Laws **2014**, *3*, 61–84; doi:10.3390/laws3010061

OPEN ACCESS

laws

ISSN 2075-471X

www.mdpi.com/journal/laws/

Article

Sub-Federal Enforcement of Immigration Law: An Introduction to the Problem of Pretextual Enforcement and Inadequate Remedies

Carrie Rosenbaum

Golden Gate University School of Law, San Francisco, CA 94105, USA;
E-Mail: crosenbaumimmigrationlaw@gmail.com; Tel.: + (415)-788-2900

Received: 8 November 2013; in revised form: 11 January 2014 / Accepted: 13 January 2014 / Published: 22 January 2014

Abstract: Sub-federal enforcement of immigration law has expanded significantly in the last decade raising questions concerning policing, rights violations, and remedies. While the Fourth Amendment has historically provided an avenue for potentially suppressing evidence obtained in violation of a criminal defendant's civil rights, its applicability in the immigration removal context has been circumscribed. Thus, the avenues to protect the rights of unauthorized noncitizens in immigration removal proceedings are less clear where sub-federal agents act outside of their authorization, particularly in the context of Secure Communities, and enforce immigration law. In the context of immigration exceptionalism, racial profiling has historically played a unique role in immigration law. The lack of adequate measures to deter rights violations where sub-federal agents enforce immigration law raises questions concerning the relationship between criminal and immigration law, and the importance of deterring civil rights violations such as racial profiling, in immigration enforcement. This article will examine the problem of sub-federal law enforcement agents' use of criminal law violations as a pretext to enforce immigration law and the lack of adequate deterrence of civil rights violations.

Keywords: Secure Communities; racial profiling; prosecutorial; discretion; sub-federal; suppression; exclusionary; bias

---

1. Introduction

The enforcement of immigration law has historically been considered a plenary power of the federal government, and the responsibility of federal immigration authorities. As state and local law

enforcement agents become increasingly involved in the enforcement of immigration law, directly or indirectly, pursuant to federal grants of authority or otherwise, more jurisprudential challenges arise concerning to the criminalization of immigration law [1–3].

Sub-federal law enforcement agents (hereinafter "sub-federal agents") do not operate in a controlled environment, or a contrived, "petri dish", of a world. Instead, they operate in the context of a hyper-politicized environment, where questions of race, belonging, and otherness are inseparable from policies, and actions of individual law enforcement officers. Sometimes, legal analyses by courts and others disregard the intangible factors that create complex contexts for our socio-legal problems.

This essay will consider the potential for pretextual enforcement of immigration law and racial profiling by sub-federal agents, and the inadequacy of existing legal remedies in addressing these potential problems. Even though noncitizens subject to pretextual arrests or arrests tainted by racial profiling experience the same rights violations as if they were solely criminal defendants, noncitizens in removal proceedings do not benefit from the equivalent protections as their criminal defendant counterparts. Moreover, noncitizens face the severe consequences of potential deportation and even banishment [4].

The exclusionary rule can provide an avenue to suppress evidence obtained in violation of the Fourth Amendment [5]. However, in spite of the criminalization of immigration law, one of the many differences between immigration and criminal law is the lesser availability of suppression of evidence obtained in violation of an individual's Fourth Amendment rights ([5], p. 1038). While the *Lopez-Mendoza* court's ruling restricting the suppression of evidence in immigration removal proceedings has been rightly critiqued by scholars [6–10], the remedy indeed falls short of addressing the potential underlying problems of pretextual enforcement and racial profiling. The reasons for the inadequacy of the remedy pertain in part, to the complexity of the problem and the difficulties of identifying racial profiling, or pretextual enforcement.

There are multiple ways in which sub-federal agents currently participate in the enforcement of immigration law. In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") establishing INA section 287(g) [11], which allows the Department of Homeland Security ("DHS") to deputize sub-federal agents to perform the duties of an immigration officer. [1] "Secure Communities" establishes a mandatory sharing of information between local jail officials and Immigration and Customs Enforcement Agents ("ICE") anytime an individual is arrested. [2] Pursuant to these programs, any arrest, including for a minor traffic violation, may lead to the detection of an unauthorized migrant, and may result in the initiation of removal proceedings in immigration court. Sub-federal agents are likely aware of the link between a criminal arrest, and the potential to identify an individual who may be undocumented.

The Supreme Court has determined that racial profiling by *federal immigration agents* constitutes an "egregious violation" sufficient to merit suppression ([5], pp. 1050–51). Since *Lopez-Mendoza,*

---

[1] This article will focus on the aspect of 287(g) concerning jail enforcement agreements because they are the only kind of 287(g) agreement in effect at the time of this writing.

[2] States and municipalities have also increasingly been passing laws to permit their local law enforcement agents to have a role in checking immigration status when an individual is booked into a jail; however, state laws encouraging or authorizing sub-federal agents role in policing immigration law will not be the focus of this article.

immigration courts have increasingly considered suppression of evidence obtained by sub-federal agents in violation of the Fourth Amendment during a traffic or criminal investigation or arrest [12,13]. However, in immigration removal proceedings, suppression may be even more ineffective than it otherwise would be, in large part, because of Secure Communities. For example, even if evidence from the initial criminal law enforcement encounter is tainted by misconduct and suppressed, it may be admitted because it will be discovered pursuant to a Secure Communities FBI record check. Thus, if the evidence is still submitted, the underlying violation will go unchecked, and undeterred. The ability of otherwise tainted evidence to be introduced was one of the reasons that the *Lopez-Mendoza* court suggested that the exclusionary rule was not the best tool to address Fourth Amendment violations, even before Secure Communities ([5], p. 1043). [3]

This article will consider existing mechanisms to deter pretextual immigration enforcement by sub-federal agents, and identify means to better protect unauthorized migrants from enforcement that is contrary to DHS policy objectives, and may diminish public confidence in the administration of justice. The problems stemming from sub-federal enforcement of immigration law perhaps signal another way in which criminal law has seeped into immigration law with respect to enforcement, but without comparable means of ensuring protections of individual rights. Part two will outline the programs most relevant to this discuss that create or incentivize sub-federal enforcement of immigration law. Part three will consider the significance of a sub-federal agent's discretion to make an arrest where their discretionary action may result in identification of an unauthorized migrant. Part four shall address data suggesting that sub-federal agents may be engaging in pretextual arrests, and anecdotally identify instances where racial profiling has been discovered. Finally, part five will discuss the shortcomings of existing remedies of deterring pretextual enforcement of immigration law and racial profiling, and identify other mechanisms to avoid such unintended outcomes which may undermine federal immigration policy.

2. Sub-federal Enforcement of Immigration Law

Based on a perceived need for increased internal measures to enforce immigration law, the federal government has increasingly delegated indirect and direct power to sub-federal agents to engage in the policing of immigration law.

The most significant changes representing the trend towards internal policing of immigration law by sub-federal agents occurred beginning in 1996, with the passage of IIRIRA [11]. Since 1996, there has been a drastic increase in programs, policies and state or municipal laws allowing for participation of sub-federal agents in the enforcement of immigration law. Agreements pursuant to 287(g), Secure Communities, and state laws and municipal regulations have all contributed to an environment of expanding sub-federal involvement in the enforcement of immigration law in spite of the federal government's historic plenary power over immigration.

---

[3] However, as the author will instead address why this problem suggests the need for additional, not just different, solutions.

2.1. Immigration and Nationality Act Section 287(g) Agreements

As a part of IIRIRA, ICE created ICE Agreements of Cooperation in Communities to Enhance Safety and Security ("ICE ACCESS") measures, which were intended to enhance cooperation between federal and sub-federal agents. Section 287(g) agreements are one of the ICE ACCESS programs, and explicitly delegate power to states and localities to deputize their law enforcement agents to enforce federal immigration laws [11]. Memorandums of Agreement ("MOA") establish a scope of authority delegated to sub-federal agents, and establish training protocols. ICE is also supposed to supervise such agents when they carry out immigration enforcement duties.

Pursuant to 287(g), states have enacted laws requiring jail officials to determine the immigration status of all individuals, and report suspected noncitizens to ICE. As of August 2013, ICE reports having 287(g) agreements with 36 law enforcement agencies, in 19 states, and indicates that since January 2006, the program "is credited with identifying more than 309,283 potentially removable aliens", primarily in local jails [14]. The states with 287(g) agreements include: Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Maryland, Massachusetts, Nevada, New Jersey, North Carolina, Ohio, Oklahoma, South Carolina, Texas, Utah and Virginia [14].

