, ICE agents are often other ways to arrest and put noncitizens in custody.

62. Cházaro, *supra* note 9, at 650–51.

63. See discussion *supra* Section I.B; Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751 (2013) (discussing how the expansion of deportation laws to include minor criminal offenses can result in deportation, and how this heightens consequences for noncitizens who face charges in lower non-federal fora which are disadvantageous to criminal defendants).

64. Eagly, *Immigrant Protective Policies in Criminal Justice*, *supra* note 9.

65. Andrea Castillo, *ACLU Demands End to Immigration Program in Fresno Jail*, FRESNO BEE (June 23, 2016, 5:50 PM), <http://www.fresnobee.com/news/local/article85663737.html> (ACLU advocates contending that PEP was essentially no better than Secure Communities in protecting noncitizens from rights violations).

have a significant impact on who experiences adverse immigration consequences.

C. *Data Collection Measures May Not Discourage Profiling in Criminal Immigration Enforcement*

Under PEP, DHS was to track data showing compliance with enforcement priorities and, to ensure transparency, was to make the data publicly available.⁶⁶ However, past measures to increase transparency and accountability have not been particularly successful. They neither created transparency nor dissuaded racially-biased practices.

Previously, in response to concerns about racial profiling resulting from Secure Communities, the Office of Civil Rights Civil Liberties (“CRCL”) was created to track and provide data to the public to demonstrate compliance with immigration enforcement priorities.⁶⁷ However, the CRCL did not make its data publicly available. An immigrant rights organization filed a Freedom of Information Act request for the data, and sued the CRCL to obtain the records, after the CRCL refused to release the data.⁶⁸

Yet, if the purpose of collecting data and making it available is to discourage unlawful racial bias in criminal policing, when data is not made publicly available, racial profiling fails to be identified, and fails to be deterred.⁶⁹ In fact, in February 2016, a nonprofit organization sued to obtain

66. Stumpf, *D(e)volving Discretion*, *supra* note 8, at 1262 n.11 (citing Jeh Johnson Apprehension Memo, *supra* note 45, at 5–6).

67. See *CRCL Immigration Section*, DEP’T OF HOMELAND SEC., OFF. FOR CIV. RIGHTS & CIV. LIBERTIES, <https://www.dhs.gov/crcl-immigration-section>.

68. Daniel M. Kowalski, *NJIC Sues DHS, ICE for PEP FOIA Disclosure*, LEXISNEXIS (Feb. 9, 2016, 7:42 PM), <https://www.lexisnexis.com/legalnewsroom/immigration/b/newsheadlines/archive/2016/02/09/njic-sues-dhs-ice-for-pep-foia-disclosure.aspx>.

69. There has been a resurgence in nationalism and racist attacks against immigrants and persons of color in the United States in conjunction with the presidential campaign of Donald Trump. See, e.g., Mirren Gidda, *How Donald Trump’s Nationalism Won Over White Americans*, NEWSWEEK (Nov. 15, 2016, 3:00 AM), <http://www.newsweek.com/donald-trump-nationalism-racism-make-america-great-again-521083>; Janelle Bouie, *What We Have Unleashed, This Year’s String of Brutal Hate Crimes is Intrinsicly Connected to the Rise of Trump*, SLATE (June 1, 2017), http://www.slate.com/articles/news_and_politics/politics/2017/06/this_year_s_string_of_brutal_hate_crimes_is_intrinsicly_connected_to_the.html; Alexis Okeowo, *Hate on the Rise After Trump’s Election*, THE NEW YORKER (Nov. 17, 2016), <http://www.newyorker.com/news/news-desk/hate-on-the-rise-after-trumps-election>; Charlotte England, *Donald Trump Blamed for Massive Spike in Islamophobic Hate Crime*, THE INDEPENDENT (Feb. 16, 2017, 11:57), <http://www.independent.co.uk/news/world/americas/donald-trump-blame-islamophobic-anti-muslim-ban-hate-crime-numbers-southern-poverty-law-center-a7582846.html>; Ben Jacobs & Warren Murray, *Donald Trump Under Fire After Failing to Denounce Virginia White Supremacists*, THE GUARDIAN (Aug. 12, 2017, 4:07 PM), <https://www.theguardian.com/us-news/2017/aug/12/charlottesville-protest-trump-condemns-violence-many-sides>; Clare Foran, *Donald Trump and the Rise of Anti-Muslim Violence*, THE ATLANTIC (Sept. 22, 2016), <https://www.theatlantic.com/politics/archive/2016/09/trump-muslims-islamophobia-hate-crime/500840/> (linking extreme political rhetoric of Donald Trump with increase in hate crimes); Katie Reilly, *Racist Incidents Are Up Since Donald Trump’s Election*, TIME (Nov. 13, 2016), <http://time.com/4569129/racist-anti-semitic-incidents-donald-trump/>. It may be worth noting that conscious, not just subconscious racial bias, is so

racial profiling data related to criminal immigration enforcement under PEP, alleging that racial profiling continued.⁷⁰ The current administration has indicated reduced tendency towards transparency and has been particularly selective regarding transparency corresponding with political priorities.⁷¹

If an administration headed by leaders who voiced concerns about racial profiling in criminal law enforcement⁷² could not make a significant dent in such practices,⁷³ presumably because it failed to see the criminal immigration connection, it may be imperative to begin to look more proactively at the underlying systemic causes of racially-biased criminal immigration deportations. In an environment where racial profiling could become a driving factor in criminal immigration enforcement,⁷⁴ examina-

insidious that the kinds of civil rights measures enacted after the Civil Rights movement of the 1960s did not create sufficient protections, and in this context of criminal immigration enforcement, and others, stronger protections yet are still required. *See, e.g.,* Kenrya Rankin, *Activists, Law Enforcement Condemn Trump's Call for Police Violence*, COLORLINES (July 31, 2017, 1:36 PM), <https://www.colorlines.com/articles/activists-law-enforcement-condemn-trumps-call-police-violence> (Representative Maxine Waters quoted as saying, "Freddie Gray's family probably wants to know if officers will protect Trump's head when he is thrown into the back of a paddy wagon," highlighting the implicitly racialized nature of policing); Roque Planas, *Why the Media Pays Less Attention to Police Killings of Latinos*, HUFFINGTON POST (Feb. 24, 2015, 5:15 PM), http://www.huffingtonpost.com/2015/02/24/police-killings-latinos_n_6739448.html (comparing media coverage of police killings of African Americans and Latinos and attributing the cause to Columbia University Center for Ethnicity and Race conclusion that Americans perceive Latinos as immigrants or foreigners and instead perceive them as criminals, more readily than victims of state violence); Brandon Ellington Patterson, *The Police Department Cheering on Trump's Call for Excessive Force is Already Under Federal Oversight for Discrimination*, MOTHER JONES (July 28, 2017, 8:36 PM), <http://www.motherjones.com/politics/2017/07/the-police-department-cheering-on-trumps-call-for-excessive-force-is-already-under-federal-oversight-for-discrimination/>.

70. *See* Press Release, Nat'l Immigr. Just. Ctr., NIJC Sues Federal Government To Release Data On Racial Profiling in Immigration Enforcement (Feb. 8, 2016), <http://www.immigrantjustice.org/press-releases/nijc-sues-federal-government-release-data-racial-profiling-immigration-enforcement>.

71. *See* Geoffrey A. Hoffman, *Scrubbing Away Transparency and Our Immigration Resources*, LAW PROFESSOR BLOGS NETWORK: IMMIGR. PROF BLOG (July 5, 2017), <http://lawprofessors.typepad.com/immigration/2017/07/scrubbing-away-transparency-and-our-immigration-resources-by-geoffrey-a-hoffman.html>; Chris Cillizza, *Donald Trump Isn't Big on the Whole Transparency Thing*, CNN (Apr. 17, 2017, 8:32 PM), <http://www.cnn.com/2017/04/17/politics/donald-trump-transparency-visitor-logs-taxes/index.html>; Nolan D. McCaskill, *Trump's White House on Defensive Over Transparency*, POLITICO (Apr. 17, 2017, 7:09 PM), <http://www.politico.com/story/2017/04/donald-trump-transparency-privacy-237297>; Jeremy Venook, *The Trouble with Trump's Uneven Approach to Transparency*, THE ATLANTIC (May 25, 2017), <https://www.theatlantic.com/business/archive/2017/05/trump-uneven-approach-transparency/528165/>.

72. *See Transcript: Obama's immigration speech*, WASH. POST (Nov. 20, 2014), https://www.washingtonpost.com/politics/transcript-obamas-immigration-speech/2014/11/20/14ba8042-7117-11e4-893f-86bd390a3340_story.html.

