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Erasing Presence Through Reasonable Suspicion: Terry and Its Progeny as a Vehicle for State Immigration Enforcement

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ERASING PRESENCE THROUGH REASONABLE SUSPICION: *TERRY* AND ITS PROGENY AS A VEHICLE FOR STATE IMMIGRATION ENFORCEMENT

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ABSTRACT

This Article examines the long shadow cast on local policing by Terry v. Ohio*, tracing the impact of* Terry*'s progeny on state legislative campaigns focused on immigration enforcement. The policing tools afforded by* Terry*'s progeny have an unmistakable presence-deterring effect on communities of color—so painfully illustrated in New York City during the siege-like "stop-and-frisk" program—and have provided the foundation on which states like Texas and Arizona can build statutory schemes to achieve "attrition through enforcement." This Article unpacks how the broad police power afforded by* Terry *and its progeny meets legislative provisions authorizing or mandating immigration inquiry at the lowest level encounter with law enforcement. At this confluence, states can use* Terry *as a sword to create an environment so hostile to undocumented immigrants that they are under siege in their own communities and, ultimately, forced to leave. This Article further discusses how to arm advocacy groups to fight the harms of* Terry *and its progeny by seeking greater transparency and accountability through data collection on police encounters, while fighting the harms of the state legislative campaigns by engaging immigrant employers in the fight to recognize and maintain the dignity of immigrants in the United States.*

TABLE OF CONTENTS

* J.D. Candidate, University of Idaho College of Law, 2019. I am immensely grateful to Professor Katherine Evans for her guidance on all aspects of this paper and for its inception; to Professor Katherine MacFarlane for her invaluable assistance; to the editors of The *Idaho Law Review* for their eagle eyes and insight; and lastly to my parents, Robert and Christine, for the fire in my heart to see a more just world.

I. INTRODUCTION

> *If you're in this country illegally and you committed a crime by being in this country, you should be uncomfortable, you should look over your shoulder. You need to be worried.*[1]

Thomas Homan, Acting Immigration and Customs Enforcement ("ICE") Director, during a House Appropriations Committee Hearing in June 2017.

> *The solution is to create "virtual choke points" . . . . [like] firewalls in computer systems, that people could pass through only if their legal status is verified. The objective is not mainly to identify illegal aliens for arrest (though that will always be a possibility) but rather to make it as difficult as possible for illegal aliens to live a normal life here.*[2]

Mark Krikorian, Executive Director, Center for Immigration Studies.

> *The commissioner of the New York City police department views the controversial practice of stop, question and frisk as a means to instill fear in young African American and Latino men, a New York state senator, [Eric Adams,] testified in a federal court on Monday . . . .*
>
> *"[Commissioner Kelly] stated that he targeted and focused on that group because he wanted to instill fear in them that every time that they left their homes they could be targeted by police," Adams testified.*[3]

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1. Stephen Dinan, *No Apologies: ICE Chief Says Illegal Immigrants Should Live in Fear of Deportation*, WASH. TIMES (June 13, 2017), http://www.washingtontimes.com/news/2017/jun/13/thomas-homan-ice-chief-says-illegal-immigrants-sho/.

2. Mark Krikorian, *Downsizing Illegal Immigration: A Strategy of Attrition through Enforcement*, CTR. FOR IMMIGR. STUD. 5 (May 2005), https://www.cis.org/sites/cis.org/files/articles/2005/back605.pdf.

3. Ryan Devereaux, *NYPD Commissioner Ray Kelly 'Wanted to Instill Fear' in Black and Latino Men*, GUARDIAN (Apr. 1, 2013), https://www.theguardian.com/world/2013/apr/01/nypd-ray-kelly-instil-fear.

On May 14, 2017, artist Ricardo Levins Morales was riding on Minneapolis Metro Transit when a transit officer began to move about the cabin checking passenger fares and asking for identification.[4] An individual did not give him a sufficient answer, and the officer asked this person, "Are you here illegally?"[5]

It was then that Morales asked the officer if he had been authorized to act on the behalf of immigration enforcement.[6] The officer replied, "No, not necessarily."[7] In response, Morales said, "Then I would stay out of that[.] . . . It's very touchy legal territory."[8] The officer responded by arresting the subject, Ariel Vences-Lopez.[9]

After the incident was reported to Metro Transit, the Metro Transit Police Chief issued a statement emphasizing that it was Metro Transit's policy not to inquire about immigration status.[10] This mirrored the Minneapolis and St. Paul Police Department's policies, which prevented officers from asking about people's immigration status by city ordinance.[11] But the damage was done: Mr. Vences-Lopez was booked into the county jail, transferred into ICE's custody, and scheduled for deportation to Mexico.[12] Though he was later released on bond by an immigration judge,[13] Mr. Vences-Lopez's future in the United States had been jeopardized by a single, non-consensual interaction with local law enforcement, a very real example for the undocumented immigrant community demonstrating that any encounter with the police could mean losing a life in the United States.

On the fiftieth anniversary of *Terry v. Ohio*, it is fitting to examine the controlling power of non-consensual stops made with less than probable cause on undocumented immigrant communities. *Terry* has been a source of scholarly critique about racial profiling: in New York, *Terry* stops were used to target the "right people" and had the impact of instilling fear in young men of color, leading them to

4. Associated Press, *Video Shows Transit Officer Asking about Immigration Status*, U.S. NEWS & WORLD REP. (May 20, 2017), https://www.usnews.com/news/us/articles/2017-05-20/video-shows-transit-officer-asking-about-immigration-status.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. Will Ashenmacher, *Metro Transit: We Didn't Note Immigration Status for Ariel Vences-Lopez*, TWIN CITIES PIONEER PRESS (May 27, 2017), https://www.twincities.com/2017/05/27/metro-transit-we-didnt-note-immigration-status-for-ariel-vences-lopez/.

10. Amber Ferguson, *'Are You Here Illegally?': Probe Underway into Video of Transit Officer Checking Rider's Immigration Status*, WASH. POST (May 22, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/05/22/are-you-here-illegally-minneapolis-probes-video-of-transit-officer-checking-riders-immigration-status/?utm_term=.8fa2711c487e.

11. Ibrahim Hirsi, *For Undocumented Immigrants, the 'Sanctuary City' of Minneapolis Doesn't Feel Much Like a Sanctuary*, MINN. POST (June 5, 2017), https://www.minnpost.com/politics-policy/2017/06/undocumented-immigrants-sanctuary-city-minneapolis-doesnt-feel-much-sanctuar. In general, these ordinances, *inter alia*, have led to the Minneapolis-St. Paul area being labeled a "sanctuary city," even though the Minneapolis Mayor says she does not use the term: "I don't want to overpromise what the city can do." *Id.*

12. Ashenmacher, *supra* note 9.

13. Mila Koumpilova, *Immigration Judge Releases Man Detained After Light-Rail Confrontation*, STAR TRIB. (July 13, 2017), http://www.startribune.com/immigration-judge-releases-man-detained-after-light-rail-confrontation/434313693/.

believe that they could be stopped at any time for no reason.[14] In the immigration enforcement context, *Terry*'s deterrent effect allows state policymakers to endorse the efforts of local enforcement officers to enforce immigration without entering formalized agreements with ICE or violating principles of federalism by taking on powers exclusively held by federal immigration authorities. By applying the tools of policing, states can realize the twin political goals of eliminating sanctuary jurisdictions and encouraging the self-deportation of undocumented immigrants. They do so by moving the spotlight from federal attempts to coerce local agencies to the state arena, where legislative campaigns co-opt local officers to do the "heavy lifting" of self-deportation.

In the wake of President Donald Trump's election, legislation concerning immigration began to proliferate in state legislatures, the number of bills enacted increasing by 110% in 2017 from the prior year.[15] Many of these bills addressed "sanctuary policies"—local or state policies that limit or prohibit agency cooperation with immigration authorities—by waging the same war of attrition through funding that President Donald Trump has promised to wage.[16] In response to the Administration's position on immigration, other states like California reacted oppositely, expressing statewide support for sanctuary policies.[17] The federal government has met state legislation reflecting federal immigration enforcement priorities with

14. Floyd v. City of New York, 959 F. Supp. 2d 540, 602–03 (S.D.N.Y. 2013). *See also* Devereaux, *supra* note 3.

15. *State Laws Related to Immigration and Immigrants*, NAT'L CONF. ST. LEGIS., http://www.ncsl.org/research/immigration/state-laws-related-to-immigration-and-immigrants.aspx (last updated Jan. 1, 2018). Only one state nationwide did not enact any immigration-related legislation in 2017. *2017 Immigration Report*, NAT'L CONF. ST. LEGIS., http://www.ncsl.org/research/immigration/2017-immigration-report.aspx (last updated Feb. 12, 2018). Notably, legislative campaign trends concerning immigration have come in reaction to political trends—2012 and 2013's increase may have come as a result of DACA's implementation, while 2010's increase may have been in response to Arizona S.B. 1070, the first omnibus bill of its kind directed at immigration enforcement. *State Laws Related to Immigration and Immigrants*, *supra*.

16. At the federal level, early in his first year, President Trump issued an embattled and ultimately enjoined executive order promising to deny federal funding to such sanctuary jurisdictions. Eli Rosenberg, *Federal Judge Blocks Trump's Executive Order on Denying Funding to Sanctuary Cities*, WASH. POST (Nov. 21, 2017), https://www.washingtonpost.com/news/politics/wp/2017/11/21/federal-judge-blocks-trumps-executive-order-on-denying-funding-to-sanctuary-cities/?utm_term=.873ad50f3636. Analogously, legislation introduced in Idaho and enacted in Texas threatened local agencies' funding if they adopt, enforce, or endorse sanctuary policies. Betsy Z. Russell, *Proposed Law in Idaho Would Discourage Sanctuary Cities and Direct Law Enforcement to Question People's Immigration Status*, SPOKESMAN-REV. (Jan. 30, 2017), http://www.spokesman.com/stories/2017/jan/30/idaho-house-panel-introduces-immigration-bill-targ/; Manny Fernandez, *Federal Judge Blocks Texas' Ban on 'Sanctuary Cities'*, N.Y. TIMES (Aug. 30, 2017), https://www.nytimes.com/2017/08/30/us/judge-texas-sanctuary-cities.html. Notably and most recently, the federal government has even explored avenues to levy criminal charges against leaders of sanctuary cities. Stephen Dinan, *Homeland Security Pursues Charges Against Leaders of Sanctuary Cities*, WASH. TIMES (Jan. 16, 2018), https://www.washingtontimes.com/news/2018/jan/16/dhs-asks-prosecutors-charge-sanctuary-city-leaders/.

17. Ben Adler, *California Governor Signs 'Sanctuary State' Bill*, NAT'L PUB. RADIO (Oct. 5, 2017), http://www.npr.org/sections/thetwo-way/2017/10/05/555920658/california-governor-signs-sanctuary-state-bill.

praise,[18] especially in light of constitutional issues implicated when the federal government strong-arms states into enforcing federal law.[19]

Multiple cases in lower courts are examining the role and scope of local officers in immigration enforcement.[20] Some of these cases implicate issues of federalism, asking whether and how the federal government can coerce local law enforcement agencies to enforce immigration both pre- and post-arrest.[21] Yet other cases concern state legislation about post-arrest immigration enforcement—compliance with detainers, for example, after an arrest for both minor and severe criminal violations.[22] These direct pathways for local enforcement to feed undocumented im-

18. Julián Aguilar, *In Austin, Sessions Touts Trump's Hardline Stance on Immigration*, TEX. TRIB. (Oct. 20, 2017), https://www.texastribune.org/2017/10/20/austin-sessions-touts-trumps-hardline-stance-immigration/. This has also extended beyond applause—U.S. Attorney General Jeff Sessions pledged Department of Justice support to Texas in the litigation that followed Texas S.B. 4's passage. Philip Jankowski, *Trump Administration to Defend 'Sanctuary Cities' Ban in Texas Lawsuit*, MY STATESMAN (June 23, 2017), http://www.mystatesman.com/news/state--regional/trump-administration-defend-sanctuary-cities-ban-texas-lawsuit/8r1fSKZtygM1bue8jkjmdI/.

19. *See generally* Printz v. United States, 521 U.S. 898 (1997). There, at issue were provisions of the Brady Act that amended the Gun Control Act of 1968 by requiring state enforcement officers to help enforce a federal gun control scheme—officers were directly conscripted to perform background checks on handgun transferees. *Id.* at 935. The Court found that this direct conscription violated states' autonomy preserved in the constitutional system of dual sovereignty. *Id.* at 918–19. Furthermore, requiring state enforcement officers to enforce federal law violated separation of powers, as it was the role of the Executive branch, not state enforcement officers, to enforce federal law. *Id.* at 922. In the immigration context, the federal government would violate these principles of federalism if it required states to enforce federal immigration law, but would not violate these principles if states acted independently and engaged in what one scholar has called "immigration federalism[:]" . . . "the engagement by national, state, and local governmental actors in immigration regulation." *See* Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 709–10 (2013). Of course, as will be discussed *infra* in Section II.B, state action must also clear the Constitutional hurdles of federal preemption. *See infra* Section II.B.

20. *See* City of El Cenizo v. Texas, 264 F. Supp. 3d 744 (W.D. Tex. 2017), *rev'd in part*, 885 F.3d 332 (5th Cir. 2017); Complaint for Injunctive and Declaratory Relief, City of Chi. v. Sessions, 264 F. Supp. 3d 933 (N.D. Ill. 2017) (No. 1:17-cv-5720); City of Chi. v. Sessions, 264 F. Supp. 3d 933 (N.D. Ill. 2017).

21. President Trump's Executive Order 13768, as implemented by the Attorney General's accompanying Memorandum, set as a precondition for federal funding certification of the jurisdiction's compliance with 8 U.S.C. § 1373 (2012). Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017); Memorandum from the Attorney Gen. for all Dep't Grant-Making Components (May 22, 2017), https://www.justice.gov/opa/press-release/file/968146/download. Though jurisdictions like the City of Chicago gained certification of compliance, the Department of Justice released press releases indicating it believed some jurisdictions had wrongfully earned certification, also levying further conditions on receipt of funds. Complaint for Injunctive and Declaratory Relief, *supra* note 20. These jurisdictions filed a complaint asking for a declaratory judgment that the conditions placed on federal funding were unlawful, as well as for an injunction against the enforcement of the conditions. *Id.* This case, and cases like it, ask whether the federal government can leverage funding to force local jurisdictions to enforce immigration. *Id.*

22. Texas Senate Bill 4, enacted in 2017 and discussed *infra* in Section II.C, required local jurisdictions to comply with all detainer requests. TEX. CODE CRIM. PROC. ANN. art. 2.251 (West 2017). A complaint filed by the City of El Cenizo challenged major provisions of Senate Bill 4, and in particular raised the question of whether states could force local jurisdictions to comply with all detainer requests despite concerns about financial and constitutional costs. Second Amended Complaint for Declaratory and Injunctive Relief, City of El Cenizo v. Texas, 264 F. Supp. 3d 744 (W.D. Tex. 2017) (No. 5:17-cv-404-OLG).

migrants into the deportation pipeline through criminal convictions are not the focus of this Article.[23] Extensive scholarship exists on the subject and addresses the Fourth Amendment violations inflicted upon individuals subject to detainer.[24]

Another set of cases, however, concerns state legislation about pre-arrest immigration enforcement. *Inter alia*, provisions in Arizona's 2010 omnibus bill, S.B. 1070, authorized warrantless stops based on probable cause of a subject's unlawful presence,[25] and mandated that officers determine the immigration status of individuals during police encounters.[26] After the subsequent litigation that culminated in the Supreme Court case *Arizona v. United States*,[27] states had defined space in the immigration enforcement field to occupy by mandating that officers determine the immigration status of people who are lawfully stopped.[28] This is the less-examined but more pervasive, indirect means of achieving the erasure of undocumented immigrants; officers use tools that have been validated by the Court to instill fear, discourage presence, and encourage self-deportation.

Self-deportation refers to immigration enforcement that makes life so miserable for undocumented immigrants that they leave.[29] This was the explicit goal of Arizona S.B. 1070—to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present . . . ."[30] This approach acknowledges that formal deportation of all undocumented immigrants is unrealistic both practically and politically.[31] By making jobs more difficult to obtain or requiring status verification at the "virtual chokepoints" referenced by Center for Immigration Studies Director Mark Krikorian,[32] life becomes so difficult and filled with fear that undocumented immigrants arrange their own departures, thus lessening the load on ICE. Though the "self-deportation" approach is predominantly federal in focus, states like Arizona, Texas, and even Idaho have entered the fray with bills like S.B. 1070, designed to deputize local officers to enforce immigration.[33]

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23. For a discussion of the "jail-to-deportation pipeline" by triggering deportation through runins with local law enforcement that result in a criminal conviction, see Rebecca Sharpless, *"Immigrants Are Not Criminals": Respectability, Immigration Reform, and Hyperincarceration*, 53 HOUS. L. REV. 691 (2016). In contrast, this Article focuses on interactions with law enforcement that may not even result in a criminal charge.

24. *See generally* Alia Al-Khatib, *Putting a Hold on ICE: Why Law Enforcement Should Refuse to Honor Immigration Detainers*, 64 AM. U.L. REV. 109 (2014); Christopher N. Lasch, *Preempting Immigration Detainer Enforcement under* Arizona v. United States, 3 WAKE FOREST J.L. & POL'Y 281 (2013).

25. Support Our Law Enforcement and Safe Neighborhoods Act § 2(b), ARIZ. REV. STAT. ANN. §11-1051(B) (2010).

26. *Id.*

27. 567 U.S. 387 (2012).

28. *See infra* Section II.B.

29. Adam Serwer, *"Self-Deportation": It's a Real Thing, and It Isn't Pretty*, MOTHER JONES (Jan. 24, 2012), http://www.motherjones.com/politics/2012/01/romneys-self-deportation-just-another-term-alabama-style-immigration-enforcement/#.

30. Support Our Law Enforcement and Safe Neighborhoods Act § 1.

31. Wayne A. Cornelius, *Why Immigrants Won't Self-Deport*, L.A. TIMES (Nov. 30, 2016), http://beta.latimes.com/opinion/op-ed/la-oe-cornelius-self-deportation-20161130-story.html.

32. Krikorian, *supra* note 2, at 5.

33. *Arizona's Immigration Law Is Back in Court, "Self-Deportation" on the Rise*, PUB. RADIO INT'L: TAKEAWAY (Apr. 26, 2012), https://www.pri.org/stories/2012-04-26/arizonas-immigration-law-back-court-self-deportation-rise; Russell, *supra* note 16.

ICE's limited workforce and federal inaction with that workforce has been the root of many states' hyper-focus on local law enforcement agencies.[34] ICE employs approximately 12,000 officers to enforce immigration laws on estimates of up to 12.5 million undocumented immigrants.[35] Policymakers already know that direct partnerships between local agencies and ICE provide the "highly successful force multiplier" to deport, as lauded by Department of Homeland Security Secretary John Kelly.[36] More insidiously, however, states co-opt local officers into immigration enforcement—requiring them to ask about immigration status through provisions commonly known by opponents as "Show Me Your Papers" bills.[37] Even more telling is that state legislatures passing provisions that keep local agencies from prohibiting their officers from asking about immigration status—referred to in this Article as "Can't Keep Me From Asking" provisions[38]—are counting on local officers to carry out anti-immigrant agendas with self-deportation at its core.

Not surprisingly, lobbyists and state legislators understand that encounters—actual or feared—with local law enforcement is the most critical stage for immigration enforcement because of the prevalence of encounters with state and local officers.[39] But the significance of these encounters extends beyond the direct pathways from criminal convictions to deportation. The indirect pathway of fear to self-

34. *See* Kevin J. Fandl, *Putting States Out of the Immigration Law Enforcement Business*, 9 HARV. L. & POL'Y REV. 529, 540 (2015); Kristen McCabe & Doris Meissner, *Immigration and the United States: Recession Affects Flows, Prospects for Reform*, MIGRATION POL'Y INST. (Jan. 20, 2010), https://www.migrationpolicy.org/article/immigration-and-united-states-recession-affects-flows-prospects-reform; *Arizona is Not the First State to Take Immigration Matters into Their Own Hands*, AM. IMMIGR. COUNCIL (May 26, 2010), https://www.americanimmigrationcouncil.org/research/arizona-not-first-state-take-immigration-matters-their-own-hands.

35. According to ICE's 2016 fiscal year budget, there are only about 12,000 agents—Enforcement & Removal Operations (ERO) and Homeland Security Investigations (HSI) combined—which has been blamed for ICE being backlogged. Josh Keefe, *How Many Immigration Border Officers Are There? Trump to Increase ICE Enforcement Agents by 80%*, INT'L BUS. TIMES (Feb. 21, 2017), http://www.ibtimes.com/how-many-immigration-border-officers-are-there-trump-increase-ice-enforcement-agents-2495482. For current undocumented immigrant estimates, see Alan Gomez, *Undocumented Immigrant Population in U.S. Stays Flat for Eighth Straight Year*, USA TODAY (Apr. 25, 2017), https://www.usatoday.com/story/news/world/2017/04/25/undocumented-immigrant-population-united-states/100877164/; Spencer Raley, *How Many Illegal Aliens Are in the US?*, FED'N FOR AM. IMMIGR. REFORM (Oct. 23, 2017), https://fairus.org/issue/illegal-immigration/how-many-illegal-immigrants-are-in-us.

36. Memorandum from John Kelly, Sec'y U.S. Dep't of Homeland Sec., to Kevin McAleenan et al., Acting Comm'r, U.S. Customs and Border Prot. 3 (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf).

37. *See* Audrey McGlinchy, *How Does Texas' 'Sanctuary Cities' Bill Stack up against Arizona's 'Show Me Your Papers' Law?*, AUSTIN MONITOR (May 5, 2017), https://www.austinmonitor.com/stories/2017/05/texas-sanctuary-cities-bill-stack-arizonas-show-papers-law/. The moniker "Show Me Your Papers" has been used to refer to provisions mandating or authorizing officers to determine a subject's immigration status, but as will be discussed *infra*, I suggest a notable distinction between "Show Me Your Papers" and the recent wave of "Can't Keep Me from Asking" provisions. *See infra* Section III.C.

38. *See infra* Section III.C.

