The Natural Persistence of Racial Disparities in Crime-Based Removals

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THE NATURAL PERSISTENCE OF RACIAL DISPARITIES IN CRIME-BASED REMOVALS

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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

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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. 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.

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. ICE agents could then check


3. ARTI 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_Febuary2012.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. The information-sharing component of Secure Communities remained in place under its replacement program, PEP.

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. 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 scholars 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, for promoting racial profiling in criminal arrests and relatedly, racially skewed deportations, and for casting too wide a net, manifesting in a disproportionate number of deportations stemming from minor offenses such as traffic violations.

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.

5. Id.
10. See, e.g., sources cited infra note 121.
11. See Cházarro, 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 determinant 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-


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. This method of implementation and the outcome of the policy itself substantiated concerns about profiling of Latina/os and a betrayal of stated objectives.

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. A trust deficit is not new, as has been highlighted by the increased attention to police killings of people of color. 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.


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.


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. The “Blue Lives Matter” movement’s de-legitimization and demonization of communities of color, sanctioned by the then president-elect, 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. 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. 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.

23. Cházaró, supra note 9, at 610–11.
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).
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...
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, ICEOUTOFCA.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 Narro, Should LA County’s Sheriff Stop Helping Deport Undocumented Angelenos?, LA PROGRESSIVE (Sept. 11, 2015), https://www.lapgressive.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.

PEP replaced Secure Communities in July 2015. The notification component of Secure Communities remained in place under the PEP, while the detainer policy changed. 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. 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, 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, De)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.


Under PEP, ICE holds and requests for notification focused on so-called “priority noncitizens,” including: (1) gang members,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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. Denver Crim. L. Rev. 1 (2015) (considering the problem of the replacement of biased “stop and frisk” policies with gang databases).


\textsuperscript{46.} DHS Releases End of Fiscal Year 2015 Statistics, supra note 40.

\textsuperscript{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 misdemeanants 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” 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. 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. 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.

However, PEP did not prevent an ICE agent’s willful violation of immigration enforcement priorities. 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, De( )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, De( )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 superficial 57 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. Cházarro, supra note 9, at 625.
54. See id.
55. See, e.g., Johnson, Doubling Down on Racial Discrimination, supra note 21.
56. Cházarro, 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).
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. Under PEP, an arrestee’s information was still transferred to ICE at the time of arrest. 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, as is particularly true in the context of misdemeanors.

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, 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. 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. Cházaró, 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 finding other ways to arrest and put noncitizens in custody.

62. Cházaró, 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 CATHOL. U. 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. 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. 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.

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. In fact, in February 2016, a nonprofit organization sued to obtain

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


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

If an administration headed by leaders who voiced concerns about racial profiling in criminal law enforcement\textsuperscript{72} could not make a significant dent in such practices,\textsuperscript{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,\textsuperscript{74} examina-
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


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


79. Recently, scholar Angélica Cházar has characterized this as “Cumulative Harms: Layering Criminal Justice Dysfunction on Immigration Enforcement.” Cházar, 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 Path 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 Crimmigration Crisis, supra note 78 (coining the term “crimmigration” 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, increased attention has been paid to the history and persistence of bias in the criminal justice system. 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,


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. Rodriguez, Immigr. and Refugee Law and Pol’y 1148–52 (5th ed. 2009) (describing the increased resources devoted to increased interior enforcement).


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 unsupported contentions that immigrants are more likely to be criminals than citizens).

Use of racial or ethnic appearance in immigration policing continues to implicitly condone racial profiling in criminal immigration enforcement. 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, combined with the Court’s ruling in Whren, failing to find an officer’s racial bias in a criminal traffic stop, seem to have tacitly condoned racial profiling in criminal immigration enforcement. Similarly, the Court’s ruling in Lopez Mendoza curtailed consideration of racial bias in a stop challenged in the immigration removal context. 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. 

The immigration removal system has increasingly relied on criminality as a means of designating noncitizens as priorities for deportation. 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).
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).
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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 Cházarro, 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.”


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 1 (2008).

101. Vázquez, Perpetuating the Marginalization of Latinos, supra note 81, at 650.
targets’ poor black US citizen males;” while here, “crimmigration ‘finely targets’ poor noncitizen Latina/os.” 102 Scholars such as Angélica Chávaro have urged a new approach to immigration enforcement that ceases to rely on “criminality” as a means of prioritizing individuals for deportation.103 Chávaro 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

103. See Chávaro, supra note 9, at 651.
104. Id. at 598.
105. See, e.g., Chávaro, 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 noncitizen 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. Chávaro, 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).
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#.g0dm3dwwz.
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, 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).
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. Nationwide, annually, there are approximately ten-million misdemeanor prosecutions, which is ten times the number of felony cases. 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, 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. 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. 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.

116. Cházarro, 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. Cházarro, 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. Cházarro, 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).

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.” The Obama administration was criticized for incarceration of immigrants and refugees and mass deportations, 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. Thus, there may not be such thing as an 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.”)


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{127} Cházaró’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.”\textsuperscript{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,\textsuperscript{129} and has been characterized as a misplaced response to the social problem of poverty.\textsuperscript{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.\textsuperscript{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

\textsuperscript{125} Cházaró, \textit{supra note 9}, at 654 n.278 (citing Michele Waslin, \textit{The Secure Communities Program: Unanswered Questions and Continuing Concerns}, \textit{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 \textit{not} criminal aliens, as opposed to fundamentally questioning the reliance on criminality).

\textsuperscript{126} Cházaró, \textit{supra note 9}, at 55.

\textsuperscript{127} \textit{See} Eagly, \textit{Immigrant Protective Policies in Criminal Justice, supra note 9}.

\textsuperscript{128} Cházaró, \textit{supra note 9}, at 659.

\textsuperscript{129} \textit{See Alexander, supra note 13}, at 60.

\textsuperscript{130} \textit{See Rosenbaum, supra note 58}, at 10–16.

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

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132. See sources cited supra notes 74–75.
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).
136. Id. at 294–99.
137. Id. at 288.
a president who has expressly made rhetorical connections between Latina/o identity and criminality, suggested return to stop-and-frisk policing in spite of studies indicating racial profiling, and an Attorney General who indicated an interest in returning to failed drug war policies known to have racially disparate impacts, 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.

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


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. 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. Studies on race, ethnicity, and their proxies suggest that prohibiting racial discrimination in the context of criminal immigration enforcement would have relevance and reverberations beyond the confines of immigration status.

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 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.” Integration presumably suggests great social and economic mobility.

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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).


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 CAT. 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.


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-immig-

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
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. 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.

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.

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-
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. 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’ . . . .” 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. 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.


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 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. 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. 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, 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.


162. Id.