73. Johnson, *Doubling Down on Racial Discrimination*, *supra* note 21, at 1010.

74. *See* Udi Ofer, *Attorney General Jeff Sessions Has Just Doubled Down on the Immoral, Racist, and Counterproductive War on Drugs*, ACLU (May 12, 2017, 4:30 PM), <https://www.aclu.org/blog/speak-freely/attorney-general-jeff-sessions-has-just-doubled-down-immoral-racist-and>; Jelani Cobb, *Will Jeff Sessions Police the Police?*, THE NEW YORKER (Apr. 24, 2017), <http://www.newyorker.com/magazine/2017/04/24/will-jeff-sessions-police-the-police> (criticizing Sessions'

tion of the underlying causes of disparate impacts on Latina/o noncitizens is imperative.⁷⁵

III. SYSTEMIC CRIMINAL IMMIGRATION BIAS

Both criminal and immigration law have a history of racially disparate enforcement in spite of facial colorblindness.⁷⁶ Even when criminal and immigration law are not explicitly connected, the two systems “generate mutually reinforcing enforcement efforts” that have a disparate impact on “disfavored minority groups.”⁷⁷ When criminal and immigration policing are merged, the practices are mutually reinforcing, the consequences compounded, and a consistently racially disparate outcome for noncitizen Latina/os is all but guaranteed. Following the first wave of “crimmigration” scholarship,⁷⁸ scholars have begun to explore racially disparate impacts in

announcement regarding reinvigorating the drug war and ceasing Justice Department review of police misconduct); Eric Lichtblau, *Sessions Indicates Justice Department Will Stop Monitoring Troubled Police Agencies*, N.Y. TIMES (Feb. 28, 2017), <https://www.nytimes.com/2017/02/28/us/politics/jeff-sessions-crime.html>; Matt Zapposky, *Trump Wants to Empower Local Police to Enforce Immigration Law, Raising Fears of Racial Profiling*, WASH. POST (Jan. 26, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/01/26/trump-wants-to-empower-local-police-to-enforce-immigration-law-raising-fears-of-racial-profiling/?utm_term=.095f15ca48f6.

75. Emily Schltheis, *Donald Trump: U.S. Must “Start Thinking About” Racial Profiling*, FACE THE NATION (June 19, 2016, 10:14 AM), <http://www.cbsnews.com/news/donald-trump-after-orlando-racial-profiling-not-the-worst-thing-to-do/>; see also Letter from Christopher Lasch, Assoc. Professor, Univ. of Denver Sturm College of Law, to Honorable Bob Goodlatte, Chairman, Comm. on the Judiciary, U.S. House of Representatives, and Honorable Zoe Lofgren, Ranking Member, Subcomm. on Immigr. and Border Sec. (Sept. 26, 2016) (on file with author) (citing TREVOR GARDNER II & AARTI KOHLI, BERKELEY LAW CTR. FOR RESEARCH & ADMIN., THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM 4–6 (Sept. 2009), https://www.law.berkeley.edu/files/policybrief_irving_0909_v9.pdf) (identifying the correlation between detainees and profiling of Latinos in Irving, Texas); SARAH WHITE & SALMUN KAZEROUNIAN, TENN. IMMIGR. & REFUGEE RTS. COAL., THE FORGOTTEN CONSTITUTION: RACIAL PROFILING AND IMMIGR. ENFORCEMENT IN BEDFORD COUNTY, TENNESSEE 6 (2011), <http://www.tnimmigrant.org/storage/The%20Forgotten%20Constitution.pdf> (recounting how Bedford County law enforcement agents engaged in racial profiling related to perceived immigration status using criminal allegations and arrests as pretext to make “arrests that will enable jailers to contact ICE”).

76. See Kevin R. Johnson, *Doubling Down on Racial Discrimination*, *supra* note 21, at 1025–26 (citing Mary Fan, *Post-Racial Proxy Battles over Immigration*, in STRANGE NEIGHBORS: THE ROLE OF STATES IN IMMIGR. POL’Y 229–58 (Carissa Byrne Hessick & Gabriel J. Chin eds., 2014)) (arguing that state immigration enforcement measures are a “proxy to vent resurgent anxieties.”) See generally Kevin R. Johnson, *A Case Study of Color-blindness: The Racially Disparate Impacts of Arizona’s S.B. 1070 and the Failures of Comprehensive Immigration Reform*, 2 U.C. IRVINE L. REV. 313 (2012) (analyzing racially disparate impacts of color-blind immigration laws).

77. Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U.L. REV. 709, 742 n.163 (2015) (citing TANYA MARIA GOLASH-BOZA, *DEPORTED: POLICING IMMIGRANTS, DISPOSABLE LABOR AND GLOBAL CAPITALISM* 132 (2015); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L.J. 599 (2015)).

78. HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* 57–61 (2014); Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDAZO L. REV. 1751, 1754–55 (2013); Gabriel J. Chin & Margaret Love, *Status as Punishment: A Critical Guide to Padilla v. Kentucky*, 25 CRIM. JUST. 21, 25 (2010); Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 253–55 (2011); Cox & Miles, *Policing Immigration*, *supra* note 18, at 88; Ingrid V. Eagly, Crimi-

criminal immigration enforcement.⁷⁹ This Part will outline the systemic na-

nal Justice for Noncitizens: An Analysis of Variation in Local Enforcement, 88 N.Y.U. L. REV. 1126, 1129–31 (2013); Ingrid V. Eagly, Prosecuting Immigration, *supra* note 12; Mary Holper, Confronting Cops in Immigration Courts, 23 WM. & MARY BILL RTS. J. 675, 675–76 (2015); Johnson, How Racial Profiling in America Became the ‘Law of the Land’, *supra* note 58, at 1007; Anil Kalhan, Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy, 74 OHIO ST. L.J. 1105, 1107–09; Daniel Kanstroom, The Right to Deportation Counsel in *Padilla v. Kentucky*: The Challenging Construction of the Fifth-and-a-Half Amendment, 58 UCLA L. REV. 1461, 1462–64 (2011); Christopher N. Lasch, Preempting Immigration Detainer Enforcement Under Arizona v. United States, 3 WAKE FOREST L. J. & POL’Y 281, 313–30 (2013); Rick Su, Police Discretion and Local Immigration Policymaking, 79 UMKC L. REV. 901, 901–03 (2011). Criticism of reliance on the criminal justice system for effectuating deportation contributes significantly to the body of “cimmigration law.” Some of that scholarship is available here: Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613 (2012); Mary Fan, *The Case for Cimmigration Reform*, 92 N.C. L. REV. 75 (2013); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and its Possible Undoing*, 49 AM. CRIM. L. REV. 105 (2012); Daniel I. Morales, *Transforming Crime-Based Deportation*, 92 N.Y.U. L. REV. 698 (2017); Daniel I. Morales, *Crimes of Migration*, 49 WAKE FOREST L. REV. 1257 (2014); Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006); see also Jennifer Lee Koh, *Cimmigration and the Void for Vagueness Doctrine*, 2016 WIS. L. REV. 1127 (2016). For analysis of the origins of the modern cimmigration system, see Rachel E. Rosenbloom, *Policing Sex, Policing Immigrants: What Cimmigration’s Past Can Tell Us About Its Present and Future*, 104 CALIF. L. REV. 149 (2016); see generally GOVERNING IMMIGRATION THROUGH CRIME: A READER (Julie A. Dowling & Jonathan Xavier Inda eds., 2013) (a collection of articles analyzing use of criminal laws for enforcement of immigration laws); Christopher N. Lasch, “Cimmigration” and the Right to Counsel at the Border Between Civil and Criminal Proceedings, 99 IOWA L. REV. 2131, 2132 (2014); Yolanda Vázquez, *Realizing Padilla’s Promise: Ensuring Noncitizen Defendants Are Advised of the Immigration Consequences of a Criminal Conviction*, 39 FORDHAM URB. L.J. 169, 190 (2011); César Cuauhtémoc García Hernández, *The Life of Cimmigration Law*, 92 DENV. U. L. REV. 697 (2015); Motomura, *supra* note 49; César Cuauhtémoc García Hernández, *Creating Cimmigration*, 2013 BYU L. REV. 1457, 1515 (2013); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. Sidebar 42 (2010); Sharpless, *supra* note 13; Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009); Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651 (2009); Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299 (2011); Ian F. Haney-López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010); Michael J. Wishnie, *Proportionality: The Struggle for Balance in U.S. Immigration Policy*, 72 U. PITT. L. REV. 431 (2011).

79. Recently, scholar Angélica Cházaro has characterized this as “Cumulative Harms: Layering Criminal Justice Dysfunction on Immigration Enforcement.” Cházaro, *supra* note 9, at 608; see also Jeh Johnson Apprehension Memo, *supra* note 45, at 5 n.17; Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613 (2012) (analyzing the overcriminalization of immigration law); Allegra M. McLeod, *The U.S. Criminal Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105 (2012) (questioning the growing reliance on the criminal law as a means of enforcing the U.S. immigration laws); Stephen H. Legomsky, *The New Patch of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007) (examining the growing ties between criminal law and removals); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 83–86 (2005) (discussing the consequences of the increasing interaction between criminal justice system and immigration enforcement laws); Stumpf, *The Cimmigration Crisis*, *supra* note 78 (coining the term “cimmigration” and analyzing the confluence of criminal and immigration law); Daniel I. Morales, *Crimes of Migration*, 49 WAKE FOREST L. REV. 1257, 1260 (2014). For examples of emerging critical race analysis implicated by the merging of criminal and immigration enforcement, see

ture of criminal immigration bias and underscore the significance of bias in criminal law in criminal immigration outcomes.

