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What (and Whom) State Marijuana Reformers Forgot: Crimmigration Law and Noncitizens

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WHAT (AND WHOM) STATE MARIJUANA REFORMERS FORGOT: 
CRIMMIGRATION LAW AND NONCITIZENS

CARRIE ROSENBAUM †

INTRODUCTION

Deportation rates of Latino/a noncitizens are higher than their presence in immigrant communities in the United States. The fact that Latino/a noncitizens experience immigration policing and deportation at higher rates than other noncitizens is due, at least in part, to federal immigration enforcement’s use of alleged criminality to identify deportable (or inadmissible) noncitizens. The drug war has had a racially disparate impact on noncitizen Latino/as; however, recent shifts towards softening of drug laws, including marijuana, are unlikely to reverse the disproportionate impact of criminal-immigration policing of Latino/as because of the systemic racial bias in criminal policing.

At least twenty states have eliminated criminal penalties for simple possession of marijuana. Other states and municipalities have passed laws allowing the medical use of marijuana. These changes have primarily resulted from fiscal pressures and represent an acknowledgment across party lines that the “war” on drugs has

† Adjunct Professor, Golden Gate University School of Law. I am grateful to Kevin R. Johnson, Steven W. Bender, Hiroshi Motomura, César Cuauhtémoc García Hernández, Yolanda Vázquez, and Marisa Cianciarulo, as well as Golden Gate University School of Law Faculty members for insightful comments, and those who provided meaningful feedback at the 2015 Immigration Professor and LatCrit Conferences. Thanks as well to Golden Gate University Law student Courtney Brown for invaluable assistance, and last but not least, the patient and thorough De Paul editorial board. Any errors in this article are all my own.
3 Id.
failed.\textsuperscript{4} In addition to fiscal considerations, moral and social justice imperatives, particularly the problem of racial disparities, have led to questioning of the legitimacy of the criminal justice system.\textsuperscript{5}

The “war” on drugs has contributed to mass or “hyper” incarceration, \textsuperscript{6} over criminalization, \textsuperscript{7} and the continuing entrenchment of overlapping racial and economic disparities throughout the United States.\textsuperscript{8} In addition to the financial costs, the war on drugs has been characterized by and criticized for its disproportionate impact on communities of color.\textsuperscript{9} African

\textsuperscript{4} After spending approximately fifty-one billion dollars per year enforcing drug laws, and arresting 693,482 people for marijuana violations, of which eighty-eight percent were simple possession charges, at least twenty states have eliminated criminal penalties for simple possession of marijuana. \textit{Id.}

\textsuperscript{5} Ming Hsu Chen, \textit{Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities}, 91 CHI. KENT L. REV. 13 (2015) (explains in detail the way in which the illegitimacy of law enforcement infected by racial bias and “unable to stick to its stated enforcement priorities” raises substantive moral and procedural concerns); Julie Hirschfeld Davis and Gardiner Harris, \textit{Obama Commutes Sentences for 46 Drug Offenders}, N.Y. TIMES (July 13, 2015), http://www.nytimes.com/2015/07/14/us/obama-commutes-sentences-for-46-drug-offenders.html?_r=0 (in commuting the sentences of 46 drug offenders President Obama’s decision was viewed as recognition that the drug was “has been a war on people of color,”); see also President Barack Obama, NAACP Conference (July 14, 2015), https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference (“we’ve locked up more and more nonviolent drug offenders than ever before, for longer than ever before…in far too many cases, the punishment simply does not fit the crime,” and “there are costs that can’t be measured in dollars and cents…[drug law enforcement] disproportionately impacts communities of color. African Americans and Latinos make up 30 percent of our population; they make up 60 percent of our inmates…”) (last visited Nov. 20, 2015).

\textsuperscript{6} See DAVID GARLAND, \textit{MASS INCARCERATION: SOCIAL CAUSES AND CONSEQUENCES} (SAGE Publications 2001) (discussing mass incarceration as a phenomenon that has become the “systematic imprisonment of whole groups of the population”).


\textsuperscript{8} See MICHELLE ALEXANDER, \textit{THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS} (The New Press 2012) (discussing the criminal justice system as the new mechanism to subordinate blacks after Jim Crow); See also WILLIAM J. STUNTZ, \textit{THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE} (2011) (discussing the criminal justice system’s disproportionate impact on Blacks, and to a lesser extent Latinos).

\textsuperscript{9} See generally MICHELLE ALEXANDER, \textit{THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS} (The New Press, 2012) (arguing that the criminal justice system has contributing to a new caste system that has maintained the subordination of African Americans in the United States); MAY LOUISE FRAMPTON ET AL., \textit{AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND THE NEW RECONSTRUCTION} I (NYU Press 2008) (stating that

\textsuperscript{4} After spending approximately fifty-one billion dollars per year enforcing drug laws, and arresting 693,482 people for marijuana violations, of which eighty-eight percent were simple possession charges, at least twenty states have eliminated criminal penalties for simple possession of marijuana. \textit{Id.}

\textsuperscript{5} Ming Hsu Chen, \textit{Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities}, 91 CHI. KENT L. REV. 13 (2015) (explains in detail the way in which the illegitimacy of law enforcement infected by racial bias and “unable to stick to its stated enforcement priorities” raises substantive moral and procedural concerns); Julie Hirschfeld Davis and Gardiner Harris, \textit{Obama Commutes Sentences for 46 Drug Offenders}, N.Y. TIMES (July 13, 2015), http://www.nytimes.com/2015/07/14/us/obama-commutes-sentences-for-46-drug-offenders.html?_r=0 (in commuting the sentences of 46 drug offenders President Obama’s decision was viewed as recognition that the drug was “has been a war on people of color,”); see also President Barack Obama, NAACP Conference (July 14, 2015), https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference (“we’ve locked up more and more nonviolent drug offenders than ever before, for longer than ever before…in far too many cases, the punishment simply does not fit the crime,” and “there are costs that can’t be measured in dollars and cents…[drug law enforcement] disproportionately impacts communities of color. African Americans and Latinos make up 30 percent of our population; they make up 60 percent of our inmates…”) (last visited Nov. 20, 2015).

\textsuperscript{6} See DAVID GARLAND, \textit{MASS INCARCERATION: SOCIAL CAUSES AND CONSEQUENCES} (SAGE Publications 2001) (discussing mass incarceration as a phenomenon that has become the “systematic imprisonment of whole groups of the population”).


\textsuperscript{8} See MICHELLE ALEXANDER, \textit{THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS} (The New Press 2012) (discussing the criminal justice system as the new mechanism to subordinate blacks after Jim Crow); See also WILLIAM J. STUNTZ, \textit{THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE} (2011) (discussing the criminal justice system’s disproportionate impact on Blacks, and to a lesser extent Latinos).

\textsuperscript{9} See generally MICHELLE ALEXANDER, \textit{THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS} (The New Press, 2012) (arguing that the criminal justice system has contributing to a new caste system that has maintained the subordination of African Americans in the United States); MAY LOUISE FRAMPTON ET AL., \textit{AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND THE NEW RECONSTRUCTION} I (NYU Press 2008) (stating that
Americans and Latino/as are more likely to be incarcerated, and in some jurisdictions, receive longer sentences than Whites.\footnote{Reducing Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers, The SENTENCING PROJECT (2008), http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf (last visited Nov. 19, 2015); Jamal Hagler, 8 Facts You Should Know About the Criminal Justice System and People of Color, CENTER FOR AMERICAN PROGRESS (May 28, 2015), https://www.americanprogress.org/issues/race/news/2015/05/28/113436/8-facts-you-should-know-about-the-criminal-justice-system-and-people-of-color/; Christopher Ingraham, Charting the Shocking Rise of Racial Disparity in Our Criminal Justice System, THE WASH. POST (July 15, 2014), http://www.washingtonpost.com/news/wonkblog/wp/2014/07/15/charting-the-shocking-rise-of-racial-disparity-in-our-criminal-justice-system/.} Since 1988, the number of Latino/as criminally incarcerated in the United States has nearly quintupled.\footnote{ELLIOtt CURRIE, CRIME AND PUNISHMENT IN AMERICA 10 (Picador 2013); see also JAMES Forman, Jr., Racial Critiques of Mass Incarceration: Beyond the New Jim Crow, 87 N.Y.U.L. REV. 21, 60 (2012) (“Hispanic prison population climbed steadily during the 1990s, to the point where one in six Hispanic males born today can expect to go to prison in their lifetime.”).} Minority drivers, including Latino/as, are more likely to be subject to traffic stops and searched for contraband even though officers were no more likely to find contraband on minority motorists.\footnote{Reducing Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers, The SENTENCING PROJECT, 2 (2013), http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf.} In the context of marijuana regulation and policing, deeply entrenched anti-Latino/a bias is reflected in the origins of marijuana prohibitions, and that bias remains alive and well today.

The last three decades have also seen massive growth in the criminal-immigration industrial complex.\footnote{The term “prison industrial complex” was coined by Angela Davis in a 1997 speech. See Prison-Industrial Complex, WIKIPEDIA, https://en.wikipedia.org/wiki/Prison%E2%80%93industrial_complex (last visited March 7, 2016).} Appropriations to
immigration law enforcement efforts have skyrocketed, just as they had with the initiation of the war on drugs.\textsuperscript{14} The merging of criminal and immigration law is “criminalization of immigration law.” \textsuperscript{15} It is in this context that sub-federal criminal law enforcement has come to play an important role in identifying noncitizens and sorting “desirable” from “undesirable” persons.\textsuperscript{16} Some of the flaws and biases of the criminal justice system concerning identifying and labeling “criminals” have migrated to the immigration removal process.\textsuperscript{17}

The Department of Homeland Security’s creation and heightened use of the “Criminal Alien Program” (CAP) to focus enforcement efforts on the identification, apprehension, detention, and deportation of noncitizens has contributed to skyrocketing deportations.\textsuperscript{18} The CAP programs, primarily the former Secure


\textsuperscript{18} Current ICE Removals of Noncitizens Exceed Numbers Under Bush Administration, TRAC IMMIGRATION (Aug. 2, 2010), http://trac.syr.edu/immigration/reports/234/ (“focusing just on aliens who have committed crimes in this country, the number of criminal aliens removed by ICE has already broken all previous records, and climbed to an all-time high. The removal pace of criminal aliens in FY 2010 is fully 60 percent higher than in the last year of the Bush administration”); Walter Ewing, \textit{The Growth of the U.S. Deportation Machine}, AMERICAN IMMIGRATION COUNCIL (Apr. 9, 2014), http://www.immigrationpolicy.org/just-facts/growth-us-deportation-machine; Ana Gonzalez-Barrera and Jens Manuel Krogstad, \textit{U.S. Deportations of Immigrants Reach Record High in 2013}, PEW RESEARCH CENTER (Oct. 2, 2014).
Communities, and now the Priority Enforcement Program, have resulted in deportations of largely non-serious and non-violent offenders, with minor drug offenders comprising a significant number of deportations. These programs incentivize criminal law enforcement agents’ engagement in de facto immigration law enforcement and mask subconscious bias and racial profiling. The “criminal alien” profile has specifically resulted in heavier immigration regulation of Latino/as.

President Obama’s recent directive to federal immigration enforcement agents to focus on “felons not families” is a stark contrast to his more sensitive remarks on criminal justice reform recognizing the problem of racial bias. The “felons not families” sound bite oversimplifies, disregards, and even reinforces the racial biases originating in criminal justice enforcement that migrate into the immigration system.

Similar to the history of bias in criminal law enforcement, immigration law enforcement has historically fallen disproportionally on Latino/as. Modern criminal-immigration enforcement’s disparate impact is reflected in the numbers - Mexican and Central American nationals are significantly overrepresented in removals when compared to the demographic profiles of those populations in the United States.

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19 Secure Communities and ICE Deportation: A Failed Program?, TRAC IMMIGRATION (Apr. 8, 2014), http://trac.syr.edu/immigration/reports/349/ (deportations for drug-related offenses pursuant to Secure Communities, Immigration and Customs Enforcement actions resulting from initial, sub-federal criminal law action were 41,335 out of 368,644 deportations in 2013).


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Criminal and immigration law have been rife with racial bias, including marijuana laws, which were first implemented against a backdrop of anti-Mexican bias and scapegoating. Marijuana enforcement is one component of the disproportionate impact of drug law enforcement on Latino/a noncitizens and provides a framework to consider the more general problem of heavier crimmigration policing of Latino/a noncitizens. Thus, the efforts to reform criminal drug law that fail to address racial profiling or disparate impacts in criminal law will disparately continue to impact noncitizen Latino/as arrested, and subsequently deported for non-serious and non-violent offenses, including minor marijuana crimes.  

While decriminalization of marijuana may decrease the total number of people incarcerated for possession of small amounts of marijuana in some states, many noncitizens will not avoid adverse immigration consequences resulting from these sub-federal reforms. Latino/a noncitizens may continue to be disproportionately arrested and conviction for other conduct that remains criminalized, because decriminalization will not prevent racial bias in policing in general. And, the concomitant immigration consequences of those arrests and convictions will persist, along with the disproportionate rate of removals for Latina/os.