Most common are the 287(g) jail enforcement agreements, which authorize local law enforcement agents within jails (not necessarily patrol officers) to determine an inmate's immigration status, communicate that information to ICE, issue detainers to hold noncitizens for ICE, and transfer individuals to ICE custody. After transfer, ICE may issue a Notice to Appear ("NTA"), commencing immigration removal proceedings [11,15].

The local agent is empowered to determine that an individual may be undocumented, and communicate that information to ICE. The local agent may determine that an individual is undocumented based on answers to questions about the arrestee's national origin, or citizenship. An officer is not prohibited from presuming that an individual is foreign-born based on factors such as appearance or ethnicity [16]. The local agent or ICE agents may then check the DHS database, conduct an interview with the detainee at the jail, issue a detainer permitting a 48-h ICE hold before s/he is transferred to ICE custody, and issue the NTA. Either DHS, or local agents at the jail may conduct any or all of these steps [17].

2.2. Secure Communities

Following implementation of Secure Communities in 2008 [18], any time a state or local law enforcement officer makes a criminal arrest, the Department of Homeland Security (DHS) receives fingerprint and biometrics data for the arrestee [14]. Where the arrestee is a noncitizen, DHS may issue an immigration detainer or place an immigration hold resulting in detention for up to 48 h, during which time the arrestee is transferred to DHS custody to await issuance of an NTA [14,19].

There are currently at least 3,000 Secure Communities jurisdictions and ICE has announced plans to include all jurisdictions by the end of 2013 [14]. [4] Unlike 287(g) agreements, whereby local law

---

[4] The author last checked ICE's Secure Communities website information on December 20, 2013 and could not confirm whether the program was or was not yet in place in all U.S. jurisdictions.

enforcement agents are deputized to enforce immigration law, Secure Communities does not explicitly authorize sub-federal enforcement of immigration law. Nevertheless, Secure Communities facilitates sub-federal enforcement of immigration law by sharing information with DHS each time an individual is arrested [20]. [5] The initial arrest may also result in commencement of removal proceedings.

Instead of deputizing local law enforcement agents to enforce immigration law, Secure Communities requires local law enforcement agents to send fingerprint and biometric data of all arrestees to DHS via the FBI, who then checks the information against its own database–the Automated Biometric Identification System or "IDENT" [20]. IDENT however does not necessarily give a black or white answer concerning a noncitizen's status, in large part because determination of status requires a sophisticated application and understanding of immigration law to an individual's unique factual situation [21].

When there is a match with the IDENT database, further investigation is conducted, and then the local ICE Enforcement and Removal ("ERO") officers may issue a detainer authorizing a 48-h ICE hold in order for ICE to obtain custody and initiate removal proceedings [20]. Unlike 287(g) agreements, Secure Communities does not authorize local agents to access DHS databases, issue ICE detainers, or issue NTAs.

2.3. Implications of 287(g) and Secure Communities

Once data is shared with ICE pursuant to Secure Communities initiation of removal proceedings is increasingly likely for unauthorized migrants because grounds of removability have drastically expanded over the past two decades [11,22]. DHS has indicated that the goal of Secure Communities is to target noncitizens with convictions for serious or violent crimes deemed to pose a threat to the community or national security [20,23] or the "most dangerous and violent" [24]. There are indications, however, that Secure Communities has resulted in arrests for minor alleged criminal and traffic violations [25,26]. Critics suggest that Secure Communities has resulted in initiation of removal proceedings against significant numbers of unauthorized migrants who are not dangerous or serious criminals [27–29]. Moreover, local law enforcement agents have stated that it interferes with legitimate law enforcement goals [30,31]. Additionally, there are indications that in some jurisdictions lacking 287(g) agreements, sub-federal agents have cooperated with ICE in enforcing immigration law by checking the immigration status of individuals detained for nonimmigrant infractions [32].

By their nature and design, 287(g) agreements and Secure Communities empower sub-federal agents to participate in identifying potentially unauthorized migrants. Because an arrest under Secure Communities automatically exposes any arrestee to the possibility of identification by federal immigration authorities [33], it could incentivize some state and local law enforcement agents to use criminal law violations as a pretext to enforce immigration law [34]. Sub-federal agents have significant power in this crimmigration equation, in large part because of their discretion to make arrests.

---

[5] Once the FBI checks the fingerprints of an arrestee, the FBI automatically sends them to DHS and ICE determines if the person is subject to removal.

3. Discretion to Arrest and Pretextual Enforcement

Sub-federal agents increasingly have power to exercise discretion in a manner that may impact a noncitizen's ability to remain in the United States. In this vein, anti-immigrant rhetoric by public officials, including law enforcement agents, could give the impression that even without these official policies in place, sub-federal agents *should* act to enforce immigration law. For example, in Knox County, TN, Sheriff J.J. Jones vowed to enforce federal immigration violations, despite ICE denying the county's application for the 287(g) program. He stated,

> "Once again, the federal government has used sequestration as a smokescreen to shirk its responsibilities for providing safety and security to its citizens by denying Knox County the 287(g) corrections model. An inept administration is clearing the way for law breaking illegal immigrants to continue to thrive in our community ... Hopefully, the denial of this program will not create an influx of illegal immigrants" [35].

He went on to suggest that he was speaking for the "vast majority" of his constituents who "feel just as I do when it comes to the issue of illegal immigration" and who would presumably support his efforts to "enforce these federal immigration violations" with or without the help of ICE [35]. Finally, he asserted, "If need be, I will stack these violators like cordwood in the Knox County Jail until the appropriate federal agency responds" [35].

Without citing reliable, or any data, public officials have not infrequently stated that unauthorized migrants are responsible for higher levels of crime. Arizona Governor Jan Brewer, one of the most vocal proponents of sub-federal enforcement of immigration law, has stated,

> "We all know that the majority of the people that are coming to Arizona and trespassing are now becoming drug mules.... They're coming across our borders in huge numbers… They're breaking the law when they are trespassing and they're criminals when they pack the marijuana and drugs on their backs" [36].

Similarly, Iowa House Representative Steve King stated that in the case of potential DREAM Act beneficiaries,

> "For everyone who's a valedictorian, there's another 100 out there that weigh 130 pounds and they've got calves the size of cantaloupes because they're hauling 75 pounds of marijuana across the desert" [37].

This kind of rhetoric has likely fueled the increasing formal and informal delegations of power to sub-federal agents, but could also give the impression that anyone who appears to be an unauthorized migrant is a target for law enforcement action. In this context, as state and local law enforcement officers are increasingly involved in enforcement of federal immigration law, it is no secret that their power to make, or not make an initial arrest can be the act that creates a cascading effect for not only the individual arrestee, but their family and community. Theoretically, sub-federal agents can act within their authority to use minor traffic violations as a pretext for determining immigration status. Where local authorities implicitly establish macro level policies by making anti-immigrant statements, sub-federal agents could perceive programs like Secure Communities as authorization to enforce immigration law through profiling and pretextual stops.

At least one scholar, Angela Banks has made the case that sub-federal agents, particularly in the southern part of the United States, engage in immigration enforcement strategies comprised of using minor traffic violations or stops as a pretext to ascertain immigration status ([34], p. 1183). Banks focuses on the potential consequences of officers exercising discretion in ways that target Latino

communities, including the perpetuation of the idea that Latinos are foreigners ([34], p. 1188). Such exercises of discretion not only contradict federal immigration policy objectives, but also have the potential to reinforce distrust of authorities and a lack of confidence in our justice system. The combination of programs like Secure Communities, and sub-federal agents' discretion to arrest, increase the chances of pretextual enforcement of immigration law.

Discretion to Arrest

Discretion by any law enforcement officer is generally exercised on micro and macro levels ([33], pp. 3–5). "Micro" level discretion may take the form of decisions by local, state, or federal law enforcement agents to arrest or prosecute, or not arrest or prosecute an individual. Micro level discretion may be exercised at the time of the initial criminal arrest, or later, when either criminal prosecutors, or immigration trial attorneys decide what charge(s) to allege, if any, or after a trial has begun ([33], pp. 3–5).

Patrol officers have a significant amount of discretion to decide whom to stop, arrest, and detain ([33], pp. 3–5; [38], pp. 1842–49). An officer exercises micro level discretion when deciding to stop an individual for a traffic violation or minor criminal offense, or make an arrest, rather than just issue a citation [34,38]. For patrol officers interested in decreasing what they perceive as an unauthorized migrant community, 287(g) and Secure Communities are potentially powerful and effective tools ([34], pp. 1183–84).