In the context of renewed yet potentially short-lived criminal justice reform,⁸⁰ increased attention has been paid to the history and persistence of bias in the criminal justice system.⁸¹ However, there is little evidence to suggest that criminal justice reforms have decreased disparate impacts on communities of color. Because criminal immigration enforcement, including Secure Communities and PEP, target noncitizens deemed “criminal,” racial profiling in the criminal justice system remains relevant to addressing disparate impacts of criminal immigration enforcement. Despite PEP’s changes, including its attempt to shift discretion back to a macro-level policy agenda (that still targets “criminal” aliens), its revised detainer policy,

Johnson, *Doubling Down on Racial Discrimination*, *supra* note 21; Johnson, *A Case Study of Color-blindness*, *supra* note 76; Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 *LAW & CONTEMP. PROBS.* 1 (2009); Fan, *The Case for Crimmigration Reform*, *supra* note 78, at 89–100 (outlining the case for crimmigration reform and discussing how the increase in the Asian and Hispanic populations in the United States transformed the nature of the debate over immigration reform); Katarina Ramos, *Criminalizing Race in the Name of Secure Communities*, 48 *CAL. W.L. REV.* 317, 338–39 (2012) (criticizing the role of race in the operation of the Secure Communities program); Maureen A. Sweeney, *Shadow Immigration Enforcement and its Constitutional Dangers*, 104 *J. CRIM. L. & CRIMINOLOGY* 227 (2014) (analyzing increasingly common phenomenon of state and local law enforcement involvement in federal immigration enforcement and the resulting negative impacts on minority communities); Vázquez, *Constructing Crimmigration*, *supra* note 77 (addressing the consequences of a color-blind approach of crimmigration which has racially disparate impacts on Latina/os); Alia Al-Khatib, Comment, *Putting a Hold on ICE: Why Law Enforcement Should Refuse to Honor Immigration Detainers*, 64 *AM. U.L. REV.* 109, 161 (2014); Rosenbaum, *supra* note 58 (describing historic bias in criminal, particularly marijuana law enforcement, and immigration law).

80. See *Criminal Justice Reform: What You Need to Know About President Obama’s Plans for Criminal Justice Reform*, THE WHITE HOUSE, <https://obamawhitehouse.archives.gov/issues/criminal-justice-reform>; Jamiles Lartey, ‘Justice for Some’: Advocates Worry Jeff Sessions Could Halt Criminal Justice Reform, THE GUARDIAN (Nov. 18, 2016), <https://www.theguardian.com/us-news/2016/nov/18/jeff-sessions-trump-attorney-general-criminal-justice-reform>; see also Nicholas Espiritu, *(E)racing Youth: The Racialized Construction of California’s Proposition 21 and the Development of Alternate Contestations*, 52 *CLEV. ST. L. REV.* 189 (2005) (addressing the racialized nature of criminal justice reform in California).

81. There is an extensive body of scholarship addressing racial bias in the criminal justice system. A very modest and not comprehensive sampling includes: ALEXANDER, *supra* note 13; Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 *WASH. & LEE L. REV.* 509 (1994); Kevin R. Johnson, *Taking the “Garbage” Out in Tulia, Texas: The Taboo on Black-White Romance and Racial Profiling in the “War on Drugs”*, 2007 *WIS. L. REV.* 283 (2007); Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 *UCLA L. REV.* 1543 (2011); RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2d ed. 2011); 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, 667 (2011) (reviewing Angela J. Davis, *Benign Neglect of Racism in the Criminal Justice System: Malign Neglect: Race, Crime, and Punishment in America*, 94 *MICH. L. REV.* 1660 (1996)); *RACE AND EQUALITY LAW* (Angela P. Harris ed., 2013); Mary Romero & Gabriella Sánchez, *Critical Issues Facing Hispanic Defendants: From Detection to Arrest*, in *HISPANICS IN THE U.S. CRIMINAL JUSTICE SYSTEM* 63 (Martin Guevara Urbina ed., 2012).

and its measures to increase transparency, PEP failed to minimize the disparate impact of criminal immigration enforcement on Latina/os.⁸²

Particularly with increased interior enforcement,⁸³ criminal immigration policing has both relied on and simultaneously reinforced existing criminological, carceral, and penal institutional structures, in spite of an increasing awareness and acknowledgment of the problems of overbreadth and racialization, even at the level of the Executive.⁸⁴ By relying on “criminality” as defined by the criminal justice system, the immigration enforcement system is tainted by the flaws of the criminal justice system.⁸⁵ Latina/o noncitizens have specifically suffered from narratives characterizing noncitizens (and Latina/o citizens) as criminals.⁸⁶ This rhetoric falsely characterizing immigrants, and particularly Latina/o immigrants, as criminals feeds policies like Secure Communities and PEP.⁸⁷ State laws that create colorblind, presumably immigration-status neutral criminal sanctions for activities engaged in by immigrants, like driving, are particularly problematic.⁸⁸

82. Aura Bogado, *Goodbye, Secure Communities. Hello, Priority Enforcement Program*, COLORLINES (Nov. 21, 2014, 8:57 PM), <http://www.colorlines.com/articles/goodbye-secure-communities-hello-priority-enforcement-program>. Other scholars, particularly Kevin R. Johnson, have explored racially disparate impacts, falling heaviest on Latina/os, of crimmigration law. *See, e.g.*, Johnson, *Doubling Down on Racial Discrimination*, *supra* note 21; Johnson, *A Case Study of Color-blindness*, *supra* note 76.

83. *See generally* STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGR. AND REFUGEE LAW AND POL’Y* 1148–52 (5th ed. 2009) (describing the increased resources devoted to increased interior enforcement).

84. Sari Horwitz & Wesley Lowery, *Obama’s Crusade Against a Criminal Justice System Devoid of ‘Second Chances’*, WASH. POST (April 22, 2016), <https://www.washingtonpost.com/graphics/national/obama-legacy/racial-profiling-criminal-justice-reform.html>.

85. Exploration of the harms of racial profiling will be even more necessary as the pendulum potentially swings back towards heightened policing of communities of color; increase in mass incarceration is feared. Ali Younes, *Black Americans Fear Racism, Police Violence Post-Trump*, AL JAZEERA (Nov. 11, 2016), <http://www.aljazeera.com/news/2016/11/black-americans-fear-racism-police-violence-post-trump-16111113721530.html>; Cristina Silva, *Will Trump Put More Black People in Prison? Law and Order Plan Will Increase Police Presence in African-American Neighborhoods*, INT’L BUSN. TIMES (N.Y.C.) (Nov. 14, 2016, 1:28 PM), <http://www.ibtimes.com/will-trump-put-more-black-people-prison-law-order-plan-will-increase-police-presence-2445902>.

86. *See generally* Deborah Weissman, *The Politics of Narrative: Law and the Representation of Mexican Criminality*, 38 *FORDHAM INT’L L.J.* 141 (2015). Racially disparate impacts of immigration enforcement are longstanding. *See* Johnson, *Doubling Down on Racial Discrimination*, *supra* note 21, at 998 (citing generally ALFREDO MIRANDÉ, *GRINGO JUSTICE* (1987)) (exploring the history of racial disparities in U.S. immigration law).

87. *See* WALTER EWING, DANIEL E. MARTÍNEZ & RUBÉN G. RUMBAUT, *THE CRIMINALIZATION OF IMMIGRATION IN THE UNITED STATES* (2015), <https://www.americanimmigrationcouncil.org/research/criminalization-immigration-united-states> (study that confirms that immigrants are less likely to engage in criminal activity than citizens); *see also* Emily Ryo, *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*, 62 *UCLA L. REV.* 622, 624–28 (2015) (deconstructing the unsupportable contentions that immigrants are more likely to be criminals than citizens).

88. *See* Annie Lai, *Confronting Proxy Criminalization*, 92 *DENV. U. L. REV.* 879, 881 (2015) (addressing the problem of state criminal penalties for conduct in which immigrants habitually engage, like driving).

Use of racial or ethnic appearance in immigration policing continues to implicitly condone racial profiling in criminal immigration enforcement.⁸⁹ The Supreme Court's rulings in the civil immigration case *Brignoni-Ponce*, authorizing use of "Mexican appearance" as a "relevant factor" in enforcing immigration law,⁹⁰ combined with the Court's ruling in *Whren*, failing to find an officer's racial bias in a criminal traffic stop,⁹¹ seem to have tacitly condoned racial profiling in criminal immigration enforcement.⁹² Similarly, the Court's ruling in *Lopez-Mendoza* curtailed consideration of racial bias in a stop challenged in the immigration removal context.⁹³ Thus, Fourteenth Amendment Equal Protection and the Fourth Amendment provide limited means to address racially-biased exercises of police discretion that impact Latina/o noncitizens.⁹⁴

The immigration removal system has increasingly relied on criminality as a means of designating noncitizens as priorities for deportation.⁹⁵ Regardless of political party affiliation, policymakers employ the "criminal alien" classification as a convenient, seemingly neutral means of defining "desirable" as opposed to "undesirable" noncitizens. The "criminal alien"

89. *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975); see also Johnson, *How Racial Profiling Became the Law of the Land*, *supra* note 58, at 1021–23, 1060–63 (examining the way in which the Supreme Court's ruling on use of racial profiling in criminal and immigration matters reinforces the practice in both).