39. *See, e.g.*, Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 234–35 (2006). Kris Kobach, notably, went on to assist in the drafting of S.B. 1070 with Russell Pearce. Russell Pearce, *SB 1070 Is Working*, HILL (Apr. 19, 2012), http://thehill.com/blogs/congress-blog/homeland-security/222597-sb1070-is-working.

deportation is equally vital to achieve states' immigration enforcement agendas. When immigrants fear that their local law enforcement is enforcing immigration law—not just serving and protecting the community—they are less likely to report crimes or cooperate with local police.[40] They are less likely to travel throughout their communities for fear of being stopped.[41] By co-opting local enforcement into a broader force of immigration enforcement—and imbuing local enforcement with the miasma of fear otherwise surrounding federal immigration enforcement ("*la migra*")[42]—state legislators can target sanctuary jurisdictions by systematically making them feel unwelcome, thereby encouraging self-deportation. To do so, state legislators must rely upon the full range of tools available to local law enforcement and count on local officers to carry out immigration enforcement alongside their normal policing duties.[43] *Terry v. Ohio* and its progeny are core to this strategy, allowing for implementation by pervasive population control.[44] State legislators passing "Show Me Your Papers" or "Can't Keep Me from Asking" provisions complement this control by mandating or authorizing immigration status determination during stops that largely sit outside judicial review.[45]

Part I discusses *Terry v. Ohio*'s impact on race-based immigration enforcement. I first explore *Terry*'s significance for local criminal enforcement, as well as the subsequent cases establishing the acceptable factors for reasonable suspicion. Given *Terry*'s application and abuse in New York City, I discuss the danger of deep injury in communities of color when stops on less than probable cause are constitutionally immunized. Part II examines the variable success of state initiatives to enforce immigration law, setting forth the confines of federalism on enlisting local enforcement as indicated in *Arizona v. Johnson*, discussing the avenues of direct local partnership between counties and ICE, and fleshing out the space created by the Court in *Arizona v. Johnson*. I argue that the new wave of state-led legislative campaigns seeks to take up as much of this Court-created space as possible, regu-

40. Mai Thi Nguyen & Hannah Gill, *Interior Immigration Enforcement: The Impacts of Expanding Local Law Enforcement Authority*, 53 URB. STUD. 302, 316 (2016).

41. *Id.* at 316–17; Andy Uhler, *In the Texas Countryside, Undocumented Immigrants Live with a Different Kind of Fear*, MARKETPLACE (Feb. 1, 2018), https://www.marketplace.org/2018/02/01/life/texas-countryside-undocumented-immigrants-live-different-kind-fear.

42. Nguyen & Gill, *supra* note 40, at 316.

43. As will be discussed *infra* in Section II.A, these tools are amplified in § 287(g) jurisdictions with the delegation of federal immigration authority; for an in-depth examination of the intersection of local policing and immigration enforcement in the § 287(g) jurisdiction Nashville, Tennessee, see AMADA ARMENTA, PROTECT, SERVE, AND DEPORT: THE RISE OF POLICING AS IMMIGRATION ENFORCEMENT 3–4 (2017).

44. *See infra* Section II.B (discussing the pervasive population control experienced by minority neighborhoods in New York City).

45. Notably, the cases establishing the boundaries of police search and seizure overwhelmingly tend to be appeals from suppression motions where evidence was acquired during a search or seizure; searches or seizures that do not lead to arrests or evidence may of course be challenged through § 1983 actions (discussed *infra* in Section IV.A), but are not automatically subject to judicial review through probable cause hearings (for arrests) or suppression hearings (for evidence). *See also infra* Section III.A. This becomes particularly relevant when the only "evidence" at issue is a subject's identity; for the undocumented immigrant, the fact that identity evidence cannot be suppressed can mean any encounter with police can lead to severe immigration consequences with no recourse even if the encounter was entirely suspicionless. *See, e.g.*, Immigr. & Nationalization Serv. v. Lopez-Mendoza, 468 U.S. 1032 (1984); Utah v. Strieff, 136 S. Ct. 2056 (2016).

lating within the confines of Arizona and in doing so, mandating—or at least authorizing—enforcement at the local level through the actions of individual police officers.

In Part III, this Article discusses the confluence of *Terry* and these state legislative campaigns, arguing that the sheer power of a "reasonable suspicion" standard at the local law enforcement level when used to amplify the political goal of deportation—or self-deportation—harms immigrant communities by using its "deterrent" effect to erase immigrant presence. Part IV examines the challenges to a litigation response of confronting racial profiling, especially in the immigration realm. The Article argues that major structural obstacles to equal protection challenges make advocating for data collection a necessity for advocacy groups, but that the most effective short-term solution is engaging industries that employ immigrants. Then, the Article ultimately concludes that advocacy groups must be fully aware of the way states use the lowest level of policing encounters as broadened by *Terry* to create environments so hostile to immigrants that they leave. Armed with this knowledge, advocacy groups must push for data collection and industry engagement together, lest reliance on immigrant employers discount the human dignity of immigrant populations.

II. *TERRY'S* LONG SHADOW ON RACE-BASED ENFORCEMENT

Encounters with state and local law enforcement are governed by the Fourth Amendment, which protects against unreasonable searches and seizures.[46] The Fourth Amendment requires a warrant supported by probable cause for a search or a seizure to be valid.[47] The reasonableness of a search or seizure is determined by balancing the government's protection of public interests and the individual's right to be free from invasions of privacy.[48] The Court establishes through precedent what will be considered reasonable, and, by this blueprint, agencies establish policies governing encounters with the civilian population and protecting rights for citizens.[49] A significant way to deter violations of the Fourth Amendment was the application of the exclusionary rule—suppression of evidence acquired during an unlawful search or seizure.[50]

Probable cause, required by the Fourth Amendment, has been the touchstone of valid searches and seizures and is defined as "a fair probability" that the person

46. U.S. CONST. amend. IV. The Fourth Amendment was incorporated to the states through the Fourteenth Amendment by the Supreme Court's decision in *Mapp v. Ohio*, 367 U.S. 643 (1961).

47. U.S. CONST. amend. IV.

48. *See* Terry v. Ohio, 392 U.S. 1, 20–21 (1968) (citing Camara v. Mun. Court, 387 U.S. 523, 536–37 (1967)).

49. *See generally* Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929 (1965); I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 3–5 (2011) (arguing that criminal procedure developed in Supreme Court cases between the 1920s and 1960s were concerned with "the Fourteenth Amendment's promise of equal citizenship").

50. Mapp v. Ohio, 367 U.S. 643, 649 (1961).

being arrested committed the crime charged, or that the thing being searched contains the evidence police are looking for.[51] Though, as time went on and exceptions were added—exigencies, for example, would excuse an officer from having to get a warrant before entering a home[52]—probable cause remained the required standard to determine that the exception was valid.

Before *Terry v. Ohio*, there were two kinds of police encounters with the public that were recognized by the Court. If voluntary, an officer did not need to justify the interaction with probable cause, but if she had probable cause to arrest for criminal behavior, she could.[53] In the decades before *Terry*, probable cause was easy to establish because of anti-loitering or vagrancy laws, which were prevalent until the late 1960s and rendered otherwise innocent behavior criminal.[54] But as these laws fell into disuse, there was a new need for the courts to examine encounters in light of Fourth Amendment concerns and for police to justify these encounters.[55]

In *Terry v. Ohio*, the Court was presented for the first time with the question of whether the Fourth Amendment protected citizens from "sidewalk searches and seizures . . . where the purpose of the detention was an investigatory stop, rather than an arrest."[56] Faced with the prospect of suppressing evidence found when an officer searched three individuals he suspected were about to commit armed robbery,[57] the Court took the opportunity to constitutionalize two policing tools utilized by the officer—the stop and the frisk—and set forth different standards for each.[58]

As relayed by Justice Warren in the Court's opinion in *Terry*, the facts were these: an experienced beat cop-turned-detective, Officer Martin McFadden, was patrolling in downtown Cleveland when he encountered two men standing on a street corner: John Terry and Richard Chilton.[59] Officer McFadden testified that he had been a detective for a long time and that he knew that the individuals in question "didn't look right to [him] at the time."[60] His interest piqued, Officer McFadden began to observe the two from about 400 feet away, and what he saw "[gave him]

51. *See* Illinois v. Gates, 462 U.S. 213, 238 (1983).

52. *See* Michigan v. Tyler, 436 U.S. 499, 509 (1978).

53. United States v. Watson, 423 U.S. 411, 424 (1976).

54. William J. Stuntz, Terry*'s Impossibility*, 72 ST. JOHN'S L. REV. 1213, 1215–16 (1998) (explaining that around this time loitering and vagrancy laws were falling to challenges of vagueness).

55. *Id. See also* William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 559–60 (1992) ("[T]he scope of police authority to make brief street stops became a hard issue only in the mid- to late 1960s, when loitering and vagrancy laws were struck down on vagueness grounds (so that the police needed to find some other justification for street stops). Only after the courts constrained the power to define crimes did Fourth Amendment standards come to mean something on city streets." (footnotes omitted)).

56. Robert V. Ward, *Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a Reasonable Person*, 36 HOWARD L.J. 239, 242 (1993). Notably, one issue first confronted in *Terry*—the constitutionality of stopping and questioning pedestrians without probable cause—had been lamented as being ignored by courts; in rapid-fire succession the Court addressed this issue not in one but *three* cases total in the same session. Wayne R. LaFave, *"Street Encounters" and the Constitution:* Terry*,* Sibron*,* Peters*, and Beyond*, 67 MICH. L. REV. 39, 40–42 (1968).

57. Terry v. Ohio, 392 U.S. 1, 4–6 (1968).

58. *Id.* at 27.

59. *Id.* at 5.

60. *Id.*

more purpose to watch them . . . ."[61] He watched one leave the other and go to a store window, then walk on, then return, looking back into the same store window before rejoining his companion; at some point they met up with a third man, a man later identified as Katz.[62] Based on these observations, Officer McFadden believed that Terry and Chilton were casing stores for an armed stickup.[63] He stopped the three men, asked their names, and upon receiving mumbling responses he patted down all three; finding guns on Terry and Chilton, he arrested all three men.[64] The two charged with carrying concealed weapons sought to suppress the guns that were found; their motions were denied, they were convicted, and they appealed.[65]

There were two components to the issue before the Court in *Terry*: the stop and the frisk. Because the case was before the Court due to the denied suppression motion, Justice Warren, in speaking for the Court, drew a narrow boundary around the question to be answered.[66] To answer this narrow question, however, the Court had to decide whether the seizure (the initial stop) and the search (the subsequent frisk yielding the evidence in dispute) were valid under the Fourth Amendment.[67] The Court ultimately answered both in the affirmative.[68]

In its reasoning, the Court dispensed with the State's arguments that the stop was not a seizure and that the frisks were not searches, even acknowledging that being frisked was not a "petty indignity."[69] On the other hand, the Court also rejected the petitioners' argument that any non-consensual encounter with police required probable cause.[70] Instead, the Court constitutionalized an intermediate standard for a non-consensual stop, placing a heavy thumb on the scale in favor of the interests of crime prevention and officer safety.[71] The intermediate standards being crafted here—i.e., "reasonable suspicion" instead of probable cause for an underlying nonconsensual stop, or reason to believe the subject was "armed and presently dangerous" for a frisk[72]—called for deference to officers who needed to

61. *Id.* at 5–6.
62. *Id.* at 6–7.
63. *Terry*, 392 U.S. at 6.
64. *Id.* at 6–7.
65. *Id.* at 7–8.
66. *Id.* at 12 ("[T]he issue is not the abstract propriety of the police conduct, but the admissibility against petitioner of the evidence uncovered by the search and seizure."). *See also* Stephen A. Saltzburg, Terry v. Ohio*: A Practically Perfect Doctrine*, 72 ST. JOHN'S L. REV. 911, 920 (1998).
67. *Terry*, 392 U.S. at 15–16.
68. The case itself supports an inference that the seizure was valid, as the frisk would not have been valid without the investigatory stop being valid. *Id.* at 30. However, this has been criticized by scholars; Professor Saltzburg notes in an otherwise approving piece, that the Court skipped over the stop straight to the frisk, "virtually ignor[ing]" whether the stop was a stop at all. Saltzburg, *supra* note 66, at 922. The failure to provide substantial analysis for the stop itself is discussed *infra* as a significant criticism, for in order "[f]or Terry to provide meaningful guidance, the Court needed to expand on this 'trigger issue[.]'" Lewis R. Katz, Terry v. Ohio *at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 444 (2004).
69. *Terry*, 392 U.S. at 16–17 ("emphatically reject[ing the] notion" that the "stop and frisk" Officer McFadden subjected Terry, Chilton, and Katz to did not rise to the level of a "'search' or 'seizure' within the meaning of the Constitution").
70. *Id.* at 11.
71. *Id.* at 28. *See also* Katz, *supra* note 68, at 424.
72. *Terry*, 392 U.S. at 24.

take "swift action predicated upon [their] on-the-spot observations. . . ."[73] In this specific case, given the facts available to Officer McFadden—and by proxy, the Court—the individual's interest in his freedom to leave as well as his personal security was not as weighty as the interest in preventing crimes and protecting investigating officers. Thus, a two-fold holding emerged in *Terry*: (1) if an officer had reasonable suspicion based on "specific and articulable facts which, taken together with rational inferences from those facts," warranted the intrusion of a temporary stop, he could conduct a non-consensual stop to investigate; and (2) if the officer had reason to believe that the person he had stopped was armed and presently dangerous, he could conduct "a carefully limited search of the outer clothing" to find weapons that could be used against him.[74] In so doing, the Court fashioned a "compromise" standard that brought the practice of stop and frisk "within the Fourth Amendment."[75]

Even while giving this "needed tool" to police,[76] the Court acknowledged the already-palpable tension between the police community and minority groups.[77] However, the Court offered a tepid shrug about the power of the exclusionary rule to prevent the "wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain[.]"[78] This viewpoint of powerlessness is reflected in how the facts recited by the Court pointedly did not include mention of the petitioners' race—they were both black, a fact that has not escaped notice and criticism by scholars.[79] This perceived futility of the exclusionary rule to prevent this harassment seems like a shrug aimed at those who point at *Terry's* consequences today: the harassment would have happened anyway, even if the exclusionary rule was applied to suppress evidence discovered as a result.[80]

This Part discusses *Terry's* impact in the cases that further fleshed out the facts that would suffice as the basis for reasonable suspicion. It discusses how these

73. *Id.* at 20.

74. *Id.* at 21, 29.

75. *See* David A. Harris, *Particularized Suspicion, Categorical Judgements: Supreme Court Rhetoric versus Lower Court Reality Under* Terry v. Ohio, 72 ST. JOHN'S L. REV. 975, 984 (1998); Susan Bandes, Terry v. Ohio *in Hindsight: The Perils of Predicting the Past*, 16 CONST. COMMENT. 491, 492–93 (1999).

76. Katz, *supra* note 68, at 429.

77. *Terry*, 392 U.S. at 14–15.

78. *Id.* at 14. *See also* Katz, *supra* note 68, at 443 ("The Court seemed resigned to its powerlessness: that no matter how it ruled in *Terry*, it would have little impact on the streets because no matter the rule, police would not obey it.").

79. I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 64 (2009).

80. Katz, *supra* note 68, at 442.

cases—referred to in this Article as *Terry's* progeny[81]—established race or race-correlative facts as acceptable reasons to make police stops.[82] This Part also discusses how the gaps in *Terry* have been filled in by the Court's hand-wave of pretextual stops in *Whren v. United States*. This Part then explores leading criticisms of Terry's "reasonable suspicion" standard and examines the shockwaves of harm to minority communities that race-based policing has inflicted.

It should be noted, I am not arguing that *Terry v. Ohio*, with the advent of the "reasonable suspicion" standard, created racial profiling. The Court in *Terry* acknowledged the risk of over-policing in the minority community and that this risk was already a reality for some jurisdictions.[83] Neither am I conflating *Terry* with its progeny. However, I argue that the lowering of the standard for a non-consensual encounter with law enforcement helped to legitimize racialized local policing.[84] Consequently, *Terry*'s significant implications amplify immigration enforcement when co-opted by state legislation.[85]

A. *Terry*'s Progeny: Immunizing Race-Based Policing Against Fourth Amendment Challenges

After *Terry*, the die was cast. Police officers now had Court-sanctioned discretion to utilize the new intermediate standard. In the years following *Terry*, the term "reasonable suspicion" was widely relied upon, but it was left to applying courts to decide what specific facts would pass muster.[86] As time passed and the lower courts continued to apply the reasoning in *Terry* to define permissible grounds for stops,[87]

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81. In scholarship, the phrase "*Terry's* progeny" has differing meanings depending on the author's focus; for example, Professor Capers has included *Whren v. United States*, 517 U.S. 806 (1996) and *United States v. Mendenhall*, 446 U.S. 544 (1980) as *Terry's* progeny. Capers, *supra* note 79, at 74. Professor Harris has generally referred to *Terry's* progeny as cases expanding, demarcating, or clarifying factors of reasonable suspicion, including such cases as *Sibron v. New York*, 392 U.S. 40 (1968), *Brown v. Texas*, 443 U.S. 47 (1979), *United States v. Cortez*, 449 U.S. 411 (1981), and *United States v. Sokolow*, 490 U.S. 1 (1989) (*inter alia*). *See generally* David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 661–67, 677 (1994). I recognize that this treatment of "*Terry's* progeny" can implicate "thousands of cases," as the Fifth Circuit notes. United States v. Scroggins, 599 F.3d 433, 447 (5th Cir. 2010). Therefore, in this Article, I draw attention to Supreme Court cases following *Terry v. Ohio* that do or may implicate race or ethnic appearance, in particular *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), *Brown v. Texas*, *Illinois v. Wardlow*, 528 U.S. 119 (2000), and *Whren v. United States*.

82. *See infra* Section I.A, in particular notes 89–118 and accompanying text.

83. Terry v. Ohio, 392 U.S. 1, 14–15 (1968).

84. *See* Katherine A. Macfarlane, *The Danger of Nonrandom Case Assignment: How the Southern District of New York's "Related Cases" Rule Shaped Stop-and-Frisk Rulings*, 19 MICH. J. RACE & L. 199, 215 (2014).

85. *See infra* Part III (discussing the confluence of *Terry*'s legacy and state efforts to co-opt policing tools to deter the presence of undocumented immigrants).

86. Harris, *supra* note 75, at 985–87. Here, Professor Harris observes that the Supreme Court stuck generally to the script provided by *Terry*, but that lower courts pushed the envelope in applying *Terry*: "Regardless of the Supreme Court's rhetorical reassurances, the law as applied by *lower* courts has moved away from the Court's insistence on individualized suspicion." *Id.* at 987 (emphasis added).

87. Harris, *supra* note 75, at 988 ("[T]he reasons courts accept as legitimate bases for stops make a great deal of difference.").

the consequence of *Terry* for local criminal enforcement became clear: officers suspecting criminal activity could stop individuals based in part on race when relevant to particularized suspicion, as well as the race-correlative socioeconomic factors of location and evasion.[88]

Of course, race may be relied upon by officers who are working with a description of a known suspect.[89] The water is muddied, however, when police use race as "a factor in deciding which person in a group of strangers is more likely than others to be involved in some as-yet-unknown crime."[90] Though "racial profiling" is a term that engenders significant controversy,[91] the Court itself has hand-waved in race or race-correlative factors as potentially relevant for the reasonable suspicion standard through a series of cases flowing from *Terry v. Ohio*, each requiring "less and less evidence for a stop and frisk."[92]

In the years following *Terry*, the Court concluded that the Constitution did not prohibit deciding whether or who to stop, question, and frisk based at least in part on race; this was established through a pair of cases in 1975 and 1976. *United States v. Brignoni-Ponce* was the first to do so, holding that Border Patrol could not base a stop for reasonable suspicion of alienage *solely* on an individual's appearance.[93] There, Border Patrol officers stopped an automobile for the sole reason that its three occupants were of Mexican appearance, believing them to be present in the country unlawfully.[94] This, the Court decided, was insufficient to constitute reasonable suspicion.[95] However, the Court emphasized the government's interest in conducting such stops,[96] and provided a list of acceptable relevant factors, including

88. Thomas B. McAffee, *Setting Us Up For Disaster: The Supreme Court's Decision in* Terry v. Ohio, 12 NEV. L.J. 609, 615 (2012) (observing that even though the Supreme Court stated that presence in a "high-crime area" or association with drug users would not itself constitute reasonable suspicion, later courts "regularly [found] adequate grounds for suspicion based on factors similar to those initially found insufficient") (citing David A. Harris, *supra* note 81, at 672–75).

89. David A. Harris, *Using Race or Ethnicity as a Factor in Assessing the Reasonableness of Fourth Amendment Activity: Description, Yes; Prediction, No*, 73 MISS. L.J. 423, 435 (2003).

90. *Id.*

91. *See, e.g.*, Evan Horowitz, *A Look at Racial Profiling*, BOS. GLOBE (Nov. 1, 2015), https://www.bostonglobe.com/metro/2015/11/01/what-are-arguments-for-and-against-racial-profiling/F0DlnqVZk7aUXolRuHc0LJ/story.html; Ranjana Natarajan, *Racial Profiling Has Destroyed Public Trust in Police. Cops Are Exploiting Our Weak Laws Against It.*, WASH. POST (Dec. 15, 2014), https://www.washingtonpost.com/posteverything/wp/2014/12/15/racial-profiling-has-destroyed-public-trust-in-police-cops-are-exploiting-our-weak-laws-against-it/?utm_term=.762ebdfa5f98. *See also* George Higgins et al., *Exploring the Influence of Race Relations and Public Safety Concerns on Public Support for Racial Profiling During Traffic Stops*, 12 INT'L J. POLICE SCI. & MGMT. 12, 18 (2010) (examining public perception of whether racial profiling exists, is widespread, and is justified).

92. Harris, *supra* note 81, at 660. Professor Harris writes that gradually, the Court began to explicitly call for more deference to police officers working the beat. *Id.* at 665. The "whole picture" concept that emerged from *United States v. Cortez*, for example, "directly instructed lower courts to defer to the judgment of police." *Id.* at 666. This deference explicitly was in favor of the common-sense conclusions arrived at by police officers; these "common-sense conclusions" were relied upon in later cases dealing with drug courier profiles to justify police action based on "certain broad categories that, in collective police experience, describe a person" likely engaged in criminal activity. *Id.*

93. 422 U.S. 873, 886 (1975).

94. *Id.* at 875.

95. *Id.* at 886.