"Macro" level discretion functions at a systemic level, when agencies and officials make policy decisions establishing enforcement priorities, and commit resources accordingly ([33], p. 2; [34], pp. 1183–84). Sub-federal agents' roles in policing immigration law are influenced by macro level exercises of discretion, which may be evidenced by their micro-level exercises of discretion.

When a local sheriff encourages patrol officers to arrest, rather than just cite a driver without a valid license, or apply rigorous standards for what constitutes a valid license, these are examples of macro level discretion. Similarly, when government and law enforcement officials make public statements implicitly, or directly blaming the undocumented population for crime, or suggest that *any* crime should subject noncitizens to deportation [39], they convey macro-level policy directives. When an ICE supervisor states that traffic violations represent a "public safety threat significant enough to warrant removal" they influence discretion on macro and micro levels ([34], p. 1185, fn. 189).

The 287(g) program can involve discretion at both of these micro, and macro levels. DHS has expressed intentions regarding whom individual officers should pursue, emphasizing a focus on criminals and terrorists [14], [6] but local criminal justice officers may function outside of these directives. Moreover ICE supervisors may, or may not address discrepancies between the federal policy objectives and how officers are exercising discretion in carrying out their authority ([34], p. 1182, fn. 145).

Secure Communities does not provide an express delegation of authority to sub-federal agents, but nonetheless, discretion exercised on micro and macro levels could play a role in whether and how an officer, or agency exercises discretion in policing, including identifying individuals for an initial

---

[6] Terrorism and criminal activity are most effectively combated through a multi-agency/multi-authority approach that encompasses federal, state and local resources, skills and expertise.

stop [33]. Laws authorizing officers to use their discretion to arrest a driver without a license at the time of arrest, combined with 287(g) agreements and Secure Communities, gives sub-federal agents significant power to determine which driver's immigration status will be checked ([34], p. 1186).

States requiring proof of lawful residence in the U.S. to obtain a driver's license create a vehicle for municipalities with 287(g) agreements, or pursuant to Secure Communities, to use traffic violations as an avenue to enforce immigration law [40]. However, some states, like California, have recently enacted laws permitting all individuals present in the U.S., regardless of immigration status, to obtain driver's licenses [41]. While this may eliminate the possibility of making an arrest of a suspected unauthorized migrant for failure to possess a driver's license, there are still other minor traffic violations, such as a broken taillight, that give authority to patrol officers to make an arrest that pursuant to Secure Communities, will result in an immigration database check ([34], p. 1188). Micro and macro exercises of discretion contribute significantly to the possibility of improper pretextual enforcement of immigration law as a result of programs such as 287(g) and Secure Communities.

4. Pretextual Arrests and Racial Profiling by Sub-federal Agents

There have been allegations of increased racial profiling following the implementation of Secure Communities, as was the case following implementation of 287(g) agreements [42–44]. Race has historically been, and still serves as a proxy for belonging and citizenship, even though use of race as the *only* factor in making a civil immigration stop is illegal [16]. [7,8]

ICE detainers are what allow a jail to hold an alleged noncitizen following a criminal arrest for up to 48 h until being transferred to ICE custody for continued detention, and initiation of removal proceedings [45]. Data suggests that traffic offenses and misdemeanors have disproportionately been the underlying offenses resulting in ICE detainers. ICE detainers result from 287(g) or Secure Communities related sub-federal policing.

One study has revealed that local law enforcement agents may use pretextual arrests to identify people they believe are unauthorized migrants and bring them to the attention of federal immigration authorities [46]. Another study indicated that from the inception of Secure Communities to approximately 2011, 93 percent of those identified through Secure Communities as removable were Latinos, while only 78 percent of the undocumented population was Latino [47].

In yet another, more recent study, TRAC Immigration found that in a 50-month period between FY2008–2012, ICE agents issued close to one million detainers, and 77.4 percent of the detainers were in cases where the individual had no criminal record–when the detainer was issued, or afterwards [48]. If there was no criminal record after the detainer was lodged, this suggests that the arrestee was

---

[7] Mexican appearance may be one of many factors relied on in making a civil immigration stop.

[8] See select scholarly works addressing race as a proxy for citizenship, e.g., Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and Constitutional Law of Immigration*, 46 UCLA L. Rev. 1 (1998); Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. Rev. 1543 (2011); Huyen Pham, *When Immigration Borders Move*, 61 Florida L. R. 1116 (2009); Aarti Kohli *et al*., *Secure Communities by the Numbers: An Analysis of Demographics and Due Process*, The Chief Justice Earl Warren Institute on Law and Social Policy (October 2011) (93% of people arrested under Secure Communities pursuant to one study, were from Latin American countries).

never criminally prosecuted for the underlying alleged offense that subjected she or he to the immigration detainer.

Only 8.6 percent of the remaining 22.6 percent of detainers were for those classified as Level 1, or "serious" offenders who may pose a serious threat to national security or public safety [48]. Over 80 percent of ICE detainers were issued in cases involving men from Mexico, Guatemala, El Salvador, Honduras or Cuba [48]. TRAC further suggested that some individuals who were only convicted of traffic violations or immigration violations such as illegal entry may be included in the 8.6 percent characterized as "Level 1" [48].

Put differently, ninety-five percent of detainers were issued against males with a median age of 30, and 85 percent of detainers were issued against Latinos. Specifically, 72.7 percent were Mexican citizens, approximately 15 percent were Guatemalans, Hondurans, El Salvadorans or Cubans, and only about 22,000 were Canadian citizens [48]. Thus the majority of ICE detainers have been issued against Latino males without criminal histories, whose criminal arrest leading to issuance of the detainer was not a serious offense [49].[9] Following implementation of Secure Communities, regardless of whether a jurisdiction has a 287(g) agreement, any criminal arrest can result in a detainer, and a detainer can only follow a criminal arrest.

Albeit somewhat anecdotal, one county's blatant racial profiling led DHS to terminate the 287(g) agreement and Secure Communities in Maricopa County, Arizona, under the jurisdiction of Sheriff Joe Arpaio [50–52]. [10] Following sustained public outcry about the statements and conduct of Sheriff Arpaio and his subordinates, the Department of Justice investigated and validated the public critiques finding that the Maricopa County Sheriff's Office was responsible for "egregious, pervasive and systemic" racial profiling [53]. The DOJ report revealed that Latino drivers were significantly more likely to be subject to a traffic stop than similarly situated non-Latinos, and that patrol officers conducted stops without constitutionally required reasonable suspicion or probable cause ([54], pp. 3, 6). If egregious racial profiling under the leadership of an infamous sheriff can be uncovered following extensive investigation by the DOJ, one might wonder what incidences of racial profiling or pretextual enforcement have remained undetected. The difficulty of detecting such practices frustrates deterrence mechanisms.

Aside from the evidence of racial profiling in Maricopa County, DHS has responded to allegations of the perceived or actual problem of racial profiling, or "improper use [20]" of Secure Communities by engaging in a study [54]. If DHS had no concern about racial profiling, it stands to reason that they would not have initiated a public campaign and study to suggest ways to eliminate racial profiling as a

---

[9] ICE's most recent, FY 2013 removal statistics indicate that 82 percent of those removed from the interior had criminal convictions, as opposed to 60 percent the prior year. Even though more deportees may have had a criminal conviction than in the prior fiscal year, the data does not demonstrate that the crimes were overwhelmingly serious or violent, nor that pretextual enforcement is no longer a problem. Moreover, the author of the study contends that even if this alleged problem does not impact the majority of deportees, the problem of pretextual enforcement or racial profiling still merits significant consideration.

[10] DHS did not renew the 287(g) agreements in 2009 and 2011 and stopped their access to DHS databases pursuant to Secure Communities in 2011.

result of Secure Communities [28,55]. A study of the problem of racial profiling would presumably be unnecessary if there was no perceived or actual problem of profiling.

ICE also asserts that Secure Communities actually "reduces opportunities for racial or ethnic profiling because *all* people booked into jails are fingerprinted" [28,55]. However, ICE's proposition discounts the potential for racial profiling in a sub-federal agent's exercise of discretion regarding whom to stop, as well as the difficulty involved in deciphering the role of race in stops.

Thus, studies, and ICE's own statements, suggest that there may be a problem with pretextual criminal enforcement and racial profiling when sub-federal agents exercise discretion to arrest in Secure Communities jurisdictions, or where a 287(g) agreement is in effect.