90. *United States v. Brignoni-Ponce*, 422 U.S. at 886–87.

91. *Whren v. United States*, 517 U.S. 806, 813 (1996).

92. See also Johnson, *Doubling Down on Racial Discrimination*, *supra* note 21, at 1010 n.71 (citing 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 147, 184 (2009)) ("The significance of the language in *Brignoni-Ponce*—'Mexican appearance'—and *Martinez-Fuerte*—'of apparent Mexican ancestry'—cannot be overstated."); see also Lupe S. Salinas & Fernando Colon-Navarro, *Racial Profiling as a Means of Thwarting the Alleged Latino Security Threat*, 37 T. MARSHALL L. REV. 5, 13 (2011) (analyzing adverse impacts of racial profiling on Latina/os).

93. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984); see also Stella B. Elias, 'Good Reason to Believe': *Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revising Lopez-Mendoza*, 2008 WIS. L. REV. 1109, 1151–54 (2013) (discussing the need for Court to reconsider the widespread nature of constitutional violations).

94. See *Lopez-Mendoza*, 468 U.S. 1032 at 1050 (asserting that exclusionary rule applies in immigration court to suppress only "egregious" violations of the Fourth Amendment); see also Carrie L. Rosenbaum, *The Role of Equality Principles in Preemption Analysis of Sub-federal Immigration Laws: The California TRUST Act*, 18 CHAP. L. REV. 481, 499–502 (2015) (making the case why the immigrant protective California TRUST Act should not be deemed preempted because of the necessary role of equality principles in the constitutional analysis and discussing shortcomings of existing measures, such as Equal Protection and the Fourth Amendment, to provide meaningful protection to noncitizens challenging criminal immigration enforcement effected by racially biased stops); see also Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1614 (2010).

95. See, e.g., Jennifer Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. 135, 143 (2009); Vázquez, *Perpetuating the Marginalization of Latinos*, *supra* note 81, at 644 (discussing portrayal of Latinos as threats to national security and criminals to justify disproportionate enforcement of criminal and immigration laws against Latinos).

classification remains an “ideologically, and politically expedient” means of drawing lines.⁹⁶

President Obama’s announcement of PEP was superficially represented as the solution to the failures of Secure Communities, highlighting “felons not families”⁹⁷ as the priority for immigration enforcement. However, this characterization erased the raced nature of criminal justice policing, perpetuating the equally racialized characterization he employed previously of “gang bangers.”⁹⁸ Both labels are reminiscent of the “tough on crime”⁹⁹ rhetoric of prior decades used to justify mass incarceration of people of color, all while appearing colorblind.¹⁰⁰ In spite of some recognition of racial injustice in the criminal justice system in recent years, even the administration of the first African-American president did not attempt to rhetorically undo the characterization of Latina/os immigrants as criminals, or otherwise address racial bias in the crimmigration pipeline.

Scholar Yolanda Vázquez aptly described the merging of criminal and immigration law as having restructured social categories, further diminishing Latina/o economic and political power, and exacerbating Latina/o marginalization.¹⁰¹ Vázquez suggests that “hyper-incarceration ‘finely

96. García Hernández, *The Perverse Logic of Immigration Detention*, *supra* note 13, at 361; *see also* Cházaro, *supra* note 9, at 599 (explaining how the Executive Action benefits from recasting immigrants as “criminal aliens” because the term denotes a “more ideologically acceptable set of targets”); Sean Bauer, *My Four Months as a Private Prison Guard*, MOTHER JONES (July/Aug. 2016), <http://www.motherjones.com/politics/2016/06/cca-private-prisons-corrections-corporation-inmates-investigation-bauer> (explaining how conflation of refugee or immigrant with criminal is enhanced by DHS policy of incarcerating refugees as if they were criminals when they arrive at the border asking for safe haven). Bauer’s article adds new complexity, suggesting it is possible that in the public imagination, the label of “immigrant” or even “refugee” may be surpassing “criminal” (or “criminal alien”) in the category of the most disdained members of society where prisoners stated that guards beat them so brutally it was “like they were refugees.”

97. President Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), <https://www.whitehouse.gov/the-pressoffice/2014/11/20/remarks-president-address-nation-immigration>.

98. John Arit, *Obama Isn’t Deporting “Gangbanger” Immigrants, But Ones Who Run Red Lights*, THE ATLANTIC (April 7, 2014), <http://www.theatlantic.com/politics/archive/2014/04/obama-isnt-deporting-gangbanger-immigrants-but-ones-who-run-red-lights/360255/> (referencing Obama’s use of the term “gangbanger” in discussing who should be deported from the U.S. and explaining the vast and biased reach of the criminal immigration system).

99. *See* STEVEN BENDER, MEA CULPA: LESSONS ON LAW AND REGRET FROM U.S. HISTORY 82 n.40 (2015) (discussing the criminalization of poverty); *see also* Miriam Zoila Pérez, ‘Crack Baby’ Hysteria Returns, COLORLINES (July 18, 2014, 7:00 AM), <http://www.colorlines.com/articles/crack-baby-hysteria-returns> (explaining term “crack babies” became synonymous with the racist characterization of babies of African-American mothers who used crack akin to Obama’s use of “gang banger” to describe young inner-city, black mothers).

100. *See generally* ALEXANDER, *supra* note 13 (arguing that the criminal justice system has contributed to a new caste system that has maintained the subordination of African Americans in the United States); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001) (discussing mass incarceration as a phenomenon that has become the “systematic imprisonment of whole groups of the population”); MAY LOUISE FRAMPTON ET AL., AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND A NEW RECONSTRUCTION I (2008).

101. Vázquez, *Perpetuating the Marginalization of Latinos*, *supra* note 81, at 650.

targets' poor black US citizen males;" while here, "cimmigration 'finely targets' poor noncitizen Latina/os."¹⁰² Scholars such as Angélica Cházaro have urged a new approach to immigration enforcement that ceases to rely on "criminality" as a means of prioritizing individuals for deportation.¹⁰³ Cházaro suggests that the criminal justice system produces "'criminal aliens' . . . along lines of race, class, and other vectors of social vulnerability."¹⁰⁴ The immigration system reinforces and re-produces raced and classed marginalization, and answers the perceived social challenge of migration with incarceration and deportation.¹⁰⁵ Disavowing criminality rather than recognizing the inherent flaws in the criminal system, particularly with respect to racial disparities, does not challenge the logic of crime but substantiates it.¹⁰⁶ As a part of the paradigm of "respectability," the system demonizes alleged "criminal" noncitizens and encourages retrenchment of biases and flaws of the system.¹⁰⁷

In spite of designated immigration priorities allegedly focusing on people who have been convicted of violent or dangerous crimes as enforcement priorities, in practice, crimes that are neither serious, nor violent, including "repeat misdemeanors," contribute to the manufacturing of "'criminals' based on race, class and social vulnerability," and funnel individuals into the immigration removal system.¹⁰⁸ Immigration authorities reliance on sub-federal arrests can mask local law enforcement agents' racial and ethnic preferences and prejudices. As the criminal justice system continues to manufacture criminals along lines of race and class, criminal-immigration

102. Yolanda Vázquez, *Crimmigration: The Missing Piece of Criminal Justice Reform*, 51 U. RICH. L. REV. 1093 (2017).

103. See Cházaro, *supra* note 9, at 651.

104. *Id.* at 598.

105. See, e.g., Cházaro, *supra* note 9, at 637–38.

106. *Id.* at 651 (citing Lisa Marie Cacho, *The Rights of Respectability: Ambivalent Allies, Reluctant Rivals, and Disavowed Deviants*, in IMMIGRATION RIGHTS IN THE SHADOWS OF CITIZENSHIP 190, 199 (Rachel Ida Buff ed., 2008)). Just as past presidents trumpeted "tough on crime" rhetoric, President Obama has sounded the alarm of the "criminal alien." By calling for a focus on identifying, apprehending, and deporting so-called "criminal aliens," his administration contributed to the characterization of immigrants as criminals, implying that the morally correct answer to the problem of unauthorized immigration is to target "felons not families." See *Obama's immigration speech*, *supra* note 72. This rhetoric erases the multidimensionality of reality—a non-citizen may be both a parent and a worker yet subject to the "criminal" label due to the flawed nature of the criminal justice system. Yet at the same time as the criminal justice system is experiencing a crisis of legitimacy, state-level and even national calls for reform and actual reforms due to recognition of over-criminalization and racial bias, the immigration system has not yet questioned reliance on this system, which has increasingly become acknowledged as a failure.

107. See Sharpless, *supra* note 13, at 731.

108. Cházaro, *supra* note 9, at 610–11 (2016) ("With ten million misdemeanor cases filed annually, as compared to the one million felony convictions entered in the United States each year, the misdemeanor process represents 'the concrete mechanism by which the system is able to generate 'criminals' based on race, class, and social vulnerability. . . .") (citing Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313,1314–15, 1368 (2012).

law will continue to entrench disparate outcomes and impacts on Latina/o noncitizens.