In order to understand why marijuana law reforms may not reverse the disparate impact of the remnants of the drug war on Latino/a noncitizens, this paper will begin by examining the disparate impact of the drug war. The first section will contextualize the war on drugs with respect to its impact on communities of color including the anti-Mexican and Central American origins of drug prohibition, as well as the disparate impact of marijuana law enforcement. Part II will address the complexity and intersectionality of the problem of the disparate impact of the criminal-immigration system. Specifically, it will underscore significance of the historic anti-Latino/a bias in immigration law to reveal the deeply entrenched nature of this bias. Part III will demonstrate the merging of criminal drug law enforcement bias with immigration enforcement from a practical standpoint by explaining the specific crimmigration mechanisms that allow institutionalized racial bias of criminal law to be transferred to immigration enforcement. After setting the stage by

examining the dual history of criminal and immigration bias against Latino/as, part IV will continue to assess the practical implications of criminal immigration enforcement by briefly outlining immigration consequences of marijuana-related conduct, as well as the practical implications of decriminalizing marijuana for noncitizens. Part IV will also address the shortcomings of decriminalization, and reference criminal and immigration proposals to address the disparate impact of criminal-immigration law enforcement. Finally, it will conclude that the underlying problem of racially disparate criminal and immigration enforcement, as described in the prior sections, may not result in equality in marijuana law reforms, particularly with respect to Latino/a noncitizens.

I. IMMIGRATION CONSEQUENCES OF MARIJUANA-RELATED CONDUCT

The relevance of the intersection of the war on drugs, racial bias in drug law enforcement, and a history of discrimination in U.S. immigration laws is acutely apparent when looking at the rate of Latino/as deported as a result of marijuana-related conduct. In characterizing “criminal aliens” as particularly undesirable, President Obama emphasized the moral correctness of pursuing identification of “felons not families” for removal from the United States.25 However, not only may “felons” be “families,” but it is particularly likely that those being removed for minor drug offenses, including marijuana-related ones, are Latino/a families, complicating an oversimplified picture.

In 2013, DHS deported over 20,000 people with convictions of simple possession of drugs or paraphernalia, and 6,600 people were convicted of mere personal marijuana possession.26 Over the course of the last 6 years, DHS has deported


26 Supreme Court Reins in Some Drug Deportations – But Deeper Reforms Needed, IMMIGRANT DEFENSE PROJECT, http://www.immdefense.org/supreme-court-reins-in-some-drug-deportations-but-deeper-reforms-needed-2/ (last visited January 8, 2016) (“In 2013 alone, the government deported nearly 20,000 people who had convictions for simple possession of a drug or drug paraphernalia, including over 6,600 people who were convicted of personal marijuana possession. Over the last six years, the government has deported nearly a quarter of a million people with a drug conviction.”) (citing Secure Communities and ICE Deportation: A Failed Program?, TRAC IMMIGRATION, tbl. 6 (April 8, 2014), http://trac.syr.edu/immigration/reports/349/).
nearly a quarter of a million people for drug convictions.\textsuperscript{27} Drug crimes have well-recognized links to race-based criminal law enforcement,\textsuperscript{28} and removal provisions based on drug crimes are among the most severe in the U.S. immigration laws.\textsuperscript{29}

Immigration consequences of marijuana-related conduct are complex and are generally either create a ground of removal or deportation, inadmissibility, or prohibit eligibility for waivers. This article will not set forth all grounds of removability, inadmissibility, or all instances where marijuana-related conduct may prevent eligibility for a waiver.\textsuperscript{30} Instead, it will highlight generally, the ways in which marijuana-related conduct has adverse immigration consequences sufficient enough to explain the limitations of some of the decriminalization or legalization measures specifically with respect to noncitizen Latino/as. A detailed analysis is particularly irrelevant here because the premise of this paper is that as long as there are any criminal marijuana prohibitions or otherwise, law enforcement agents will still be able to enforce existing laws influenced by implicit or explicit racial bias. Primarily because the immigration enforcement system relies heavily on criminal law enforcement, the inherent racial biases in criminal enforcement will continually filter into immigration and negatively impact Latino/a noncitizens.

\textit{Immigration Consequences of Marijuana-Related Conduct}

Marijuana-related conduct can trigger adverse immigration consequences for those who are undocumented or lawful permanent residents. Inadmissibility grounds generally prevent

\textsuperscript{27} Secure Communities and ICE Deportation: A Failed Program?, TRAC IMMIGRATION, tbl. 6 (April 8, 2014), http://trac.syr.edu/immigration/reports/349/.


someone from entering the U.S. legally, and deportation grounds subject a noncitizen to removal. Marijuana-related conduct can also prevent eligibility for waivers from removability or to avoid inadmissibility grounds.

The controlled substance deportation grounds render a noncitizen deportable for a conviction relating to a controlled substance offense as defined by U.S. code, and marijuana is listed as a schedule 1 controlled substance offense. The concept of a conviction is broadly defined, can even include things like a guilty plea where charges are dismissed later, suspended sentences, and probation, violations and infractions.

There is a personal use exception to the controlled substance deportation ground for a first time offense possession for personal use of 30 grams or less, however many do not qualify. In some cases, marijuana conduct can be an aggravated felony resulting in mandatory deportation, where an immigration judge has no ability to exercise discretion to consider rehabilitation and to stop deportation; deportation is only avoided if the person would be subject to torture in their home country. Additionally, the noncitizen will be mandatorily detained throughout the course of the proceedings to challenge whether or not the offense is indeed an aggravated felony.

Marijuana offenses or even just conduct can cause inadmissibility preventing someone seeking admission to the U.S. from lawfully entering. Inadmissibility grounds do not require convictions and waivers are extremely limited. In practice, a Customs and Border Protection agent at the border can determine an applicant is a drug abuser or “reason to believe drug trafficker” based on an applicant for entry’s statements at the border. For example, because inadmissibility can arise absent a conviction, a conversation with a Customs and Border Protection agent about use of a medical marijuana card could trigger this ground of inadmissibility.

32 For those seeking admission to the U.S. to work, study, or immigrate to be with an immediate relative, a marijuana-related offense can permanently prevent entry to the U.S. A noncitizen can be found inadmissible to the United States for: (1) a conviction related to marijuana, (2) for admitting to committing the essential elements of any marijuana related offense; (3) for “reason to believe” the person is trafficker of controlled substances; (4) or for being a drug abuser pursuant to INA section 212(a)(2)(A)(i)(II). Immigration and Nationality Act § 212(a)(2)(A).
Sometimes a marijuana offense eliminates the possibility of a waiver to avoid deportation or overcome a ground of inadmissibility. Waiver of inadmissibility for marijuana is limited to simple possession of thirty grams or less for personal use and requires proof of other factors including extreme hardship to qualifying U.S. citizen or lawful permanent resident. There are also limitations to availability of a waiver, for example, if the offense arose in the context of a traffic stop, as is so common in immigration removal cases resulting from the criminal alien program and PEP. The waiver is also often not available if the marijuana-related conduct transpired in a vehicle. Additionally, waivers are rarely granted at consulates – only about 15% of those found ineligible for immigrant visas on controlled substance grounds either received waivers or won challenges to the controlled substance ground of inadmissibility. (Statistics are unavailable specifically pertaining to marijuana.)

Before unpacking why marijuana law reforms may not be experienced evenly by all noncitizens, it is necessary to trace the origins of the disparate impact of the war on drugs, and the evolution of marijuana prohibition.

II. THE RACIALLY DISPARATE IMPACT AND ORIGINS OF THE WAR ON DRUGS

In order to understand why and how marijuana law enforcement falls disproportionately on communities of color and Latino/as, and results in disproportionately higher removals of Latina/os, it is necessary to understand the racialized history of the drug war and the origins of marijuana prohibitions, before addressing the role of race and national-origin bias in immigration law enforcement.

A. A brief history of racial bias in the “war” on drugs

One of the primary markers of what has been dubbed the “war” on drugs were the Rockefeller drug laws, presented as a response to urban poverty affecting inner-city African Americans. The drug laws were color-blind, but their burden

33 See Edward J. DiMaggio, New York’s Rockefeller Drug Laws, Then and Now, 78 N.Y. St. B.J. 30, 30 (2006). (New York’s drug laws required judges to sentence anyone selling two ounces or possessing four ounces of narcotics to a term of 15 years to life which was about the same length as for second-degree murder); see also Madison Gray, A Brief History of New York’s Rockefeller Drug Laws, TIME MAG., Apr. 2, 2009,
fell most heavily on African Americans, and subsequently other communities of color as well. At the point where immigration law and the drug war intersect, it has often been Latina/os who have experienced the cascading consequences of contact with the criminal justice system.

At the outset, the drug laws served as a means of social control similar to vagrancy laws of an earlier era, which controlled the movement of newly freed slaves shortly after the formal end of slavery.\textsuperscript{35} The vagrancy laws were enforced with rigor against African Americans, serving to manufacture criminals out of unemployed African Americans. Drug laws replaced vagrancy laws as a means of social control, in lieu of actual social programs. This critique of drug laws as a racialized means of social control persists, in spite of the beginning of a shift towards decarceration and a questioning of the efficacy of the war on drugs.\textsuperscript{36} Similar to the drug laws, harsh immigration removal measures ensure an equivalent form of control of Latina/o noncitizens who may experience disproportionate criminal policing.

Mass incarceration of African Americans and Latino/as significantly expanded in the 1970s after drug policies shifted from a focus on treating drug use as a social disease, to increasingly associating drugs with criminality.\textsuperscript{37} The Nixon administration declared drugs “public enemy number one,”\textsuperscript{38} and the infamous Daniel Patrick Moynihan, serving as the Kennedy Administration’s Assistant Secretary of Labor, suggested that black culture was responsible for crime associated with drug use rather than systemic poverty and institutionalized racism.\textsuperscript{39}

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http://www.time.com/time/nation/article/0,8599,1888864,00.html. This led to an increase in drug convictions in the state, with no marked decrease in crime. \textit{Id.}  
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34 In some respects, the facially neutral drug laws are not dissimilar from the facially neutral/colorblind 1965 Immigration Act.  
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35 Ta-Nehisi Coates, \textit{The Black Family in the Age of Mass Incarceration}, THE ATLANTIC, 28 (October 2015) (Coates describes “postbellum Alabama” which solved the perceived competition for work from newly freed slaves competing on an open labor market by “manufacturing criminals” – blacks who couldn’t find work were labeled vagrants and sent to jail… then leased as labor to the people who had enslaved them. The laws themselves were nominally colorblind, but applied against Negroes (principally if not exclusively)).  
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39 See ALEXANDER, supra note 11, at 41-42.  
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President Reagan’s administration significantly ratcheted up drug law enforcement, largely eliminating harm reduction and the focus on public health. In 1986, Reagan signed the Anti-Drug Abuse Act allocating an additional $1.7 billion to fund the drug war and imposing mandatory minimums for drug offenses. Reagan’s official declaration of the “War on Drugs” was marked by skyrocketing financial investment in enforcement, which would be mirrored approximately two decades later by similarly drastic increases in immigration law enforcement. The parallel in increased funding was not the only similarity to the drug war – immigration enforcement would also have racially disproportionate impacts and represented a new form of social control, or more accurately, social selection.

In the “war” on drugs, minor marijuana offenses have constituted a noteworthy share of drug law enforcement. Instead of targeting drug dealers and dangerous drugs as stated by lawmakers, marijuana possession accounted for almost 80% of the growth in the 1990s drug arrests and in 2005 and 42.6% of all drug arrests were for marijuana offenses. Between 2001 and 2010, there were over eight million arrests in the U.S. for marijuana-related offenses. As of approximately 2009, more than 750,000 people are arrested annually in the U.S. for marijuana possession. In

40 War on Marijuana, supra note 32.
41 The discretion taken from judges in connection with mandatory minimums is akin to the lack of discretion immigration judges have with the elimination of INA sec. 212(c) allowing judges to consider rehabilitation of non-citizen, lawful permanent residents convicted of certain crimes, including drug offenses. Id. Throwing Good Money After Bad, AMERICAN IMMIGRATION COUNCIL (May 26, 2010), http://www.immigrationpolicy.org/just-facts/throwing-good-money-after-bad-immigration-enforcement (from 2004 to 2008 Immigration and Customs Enforcement (ICE) funding rose from $6.6 million to $180 million, and then in 2009 ICE began receiving $1 billion annually).
42 Alexander, supra note 33, at 49; see also Coates, supra note 35, at 32 (citing DAVID F. MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL (1973) (suggesting that contrary to most literature, the first war on drugs commenced in 1914. The drug war that commenced in the 1970s was actually our third drug war of the 20th century); see also César Cuauhtémoc García Hernández, Immigration Detention as Punishment, 61 UCLA L. REV. 1346, 1361 (2014) (on Congress’ laws to “fight drugs” 1986-1994).
43 ALEXANDER, supra note 34, at 60 (citing Marc Mauer and Ryan King, A 25-Year Quagmire: The ‘War on Drugs’ and Its Impact on American Society, SENTENCING PROJECT, 2-3 (2007)) (also noting in 2005, four out of five U.S. drug arrests were for possession rather than selling drugs).
44 War on Marijuana, supra note 32, at 36.
45 Tony Newman, Marijuana in America: More Mainstream Than Ever, More Arrests Than Ever!, HUFFINGTON POST (November 30, 2009),

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2013, 693,482 people were arrested for a marijuana law violation.\(^{47}\) Today, nearly half of all drug-related arrests in the U.S. are for marijuana use.\(^{48}\) The Federal Bureau of Investigation estimates that police arrest someone for possession of marijuana every forty-eight seconds.\(^{49}\) Eighty-eight percent of the 2013 marijuana arrests were for possession only.\(^{50}\) Additionally, the racial disparities in marijuana law enforcement follow the overall drug law enforcement trends and are rooted in particularly racialized origins.