96. *Id.* at 881, 878–79 (acknowledging public interest in "prevent[ing] the illegal entry of aliens at the Mexican border" due to job scarcity or the implicated extra burdens on social safety nets).

the "characteristic appearance" of someone living in another country.[97] While at face value this perhaps seemed like a victory against racial profiling (i.e., stops could not be based solely on race), the Court's reasoning relied on the belief that Mexican appearance increased the likelihood of alienage.[98] *Brignoni-Ponce* clearly cemented the Court's approval of race in conjunction with other factors. Justice Douglas concurred in the judgment but lamented "the weakening of the Fourth Amendment" as an already weak reasonable suspicion standard had "come to be viewed as a legal construct for the regulation of a general investigatory police power[,]" allowing stops on "the flimsiest of justifications."[99] The significance of this decision for local policing also became clear, as after *Brignoni-Ponce*, law enforcement could rely on "Mexican appearance" as a factor—though not the sole one—to make stops.[100]

A year after *Brignoni-Ponce*, in *United States v. Martinez-Fuerte*,[101] the Court took up a case with remarkably similar facts to *Brignoni-Ponce*, except "the defendants were stopped and apprehended not by a roving patrol, but at a fixed checkpoint."[102] In *Martinez-Fuerte*, the Court ruled that the decision of an officer to refer a vehicle for secondary inspection did not have to be based on individual suspicion, and that Mexican appearance could be one of several factors for this decision.[103]

> "[I]t is constitutional," the Court said, "to refer motorists selectively to the secondary inspection area . . . on the basis of criteria that would not sustain a roving-patrol stop. Thus, even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation." . . . A person's ancestry, as manifested in his appearance, could indeed form at least part of the basis for an enforcement officer's decision about whom to stop, question, and search.[104]

97. *Id.* at 886–87.

98. *Id.* ("The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens."). Notably, the Ninth Circuit has since departed from this dictum, concluding in *United States v. Montero-Camargo* that the significant demographic changes to the Southwest and Far West made race "of such little probative value that it may not be considered as a relevant factor where particularized or individualized suspicion is required." United States v. Montero-Camargo, 208 F.3d 1122, 1135 (9th Cir. 2000). *See also* Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1033 n.159 (2010).

99. *Brignoni-Ponce*, 422 U.S. at 889, 890 (Douglas, J., concurring).

100. Johnson, *supra* note 98, at 1009. *See also* Harris, *supra* note 89, at 430–31 ("[W]hile *Brignoni-Ponce* appears to restrict the use of ethnic appearance as a factor in deciding whether reasonable suspicion exists, it actually does so only in the most narrow sense: in situations where ethnic appearance is the only factor involved. And it leaves the door open to using ethnic appearance when it is among several factors.").

101. 428 U.S. 543 (1976).

102. Harris, *supra* note 89, at 431.

103. *Martinez-Fuerte*, 428 U.S. at 563.

104. Harris, *supra* note 89, at 432 (quoting *Martinez-Fuerte*, 428 U.S. at 563).

Understandably, the Court seemed cautious to apply the reasoning from a border patrol case to those within the country's interior.[105] After all, the role of border patrol may extend from enforcing criminal violations of the Immigration and Nationality Act to enforcing civil violations.[106] However, the appearance of alienage was relevant to the criminal violation suspected or discovered—illegal smuggling, in both cases.[107] In both *Brignoni-Ponce* and *Martinez-Fuerte*, the Border Patrol of-

105. JODY FEDER, CONG. RESEARCH SERV., RL31130, RACIAL PROFILING: LEGAL AND CONSTITUTIONAL ISSUES 5 (2012). In acknowledging this caution, I would like to point out that the term "reasonable suspicion" has similar implications for ICE officers as it does local law enforcement; all searches and seizures are subject to Fourth Amendment review. United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975). An ICE officer can ask questions of anyone she believes to be an alien, but must have reasonable suspicion that the individual is "engaged in an offense against the United States or is an alien illegally in the United States" in order to briefly detain him for questioning. 8 C.F.R. § 287.8(b)(2) (2017). An ICE officer may even arrest without a warrant if she has reasonable suspicion that the individual is violating immigration laws, if there is a likelihood of the individual's escaping "before a warrant can be obtained for his arrest[.]" 8 U.S.C. § 1357(a)(2) (2012); 8 CFR § 287.8(c)(2) (2017). Unlike state officers, ICE officers are authorized to enforce both civil and criminal immigration violations. MICHAEL JOHN GARCIA & KATE M. MANUEL, CONG. RESEARCH SERV., R41423, AUTHORITY OF STATE AND LOCAL POLICE TO ENFORCE FEDERAL IMMIGRATION LAW 10 (2012). As it plays out on the ground, "reasonable suspicion" is no different in practice between ICE and state officers except for jurisdiction of enforcement; ICE officers can use *Terry* and its progeny to target those who most look like they are undocumented aliens.

106. The most significant difference between these two types of violations is that civil immigration violations generally can only be enforced by federal immigration authorities (or those delegated federal power through partnerships with the federal government—see *infra* Section III.A) whereas criminal immigration violations can be enforced by both federal and state authorities. GARCIA & MANUEL, *supra* note 105, at 10. Therefore, that federal immigration and border patrol authorities were the officers in question in *Brignoni-Ponce* and *Martinez-Fuerte* does not necessarily preclude these cases' later application, as they were enforcing violations that local law enforcement could also enforce. *See generally* United States v. Ramos, 629 F.3d 60 (1st Cir. 2010); United States v. Rogers, 244 Fed. Appx. 541 (5th Cir. 2007); United States v. Abbott, No. CRIM. H-05-309, 2005 WL 2591007 (S.D. Tex. Dec. 30, 2005); United States v. Travis, 837 F. Supp. 1386, 1394–96 (E.D. Ky. 1993). However, to the author's knowledge, the application of these nuances of *Brignoni-Ponce* and *Martinez-Fuerte* has been limited to immigration violations, both civil and criminal. *See* Farag v. United States, 587 F. Supp. 2d 436, 464 (E.D.N.Y. 2008)

> To the Court's knowledge, no court has ever marshaled statistics to conclude that racial or ethnic appearance is correlated with, and thus probative of, any type of criminal conduct other than immigration violations. . . .
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> . . . .
>
> . . . Notably, the Supreme Court has never revisited its dictum in *Brignoni-Ponce*, nor has it ever addressed whether, absent compelling statistical evidence, race or ethnicity may be used as a factor in the Fourth Amendment calculus to indicate criminal propensity.;

United States v. Avery, 137 F.3d 343 (6th Cir. 1997) (refusing "to adopt, by analogy, the concept that 'the likelihood that any given person of African ancestry is involved in drug trafficking is high enough to make African ancestry a relevant fact' in investigating drug trafficking at the airport.") (quoting *Brignoni-Ponce*, 422 U.S. at 886–87); United States v. Andrews, No. 8:05CR139, 2005 WL 4753403, at n.2 (D. Neb. Nov. 1, 2005) ("The requirement of individualized suspicion is relaxed only in limited circumstances that involve important governmental interests or immediate hazards. . . ."); United States v. Montero-Camargo, 208 F.3d 1122, 1132 (9th Cir. 2000) ("The likelihood that in an area in which the majority–or even a substantial part–of the population is Hispanic, any given person of Hispanic ancestry is in fact an alien, let alone an illegal alien, is not high enough to make Hispanic appearance a relevant factor in the reasonable suspicion calculus.").

107. *Brignoni-Ponce*, 422 U.S. at 874–75; *Martinez-Fuerte*, 428 U.S. at 550.

ficers stopped defendants on suspicion of criminal immigration violations—knowingly transporting illegal immigrants in violation of the Immigration Nationality Act.[108] In these cases, the Court found that appearance of alienage by way of race was relevant to officers in "detecting illegal entry and smuggling[,]"[109] and that race could be dispositive for choosing to refer drivers for increased levels of search and seizure on suspicion of illegal entry and smuggling.[110] Even though the Court had been clear in *Terry* that it would not sanction "intrusions . . . based on nothing more substantial than inarticulate hunches,"[111] these cases working together gave law enforcement the ability to point to racial or ethnic characteristics when viewed as predictive of criminal activity.[112]

Race was even further highlighted in the metaphorical constellation of facts that could constitute reasonable suspicion as lower courts struggled with the use of two factors together—that of location and evasion.[113] An individual's presence in a "high crime area" was dismissed by the Court as a sole factor for reasonable suspicion in *Brown v. Texas*, where the sole basis of the stop was the subject's presence in an area known for narcotics trafficking.[114] As it did in *Brignoni-Ponce*, by leaving unanswered the question of whether presence in a high crime area could *ever* be part of the basis for reasonable suspicion, the Court implied that it could be.[115]

Evasion—walking away from or avoiding encounters with police—was a mixed bag: lower courts split on whether evasion could constitute a sole basis for reasonable suspicion, with four courts determining that it could and a number of states and circuits finding that it could not.[116] Even though the Court had stated unequivocally that an individual has the constitutional right to avoid the police, the courts accepting evasion as grounds for reasonable suspicion equated avoiding the police with guilt.[117] It was not until 2000 that the Court examined and upheld a *Terry* stop in *Illinois v. Wardlow*, based on the two factors: flight from the police in an area known for heavy narcotics trafficking.[118] Here, the Court also pointed out that "nervous, evasive behavior" was also a relevant factor.[119] As observed by Professor Harris, "allowing stops based only on the fact that the individual observed falls into the category of having an unusual reaction to the police is likely to sweep in many people as suspects without any real suspicion of their involvement in criminal activity."[120]

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108. *Brignoni-Ponce*, 422 U.S. at 875; *Martinez-Fuerte*, 428 U.S. at 547–48.

109. *Brignoni-Ponce*, 422 U.S. at 885 (citing Terry v. Ohio, 392 U.S. 1, 27 (1968)).

110. *Martinez-Fuerte*, 428 U.S. at 563.

111. *Terry*, 392 U.S. at 22.

112. *See* Harris, *supra* note 89, at 452–53.

113. Harris, *supra* note 81, at 674.

114. 443 U.S. 47, 52 (1979).

115. Harris, *supra* note 81, at 672.

116. *Id.* at 673 n.137. The Eighth Circuit as well as the Minnesota, Indiana, and Wisconsin Supreme Courts have considered avoiding police as sufficient basis for reasonable suspicion by itself. *Id. See also* Harris, *supra* note 75, at 993 n.80.

117. Harris, *supra* note 81, at 674 n.138.

118. 528 U.S. 119, 121 (2000).

119. *Id.* at 124.

120. Harris, *supra* note 75, at 996.

While not expressly race-based, using location and evasion together targets minorities because all too often "high crime areas" are coded terms for "inner city neighborhoods," where class and race segregation near-overlap.[121] Professor David Harris writes that this segregation leads to the synonymy of minority neighborhoods and higher crime and springs from a number of socioeconomic factors causing minorities to live and work in these neighborhoods.[122] These "high crime" areas are frequently the focus of "hot spot policing,"[123] a police strategy that has received significant praise for effectiveness in targeting "small units of geography with high rates of crime."[124] Hot spot policing strategies are varied, but may be as simple as police officers spending more time at "hot spots."[125] As a result, however, minorities may be caught in a vicious cycle of avoiding encounters with police because they are more likely to be stopped due to where they live and being more likely to be stopped because they avoid encounters with police.[126] Yet as the influence of *Terry* is traced through cases the law "effectively allows police nearly complete discretion to stop [minorities] . . . in crime-prone urban neighborhoods."[127]

Significantly, it was a case that does not flow directly from *Terry*—and therefore does not necessarily qualify as *Terry's* progeny—that helps fill the gaps of the Court's allowance of race in policing on less than probable cause.[128] In *Whren v. United States*, vice officers in southeast Washington, D.C. saw a dark SUV with two black occupants stopped at a stop sign in a "high drug area";[129] suspecting drug activity but without any evidence other than the race of the occupants, their location, and the car they were driving, the officers were making a U-turn to follow the SUV when it made a sudden right turn without signaling and sped off.[130] The officers pursued, stopped the SUV, and discovered large amounts of crack cocaine and other drugs inside the vehicle.[131]

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121. Harris, *supra* note 81, at 677.

122. *Id.* at 678 ("African Americans and Hispanic Americans find themselves segregated into crime-prone locations. . . . By virtue of their relative socioeconomic status, not to mention persistent racial discrimination, African Americans and Hispanic Americans find themselves living in the very areas of cities labeled 'high crime areas' and 'drug trafficking locations.'"(footnotes omitted)).

123. *See Hot Spots Policing*, CTR. FOR EVIDENCE-BASED CRIME POL'Y, http://cebcp.org/evidence-based-policing/what-works-in-policing/research-evidence-review/hot-spots-policing/ (last visited Apr. 29, 2018).

124. *Id. See also* Lawrence Rosenthal, *Pragmatism, Originalism, Race, and the Case Against* Terry v. Ohio, 43 TEX. TECH L. REV. 299, 323 (2010) (attributing the late 1990s crime drop in New York City to hot spot policing).

125. *Hot Spots Policing*, *supra* note 123.

126. Harris, *supra* note 81, at 680. *See also* Harris, *supra* note 75, at 1000.

127. Harris, *supra* note 75, at 1000.

128. As discussed *supra* note 81, the definition of "*Terry's* progeny" in this Article extends to cases that expand, demarcate, or clarify factors of reasonable suspicion. Thus, *Whren v. United States*—dealing with probable cause and pretextual stops—is not a case that naturally flows from the creation of the *Terry* stop-and-frisk standard. I include *United States v. Whren* in my discussion, however, because this case highlights the Court's disinterest in the subjective motivation of the stopping officer. Johnson, *supra* note 98, at 1061. This—and the Court's insistence that an Equal Protection Clause claim was the remedy, not application of the exclusionary rule—is particularly relevant in my discussion of the structural obstacles to litigating a remedy. *See id.* at 1061–62; *see infra* Part IV.

129. 517 U.S. 806, 808, 811 (1996).

130. *Id.* at 808.

131. *Id.* at 808–809.

On appeal from their convictions for possession with intent to distribute, the defendants argued that the drugs discovered should be suppressed because the traffic stop was pretextual: the stop was based on the assumption that young black men in SUVs with temporary tags must be carrying drugs.[132] They asked the Court to examine the motives of the officers performing the stop, underlining the need for a "would have" test—"a stop is valid only if under the same circumstances a reasonable officer *would have* made the stop, absent an impermissible purpose"[133]—instead of the pretextual stop-permitting "could have" test, where an officer can stop if there is probable cause of any sort, even for a minor infraction.[134] The Court rejected the "would have" test, arguing that it would not be workable to determine an officer's state of mind on every single stop and that such a holding would contradict other holdings regarding an acting officer's motives in a search or seizure.[135] Improper motives (e.g., race) leading to disparate treatment could be remedied instead through Equal Protection challenges, the Court stated, not through application of the exclusionary rule.[136]

The Court's refusal to examine an officer's state of mind—and its assumption that an Equal Protection claim could catch the officers with improper motives—cemented the expansive, pervasive role of policing requiring less than actual, particularized probable cause. First, *Terry* drew non-consensual encounters on less than probable cause into the protection of the Fourth Amendment.[137] Though the Court specified that ethnic appearance, presence in a high-crime area, and evasive or avoidant behavior could not be used as the sole basis for a reasonable suspicion stop,[138] later cases emphasizing deference to officers' judgment provided room for lower courts to differ as to the use of these factors together.[139] The significance of *Terry's* progeny, therefore, encompasses more than establishing which factors would pass muster: it signaled an era of extreme deference to the training and experience of police officers. After *Whren* this deference meant a blind eye to evidence of improper motive if there was sufficient basis for a pretextual stop.[140]

B. The Well-Documented Harms of *Terry* to Minority Populations

Terry v. Ohio and its progeny have faced severe criticism in the last fifty years. A vast body of scholarship exists about the dangers of an ill-defined reasonable suspicion standard, how it gives officers excessive discretion to stop, and the "parlor game" the courts encourage officers to play in justifying the stops.[141] Far more deeply felt, however, are the harms inflicted on minority populations. As described

132. Johnson, *supra* note 98, at 1057.
133. *Id.*
134. *Id.* at 1058.
135. *Whren*, 517 U.S. at 812–13.
136. *Id.* at 813.
137. *See* Terry v. Ohio, 392 U.S. 1 (1968).
138. United States v. Brignoni-Ponce, 422 U.S. 873, 887 (1975); Brown v. Texas, 443 U.S. 47, 52 (1979); Illinois v. Wardlow, 528 U.S. 119, 121–22 (2000).
139. *See supra* note 92 and accompanying text.
140. Johnson, *supra* note 98, at 1061–62; *see also Whren*, 517 U.S. at 815.
141. United States v. Zapata-Ibarra, 223 F.3d 281, 285 (5th Cir. 2000) (Wiener, J., dissenting).

in exhaustive detail in Justice Sotomayor's dissent in *Utah v. Strieff*, the tools given to police—when exercised on less than adequate cause—provide "reason to target pedestrians in an arbitrary manner."[142] The harms that result when the law brings this targeting under Constitutional protection are felt deeply among minority communities. New York City's stop-and-frisk program—also the subject of much scholarship—illustrates this well, showing the human impact of *Terry*.

The Court's emphasis on "specific articulable facts" in *Terry v. Ohio* has been criticized for the difficulty of pinning down its definition and the impossibility of quantifying its weight.[143] The Court stated that "inchoate" and "inarticulate hunches" would not pass muster, but pointed only to the ability of an officer to articulate specific facts—and the inferences he could draw from these facts based on his experiences—to establish "reasonable suspicion."[144] Professor Katz writes that "[t]he Court failed to adequately define an 'investigatory stop,' leading later courts to harden the definition[.]"[145] This has given rise to a vast constellation of potential facts that can serve as the basis of reasonable suspicion; Judge Wiener of the Fifth Circuit decried this in *United States v. Zapata-Ibarra*, pointing out the array of often-contradictory factors allowed for a reasonable suspicion vehicle stop in Fifth Circuit cases:

> [T]he driver was suspiciously dirty, shabbily dressed and unkept *or* the driver was too clean; . . . the driver would not make eye contact with the agent, *or* the driver made eye contact too readily; the driver appeared nervous (or the driver even appeared too cool, calm, and collected) . . . and on and on *ad nauseam*.[146]

Quantifying reasonable suspicion—calculating the probability of criminal wrongdoing—is even more difficult. Scholar William Stuntz proposes that if probable cause means it is "more-likely-than-not" crime will occur or has occurred, reasonable suspicion may be "something like a one-in-five or one-in-four chance."[147] This difficulty of quantification is partially due to courts' reliance on reasonable suspicion's relationship with probable cause: "[r]easonable suspicion requires some degree of certainty, which is less than probable cause, and police must articulate the grounds for that suspicion."[148] As a result, reasonable suspicion is a constitutionally immunized standard that justifies a stop even when it is more probable that the subject is, in fact, innocent of any suspected criminality.

More concerning than the difficulty of quantifying "reasonable suspicion" is the fact that "[i]n most stops and frisks, the articulable suspicion is simply wrong."[149] As a result of a settlement regarding the NYPD's broad use of stop and

142. Utah v. Strieff, 136 S. Ct. 2056, 2069 (2016) (Sotomayor, J., dissenting).

143. William J. Stuntz, Terry*'s Impossibility*, 72 ST. JOHN'S L. REV. 1213, 1215 (1998) ("[R]easonable suspicion has never received a solid definition. (Perhaps it can't.)").

144. Terry v. Ohio, 392 U.S. 1, 22, 27 (1968).

145. Katz, *supra* note 68, at 429.

146. *Zapata-Ibarra*, 223 F.3d at 282–83.

147. William J. Stuntz, Terry *and Substantive Law*, 72 ST. JOHN'S L. REV. 1362, 1362 (1998).

148. Erica Goldberg, *Getting Beyond Intuition in the Probable Cause Inquiry*, 17 LEWIS & CLARK L. REV. 789, 797 (2013).

149. Capers, *supra* note 79, at 63.

frisk, the department was required to track its stop and frisks.[150] This data was a great boon for plaintiffs in the class-action bias suit (as most jurisdictions do not require stop data to be tracked); the data showed that of more-than-half-a-million stops over a single year, only about 50,000 led to arrests or summons.[151] Jeffrey Fagan—the plaintiffs' expert witness in *Floyd*—also analyzed the same set of data to see if "reasonable suspicion" stops had any more crime reductive effect than "probable cause" stops; they did not.[152] As Fifth Circuit Judge Wiener emphasized in *Zapata-Ibarra*, "Bragging about netting 30 apprehensions out of 200 stops is analogous to a major league baseball player's bragging about a .150 batting average—hardly an all-star performance."[153]

Ultimately, lowering of a standard for a stop—and expanding the factors to allow for such stops—amplifies other tools allowing searches and seizures on less than pure probable cause. This "array of instruments," Justice Sotomayor wrote in *Utah v. Strieff*, allows officers to "probe and examine" people—and use what they find to confirm their initial hunches.[154] Justice Sotomayor described in rapid-fire detail the full range of possible officer control, from a *Terry* "reasonable suspicion" stop to pretextual stops allowed by *Whren*, from the factors allowed for a stop to the searches that may follow incident to an arrest from any infraction or discovered outstanding warrant, from the invasion of privacy at the stationhouse to the "civil death" of discrimination flowing from an arrest record.[155] Most disturbing is that all of these indignities can lawfully flow from stops where the chance that the subject is innocent is far greater than the chance that the subject is not. Legitimizing this conduct "implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be catalogued."[156]

Consequently, *Terry's* legitimation of racial profiling has left deep scars on communities of color, starting with harms experienced by individuals targeted by race-based policing. Professor Stuntz theorized four types of harm experienced by individuals as follows: (1) injury to the subject's individual privacy rights (being stopped, being patted down, or having containers searched); (2) "targeting harm" ("the injury suffered by one who is singled out by the police and publicly treated like a criminal suspect"); (3) injury flowing from treatment based on race (feeling that the stop was based on the subject's race); and (4) injury flowing from police

150. Darius Charney et al., Suspect Fits Description: Responses to Racial Profiling in New York City (Sept. 29, 2010), *in* 14 CUNY L. REV. 57, 73–74 (2010).

151. Capers, *supra* note 79, at 63. The *Floyd* court relied heavily on the tracking data in determining the department practice widespread racial profiling and enjoining these practices. *See* Floyd v. City of N.Y., 959 F. Supp. 2d 540 (S.D.N.Y. 2013). For a broad discussion of which jurisdictions require stop tracking, see Michael Boren & Jonathan Lai, *Patrolling for Bias*, INQUIRER PHILLY DAILY NEWS (July 5, 2017), http://www.philly.com/philly/news/racial-profiling-traffic-stop-philadelphia-police-pa-nj.html.

152. Jeffrey Fagan, Terry's *Original Sin*, 2016 U. CHI. LEGAL F. 43, 86 (2016).

153. United States v. Zapata-Ibarra, 223 F.3d 281, 284–85 (5th Cir. 2000) (Wiener, J., dissenting).

154. Utah v. Strieff, 136 S. Ct. 2056, 2069 (2016) (Sotomayor, J., dissenting) (arguing that the discovery of a subject's outstanding warrant on an unlawful suspicionless stop does not break the link between the original "poisonous tree" of the unlawful stop and the discovered "fruit" of the warrant).

155. *Id.* at 2069–70.