The disproportionate criminal immigration deportation of noncitizens of Central American and Mexican origin reflects the racial and ethnic disparities of the criminal justice system.¹⁰⁹ More than ninety-five percent of noncitizens removed annually are from Mexico and Central America—far out of proportion to those groups’ representation in the U.S. immigrant population.¹¹⁰ The possibility of incarceration or deportation, or the incarceration or deportation of family members, is ever-present in the lives of Latina/os, not unlike the threat of police violence in all communities of color.¹¹¹

Racial bias in criminal sub-federal law enforcement begins at least in part with arresting officers’ discretion to arrest.¹¹² Sub-federal racially-biased abuse of discretion can occur in the context of using arrests to “control” the streets.¹¹³ Along these lines, the Supreme Court’s allowance of warrantless arrests for minor offenses seems to sanction such practices,¹¹⁴ despite the fact that such tactics fall disproportionately on communities of color.¹¹⁵ Crime “control” arrests often lack probable cause and mask implicit bias.

As Angelica Cházaro explains, in the context of addressing the problem of the “criminal alien paradigm,” misdemeanor prosecutions are a fre-

109. See Rosenbaum, *supra* note 58, at 13; see also Johnson, *Racial Profiling in the War on Drugs Meets the Immigration Removal Process*, *supra* note 43, at 976–77 (citing sources).

110. See Johnson, *Racial Profiling in the War on Drugs Meets the Immigration Removal Process*, *supra* note 43, at 969, 976–77.

111. See Hing, *From Ferguson to Palestine*, *supra* note 21, at 574 (addressing police abuse of power in a racist manner, discussing the “broken windows” model of policing, and considering whether the Black Lives Matter movement offers alternatives that ensure equal access to protection and public safety while eliminating the ever present fear of police brutality in communities of color); Sam P.K. Collins, *How the Breakdown of Trust with the Police Impacts Black Lives*, THINK PROGRESS (July 31, 2015), <https://thinkprogress.org/how-the-breakdown-of-trust-with-the-police-impacts-black-lives-dca8c95a6a74#.g0dm3dwvz>.

112. See Motomura, *supra* note 49, at 1853 (explaining that the “discretion that matters” for noncitizens fearing deportation “is the discretion by local law enforcement to arrest” them and that once noncitizens are put into removal proceedings, there is a “very high likelihood that they will be ordered and actually removed.”)

113. David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 *NEW CRIM. L. REV.* 157–223 (2012) (explaining federal immigration enforcement’s merging with sub-federal criminal enforcement induces police to view the two—criminal and immigration law—as different tools to access in achieving their ultimate goal; use whichever best suits the circumstances).

114. See *Terry v. Ohio*, 392 U.S. 1 (1968).

115. *Atwater v. Lago Vista*, 532 U.S. 318 (2000); see also *Utah v. Strieff*, 136 S. Ct. 2056, 2070–71 (2016) (Sotomayor, J., dissenting) (citing scholars Michelle Alexander, Ta-Nehisi Coates, Lani Guinier and Gerald Torres, suggesting “[i]t is no secret that people of color are disproportionate victims of this type of scrutiny,” referring to racially-biased policing, and “you are not a citizen of a democracy but the subject of a carceral state, just waiting to be catalogued.”) Had this case concerned a noncitizen subject to this same arguably unconstitutional policing, the implications would be more severe, but the legal remedies even more curtailed/circumscribed.

quent outcome of pretextual crime control arrests.¹¹⁶ Nationwide, annually, there are approximately ten-million misdemeanor prosecutions, which is ten times the number of felony cases.¹¹⁷ Misdemeanor arrests often result in misdemeanor convictions, in part because most indigent arrestees lack appointed counsel for misdemeanor charges. Young Latino men bear the disproportionate burden of misdemeanor arrests without probable cause, particularly when they live in low-income communities,¹¹⁸ and accordingly, when they are noncitizens, similarly, they are disproportionately deported.

Indicative of the more fundamental problem of the “criminal alien” paradigm, because of the data transmission component of PEP, sub-federal law enforcement agents used misdemeanors as a pretext in identifying potential noncitizens.¹¹⁹ Because PEP designated “serious,” that is, repeat, misdemeanants as an immigration enforcement priority, the problems of biased criminal policing continue to migrate to the immigration removal system.¹²⁰ This is particularly true in the case of noncitizens identified by criminal law enforcement agents as a result of conduct constituting a misdemeanor offense. Because immigration enforcement can result from criminal law enforcement action, arrests can be used as regulation with racially-biased screening used to detect suspected noncitizens, all while evading barriers intended to prevent racial bias in criminal policing.¹²¹

116. Cházaro, *supra* note 9, at 608 (citing Natapoff, *supra* note 108, at 1314–15) (arguing that informal and deregulated processing, weak prosecutorial screening, poor defense bar, and high plea rates contribute to mass conviction of petty misdemeanor offenses, which carry harsh consequences and implicate due process concerns).

117. *Id.* at 670 n.71 (“The lack of procedure during the plea or trial phase of the misdemeanor process transfers the legal authority as to who will be convicted to police officers. This transfer means that a misdemeanor arrest is overwhelmingly likely to result in a misdemeanor conviction. Because racial profiling is a reality in urban policing, the increased legal authority given to police officers translate into the mass criminalization of young men of color.”); *see also* Sharpless, *supra* note 13, at 727–28 (arguing traffic violations, historically subject to pre-textual practices, are frequently the gateway offense leading to adverse immigration consequences).

118. Cházaro, *supra* note 9, at 610 (citing *Ice Deportations: Gender, Age, and Country of Citizenship*, TRAC IMMIGR. (Apr. 9, 2014), <http://trac.syr.edu/immigration/reports/350/> (noting that, between 2012 and 2013, more than ninety percent of ICE deportees were male); *see also* Natapoff, *supra* note 108, at 1330–31).

119. Cházaro, *supra* note 9, at 617.

120. *Id.* at 624; *see also* Johnson, *Doubling Down on Racial Discrimination*, *supra* note 21, at 998–1000 (critiquing the lack of adequate attention by the scholarly community to address the relevance of racial profiling in criminal policing and its relatedness to criminal immigration enforcement).

121. *See* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 854–55 (2015); Elina Treyger, *Collateral Incentives to Arrest*, 63 U. KAN. L. REV. 557, 559 (2015); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1102–15 (2004) (explaining how state and local enforcement of immigration law may increase racial profiling in criminal policing); *see also* Letter from Thomas E. Perez, Assistant Att’y Gen., U.S. Dep’t of Just., Civ. Rts. Div., to Clyde B. Albright, Cty. Att’y, Alamance Cty. & Chuck Kitchen, Turrentine Law Firm 5 (Sept. 18, 2012), <http://goo.gl/vovKgM>; *Melendres v. Arpaio*, 989 F. Supp. 2d 822, 827 (D. Ariz. 2013) (providing specific examples in Alamance County, North Carolina where police were more likely to stop Latino drivers, and Phoenix, Arizona, where former Sheriff Joe Arpaio of Maricopa County directed or allowed officers to rely on race to conduct traffic stops in

Even with PEP's requirement of a conviction for a "significant" misdemeanor, the realities of policing of criminal misdemeanors meant that the Program was unlikely to have minimized disparate impact on noncitizen Latina/os. Individuals arrested for low-level criminal offenses are likely to enter the criminal justice system as a result of racial profiling, compounding the problem of racial and ethnic bias in the criminal immigration removal system. Absent an undoing of racially-biased criminal policing, PEP's attempt to shift discretion to macro-level priorities and its requirement of convictions rather than just arrests were unlikely to have solved the problem.

Professor Cházaro has stated that while criminal justice policy experienced a period where mass incarceration was recognized as a problem and thus became less punitive, the same was not true in immigration enforcement where "the unprecedented resources applied to both border and interior enforcement and the growth in detention have not yet reached politically unpalatable levels."¹²² The Obama administration was criticized for incarceration of immigrants and refugees and mass deportations,¹²³ and President Trump and his appointees have expressed intent to dedicate even more resources to incarcerating and deporting noncitizens, with fewer protections than existed previously.¹²⁴ Thus, there may not be such thing as a

express violation of the Equal Protection Clause); Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1057 (2015) (exploring misdemeanor decriminalization, in part arguing that the "misdemeanor machinery is a major source of overcriminalization" and "produces much of the racial skew of the U.S. criminal population.")

122. Cházaro *supra* note 9, at 643 nn.227–28.

123. Editorial Board, *Mr. Obama's Dubious Detention Centers*, N.Y. TIMES (Jul. 18, 2016), <https://www.nytimes.com/2016/07/18/opinion/mr-obamas-dubious-detention-centers.html>; Julianne Hing, *For Immigrants, the Obama Era Has Been Long and Maddening*, NATION MAG. (Jun. 27, 2016) <https://www.thenation.com/article/for-immigrants-the-obama-era-has-been-long-and-maddening/>; Philip L. Torrey, *Immigration Detention's Unfounded Bed Mandate*, 15-04 IMMIGR. BRIEFINGS 1, Apr. 2015, (calling out the immigration detention "bed mandate" or "bed quota," as "poor public policy at best and unconstitutional at worst"); Anita Sinha, *Arbitrary Detention? The Immigration Detention Bed Quota*, 12 DUKE J. CONST. L. & PUB. POL'Y 77 (2017) (examining the detention bed quota and providing a due process and human rights critique); Bill Ong Hing, *Ethics, Morality, and Disruption of U.S. Immigration Laws*, 63 U. KAN. L. REV. 981, 983 (2015) (critiquing Obama era mass deportation and disruptive enforcement tools creating a culture of impunity for rights violations); Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 668–69 (2015) (describing enforcement and lack of sufficient discretion in immigration enforcement under the Obama administration and suggesting that Congress address immigration reform by scaling back removal provisions, create opportunity for judicial discretion and legalization for undocumented persons); Muzaffar Chishti, Sarah Pierce & Jessica Bolter, *The Obama Record on Deportations: Deportee in Chief or Not?*, MIGRATION POL'Y INST. (Jan. 26, 2017) (analyzing the Obama record and legacy on deportations and acknowledging the complexity of the immigration system), <http://www.migrationpolicy.org/article/obama-record-deportations-deportee-in-chief-or-not>.