5. Use of Ethnicity or Pretextual Law Enforcement in Criminal and Immigration Law, Shortcomings of Existing Remedies, and Proposals

The exclusionary rule serves to prevent the introduction of evidence obtained in violation of the Fourth Amendment by allowing judges to suppress unlawfully obtained evidence [56–58]. The doctrine is intended to serve as a deterrent to unlawful police action, and originated in the context of criminal proceedings [59]. A criminal defendant may move to have the court suppress evidence allegedly involving racial profiling or pretext by demonstrating that the stop violated the Fourth Amendment. If a court rules in the defendant's favor, the evidence would not be admitted to prove guilt, and the defendant may avoid a criminal conviction. The Fourth Amendment prohibition against unreasonable searches and seizures applies in a more limited scope in immigration removal proceedings.

In the context of racial profiling or use of ethnicity in enforcing immigration law, the Supreme Court has not explicitly endorsed the use of racial profiling in criminal or immigration law enforcement, but it also has not uniformly directed suppression of evidence obtained pursuant to pretextual stops, or those that may be affected by profiling. Within Fourth Amendment jurisprudence, the Court has not held that all pretextual stops contested in criminal proceedings necessarily constitute Fourth Amendment violations [60]. In immigration enforcement, the Court has permitted law enforcement agents to use ethnicity as one of multiple factors in establishing reasonable suspicion that an individual is unlawfully present in the United States ([6], p. 1151; [16]).

Much consideration has been given to the Supreme Court's *United States v. Brignoni-Ponce* decision, where the Court, in applying the Fourth Amendment reasonable suspicion standard to a border stop, held that "Mexican appearance" could be one of multiple factors in determining whether an individual was unlawfully present ([9], p. 1024; [16]; [42], pp. 145–46). The Ninth Circuit Court of Appeals, however, has acknowledged that "Hispanic appearance," even in combination with other factors, does not provide reasonable suspicion that an individual is an unauthorized migrant or unlawfully present [61].

While sub-federal agents enforcing criminal law are *not* permitted to consider ethnicity as a factor in establishing reasonable suspicion of a crime, the current state of Fourth Amendment jurisprudence within immigration courts, does not provide for exclusion in all cases of a Fourth Amendment violation. The more restricted approach to the Fourth Amendment is one of several reasons that sub-federal agents may not be sufficiently deterred from engaging in pretextual enforcement of immigration law, or racial profiling.

5.1. Limitations on the Exclusionary Rule in Immigration Proceedings

The Supreme Court's 1984 decision in *Lopez-Mendoza* considered suppression of evidence unlawfully obtained by immigration agents in removal proceedings [5]. The Court held that in immigration removal proceedings, the exclusionary rule applied only to "egregious violations", which are violations that are "fundamentally unfair", or "undermine reliability of evidence" ([5], pp. 1044–51). The *Lopez-Mendoza* court's decision was limited to consideration of suppression in immigration removal proceedings where federal immigration authorities engaged in constitutional violations [5].

The *Lopez-Mendoza* court explained that the exclusionary rule need not generally apply in immigration proceedings in the absence of an egregious violation because: (1) suppression did not act as a deterrent because the government usually had alternative means of introducing the evidence sought to be suppressed; (2) the INS agents knew that the arrestee would not try to suppress evidence in civil removal proceedings and would likely accept voluntary departure rather than fight their deportation; (3) the INS has its own comprehensive scheme for deterring Fourth Amendment violations, (4) violations were not necessarily widespread [8,62–64]; and, (5) asking immigration court judges to consider Fourth Amendment claims would bog down an already burdened immigration court system [5]. However, where an arrest is based on race or a "foreign-sounding" name, and no other reason, such a stop or arrest would be egregious [65–67].

Aspects of the Court's rationale have been critiqued, and it has become clear that much has changed in the nearly thirty years following the *Lopez-Mendoza* decision [62–64]. Even though suppression may be inadequate in addressing pretextual enforcement of immigration law by sub-federal agents, the *Lopez-Mendoza* court's rationale for suppressing evidence only in the cases of "egregious violations" has largely lost currency.

First, suppression may be a deterrent if the government does not have alternative means of presenting the evidence sought to be suppressed. Second, even without provision of government appointed counsel, significantly more noncitizens fight removal than accept voluntary departure than in the past [68]. As accessibility to counsel increases, suppression will be pursued more frequently [69–72]. [11] The more suppression arguments can be successfully brought, the more DHS, and state and local police, will know noncitizens can avoid removal pursuant to successful Fourth Amendment claims. As offending officers are required to testify in immigration court proceedings about their misconduct, they may be increasingly deterred from engaging in these practices.

Third, as has always been the case and was not addressed by the Court, ICE's (formerly INS') scheme for deterring violations is inapplicable where violations are by non-federal immigration agents [5]. Moreover, one scholar's review of the "Blackmun files", notes prepared by Justice Blackmun in connection with the *Lopez-Mendoza* decision, indicated that "Chief Justice Burger believed that INS was '*better than most police departments'* at preventing constitutional violations from occurring" ([6], p. 1122, fn. 64). Justice Burger's inclination that local police may be more likely to engage in constitutional violations has been echoed by immigrant rights organizations and in the

[11] Because deportation is a civil and not a criminal punishment, the Supreme Court has yet to recognize the right to appointed counsel for immigrants in removal proceedings.

media [73]. Thus either the Fourth Amendment should be applied similarly in removal proceedings, and/or other measures to protect noncitizens rights may be appropriate.

Fourth, there is evidence that violations by both federal agents, and sub-federal agents are widespread, and that racial discrimination have figured prominently in enforcement by immigration agents ([62]; [63], p. 1114; [74]). Fifth and finally, immigration judges have increasingly demonstrated willingness to review Fourth Amendment claims. Where suppression results in ICE's inability to prove the allegations in the NTA and an immigration judge terminates the proceedings before moving forward with the merits of the case, fewer resources may be expended on litigation.

5.2. What Constitutes an "Egregious" Violation?

An arrest based on racial appearance or a foreign-sounding name, may constitute an "egregious" violation of the Fourth Amendment ([65], p. 235; [66], p. 497). Where the arresting officers use force or violence, *and* rely on racial appearance or a foreign-sounding name as a basis for probable cause or reasonable suspicion, courts are more likely to find an egregious violation. However, where the facts concerning racial profiling or pretext are not as well-documented, and/or where the respondent lacks zealous counsel, the respondent would be much less likely to prevail on a Fourth Amendment claim.

Recently, a Miami, Florida immigration judge suppressed evidence introduced as a result of an egregious violation by sub-federal agents including both racial profiling and abuse of force [75]. The immigration judge suppressed evidence and terminated proceedings where the local police were responsible for the underlying constitutional violations resulting in their obtaining evidence of alienage during an arrest [75]. The respondent testified that during the course a criminal investigation and arrest, Miami police kicked and hit him and ordered their dog to bite him, and made racial or nativist slurs ([75], p. 16). When he told one of the officers where he was from, "the officer said in mockery that he was going back to that country to 'eat pupusas' because Immigration was coming for him" ([75], p. 26). The Court considered the violations to be egregious because they were "transgressions of fundamental fairness" and undermined the probative value of the evidence obtained pursuant to *Lopez-Mendoza* ([5]; [75], p. 39). The respondent was fortunate to have the benefit of representation by a well-respected law school's immigration clinic. [12]

The immigration judge's decision to suppress evidence and terminate proceedings specifically referenced the incentive Secure Communities provides to engage in racial profiling and otherwise unlawful police practices [75]. The decision also emphasized the important deterrent nature of granting suppression in removal proceedings where state and local police are empowered to play a significant role in immigration enforcement [75]. However, not all arrests by sub-federal agents that involve racial profiling and pretextual enforcement of immigration law fit as easily with the *Lopez-Mendoza*'s criteria for finding an egregious violation meriting suppression.

---

[12] The respondent was represented by the University of Miami School of Law Immigration Clinic, directed by Rebecca Sharpless.

5.3. Circuit Courts on Egregious Violations

In the years following the *Lopez-Mendoza* decision, the Circuit Courts of Appeal have been divided with respect to defining, or even acknowledging an "egregious violation" in civil immigration cases, regardless of whether violations are by federal immigration agents or state or local police. The U.S. Courts of Appeals for the First, Second, Third, Sixth, Eighth, Ninth, and Tenth Circuits interpret the availability of exclusion more broadly than the *Lopez-Mendoza* court, and have ruled that certain constitutional violations warrant suppression in removal proceedings [65,76–80]. The Seventh Circuit has indicated that if a violation were egregious, evidence may theoretically, be excluded [81].