156. *Id.* at 2071.

violence (both physical injury because of excessive force and fear that it will be applied).[157] These harms work together to alienate members of the community from authorities; in severe cases, such as in New York City, they deepen racial divisions and create an environment of being "under siege."[158]

New York City provides a telling illustration of the harms felt by communities of color. Though "stop-and-frisk" was rendered a lawful police practice in New York in 1964,[159] the New York Police Department established an aggressive stop-and-frisk program by the late 1990s aimed at addressing the City's crime problem in certain high-crime neighborhoods.[160] In 1999, this practice was challenged by a class action lawsuit brought by the Center for Constitutional Rights in *Daniels v. City of New York*; as part of the 2003 settlement the NYPD was required to track stop-and-frisk data and turn it over to the Center.[161] When released data indicated the City was not complying with the terms of the settlement, the Center filed *Floyd v. City of New York*.[162]

The data revealed that stops were targeted to very specific neighborhoods. At night, a stretch of about eight blocks in Brownsville, Brooklyn, for example, would be blanketed with police cruisers and officers patrolling the public housing complexes.[163] Neighborhoods targeted were mostly neighborhoods of color, with the least stops in white-dominant neighborhoods.[164] Those targeted included kids in middle school, and it was common knowledge it was because of skin color.[165] One young man, fourteen-years-old, lamented that mere miles away, "white kids in Manhattan have no idea cops can frisk you for no reason[.]"[166] Some young men were stopped so frequently that a football coach at Thomas Jefferson High School allowed his players to wear their helmets while leaving practice to signal to police they were not gang members.[167] For these targeted neighborhoods, occupants felt like they were under siege, unable to leave their homes without the threat of being

157. Stuntz, *supra* note 143, at 1218.

158. CTR. FOR CONSTITUTIONAL RIGHTS, STOP AND FRISK: THE HUMAN IMPACT 17 (2012), https://ccrjustice.org/sites/default/files/attach/2015/08/the-human-impact-report.pdf.

https://ccrjustice.org/sites/default/files/attach/2015/08/the-human-impact-report.pdf.

159. Alex Elkins, *The Origins of Stop-and-Frisk*, JACOBIN MAG. (May 9, 2015), https://www.jacobinmag.com/2015/05/stop-and-frisk-dragnet-ferguson-baltimore/.

160. Arthur H. Garrison, *NYPD Stop and Frisk, Perceptions of Criminals, Race and the Meaning of* Terry v. Ohio*: A Content Analysis of* Floyd, et al. v. City of New York, 15 RUTGERS RACE & L. REV. 65, 84 (2014).

161. Charney et al., *supra* note 150, at 73–74.

162. *See Daniels, et al. v. City of New York*, CTR. FOR CONST. RIGHTS., https://ccrjustice.org/home/what-we-do/our-cases/daniels-et-al-v-city-new-york (last updated Oct. 1, 2012).

163. Ray Rivera et al., *A Few Blocks, 4 Years, 52,000 Police Stops*, N.Y. TIMES (July 11, 2010), https://mobile.nytimes.com/2010/07/12/nyregion/12frisk.html.

164. Dylan Matthews, *Here's What You Need to Know About Stop and Frisk—and Why the Courts Shut It Down*, WASH. POST: WONKBLOG (Aug. 13, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/08/13/heres-what-you-need-to-know-about-stop-and-frisk-and-why-the-courts-shut-it-down/?utm_term=.b4b039e59d98.

165. Ailsa Chang, *For City's Teens, Stop-and-Frisk is Black and White*, WNYC.ORG (May 28, 2012), https://www.wnyc.org/story/212460-city-teenagers-say-stop-and-frisk-all-about-race-and-class/.

166. *Id.* ("[L]ike they walk past the cops and actually say, 'Good Morning' to them.'")

167. Rivera, *supra* note 163 ("My players were always calling me saying 'Coach, the police have me[.]'").

stopped at any time.[168] This effect on these neighborhoods was not accidental, either, having been referenced by the Commissioner and Mayor alike.[169]

At the individual level, the indignity of being stopped extended far past inconvenience. Community members in New York City described these encounters as traumatic and humiliating, leaving people "feeling unsafe, fearful of police, afraid to leave their homes, or re-living the experience whenever they see police."[170] The fear caused many to change the way they lived—dressing or fixing their hair differently, making different transportation plans, and always bringing ID or pieces of mail to prove identity and legally belonging in that neighborhood when going out in case of a stop.[171] Simply being present in their own neighborhoods was suspect:

> If I'm in a group of people, you can't be in front of the building you live in. If you show the police officers your ID that says you live [there], they tell you to go in the house or walk somewhere else; you can't be here on the block. They want to kick you off the block. They want to kick you out the building. We can't be outside?... So what can we do?[172]

At the community level, stop-and-frisk in New York led to distrust of police, where authorities were seen less as protection and more as instruments of control.[173] According to a study by the Vera Institute, individuals who were stopped more frequently were less willing to report future crimes—even if they were the victims.[174] Residents of targeted neighborhoods felt the hostility, and many returned it. Even if there was a short-term effect on crime, the resulting alienation of young people stopped for no reason may "lead to worse citizens in the future."[175] The individual is broken down, made to fear interactions with police, and subjected to the humiliation of a near-suspicionless stop.[176] The neighborhood is occupied. The community is amputated from itself as people fear to leave their homes.

What occurred in New York City provides a dire warning for what happens when the discretionary power of *Terry* is used with official policymaker sanction to target populations of color. However, it is not the only place where community

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168. *See* CTR. FOR CONST. RTS., *supra* note 158.

169. Devereaux, *supra* note 3; Floyd v. City of N.Y., 959 F. Supp. 2d 540, 606 (S.D.N.Y. 2013). *See also* Garrison, *supra* note 160, at 101, 103, n.124. For a discussion of the deterrent effect of stop-and-frisk, see Robert Apel, *On the Deterrent Effect of Stop, Question, and Frisk*, 15 CRIMINOLOGY & PUB. POL'Y 27 (2015).

170. CTR. FOR CONST. RTS., *supra* note 158, at 6.

171. *Id.* at 7.

172. *Id.* at 19.

173. *Id.* at 20 ("People from communities of color don't see NYPD as being there for them or being there to provide safety or security for them. If anything, they see NYPD in their communities as a form of keeping control in those communities. And NYPD sees our communities as dangerous.").

174. Nancy La Vigne et al., *Stop and Frisk: Balancing Crime Control with Community Relations*, URB. INST. 19 (2014), https://ric-zai-inc.com/Publications/cops-p306-pub.pdf.

175. *Id.* at 18.

176. CTR. FOR CONST. RIGHTS, *supra* note 170, at 6 ("When they stop you in the street, and then everybody's looking... it does degrade you. And then people get the wrong perception of you. That kind of colors people's thoughts towards you, might start thinking that you're into some illegal activity, when you're not.").

harm has been replicated. Consider Philadelphia, where a class-action lawsuit concerning stop-and-frisk practices was settled in 2011.[177] As part of the settlement terms the Philadelphia Police Department was required to track and release data on stops, but as of mid-2017, the data continued to suggest that pedestrian stops were still based on race.[178] One woman told Newsweek that she had been stopped while returning from a drugstore, and then was "ordered . . . to get inside her house."[179] "'I wasn't doing any mischief. That makes me feel like I can't trust the police[,]'" she explained.[180]

Those who have been stopped and frisked based on "reasonable suspicion"—or who suspect they have been targeted because of their race—may be less upset about the stop itself than what the stop meant: that the police are not there to protect them, but are acting on the assumption that their race is somehow predictive of criminality.[181] Race-based policing has left deep generational scars. Parents wrestle with how—or whether—to inform their black sons about the extra attention they may receive from law enforcement.[182] The feeling of standing out or being subject to extra attention by police officers breaks down trust with local authorities,[183] leaving many feeling empty "due to the lack of a meaningful relationship between the police and members of the African-American community."[184]

The effect of *Terry* and its progeny, therefore, is not just that officers now had the authorization to make stops on less than probable cause—stops that Justice Warren acknowledged in *Terry* may be used for minority harassment.[185] More than

177. *Bailey v. City of Philadelphia*, C.R. LITIG. CLEARINGHOUSE, https://www.clearinghouse.net/detail.php?id=11786 (last visited May 1, 2018).

178. Bobby Allyn, *Report: Thousands of Pedestrian Stops by Philly Police Illegal, Racially Biased*, WHYY (Mar. 21, 2016), https://whyy.org/articles/report-thousands-of-stops-by-philly-police-illegal-racially-biased/; *Racial Analysis Suggests Philly Police Still Stop Pedestrians Based on Race*, ACLU PA. (May 23, 2017), https://www.aclupa.org/news/2017/05/23/racial-analysis-suggests-philly-police-still-stop-pedestrian; Erica Goode, *Philadelphia Defends Policy on Frisking, With Limits*, N.Y. TIMES (July 11, 2012), http://www.nytimes.com/2012/07/12/us/stop-and-frisk-controls-praised-in-philadelphia.html.

179. Josh Saul, *America Has a Stop-and-Frisk Problem. Just Look at Philadelphia*, NEWSWEEK (May 18, 2016), http://www.newsweek.com/2016/06/10/stop-and-frisk-philadelphia-crisis-reform-police-460951.html.

180. *Id.*

181. M. Rick Turner, *The Noxious Effects of Racial Profiling*, DAILY PROGRESS (July 15, 2012), http://www.dailyprogress.com/news/the-noxious-effects-of-racial-profiling/article_cf6213d3-d1fb-573c-a41f-4683db3a9bc7.html ("It is often the nature of the interaction with the police that [many African-American men and women in the community] feel most deeply aggrieved about, not the stop itself.").

182. *See* Rheana Murray, *The Conversation Black Parents Have with Their Kids About Cops*, ABC NEWS (Dec. 8, 2014), http://abcnews.go.com/US/conversation-black-parents-kids-cops/story?id=27446833; Issac J. Bailey, *I Refuse to Have 'The Talk' with My Black Son*, POLITICO MAG. (Dec. 1, 2015), https://www.politico.com/magazine/story/2015/12/why-i-refuse-to-have-the-talk-with-my-black-son-213406.

183. Richard Fausset & P.J. Huffstutter, *Black Males' Fear of Racial Profiling Very Real, Regardless of Class*, L.A. TIMES (July 25, 2009), http://articles.latimes.com/2009/jul/25/nation/na-racial-profiling25. One interviewee revealed that if his house alarm goes off, his wife goes to meet police at their suburban front gate in a mostly-white neighborhood, fearing that if he goes, "they will mistake him for an intruder." *Id.*

184. Turner, *supra* note 181.

185. Terry v. Ohio, 391 U.S. 1, 14 n.11 (1968).

that, *Terry* widened officers' discretionary power so much that as crime rates increased in the bigger cities and the war on drugs began,[186] the need arose for officers to narrow their focus somehow. This vast amount of discretion has allowed officers to operate on profiles of "the right people" for crimes.[187] Unfortunately, as envisioned and realized in New York City, this discretionary space to decide who to stop—when officially sanctioned by policymakers as it was by the NYPD—also has the side effect of deterring presence: occupying neighborhoods, discouraging residents from being in public, and encouraging them to hide in their homes. As will be discussed below, state policymakers who are familiar with the power and pervasiveness of local law enforcement can use the tools at their disposal to achieve political goals. In the context of immigration, states wanting to achieve the political goal of more effective immigration enforcement have learned to make use of the discretionary power afforded by *Terry*.

III. STATE IMMIGRATION ENFORCEMENT INITIATIVES AFTER *ARIZONA V. UNITED STATES*: "STOP, FRISK, AND SHOW ME YOUR PAPERS"

Given the tools available to local law enforcement and the presence-deterring effect of those tools, it is not surprising that states have chosen to co-opt local law enforcement into immigration enforcement. By the numbers alone, states and policymakers alike are aware of the "force multipl[ying]" power of local law enforcement in enforcing immigration laws.[188] However, because the field of immigration falls under Congress's plenary power and is enforced through agencies in the Department of Homeland Security, states must tread carefully when stepping into immigration enforcement themselves.[189]

The focus on local law enforcement as part of immigration enforcement is not new. When Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), it included what became known as § 287(g) of the Immigration and Nationality Act (INA), allowing local agencies to partner directly with the federal government to enforce immigration law.[190] Even before then, ICE and its predecessor, the Immigration and Naturalization Service (INS), used detainers to formally request that local agencies hold detained individuals for ICE pick up.[191] However, these are federal initiatives that are not mandatory.[192] As a result, local agencies have had discretion to decide whether to partner with the federal government through these avenues. When city police departments or sheriffs' offices decline to partner or adopt policies of minimal cooperation with immigration

186. *Timeline: America's War on Drugs*, NAT'L PUB. RADIO (Apr. 2, 2007), https://www.npr.org/templates/story/story.php?storyId=9252490.

187. Floyd v. City of New York, 959 F.Supp.2d 540, 602–03 (2013).

188. *The Role of State & Local Law Enforcement in Immigration Matters and Reasons to Resist Sanctuary Policies*, FED'N. FOR AM. IMMIGR. REFORM (Jan. 2016), https://fairus.org/issue/illegal-immigration/role-state-local-law-enforcement-immigration-matters-and-reasons-resist.

189. *See generally* Arizona v. United States, 567 U.S. 387, 394–98 (2012).

190. *The 287(g) Program: An Overview*, AM. IMMIGR. COUNCIL (Mar. 15, 2017), https://www.americanimmigrationcouncil.org/research/287g-program-immigration.

191. KATE M. MANUEL, CONG. RESEARCH SERV., RL42690, IMMIGRATION DETAINERS: LEGAL ISSUES 1 (2015).

192. *Id.* at 12–15. *But see infra* note 202 (discussing the mandatory Secure Communities program).

enforcement, but the state governments that fund them want full cooperation with the federal government, the result is a clash at the state legislative level as the state government asserts its authority. When Arizona passed its groundbreaking omnibus bill S.B. 1070 in 2011, the confines of state authority to step into the immigration enforcement field were tested, leading to few guidelines for states to follow.

In the last decade, states have taken matters into their own hands to address illegal immigration, citing federal inaction. In 2005, then-Governor of Arizona Janet Napolitano declared a state of emergency in the state, joining New Mexico Governor Bill Richardson in earmarking funds to combat illegal immigration and drug trafficking; the governors decried the federal government's failure to secure the southern border.[193] By 2010, there were estimates the number of unauthorized immigrants had increased by more than five times since the 1990s.[194] Arizona S.B. 1070 was introduced and passed in early 2010, igniting a wildfire of controversy.[195]

Not surprisingly, the wave of immigration enforcement legislation has not subsided.[196] Recently, Texas has stepped into the fray with S.B. 4, another omnibus bill targeting the same kind of policies S.B. 1070 prohibited.[197] Idaho followed suit shortly thereafter, introducing a near-identical bill.[198] This Part examines first the formal mechanisms for cooperation between local agencies as well as the reasons many agencies decline to enter into these agreements. This Part then turns to the rules of the road delineated by *Arizona v. United States*, sketching out the next round of legal battles for "sanctuary policies." Finally, this Part concludes with a discussion of the modern wave of state legislation, identifying the common threads of anti-sanctuary legislation.

A. The Impact of Formal Partnerships Between Immigration Agencies and Local Law Enforcement

Local agencies have a range of partnership options with the federal government for immigration enforcement, most filling in personnel gaps by bringing local officers on board and authorizing them to enforce immigration laws.[199] While direct partnerships with ICE are not the focus of this Article, the impact of these partnerships on communities has led many entities to avoid cooperation of this sort.[200] The

193. Mike Sunnucks, *Arizona Governor Declares State of Emergency Along Mexican Border*, PHX. BUS. J. (Aug. 16, 2005), https://www.bizjournals.com/phoenix/stories/2005/08/15/daily11.html.

194. Elliot Spagat, *Other Border States Shun Arizona's Immigration Law*, NBC NEWS (May 13, 2010), http://www.nbcnews.com/id/37116159#.Wk_VCDdG2Uk.

195. Laura Sullivan, *Prison Economics Help Drive Ariz. Immigration Law*, NAT'L PUB. RADIO (Oct. 28, 2010), https://www.npr.org/2010/10/28/130833741/prison-economics-help-drive-ariz-immigration-law.

196. Ann Morse et al., *Immigrant Policy Project*, NAT'L CONF. ST. LEGISLATORS (Aug. 27, 2012), http://www.ncsl.org/research/immigration/omnibus-immigration-legislation.aspx.

197. Julianne Hing, *Texas's SB 4 Is the Most Dramatic State Crackdown Yet on Sanctuary Cities*, NATION (June 1, 2017), https://www.thenation.com/article/texass-sb-4-dramatic-state-crackdown-yet-sanctuary-cities/.

198. Russell, *supra* note 16.

199. Paul J. Larkin, Jr., *Deputizing Federal Law Enforcement Personnel Under State Law*, HERITAGE FOUND. 3 (July 12, 2017), https://www.heritage.org/sites/default/files/2017-07/LM-209_1.pdf.

200. *See, e.g.*, Randy Capps et al., *Delegation and Divergence: 287(g) State and Local Immigration Enforcement*, MIGRATION POL'Y INST., (Jan. 2011), http://www.migrationpolicy.org/pubs/287g-divergence.pdf.

resulting policies of limited cooperation are often the target of state legislation trying to enter the immigration enforcement field.[201] This section will briefly lay out the mechanisms for local entities to partner with the federal government and the impacts these partnerships have had.

The formal mechanisms for partnership with the federal government can be divided into pre-arrest and post-arrest—i.e., whether the mechanisms kick in before or after a lawful arrest. The post-arrest formal mechanisms are many but center on information sharing and compliance with detainers. Information sharing itself is mandatory through Secure Communities, a program through which an arrestee's fingerprint information is shared with ICE via the FBI. This information is checked against immigration databases maintained by the Department of Homeland Security.[202] ICE then determines whether to issue a detainer for the individual.[203] Once a local agency receives a detainer request from ICE, there is yet another opportunity for agencies to cooperate with ICE by honoring the detainer request.[204] In a detainer request, ICE requests that the individual in question be held for forty-eight hours—and if ICE does not take custody in that period, that the individual be released.[205]

287(g) agreements provide both pre- and post-arrest mechanisms.[206] 287(g) programs are entered into through Memoranda of Agreement (MOA) between ICE and the local enforcement entity.[207] When ICE and local entities partner in official 287(g) programs, local officers are "deputized" and have great latitude to use all the tools available to them to enforce immigration.[208] Deputized officers on the street are allowed to exercise the same amount of power as ICE officers—question on reasonable suspicion of alienage, detain on reasonable suspicion of unlawful presence, and warrantless arrest on reasonable suspicion of violation of immigration law.[209]

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201. *See* Larkin, *supra* note 199, at 7.

202. *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/secure-communities (last updated Mar. 20, 2018).

203. *Immigration Detainers: An Overview*, AM. IMMIGR. COUNCIL (Mar. 21, 2017), https://www.americanimmigrationcouncil.org/research/immigration-detainers-overview.

204. *Id.*

205. *Id.*

206. *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/287g (last updated March 26, 2018).

207. *Id.*

208. *Id.* ICE puts 287(g) officers through a four-week basic training program and requires a one-week refresher course to be completed every two years. *Id.* Today, ICE has seventy-six MOAs on file with law enforcement entities in twenty states, and has deputized more than 1,822 local law enforcement officers. *Id.* The statute authorizes 287(g) programs between the federal government and states as a whole, the 287(g) program model has not been adopted at the state level the way local county authorities and police departments have. *Id.*

209. *Id.*

Since President Trump took office, the Department of Homeland Security has focused on expanding 287(g) program agreements and honoring detainer requests.[210] However, many jurisdictions refuse to enter into these partnerships, citing the civil rights and social cost. The civil rights cost for communities is well-documented. In 2009, the U.S. Government Accountability Office (GAO) released a report identifying significant shortcomings in the 287(g) program, namely the lack of controls that would allow ICE to make sure the program worked as hoped.[211] The report also indicated that community concern about racial profiling was prevalent in a vast majority of the 287(g) jurisdictions examined.[212] The Department of Justice, for example, found such great evidence of civil rights violations in Alamance County, North Carolina that a lawsuit was filed and their 287(g) status was revoked; there, the DOJ concluded that deputies targeted Latinos in traffic stops and through checkpoints in Latino neighborhoods.[213] In Maricopa County, Arizona, the Department of Justice brought suit and suspended the 287(g) program after intentional and systematic discrimination against Latinos; this extended from the very first contact with the Maricopa County Sheriff's Office—Latinos were four to nine times more likely to be stopped than non-Latinos—to detention at the Maricopa County Jail, where human rights abuses abounded.[214]

The social costs are equally great. A study by the Migration Policy Institute showed that in 287(g)-partnered counties, immigrants avoided public places, distrusted police, and failed to report crimes as frequently—even when they were victims.[215] Another survey conducted by the University of Illinois at Chicago and Lake Research Partners indicated that many Latinos were reluctant to cooperate with police on other investigations due to fear that their immigration status or that of people they know would be questioned.[216] Every potential encounter with police could be an "opportunity to investigate . . . immigration status[,]" so Latinos distrusted the very force that should protect them.[217] One domestic violence survivor recounted her mistrust: "'My family always told me to never call the cops,' [she] said. 'My family told me that the only thing worse than the beatings was the police,

210. David Nakamura, *Memos Signed by DHS Secretary Describe Sweeping New Guidelines for Deporting Illegal Immigrants*, WASH. POST (Feb. 18, 2017), https://www.washingtonpost.com/politics/memos-signed-by-dhs-secretary-describe-sweeping-new-guidelines-for-deporting-illegal-immigrants/2017/02/18/7538c072-f62c-11e6-8d72-263470bf0401_story.html?utm_term=.fd4840762995.

211. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-109, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS 4 (2009).

212. *Id.* at 23.

213. Billy Ball, *DOJ Ends Federal Immigration Program in Alamance County*, INDY WEEK (Sept. 26, 2012), https://www.indyweek.com/indyweek/doj-ends-federal-immigration-program-in-alamance-county/Content?oid=3157331.

214. *Department of Justice Files Lawsuit in Arizona Against Maricopa County, Maricopa County Sheriff's Office, and Sheriff Joseph Arpaio*, U.S. DEP'T JUST. OFF. PUB. AFF. (May 10, 2012), https://www.justice.gov/opa/pr/department-justice-files-lawsuit-arizona-against-maricopa-county-maricopa-county-sheriff-s; Complaint, United States v. Maricopa Cty. Sheriff's Office, No. 2:12-cv-00981 (D. Ariz. May 10, 2012).

215. Capps et al., *supra* note 200, at 43.

216. NIK THEODORE, INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT 5–6 (2013), http://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF.