124. Chris Hayes & Brian Montopoli, *Trump Admin. Plans Expanded Immigration Detention*, MSNBC (Mar. 3, 2017), <http://www.msnbc.com/all-in/exclusive-trump-admin-plans-expanded-immigrant-detention>; Caitlin Dickerson, *Trump Plan Would Curtail Protections for Detained Immigrants*, N.Y. TIMES (Apr. 13, 2017), <https://www.nytimes.com/2017/04/13/us/detained-immigrants-may-face-harsher-conditions-under-trump.html>.

politically unpalatable level of criminal and/or criminal immigration enforcement.

While Secure Communities resulted in disproportionate deportation of Latina/os with minor criminal convictions (or none at all), the focus on procedural failures rather than substantive challenges and the premise that criminality is an indicator of undesirability validated PEP's immigration enforcement regime in spite of continuing racial disparities.¹²⁵ Even if resistance to criminal immigration enforcement via renewed vows to honor sanctuary policies persists, the foundational and substantive problem of criminal immigration enforcement remain.

Additionally, misplaced focus on procedural failures, including those advanced by a relatively pro-immigrant, rather than restrictionist administration, erases structural factors that manufacture a "criminal alien" out of a noncitizen—race, class, and factors like local policing practices."¹²⁶ As Ingrid Eagly highlights, the variance amongst immigrant protective policies within even one state can suggest vastly different outcomes for immigrants who have come into contact with the criminal justice system.¹²⁷ Cházaro's central claim is that the "criminal alien" paradigm should be dispensed with, in part because it is "an unnatural category for the distribution of the harms of detention and deportation."¹²⁸

The mismatched response of manufacturing "criminal aliens" instead of addressing systemic causes of the perceived problem of migration is reminiscent of the war on drugs of the 1980s. The drug-war policies resulted in what are now widely recognized as excessively punitive mass incarceration without a corresponding decrease in crime,¹²⁹ and has been characterized as a misplaced response to the social problem of poverty.¹³⁰

In recent years, drug policy measures had begun to shift with reframing of drug abuse as a public health rather than criminal justice problem.¹³¹ However, a parallel shift has yet to occur in criminal immigration law, and the two systems have yet to make meaningful change to decrease racially disparate impacts in the context of criminal immigration enforcement in general. As draconian drug policy measures are likely to be resurrected in

125. Cházaro, *supra* note 9, at 654 n.278 (citing Michele Waslin, *The Secure Communities Program: Unanswered Questions and Continuing Concerns*, IMMIGR. POL'Y CTR. 8–9 (Nov. 2011), <https://perma.cc/CSG5-NGM9> (explaining anti-Secure Communities advocates may have unintentionally reinforced the criminal alien category by critiquing ICE's removal statistics for deporting people who were *not* criminal aliens, as opposed to fundamentally questioning the reliance on criminality)).

126. Cházaro, *supra* note 9, at 55.

127. See Eagly, *Immigrant Protective Policies in Criminal Justice*, *supra* note 9.

128. Cházaro, *supra* note 9, at 659.

129. See ALEXANDER, *supra* note 13, at 60.

130. See Rosenbaum, *supra* note 58, at 10–16.

131. See, e.g., *Bernie Sanders on Drug Policy*, FEELTHEBERN.ORG, <http://feelthebern.org/bernie-sanders-on-drug-policy/> (last visited Feb. 4, 2017) (advocating for treatment in place of criminalization).

the coming years,¹³² the rhetoric about crime and safety will include the same veiled and structural racism of the past.

IV. THE ROLE OF EQUALITY CONSIDERATIONS IN CRIMINAL IMMIGRATION POLICING

Whether the mechanism connecting criminal and immigration enforcement is Secure Communities or PEP, systemic and persistent racial bias pervades criminal law enforcement and migrates into criminal immigration policing.¹³³ In discussions of counteracting or ending the racial harms of the criminal immigration system, scholars have focused primarily on immigrant “protective policies” at the sub-federal level and proposals for immigration reform.¹³⁴ To contribute to these conversations, this Part will propose further incorporation of discussions of equality principles in the context of decoupling criminal and immigration enforcement.¹³⁵ This Part will also suggest that eliminating the criminalization of noncitizens via the “criminal alien” profile might counteract the harms done by racially-biased criminal immigration policing. Shaping immigration policy with an emphasis on equality and with an eye toward integration may bring other collateral social and socio-legal benefits that come from substantively and meaningfully valuing the notion of equality.

Scholar Ingrid Eagly is one of the first criminal immigration scholars to explore the concept of immigrant equality in the context of criminal immigration enforcement and immigrant protective policies.¹³⁶ Eagly considers the way in which advocates have advanced the notion of equality principles as a justification for sub-federal immigrant protective policies, specifically with respect to the problem of unequal treatment of noncitizens accused of crimes.¹³⁷ Particularly in the face of a new administration led by

132. See sources cited *supra* notes 74–75.

133. See Lucas Guttentag, *Introduction, Immigration Reform: A Civil Rights Issue*, 3 *STAN J. C.R. & C.L.* 157, 158 (2007) (contending that “immigration law and policy cannot be divorced from issues of race, national origin, ethnicity, and color.”)

134. See generally Eagly, *Immigrant Protective Policies in Criminal Justice*, *supra* note 9 (addressing state and local immigrant protective policies as one manifestation of concerns about racially disparate impacts of criminal immigration enforcement); see also Johnson, *Doubling Down on Racial Discrimination*, *supra* note 21, at 1014–22 (analyzing state and local resistance to cooperation with federal immigration authorities, and immigration reform, as means to respond to the racially disparate harms of the criminal immigration removal system).

135. Eagly, *Immigrant Protective Policies in Criminal Justice*, *supra* note 9, at 301 (citing Off. of Cmty. Oriented Policing Servs., President’s Task Force On 21st Century Policing, Final Report Of The President’s Task Force On 21st Century Policing 18 (2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf) (“Federal immigration enforcement can be decouple[d] from routine policing for civil enforcement and non-serious crime.”); see also *id.* at 288 (citing Hiroshi Motomura, *Immigration Outside the Law*, 108 *COLUM. L. REV.* 2037, 2071, 2073–75 (2008)) (beginning the conversation about the immigrant integration justification for pro-immigrant local protective policies).

136. *Id.* at 294–99.

137. *Id.* at 288.

a president who has expressly made rhetorical connections between Latina/o identity and criminality,¹³⁸ suggested return to stop-and-frisk policing in spite of studies indicating racial profiling,¹³⁹ and an Attorney General who indicated an interest in returning to failed drug war policies known to have racially disparate impacts,¹⁴⁰ it may be appropriate to explore the relevance of equality principles even more broadly, rather than, as this Article has done thus far, merely address the failures of the PEP with respect to reinforcing racial profiling.¹⁴¹

Accordingly, this Part will plant the seeds for a fuller discussion of equality principles as a rationale, as a step, towards immigrant integration

138. David Nakamura, *Blame Game: Trump casts immigrants as dangerous criminals, but the evidence shows otherwise*, WASH. POST (Mar. 24, 2017), https://www.washingtonpost.com/politics/blame-game-trump-casts-immigrants-as-dangerous-criminals-the-evidence-shows-otherwise/2017/03/23/f12dffdc-0f4d-11e7-9d5a-a83e627dc120_story.html?utm_term=.93b8f1f831ad; Lisa Desjardins, *Every moment in Donald Trump's long and complicated history with race*, PBS NEWSHOUR (August 23, 2017, 10:56 AM), <http://www.pbs.org/newshour/updates/every-moment-donald-trumps-long-complicated-history-race/>.

139. Desjardins, *supra* note 138; Jeremy Diamond & David Wright, Trump touts stop-and-frisk practice amid black outreach, CNN (Sept. 22, 2016, 11:14 AM), <http://www.cnn.com/2016/09/21/politics/donald-trump-stop-and-frisk/>.