In an unpublished decision specifically addressing whether or not evidence should be suppressed in the context of alleged racial profiling, the Eleventh Circuit found that a traffic stop did not involve "abuse, force, racial profiling, or other conduct that rises to the level required for exclusion" [82]. The Fourth and Fifth Circuits have either declined to consider whether the exclusionary rule applies in removal proceedings or suggested that it does not apply [83–85]. The Second and Third Circuits consider the use of race or ethnicity, and the intentionality or bad faith of the officers in assessing whether a violation was egregious ([65], pp. 236–37; [77], p. 279).

The Eighth Circuit in *Puc-Ruiz v. Holder,* considered suppression of alienage evidence in removal proceedings, where the stop and arrest was not by immigration agents, but instead, by state or local police [86]. The *Puc*-Ruiz decision was the Eighth Circuit court's first consideration of whether or a violation was "egregious" for the purposes of *Lopez-Mendoza* ([86], p. 778).

Specifically, in *Puc-Ruiz*, the respondent sought to suppress evidence obtained by sub-federal agents, but used in the Form I-213, which was prepared by an ICE agent ([86], p. 777). The ICE agent would not have had the evidence included in the I-213 absent the arrest and information obtained by the local police [86]. Although Puc-Ruiz did not contend that the stop was based on his race or appearance, or that the police lacked any articulable suspicion, the Court suggested the use of "race or appearance", or detention in the absence of any "articulable suspicion whatsoever" would theoretically, be egregious violations ([86], p. 779).

At the same time, however, the Court cast doubt on whether the exclusionary rule could ever apply in immigration removal proceedings to an otherwise egregious violation if the evidence was obtained by state officers engaged in a criminal investigation, acting independently of federal agents ([86], p. 778; [87]). Thus even if use of race [65,79,88] [13] or name [66] in making a stop is otherwise potentially an egregious violation ([5], p. 1050), at least in some jurisdictions, suppression may be entirely unavailable in removal proceedings if the agents were sub-federal, and acting independently of federal immigration agents.

The exclusionary rule falls short for the reasons discussed above, including the court's reluctance to apply it as extensively as in criminal proceedings, in spite of the fact that criminal and immigration law are increasingly merging from enforcement and custody perspectives, and in spite of the fact that the consequences of not suppressing are just as great or worse for noncitizens in removal proceedings than for defendants in criminal court. Suppression is also unavailable where the violations do not

---

[13] In the 9th Circuit a stop based solely on race is an "egregious violation," but proving a stop is based on race is difficult.

clearly present themselves as prohibited by the Constitution, such as pretextual enforcement of immigration law.

To some extent, the *Lopez-Mendoza* court was correct that the remedy is inadequate because the evidence sought to be suppressed may be introduced via other means ([5], p. 1043), including via Secure Communities databases. However, this need not be a reason to discount it, but instead suggests the need to supplement it. Possible means of discouraging pretextual enforcement of immigration law include directives to sub-federal agents by ICE supervisors, termination of Secure Communities and 287(g) agreements where there is evidence of such improper enforcement practices, and increased use prosecutorial discretion by ICE trial attorneys.

While the exclusionary rule may result in suppression of evidence of alienage, and termination of removal proceedings, there may be more efficient and appropriately preventative ways of deterring pretextual enforcement in the era of increased sub-federal enforcement of immigration law. Instead of focusing on fixing potential misconduct of sub-federal officers after the fact, where injustices may never be discovered because of absence of counsel or a myriad of other factors, DHS could make efforts to ensure that their deportation policies are honored by local police in the field.

5.4. Potential Preventative Measures

After extensive media attention, investigation, and even litigation, DHS finally terminated the Secure Communities program in Maricopa County [89]. There are potentially other jurisdictions where such abuses are occurring, however they evade discovery because they may not be as flagrant as those committed by notorious Sheriff Arpaio and his subordinates. Rather than costly litigation being the main deterrent, which may never manifest, ICE could engage in better supervision of sub-federal agents' activities, including at a minimum, discouraging sub-federal agents from making what could be perceived as pretextual arrests. ICE supervisors have some authority over local police and could emphasize the importance of following Agency directives concerning enforcement and removal priorities. [14] ICE could terminate counties' agreements where there is evidence of repeated pretextual enforcement or profiling, such as disproportionately high numbers of citations or arrests for minor criminal or traffic violations, particularly targeting Latinos.

Thus far ICE has recognized the potential for racial profiling, but has only implemented a program to study the issue ([28], p. 22). ICE's data collection is intended to identify racial profiling and intends to compare the percentage of all "alien arrestee fingerprints that match an immigration database record to the percentage of that county's population that was born abroad" ([28], p. 22). At the outset, one of the deficiencies in this approach to addressing potential racial profiling stems from the questions the study poses, and means to uncover answers. Being born abroad does not necessarily equate to having an appearance of being an unauthorized foreign national [90–92].

To better estimate how frequently sub-federal officers make arrests as a pretext to enforce immigration laws and rely on racial profiling to do so, it would be important to know an arresting

---

[14] INA § 287(g) authorizes state and local law-enforcement agencies to enforce federal immigration laws provided they are trained and supervised by ICE officers.

officer's intent. [15] However, intent is difficult to decipher because of implicit racial bias [93] and logistical challenges of gathering such data. The study does not appear to have mechanisms in place to consider pretextual enforcement, such as a high volume of arrests for traffic, or minor criminal violations, and/or arrests targeting Latinos. Because the study cannot detect racial bias, a better mechanism to consider whether pretextual enforcement is taking place is to consider the volume of arrests for traffic or minor criminal violations, and/or correlation to perceived Latino identity. [16]

Finally, as noted above, ICE's goal of targeting serious offenders may be better served by changing the nature of ICE supervisors' relationship with sub-federal agents. To provide incentive to follow DHS directives, when appropriate, DHS could terminate Secure Communities or 287(g) agreements. Additionally, a neutral third party could be invited to act as a "watchdog" to ensure that ICE is properly holding sub-federal agents accountable for pretextual enforcement that contradicts DHS enforcement policy.

In the absence of DHS action or other means to avoid perceived rights violations, states and counties have passed legislation to prevent or minimize the role and impact of sub-federal agents in immigration enforcement [94,95]. Perhaps more states and municipalities will continue to pass such legislation.

5.5. ICE Prosecutorial Discretion

As a counter to the potential harm caused by sub-federal agents discretion to arrest, ICE could utilize discretion not to prosecute. In June 2010, and again in June 2011 [96], former ICE Director John Morton issued a memo instructing ICE Chief Counsel to exercise discretion in removal proceedings with a focus on prosecuting dangerous criminals, repeat immigration violators, and suspected terrorists [23]. However, while a district attorney might be likely to drop charges against a noncitizen stopped for a minor criminal violation, DHS has not historically exercised equivalent discretion in the immigration context, even where DHS lacks the actual capacity to carry out removal. Discretion may be an appropriate tool where sub-federal agents engage in behavior that could fall short of an egregious violation for Fourth Amendment purposes, but still contradicts DHS enforcement policy.

The lack of arresting and prosecutorial discretion exercised in immigration law is in direct contrast to discretion practices in criminal law [33]. Thus an undocumented noncitizen who may not be prosecuted for a crime will still likely face removal proceedings. This discrepancy between criminal and immigration discretionary practices symbolizes a lack of congruity between the criminal and

---

[15] Articles addressing the difficulty of proving discriminatory intent: Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 319–23 (1987) (arguing that most behavior that produces racial discrimination results from "unconscious racial motivation"); Paul Brest, *In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1, 4–5 (1976) (setting forth a disproportionate impact doctrine as an alternative to the *Washington v. Davis* discriminatory purpose standard, arguing that the Davis standard ignores the fact that "race-dependent decisions are so often concealed").

[16] The TRAC study has already begun to compile this data, which suggests that the majority of ICE detainers have been issued against Latino men without criminal histories, whose criminal arrest leading to issuance of the detainer was not a serious offense [48].

immigration enforcement systems with respect to rights and protections. This discrepancy is particularly important here, where sub-federal agents pretextual enforcement is what brings the noncitizen to the attention of immigration authorities.

Following the 2010 Morton Memo on prosecutorial discretion, through July 2012, 22,980 cases were found provisionally eligible for administrative closure, out of 356,733 reviewed [97]. As of June 28, 2012 a total of 5684 cases were closed pursuant to grants of prosecutorial discretion [98]. While prosecutorial discretion has technically been available for decades, and the most recent administration has encouraged it, in practice, it is relatively rare for DHS trial attorneys to either initiate prosecutorial discretion or grant it upon request by lawyers for noncitizens. As of August 2013, about 24,602 cases were closed in immigration court with grants of prosecutorial discretion ([8], p. 11–15; [99]). This represents only about 7 percent of the backlog of cases as of September 2012, and that backlog has only increased [99].