In the late 1970s and early 1980s, lawmakers and others used race-neutral terminology concerning policies that would have disparate impacts on the African American community. President Regan’s “welfare queen” was an encrypted yet racially loaded connotation, which evaded allegations of racial bias – a style became increasingly employed over time.\(^{51}\) Before President Regan, President Nixon strategically and intentionally shifted official discourse to camouflage racist policy proposals using synonyms in place of racially explicit terms.\(^{52}\)


\(^{49}\) War on Marijuana, supra note 32, at 4.

\(^{50}\) See STEVEN W. BENDER, MEA CULPA: LESSONS ON LAW AND REGRET FROM U.S. HISTORY, 82 fn. 40 (2015) (discussing criminalization of poverty) (citing a 1994 Heritage Foundation report rationalized criminalization of African Americans describing so-called “behavioral poverty” and a “social pathology” which “eroded work ethic and dependency, the lack of educational aspirations and achievement, an inability or unwillingness to control one’s children, … criminal activity, and drug and alcohol use”); see also Miriam Zoila Perez, ‘Crack Baby’ Hysteria Returns, COLOR LINES (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 allegedly used this less expensive, and more accessible form of cocaine”).

\(^{51}\) Coates, supra note 30, at 38-39. (Explaining that Nixon’s campaign strategy and other tactics as revealed by his aide John Ehrlichman Nixon targeted the “racists”’ vote with Erlichman stating “that subliminal appeal to the antiblack voter was always in Nixon’s statements and speeches,” and Cotes states that according to another Nixon aide, H. R. Haldeman, Nixon faulted “the blacks” for “whole problem” of welfare and poverty. The civil-rights movement caused Nixon to mask his racist tactics thus his aide, Haldeman wrote, “The key is to devise a system that recognizes this while not appearing to,” and a 1968 tape of Nixon rehearsing a campaign ad revealed what he probably intended as an off-
The Nixon, Reagan, and Clinton administrations criminalized and racialized poverty and created a system of mass incarceration. Professor Steven Bender explains:

Restrictive welfare reform was inevitable once the longstanding conception of the undeserving poor was racialized in the second half of the twentieth century both by the image of the welfare queen, which became code for African American unwed mothers, and by the Mexican face of poverty…

Stereotyping and demonizing Latina/os paved the way for what might be characterized as the double penalty of immigration consequences for noncitizen Latina/os.

Similarly, President Bill Clinton’s welfare reform of 1996 used imagery from slavery to justify demonization of black mothers. One of the hallmarks of the racial bias in the enforcement of drug laws was the criminalization of crack cocaine disproportionate to powder cocaine more frequently used by whites.

In the mid-1990s, New York’s police commissioner instituted a “stop and frisk” policy in the colorblind guise of “order maintenance.” Data demonstrated that police stopped African Americans and Hispanics significantly more than Whites. In 2013 the policy was finally ruled unconstitutional, but not before it helped fuel mass incarceration, and combined with harsh

the-record comment about the unspoken pretext in the script, “Yep, this hits it right on the nose…it’s all about law and order and the damn Negro–Puerto”).

53 Bender, supra note 46, at 80 n. 26.
55 Alexander, supra note 34, at 112-14 (in 2010 Congress reduced the disparity in criminal sentencing between crack and power cocaine possession from 100:1 to 18:1).
56 Coates, supra note 30, at 34-35; see also Stop-And-Frisk Data, NYCLU, http://www.nyclu.org/content/stop-and-frisk-data (last viewed January 8, 2016)
57 In this particular study, as is common, the data was tracked by the category described as “Hispanic,” rather than Latino/a.
immigration measures, contributed to disparate removals of noncitizen Latina/os. 59 While a decrease overall in stops has coincided with lower crime rates, there is no indication that racially disparate outcomes have changed in the criminal, or immigration context. 60 Pretextual policing, usually in traffic stops and resulting in racial disparities outside of the context “stop and frisk” practices are characterized by law enforcement as a tool to investigate drivers. 61

In illustrating the Chicano community’s relationship with the police, scholar Alfredo Mirandé discusses a historic incident that could have taken place yesterday. Mirandé describes a police stop where a Denver police officer stopped a car driven by a blonde Anglo girl, with a Chicano youth passenger. The officer said to the passenger “Mexican, what are you doing with a white woman?” and arrested him. He was charged with traffic violations, dismissed in court because he was not driving the vehicle. 62 This anecdote highlights the historic and entrenched nature of police bias against Latino/as.

More recently, data indicates that 57% of those in state prison for a drug-related offense are African American and Latino. 63 Since implementing the drug war, from 1985-1995, Hispanics

59 Coates supra note 30, at 34.
61 David A. Harris, The Stories, The Statistics, and the Law: Why “Driving While Black” Matters, 84 Mkt. L. Rev. 265, 311-18 (1999) (discussing techniques and case law enabling police to use traffic stops to investigate the car and driver.) (While traffic stops may be used to investigate drivers for more serious offenses, like drug crimes, the unstated and almost impossible to prove or contest pretext is the race or ethnicity of the driver).
62 ALFREDO MIRANDE, GRINGO JUSTICE, 153 (University of Notre Dame Press 1987).
63 Drug War Statistics, DRUG POLICY ALLIANCE, http://www.drugpolicy.org/drug-war-statistics (last visited November 19, 2015); The War on Marijuana in Black and White, AMERICAN CIVIL LIBERTIES UNION (June 2013), https://www.aclu.org/feature/war-marijuana-black-and-white; United States Punishment and Prejudice: Racial Disparities in the War on Drugs, HUMAN RIGHTS WATCH (May 2011), https://www.hrw.org/reports/2000/usa/Rcedrg00.htm#P54_1086 (Human Rights Watch indicated that in 2000, African Americans were 80 to 90% of drug offenders imprisoned in seven states); STEVEN W. BENDER, RUN FOR THE BORDER: VICE AND VIRTUE IN U.S.-MEXICO BORDER CROSSINGS 164-165 (Ediberto Román, ed., 2012); (Equivalent statistics were not available for Latino/as, likely because Latino/as are often counted as White making tracking).
are the fastest growing group imprisoned, with a 219% increase. Hispanic men are almost four times as likely to go to prison during their lifetimes than non-Hispanic White males and are twice as likely as Whites to be incarcerated for a drug offense. The criminalization of marijuana was similarly infected with anti-Latina/o or Mexican and Central American bias, contributing to both the criminalization of Latina/os and their disproportionate removal as criminal noncitizens.

B. Anti-Mexican and Central American Origins of Marijuana Prohibition

In early drug prohibition efforts, users of marijuana, cocaine and opium were characterized by race or ethnicity as Mexican, African American, or Chinese, respectively. Marijuana prohibition arose in the context of explicit, and sometimes more implicit anti-Latino bias, which persists today and is borne out in the incarceration data described above. Evidence of bias is implicated in part by the implementation of marijuana prohibitions, which originated in regions of the U.S. most heavily populated by Mexican and Central American immigrants. Some have suggested that marijuana prohibition did not arise due to hostility toward the drug, but to newly arrived Mexicans that were perceived to use it.

Racialized and negative views of Mexicans contributed to the criminalization of marijuana, which was “tied to racist origins of regulation.” Professor Steven Bender explains the context of criminal classification of marijuana which arose out of “...longstanding stereotypes of the criminal and treacherous Mexican” which were “irresistible to law and order politicians and

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67 See supra. Section II.A.
69 Id.
70 BENDER, supra note 58, at 164.
voters in scapegoating the Mexican people for the drug trade...”

Today, the combination of disproportionate numbers of Latina/os filling prisons and jails for often minor marijuana offenses combined with harsh immigration consequences is a reflect of this history.

The first federal marijuana prohibitions stemmed from the 1937 Marihuana Tax Act, which was facially racially neutral, but arose in the context of the anti-Mexican immigrant environment. The first Commissioner of the Federal Bureau of Narcotics, Harry Anslinger, read anti-Mexican statements into the record in a House Ways and Means Committee hearing on marijuana referring to marijuana users as “degenerate Spanish-speaking residents.”

In the time leading up to initial marijuana prohibitions, an increasing crime-rate and “anti-Mexican bias” fueled marijuana prohibitions which the Federal Bureau of Narcotics left primarily, for the states to enact. In a 1931 study entitled “Crime and the Foreign Born” by President Hoover’s Attorney General’s commission (the “Wickersham Commission”), analysis of arrest and conviction data demonstrated overrepresentation of Mexicans. Ultimately, the data was used to justify the conclusion that Mexicans were “criminally inclined” and that they were responsible for using and selling marijuana and engaging in other criminal acts, and influencing Whites to do the same. Also leading up to federal prohibitions, the Christian Science Monitor published a story entitled “Drug Used by Mexican Aliens Finds Loophole in U.S. Laws Spread of Growth of Marihuana in Wake of Immigrants Cause Grave Concern at Washington” citing the Wickersham studies.

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71 Id. at168 (in critiquing the origins and impact of marijuana law, Bender also explains that “Accusations of murderous rampages and seductions of white women by minority users of cocaine and opiates have since been exposed as the regrettable legacy of racial paranoia in the early twentieth century.”)
72 See supra. Section I.
75 Id. at 76. (citing “A study author, Paul L. Warnshuis, head of the western branch of the Presbyterian Board of National Missions suggested, “Those who know the Mexican…would be certain to blame marihuana for a portion of the Mexican arrests.”)
76 Id.
77 Id. at 76-77.
Within the states, marijuana prohibitions also reflected anti-Latino/a bias, characterizing Mexican immigrants as criminals and drug abusers. In Colorado, the state’s alleged marijuana problems were associated with Mexicans who allegedly sold it to mostly white high school students.” 78 In 1932, a member of the Wichita, Kansas Police Department authored a much-cited article associating crime and insanity related to drug use attributing “the introduction and diffusion of the marihuana evil to Mexicans,” suggesting that marijuana became a “menace” when “native whites” began using it after they were introduced to it by individuals of Mexican descent. 79

Legislative records are also telling. A Texas state senator said in the context of considering a law to criminalize marijuana, “all Mexicans are crazy and marijuana is what makes them crazy.” 80 In advocating for the first federal marijuana prohibitions in the early 1930s, the first U.S. Treasury Department Federal Bureau of Narcotics commissioner Harry Anslinger read a document into the record alleging that marijuana had violent effects on the state’s, “degenerate Spanish-speaking residents.” 81

Mention of the association of marijuana with Mexican nationals would be incomplete without reference to the filmmakers Cheech Marin and Tommy Chong, whose films, released during the drug war, simultaneously both challenged and some suggest, if viewed over-simplistically, reinforced the stereotype of mainstream depictions of stereotypical pot-smoking criminal Mexican immigrants. 82

What Ronald Reagan first declared as the “war on drugs,” has been responsible for the mass incarceration of African

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78 Id. at 14.
79 Id. at 73. (citing Maureen A. Sweeney, Shadow Immigration Enforcement and its Constitutional Dangers, 104 J. CRIM. L & CRIM. 227, fn. 48 (2014)).
80 BUTLER, supra note 61, at 45 (internal quotation marks omitted).
81 Jordan Cunnings, Nonserious Marijuana Offenses and Noncitizens: Uncounseled Pleas and Disproportionate Consequences, 62 UCLA L. REV. 510, 519 fn. 42 (2015) (citing CHERYL L. CHAMBERS, DRUG LAWS AND INSTITUTIONAL RACISM: THE STORY TOLD BY THE CONGRESSIONAL RECORD 97 (2011) (citation omitted) (That’s why our problem [with marijuana] is so great; the greatest percentage of our population is composed of Spanish-speaking persons most of who [sic] are low mentally, because of social and racial conditions”)), see also DAVID E. NEWTON, MARIJUANA: A REFERENCE HANDBOOK 163 (2013) (quoting Harry Anslinger’s writings).
Americans and Latino/as. Instead of focusing on rehabilitation and investing in communities, the war on drugs, including, but not limited to marijuana laws, invested heavily into law enforcement and prison construction, removing federal funds from social programs and housing development. The result has been the criminalization of communities of color, primarily African American and Latino/a.

Professor Michelle Alexander declared the war on drugs the “new Jim Crow” stating that mass incarceration of African Americans is the modern day form of pseudo-slavery. Drug laws have been largely responsible for the increase in the U.S. prison population from three hundred thousand to over two million in less than thirty years and are a means of racialized social control. Even today, over $51 billion is spent on enforcing drug laws.