140. See Graham Vyse, *Jeff Sessions is bringing back the War on Drugs*, NEW REPUBLIC, <https://newrepublic.com/minutes/142678/jeff-sessions-bringing-back-war-drugs>; see also Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 462–63 (2000) (analyzing stop and frisk as a part of “broken windows” policing to assess whether broken windows reflected “place-based” strategies of what Broken Windows theory purports to be, or instead, targets people for arrest based on race and class); BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING*, 59-78 (2001). In the most comprehensive study of the “Broken Windows” theory to date, Robert Sampson and Stephen Raudenbush could find no relationship between observed physical disorder and crime in subject neighborhoods in Chicago, Illinois, finding instead that indicia of concentrated disadvantage within a community best predicted crime rates. See Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOC. 603, 637–39 (1999); see also Jonathan Oberman & Kendea Johnson, *Broken Windows: Restoring Social Order or Damaging and Depleting New York's Poor Communities of Color?*, 37 CARDOZO L. REV. 931, 950 (2016) (“Broken Windows policing has flooded the criminal justice system with a volume of low-level offenses that dramatically exceeds the system’s capacity for nuanced, due process based, adversarially-tested resolution.”); Lawrence Rosenthal, *The Crime Drop and the Fourth Amendment: Toward an Empirical Jurisprudence of Search and Seizure*, 29 N.Y.U. REV. L. & SOC. CHANGE 641, 682 (2005); Hope Corman & Naci Mocan, *Carrots, Sticks and Broken Windows* (Nat’l Bureau of Econ. Res., Working Paper No. 9061, 2002) (finding that arrest rates explained New York City’s crime reductions to a far greater extent than did economic conditions or Broken Windows-related factors); Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249, 2251 (1998) (suggesting that contrary to claims that “broken windows” policing using broad discretion for effective crime prevention is fallacious and results in civil rights violations and oppression of minority communities).

141. The Author will acknowledge more fully, in a subsequent work, the strategic and logistical reasons that advocates have come to rely less on the Equal Protection clause in litigation. Here, the Author intends to propose that despite challenges in using the Clause to advocate for equal justice, reasserting the relevance of equality and equal protection still play a critical role in the public perception of the value of equality. Eventually, that public perception may have the potential to shape the ability to resurrect, and see vindicated, equality claims in the courts.

and equality outside of the confines of immigration status.¹⁴² Recognizing and valuing equality principles is essential to countering systemic racism perpetuated through the criminal and criminal immigration systems, resulting in racially disparate deportations, and deepening socioeconomic and other longstanding racial divides that impact noncitizens and citizens alike.¹⁴³ Studies on race, ethnicity, and their proxies¹⁴⁴ suggest that prohibiting racial discrimination in the context of criminal immigration enforcement would have relevance and reverberations beyond the confines of immigration status.¹⁴⁵

There are several ways in which equality principles and the different but related principle of immigrant integration have been discussed in academic literature. Hiroshi Motomura has explored the significance of the Court's ruling in *Plyler v. Doe*¹⁴⁶ in the context of immigrant integration, where the "*Plyler* majority evidently saw immigrant integration not just as formal status but also as functional participation in American society."¹⁴⁷ Integration presumably suggests great social and economic mobility,¹⁴⁸

142. Cf. Eagly, *Immigrant Protective Policies in Criminal Justice*, *supra* note 9, at 288 (explaining that Linda Bosniak is one of the first to discuss the concept of "immigrant integration," and has written extensively on the idea of immigrant integration); see Linda S. Bosniak, *Immigrants, Preemption and Equality*, 35 VA. J. INT'L L. 179, 186 n.25 (1994).

143. See, e.g., Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, The Sentencing Project (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/> (in the context of incarceration); Timothy Williams, *Study Supports Suspicion that Police Are More Likely to Use Force on Blacks*, N.Y. Times (July 14, 2016), <https://www.nytimes.com/2016/07/08/us/study-supports-suspicion-that-police-use-of-force-is-more-likely-for-blacks.html> (in the context of policing); *On Views of Race and Inequality, Blacks and Whites Are Worlds Apart*, Pew Research Ctr. (June 27, 2016), <http://www.pewsocialtrends.org/2016/06/27/on-views-of-race-and-inequality-blacks-and-whites-are-worlds-apart/> (in the context of racial equality); Joshua Holland, *The Average Black Family Would Need 228 Years to Build the Wealth of a White Family Today*, The Nation (August 8, 2016), <https://www.thenation.com/article/the-average-black-family-would-need-228-years-to-build-the-wealth-of-a-white-family-today/> (in the context of socioeconomic equality).

144. See, e.g., Khaled A. Beydoun, *'Muslim Bans' and the (Re)Making of Political Islamophobia*, U. ILL. L. REV. (forthcoming 2017), <https://ssrn.com/abstract=2742857> (discussing Islamophobia and how Islam is constructed not only as a religion but also on racial terms equated with "otherness," and tracing the history of the Muslim naturalization ban to the modern day American Islamophobia).

145. See, e.g., Kevin R. Johnson, *Melting Pot or Ring of Fire: Assimilation and the Mexican-American*, 85 CAL. L. REV. 1259 (1997) (poignantly examining the ways in which the elevated status of "Whiteness" exacts a steep toll on not only Mexican nationals who lack legal status in the U.S. but on all Mexican-Americans). The Author hopes to explore the significance of elevating equality principles, chip away at Whiteness' hegemonic power, and decrease the harms of racial bias for both noncitizen Latina/os and all present in the United States.

146. *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (striking down a Texas statute requiring unauthorized immigrant children to pay for or be denied public education from kindergarten through twelfth grade).

147. Motomura, *Immigration Outside the Law*, *supra* note 135, at 2072 (explaining that while the *Plyler* decision focused on integration and education, the same principles are relevant in this context and merit a fuller discussion, which the Author hopes to address in an upcoming work).

148. See Eagly, *Immigrant Protective Policies in Criminal Justice*, *supra* note 9, at 289 (citing Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L.

which can correspond with decreased interaction with the criminal justice system.¹⁴⁹

One form of “immigrant equality” is informed by the idea of “equal treatment along racial and ethnic lines.”¹⁵⁰ Eagly explains, “An immigrant equality approach calls for attention to the ways in which immigration policing can shift the priorities and practices of the criminal law in ways that promote and mask profiling of Latinos and ethnically disparate treatment in prosecution and punishment practices.”¹⁵¹ In other words, criminal immigration enforcement necessarily creates a potential incentive to attempt immigration law enforcement via criminal policing. That alone, even absent already systemic racial bias in criminal policing, adds another dimension to the racial bias persistent in criminal law enforcement efforts.

Therefore, if connecting criminal and immigration enforcement adds more incentive to engage in racial profiling, and criminal enforcement is already infected by such bias, equal treatment along racial and ethnic lines may implicate not just policing of noncitizen “criminals,” but any and all who come into contact with the criminal dragnet. Because perceived race and ethnicity have historically been used lawfully to enforce immigration law,¹⁵² and unlawfully to police alleged criminals and criminal-immi-

REV. 567, 581–82 (2008)) (describing “programs adopted by various states and localities to integrate immigrants affirmatively into local institutions and networks”); *see also Immigrant Integration*, MIGRATION POL’Y INST., <http://www.migrationpolicy.org/topics/immigrant-integration> (last visited Feb. 7, 2017) (defining immigrant integration as “the process of economic mobility and social inclusion for newcomers and their children including early childhood care, educational opportunities, workforce development, and healthcare”); Rubén G. Rumbaut, *Assimilation’s Bumpy Road*, in *AMERICAN DEMOCRACY AND THE PURSUIT OF EQUALITY* 184–219 (M. Chowkwanyin & R. Serhan eds., 2011) (considering the problematic nature of the term “assimilation,” that it masks and minimizes structural inequities; addressing language acquisition and social mobility in immigrant integration); *see generally* Lauren Gilbert, *Citizenship, Civic Virtue and Immigrant Integration: The Enduring Power of Community-Based Norms*, 27 *YALE L. & POL’Y REV.* 335 (2009) (evaluating the merits of, exploring approaches to, and critically assessing different models of immigrant integration, including multicultural accommodation).

149. While increased socio-economic success can help facilitate, or be an indicator of integration (irrespective of immigration status), and racial-biased policing usually focuses on low-income communities, socio-economic status does not necessarily create immunity from racially-biased policing. *See, e.g.*, Abby Goodnough, *Harvard Professor Jailed; Officer is Accused of Bias*, N.Y. TIMES (July 20, 2009), <http://www.nytimes.com/2009/07/21/us/21gates.html> (describing how prominent African-American Harvard scholar was arrested in his home as a suspect in robbing his own house). The Author would also like to explore the possibility that an elevation of equality principles—that is, the integration of all persons, citizen and noncitizen—could lead to disassociation in the public imagination and socio-political infrastructure that facilitate racial oppression.

150. *See* Eagly, *Immigrant Protective Policies in Criminal Justice*, *supra* note 9, at 300 (citing Carbado & Harris, *supra* note 81, at 1545–47) (arguing the apparatus of immigration-enforcement and criminal procedure laws have only further enabled and legitimized race-based immigration enforcement).

151. Eagly, *Immigrant Protective Policies in Criminal Justice*, *supra* note 9, at 296.

152. *See Brigoni-Ponce*, 422 U.S. at 885–87 (suggesting in dicta that Mexican appearance could be a relevant factor in the reasonable suspicion determination); *but see* *United States v. Montero-Camargo*, 208 F.3d 1122, 1131–33 (9th Cir. 2000) (en banc) (Mexican appearance *not* sufficient to satisfy the reasonable suspicion standard in the border region where a significant

grants,¹⁵³ equal treatment of noncitizens along racial and ethnic lines may be a worthwhile goal to also help decrease disparate treatment of all persons of color, irrespective of immigration status.