217. *Id.* at 6.

the deportation.'"[218] Many jurisdictions therefore avoid 287(g) partnerships because of the erosion of trust between immigrant communities and their local authorities.[219]

Even though the opportunities are vast for local entities to partner with the federal government, the costs are great. Many local entities prefer to maintain good community relations, citing the need for trust between the Latino community and the police. Others look at the financial costs—certainly contributed to by liability exposure from the potential abuses of civil rights that the partnerships are associated with. However, when local entities establish policies of restricting their cooperation with the federal government—and their funding states disagree—a unique problem emerges: what can states do to curb these policies against enforcement when entities refuse to directly partner? As discussed in the next section, after *Arizona v. United States*, the answer is clearer. States, while limited by the confines of federalism, have the means to enforce immigration indirectly through local enforcement. As a result, states have moved toward using the very tools of policing as tools of immigration enforcement with the goal of deterring—and erasing—undocumented immigrant presence.

B. *Arizona v. United States*: The Rules of the Road for State Legislation on Immigration Enforcement

The direct enforcement methods discussed above have deterred many jurisdictions from partnering; the resulting community distrust even has spurred official policies of restricted cooperation with immigration authorities. For state legislators motivated by anti-immigrant political goals, the state authority appears a foolproof way to strongarm jurisdictions into full cooperation with federal immigration enforcement. However, as learned by Arizona, the way this cooperation is authorized or mandated can be the difference between a workable provision and one that is enjoined before enactment. This section aims to explore the rules governing the immigration enforcement road. It discusses the legislative intent of Arizona S.B. 1070 to eliminate sanctuary policies, its major provisions, as well as the preemption arguments analyzed by the Supreme Court. This Part explains that after *Arizona*, the Court unequivocally established that there was space for states to indirectly enforce immigration at the local level, and concludes that while many state enforcement efforts are preempted by federal immigration law, the Court has allowed "Show Me Your Papers" provisions to stand. States that mandate local officers to ask about immigration status therefore can use encounters with local law enforcement as a tool for state enforcement due to § 1373's federal restriction on the sharing of immigration status information.

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218. Karl Fortier, *Citizens Ask Sheriff and ICE to Drop Illegal Immigration Detainment Program*, FOX4 (Dec. 11, 2017), https://www.fox4now.com/news/local-news/citizens-ask-sheriff-and-ice-to-drop-illegal-immigrant-detainment-program.

219. Antonie Boessenkool, *Eric Holder, LAPD Chief Say 'Sanctuary State' Bill Will Restore Trust Between Immigrants, Police*, L.A. DAILY NEWS (June 19, 2017), http://www.dailynews.com/2017/06/19/eric-holder-lapd-chief-say-sanctuary-state-bill-will-restore-trust-between-immigrants-police/.

When Arizona S.B. 1070 was passed, the bill's sponsor, Russell Pearce, told reporters that the bill's purpose was "to eliminate sanctuary policies[.]"[220] Not surprisingly, the purpose of Arizona S.B. 1070 cannot be fully understood without a discussion of "sanctuary policies." As noted above, many jurisdictions are so concerned with the potential consequences of being associated with federal immigration enforcement that they enact policies of non-cooperation.[221] In broad strokes, a sanctuary policy is a formal or informal policy adopted by an entity that limits its own compliance with immigration authorities or enforcement of immigration law, but these policies can take many forms.[222] Some jurisdictions prohibit their officers from routinely inquiring into immigration status during stops,[223] others do not honor ICE requests to assume custody of immigrants identified for removal,[224] while still others heavily restrict ICE presence in jails.[225]

The concept of "sanctuary" jurisdictions is not new to this era, stretching as far back as ancient Hebrew culture.[226] In the United States, sanctuary policies sprang up in the 1980s in response to perceived mishandling of Central American humanitarian crises by the United States government.[227] Today, the term "sanctuary city" has polarizing effects, despite the difficulty of pinning down a definition.[228] Jurisdictions that have policies limiting immigration enforcement may not even call themselves "sanctuary" jurisdictions because of the attached controversy.[229]

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220. Howard Fischer Capitol Media Serv., *Both Brewer, Pearce Call SB 1070 a Success*, TUCSON (Apr. 18, 2011), http://tucson.com/news/local/border/both-brewer-pearce-call-sb-a-success/article_a3cf2637-d420-5e4a-83c1-f8a80449ac46.html.

221. *Understanding Trust Acts, Community Policing, and "Sanctuary Cities"*, AM. IMMIGR. COUNCIL (Oct. 10, 2015), https://www.americanimmigrationcouncil.org/research/sanctuary-cities-trust-acts-and-community-policing-explained.

222. Some sanctuary policies refuse to comply with ICE requests for detainer of suspects post-arrest, while others attempt to assure community members that their immigration status will not be questioned if they report crimes or otherwise interact with the police. *Id.*

223. Taylor Dobbs, *Not 'Sanctuary City,' But New Policy Means Burlington Cops Won't Ask About Immigration*, VT. PUB. RADIO (June 13, 2017), http://digital.vpr.net/post/not-sanctuary-city-new-policy-means-burlington-cops-wont-ask-about-immigration.

224. Alejandra Molina & Brenda Gazzar, *How California's 'Sanctuary State' Bill Would Further Limit ICE's Ability to Arrest Immigrants*, L.A. DAILY NEWS (Aug. 28, 2017), http://www.dailynews.com/2017/07/21/how-californias-sanctuary-state-bill-would-further-limit-ices-ability-to-arrest-immigrants/.

225. *Id.*

226. LINDA RABBEN, SANCTUARY AND ASYLUM: A SOCIAL AND POLITICAL HISTORY 32 (UNIV. OF WASH. PRESS 2016).

227. *Id.* at 131. Many churches nationwide "declared sanctuary"—many of their parishioners sheltering Central American refugees in their own homes—after the INS declared they would not pursue suspects into "churches, schools, or hospitals." *Id.* at 132–33. Berkeley, California was the first United States government body to offer sanctuary since the mid-1800s. *Id.* at 135.

228. *See* Tal Kopan, *What Are Sanctuary Cities, and Can They Be Defunded?*, CNN: POL. (Jan. 25, 2017), http://edition.cnn.com/2017/01/25/politics/sanctuary-cities-explained.

229. Dobbs, *supra* note 223. The city of Austin, Texas, for example, does not consider itself a sanctuary city, according to Austin police chief Brian Manley: "[W]e are not a sanctuary city in Austin because we will enforce laws when individuals commit crimes and we will partner with federal agencies as long as what we're working on is something that has a criminal nexus." *Austin Police Address Immigration Enforcement with Community*, FOX4 (Feb. 5, 2017), http://www.fox4news.com/news/texas/austin-police-address-immigration-enforcement-with-community.

In response to the perceived flagrancy of sanctuary policies, S.B. 1070 was proposed and passed.[230] It was the first of its kind; no state legislative campaign before it was as strict or ambitious.[231] S.B. 1070 began with a sweeping, explicit statement of intent:

> The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona. The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.[232]

S.B. 1070 prohibited officials and agencies from having policies that limited or restricted "enforcement of federal immigration laws to less than the full extent permitted by federal law[,]" or from restricting sharing individuals' immigration status with ICE.[233] It also required law enforcement officers to make a "reasonable attempt" to find out the immigration status of individuals during any lawful contact if the officer had reasonable suspicion the individual was unlawfully present in the country; this provision became known as the "Show Me Your Papers" section of the bill.[234] S.B. 1070 also required agencies to transfer convicted individuals to ICE custody,[235] and authorized law enforcement officers to arrest based on probable cause that an individual was unlawfully present in the country.[236] The bill also created a criminal violation of state trespassing for undocumented immigrants "present on any public or private land" in Arizona.[237] It allowed officers to stop a vehicle based on reasonable suspicion that a driver was transporting undocumented immigrants,[238] created a misdemeanor for stopping to pick up unauthorized workers,[239] and created an affirmative defense for entrapment for employers who hired unauthorized workers.[240] *Inter alia*, a number of provisions provided for penalties, including waiving of sovereign immunity through a private right of action against an agency with a policy of limiting immigration enforcement.[241]

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230. Howard Fischer Capitol Media Serv., *supra* note 220.

231. Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES (Apr. 23, 2010), http://www.nytimes.com/2010/04/24/us/politics/24immig.html?ref=us.

232. Support Our Law Enforcement and Safe Neighborhoods Act § 1, 2010 Ariz. Legis. Serv. Ch. 113 (West).

233. Support Our Law Enforcement and Safe Neighborhoods Act § 2, 2010 Ariz. Legis. Serv. Ch. 113 (West).

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at § 3.

238. *Id.* at §§ 4, 5.

239. Support Our Law Enforcement and Safe Neighborhoods Act § 5, 2010 Ariz. Legis. Serv. Ch. 113 (West).

240. *Id.* at § 6 (providing an affirmative defense for employers to avoid the criminal liability for knowingly employing unauthorized workers if they worked with law enforcement in sting operations to catch, prosecute, and deport).

241. *Id.* at § 2.

After S.B. 1070 was signed into law in April 2010, the federal government filed suit, challenging whether states had any role at all in immigration enforcement.[242] The Department of Justice's lawsuit sought declaratory and injunctive relief on the basis that the state of Arizona was infringing upon a field of regulation exclusively held by the federal government by stepping into immigration enforcement.[243] While this case played out—and was ultimately heard by the Supreme Court—other states began to pass their own versions of the omnibus bill.[244]

The Justice Department's challenge of S.B. 1070 was chiefly on grounds of federal preemption under the Supremacy Clause.[245] When a state enacts a law stepping beyond territory normally left to the States and into territory regulated by federal law, the federal government may challenge this enactment as preempted.[246] Three types of preemption may be possible. First, express preemption concerns state laws that clearly disagree with, and therefore are expressly preempted by, federal law.[247] Second, field preemption occurs when federal legislation on a subject occupies so much space in that "field" that it can be inferred that "Congress left no room for the States to supplement it."[248] Third, conflict preemption may occur in two ways and focuses on how carrying out the state law affects compliance with the federal law and its objective.[249] A state law is conflict preempted when it is physically impossible to comply with both the state and the federal law; a state law may also be conflict preempted if it stands as an obstacle to the federal law's objective.[250]

In *Arizona v. United States*, the Court examined four provisions of S.B. 1070 for these types of preemption, concluding that all but one attempted to replicate or extend past the federal scheme.[251] In so concluding, the Court delineated some clear rules of the road regarding alien registration, immigrant employment, and warrantless arrests.[252] As to the remaining provision—the "Show Me Your Papers" provision—the Court indicated states could regulate in this manner but did not foreclose applied legal challenges.[253]

First, the Court was clear that provisions that replicated federal legislative schemes for immigration enforcement were enjoined.[254] For example, states could

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242. Dan Nowicki, *Arizona Immigration Law Ripples through History, U.S. Politics*, ARIZ. REPUBLIC (July 25, 2010), http://archive.azcentral.com/arizonarepublic/news/articles/2010/07/25/20100725immigration-law-history-politics.html.

243. *See* First Amended Complaint for Declaratory and Injunctive Relief, United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. CV 10-1413-PHX-SRB).

244. Morse et al., *supra* note 196. Some states attempted to pass similar legislation piecemeal in hopes of getting some signed into law. Seth Freed Wessler, *Bills Modeled After Arizona's SB 1070 Spread Through States*, COLORLINES (Mar. 2, 2011), https://www.colorlines.com/content/bills-modeled-after-arizonas-sb-1070-spread-through-states.

245. First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 243.

246. Arizona v. United States, 567 U.S. 387, 399 (2012).

247. *Id.*

248. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

249. *Arizona*, 567 U.S. at 399–400.

250. *Id.*

251. *Id.* at 416.

252. *Id.*

253. *Id.* at 415.

254. *Id.*

not enter the field of alien registration, even if they replicate federal regulations in state regulation form.[255] Section 3 created a new state misdemeanor for "failure to complete or carry" an alien registration document.[256] The Court ruled that this provision was field preempted by Congress's full occupation of the field of alien registration.[257]

Second, the Court ruled that attempts to prohibit undocumented immigrants from soliciting work were preempted because they not only stepped into a field occupied by federal immigration schemes but proved an obstacle to achieving that scheme.[258] Section 5(C) criminalized solicitation or application for work by an undocumented immigrant.[259] Because Congress intentionally entered the field of employment regulation as applied to immigrants and structured its existing regulation to penalize not the workers but the employers of undocumented immigrants, Arizona's attempt to criminalize immigrant workers was federally preempted.[260]

Third, the Court ruled that states could not give state officers the same or more power to enforce immigration as federal officers, by enjoining the provision authorizing warrantless arrests by state officers based on possible removability.[261] Section 6 gave state police officers the power to arrest without a warrant if they have probable cause to believe that the subject "has committed any public offense that makes [him] removable from the United States."[262] This provision gave state officers greater power to arrest without a warrant than federal officers have—they are authorized to arrest without a warrant only if the subject is likely to flee before a warrant can be obtained—and for that reason was federally preempted by the process for removal that Congress had established.[263]

On the other hand, the Court ruled that states were not facially preempted from mandating their officers to make reasonable attempts to determine immigration status of individuals otherwise lawfully stopped.[264] The Court rejected the Government's arguments about preemption, reasoning that Congress had encouraged information sharing with ICE, and emphasizing that "reasonable attempts" to gain this information would not unconstitutionally prolong the stop.[265] Section 2(B) of S.B. 1070 was not preempted because it was properly limited to avoid Constitutional concerns, and Congress had clearly anticipated and encouraged communica-

255. *Arizona*, 567 U.S. at 400–402.
256. *Id.* at 400.
257. *Id.* at 403.
258. *Id.* At 406–407.
259. *Id.* at 403.
260. *Id.* at 407.
261. *Arizona*, 567 U.S. at 410.
262. Support Our Law Enforcement and Safe Neighborhoods Act § 6, ARIZ. REV. STAT. ANN. § 13-3883(A)(5) (2010).
263. 8 U.S.C. § 1357(a)(2); *Arizona*, 567 U.S. at 408.
264. *Arizona*, 567 U.S. at 416.
265. *Id.* at 413–414.

tion between state and federal officers regarding suspected immigration violations.[266] Therefore, after *Arizona*, states may mandate reasonable attempts to inquire into and determine immigration status of individuals otherwise lawfully stopped.[267]

The significance of the "Show Me Your Papers" provision's survival cannot be underestimated, given 8 U.S.C. § 1373, a federal law that keeps government entities from prohibiting or restricting information sharing of individuals' immigration status with the federal government.[268] In other words, if an undocumented immigrant is stopped for a traffic violation, and the officer's routine inquiries do not include immigration status, there is no information about immigration status to share with the federal government, and the entity is still in compliance with § 1373. But if the immigrant is asked her immigration status, the enforcement entity cannot prevent that officer from transmitting her answer to federal immigration authorities.

By ruling that Arizona's "Show Me Your Papers" provision was not preempted, the Court threw open the doors for states to strongarm local enforcement into information gathering for the federal government. Now there would be vast amounts of immigration status information gathered because it was mandatory. Even though much of Arizona's direct immigration enforcement framework was enjoined, the Supreme Court's decision on Section 2(B) was still seen as a victory for Arizona and its goal of "attrition through enforcement."[269] Governor Jan Brewer insisted that "the heart of Senate Bill 1070 [had] been proven to be constitutional."[270] Litigation continued after *Arizona v. United States*, but ultimately the plaintiffs settled with the state in return for $1.4 million in legal fees and an informal opinion from Arizona's attorney general that narrowly limited use of Section 2(B).[271] The provision would remain on the books and the constitutional ramifications of *Arizona v. United States* were cemented.

Arizona meant more than delineating what states could do: it established that there was space within the field of immigration enforcement for states to occupy with legislation and without partnerships with the federal government.[272] By allowing states to mandate immigration inquiry, *Arizona* gave states the tools to undercut sanctuary policies at the baseline encounter with community members. Any lawful encounter with the police meant immigration status could be determined, and any immigration status information could be transmitted to the federal government. The Government's argument that there was no place for states had been re-

266. *Id.* at 414–415.

267. *Id.*

268. 8 U.S.C. § 1373.

269. Support Our Law Enforcement and Safe Neighborhoods Act § 1, 2010 Ariz. Legis. Serv. Ch. 113 (S.B. 1070) (West).

270. M.J. Lee, *Brewer: Ariz. Law's 'Heart' Upheld*, POLITICO (June 25, 2012), https://www.politico.com/story/2012/06/brewer-scotus-ruling-a-victory-077794.

271. Michael Kiefer, *Arizona Settles Final Issues of SB 1070 Legal Fight*, AZCENTRAL (Sept. 15, 2016), https://www.azcentral.com/story/news/politics/immigration/2016/09/15/arizona-settlement-sb-1070-lawsuit-aclu-immigration/90424942/; Elvia Diaz, *Diaz:'Show Me Your Papers' Still Is the Law, But Now Everyone Is Happy?*, AZCENTRAL (Sept. 19, 2016), https://www.azcentral.com/story/opinion/op-ed/elviadiaz/2016/09/19/show-me-your-papers-sb-1070/90435066/.

272. *Arizona*, 567 U.S. at 413.

jected outright. Arizona's goal of "attrition through enforcement" could still be accomplished indirectly. These lessons were observed and taken to heart by states trying to accomplish the same goal.

C. State Legislation Proliferates and *Arizona's* Impact Solidifies

After *Arizona*, circuit courts now had precedent to apply to the state initiatives that sprang up alongside S.B. 1070. Predictably, provisions that mimicked Arizona's—such as the "Show Me Your Papers" provision—were treated as *Arizona* instructed,[273] but there were other pieces of state legislation that were different enough for which *Arizona* could only be an instructive analogy. This section discusses how *Arizona* was applied to 1070's contemporaries and examine later efforts by states to specifically target and punish sanctuary jurisdictions. Then this section concludes that because *Arizona* established space for local law enforcement to enforce immigration, state legislatures have built entire anti-sanctuary statutory schemes on initial encounters between law enforcement and civilians to achieve the goal of "attrition through enforcement" indirectly.

In late 2012, the Eleventh Circuit applied *Arizona* to state statutes in Georgia and Alabama that were signed into law shortly after S.B. 1070. In Georgia, H.B. 87 ("Illegal Immigration Reform and Enforcement Act") contained twin provisions that the Eleventh Circuit enjoined and allowed.[274] The first provision prohibited transporting, moving, harboring, or concealing undocumented immigrants while committing another crime, or inducing undocumented immigrants to enter the state.[275] This was enjoined as conflict preempted because the provision replicated federal regulation.[276] The second provision authorized officer investigation into immigration status if the officer had probable cause that the individual committed a crime; if the individual could not provide identification to verify his immigration status, the officer was authorized to "take any action authorized by state and federal law[.]"[277] In Alabama, H.B. 56 ("Beason-Hammon Alabama Taxpayer and Citizen Protection Act") contained mirror provisions to Sections 3, 6, 5(C), and 2(B), which were enjoined and allowed, respectively, by the Eleventh Circuit.[278]

These decisions by the Eleventh Circuit were persuasive in subsequent decisions concerning South Carolina's Act 69.[279] Twin subsections made it a state felony to transport, move, conceal, harbor, or shelter an undocumented immigrant—and

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273. The provisions were typically spared injunction at the district court level and were not at issue by the time the circuits heard and decided the cases. *See generally* United States v. South Carolina, 906 F. Supp. 2d 463, 471 (D.S.C. 2012); Ga. Latino All. for Human Rights v. Governor of Ga., 691 F.3d 1250, 1268 (11th Cir. 2012). Injunction was denied for Alabama's H.B. 56 "Show Me Your Papers" provision before the Supreme Court heard *Arizona*; the Ninth Circuit's dissent to the stay on Arizona's provision was persuasive for the Alabama Northern District Court. United States v. Alabama, 813 F. Supp. 2d 1282, 1328 (N.D. Ala.), *rev'd in part*, 813 F. Supp. 2d 1282 (11th Cir. 2011).

274. *Ga. Latino All. for Human Rights*, 691 F.3d at 1256.

275. GA. CODE ANN. §§ 16-11-200(b), -201(b), -202(b) (West 2018).

276. *Ga. Latino All. for Human Rights*, 691 F.3d at 1265–66.

277. GA. CODE ANN. §§ 17-5-100(b), 100(e).

278. *Alabama*, 691 F.3d at 1301.

279. United States v. South Carolina, 720 F.3d 518, 531 (4th Cir. 2013).

punished the undocumented immigrant for allowing herself to be so transported, concealed, etc.[280] Another section made it a state misdemeanor for adults to fail to carry a certificate of alien registration, while yet another criminalized having false identification.[281] These subsections were enjoined as preempted due to their similarities to Arizona's enjoined provisions.[282]

Other states attempted to pass omnibus legislation like S.B. 1070 but were unsuccessful. Kansas, for example, introduced legislation about, *inter alia*, alien registration, verification of lawful status for any public benefit (including licenses issued by the department of wildlife, parks, and tourism), E-Verify, and requiring officers to determine immigration status during any lawful stop.[283] Mississippi introduced two pieces of legislation that included requiring officers to determine immigration status during a lawful stop, schools to verify the immigration status of enrolled children and their parents (and authorized sharing of this information with ICE), and even any political subdivision of the state to verify immigration status of anyone entering a "business transaction" with them.[284] These bills died in committee.[285] By 2013, it looked as though omnibus legislation had fallen out of popularity, with no omnibus legislation passed between 2014 and mid-2016.[286]

Today, the tide is coming back in, and the latest wave of legislation targets sanctuary policies held at the local level. It started in states like North Carolina; there a 2013 omnibus bill much like Arizona's was enacted over governor veto,[287] and in 2015 a smaller bill targeting unauthorized immigrant workers was passed, including a provision prohibiting entities from adopting sanctuary policies, ordinances, or procedures.[288] In the first half of 2017, more than 100 bills were proposed in at least 36 states regarding sanctuary policies.[289] In distinct focus today is

280. S.C. CODE ANN. §§ 16-9-460(A)–(D) (2012).

281. *Id.* § 16-17-750; *Id.* § 17-13-170(B)(2).

282. *South Carolina*, 720 F.3d at 530–533.

283. Allison Johnston & Ann Morse, *2012 Immigration-Related Laws and Resolutions (Jan-Dec 2012)*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/immigration/2012-immigration-related-laws-jan-december-2012.aspx (last visited May 1, 2018); *see* H. 2576, 2012 Sess. (Kan.); H. 2578, 2012 Sess. (Kan.). H.B. 2578 prohibited officers from independently verifying immigration status, requiring them instead to contact the federal government. Notably, a bill introduced later that session also criminalized refusing to answer an officer's inquiry about date of birth. *See* H. 2601, 2012 Sess. (Kan.).