While the Morton Memo also suggests that discretion be exercised where the respondents are litigating civil rights violations [23,100], discretion could also be exercised more expansively in the context of pretextual arrests where suppression of evidence under the exclusionary rule may not be an appropriate or available remedy, or where an Equal Protection ([5], p. 1055; [6], p. 1150) claim is inappropriate.

Again, one way prosecutorial discretion could be exercised more consistently to discourage certain pretextual enforcement practices could be for DHS to mandate a policy that ICE trial attorneys will not issue NTAs where the underlying arrest is for a minor traffic violation absent any other criminal history or prior deportations. Alternatively, and later in the temporal landscape, following the letter and spirit of the Morton Memos on prosecutorial discretion, ICE trial attorneys could more actively exercise prosecutorial discretion where there are indicators that the initial criminal arrest was pretextual or marred by racial profiling [8]. An exercise of discretion would serve the policy goals outlined in the Morton Memo because the Agency could focus resources on seeking removal of those who pose a public safety or national security threat, rather than low-level offenders or those with immigration violations constituting nothing more than unlawful presence, and entry without inspection. Furthermore, an exercise of discretion in this context would serve to uphold the integrity of the immigration system [96].

In order to access potential strategies to combat racial profiling and civil rights violations such as filing of motions to suppress evidence, noncitizens will need greater access to counsel, again highlighting the need for appointed counsel for all individuals in removal proceedings [101–105].[17] At least one study suggests that those arrested under Secure Communities are less likely to be represented by lawyers than others in removal proceedings ([47], p. 10).[18, 19] A more formal policy providing for

---

[17] Currently, there is no right to appointed counsel in immigration court proceedings.

[18] "Nearly half (46%) the people in our sample had an immigration court proceeding" and those "processed through Secure Communities, however, have far lower rates of representation," as few as 24% had a lawyer.

[19] Most or all of these remedies would fail to help the thousands of noncitizens who are deported without a removal hearing. Noncitizens who have not been formally admitted to the U.S. may be subject to expedited removal; 8 U.S.C. § 1225(b)(1)(A)(i)(iii) (arriving aliens), and 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) noncitizens with prior removal orders, even those that were in absentia who are subject to reinstatement of removal.

prosecutorial discretion by ICE trial attorneys could help address problems related to pretextual enforcement by sub-federal agents.

6. Conclusions

This essay has been a starting point to consider the problem of pretextual enforcement of immigration law by sub-federal agents, and the inadequacy of existing measures to remedy or deter practices that could contradict both established policies, and notions of justice and fairness. It has identified ways in which suppression of evidence pursuant to the exclusionary rule may be incomplete or insufficient, and has preliminarily considered alternative means of deterring profiling and pretextual enforcement of immigration law by sub-federal agents.

Acknowledgements

I would like to thank Dean Kevin Johnson of the U.C. Davis School of Law for encouraging this research, and those who have provided inspiration and feedback, including but not limited to, my commenters at the 2013 UCI Emerging Immigration Law Professors Conference including: Jason Cade, University of Georgia School of Law, Juliet Stumpf of Lewis and Clark Law School, Tara Lundstrom, Mark Noferi of the Center for Migration Studies, Kari Hong of Boston College Law School, Jennifer Koh of Western State College of Law, Elizabeth Keyes of the University of Baltimore School of Law, and Kathleen Kim of Loyola Law School. Special thanks to Lauren Champion, Golden Gate University School of Law graduate 2013, for indispensible research assistance.

Conflicts of Interest

The author declares no conflicts of interest.

References and Notes

1. Juliet Stumpf. "The crimmigration crisis: Immigrants, crime, and sovereign power." *American University Law Review* 56 (2006): 367–419.
2. Teresa Miller. "Blurring the boundaries between immigration and crime control after September 11th." *Boston College Third World Law Journal* 25 (2005): 81–123.
3. Stephen H. Legomsky. "The New Path of immigration law: Asymmetric incorporation of criminal justice norms." *Washington & Lee Law Review* 64 (2007): 469–528.
4. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).
5. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).
6. Stella Burch Elias. "'Good Reason to Believe': Widespread constitutional violations in the course of immigration enforcement and the case for revisiting *Lopez-Mendoza*. *Wisconsin Law Review* 2008 (2008): 1113–58.
7. Elizabeth Rossi. "Revisiting INS v. Lopez-Mendoza: Why the fourth amendment exclusionary rule should apply in deportation proceedings." *Columbia Human Rights Law Review* 44 (2013): 1–60.

8. Jason A. Cade. "Policing the immigration police: ICE prosecutorial discretion and the fourth amendment." *Columbia Law Review Sidebar* 113 (2013): 180–203.
9. Kevin R. Johnson. "How racial profiling in America became the "Law of the Land": United States v. Brignoni-Ponce and Whren v. United States and the need for truly rebellious lawyering." *Georgetown Law Journal* 98 (2010): 1005–77.
10. Devon W. Carbado, and Cheryl I. Harris. "Undocumented criminal procedure." *UCLA Law Review* 58 (2011): 1543–616.
11. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 133, 110 Stat. 3009-562, 3009-563 (codified at 8 U.S.C.§ 1357(g)) [hereinafter INA 287(g)].
12. Matter of Velasquez, 19 I&N Dec. 377 (BIA 1986).
13. Each year the Executive Office of Immigration Review (EOIR) publishes a statistical yearbook providing a full report on all of its activities during the previous financial year. The statistics include the number of individuals in immigration proceedings and the number of individuals removed, granted a form of relief, and the number of cases ending in termination. Not all cases that end in termination did so because of successful motions to suppress, and otherwise, the statistics do not reference the number of cases where respondents brought motions to suppress based on alleged Fourth Amendment violations. See USDOJ.gov, Statistical Year Book. Available online: http://www.justice.gov/eoir/statspub/fy12syb.pdf (accessed on 19 December 2013).
14. U.S. Immigration & Customs Enforcement, U.S. Department of Homeland Security. "Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act." Available online: http://www.ice.gov/news/library/factsheets/287g.htm (accessed on 30 November 2013).
15. Randy Capps, Marc R. Rosenblum, Cristina Rodríguez, and Muzaffar Chishti. "Delegation and divergence: A study of 287(g) state and local immigration enforcement." *Migration Policy Institute*, January 2011. http://www.migrationpolicy.org/pubs/287g-divergence.pdf.
16. United States v. Brignoni-Ponce, 422 U.S. 873 (1975). (Use of ethnicity as one of many factors by immigration enforcement agents in identifying unauthorized migrants).
17. Michele Waslin. "ICE Scaling Back 287(g) Program." *American Immigration Council Immigration Impact*, 19 October 2012. Available online: http://immigrationimpact.com/2012/10/19/ice-scaling-back-287g-program/ (accessed on 30 November 2013). ("The 287(g) jail model can work in combination with Secure Communities. 287(g) officers can follow up when someone receives a Secure Communities database hit, and can issue a detainer or a Notice to Appear, initiating deportation proceedings. Even if there is no database hit, 287(g) jail officers can interview persons they believe to be noncitizens and initiate immigration enforcement if appropriate.").
18. U.S. Immigration & Customs Enforcement, U.S. Department of Homeland Security, Department of Homeland Security. Activated Jurisdictions. Available online: http://www.ice.gov/secure_communities/ (accessed on 30 November 2013). (Began with 14, now presumably all jurisdictions are active.)
19. Some states have begun considering and passing legislation to refrain from holding noncitizens for transfer to ICE after being charged with, or convicted of minor crimes. On October 5, 2013, Governor Brown signed A.B. 4, the "TRUST Act" to limit the immigration ramifications of

Secure Communities for such noncitizens. Available online: http://nilc.org/nr100513.html (accessed on 30 November 2013).