C. Disparate Impact of Marijuana Law Enforcement

Poor communities of color experience disproportionately enforced Marijuana laws. Professor Michelle Alexander explains, “thousands of black men have disappeared into prisons and jails, locked away for drug crimes that are largely ignored when committed by whites.” Although White youth use marijuana at
higher rates than African Americans or Latina/os, youth of color are disproportionately targeted and arrested for drug possession.\textsuperscript{88}

President Obama has acknowledged that middle-class youth do not get arrested as frequently for smoking pot, but “poor kids,” specifically “African American and Latinos,” do.\textsuperscript{89} Marijuana law enforcement follows the pattern of general drug law enforcement and disproportionately effects African Americans and Latino/as.

Racial disparities in marijuana arrests have increased in the most recent decade with racial disparities in marijuana possession arrests increasing in thirty-eight of fifty states.\textsuperscript{90} Nationwide, African Americans are 3.73 times more likely than Whites to be arrested for marijuana-related offenses.\textsuperscript{91} In major California cities, Latino/as are arrested and prosecuted for marijuana use at rates double and triple that of Whites, despite rates indicating that Latino/as use marijuana at equal or lower rates than Whites.\textsuperscript{92} In

\begin{itemize}
\item \textsuperscript{88} Steven W. Bender, \textit{Run for the Border: Vice and Virtue in U.S.-Mexico Border Crossings} 165 (Ediberto Román, ed., 2012).
\item \textsuperscript{89} David Remnick, \textit{Going the Distance: On and Off the Road with Barack Obama} The New Yorker (last visited Jan. 27, 2014), http://www.newyorker.com/magazine/2014/01/27/going-the-distance-david-remnick. (“What clearly does trouble him is the radically disproportionate arrests and incarcerations for marijuana among minorities. “Middle-class kids don’t get locked up for smoking pot, and poor kids do,” he said. “And African-American kids and Latino kids are more likely to be poor and less likely to have the resources and the support to avoid unduly harsh penalties.” But, he said, “we should not be locking up kids or individual users for long stretches of jail time when some of the folks who are writing those laws have probably done the same thing.” Accordingly, he said of the legalization of marijuana in Colorado and Washington that “it’s important for it to go forward because it’s important for society not to have a situation in which a large portion of people have at one time or another broken the law and only a select few get punished.””)
\item \textsuperscript{90} The War on Marijuana in Black and White, American Civil Liberties Union 20 (June 2013), https://www.aclu.org/feature/war-marijuana-black-and-white (while the overall number of marijuana arrests has increased over the past decade, white arrest rate has been constant, around 192 per 100,000 whites, but the black arrest rate has risen from 537 per 100,000 in 2001 to 716 per 100,000 in 2010).
\item \textsuperscript{92} Arresting Latinos for Marijuana in California, Possession Arrests in 33 Cities, 2006-08, Drug Policy Alliance (October 2010), http://www.drugpolicy.org/docUploads/ArrestingLatinos.pdf (Report says Latinos unfairly targeted for pot use); Josh Richman, Political Blotter: Report says Latinos Unfairly Targeted for Pot Use, San Jose Mercury News
\end{itemize}
2008, African Americans and Latino/as were about half of the urban population in New York but were 87% of the 40,000 arrests for marijuana possession. In New York City, Latinos reportedly are arrested at 2.5 times the rate of Whites for marijuana possession. When Latina/os arrested are also noncitizens, they similarly experience disproportionate rates of adverse immigration consequences.

In the context of addressing drug law reform, President Obama expressed concern for reversing the racial bias inherent in drug law enforcement to avoid having a “large portion of people” who have “broken the law and only a select few [who] get punished.” He has also noted middle-class youth’s seeming exemption from prosecution for smoking pot, as opposed to “poor kids,” particularly “African-American kids and Latino kids” whose lives are forever impacted by prosecution for marijuana offenses.

Not only does the racial profiling associated with enforcement of the drug laws including, but not limited to minor marijuana offenses result in a disproportionately African-American and Latino/a prison population, but the disproportionate enforcement of Latino/as carries over into immigration enforcement including immigration incarceration and deportation. Noncitizens imprisoned for drug-related offenses are more likely to be transferred to Immigration and Customs


The War on Marijuana in Black and White, supra note 32.

See supra. Section I.

David Remnick, supra note 81.

Id. (“What clearly does trouble him is the radically disproportionate arrests and incarcerations for marijuana among minorities. “Middle-class kids don’t get locked up for smoking pot, and poor kids do,” he said. “And African-American kids and Latino kids are more likely to be poor and less likely to have the resources and the support to avoid unduly harsh penalties.” But, he said, “we should not be locking up kids or individual users for long stretches of jail time when some of the folks who are writing those laws have probably done the same thing.” Accordingly, he said of the legalization of marijuana in Colorado and Washington that “it’s important for it to go forward because it’s important for society not to have a situation in which a large portion of people have at one time or another broken the law and only a select few get punished.”)

BENDER, supra note 46 “By deploying racial profiling and expanded enforcement budgets in neighborhoods of color and the borderlands, the drug war results in a staggeringly racialized prison population.”)
Enforcement custody and subject to immigration removal proceedings. Professor Mariela Oliveras suggests that the prison industry, particularly private prisons, has discovered the value of immigrants and have accordingly commodified them.99

This data underscores the fact that the drug law enforcement has largely fallen on minor offenders, including minor marijuana users. Similarly, immigration law enforcement premised on “criminal” aliens has primarily impacted low-level offenders rather than individuals that pose a legitimate threat to safety or security.

It is important to consider the specific way in which Latino/a noncitizens experience marijuana law enforcement and reforms because of the interaction of the criminal and immigration systems, and the anti-Mexican and Central American history within immigration law. Because marijuana prohibitions arose in the context of anti-Mexican and anti-Latino/a bias where Latino/as were portrayed as criminals in part because they used marijuana, and were allegedly responsible for corrupting Whites by disseminating it, it is unsurprising that marijuana law enforcement has disproportionately impacted Latino/a noncitizens and citizens. U.S. drug law enforcement, including marijuana laws, are still characterized by disparate impact in spite of an increased recognition of the harms of systemic and institutional biases.100 Thus it should be unsurprising that where marijuana law reforms fail to consider impacts on Latino/as, this historic bias may persist. When specifically considering the intersection of criminal and immigration law policing of “criminal aliens,” the history of anti-Latino/a bias in immigration law highlights the deeply entrenched nature of the problem.

II. HISTORIC IMMIGRATION LAW ANTI-LATINO/A BIAS

In examining why noncitizen Latino/as should, but may not benefit from softening of marijuana laws at the state level, it is necessary to not only understand the anti-Latino/a origins of marijuana laws, but the anti-Mexican and Central American biases throughout the history of U.S. immigration law. The social and political construction of race has played a role in the alternating

99 Mariela Olivares, Intersectionality at the Intersection of Profiteering and Immigration Detention, 95 Neb. L. Rev. 19 (forthcoming 2016) (citing douglas pond cummings [http://law.indianatech.edu/staff/faculty/cummings/] regarding profitability of mass incarceration of people of color)
100 The law lags behind in providing adequate remedy allowing facially neutral laws to be enforced subject to racial bias with racially disparate impacts.
accepting, and discouraging entry and integration of particular groups, including Latino/as. While criminal law is designed to distinguish between desirable and undesirable persons based presumably on behavior and compliance with a social contract, immigration law has identified acceptable members of the U.S. polity/society more explicitly relying on national origin, which has served as a proxy for race. Immigrants from Mexico and Central America, as well as persons of Mexican and Central American descent have experienced explicit and implicit forms of oppression and bias throughout U.S. history.

Beginning with the first immigration laws, a contradiction in national ethos or identity has existed between the United States as a “melting pot,” a democracy founded on equality, and welcoming “huddled masses,” and the nativist, at times explicitly racist messages warning of “vast hordes” allegedly “encroaching.” This hypocrisy has persisted, manifesting in federal and sub-federal law. Exclusion of certain groups is reinforced by, and simultaneously justifies the implication that they are inferior. Throughout the ebbs and flows of U.S. immigration policy, the significance of citizenship, which has served as a proxy for race, has been consistent in spite, or because of the fact that race is a social construct.

102 Chae Chan Ping v. United States, 130 U.S. 581 (1889) (while the opinion was largely favorable for noncitizens, in Arizona v. United States, 132 S. Ct. 2492, (2012), the court cited the Petitioner’s brief referencing Petitioner’s concerns about an “epidemic of crime, safety risks, serious property damage and environmental problems’ associated with the influx of illegal migration…near the Mexican Border, citing Brief for Petitioners 6).
104 See generally, Kevin R. Johnson, The End of Civil Rights’ As We Know It?: Immigration and Civil Rights in the New Millenium, 49 UCLA L. REV. 1481 (2002).
105 Devon Carbado and Cheryl Harris, Undocumented Criminal Procedure, 58 UCLA L. REV. 1543, 1545 (2011) (citing Gabriel J. Chin, Segregation’s Last Stronghold: Race Discrimination and Constitutional Law of Immigration, 46 UCLA L. REV. 1 (1998); JUAN F. PEREA, INTRODUCTION TO IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan F. Perea ed., 1997). (Early rules regarding naturalization—that is, who could become a citizen—were defined in explicitly racial terms. The Naturalization Act of 1790 restricted citizenship to white persons, and this
Critical legal studies and critical race scholar Ian Haney Lopez has explained that the notion of “Whiteness” was constructed by and through law by allocating immigration benefits according to status as “white” in spite of the lack of precision and contradictions in defining White and non-White. In 1790, Whiteness was a prerequisite for naturalization. In recent decades immigration law has formally become “colorblind,” as criminal law proclaims to be, although the excluding aspects of immigration law impacts certain populations more than others. Latino/as have been particularly adversely impacted by the excluding forces of U.S. immigration laws.

Because immigration law enforcement allows apparent Latino/a ancestry to serve as an indicator of (il)legal immigration status, race and immigration status are conflated. Accordingly, Professors Carbado and Harris explain, “because Latino identity is deemed relevant to the question of whether a person is undocumented, all Latinos live under a condition of presumed illegality.” This inherent presumption has been more apparent at

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107 IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 1 (2d ed., 2006); Devon W. Carbado, Yellow by Law, 97 Calif. L. Rev. 633 (2009) (Because of the similarities between racial profiling of Blacks and Latina/os in the enforcement of drug laws note that Blacks were also juridically excluded from citizenship, as affirmed by the Supreme Court in the Dred Scott decision.) See Dred Scott v. Sandford, 60 U.S. 393 (1856).

108 Id. at xiii (stating of colorblindness – it “wears its antiracist pretensions boldly but acts overwhelmingly to condemn affirmative action and to condone structural racial inequality…protects the continued privileged position of Whites…even as it relegates minorities to …marginalization.”)

109 While I will not address the issue here, other scholars have discussed the particular problems faced by Latina/os of sometimes being considered “White” for demographic or data-tracking purposes which erases the reality of racial profiling and interferes with finding proper remedies.


particular points in history, and when combined with anti-Latina/o bias in criminal-immigration enforcement, has reverberating effects.

A. The Foundations of Racial and Ethnic Exclusion and Mistreatment

Racial bias camouflaged as national origin bias is evidenced throughout the nation’s immigration jurisprudence. Negative characterizations of noncitizens have been used to justify decisions that deprive constitutional protections or circumscribe immigration rights or justify anti-immigrant outcomes.\textsuperscript{112} Immigration exceptionalism, and specifically, the plenary power doctrine, is one tool courts have relied on to refrain from recognizing the same constitutional protections for noncitizens as provided to citizens\textsuperscript{113} and has created or further entrenched otherwise impermissible race or ethnicity-based discrimination.\textsuperscript{114}

The first general federal immigration law, the Chinese Exclusion Act of 1882, arose in the context of an economic downturn and domestic labor protectionism.\textsuperscript{115} The Chinese

\footnotesize{\textsuperscript{112} BENDER, supra note 46.}

\footnotesize{\textsuperscript{113} There is a well-developed body of scholarship addressing immigration exceptionalism which, because of recent trends in the Supreme Court and otherwise, is seeing a resurgence of attention from the scholarly community. This definition is derived from the work of Hiroshi Motomura, Federalism, International Human Rights, and Immigration Exceptionalism; T. Alex Aleinikoff, Citizens, Aliens, Membership and the Constitution, 7 Const. Commentary 9, 34 (1990); see also Stephen H. Legomsky, Immigration law and the Principle of Plenary Congressional Power, 1984 SUP. CT. REV. 255; Hiroshi Motomura, Norms and Statutory Interpretation, 100 YALE L. J. 545 (1990); discussion of newer trends in immigration exceptionalism and federalism, see e.g. Stella Burch Elias, New Immigration Federalism, 74 OHIO ST. L. J. 5 (2013).