284. Johnston & Morse, *supra* note 283; H. 488, 2012 Reg. Sess. (Miss.); S. 2090, 2012 Reg. Sess. (Miss.).

285. Johnston & Morse, *supra* note 283.

286. Ann Morse, *2013 Immigration Report*, NAT'L CONF. ST. LEGISLATURES (Jan. 20, 2014), http://www.ncsl.org/research/immigration/2013-immigration-report.aspx; Ann Morse et al., *2014 Immigration Report*, NAT'L CONF. ST. LEGISLATURES (Jan. 7, 2015), http://www.ncsl.org/research/immigration/2014-immigration-report.aspx; Ann Morse et al., *Report on 2015 State Immigration Laws*, NAT'L CONF. ST. LEGISLATURES (Feb. 16, 2016), http://www.ncsl.org/research/immigration/report-on-2015-state-immigration-laws.aspx; Ann Morse et al., *Report on 2016 State Immigration Laws*, NAT'L CONF. ST. LEGISLATURES (Sept. 1, 2016), http://www.ncsl.org/research/immigration/report-on-2016-state-immigration-laws-january-june.aspx.

287. *See* H.R. 786, 2013 Sess. (N.C.).

288. *See* H.R. 318, 2015 Sess. (N.C.).

289. Ann Morse & Maria Pimienta, *Report on 2017 State Immigration Laws: January-June*, NAT'L CONF. ST. LEGISLATURES (July 12, 2017), http://www.ncsl.org/research/immigration/report-on-2017-state-immigration-laws-january-june.aspx.

Texas's S.B. 4 that contained many provisions designed to prevent local entities from adopting sanctuary policies.[290]

Bills targeting sanctuary jurisdictions start with broad strokes, prohibiting local entities from having any official policy of restricting immigration enforcement or compliance.[291] Consider the text of Texas S.B. 4's sanctuary policy provision, replicated in Idaho S.B. 76/198: "A local entity or campus police department may not adopt, enforce, or endorse a policy under which the entity or department prohibits or materially limits the enforcement of immigration laws."[292] Consequences can be severe. The common thread for these provisions is financial, such as threatening to withhold state funding to these jurisdictions—as in the proposed Idaho S.B. 76/198.[293] The first incarnation of this bill threatened withholding of all funds to an entity with a sanctuary policy, but a subsequent amendment reduced it to only a 50% loss of state funds.[294] Some states go much further than cutting off funding, such as Texas S.B. 4, which (like S.B. 1070) allows local entities to face civil penalties, but also permits elected or appointed officials to be removed from office for violation of the provision.[295] Still other provisions waive sovereign immunity for sanctuary jurisdictions, like S.B. 4 did "to the extent of liability created."[296] One such proposed Florida bill, H.B. 9, recently passed its House, and opens sanctuary jurisdictions up to liability if a person is injured by an undocumented immigrant upon proof that the sanctuary policy resulted "in such alien's having access to the person injured . . . ."[297]

Other state provisions prohibit sanctuary policies at the critical pre-arrest stage by authorizing officers to make immigration status inquiries. While "Show Me Your Papers" provisions mandate that officers determine the immigration status of

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290. Richard Gonzales, *Federal Judge Temporarily Blocks SB4, Texas Law Targeting Sanctuary Cities*, NAT'L PUB. RADIO (Aug. 30, 2017), https://www.npr.org/sections/thetwo-way/2017/08/30/547459673/federal-judge-temporarily-blocks-sb4-texas-law-targeting-sanctuary-cities.

291. Also paired with these broad-strokes policy prohibitions are provisions that mandate post-arrest compliance with the federal scheme through information sharing on detained individuals, honoring detainer requests, and allowing ICE presence in jail. Detainer compliance and information sharing on arrestees has been a major focus of this Administration, and while not the focus of this Article, remains a key battle to be fought. Complaint for Injunctive and Declaratory Relief, City of Chi. v. Sessions, 264 F. Supp. 3d 933 (N.D. Ill. 2017) (No. 1:17-cv-5720).

292. TEX. GOV'T. CODE ANN. § 752.051 (West 2017); H. 76, 64th Leg., 1st Reg. Sess. (Idaho 2017); H. 198, 64th Leg., 1st Reg. Sess. (Idaho 2017).

293. Harrison Berry, *Bill Banning Idaho Sanctuary Cities Moves Forward Despite Opposition from Democrats*, BOISE WEEKLY (Feb. 20, 2017), https://www.boiseweekly.com/boise/bill-banning-idaho-sanctuary-cities-moves-forward-despite-opposition-from-democrats/Content?oid=4055684.

294. *Id.*

295. TEX. GOV'T CODE ANN. § 752.056 (West 2017); Suzanne Gamboa, *Texas' SB4 Immigration Enforcement Law: 5 Things to Know*, NBC NEWS: LATINO (May 11, 2017), https://www.nbcnews.com/news/latino/texas-sb4-immigration-enforcement-law-5-things-know-n758126. This is not new to S.B. 4; in Arizona, upon judicial finding that an entity did indeed adopt, enforce, or endorse a sanctuary policy, the entity may be subject to civil fees up to $5,000 per day for as long as the policy was in effect since the action was filed. *See* ARIZ. REV. STAT. § 11-1051(g) (West 2018).

296. TEX. GOV'T CODE ANN. § 752.056(e) (2017).

297. H.R. 9, 2018 Leg., Reg. Sess. (Fla. 2017); *See also* César Cuauhtémoc García Hernández, *Florida Steps into the Anti-Migrant Fray*, CRIMMIGRATION (Nov. 10, 2017), http://crimmigration.com/2017/11/10/florida-steps-into-anti-migrant-fray/.

individuals, the "Can't Keep Me From Asking" provisions proscribe local entity policies against asking about immigration status.[298] In Texas's capitol city, for example, Austin Police Department policy prevented officers from asking about immigration status.[299] Texas S.B. 4 aimed to cut those policies out at the root; instead of mandating that officers make a "reasonable attempt" to determine immigration status (required by Arizona S.B. 1070's § 2(B)), S.B. 4 prohibited local entities from having policies preventing an officer from doing so.[300] Both "Show Me Your Papers" and "Can't Keep Me From Asking" provisions work with 8 U.S.C. § 1373 as an information-gathering tool, because § 1373 proscribes local enforcement entities from restricting information sharing on individuals' immigration status with the federal government.[301]

In Texas, S.B. 4 was introduced in the Senate a week after the 2016 Presidential Election.[302] By early 2017, Governor Greg Abbott had placed a target on sanctuary cities, declaring that sanctuary cities were an "emergency item" so as to set the Texas GOP into motion to vote.[303] S.B. 4 passed and was signed into law in May 2017, to be effective September 1, 2017.[304] The City of El Cenizo filed a complaint a day after S.B. 4 was signed into law; after the dust of other complaints settled and cases were consolidated, *City of El Cenizo v. State of Texas* emerged as the predominant piece of litigation challenging S.B. 4.[305] The plaintiffs sought declaratory and injunctive relief, arguing that the anti-sanctuary provision that prohibited "endorsing" sanctuary policies violated the First Amendment because it required state employees to take positions in favor of limiting immigration enforcement.[306] Plaintiffs also challenged the anti-sanctuary provision on vagueness under the Due Process Clause—which "requires that a law give reasonable notice of what conduct it prohibits."[307] Among the other claims was a Fourth Amendment challenge to the requirement that local entities honor all detainer requests, and a preemption challenge to provisions plaintiffs claimed duplicated the federal immigration scheme.[308]

298. TEX. GOV'T CODE ANN. § 752.053(b) (2017) ("a local entity or campus police department may not prohibit or materially limit [an officer] . . . from . . . inquiring into the immigration status of a person under a lawful detention or under arrest"); H. 76, 64th Leg., 1st Reg. Sess. (Idaho 2017); H.R. 198, 64th Leg., 1st Reg. Sess. (Idaho 2017).

299. Tony Cantu, *Austin Police Can Now Ask Detainees About Immigration Status Per SB 4*, AUSTIN PATCH (Sept. 27, 2017), https://patch.com/texas/downtownaustin/austin-police-can-now-ask-detainees-immigration-status-sb-4.

300. *Id.*

301. 8 U.S.C. § 1373 (2012).

302. *85(R) History for SB 4*, TEX. LEGIS. ONLINE, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=85R&Bill=SB4 (last visited May 1, 2018).

303. *Id.*; Henry Grabar, *Austin vs. Austin*, SLATE: METROPOLIS (Feb. 3, 2017), http://www.slate.com/articles/business/metropolis/2017/02/texas_is_trying_to_crack_down_on_sanctuary_cities.html.

304. TEX. LEGIS. ONLINE, *supra* note 302.

305. *Case Profile: City of El Cenizo v. State of Texas*, C.R. LITIG. CLEARINGHOUSE, https://www.clearinghouse.net/detail.php?id=15825 (last visited May 1, 2018) [hereinafter C.R. LITIG. CLEARINGHOUSE].

306. Second Amended Complaint for Declaratory and Injunctive Relief, *supra* note 22, at 11.

307. *Id.* at 12, ¶ 34.

308. *Id.* at 13–14.

The day before the law was to go into effect, the preliminary injunction was granted as to certain portions of provisions, but much of the bill stayed intact.[309] In particular, District Judge Garcia was persuaded by the vagueness arguments concerning the terms "endorse" and "materially limit," and agreed with the Fourth Amendment challenge to the detainer compliance provision.[310] These provisions were temporarily enjoined.[311] However, this left the "Can't Keep Me From Asking" provision intact, a fact not lost on the public.[312] Within a month, a Fifth Circuit panel stayed the preliminary injunction on the detainer compliance provision, also clearing the way for local and college police officers to assist federal immigration.[313] Consequently, Austin Police Chief Brian Manley announced a policy change on asking about immigration status within the department to comply with the law.[314] In March 2018, the Fifth Circuit vacated in large part the district court's injunctions, leaving S.B. 4 intact except for the "endorsement" provision.[315]

After *Arizona v. United States*, the blueprint for "attrition through enforcement" had been drafted. While the Court established in *Arizona* that suspicion of alienage would not create a separate ground for interrogation or arrest,[316] the Court found no problem with mandated immigration inquiry.[317] States could now force local officers to get the very information sanctuary jurisdictions were avoiding out of begrudging respect for the mandates of § 1373. As discussed below, the resulting environment for Latino communities is so uncomfortable that the undocumented are held in a state of siege, and some are forced to leave.

IV. THE CONFLUENCE OF *TERRY'S* PROGENY AND STATE LEGISLATION: ERASING IMMIGRANT PRESENCE

Professor Jeffrey Fagan refers to *Terry v. Ohio* as a Fourth Amendment "original sin"; by throwing wide the doors of discretion to police officers looking to make stops "based on the very hunches that worried the *Terry* Court."[318] If this is *Terry*'s "original sin," then the present sin is the way states have weaponized this tool of policing to achieve attrition through pre-arrest immigration enforcement. States have built entire legislative frameworks around co-opting immigration inquiry into each encounter. States combine *Terry's* reasonable suspicion standard with "Show Me Your Papers" and "Can't Keep Me From Asking" provisions to indirectly enforce

309. C.R. LITIG. CLEARINGHOUSE, *supra* note 305.

310. City of El Cenizo v. Texas, 264 F. Supp. 3d 744, 812–13 (W.D. Tex. 2017).

311. *Id.*

312. Gus Bova, *Judge Eviscerates Much of Senate Bill 4, But Leaves Intact "Show Me Your Papers" Provision*, TEX. OBSERVER (Aug. 31, 2017), https://www.texasobserver.org/judge-senate-bill-4-show-me-your-papers/.

313. Julián Aguilar, *Appeals Court Allows More of Texas "Sanctuary Cities" Law to Go into Effect*, TEX. TRIBUNE (Sept. 25, 2017), https://www.texastribune.org/2017/09/25/appeals-court-allows-more-texas-sanctuary-cities-law-go-effect/.

314. Cantu, *Austin supra* note 299.

315. *See* City of El Cenizo v. Texas, 885 F.3d 332 (5th Cir. 2018); Julián Aguilar, *Federal Appeals Court's Ruling Upholds Most of Texas' "Sanctuary Cities" Law*, TEX. TRIBUNE (Mar. 14, 2018), https://www.texastribune.org/2018/03/13/texas-immigration-sanctuary-cities-law-court/.

316. Arizona v. United States, 567 U.S. 387, 410 (2012).

317. *Id.* at 415–16.

318. Fagan, *supra* note 152, at 84.

immigration law without relying on the criminal justice system. Because the sweeping majority of *Terry* stops sit outside the legal process when they do not result in arrests, the result is immigration enforcement that does not rely on the deportation pipeline; instead, the high volume of nonconsensual encounters into which immigration inquiry is co-opted is feared and avoided by undocumented communities, resulting in self-deportation.

This Part discusses how the legal confluence of *Terry* and "Show Me Your Papers" provisions play out, explaining that the immunization of *Terry* stops that do not result in an arrest from automatic judicial review provide a legal island ideal for amplification of anti-sanctuary and anti-immigrant goals. The Part then turn to the effect this has had on immigrant communities, emphasizing that this is the intent of state legislatures capitalizing on the confluence of *Terry* and "Show Me Your Papers" provisions.

A. The Legal Confluence of *Terry* and Anti-Sanctuary Bills: Criminal *Terry* Stops as a Vehicle for Immigration Enforcement

Arizona meant that immigration status could be investigated at the lowest level encounter with local law enforcement. After *Terry*, the lowest level encounter for a lawful stop by local law enforcement required only a very small amount of suspicion of criminality. *Terry* stops combine with "Show Me Your Papers" provisions to achieve goals of attrition through enforcement, given the constitutional cover of "innocent" *Terry* stops against judicial review. Ultimately, "Show Me Your Papers" provisions change the very nature of the lowest level encounter; the "Can't Keep Me From Asking" provisions inject uncertainty into encounters with law enforcement.

Terry stops can be predicated on thin and contradictory facts—even describing wholly innocent behavior—in supporting a reasonable suspicion of particularized criminality.[319] An officer suspecting a crime is about to occur or is occurring may stop someone without enough evidence to substantiate an arrest for the same. The vast amount of infractions for which officers can stop, and the feeble amount of justification required for these stops, means officers must target neighborhoods and subjects they believe are likely to yield evidence of criminality.[320]

Reasonable suspicion of crimes associated with poverty—such as loitering, vagrancy, or turnstile jumping[321]—have disproportionately subjected minorities to a high volume of non-consensual lawful encounters with police.[322] In the immigration enforcement context, an officer can use reasonable suspicion to lay the foundation for a lawful, non-consensual encounter with minority immigrants. Consider Ariel

319. *Id.* at 52. *See also supra* Section I.B.

320. Harris, *supra* note 75, at 452.

321. *See* Brendan Cheney, *Manhattan DA Will No Longer Prosecute Turnstile Jumping*, POLITICO (Feb. 1, 2018), https://www.politico.com/states/new-york/city-hall/story/2018/02/01/manhattan-da-will-no-longer-prosecute-turnstile-jumping-229568; Rebecca Vallas, *A Poverty Expert Explains How We Make It a Crime to Be Poor*, TALK POVERTY (Oct. 18, 2017), https://talkpoverty.org/2017/10/18/poverty-expert-explains-make-crime-poor/.

322. Dorothy E. Roberts, *Forward: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 790–93 (1999).

Vences-Lopez in Minneapolis, who was asked for identification on suspicion of fare evasions; when he indicated he did not have any, the officer inquired into his immigration status.[323] Even though in this instance the officer inquired against department policy, if the Minnesota State Legislature had passed "Show Me Your Papers" or "Can't Keep Me From Asking" provisions, the officer would be well within his job description to do so.

States that mandate immigration inquiry piggyback the high-volume of lawful encounters permitted by the broad power of *Terry's* progeny. The practical effect of "Show Me Your Papers" provisions is the collection of immigration status information to be transmitted to the federal government for compliance with § 1373. The practical effect of "Can't Keep Me From Asking" provisions is not different, injecting uncertainty into encounters with law enforcement. If the officer on the beat already believes that it is not part of her duties to inquire into immigration status, provisions like this change nothing for her typical encounter. On the other hand, if the officer harbors prejudices about undocumented individuals (e.g., believes that those unlawfully present in the United States are criminogenic, take resources from those lawfully present, or should be deported as soon as possible), such provisions arm her to enforce a personal agenda of immigration law, which the local entity can no longer prohibit. However, even before these encounters occur, a state that passes "Show Me Your Papers" provisions has already co-opted the pervasiveness of police power to instill and sustain fear of police's affiliation with immigration authorities.

The confluence of *Terry* and immigration inquiry provisions is made even more significant given the way unsuccessful stops stand independent from judicial review. Arrests are subject to probable cause hearings, and discovery of evidence may be subject to suppression hearings—the danger of an unlawful arrest or of the "fruit of the poisonous tree," for example, are significant, warranting independent review. But after *Terry* stops that yield no evidence of criminality, there is no ready remedy in criminal procedure for someone who believes that she has been stopped based on race. There may be a remedy through a § 1983 claim, but barring the use of excessive force, it is highly unlikely that the stopped individual would pursue such a claim for one encounter with an officer. As a result, *Terry* operates as a policing mechanism that, when not resulting in arrest, is incredibly difficult to address and remedy.

While states looking to put people in the deportation pipeline have more direct means to do so—287(g) partnerships, arresting immigrants for traffic violations—states can use the dragnet of *Terry* alongside "Show Me Your Papers" to achieve the same deterrent effect as was accomplished in New York City, simply with a different goal and different population in mind.

B. Using *Terry* as a Sword to Erase Immigrant Populations

Given the power of *Terry* and its ability to target minority populations with a mechanism that sits largely outside judicial review, states can piggyback immigration status inquiries on the lowest level of non-consensual encounters with police,

323. Associated Press, *supra* note 4.

achieving erasure of undocumented immigrants. This section examines the deterrent effect of *Terry* in New York City, as amplified by state policymakers into the aim of erasure. Because local officers have such excessive discretion to stop on less than probable cause, state policymakers—through passage of legislative campaigns aimed at enlisting local officers in immigration enforcement—can therefore use stops on less than probable cause to deter those who "look like" undocumented immigrants from leaving their homes without fear of being stopped at any time.

In New York City, these tools were used to accomplish the political goal of deterring the public presence of young Black and Hispanic men. Stop-and-frisk was explicitly aimed to deter young Black and Hispanic men from leaving their homes by imposing the threat they could be stopped at any time.[324] Mayor Bloomberg and Commissioner Kelley repeatedly underlined through press releases, press conferences, and campaign trail assurances that young men of color were inextricably linked to crime.[325] This stop-and-frisk policy had its intended effect; young minority men knew they could get stopped at any moment.[326] An entire generation of young people grew up incorporating into their routines "the sense that [they] might find [themselves] up against a wall or on the ground with an officer's gun at [their] head[s]."[327] Consider the young people stopped on the way to school, coming back from football practice, or told to go inside if they sat on a bench outside their buildings.[328]

Attitudes toward immigration have manifested in even more explicit animus than identifiable in the upper echelons of the NYPD. Anti-immigration sentiment is hardly new, but there has been a fierce recent resurgence that can be linked to President Trump's campaign rhetoric.[329] While on the campaign trail, Trump fanned the flames of anti-Latino sentiment, drawing a direct line between unlawful presence and criminality and capitalizing on resentment of immigrant workers.[330] After

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324. Devereaux, *supra* note 3.

325. *Id.*; *see also* Garrison, *supra* note 160. (Mayor Bloomberg spoke at a Brownsville church in mid-2012, saying that while the NYPD did not condone racial profiling, the City would not "deny reality" about the crime reports) (quoting Press Release, Mayor Bloomberg Speaks to Parishioners of the First Baptist Church of Brownsville About How Crime Can be Driven Down even Further While Continuing to Improve Community Relations (June 10, 2012)); Kate Taylor, *Stop-and-Frisk Policy 'Saves Lives,' Mayor Tells Black Congregation*, N.Y. TIMES (June 10, 2012), http://www.nytimes.com/2012/06/11/nyregion/at-black-church-in-brooklyn-bloomberg-defends-stop-and-frisk-policy.html?_r=0.

326. Chang, *supra* note 165; Nicholas K. Peart, *Why Is The NYPD After Me?*, N.Y. TIMES (Dec 17, 2011), http://www.nytimes.com/2011/12/18/opinion/sunday/young-black-and-frisked-by-the-nypd.html.

327. Peart, *supra* note 326.

328. *See supra* Section I.B.

329. Angelica Quintero, *America's Love-Hate Relationship with Immigrants*, L.A. TIMES (Aug. 2, 2017), http://www.latimes.com/projects/la-na-immigration-trends/; Jessica Weiss, *Six Months of Hate: How Anti-Immigrant Sentiment is Affecting Latinos in the United States*, UNIVISION (June 14, 2017), https://www.univision.com/univision-news/united-states/six-months-of-hate-how-anti-immigrant-sentiment-is-affecting-latinos-in-the-united-states.

330. Dominic Tierney, *Trump's Unspeakable Strategy to Erase His Past*, ATLANTIC (Feb. 10, 2016), https://www.theatlantic.com/politics/archive/2016/02/trumps-unspeakable-strategy-to-erase-his-past/458748/ ("Donald Trump described Mexican immigrants as 'bringing drugs, they're bringing crime. They're rapists.'"); Elise Foley, *Jeff Sessions Says Donald Trump is Mulling Making Undocumented Immigrants 'Self-Deport'*, HUFFINGTON POST (Oct. 5, 2016), https://www.huffingtonpost.com/entry/jeff-sessions-donald-trump-self-deportation_us_57f4f424e4b0325452628ab7.

his inauguration, his Administration has taken a hard line on undocumented immigrants, encouraging recipients of the now-rescinded DACA program to prepare for their self-deportation.[331]

Today, state policymakers encourage local authorities to over-police immigrant communities, counting on local police officers to enforce private agendas of immigration enforcement by treating immigrants as subordinate and second-class status citizens.[332] Just as the NYPD counted on police officers to buy into the concept of young men of color being criminogenic, states pushing "Can't Keep Me from Asking" provisions through their legislatures count on officers to harbor a private agenda of immigration enforcement. The subtext in these provisions is that officers like Officer Andy Lamers—the Minneapolis Metro Transit officer who quizzed Ariel Vences-Lopez on his immigration status while checking fares—exist:[333] that there are officers who would otherwise ask about immigration status but are prohibited from doing so by local policy. Through "Show Me Your Papers" or "Can't Keep Me from Asking" provisions, states symbolically bless the efforts of these local officers and rely on them to use their wide discretion to stop on less than probable cause to amplify political goals of deportation. "This policy of no policy gives officers the freedom to act according to their preferences," writes Amada Armenta, who spent more than two years doing field work in Nashville, Tennessee accumulating over 120 hours of ride-alongs.[334]

Just as the NYPD had the intent and effect of instilling fear into young men of color that if they left their houses they would be stopped, states passing "Show Me Your Papers" provisions do so to erase presence. They do so in hopes of creating an environment so hostile to undocumented immigrants that these populations are forced to move elsewhere to "self-deport," in the words of then-Presidential candidate Mitt Romney.[335] Kris Kobach, co-author of Arizona S.B. 1070 and a key drafter of Alabama H.B. 56, described the success of Alabama's law as having "done a great service to America": "'There haven't been mass arrests. There aren't a bunch of court proceedings. People are simply removing themselves. It's self-deportation at no cost to the taxpayer. I'd say that's a win.'"[336] Russell Pearce, another author of Arizona S.B. 1070, told the Arizona Republic in 2006—four years before S.B. 1070 was signed into law—"'Disneyland taught us that if you shut down the rides people

331. Cecilia Vega et al., *Trump Administration to Dreamers: Prepare to Self-Deport*, ABC NEWS (Sept. 5, 2017), http://abcnews.go.com/Politics/trump-administration-dreamers-prepare-deport/story?id=49638263.