20. U.S. Immigration & Customs Enforcement. "Secure Communities." Available online: http://www.ice.gov/secure_communities/ (accessed on 30 November 2013).
21. Arizona v. United States, 132 S.Ct. 2492 (2012). Just as the Supreme Court refused to recognize the state of Arizona's delegation of sub-federal agents to enforce immigration law and determine whether an individual was removable because such determinations require complex legal analyses, the same problem is implicated here. However, this issue will not be addressed in this article.
22. REAL ID Act, Pub. L. 109-13, § 102, 119 Stat. 231(2005).
23. U.S. Department of Homeland Security. "U.S. Immigration and Customs Enforcement." Available online: http://www.ice.gov/doclib/detention-reform/pdf/civil_enforcement_priorities.pdf (accessed on 30 November 2013).
24. U.S. Immigration and Customs Enforcement. "Secure Communities: A modernized approach to identifying and removing criminal aliens." Available online: https://www.ice.gov/doclib/secure-communities/pdf/sc-brochure.pdf (accessed on 30 November 2013).
25. "Few ICE detainers target serious criminals." *TRAC*, 17 September 2013. Available online: http://trac.syr.edu/immigration/reports/330/ (accessed on 30 November 2013). (Local law enforcement agencies "have expressed concern that SC may be sweeping up and processing for deportation individuals who were charged with only a minor violation." ICE has withheld information on detainers issued as a part of the Secure Communities program).
26. "Restoring community: A national community advisory report on ICE's failed 'Secure Communities' program." *Center for Constitutional Rights*, 16 August 2011. Available online: http://ccrjustice.org/newsroom/press-releases/authoritative-national-report-condemns-secure-communities-program (accessed on 30 November 2013).
27. "Immigration enforcement off target: Minor offenses with major consequences." *American Immigration Lawyers Association*, 16 August 2011. Available online: http://www.aila.org/content/fileviewer.aspx?docid=36646&linkid=236762 (accessed on 30 November 2013).
28. Homeland Security Advisory Council. Task Force on Secure Communities, Findings and Recommendations. Available online: http://www.dhs.gov/xlibrary/assets/hsac-task-force-on-secure-communities-findings-and-recommendations-report.pdf (accessed on 30 November 2013).
29. "Frederick's mistaken obsession with immigration enforcement." *The Baltimore Sun*, 11 August 2013. Available online: http://articles.baltimoresun.com/2013-08-11/news/bs-ed-frederick-immigration-20130811_1_immigration-law-deputies-frederick-county-sheriff (accessed on 30 November 2013).
30. Michael Hennessey. "Secure communities destroys public trust." *SFGate*, 1 May 2011. Available online: http://www.sfgate.com/opinion/article/Secure-Communities-destroys-public-trust-2373213.php (accessed on 30 November 2013).
31. "On second thought, Los Angeles sheriff stands against federal immigration program." *Fox News Latino*, 6 December 2012. Available online: http://latino.foxnews.com/latino/politics/2012/12/06/la-sheriff-backs-off-federal-immigration-program/ (accessed on 30 November 2013).

32. U.S. Immigration & Customs Enforcement, U.S. Department of Homeland Security. "ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS)." Available online: http://www.ice.gov/news/library/factsheets/access.htm (accessed on 30 November 2013).
33. Hiroshi Motomura. "Prosecutorial discretion in context: How discretion is exercised throughout our immigration system." Immigration Policy Center, 4 April 2012. Available online: http://www.immigrationpolicy.org/special-reports/prosecutorial-discretion-context-how-discretion-exercised-throughout-our-immigration (accessed on 12 January 2014)
34. Angela M. Banks. "The curious relationship between "Self-Deportation" policies and naturalization rates." *Lewis & Clark Law Review* 16 (2013): 1149–213.
35. Elise Foley, and Amanda Terkel. "Tennessee sheriff ready to stack undocumented immigrants in Jail 'Like Cordwood'." *Huffington Post*, 22 August 2013. Available online: http://www.huffingtonpost.com/2013/08/22/immigrants-cordwood-jj-jones_n_3795634.html (accessed on 30 November 2013).
36. "Arizona's brewer: Most illegal immigrants are 'drug mules'." *CNN Wire Staff*, 27 June 2010. Available online: http://www.cnn.com/2010/US/06/25/arizona.immigrants.drugs/ (accessed on 30 November 2013).
37. "Poll: Anti-immigrant rhetoric hurts republicans in Battleground States." *NBC Latino*, 24 July 2013. Available online: http://nbclatino.com/2013/07/24/poll-anti-immigrant-rhetoric-hurts-republicans-in-battleground-states/ (accessed on 30 November 2013).
38. Hiroshi Motomura. "The discretion that matters: Federal immigration enforcement, state and local arrests, and the civil-criminal line." *UCLA Law Review* 58 (2011): 1819–58.
39. "Sheriff hodgson on 'Secure Communities' and undocumented immigrants." *Brian Fraga*, 9 June 2011. Available online: http://blogs.southcoasttoday.com/new-bedford-crime/2011/06/09/sheriff-hodgson-on-secure-communities-and-undocumented-immigrants/ (accessed on 30 November 2013).
40. Kevin R. Johnson. "Driver's licenses and undocumented immigrants: The future of civil rights law?" *Nevada Law Journal* 5 (2004): 213–39.
41. Jacqueline Hurtado, and Catherine E. Sholet. "New California Law gives undocumented immigrants driver's licenses." *The Cable News Network,* 3 October 2013. Available online: http://www.cnn.com/2013/10/03/us/california-undocumented-immigrant-drivers-licenses/ (accessed on 30 November 2013).
42. Jennifer M. Chacón. "Border exceptionalism in the era of moving border." *Fordham Urban Law Journal* 38 (2010): 129–53.
43. "No Security in 'Secure Communities'." *American Civil Liberties Union*, 19 August 2010. Available online: https://www.aclu.org/blog/immigrants-rights-racial-justice/no-security-secure-communities (accessed on 30 November 2013).
44. "Immigration bait and switch." *New York Times*, 17 August 2010. Available online: http://www.nytimes.com/2010/08/18/opinion/18wed3.html?_r=1& (accessed on 30 November 2013).

45. U.S. Immigration & Customs Enforcement, U.S. Department of Homeland Security. "ICE Detainers: Frequently Asked Questions." Available online: http://www.ice.gov/news/library/factsheets/detainer-faqs.htm (accessed on 30 November 2013).
46. Trevor Gardner II, and Aarti Kohli. *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program*. UC Berkeley: The Chief Justice Earl Warren Institute on Law and Social Policy, September 2009.
47. Aarti Kohli, Peter L. Markowitz, and Lisa Chaves. *Secure Communities by the Numbers: An Analysis of Demographics and Due Process*. UC Berkeley: The Chief Justice Earl Warren Institute on Law and Social Policy, October 2011.
48. "Who are the targets of ICE detainers?" *TRAC*, 20 February 2013. Available online: http://trac.syr.edu/immigration/reports/310/ (accessed on 30 November 2013).
49. U.S. Immigration & Customs Enforcement, U.S. Department of Homeland Security. "FY 2013 ICE Immigration Removals." Available online: http://www.ice.gov/removal-statistics/index.htm (accessed on 30 November 2013).
50. Randal C. Archibold. "Immigration hard-liner has his wings clipped." *New York Times*, 7 October 2009. Available online: http://www.nytimes.com/2009/10/07/us/07arizona.html?_r=1&adxnnl=1&hpw=&adxnnlx=1325624713-TZ+c+E/mZqAOBlWBheO5wQ (accessed on 30 November 2013).
51. "Dep't Homeland Security, statement by Secretary Napolitano on DOJ's findings of discriminatory policing in Maricopa county." Department of Homeland Security, 15 December 2011. Available online: http://www.dhs.gov/news/2011/12/15/secretary-napolitano-dojs-findings-discriminatory-policing-maricopa-county (accessed on 30 November 2013).
52. "The case against sheriff Arpaio." *New York Times*, 16 December 2011. http://www.nytimes.com/2011/12/17/opinion/the-case-against-sheriff-arpaio.html.
53. Letter from Thomas E. Perez, Assistant Attorney General of the United States to Bill Montgomery, County Attorney for Maricopa County, Arizona, 6 (December 15, 2011). Available online: http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf (accessed on 30 November 2013).
54. "Secure communities: Statistical monitoring." U.S. Department of Homeland Security, 16 November 2011. Available online: http://www.ice.gov/doclib/secure-communities/pdf/sc-statistical-monitoring.pdf (accessed on 30 November 2013).
55. U.S. Immigration & Customs Enforcement, U.S. Department of Homeland Security. "ICE Response to Task Force on Secure Communities Findings and Recommendations." Available online: http://www.dhs.gov/xlibrary/assets/hsac/ice-response-to-task-force-on-secure-communities.pdf (accessed on 30 November 2013). (The Secretary of Homeland Security requested that the Homeland Security Advisory Council study Secure Communities, including concerns that "relate to [its] impact on community policing and the possibility of racial profiling," and "how to best focus on individuals who pose a true public safety or national security threat" emphasis added).
56. Mapp v. Ohio, 367 U.S. 643, 654-55 (1961).
57. Weeks v. United States, 232 U.S. 383, 398 (1914) (ruling that illegal evidence gathered by state officers cannot be used against defendants in federal court).