\textsuperscript{114} Devon W. Carbado & Cheryl I. Harris, Undocumented Criminal Procedure, 58 UCLA L. REV. 1543, 1545 (2011) (citing Gabriel J. Chin, Segregation’s Last Stronghold: Race Discrimination and Constitutional Law of Immigration, 46 UCLA L. REV. 1, 5-9 (1998) (explaining that as least as recently as 1996, the Illegal Immigration Reform and Immigration Responsibility Act allowed the State Department to rely on race among other factors in establishing visa application and procedures and the “purported justification for these racially discriminatory practices” was that Congress has “plenary, and thus nearly unfettered, power over immigration.”).

\textsuperscript{115} STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION LAW AND POLICY 1148-52 (Foundation Press 2015) (explaining that prior to the 1882 “Chinese Exclusion Act” Congress passed a facially neutral law expressly barring convicted criminals and prostitutes but as noted by Professor Hiroshi Motomura, legislative history revealed that the true intention of the facially race/origin-neutral law was to prevent Chinese women from immigrating to the United States). See HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 25 (Oxford}
Exclusion Act is an oft-cited marker of the beginning of immigration exceptionalism as a justification for disparate treatment. In approving Congress’ restriction of Chinese nationals, the Supreme Court deemed it appropriate to deny due process to noncitizens, including lawful United States residents seeking to return to the United States, on the basis of the purported importance of deferring to Congress when a federal immigration law is in question, even if it potentially abridges otherwise protected constitutional rights.\textsuperscript{116}

The way in which the Supreme Court upheld the Chinese exclusion laws, which remained in effect until 1943, \textsuperscript{117} demonstrated the Court’s willingness to support Congress’ use of racial animus in the immigration sphere. Racial and ethnic bias is demonstrated in Court’s depiction of Chinese immigrants as representing a so-called “foreign encroachment” of “vast hordes … crowding in upon us.”\textsuperscript{118} The Court implied that they \textit{chose} not to assimilate, and were accordingly dangerous, justifying exclusion.\textsuperscript{119}

Similarly, in the context of Mexican immigration, even in recent years, U.S. courts have employed foreboding, anti-Mexican language warning of a “silent invasion of illegal aliens from

\begin{footnotesize}
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\item 116 \textit{See} Chae Chan Ping v. United States, 130 U.S. 581 (1889) (Though the tides may be shifting, this rationale has been employed to justify failure to recognize full application of constitutional protections for noncitizens.); \textit{See e.g.} Kevin R. Johnson, \textit{Race, the Immigration Laws and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness}, 73 \textit{Ind. L. J.} 1111, 1113 (1998) (explaining that the plenary power doctrine has also been described as a means for the Court to avoid consideration of the constitutionality of Congress’ actions when they impacted noncitizens).
\item 118 Chae Chan Ping v. United States, 130 U.S. 581 (1889).
\item 119 \textit{Id.} (the Court suggested Congress deemed them dangerous and therefore excludable, based on their mere presence and alleged lack of assimilation, stating, “If… the government of the United States, through its legislative department, considers the presence of foreigners of a \textit{different race} in this country, who \textit{will not assimilate} with us, to be dangerous…”)
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Mexico” \(^{120}\) and the “northbound tide of illegal entrants.” \(^{121}\) More recently and more often voiced by those in the media and politicians than Supreme Court justices, demonizing of immigrants as dangerous or criminal and tying such criminality or danger to race persists in justifying exclusion. \(^{122}\) Such characterizations mirror anti-Latina/o bias of early marijuana prohibitions. \(^{123}\)

**B. Anti-Mexican and Central American Bias**

Anti-Mexican and Central American policies have surfaced throughout U.S. immigration history and enforcement actions have been carried out by immigration agents, as well as with the lawful and unlawful collaboration of sub-federal law enforcement agents, and even vigilantes.

Animosity towards Latino/as instituted through official immigration policy in some respects commenced with denial of full citizenship rights after the Mexican-American War where the United States took possession of over 50% of Mexican land. \(^{124}\) Policies of the early 1900s were rife with negative and inhuman depictions of Mexicans used to justify excluding or deporting Mexicans or those of Mexican descent. \(^{125}\) A critical component of

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121 Steven W. Bender, Mea Culpa: Lessons on Law and Regret from U.S. History, 37 (2015) (citing City of Indianapolis v. Edmond, 531 U.S. 32, 38 (2000) (opinion written by Justice Sandra Day O’Connor) (Bender commenting that “the enforcement focus on the U.S.-Mexico border and northerly ‘flows’ and ‘tides’ ignores the significant number of Canadian entrants who overstay their visas...)).

122 130 U.S. 581, 606 (1889); see discussion by Kevin R. Johnson, It’s the Economy, Stupid: The Hijacking of the Debate Over Immigration Reform by Monsters, Ghosts, and Goblins (or the War on Drugs, War on Terror, Narcoterrorists, Etc.), 13 Chap. L. Rev. 583, 594 (2010); Yolanda Vazquez, Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System, 54 Howard L. J. 3 (2011) (Discussing portrayal of Latinos as threats to national security and criminals to justify disproportionate enforcement of criminal and immigration laws against Latinos); Anna Sampaio, Terrorizing Latina/o Immigrants: Race, Gender and Immigration Politics in the Age of Security (2015).

123 See supra. Section II. B.


excluding or marginalizing Mexicans and Latino/as was the legal codification of difference.126 “White” Mexicans could obtain citizenship, whereas Mexicans of Indian, Black or a “mixed” race were not white and therefore, ineligible to be citizens.127

Following prior exclusionary immigration policies targeting Mexicans and Latino/as, after asking for better working conditions, in 1917 undocumented Mexican mine workers in the town of Bisbee, Arizona were arrested and deported.128 Local law enforcement agents worked alongside vigilantes and arrested Mexicans and Mexican Americans and effectuated the deportation of approximately 1,300 workers absent any legal process.129

During the 1920s, economic downturn police and local government officials acted with vigilante mobs to literally run those of perceived Mexican origin out of town.130 Depression-era deportation tactics used racial profiling to target undocumented as well as documented immigrants and many U.S.-citizen Latino/as.131 Subsequently, immigration raids around the time of the Great Depression also targeted those of apparent Mexican origin for deportation.132

In 1929, restrictionist immigration policy initiatives targeted Mexican “irregular” immigrants, with laws singling out

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126 Supra note 107.


128 Yolanda Vazquez, Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System, 54 HOWARD L. J. 3, 650 (2011) (discussing Bisbee deportations); see also KATHERINE BENTON-COHEN, BORDERLINE AMERICANS: RACIAL DIVISION AND LABOR WAR IN THE ARIZONA BORDERLANDS 198-238 (2009) (Similar tactics are employed today and reported on extensively by journalist David Bacon); see e.g. David Bacon, Federal Raids Against Immigrants on the Rise, 17 WEAVING THE THREADS 2 (2010), http://reimagerpe.org/node/5826; see also generally DAVID BACON, THE RIGHT TO STAY HOME: HOW US POLICY DRIVES MEXICAN MIGRATION (Beacon Press 2013).


130 BENDER, supra note 46, at 40.

131 Id.

132 Id.
those lacking language literacy and failure to meet other requirements. These laws used race-neutral proxies to impose racial restrictions.

Following the Great Depression, the 1930s Mexican-American repatriation resulted in a massive deportation of approximately one million noncitizens and citizens of the U.S. to Mexico. Around the same time, Congress held hearings on a proposed bill to eliminate almost all immigration from Mexico.

Subsequently, as the pendulum swung in the other direction, to some extent, the Bracero Program invited Mexican temporary workers to fill a need in agriculture and resulted in the admission of about 400,000 Mexican temporary workers, annually from 1942-1962. In spite of poor treatment and no path to legal status, even after the program ended, Mexican workers continued to come to the U.S. to fill needs in agriculture. Irrespective of the continuing need for workers, and in spite of having invited them per the Bracero Programs, in 1954 the federal government instituted “Operation Wetback” to apprehend and deport unauthorized farmworkers of Mexican descent. This contradictory welcoming and excluding is representative of the historic treatment of Latino/a noncitizens. Though the timing of when Mexican nationals were no longer needed for the Bracero

134 FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S (University of New Mexico Press 2006).
135 BENDER, supra note 46, at 30.
138 STEVEN W. BENDER, MEA CULPA: LESSONS ON LAW AND REGRET FROM U.S. HISTORY, 40 (2015) (describing Operation Wetback wherein during the mid-1950s economic downturn the “U.S. deported more than a million Latinos/as, mostly Mexicans, and even some U.S. citizens because of racial profiling and targeting of Latinos/as in their communities.”) As was aptly noted over a decade ago by Professor Kevin R. Johnson, a new temporary worker program, if implemented with immigration reform, would likely address workers primarily of color, from developing nations and would have “racial caste qualities” just as the prior Bracero and work programs did. See Kevin R. Johnson, The End of “Civil Rights” As We Know It?: Immigration and Civil Rights in the New Millennium, 49 UCLA L. REV. 1481, 1498 (2002)
program overlapped with the initiation of marijuana law prohibitions relying on anti-Latina/o stereotypes.\textsuperscript{139}

Reminiscent of the Bisbee workplace raid of 1917, in 2008 federal immigration agents raided a meatpacking plant in Postville, Iowa arresting 398 suspected undocumented immigrants.\textsuperscript{140} In a new legal strategy also indicative of the merging of immigration and criminal law, the workers were charged with the crime of aggravated identity theft, a felony, rather than just an immigration offense, which may alone have carried slightly less severe immigration penalties.\textsuperscript{141} Deportation procedures were conducted in makeshift courts, many noncitizens lacked adequate legal representation, and due process protections were largely absent.\textsuperscript{142}

In cooperation with federal immigration authorities, local police have enforced immigration law in ways that discriminated against Latino/as.\textsuperscript{143} The city of Chandler, Arizona used traffic checkpoints to identify suspected noncitizens of Mexican origin for arrest and deportation, absent probable cause or reasonable suspicion of any other legal violation.\textsuperscript{144} Local police stopped

\textsuperscript{139} See supra. Section I. B.

\textsuperscript{140} Maggie Jones, \textit{Postville, Iowa, Is Up for Grabs}, NEW YORK TIMES (July 11, 2012), http://www.nytimes.com/2012/07/15/magazine/postville-iowa-is-up-for-grabs.html?_r=0; Adam Nossiter, \textit{Hundreds of Workers Held in Immigration Raid}, N.Y. TIMES (August 25, 2008), http://www.nytimes.com/2008/08/26/us/26raid.html (workplace raids were proposed as fairer immigration enforcement as compared to home-based raids and more overt racially-biased tactics brought to light through advocacy organizations and the media.)


\textsuperscript{142} BENDER, supra note 46, at 48.


people in cars or on the street and demanded immediate proof of lawful status in the U.S.\textsuperscript{145} Grounds for a stop and interrogation were speaking Spanish or “Mexican appearance.”\textsuperscript{146} At least 432 people were arrested and deported.\textsuperscript{147} Litigation officially revealed the use of racial profiling.\textsuperscript{148}

In the year 2000 in Kentucky, local police set up roadblocks on a highway en route to a poultry-processing plant to verify drivers’ licenses, registrations, and automobile insurance, and then arrested a group of Latina/o immigrants, and notified the INS, which took the immigrants into custody when they appeared in court to pay the traffic fines.\textsuperscript{149} Similar tactics have been reported as recently as the writing of this article, in New Orleans, Louisiana.\textsuperscript{150} During the time in which Secure Communities was in effect, in Maricopa County police officers used traffic stops for minor violations to justify a stop and request identification, and take a suspected noncitizen into custody and charged with document fraud if their identification document “looked suspicious.”\textsuperscript{151} Even if no crime had taken place, this tactic allowed them to make the arrest, which triggered the ICE contact and, if applicable, ensuing immigration consequences.

The history of anti-Mexican and Central American bias in immigration law, and the persistence of legal and sub-legal

\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{148} Corrie Bilke, Divided We Stand, Analysis of Sanctuary Cities’ Role in the “Illegal Immigration” Debate, 42 IND. L. REV. 165, 185 (2009) (describing Chandler litigation leading to sanctuary city policy there).
\textsuperscript{149} Kevin R. Johnson, The End of ‘Civil Rights’ as We Know it?: Immigration and Civil Rights in the New Millennium, 49 UCLA L. REV. (2002) (citing Ty Tagami, INS Arrests 14 Hispanics at Courthouse in Monticello, LEXINGTON HERALD-LEADER (Nov. 21, 2000) at A1 (reporting that local police set up roadblocks on a highway en route to a poultry-processing plant to verify drivers’ licenses, registrations, and automobile insurance, then arrested a group of Latina/o immigrants, and notified the INS, which took the immigrants into custody when they appeared in court to pay the traffic fines)); cf. United States v. Lin, 143 F. Supp. 2d 783 (E.D. Ky. 2001) (addressing the legal issues raised by an INS raid on a Chinese restaurant in Lexington, Kentucky). The author notes that Kevin R. Johnson’s prediction that abuses might increase if “the federal government affords local police greater authority to enforce immigration laws” has been proven correct.
\textsuperscript{150} 2015 Annual National Immigration Project Conference (notes on file with author).
\textsuperscript{151} Melendres v. Arpaio, No. PHX-CV-07-02513-GMS 10 (D. Ariz. June 14, 2013.)
collaboration between immigration agents and sub-federal law enforcement agents is one of the reasons Latino/as comprise a disproportionate number of persons removed from the U.S. as compared to their share of the U.S. immigrant population. These systemic immigration law biases combined with the anti-Latino origins of marijuana prohibitions explain why noncitizen Latino/as may not benefit from marijuana law reform with respect to adverse immigration consequences of marijuana-related conduct. In order to understand why Latino/a noncitizens may not experience the benefits of state level marijuana-reforms it is first necessary to briefly describe the immigration consequences of marijuana-related conduct.