332. ARMENTA, *supra* note 43, at 154, 148.

333. Hirsi, *supra* note 11.

334. ARMENTA, *supra* note 43, at 154.

335. Lucy Madison, *Romney on Immigration: I'm for 'Self-Deportation'*, CBS NEWS (Jan. 24, 2012), https://www.cbsnews.com/news/romney-on-immigration-im-for-self-deportation/. While Mr. Romney's comments mentioned only employment regulations as cause for "self-deportation," other proponents of the concept have advocated for "making life in the United States so uncomfortable" that undocumented immigrants leave voluntarily. Robert Mackey, *The Deep Comic Roots of 'Self-Deportation'*, N.Y. TIMES: LEDE (Feb. 1, 2012), https://thelede.blogs.nytimes.com/2012/02/01/the-deep-comic-roots-of-self-deportation/.

336. George Talbot, *Kris Kobach, The Kansas Lawyer behind Alabama's Immigration Law*, AL (Oct. 16, 2011), http://blog.al.com/live/2011/10/kris_kobach_the_kansas_lawyer_1.html.

leave the amusement park.'"[337] After S.B. 1070 was enacted, Pearce crowed that the undocumented were "'leaving in caravans'": "'I've talked to a U-Haul dealer . . . . He said business has never been better.'"[338]

These hostile attitudes are felt deeply by undocumented immigrants and are being taken to heart by some who decide it is easier to leave than be deported.[339] "'They're sending a message that, "You're not welcome here, we don't want you here …. We're going to find you,"'" one immigrant said, explaining why she and her family were returning to Mexico.[340] When facing her own departure date, another immigrant revealed the turmoil: "'I don't think about it, because I don't want to go . . . . I don't know if this is right or not.'"[341]

For those who stay, there is deep anxiety as individuals make minute-to-minute decisions in fear of encounters with police and immigration authorities. Families paper over windows and peepholes.[342] The physical and mental health of immigrant families is negatively affected as parents cancel doctor's appointments because of fear of the commute there.[343] Immigrant children suffer from depression and anxiety, as well as children with problems "eating, sleeping and doing schoolwork."[344] One woman who had been taking English classes at a local college stopped after Trump was elected and now she stays home, afraid to leave. "'[W]hen my children are at school, I stay in the house. My opinion is it's more fear.'"[345] People are afraid to buy groceries or drop their kids at the bus stop.[346] For mixed status families—e.g., an undocumented parent of a U.S. citizen child—the fear of a parent's deportation takes on unique proportions as the "separate legal statuses but intertwined fates" means a choice between bringing children who may not speak the language or dividing the family by leaving them behind.[347] Even when paths do not cross with ICE, the fear that this could occur is debilitating. "'It's like, you're living a happy life . . . . But at the same time, you're not able to get out of that

337. E.J. Montini, *Trump Revives Russell Pearce's Dream of a Present-Day 'Operation Wetback'*, AZCENTRAL (Aug. 31, 2016), https://www.azcentral.com/story/opinion/op-ed/ej-montini/2016/09/01/montini-donald-trump-russell-pearce-operation-wetback/89685864/.

338. Howard Fischer Capitol Media Services, *supra* note 220.

339. Brittny Mejia, *Leaving America: With Shaky Job Prospects and Trump Promising Crackdowns, Immigrants Return to Mexico with U.S.-Born Children*, L.A. TIMES (Sept. 19, 2017), http://beta.latimes.com/local/la-me-ln-dual-citizenship-20170808-htmlstory.html.

340. *Id.*

341. Jack Healy, *Stay, Hide, or Leave? Hard Choices for Immigrants in the Heartland*, N.Y. TIMES (Aug. 12, 2017), https://www.nytimes.com/2017/08/12/us/stay-hide-or-leave-hard-choices-for-immigrants-in-the-heartland.html?_r=0.

342. *Id.*

343. Anna Gorman, *Fear Compromises the Health, Well-Being of Immigrant Families, Report Finds*, KAISER HEALTH NEWS (Dec. 13, 2017), https://khn.org/news/fear-compromises-the-health-well-being-of-immigrant-families-survey-finds/.

344. *Id.*

345. Kristen Hwang, *As American Kids Pour Across the Border, Mexican Schools Struggle to Keep Up*, USA TODAY (Sept. 5, 2017), https://www.usatoday.com/story/news/nation-now/2017/09/05/american-kids-pour-across-border-mexican-schools-struggle-keep-up/629458001/.

346. Jim Mustian & Max Muth, *Louisiana Illegal Immigrants Face Skyrocketing Deportations, Rising Uncertainty Under Trump Administration*, ADVOCATE (Aug. 12, 2017), http://www.theadvocate.com/baton_rouge/news/politics/article_93180a42-7d1a-11e7-86f0-630976a90d45.html.

347. Brooke Jarvis, *'Will They Take Me, Too?'*, N.Y. TIMES (Dec. 14, 2017), https://www.nytimes.com/2017/12/14/magazine/will-they-take-me-too.html?_r=0.

bubble. You're just there, trapped.'"[348] These are the same harmful outcomes pointed to by studies on 287(g) programs: anxiety, tensions, and mistrust of the police.[349] Those who do not leave avoid public places[350] change their driving patterns or change other behavior "to avoid contact with police and other authorities."[351]

States that pass "Show Me Your Papers" or "Can't Keep Me from Asking" provisions are able to, with every encounter between police and undocumented civilian, add bricks in the wall separating immigrant communities from the outside world. Immigrant communities are already gripped with fear as the Administration ramps up enforcement at the federal level. Communities stay closely connected through technology, informing each other through Facebook, text, and phone of ICE movements.[352] Immigrants stay out of sight, taking cabs and Ubers instead of driving, knowing that any interaction with law enforcement can lead to deportation.[353] Provisions that give local officers the state stamp of approval to ask about immigration status—counting on those with anti-immigrant prejudices—amplify these political agendas, making life so fraught that the undocumented are not just encouraged to leave: they are held captive in their own homes unless they do.

For the state legislatures passing this legislation, this is the desired effect. The consequences for community safety and the economy are significant, spreading the impact of the 287(g) programs far and wide without the burdens of official partnerships. As learned from studies of 287(g) jurisdictions, when immigrant communities associate police presence with immigration enforcement, communities distrust their local law enforcement.[354] Immigrants avoid reporting crimes—even when they are victims—fearing that encounters with police could mean being asked about immigration status and being referred to ICE.[355] Seasonal workers avoid states with these policies, affecting the available worker pool and hurting the state economy.[356] More significantly, the humanitarian effect of the "constant, even urgent source of stress" on an entire minority population is significant.[357] Even though there are more direct methods than *Terry* of funneling people into the immigration pipeline,

348. Alene Tchekmedyian, *'Trapped': Why One Mexican Woman 'Self-Deported,' Long Before Trump*, L.A. TIMES (June 1, 2017), http://www.yorkdispatch.com/story/news/2017/06/01/trapped-why-one-mexican-woman-self-deported-long-before-trump/102377810/.

349. Capps et al., *supra* note 215, at 44–45.

350. *Id.* at 43. *See also id.* at 43 n.117 and accompanying text.

351. *Id.*

352. Vivian Yee, *'Please God, Don't Let Me Get Stopped': Around Atlanta, No Sanctuary for Immigrants*, N.Y. TIMES (Nov. 25, 2017), https://www.nytimes.com/2017/11/25/us/atlanta-immigration-arrests.html.

353. *Id.*

354. Capps et al., *supra* note 215.

355. *Id.*

356. Benjamin Powell, *The Law of Unintended Consequences: Georgia's Immigration Law Backfires*, FORBES (May 17, 2012), https://www.forbes.com/sites/realspin/2012/05/17/the-law-of-unintended-consequences-georgias-immigration-law-backfires/.

357. Samantha Max, *Children of Undocumented Parents Are Safe from Deportation, But Not from Fear*, CHI. TRIB. (June 7, 2017), http://www.chicagotribune.com/hoy/chicago/ct-hoy-safe-from-deportation-but-not-from-fear-20170607-story.html.

for the undocumented immigrant the implication is the same: any encounter with local law enforcement is equally rife with fear.

Ultimately, and perhaps most importantly, the self-deportation approach to immigration enforcement reflects a moral and humanitarian void—one that views non-citizens as non-persons—paving the way for the denial of human rights.[358] This attitude manifests itself innocuously as word choice when discussing those present unlawfully; consider the words in which supporters and critics of Proposition 187 in California characterized the objects of the initiative: "illegal aliens" and "undocumented persons," respectively.[359] This attitude manifests in "us vs. them" language, feeding on and propagating narratives of the "Mexican immigrant as the enemy,"[360] the "immigrant welfare problem,"[361] and even the "bad hombres" of which presidential candidate Trump warned.[362] There is a "bitter irony"[363] in characterizing immigrants as responsible for a state's economic and social problems given America's perceived promise as "a nation of immigrants."[364] But marginalizing—even demonizing—the "other" is not new in America. Consider the American tragedy of slavery, an original sin providing the foundation of an "underclass culture" in urban America,[365] the Jim Crow laws, and the sundown towns.[366] Consider the largest official mass lynching in New Orleans in 1891, not of African-Americans but of eleven Italian immigrants acquitted of murder; Teddy Roosevelt "famously said [the lynchings] were 'a rather good thing.'"[367] The moral and humanitarian void displayed when immigrants are dehumanized—reduced to whether they are legal or not—injures

358. Kristina M. Oven, *The Immigrant First as Human: International Human Rights Principles and Catholic Doctrine as New Moral Guidelines for U.S. Immigration Policy*, 13 NOTRE DAME J.L., ETHICS, AND PUB. POL'Y 499, 500 (1999).

359. Hugh Mehan, *The Discourse of the Illegal Immigration Debate: A Case Study in the Politics of Representation*, 8 DISCOURSE & SOC'Y 249, 256–61 (1997) (positing that the difference between "illegal alien" and "undocumented person" reflects depictions of society as exclusive or inclusive, respectively). *See also* David Nakamura, *'Language As a Weapon': In Trump Era, Immigration Debate Grows More Heated Over What Words to Use*, WASH. POST (Jan. 21, 2018), https://www.washingtonpost.com/politics/language-as-a-weapon-in-trump-era-immigration-debate-grows-more-heated-over-what-words-to-use/2018/01/21/d5d9211a-fd6a-11e7-a46b-a3614530bd87_story.html?utm_term=.654e52ae0f79.

360. Mehan, *supra* note 359, at 267.

361. Lynn H. Fujiwara, *Immigrant Rights are Human Rights: The Reframing of Immigrant Entitlement and Welfare*, 52 SOC. PROBS. 79, 80 (2005).

362. Julia Jacobo, *Donald Trump Says He Will Get 'Bad Hombres' Out of US*, ABC NEWS (Oct. 19, 2016), http://abcnews.go.com/Politics/donald-trump-bad-hombres-us/story?id=42926041.

363. Oven, *supra* note 358, at 502.

364. *See generally* JOHN F. KENNEDY, A NATION OF IMMIGRANTS (1964). *But see* Arica L. Coleman, *The Problem with Calling the U.S. a 'Nation of Immigrants'*, TIME (Mar. 17, 2017), http://time.com/4705179/nation-of-immigrants-problem/.

365. *See* Glenn C. Loury, *An American Tragedy: The Legacy of Slavery Lingers in Our Cities' Ghettos*, BROOKINGS INSTITUTION (Mar. 1, 1998), https://www.brookings.edu/articles/an-american-tragedy-the-legacy-of-slavery-lingers-in-our-cities-ghettos/.

366. *See generally* Rhonda Colvin, *Traveling While Black: Some Americans are Afraid to Explore Their Own Country, Concerns that Evoke the Jim Crow-era Green Book*, WASH. POST (Jan. 26, 2018), https://www.washingtonpost.com/news/national/wp/2018/01/26/feature/traveling-while-black-why-some-americans-are-afraid-to-explore-their-own-country/?utm_term=.38c4a9a90196.

367. Ed Falco, *When Italian Immigrants Were 'The Other'*, CNN (July 10, 2012), http://www.cnn.com/2012/07/10/opinion/falco-italian-immigrants/index.html.

everyone by laying a foundation for, as so painfully carried out in the history of this nation, human exploitation and the destruction of communities.[368]

V. CURRENT CHALLENGES TO CONFRONTING RACIALIZED ENFORCEMENT

Advocacy groups who foresee the deep harms of this confluence face significant challenges in preventing or remedying them. However, because *Terry* stops that do not lead to arrests sit outside any formal area of review by the courts through the Fourth Amendment, advocacy groups must use both litigation and non-litigation responses, keeping in mind key stakeholders that can be leveraged as well as the shortcomings of doing so. State legislative campaigns to enforce immigration at the local level would be less effective with less tools in police officers' toolboxes to control the movement of minority community members. However, the Court's current composition and recent trends make limiting the scope of *Terry v. Ohio* extremely unlikely. Even less likely is the ability of litigation to remedy harms experienced by undocumented individuals whose Fourth Amendment rights are violated, given the inability to suppress identity as the fruit of an unlawful search or seizure.[369] This Part will discuss the challenges in litigation responses to the dynamic of *Terry* as a sword, lessons learned from successful efforts to challenge abuses of *Terry*, and the type of policy advocacy that is possible given the critical stakeholders that can be engaged.

A. Obstacles to Litigations Challenging Race-Based Policing

Under the Fourth Amendment, the product of an unlawful stop or seizure may be considered the "fruit of the poisonous tree."[370] However, when pretextual stops or *Terry* stops based on specific articulable facts (such as presence in a "high-crime area" paired with avoiding an encounter with the police) lead to immigration consequences, the usual vehicles for challenging race-based enforcement are not available. Even though policing based on race—and pretextual justification thereof—runs counter to the heart of the Fourth Amendment, the Court wrote in *Whren v. United States* that the remedy for "object[ions] to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."[371] In immigration, a subject's identity is sufficient to prove commission of an immigration violation and cannot be suppressed even as the fruit of a stop unlawful under the Fourth Amendment[372] and under *Utah v. Strieff*, identity cannot be suppressed.[373]

368. *See* Susan Opotow, *Moral Exclusion and Injustice: An Introduction*, 46 J. SOC. ISSUES 1, 2 (1990).

369. Utah v. Strieff, 136 S. Ct. 2056, 2064 (2016).

370. *See supra* Part I (briefly discussing the exclusionary rule as laid out in Mapp v. Ohio, 367 U.S. 643 (1961)).

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

372. Immigration & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984) ("The 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred."). *See also Strieff*, 136 S. Ct. at 2064 (defendant stopped by an officer in violation of the Fourth Amendment was arrested after the officer discovered an outstanding warrant; a search incident to the arrest yielded drugs and paraphernalia; the Court ruled that the drug evidence was sufficiently attenuated from the "poisonous tree" of the unlawful stop by discovery of the outstanding warrant).

373. *Strieff*, 136 S. Ct. at 2064.

Even though these stops may lead to no criminal charges at all, immigration consequences follow when an identity is ascertained. As a result, the Equal Protection Clause is the most viable litigation response—but as discussed in this section, it faces significant structural challenges.

There are three key structural challenges to Equal Protection Clause claims brought by plaintiffs attempting to show racial profiling, especially in the realm of racialized policing towards undocumented immigrants. The first is procedural. Section 1983 claims concern constitutional matters by definition and therefore, federal courts have subject-matter jurisdiction over them; for that reason, airtight class action lawsuits must comply strictly with federal pleading standards and the class action rules set out in Federal Rules of Civil Procedure Rule 23. The second challenge is substantive—on the merits. To make a claim of racial profiling under the Equal Protection Clause, plaintiffs must be able to show that they were treated differently from other similarly situated individuals and if it is due to their race, they must show that the government action is not narrowly tailored to serve a compelling government interest.[374] The third challenge is strategic; it is often very difficult to find sympathetic ears at the federal district court level, and as shown in *Floyd v. City of New York*, judge-shopping may be necessary to find such a pair of ears.[375]

First, plaintiffs face procedural challenges in the form of heightened pleading standards and getting classes certified. After the geminate cases *Bell Atlantic Corp. v Twombly* and *Ashcroft v. Iqbal* altered the pleading standard from notice to "plausibility," heightened pleading standards negatively affected the disposition of civil rights litigation cases.[376] In civil rights cases where policy decision makers are so far removed from the actual actors that plaintiffs "cannot know or plead essential information with particularity at the outset [of the case] without the benefit of discovery[,]" denying plaintiffs access to discovery endangers vindication of their constitutional and civil rights.[377] If the claimed injury by plaintiffs is being stopped disproportionately more than similarly situated white people, there must be adequate and accessible data (discussed *infra*) to substantiate this claim at the pleading stage—before discovery, which would theoretically provide access to documentation on stops.

The procedural challenges also extend to class certification. To certify a class of plaintiffs, Rule 23 has four requirements: "numerosity, commonality, typicality, and adequate representation."[378] While numerosity may not be difficult—requiring only a class large enough that "joinder of all members is impracticable"[379]— commonality requires that there be "questions of law or fact common to the class[,]"[380] and typicality requires that the injuries suffered by class members be typical of the

374. Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 164 (1989).

375. Macfarlane, *supra* note 84, at 231.

376. Howard M. Wasserman, Iqbal*, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 160 (2010).

377. *Id.* at 158. *Cf.* Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119 (2011).

378. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 (2011).

379. FED. R. CIV. P. 23(a)(1).

380. FED. R. CIV. P. 23(a)(2).

rest of the class.[381] In other words, plaintiffs must show that they suffered the same kind of injury at the hands of the same system and that those chosen to represent the class present typical injuries.[382] In *Floyd v. City of New York*, the class was certified because the class was large—and ascertainable[383]—enough based on the available evidence; the plaintiffs set forth common claims of Fourth and Fourteenth Amendment violations; and the class representatives' injuries arose from the NYPD's stop-and-frisk program.[384] However, the Judge's ability to confirm the estimated number of stops—and the amount of constitutionally suspect ones—was underlined by the sheer body of data plaintiffs provided.[385]

In the immigration enforcement context, if plaintiffs challenging inquiry provisions claim being stopped disproportionately more than similarly situated white people because of Latino appearance, the class could theoretically include U.S. citizens, U.S. nationals, and undocumented immigrants. However, without the sheer amount of data on stops that was available in *Floyd v. City of New York*, plaintiffs will have trouble corroborating that these stops occurred—and that they may have occurred on suspicious constitutional footing. Furthermore, undocumented victims of crimes are already deterred from reporting crimes because encounters with the legal system may result in deportation.[386] These potential class representatives may be hesitant to join in a suit because of the media attention and government focus they may receive, even if they have experienced the most egregious injuries.

Second, challenges confront plaintiffs in showing on the merits that racial profiling has occurred in violation of the Equal Protection Clause through a § 1983 Claim.[387] Section 1983 claims are governed by 42 U.S.C. § 1983;[388] to succeed in a § 1983 claim against a municipality, plaintiffs must show that actions by employees that caused constitutional injury were "pursuant to official municipal policy."[389] This

381. FED. R. CIV. P. 23(a)(3).

382. *Wal-Mart Stores, Inc.,* 564 U.S. at 349.

383. Floyd v. City of N.Y., 283 F.R.D. 153, 160 (S.D.N.Y. 2012) ("All persons who since January 31, 2005 have been, or in the future will be, subjected to the New York Police Department's policies and/or widespread customs of practices of stopping, or stopping and frisk, persons in the absence of a reasonable, articulable suspicion that criminal activity has taken, is taking, or is about to take place in violation of the Fourth Amendment, including persons stopped or stopped and frisked on the basis of being Black or Latino in violation of the Equal Protection Clause of the Fourteenth Amendment.").

384. *Id.* at 177.

385. *Id.* at 172, 164–166.

386. Tom Dart, *Fearing Deportation, Undocumented Immigrants Wary of Reporting Crimes*, GUARDIAN (Mar. 23, 2017), https://www.theguardian.com/us-news/2017/mar/23/undocumented-immigrants-wary-report-crimes-deportation; John Burnett, *New Immigration Crackdowns Creating 'Chilling Effect' on Crime Reporting*, NAT'L PUB. RADIO (May 25, 2017), https://www.npr.org/2017/05/25/529513771/new-immigration-crackdowns-creating-chilling-effect-on-crime-reporting; Betsy Woodruff, *Legal Immigrants Fear Getting Arrested in Court by ICE*, DAILY BEAST (Mar. 30, 2017), https://www.thedailybeast.com/legal-immigrants-fear-getting-arrested-in-court-by-ice.

387. Melissa Whitney, *The Statistical Evidence of Racial Profiling in Traffic Stops and Searches: Rethinking the Use of Statistics to Prove Discriminatory Intent*, 49 B.C.L. REV. 263, 299 (2008); Galloway, *supra* note 374, at 164.

388. 42 U.S.C. § 1983 (2012).

389. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978).

policy can be evidenced through actual "policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy."[390] Where the injury is caused by failure to train, the plaintiff must show deliberate indifference by "a pattern of similar constitutional violations by untrained employees[,]"[391] and may show this deliberate indifference through "conscious disregard for the consequences" of failure to prevent tortious conduct.[392] In *Floyd v. City of New York*, the District Judge evaluated a significant amount of intent evidence: audio recordings of precinct roll calls, statements at meetings regarding data collection, and statements by the high-ranking policymakers in the NYPD.[393] This intent evidence indicated that the stop-and-frisk program was predominantly racially targeted.[394]

In a challenge of race-based policing in immigration enforcement, plaintiffs may claim that police officers stop Latino individuals more often than similarly situated white people. There, the challenge is proving that (1) there is an official or unspoken municipal policy thereof, or (2) the officers engaging in these stops were improperly trained to an extent indicating deliberate indifference on the part of the policymakers. When a state, through legislative campaigns, counts on individual officers to enforce private immigration agendas, but the municipality itself does not have such a policy and its hands are tied by "Can't Stop Me from Asking" provisions, plaintiffs will struggle to show deliberate indifference on the part of the policymakers without evidence of a long-term policy like existed in New York City.[395]

The challenge of establishing a claim on its merits also extends to the Equal Protection analysis. Generally speaking, a plaintiff may show either that the law or policy (1) is facially discriminatory,[396] (2) is facially neutral but is applied with a discriminatory animus and results in impact on one race over another,[397] or (3) is facially neutral but is applied in a clear discriminatory pattern that is "unexplainable on grounds other than race."[398] In *Floyd*, as discussed, the discriminatory animus was easily determined by the large amount of intent evidence.[399] A clear discriminatory pattern was also discernable, as the plaintiffs' case was built upon the statistical analysis of the data available on stops.[400] The district court concluded that

390. *Id.* at 694.