58. Wong Sun v. United States, 371 U.S. 471, 484–85 (1963).
59. Elkins v. United States, 364 U.S. 206, 217 (1960).
60. Whren v. United States, 517 U.S. 806 (1996) (evidence may not be suppressed in criminal proceedings where criminal law enforcement agents engage in pretextual stops and race may "seep into the calculus").
61. United States v. Montero-Camargo, 208 F.3d 1122, 1131 (9th Cir. 2000).
62. Jennifer M. Chacón. "A diversion of attention? Immigration courts and the adjudication of fourth and fifth amendment rights." *Duke Law Journal* 59 (2010): 1563–633.
63. Michael J. Wishnie. "State and local police enforcement of immigration law." *University of Pennsylvania Journal of Constitutional Law* 6 (2004): 1084, 1102–11.
64. Jonathan L. Hafetz. "The rule of egregiousness: INS v. Lopez-Mendoza reconsidered." *Whittier Law Review* 19 (1998): 843–67.
65. Almeida-Amaral v. Gonzales, 461 F.3d 231, 235 (2006) (holding that any arrest predicated on race is an arrest for "no reason at all" and is per se egregious).
66. Orhorhaghe v. INS, 38 F.3d 488, 504 (1994) (holding that arresting an individual based on his "foreign sounding name" was egregious).
67. Martinzez-Camargo v. INS, 282 F.3d 487, 492 (2002).
68. "Immigration Court Processing Time by Outcome." *TRAC*, December 2013. Available online: http://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php (accessed on 12 January 2014).
69. Wong Wing v. United States, 163 U.S. 228 (1896).
70. Zakonaite v. Wolf, 226 U.S. 272 (1912) (immigration proceedings do not trigger Sixth Amendment protections).
71. Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) ("deportation is not punishment for a crime").
72. Hoping to bridge the gap between legal services and New York's immigrant community, the New York City Bar Immigration and Nationality Committee has recently submitted testimony to New York Chief Judge Jonathan Lippmann's Task Force to Expand Access to Civil Legal Services, calling on the Task Force to support legal aid in civil immigration proceedings. Letter from New York City Bar Immigration and Nationality Committee to The Task Force to Expand Access to Civil Legal Services in New York, 24 September 2013. Available online: http://www2.nycbar.org/pdf/report/uploads/20072569-ImmigrationIssuesareCivilAccesstoJusticeIssues.pdf (accessed on 15 December 2013).
73. "ACLU Puts Arizona law enforcement agencies on notice." American Civil Liberties Union, 12 November 2013. Available online: https://www.aclu.org/immigrants-rights/aclu-puts-arizona-law-enforcement-agencies-notice (accessed on 15 December 2013).
74. Stephanie Francis Ward. "Illegal Aliens on ICE: Tougher immigration enforcement tactics spur challenges." *ABA Journal*, 1 June 2008. http://www.abajournal.com/magazine/article/illegal_aliens_on_ice/.
75. U.S. Department of Justice, Executive Office for Immigration Review, Immigration Court, Miami, Florida, Decision, August 12, 2013, page 42. Decision on file with author.
76. Kandamar v. Gonzales, 464 F.3d 65, 69 (2006).

77. Oliva-Ramos v. Att'y Gen., 694 F.3d 259 (2012) (suppression where violation is egregious or widespread).
78. United States v. Navarro-Diaz, 420 F.3d 581, 587 (2005).
79. Gonzalez-Rivera v. INS, 22 F.3d 1441, 1449 (1994) ("bad faith" violations are egregious and occur when "evidence is obtained by deliberate violations of the Fourth Amendment, or by conduct a reasonable officer should have known is in violation of the U.S. Constitution.").
80. United States v. Olivares-Rangel, 458 F.3d 1104, 1116 n.9 (2006).
81. Gutierrez-Berdin v. Holder, 618 F.3d 647, 652 (7th Cir. 2010).
82. Ghysels-Reals v. Att'y Gen., 418 Fed. App'x 894, 895 (11th Cir. 2011).
83. United States v. Oscar-Torres, 507 F.3d 224 (4th Cir. 2007) (ruling it need not consider whether egregious violations of the Fourth Amendment warrant a suppression remedy).
84. Mendez-Solis v. INS, 36 F.3d 12, 12 (5th Cir. 1999) (stating that the exclusionary rule does not apply in removal proceedings).
85. Escobar v. Holder, 398 Fed. App'x 50, 53–54 (5th Cir. 2010) (declining to consider the question in the absence of a Fourth Amendment violation altogether).
86. Puc-Ruiz v. Holder, 639 F.3d 771, 777 (2010).
87. Lopez-Gabriel v. Holder, 653 F.3d 683 (2011), 686 (citing Puc-Ruiz at 778).
88. Melnitsenko v. Mukasey, 517 F.3d 42, 47 (2008).
89. "DHS shuts down 287g agreement with Maricopa county following DOJ investigation restricts secure communities." American Immigration Council, 15 December 2011. Available online: http://immigrationimpact.com/2011/12/15/dhs-shuts-down-287g-agreement-with-maricopa-county-following-doj-investigation-restricts-secure-communities/ (accessed on 15 December 2013).
90. Bill Ong Hing. "Institutional Racism, ICE Raids, and Immigration Reform." *University of San Francisco Law Review* 44 (2009): 307–57.
91. Bill Ong Hing. Understanding SB1070 from the Lens of Institutionalized Racism and Civil Rights. *Legal Services of Northern California.* Available online: http://equity.lsnc.net/understanding-sb1070-from-the-lens-of-institutionalized-racism-and-civil-rights/ (accessed on 15 December 2013).
92. Gabriel J. Chin. "Segregation's last stronghold: race discrimination and constitutional law of immigration." *UCLA Law Review* 46 (1998): 1–74.
93. Jerry Kang. "Trojan Horses of Race." *Harvard Law Review* 118 (2005): 1489–593.
94. "Trust act signed in California to limit deportation program." *Huffington Post*, 5 October 2013. Available online: http://www.huffingtonpost.com/2013/10/05/trust-act-signed_n_4050168.html (accessed on 15 December 2013).
95. "Miami-Dade plans to stop paying for federal immigration detentions." *Miami Herald*, 18 December 2013. Available online: http://www.miamiherald.com/2013/12/18/3826317/miami-dade-plans-to-stop-paying.html (accessed on 15 December 2013).
96. Memorandum of John Morton, Director Of ICE, U.S. Department of Homeland Security, to All Field Office Directors, All Special Agents in Charge & All Chief Counsel, ICE, U.S. Department of Homeland Security (June 17, 2011).

97. "ICE numbers on prosecutorial discretion keep sliding downward." American Immigration Council, 30 July 2012. Available online: http://immigrationimpact.com/2012/07/30/ice-numbers-on-prosecutorial-discretion-sliding-downward/#sthash.cKYSveBv.dpuf (accessed on 15 December 2013).
98. "ICE prosecutorial discretion program." *TRAC*, 28 July 2012. Available online: http://trac.syr.edu/immigration/reports/287/ (accessed on 15 December 2013).
99. "Immigration court cases closed based on prosecutorial discretion." *TRAC*, 13 August 2013. Available online: http://trac.syr.edu/immigration/reports/308/#pd (accessed on 15 December 2013).
100. Rachel R. Ray. "Insecure communities: Examining local government participation in U.S. immigration and customs enforcements' 'Secure Communities' Program." *Seattle Journal of Social Justice* 10 (2011): 367–93.
101. INA § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A).
102. Mark Noferi. "Cascading constitutional deprivation: The right to appointed counsel for mandatorily detained immigrants pending removal proceedings." *Mich. Journal of Race and Law* 18, no. 1 (2102): 63–129.
103. Daniel Kanstroom. "The right to deportation counsel in Padilla v. Kentucky: The challenging construction of the fifth-and-a-half amendment." *UCLA Law Review* 58 (2011): 1461–514.
104. Kevin R. Johnson. Gideon v. Wainright and the Right to Counsel in Immigration Removal Cases: An Immigration Gideon for Lawful Permanent Residents? UC Davis Legal Studies Research Paper Serious, UC Davis School of Law, No. 316 (December 2012).
105. Ingrid V. Eagly. "Gideon's migration." *Yale Law Journal* 122 (2013): 2282–313.