Along these lines, as Eagly described the decades-prior sanctuary policies which excluded those with criminal records, San Francisco is now struggling with creating effective sanctuary policies.¹⁵⁴ In response to President Trump's statements on enforcing immigration, states like California and cities like San Francisco are aggressively pursuing measures to protect immigrants who benefited from the prior administration's DACA program, and to protect immigrants from potential immigration raids known to drastically disrupt communities on every level.¹⁵⁵

However, even in these nascent sanctuary discussions, lines have been drawn between the "good" and "bad," the immigrant and the "criminal" immigrant, reinforcing the Obama administration rhetoric that creates a false binary between "family" and "felon," and disregards the racial bias inherent in criminal and criminal immigration enforcement.¹⁵⁶

While the earlier 1980s sanctuary policies were not designed to help protect noncitizens who had come into contact with the criminal justice system, not only were realizations of the racially-biased drug war resulting in mass incarceration just surfacing, but Secure Communities and similar programs linking criminal and immigration enforcement did not yet exist. The metaphorical and literal labeling of immigrants as "criminals" had yet to take on the legal significance it took following Secure Communities. Just as the drug war resulted in mass incarceration of people of color, criminal immigration policing, caused primarily by Secure Communities, has re-

portion of citizens and lawfully present noncitizens are Hispanic); *see also* Carbado & Harris, *supra* note 81, at 1568–78 (discussing the ways in which criminal immigration enforcement, and criminal procedure itself, have reinforced race-based immigration enforcement practices).

153. *See* Johnson, *Racial Profiling in the "War on Drugs" Meets the Immigration Removal Process*, *supra* note 43.

154. Eagly, *Immigrant Protective Policies in Criminal Justice*, *supra* note 9, at 301 ("these early municipal laws assisting migrants in finding refuge were never designed to provide a sanctuary for those immigrants charged with criminal conduct").

155. *See* White & Koseff, *supra* note 26.

156. At the time of writing, San Francisco Board of Supervisors and Mayor Ed Lee are divided on whether to support the public defender's office in aiding noncitizens accused of crimes as a part of an intended sanctuary policy. The City is asked to allocate funds to community-based organizations and to the public defender's office to help provide representation to immigrants in removal proceedings. *See, e.g.,* Tim Redmond, *The Agenda: Why Breed and Lee are Blocking Sanctuary City legislation*, 48 HILLS (December 5, 2016), <http://48hills.org/2016/12/05/17361/> ("[T]he public defender . . . represents, by definition, people who are accused of crimes. And the Mayor' [sic] Men want to make the distinction between 'good immigrants' and 'bad immigrants'—that is, they don't want to defend people who, rightly or wrongly, are charged with a crime."). The Author also concludes that this position is inappropriate, since immigrants and non-immigrants both often end up with charges being dismissed. *See* Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 226–31 (2013) (discussing problems inherent in the good-versus-bad-immigrant paradigm and ways to change the narrative).

sulted in disproportionate criminalization and deportation of Latina/os and persons of color.

Along the lines of discussions considering immigrant integration, scholar Stella Elias Burch explores the notion of what she characterizes as “immigrant covering,” an example of which includes state grants of driver’s licenses to persons with Deferred Action for Childhood Arrivals (DACA), or in the alternative, to all residents including those with no immigration status.¹⁵⁷ Burch sets forth the theoretical framework of “immigrant covering,” where “covering” is a way in which “immigration laws operate to promote immigration status ‘conversion,’ and ‘passing’ . . .”¹⁵⁸ Burch carefully considers the advantages and disadvantages of covering. To the extent that immigrant covering may be inspired by or indicative of recognition of the importance of equality principles and favors incorporation into the socio-political framework, it is worth considering whether covering could decrease incentives to engage in racial profiling.

However, Burch is careful to note that covering has its limitations and in some respects could backfire by “reinforcing the underlying stigma” of noncitizens.¹⁵⁹ Thus, in order to truly promote equality and immigrant integration, more formal legal and socio-legal measures may be required to avoid continuing marginalization and race-based discrimination against noncitizens.

Eagly, like other scholars such as Geoffrey Heeren, emphasizes that the equality norm should be central in discussions of sub-federal immigration enforcement where racial or ethnic discrimination is the central issue in order to avoid mismatching remedies that do not directly address discrimination, thereby doing an injustice to the importance of racial justice.¹⁶⁰

157. Stella B. Elias, *Immigrant Covering*, 58 WM. & MARY L. REV. 765, 835 (2017) (noting that ten states and the District of Columbia permitted all residents to obtain drivers licenses at the time of her writing).

158. *Id.* at 765.

159. *Id.* at 856 (asserting that covering, in place of immigration reform and a path to legal status, could also do a disservice to noncitizens and could make it easier for “the majority to disattend to the realities of the everyday struggles of unauthorized immigrants, while simultaneously perpetuating, and reinforcing the underlying stigma of being undocumented”); *id.* at 834 (recognizing that expanding this form of immigrant covering, by granting driver’s licenses to individuals with DACA, and extending that covering to others with no immigrant status, is controversial).

160. See Eagly, *Immigrant Protective Policies in Criminal Justice*, *supra* note 9, at 296 (discussing the ideas of community policing, immigrant integration, and fiscal prioritization); *id.* at 297 (“[B]y failing to put the norm of equality front and center, these alternative frameworks also have a tendency to overlook and mask equality concerns, particularly for those immigrants who find themselves within the criminal system.”); see also Geoffrey Heeren, *Persons Who Are Not the People: The Changing Rights of Immigrants in the United States*, 44 Colum. Hum. Rts. L. Rev. 367, 400 (2012) (discussing Senate Bill 1070 litigation and the importance of litigation strategy that highlights the equal protection clause and discrimination, as compared to the strategy used in *Arizona v. United States*, 132 S. Ct. 2492 (2012), which undermined the importance of the Equal Protection Clause).

Eagly's discussion of equality-inspired sub-federal immigrant protective policies references activist and scholar Angela Davis' proposals for reform to systemically-biased criminal justice prosecutions.¹⁶¹ Davis has suggested an approach, implemented in at least one district attorney's office in the United States, that is the opposite of colorblind, and exemplifies substantive adherence to equality principles. In that office, prosecutors analyze the racial impact of their decisions and then tailor their decision-making to minimize racial disparities.¹⁶² Eagly suggests that Davis' proposals are instructive for ensuring immigrant communities do not continue to experience racially-biased, disproportionate criminal justice and criminal immigration outcomes.

In a time when explicit racial bias has seeped back into the mainstream and has become more prevalent with regular displays of white nationalist rallies,¹⁶³ and national leaders may attack civil rights gains, whether defensively addressing laws with racially disparate impacts, or proactively crafting state or local measures to protect immigrants, equality concerns should be at the forefront. In spite of, or perhaps because of, the extensive history of characterizing immigrants as criminals, and racially- and ethnically-biased criminal and immigration policing, it is particularly important that critiques of criminal immigration enforcement consider the role of equality principles, and even introduce the rationale for considering immigrant integration. Failing to create sanctuary or other immigrant protective policies and immigration enforcement mechanisms that counteract the role of race in policing, may further mask and entrench racial bias and its harms. Instead of mythologizing immigrants as criminals, finding creative ways to encourage consideration of immigrant equality may decrease the persistence of racial segregation and bias irrespective of immigration status.

161. Eagly, *Immigrant Protective Policies in Criminal Justice*, *supra* 9, at 305 (citing Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. Legis. & Pub. Pol'y 821, 824 (2013)).

162. *Id.*

163. Terry Smith, *White Backlash in a Brown Country*, 50 VAL. U. L. REV. 89, 94 (2015) (exploring white backlash in American history through the Obama presidency and the need for greater protections of people of color in a "post-racial" America that is "becoming brown"); Mark Potok, *The Radical Right Was More Successful in Entering the Political Mainstream Last Year than in Half a Century*, S. POVERTY L. CTR. (Feb. 15, 2017), <https://www.splcenter.org/fighting-hate/intelligence-report/2017/year-hate-and-extremism>; Sarah Posner & David Neiwert, *How Trump Took Hate Groups Mainstream*, MOTHER JONES (Oct. 14, 2016), <http://www.motherjones.com/politics/2016/10/donald-trump-hate-groups-neo-nazi-white-supremacist-racism/>; *see also* Steven Rosenfeld, *A United States of Hate Has Exploded Under Trump*, ALTERNET (Feb. 15, 2017), <http://www.alternet.org/election-2016/united-states-hate-has-exploded-under-trump>; *Hate Groups Increase for Second Consecutive Year as Trump Electrifies Radical Right*, S. POVERTY L. CTR. (Feb. 15, 2017), <https://www.splcenter.org/news/2017/02/15/hate-groups-increase-second-consecutive-year-trump-electrifies-radical-right>; Jamelle Bouie, *Government of White Nationalism Is Upon Us*, SLATE (Feb. 6, 2017), http://www.slate.com/articles/news_and_politics/cover_story/2017/02/government_by_white_nationalism_is_upon_us.html.