III. THE MECHANISM(S) THAT CAUSE RACIAL BIAS IN SUB-FEDERAL CRIMINAL ENFORCEMENT TO FILTER INTO IMMIGRATION ENFORCEMENT

Within the last two decades, immigration and criminal law have increasingly merged, and their consequences have been felt unevenly in immigrant communities. Immigration law has come to mirror criminal law with respect to the federal government’s extraordinary monetary investment in enforcement, and the results of that investment. Federal appropriations for immigration enforcement efforts have skyrocketed, not unlike the increase in expenditure as the war on drugs commenced. Particularly in recent years, President Obama and his administration have emphasized interior immigration enforcement and focus on “criminal” unauthorized immigrants or noncitizens. Immigration law now,

152 American Immigration Council, Throwing Good Money After Bad, AMERICAN IMMIGRATION COUNCIL (May 26, 2010), http://www.immigrationpolicy.org/just-facts/throwing-good-money-after-bad-immigration-enforcement (funding for criminal alien programs grew almost thirty-fold from 2004 to 2008 going from $6.6 million per year to $180 million, and in 2009 ICE began receiving $1 billion dollars for the criminal alien program).

more than in the past, relies on criminal records and criminal law enforcement, conducted often at the sub-federal level to identify potential noncitizens for apprehension, and increasingly, detention or incarceration and deportation.

The shift towards interior immigration enforcement, and the focus on “criminal” noncitizens has led to the participation of sub-federal law enforcement agents in direct, or indirect, authorized, and unauthorized immigration enforcement. The four main programs designed to identify and apprehend “criminal aliens” within the United States are: the Criminal Alien Program (CAP), the Priority Enforcement Program (PEP, and previously Secure Communities), 287(g) agreements, and the National Fugitive Operations Program (NFOP). These programs combined have resulted in a massive increase in annual immigration-related arrests (and incarcerations) – from 11,000 to 289,000.

President Obama’s 2014 uncontroversial reaffirmation of the administration’s commitment to deporting “criminal aliens,” mirrors prior administrations’ proclamation of a “war” on drugs, which was met with little mainstream political resistance. With


155 Enforcement Overdrive: A Comprehensive Assessment of ICE’s Criminal Alien Program, IMMIGRATION POLICY CENTER (November 2, 2015), http://immigrationpolicy.org/print/special-reports/enforcement-overdrive-comprehensive-assessment-criminal-alien-program (some of the conclusions include: “the program removed mainly people with no criminal convictions, and people who have not been convicted of violent crimes or crimes the Federal Bureau of Investigation (FBI) classifies as serious. CAP also appears biased against Mexican and Central American nationals. (Emphasis added.) (“CAP is not narrowly tailored to focus enforcement efforts on the most serious security or safety threats—in part because CAP uses criminal arrest as a proxy for dangerousness and because the agency’s own priorities have been drawn more broadly than those threats”).


158 Kevin R. Johnson, Race-Based Law Enforcement: The Racially Disparate Impacts of Crimmigration Law, CASE W. L. REV. 6 (2015), (“The simple truth of the matter is that mass removals of ‘criminal aliens’ are unlikely to generate a
the drug war, the social problem of drug use was characterized as a problem of “bad” or undesirable people, branded as criminals. In
the immigration context, undocumented persons have been characterized as criminals, rather than a part of a larger international, social problem pertaining to factors driving migration (wars, climate change, poverty, human rights abuses). The war on drugs found public support due to these negative depictions and perception of a social problem as one of criminality. Similarly, the new focus on “criminal aliens” finds public support for this immigration enforcement focus by characterizing undocumented persons and noncitizens with an arrest record, sometimes even absent a conviction, as criminals. Attitudes may still likely be an important determinant of perceived mainstream support for anti-immigration efforts, particularly when immigrants are characterized as “criminals.”

159 The targets of the drug war were dehumanized and characterized as criminals instead of as a part of a public health problem, their criminality in part, defined by race. “Criminal” immigrants are similarly dehumanized and implicitly, and sometimes explicitly, defined in racial terms.

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The Priority Enforcement Program (PEP) and previously, Secure Communities, play a prominent role in criminal-immigration law enforcement. Immigration scholar Yolanda Vázquez describes the incorporation of immigration law into the criminal justice system as the primary vehicle for discriminating against the Latino community. Secure Communities, and now the Priority Enforcement Program (PEP) is the lynchpin of this system.

meaningful response, much less massive political resistance, and indeed may be supported by the public at large, especially because the people primarily affected are a disenfranchised political minority.”

159 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 4 (2014) (explaining that the general public is largely unsympathetic to noncitizens with “virtually any brushes with the criminal law” who have thus “been subject to those aggressive removal efforts.”) (citing Kevin R. Johnson, Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender and Class, 42 UCLA L. Rev. 1509, 1532-34 (1995)).


161 Vazquez, supra note 118.
As a part of the Secure Communities program and now PEP, at the same time that local law enforcement agents submit fingerprint data of arrestees to the FBI, they also submit biometric data to ICE who is supposed to determine if the arrestee is a priority for removal.\footnote{Priority Enforcement Program, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, www.ice.gov/pep (last visited March 1, 2016) (“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 U.S. Immigration and Customs Enforcement (ICE) so that ICE can determine whether the individual is a priority for removal, consistent with the DHS enforcement priorities described in Secretary Johnson’s November 20, 2014 Secure Communities memorandum.” Note that some non-serious criminal offenders, as defined by the FBI, are also priorities for enforcement, including immigration “fugitives” and recent unlawful entrants. However, where police practices are marred by racial profiling the legitimacy of the system overall is called into question. Additionally, in his November 2014 remarks regarding PEP’s replacement of Secure Communities, President Obama emphasized focus on serious criminals. To the extent that the current criminal-immigration practices are both subject to improper biases and fail to identify the largest possible number of dangerous criminals, President Obama’s goals are not being met. Some of the same problems in the now defunct “broken windows” method of policing –targeting low level offenders to prevent more serious crimes, but being infected by racial profiling, and failing in the overall goals, seem to be being repeated in criminal-immigration enforcement.)} The arrests resulting in immigration investigation by ICE result largely from traffic stops, or “Terry”\footnote{Terry v. Ohio, 392 U.S. 1, 27-28 (1968).} style investigative stops where an officer need only have a reasonable suspicion of criminal activity.\footnote{Id.} A police officer’s actual motivation in making the stop, even if based on impermissible racial profiling, is difficult if not impossible to prove and therefore challenge, so long as the officer had the minimal probable cause needed to make a stop. (And as I will describe below, in the case of Adrian Moncrieffe, sometimes criminal and ensuing immigration consequences may result even absent true probable cause.) In other words, unlawful racial profiling can be masked by a lawful Terry stop. Thus, police can use minor offenses, or reasonable suspicion of one, as a pretext to pursue a suspected noncitizen.\footnote{See David Alan Sklansky, Crime, Immigration, and Ad Hoc Instrumentalism, 15 NEW CRIM. L. REV. 157, 157-223 (2012) (Explaining that another way in which the lines between criminal and immigration law enforcement have merged is represented by the suggestion that in practice, 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 and will use which ever best suits the circumstances.).}
Aware of this possibility of racial profiling, the Department of Homeland Security created the Office of Civil Rights and Civil Liberties (CRCL), tasked with in part, monitoring the potential for racial profiling within Secure Communities. While the monitoring requirements remained the same after rebranding Secure Communities as the Priority Enforcement Program, DHS and ICE have refused to release data and documents concerning racial profiling. ICE and the CRCL had hired a criminologist to conduct quarterly analyses of racial profiling data, however neither has been willing to release the reports, nor take measures to address racial profiling revealed otherwise. At the time of writing the National Immigrant Justice Center (NIJC), and immigrant rights organization, had just sued DHS and ICE for failing to request records pursuant to a March 2014 Freedom of Information Act Request.

Once the ICE agent declares the arrestee a priority, they notify local law enforcement that they wish to seek transfer of a suspected removable noncitizen. Because criminal arrests can assist ICE in identifying unauthorized noncitizens, PEP (and its predecessor, Secure Communities) result in de facto delegation of some aspects of interior immigration enforcement to sub-federal law enforcement agents. Sub-federal law enforcement agents may use traffic offenses or suspected minor criminal violations to stop suspected noncitizens. Others have described this

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168 Complaint on file with author.
169 Id.; Priority Enforcement Program, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, www.ice.gov/pep (last visited March 1, 2016) (ICE is notorious for failing to exercise discretion at all, let alone consistently with administratively established priorities.).
171 Montana Highway Patrol Settles Traffic Stop Case, IMMIGRATIONPROF BLOG (April 3, 2015) (“Montana Highway Patrol and Plaintiffs Settle Litigation Over Traffic Stops” – challenge to way Montana Highway Patrol were handling traffic stops – allegations profiling people they thought were in the US without
phenomenon as police anticipation of back-end enforcement (the possible immigration outcome), which distorts front-end policing choices. PEP incentivizes state and local police who are more subject to pressures of local politics and prejudices, to use their power to identify suspected noncitizens or undocumented persons.

Under Secure Communities, unauthorized immigration enforcement impaired by racial profiling has been confirmed. This practice undermines both criminal and criminal-immigration enforcement goals of targeting truly serious and dangerous offenders – noncitizen or otherwise. Use of traffic and Terry stops are more likely to result in racial profiling of suspected noncitizens, and as the data has demonstrated, do not target the

authorization. Lawsuit settled April 2015); Some cities, such as San Francisco, CA, have voted to opt out of PEP as they had previously done with Secure Communities, and the citizens of CA succeeded in passing the TRUST Act to minimize this sub-federal collaboration with ICE, although advocates report widespread TRUST violations Email from August – November 2015 (on file with author); Eisha Jain, Arreasts as Regulation, 67 STAN. L. REV. 809 (2015) (explaining that state and local police enforcement of immigration law incentivizes responding to local sentiment over federal immigration goals and creates potential for prioritizing arrest of suspected unauthorized immigrants”).


HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 115 (1st ed. 2014) (discussing the higher likelihood of racial and ethnic discrimination by sub-federal law enforcement officers.); see also Stella Burch Elias, “Good Reason to Believe”: Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza, 2008 WIS. L. REV.1109, 1119 (referencing the Lopez-Mendoza decision, where “Chief Justice Burger believed that INS was “better than most police departments” at preventing constitutional violations from occurring” suggesting that sub-federal law enforcement agents are more prone to racial bias and abuse) (quoting Justice Harry Blackmun, Harry Blackmun’s Conference Notes (Apr. 20, 1984), in HARRY A. BLACKMUN PAPERS, 407/83/491 (Manuscript Division, Library of Cong., Washington D.C.)).

Jain, supra n.119 (2015) (“The potential for abuse has been demonstrated in several lawsuits alleging racial profiling of immigrants by police”); See, e.g., Melendres v. Arpaio, 989 F. Supp. 2d 822, 825- 26 (D. Ariz. 2013); Letter from Thomas E. Perez, Assistant Attorney Gen., to Joseph Maturo, Jr., Mayor, Town of East Haven, 2-4 (Dec. 19, 2011) (noting that shortly after a rapid increase in the Latino population, police engaged in racial harassment and profiling of Latinos); Letter from Thomas E. Perez, Assistant Attorney Gen., to Bill Montgomery, Cnty. Attorney, Maricopa Cnty., 8 (Dec. 15, 2011) (citing police testimony that criminal arrests at day laborer hiring sites were conducted in response to citizen complaints about the presence of “dark-completed people”); see also Devon W. Carbado & Cheryl I. Harris, Undocumented Criminal Procedure, 58 UCLA L. REV. 1543, 1546-50 (2011).
more serious criminals stated to be the priority for criminal immigration enforcement.\textsuperscript{175}

In addition to being meted out contrary to stated policy goals of targeting violent or dangerous noncitizens similar to the drug war’s failure to target serious criminals, Secure Communities also resulted in discriminatory policing.\textsuperscript{176} By using criminal arrests or contact with the criminal justice system to serve as a gateway to immigration removal proceedings or a subsequent barrier to admissibility, the same racially disparate impacts that mar the criminal justice system result in disproportionate removals and inadmissibility charges against noncitizens of color, particularly Latino/as.\textsuperscript{177} Sub-federal law enforcement agents’ vast discretionary powers to arrest mean that contact with criminal law enforcement can trigger the cascading effects of immigration incarceration and enforcement.\textsuperscript{178} As a part of this process, implicit or explicit anti-Latino/a immigrant bias can drive sub-federal

\textsuperscript{175} Barbara E. Armacost, \textit{Local Resistance to Immigration Federalism}, 2039 (U. VA. SCH. L., PUB. L. AND LEGAL THEORY RES. PAPER SERIES, PAPER NO. 50) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2655032, (“If police officers are permitted (or required) to verify the immigration status of an individual who is stopped or detained in these kinds of circumstances [Terry and traffic stops under PEP] it is hard to argue that they are targeting the subset of ‘criminals’ who are the most deserving of immigration investigation or enforcement.”).


\textsuperscript{177} Mariela Olivares, \textit{Intersectionality at the Intersection of Profiteering and Immigration Detention}, 95 NEB. L. REV. 19 (forthcoming 2016) (The private prison industry has seized on the opportunity to grow profits by commodifying noncitizens and have successfully secured large numbers of noncitizens, many without any criminal history, and often asylum seekers, and largely from Central America, to fill their prisons.).

\textsuperscript{178} Email from August – October 2015 (on file with author) (immigration attorneys and immigrant rights advocates note that even absent the shield these programs provide, local police in collaboration with ICE or CBP blatantly and illegally engage in racial profiling to identify suspected undocumented Mexican or Central American immigrants and at times flagrantly).
policing because of PEP helps identify a potential noncitizen who could be deported because of the sub-federal criminal arrest.

As federal immigration regulations and policies permit a role for sub-federal law enforcement officers in immigration policing, it is hard to overstate the importance of the discretion such law enforcement agents wield regarding whom to stop, and whom to arrest.¹⁷⁹ Scholar Hiroshi Motomura succinctly explains why criminal law enforcement agents are such a powerful component of immigration enforcement under PEP and formerly Secure Communities – it is officers’ discretion to arrest, which is the “discretion that matters.”¹⁸⁰ Sub-federal law enforcement officers have significant discretion in deciding whom to stop, detain and arrest.¹⁸¹

Criminal law enforcement officers can use their discretion to engage in pretextual criminal or traffic law policing for targeting those suspected of having unlawful immigration status, based on observable ethnic or racial characteristics.¹⁸² Some suggest that Secure Communities had the result of seemingly legalizing racial profiling in criminal law enforcement.¹⁸³ A stop and subsequent arrest by sub-federal law enforcement officers, even absent a conviction, can lead to criminal and immigration legal battles, immigration-related incarceration,¹⁸⁴ and last but not least, deportation and/or future prevention from obtaining lawful status in the United States, in spite of family ties or other equities. In one clearly observable example of racial and ethnic bias in sub-federal law enforcement cooperation with ICE, a local sheriff seemingly justified his focus on Mexican-appearing nationals, explaining his view of persons of Mexican descent: “Their values are a lot

¹⁷⁹ HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW,128-31 (1st ed., 2014)
¹⁸⁰ HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW,128-31 (1st ed., 2014)
¹⁸⁴ The author refers to immigration detention as “incarceration” because even though it’s technically civil in nature, the experience for the noncitizen, including the deprivation of freedom, and the place and nature of the incarceration differ little if at all, from jails or prisons otherwise reserved for those accused of or punished for crimes.

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different – their morals – than what we have here…” This serves as an example of racially neutral laws enforced by an officer with express racial bias. Just as insidious is the problem of subconsciously biased enforcement of racially neutral laws.

Also problematic, or suggestive of a systemic bias against Latino/as, was the way in which Secure Communities was implemented. The Department of Homeland Security implemented the Secure Communities program first in Hispanic or Latino, rather than high-crime communities. Those arrested through Secure Communities were primarily minor offenders, and in some cases, had no criminal history whatsoever. In 2009, thirty-five and a half percent of criminal deportees were deported for drug offenses and less than 15% for violent crimes. Secure Communities has also resulted in a disproportionate rate of Latino/a arrests, detentions and removals as opposed to those of other national origins.

Not unlike the impact of the war on drugs, Secure Communities, and now PEP, channels primarily minor offenders from the criminal justice to the immigration removal system where more Latino/as are arrested, incarcerated and deported,

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186 See e.g. Adam B. Cox & Thomas J. Miles, Policing Immigration, U. CHI. L. REV. 80, 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.”); see also Thomas J. Miles and Adam B. Cox, Does Immigration Enforcement Reduce Crime? Evidence From Secure Communities, 57 J. L. AND ECON. 4 937-73 (2014), (discussing empirical data demonstrating that immigrants to do not commit crimes than native-born people).
187 Tanya Golash-Boza & Pierrette Hondagneu-Sotelo, Latino Immigrant Men and the Deportation Crisis: A Gendered Racial Removal Program, 11 U.C. MERCEDEZ LATINO STUD. 3, 280 (2013) (citing Lacayo, 2010 – (majority of those detained were apprehended for minor violations, such as driving with a broken taillight).
disproportionate to their population and to rates of admissions. Mexican and Central American nationals continue to be overrepresented in removals resulting from the Criminal Alien Program (CAP), compared to the demographic profiles of those populations in the United States.\textsuperscript{189}

Specifically, people from Mexico and the Northern Triangle (Guatemala, Honduras, and El Salvador) accounted for 92.5\% of all CAP removals between 2010 and 2013, even though collectively, nationals of those countries account for 48\% of the noncitizen population in the United States.\textsuperscript{190} While they account for higher rates of arrest, incarceration, and deportation, Mexican and Northern Triangle nationals are not more likely to be convicted of violent or serious crimes.\textsuperscript{191} The interconnectedness of criminal and immigration law enforcement, and sub-federal law enforcement officers’ discretionary powers, are largely responsible for these disparities.

The case of Adrian Moncrieffe epitomizes the problematic intersection of the war on drugs and the immigration removal system.

\textit{Adrian Moncrieffe: The Intersection of Sub-federal Drug Law Enforcement and Immigration Law}

\textsuperscript{189} Guillermo Canto, Mark Noferi & Daniel E. Martínez, \textit{Enforcement Overdrive: A Comprehensive Assessment of ICE’s Criminal Alien Program}, IMMIGRATION POLICY CENTER (November 2, 2015), http://immigrationpolicy.org/print/special-reports/enforcement-overdrive-comprehensive-assessment-criminal-alien-program (The shift towards interior immigration enforcement, and the focus on “criminal” noncitizens has led to the participation of sub-federal law enforcement agents in direct, or indirect, authorized, and unauthorized immigration enforcement).


The case of Adrian Moncrieffe highlights the significance yet invisibility of race in the criminal-immigration enforcement system. As has been carefully deconstructed and analyzed by Professor Kevin Johnson, Adrian Moncrieffe’s criminal arrest, which nearly led to his deportation and permanent banishment from the United States, exemplifies the way in which the “criminal justice system works in combination with the modern removal machinery to disparately impact communities of color.”

The facts of Mr. Moncrieffe’s arrest pursuant to a “routine” traffic stop highlight the ways in which racial profiling in criminal drug-law enforcement infect the immigration removal system.

Adrian Moncrieffe is a Black Jamaican who has been a lawful permanent resident since the age of three, and is the father of United States citizen children. He was arrested during a local drug interdiction effort in a small Georgia town resulting in a conviction under Georgia law for possession of 1.3 grams of marijuana, enough for about two marijuana cigarettes. The Georgia statute criminalized possession with intent to distribute; he received no prison time, just probation, and the offense was later expunged.

Seven years after the initial criminal arrest in 2013, the Supreme Court heard the case of Moncrieffe v. Holder and ruled on a technical legal issue regarding the definition and analysis of what constitutes an aggravated felony for immigration purposes.

Even though racial bias may have figured heavily in the reason for the traffic stop, racial profiling was not a factual or legal issue before the Court.

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196 See Immigration and Nationality Act (INA) Section 101(c)(43); 8 USC 1101(a)(43)...


198 If the crime of possession of a small amount of marijuana no longer existed, even assuming race was a factor in the initial traffic stop, the adverse immigration consequences stemming from that stop may not have been avoided.
Professor Kevin Johnson painstakingly analyzed the police report that is highly suggestive of a pretextual stop; beginning with the presence of a drug-sniffing dog on the scene, suggesting that drug interdiction was one of the reasons that officer was “monitoring” traffic. Among the indicators of racial profiling was the police report’s author’s note that he particularly liked “the tint violation as a reason for stopping folks because it negates the argument that I stopped a particular sex or race…” even though, as Johnson points out, he would have had a hard time seeing a potential tint violation because the stop was conducted at night. Johnson suggests, “none of the totality of the circumstances …would seem to provide the probable cause necessary for a search.”

See e.g. See Kevin R. Johnson, Racial Profiling in the “War on Drugs” Meets the Immigration Removal Process: The Case of Moncrieffe v. Holder, 48 U. MICH. J. L. REFORM 4, 5 (2014). (“One might not even be sure from reading the Court’s matter-of-fact opinion that Moncrieffe was Black. Rather the Court treats the matter as routine – and race neutral color blind – immigration removal matter, little different from the thousands of such removal orders entered each year.”) Also note that motions to suppress are less available in immigration court proceedings to challenge alleged racial bias in the underlying criminal arrest which resulted in the subsequent immigration proceedings – cite case. And, the equal protection doctrine is rarely raised to challenge alleged racial bias under these circumstances for the same reason it fails to be particularly helpful in the criminal proceedings – it is difficult if not impossible, to prove the racially biased intentions in an officer’s mind at the time of the alleged improper arrest or police misconduct. Finally, the lack of entitlement of noncitizens to appointed counsel in removal proceedings makes it a near practical impossibility to raise such challenges even where the facts suggest they might be viable claims.


200 See Kevin R. Johnson, Racial Profiling in the “War on Drugs” Meets the Immigration Removal Process: The Case of Moncrieffe v. Holder, 48 U. MICH. J. L. REFORM 4, fn 71 (2014). (“Brainard later wrote that he looked for “driving behaviors that people do to avoid . . . law enforcement contact” and “any violation of law that establishes probably cause to make a traffic stop. . . . [I]n this case, the vehicle passed me with an obvious tint violation. . . . I particularly like the tint violation as a reason for stopping folks because it negates the argument that I stopped a particular sex or race. If you can’t see what’s in the vehicle, they certainly can’t say you stopped them because they were a particular sex or race. In today’s world, it seems to be the number one argument presented as a defense.” Id. (emphasis added)”) 

The initial discretionary arrest of Mr. Moncrieffe by sub-federal immigration officers, which resulted in conviction of an offense, considered relatively minor by Georgia criminal law standards, and was later expunged, triggered potentially severe immigration consequences. If the case had not involved, the complicated, categorical approach analysis, it may have been just another removal case that likely began with a pretextual traffic stop of a longtime lawful permanent resident, arrested for a minor marijuana offense.

Mr. Moncrieffe’s case demonstrates how “routine traffic stops can trigger immigration enforcement actions that contribute to the racially disparate impacts” in immigration removals/deportations that impact communities of color. Even though ostensibly, the criminal and immigration enforcement systems are racially neutral, one commentator has noted, “because race is relied on in ordinary criminal law enforcement and immigration enforcement increasingly relies on criminal enforcement, removals have fallen primarily on Latino immigrants.” Thus this case is emblematic of the experience of potentially thousands of noncitizen Latina/os who are also disproportionately apprehended and deported as a result of sub-federal criminal policing combined with PEP.

IV. IMMIGRATION CONSEQUENCES OF MARIJUANA-RELATED CONDUCT: DECRIMINALIZATION OF MARIJUANA AND NONCITIZENS

Considering this historical context of the war on drugs, anti-Latino/a bias in immigration law, and the merging of criminal and immigration law, it should come as no surprise that the benefits of marijuana law reforms may not be experienced by Latino/a noncitizens. Before considering new potential adverse consequences of reforms for Latino/as, and then policy suggestions to help ensure that the benefits of reforms are equitable, it is necessary to briefly consider the potential impact of decriminalization of marijuana for noncitizens.

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203 Moncrieffe’s case also demonstrates the way in which the nature of racial bias in drug law enforcement, and the subsequent penalty of a marijuana offense for a noncitizen, is disproportionate to that of U.S. citizens. See e.g. Michael Wishnie, Immigration Law and the Proportionality Requirement, 2 U.C. IRV. L. REV. 415 (2012).
A. Potential Practical Implications of Decriminalization for Noncitizens\textsuperscript{204}

Decriminalization of marijuana may eliminate inadmissibility, removability or other adverse consequences in some cases where no criminal charges are brought because the conduct is no longer prohibited by state law. However, decriminalization of marijuana will not eliminate all adverse immigration consequences and may have some unintended, new adverse consequences for noncitizens.\textsuperscript{205} Limited decriminalization still leaves open the possibility of removability and inadmissibility grounds, and in some ways makes noncitizens more vulnerable to immigration incarceration and removal.

In many cases, avoidance of a conviction and diversion to drug court could eliminate adverse immigration consequences. As an example, decriminalization could eliminate the adverse immigration consequences of conviction of first-time possession for a small amount of marijuana, but still over 30 grams. However, in some cases adverse immigration consequences would still result because an admission of marijuana-related conduct could still result in inadmissibility, even absent a criminal conviction. In cases where there are still criminal charges, or diversion, but no jail time, such changes to marijuana laws could eliminate access to criminal defense counsel who could otherwise have potentially negotiated a more favorable plea for immigration purposes. If marijuana-related conduct resulted in diversion to drug court instead of a drug conviction,\textsuperscript{206} the noncitizen would be in a more disadvantageous position than if decriminalization had not occurred and their right to counsel would have been triggered by the charge. Where competent appointed counsel complies with \textit{Padilla v. Kentucky}\textsuperscript{207} or otherwise attempts to mitigate adverse immigration consequences, counsel may be able to negotiate a better plea avoiding the adverse immigration consequences.\textsuperscript{208}

\textsuperscript{204} More complete discussion of the adverse immigration consequences of decriminalization of marijuana is beyond the scope of this paper, which will instead focus on the relationship between decriminalization of marijuana and immigration removals of Latino/as.

\textsuperscript{205} Extensive discussion of practical and legal consequences of actual or hypothetical decriminalization of marijuana is beyond the scope of this paper.


\textsuperscript{207} 559 U.S. 356 (2010).

\textsuperscript{208} Example – possession for personal use of under 30 grams instead of possession for sale or possession of 31 grams, eliminating the 237(a)(1)(h) exception to removability for possession for one’s personal use of 30 grams or less of marijuana.
Absent access to counsel, the noncitizen may suffer less severe criminal consequences, but more severe immigration ones.

Noncitizen Latino/as experience the adverse consequences of drug-related conduct more than other noncitizens. The main reason for this is the disproportionate impact of drug law policing in the Latina/o community and the way in which federal immigration law and policy focuses on “criminal aliens,” resulting in deportation of a disproportionate number of Latina/os.

B. New adverse immigration consequences and shortcomings for the Latino/a noncitizen

Even if there are fewer arrests because marijuana-related conduct that was criminal no longer is, racial disparities will likely persist in arrest and incarceration, as well as in ensuing immigration incarceration and deportations. If racial profiling still occurs in criminal law enforcement, removals will remain disproportionate because of the expansive and entrenched ties between criminal and immigration law, and the absence of effective deterrence to racial profiling in criminal and immigration law enforcement.

Contrary to the more optimistic expectations of some, legalization or decriminalization could result in an increase in

racial disparity in drug law policing and related adverse immigration consequences. There is some anecdotal evidence that police may be enforcing the remaining laws criminalizing marijuana conduct even more heavily in poorer, more predominantly Black and Latino communities, because of the way in which decriminalization has been structured. 210 If police use the same tactics for policing, regardless of whether they are making arrests for marijuana-related conduct, or other prohibited behavior, such as public intoxication, or traffic violations, there is no evidence to suggest that policing will fall less heavily on Latino/a communities than in the past.211

In particular, racial disparities reported after decriminalization of marijuana in Colorado appear to have persisted, and possibly even increased, because of the nature of enforcement practices.212 Specifically, racial disparities for still-

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211 See Steven Bender, The Colors of Cannabis: Race and Marijuana, U.C. DAVIS L. REV. (forthcoming 2016) (explaining the continuation of a form of “broken windows” policing which extends to minor marijuana offenses which remain criminalized such as driving under the influence of marijuana, possession by youths, and public consumption) (citing Raven Rakia, When People are Property: How Strategically Choreographed, Racialized Fear Built Prisons out of Broken Windows, MEDIUM (July 22, 2014) (history of broken windows policing and contextualizing marijuana arrests within this particular enforcement strategy); see also Vince Sliwoski, Oregon’s Hazy Law on Smoking Marijuana in “Public Places,” CANNA LAW BLOG (Aug. 5, 2015), http://www.cannalawblog.com/oregons-hazy-law-on-smoking-marijuana-in-public/ (discussing uncertainties under Oregon law, including whether consumption in a vehicle is considered a public place and looking to analogous Oregon authority to conclude affirmatively); David Blakea and Jack Finlawaa, Marijuana Legalization in Colorado: Learned Lessons, 8 HARV. L. & POL’Y REV. 359, 374 (2014) (discussing how the Denver City Council narrowly rejected an ordinance that would have prohibited recreational marijuana smoking on a front porch). Steven Bender, The Colors of Cannabis: Race and Marijuana, U.C. DAVIS L. REV. (forthcoming 2016) (using the above sources to support the content that decriminalization and legalization that leaves in place criminalization or regulation of use in public, in particular, will fall disproportionately on poor people, who are more likely to be persons of color, largely because their marijuana use is forced into public spaces due to overcrowding in homes and other reasons).

212 New Report Provides Comprehensive Data on Marijuana Arrests and Charges in Colorado After Legal Regulation for Adult Use, DRUG POLICY ALLIANCE (April 24, 2015), http://www.drugpolicy.org/news/2015/03/new-
illegal and petty charges persist for African Americans compared to Whites. African Americans in Colorado are 2.4 times more likely than Whites to be arrested for remaining marijuana violations. While Latino/a-related data is not available as of the time of writing, there is no reason to assume the historic disparate impact on Latino/as has changed.

Absent more comprehensive decriminalization or legalization measures, Adrian Moncrieffe and similarly situated noncitizens may similarly not have escaped the initial traffic stop even if Georgia had decriminalized possession of marijuana. If only possession of a small amount of marijuana were decriminalized, Mr. Moncrieffe could still even have faced the same underlying criminal charges. As Professor Victor Romero explains, the Moncrieffe decision still allows for deportation for minor drug offenders. If marijuana offenses are still criminalized, or in some cases, even where they are not criminalized, individuals like Mr. Moncrieffe may still suffer adverse immigration consequences stemming from potentially discriminatory policing.

C. Proposals to Ensure Criminal Law Reforms are Inclusive and Equitable

There are proposals to decrease racial profiling in the criminal-immigration sphere and ensure that the benefits of marijuana decriminalization are experienced by all equally, though any solution that does not address the intersection of criminal and immigration law will be incomplete. In the context of drug law reform where racial bias is acknowledged as a problem, proposed solutions include: training of officers to avoid racial profiling, restricting discretion in traffic stops, providing meaningful remedies for impermissible stops, and eliminating policies that incentivize arrests for minor offenses that have historically been used as a part of pretextual policing. However, these changes may still fall short if police still believe they can identify a potential noncitizen who could end up in removal proceedings because of an arrest they make as a result of the relationship between the criminal and immigration law enforcement systems. The same is true even where such bias is subconscious. Even if the Priority

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213 Id.
215 Id.
Enforcement Program replacing Secure Communities shifts discretion away from sub-federal policing by minimizing the incentive for sub-federal police to engage in de facto immigration enforcement, the continued use of the “criminal alien” profile will ensure the persistence of bias in policing and it’s transmission to immigration enforcement.

Criminal law enforcement changes in isolation of the criminal-immigration paradigm may be incomplete, particularly where racial bias in policing has been a deeply entrenched, systemic problem for decades. Some of the suggestions to minimize adverse consequences of marijuana conduct for noncitizens to better correspond with state measures and address profiling include: legalizing marijuana at the federal level and amending the INA to eliminate controlled substance inadmissibility and deportation grounds for minor marijuana offenses. While these measures might eliminate law enforcement agents’ use of marijuana-related conducted to identify potential noncitizens for removal, such changes may do little to impact the systemic bias that characterizes the immigration removal system, particularly when it relies on a conception of criminality to identify less desirable persons for full participation and residence in the United States polity.

Additionally, provision of appointed counsel for noncitizens with marijuana charges would help ensure remedies available are pursued, including motions to suppress where possible. Immigration trial attorneys could exercise prosecutorial discretion to refrain from bringing removal proceedings against a noncitizen with minor marijuana charges to better reflect the trend in minimizing the adverse criminal consequences of marijuana-related conduct. At least one scholar has suggested that the significant number of removals based on minor criminal offenses is both a failing of the criminal-immigration enforcement model and an indication of ICE’s failure to monitor its agents and ensure agents consistently exercise policy directives on discretion.

216 See Juliet Stumpf, D(e)Volving Discretion – Lessons from the Life and Times of Secure Communities, 64 AM. U. L. REV. 1259, 1267 (2015), (discussing the possibility of PEP shifting the de facto “devolution of enforcement discretion into a de jury policy” such that macro-level, federal immigration enforcement policies are reflected in reality)
Terminating, rather than modifying what was renamed the Priority Enforcement Program could significantly disrupt the criminal-immigration pipeline. Congress could bring back discretionary immigration relief ended by Congress in 1996 by eliminating INA section 212(c).

The complete application of the Sixth Amendment in immigration court would make motions to suppress more helpful. However, motions to suppress do not entirely prevent critical evidence of national origin, necessary for proving the charges in a Notice to Appear from entering the record and are, therefore, limited in their ability to deter or challenge sub-federal criminal law enforcement racial profiling that results in immigration removal proceedings. One scholar has suggested the trigger for removal proceedings be triggered by more substantial indicia of criminality – presumably a more substantial criminal history. However, if the significance of the pervasiveness of racial bias in criminal policing and prosecutions are not remedied this may only serve to entrench further and validate the criminal paradigm.

One scholar suggests courts be permitted to inquire into the subjective motivation of sub-federal law enforcement agents’ motivation for a stop. However, given the difficulty of proving intent of an officer, without a right to appointed counsel the ability to inquire into the subjective motivation for a stop, and then taking appropriate remedial action may prove challenging.

The ICE Task Force on Secure Communities suggested withholding immigration enforcement action and refraining from issuing a Notice to Appear where the only offense is a minor traffic violation. However, implementing consistent immigrant-favorable discretionary practices has proven to be an intractable challenge for ICE. ICE has also directed officers, under PEP, to pursue removal where an individual was convicted, not just arrested. However, there is no indication yet, that officers honor these instructions in practice.

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219 HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW, 128-31 (1st ed., 2014); Mary D. Fan, The Case for Crimmigration Reform, 92 N.C. L. REV. 101, 129, Mary D. Fan, The Case for Crimmigration Reform, 92 N.C. L. REV. 101, 156 (describing requiring “an indicia of risk beyond criminal status, such as significant prior criminal history”).

220 ARMACOST, supra note 215.

If marijuana law follows the path of lesbian and gay marriage laws, state level changes could lead to change at the federal level that could have a positive collateral immigration impact. This may already be occurring as Congress may have recently ended the government’s ban on medical marijuana.222 In the immigration law context, when the Supreme Court issued a ruling recognizing gay marriages entered into at the state level, lesbian and gay married couples no longer faced a discrepancy at the federal level when seeking immigration benefits based on their marriages. In the marijuana law context, the adverse immigration implications of marijuana-related conduct would be eliminated if the federal government eventually decriminalizes or legalizes marijuana.223

However, there is a drastic difference between the struggle for marriage equality, and the landscape surrounding challenging crimmigration enforcement. The problem of racial bias in the criminal system and its transmission into immigration enforcement suggest a more intractable problem that may not be entirely solved, even by the federal-level legalization of marijuana, as long as immigration enforcement relies on the “criminal alien” profile.

Immigration Federalism may provide yet another avenue of addressing the disparities resulting from criminal-immigration enforcement. The increasing role of states in immigration enforcement suggests that where states are changing marijuana laws and the federal government policies have not caught up; states could use this as yet another way to enter the business of declining federal criminal-immigration enforcement invitations. In line with TRUST Acts in California and Connecticut and the many localities that have opted out of cooperation with PEP and detainer policies, sub-federal entities could help ensure that noncitizens do not get identified for removal as a result of minor marijuana offenses where sub-federal agents make the initial arrest. The same policy incentives motivating sub-federal entities to engage in sanctuary policies would justify their taking a position on refraining from cooperating with federal immigration enforcement efforts where minor marijuana offenses were at issue. This would send a message to the Federal government, specifically Congress, regarding the need for the federal government and sub-federal

223 Id.

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entities to have a more collaborative relationship where criminal-immigration enforcement is concerned, especially with equality principles.

CONCLUSION

State-level marijuana reform and criminal justice reform more broadly, put a spotlight on the ways in which the inequities of criminal enforcement transmit into the immigration removal system. Marijuana law and criminal justice reform, however, provide the opportunity to deeply scrutinize these inequities through consideration of systemic changes to both the immigration and criminal justice systems, as well as the place where the two meet – crimmigration or the criminal-immigration removal system. Rather than take to task criminal justice reformers for not ensuring that noncitizens also benefit from state-level marijuana reforms, this article has intended to highlight the deeper, more systemic problems at the intersection of criminal-immigration law enforcement, through the lens of marijuana reform.

The issue of state-level marijuana reforms also raises issues of federalism and the relationship between the states and federal immigration law. Perhaps states that have taken steps to decriminalize or legalize marijuana who currently cooperate with federal immigration enforcement efforts, such as the Priority Enforcement Program, will opt out of such collaborations as a way of conveying to the federal government that federal immigration law should respect state-level criminal justice reforms. If states have decided to treat marijuana offenses more favorably than in the past, but noncitizens, particularly Latino/as, suffer continued adverse immigration consequences, states could choose this route as a means of noncooperation to encourage federal policy change in keeping with sub-federal political and social policy changes.