391. Connick v. Thompson, 563 U.S. 51, 62 (2011).

392. Bd. of the Cty. Comm'rs v. Brown, 520 U.S. 397, 407 (1997).

393. Floyd v. City of N.Y., 283 F.R.D. 153, 165–167 (S.D.N.Y. 2012)

394. *Id.*

395. Floyd v. City of N.Y., 959 F.Supp.2d 540, 658–59 (2013). Sufficient evidence existed for District Judge Shira Scheindlin to find "deliberate indifference" because of the two different policies espoused by the NYPD. *Id.* at 603. ("Two different policies . . . [existed:] a written policy that prohibits racial profiling and requires reasonable suspicion for a stop—and another, unwritten policy that encourages officers to focus their reasonable-suspicion-based stops on 'the right people, the right time, the right location.'" (footnotes omitted)).

396. Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2419 (2013) ("[J]udicial review must begin from the position that 'any official action that treats a person differently on account of his race or ethnic origin is inherently suspect.'") (quoting Fullilove v. Klutznick, 448 U.S. 448, 523 (1980) (Stewart, J., dissenting); Johnson v. California, 543 U.S. 499, 505 (2005).

397. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

398. *Id.*

399. Floyd v. City of N.Y., 959 F.Supp.2d 540, 658–59 (2013).

400. *Id.* at 660.

the practice of race-based and otherwise unjustified stops was persistent and widespread, as corroborated by the stop data.[401]

If the plaintiffs' claim is that police officers stop Latino individuals more often than similarly situated white people, the obstacle is being able to present evidence enough to prove that the policy is facially discriminatory (e.g., policy of encouraging these types of stops based on race), or that it has significant impact on one race over another and is accompanied by animus, or it is applied with a clear pattern that cannot be otherwise explained. Dismissing for a moment the difficulty of establishing that a policy in fact existed, a significant challenge confronts plaintiffs in gathering evidence to prove animus or discriminatory intent; the Court itself recognized this as a "sensitive inquiry" where evidence may not be available,[402] but did not pave the way for plaintiffs.

Finally, the strategic challenge of finding a sympathetic—but not overtly biased—forum remains, as highlighted by a wrench in the works criticized after *Floyd v. City of New York*. In New York City, *Floyd* was not the first high-profile lawsuit addressing NYPD's "stop-and-frisk" policy, but arose after settlement of *Daniels v. City of New York* in 2001, a case presided over by Judge Shira Scheindlin in the Southern District of New York.[403] Since arriving on the federal bench career, Judge Scheindlin had arguably evidenced bias against police; she had given interviews exhibiting a slant against police officers, and, according to a study by the New York City Mayor's office, her track record suppressed "evidence on the basis of illegal police searches far more than any of her colleagues—twice as often as the second-place judge."[404]

Six years after *Daniels*, the parties returned to her courtroom, the plaintiffs accusing the NYPD of a resurgence of the stops that precipitated the *Daniels* case and settlement.[405] Judge Scheindlin declined to re-open the case but suggested that there might be a "good constitutional case[]" there, indicating that it might be marked as "related."[406] Because of the "related cases" rule in the District—which allowed judges to claim priority for newly filed cases related to those already assigned to them, Judge Scheindlin was assigned the subsequently filed *Floyd v. City of New York*.[407] The judge was criticized for the appearance of bias against police, and although *Floyd* was handed to the plaintiffs at the district court level—and the City subsequently decided to settle it after newly elected Mayor Bill de Blasio entered office[408]—these criticisms led to the Judge's removal from the cases deemed "related" to *Daniels*.[409] Practically speaking, plaintiffs looking to bring a suit in the

401. *Id.*

402. *Id.*

403. Macfarlane, *supra* note 84, at 242.

404. Jeffrey Toobin, *Rights and Wrongs*, NEW YORKER (May 27, 2013), https://www.newyorker.com/magazine/2013/05/27/rights-and-wrongs-2.

405. Macfarlane, *supra* note 84, at 220.

406. *Id.* at 220–21.

407. *Id.* at 222.

408. Benjamin Weiser & Joseph Goldstein, *Mayor Says New York City Will Settle Suits on Stop-and-Frisk Tactics*, N.Y. TIMES (Jan. 30, 2014), https://www.nytimes.com/2014/01/31/nyregion/de-blasio-stop-and-frisk.html.

409. Macfarlane, *supra* note 84, at 242.

Southern District of New York now faced the difficulty of finding a court as hospitable as Judge Scheindlin's. Likewise, while the "related cases" rule is not unique to the Southern District of New York, potential class action plaintiffs have an uphill road in finding a forum where their claims will be heard without appearance of bias on either side.

These challenges—the requirement for the "right plaintiffs," the right kind of municipal policy, sufficient evidence to survive the pleading stage, as well as time to establish data on police encounters—pose an incredible uphill battle. At present, the majority of challenges to state legislative provisions are facial, not as-applied, so for cases to be as successful as *Floyd* without the suspicious "related cases" rule and an overly sympathetic judge, there must be significant amounts of data on police encounters from which an unbiased judge may infer racial motivation and impact.

B. The Role and Struggle of Data Collection: Keeping Authorities Accountable

Where a state action concerning immigration enforcement does not explicitly classify based on race and is not easily vulnerable to an Equal Protection challenge based on a codified racialized enforcement policy, the best route is establishing by evidence a clear discriminatory pattern that is "unexplainable on grounds other than race."[410] To show racial profiling through statistics, plaintiffs must show "that the disparity cannot be explained by some other nondiscriminatory factor or chance variations in selecting whom to stop."[411] They must have data of such volume and specificity by which experts can show this disparity. A successful racial profiling case, therefore, requires standing on the shoulders of giants before who fought for comprehensive, meaningful, and transparent data collection. There are significant hurdles to clear before plaintiffs can utilize a sound body of data in such a case, culminating in the need for comprehensive tracking at all levels of enforcement.

Data collection for racial profiling analysis requires collecting information "on the nature, character, and demographics of police enforcement practices."[412] This includes an officer's decision to stop as well as how the officer acts during that stop; for example, whether subjects were searched, consent was requested, and how long the encounter lasted.[413] Data collection is often required as part of racial profiling settlements to allow for further monitoring, as occurred in NYPD after *Daniels v. City of New York*.[414] If *Daniels* had not included this requirement for officers to

410. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

411. Whitney, *supra* note 387, at 266.

412. U.S DEP'T OF JUSTICE., A RESOURCE GUIDE ON RACIAL PROFILING DATA COLLECTION SYSTEMS: PROMISING PRACTICES AND LESSONS LEARNED iii (2000), https://www.ncjrs.gov/pdffiles1/bja/184768.pdf.

413. *Id.* at 5.

414. Stipulation of Settlement, Daniels v. City of N.Y., 199 F.R.D. 513 (2001) (No. 1:99-cv-01695).

document their reasons for stop and frisks, *Floyd* would never have been as successful as it was.[415] Some jurisdictions have begun to collect data on stops preemptively in hopes of exonerating themselves before complaints arise.[416] Still, other jurisdictions, like the state of Kansas, require tracking only of racial profiling *complaints*.[417]

However, challenges exist for both data collection and analysis. One significant challenge comes when jurisdictions decide to track and analyze data internally. When handled internally, setting up an effective data collection system can be an arduous, complicated process, as California has discovered.[418] Some jurisdictions preemptively track stop data but miss important variables such as factors leading to reasonable suspicion or cause to stop a vehicle.[419] Others track over a short period of time, using this data to conclude there is no evidence of racial profiling.[420] Still, other jurisdictions track data internally but do not share it, or share it only after significant redaction.[421] Conversely, when data is tracked by external entities, police departments may face allegations of underreporting stops, and in turn, may discount this data and its methodology as "deeply flawed."[422]

Furthermore, even if a sufficiently representative body of data is acquired, a major hurdle is deciding on an interpretation that properly accounts for all relevant factors, including policing priorities and the rate of successful stops.[423] What constitutes a "sound methodology" for data analysis and how to control for population

415. *See* Macfarlane, *supra* note 84, at 221.

416. Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 86 (2001).

417. Kelsey Ryan, *Filing a Complaint over Police Racial Profiling in Kansas? Don't Expect Much*, KAN. CITY STAR (Dec. 17, 2017), http://www.kansascity.com/news/politics-government/article190119129.html.

418. Liam Dillon, *Rules for Collecting Racial Profiling Data in California are Delayed*, L.A. TIMES (July 12, 2017), http://beta.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-california-police-racial-profiling-1499890795-htmlstory.html.

419. Kami Chavis Simmons, *Beginning to End Racial Profiling: Definitive Solutions to an Elusive Problem*, 18 WASH. & LEE J. C.R. & SOC. JUST. 25, 36 (2011).

420. Garrett, *supra* note 416.

421. Ryan, *supra* note 417.

422. Jesse Leavenworth & Vinny Vella, *Police Question Findings on Racial Profiling in Traffic Stops*, HARTFORD COURANT (May 5, 2017), http://www.courant.com/community/hartford/hc-hartford-traffic-stop-data-20170505-story.html.

423. *Id.* Two Connecticut jurisdictions protested external data collection that concluded they had passed a "disparity threshold"; one criminal justice professor wrote in his support that "[t]he researchers fail to consider that patrol resources might be legitimately allocated on the basis of demand for policing services and not the race of the residents[.]" *Id.* For an in-depth discussion of the difficulty of acquiring "good data" from which to draw conclusions, see Emily Badger, *Why It's So Hard to Study Racial Profiling by Police*, WASH. POST: WONKBLOG (Apr. 30, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/04/30/it-is-exceptionally-hard-to-get-good-data-on-racial-bias-in-policing/.

samples varies widely between scholars and analysts.[424] These challenges coalesce in the trend of "polar opposite answers" based on the same body of data.[425]

Advocacy groups predicting an uptick of racialized enforcement must now more than ever call for comprehensive data collection at every level of law enforcement. Data collection still provides the best way to empirically establish the presence of improper, discriminatory motive in racialized enforcement.[426] The scattershot of methodologies emphasizes the need for a unified approach, but the first step is establishing a foundation—a control against which data can be compared when immigration enforcement provisions are passed and go into effect. This advocacy work should be focused at every level—local, county, and state enforcement entities—and should include both traffic stops and pedestrian stops so as to accurately reflect the broad discretion given to officers to initiate non-consensual encounters with civilians.[427]

What made the data in *Floyd v. City of New York* so unique was the access to the very database that police entered the data into, and the statistical analysis available from the two most used justifications for stops.[428] When filling out UF-250s, officers could select any number of factors, including, *inter alia*, "furtive movements" "casing" "evasive actions," and "suspicious bulge."[429] These observable suspect behaviors were specific enough for officers to justify in individual cases, but subjective enough to serve as a basis for conclusion that many of the "furtive movements" stops were based on the bare minimum of stop justification.[430] Furthermore, because the data was required as part of the *Daniels* settlement, there were

424. *See generally* Brian R. Jones, *Biased-Based Policing in Vermont*, 35 VT. L. REV. 925, 940 (2011) (emphasizing "internal benchmarking," or comparing the actions of police officers "within a given geographic area, at a specific time of day or night, and by assignment," as a means of eliminating the need to establish a proper population sample); Garrett, *supra* note 416, at 94 (supporting the use of "early warning systems" when data reveals that "particular officers . . . use questionable techniques or methods substantially more often than the norm in analogous situations"); Sonja B. Starr, *Testing Racial Profiling: Empirical Assessment of Disparate Treatment by Police*, 2016 U. CHI. LEGAL F. 485, 487 (2016) (proposing "auditing," or employing minority individuals to "elicit possible interactions with the police[,]" as a means of testing to monitor racial disparity).

425. Starr, *supra* note 424, at 486 n.4 (citing, conversely, a Washington Post letter from Maya Rockeymoore to President Obama, and commentator Heather McDonald's conclusion that "black crime rates . . . predict the presence of blacks in the criminal justice system."). Either side tends to criticize the other for starting with a conclusion and "reverse engineering" data to support it. *See* Shanifa Nasser & Andrea Janus, *Probe into Racial Profiling by Toronto Police Will Only Prove What Black Community Knows, Says Activist*, CBC NEWS: TORONTO (Nov. 30, 2017), http://www.cbc.ca/news/canada/toronto/human-rights-commission-racial-profiling-inquiry-1.4426707.

426. David A. Harris, *The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection*, 66 L. & CONTEMP. PROBS. 71, 76 (2003) (arguing that data collection allows police departments the means to answer "the most basic questions, such as whether racial targeting of drivers truly happens, and if so, how common a practice it is. . . .").

427. For a broad discussion of which jurisdictions require stop tracking, see Boren & Lai, *supra* note 151.

428. Garrison, *supra* note 160, at 85–86.

429. Fagan, *supra* note 152, at 68.

430. *Id.* at 69.

certain categories of information that were mandatory for tracking—and the data was turned over regularly to counsel for plaintiffs.[431]

Furthermore, because of the wide variation in the jurisdictional application of data collection, advocacy groups in states seeking to pass immigration enforcement legislation should look nationally for methodology and standards. One suggestion is to coordinate with national initiatives such as the National Initiative for Building Community Trust and Justice, established in 2014 through a Department of Justice grant, to determine local need and methods to shore up procedural justice.[432] Alternatively, groups may lobby for and craft data collection rules that meet the NAACP criteria for effective anti-racial profiling bills.[433]

The challenges to effective data collection provides long odds for immigrant advocacy groups anticipating racialized enforcement targeting Latinos. With the humanitarian cost of anxiety and fear among immigrant communities, advocacy groups simply do not have the time required to collect evidence and prove discriminatory animus and impact. At a time when ICE boasts a 37% increase in interior removals in FY 2017 as compared to 2016,[434] every day that immigration enforcement provisions are on the books and carried out in practice is a day of fear and disruption for immigrant communities. Therefore, the best short-term solution is preventing these provisions from being enacted in the first place, namely through engaging immigrant employers in policy change.

C. Engaging Immigrant Employers in Policy Change

For the short-term, the most effective solution to avoid the state-endorsed dangers of unleashing police officers with personal immigration enforcement agendas is to engage employers of immigrants in the policymaking process. Because the immediate consequence of deterring immigrant presence is deterring employment of immigrants, leaders of industries that employ immigrants have skin in the game, so to speak, by losing potential employees. This approach to policy decisions—if long-term—flies in the face of moral and humanitarian concerns about treating immigrants as just cogs in the production system. However, it is effective. This section

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431. Stipulation of Settlement at 8–9, Daniels v. City of New York, 199 F.R.D. 513 (2001) (No. 99 CIV. 01695).

432. *See* U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS DIAGNOSTIC CTR., *Data Driven Solutions*, https://www.ojpdiagnosticcenter.org (last visited May 1, 2018); NAT'L INITIATIVE FOR BUILDING COMTY: TRUST & JUSTICE, *Mission*, TRUSTANDJUSTICE, https://trustandjustice.org/about/mission (last visited May 1, 2018); Larry Kaplan, *DOJ Initiative on Community-Police Relations Draws Support*, NONPROFIT Q. (Sept. 14, 2014), https://nonprofitquarterly.org/2014/09/24/doj-initiative-to-build-better-community-police-relations-draws-support/. For a snapshot of a NIBCTJ pilot site, see Teresa Varley, *Working Together as One*, STEELERS (Dec. 22, 2017), http://www.steelers.com/news/article-4/Working-together-as-one/a2ad0223-8e0b-4461-8404-78052d930a01.

433. *See* NAACP, BORN SUSPECT: STOP-AND-FRISK ABUSES & THE CONTINUED FIGHT TO END RACIAL PROFILING IN AMERICA Appendix III: Anti-Racial Profiling Model Bill (Sept. 2014), https://action.naacp.org/page/-/Criminal%20Justice/Born_Suspect_Report_final_web.pdf.

434. *By the Numbers FY 2017*, IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/topics/fy2017 (last visited May 1, 2018); *FY 2016 ICE Immigration Removals*, IMMIGR. & CUSTOMS ENFORCEMENT (last visited May 1, 2018), https://www.ice.gov/removal-statistics/2016.

reviews the impact of engaging immigrant employers to stop state legislation aimed to drive out undocumented immigrants.

The writing on the wall is clear: heavily agricultural states suffer when anti-immigrant legislation is pushed through. By the time H.B. 87 was passed in Georgia in 2011, containing many copycat provisions to Arizona's S.B. 1070,[435] it had faced significant opposition from the agricultural industry.[436] As predicted, by deterring immigrant presence in the state, the state itself was running off workers the fruit and vegetable industry needed to harvest crops that otherwise would, and did, rot in the fields.[437] With the agricultural workforce (authorized or unauthorized alike) shrinking since 2002,[438] any risk of worker loss is felt deeply by the industry. In 2011, a University of Georgia study found, about 11,000 jobs went unfilled in Georgia.[439] This deterrence of presence also did not result in "self-deportation" from the country; workers instead found agricultural jobs in less hostile states like North Carolina.[440] Likewise, Texas S.B. 4's impact on the agricultural industry has been amplified by increased ICE presence and the omnipresence of interior checkpoints and has resulted in agricultural losses in areas further into the interior.[441]

Reading the writing on the wall, many states have considered these costs when preventing the passage of S.B. 1070 copycats, such as in Kentucky and Idaho. In Idaho, H.B. 76/198 was introduced, a near-carbon copy of S.B. 4 containing the same "Can't Keep Me from Asking" and anti-sanctuary policy provisions.[442] However, the Idaho Dairymen's Association, Food Producers of Idaho, and the Idaho Association of Commerce and Industry worked to lobby against the bill, citing the bill's effect on available workers.[443] "[W]ithout workers, without somebody that's going to be there 12 hours a day, milking your cows, getting dirty, there's no business[.]"[444] The Dairymen's Association Executive Director publicly announced, "We

435. *See supra* Part II.

436. Phillip E. Wolgin & Angela Maria Kelley, *Your State Can't Afford It: The Fiscal Impact of States' Anti-Immigrant Legislation*, CTR. FOR AM. PROGRESS (July 2011), https://cdn.americanprogress.org/wp-content/uploads/issues/2011/07/pdf/state_immigration.pdf.

437. Benjamin Powell, *The Law of Unintended Consequences: Georgia's Immigration Law Backfires*, FORBES (May 17, 2012), https://www.forbes.com/sites/realspin/2012/05/17/the-law-of-unintended-consequences-georgias-immigration-law-backfires/.

438. *The Market for Lemons: If America is Overrun by Low-Skilled Migrants…*, ECONOMIST (July 27, 2017), https://www.economist.com/news/united-states/21725608-then-why-are-fruit-and-vegetables-rotting-fields-waiting-be-picked-if-america.

439. Mike Klein, *Will Georgia Avoid Last Year's Farm Labor Shortage Fiasco?*, GA. PUB. POL'Y FOUND. (Apr. 27, 2012), https://www.georgiapolicy.org/2012/04/will-georgia-avoid-last-years-farm-labor-shortage-fiasco/.

440. *Id.*

441. Christopher Collins, *Immigrant Workers in Texas Could Fill Farm Vacancies, But They're Trapped in the Valley*, TEX. OBSERVER (Oct. 19, 2017), https://www.texasobserver.org/immigrant-workers-texas-fill-farm-vacancies-theyre-trapped-valley/.

442. *Compare* H. 76, 64th Leg., 1st Reg. Sess. (Idaho 2017), *with* S. 4, 85th Leg., Reg. Sess. (Tex. 2017).

443. *ACLU of Idaho: Legislative Recap 2017*, ACLU IDAHO (2017), https://www.acluidaho.org/sites/default/files/aclu_2017_legislative_report_17x11_final_2.pdf.

444. Susan Ferriss, *How Trump's Immigration Crackdown Threatens 'Made in America' Dairy-Industry Miracle*, CTR. FOR PUB. INTEGRITY (Sept. 16, 2017), https://www.publicintegrity.org/2017/09/16/21179/how-trump-s-immigration-crackdown-threatens-made-america-dairy-industry-miracle.

would never be supportive of the bill, and we're reassessing whether we can remain neutral . . . ."[445] As a result, the agriculture and dairy industry's lack of support of S.B. 98/176 was instrumental in the bill dying in committee.[446] In Kentucky, for example, S.B. 6 was introduced in 2011 but died in committee after significant concerns about the associated costs—not the least of which was the loss of economic activity due to losing more than 12,000 jobs.[447]

Advocacy groups seeking to avoid the injury of state immigration enforcement on immigrant communities must address the short-term damage by lobbying with industry leaders, especially those in agriculture where immigrant presence (or lack thereof) immediately affects the bottom line, but must be aware of the long-term damage of relying on these industries to do the policy heavy lifting. Employers can pay immigrants lower wages to do jobs that Americans do not seek.[448] Reliance on industries to spearhead policy reform equates immigrants with their utility to the industry—equating deservingness of dignity with productivity. With that in mind, advocacy groups must work both in the short- and long-term to protect immigrant communities while preserving their dignity.

VI. CONCLUSION

At the fiftieth anniversary of *Terry v. Ohio*, the full weight of *Terry* cannot be underestimated. *Terry* lowered the standard required for non-consensual encounters with law enforcement and has been used effectively to deter the presence of targeted individuals, as shown by the NYPD's massive stop-and-frisk program. At a time when state legislatures are testing the confines of federalism, the continued success of "Show Me Your Papers" and "Can't Stop Me from Asking" provisions after *Arizona* provide a blueprint for states to structure immigration enforcement statutory schemes.

Because "reasonable suspicion" stops can be used to deter presence when paired with political agendas, states today can rely on the deterrent effect of excessive police discretion in initiating non-consensual encounters. *Arizona* meant that immigration status could be investigated at the lowest level encounter with local law enforcement. After *Terry*, the lowest level encounter for a lawful stop by local law enforcement required only a very small amount of suspicion of criminality. Thus, states build upon *Terry*'s vast discretion (and ill-defined limits) to achieve the

445. Harrison Berry, *Trump's Clumsy Sweep: Idaho Immigrants Caught in Political Divide*, BOISE WKLY. (Mar. 1, 2017), https://www.boiseweekly.com/boise/trumps-clumsy-sweep-idaho-immigrants-caught-in-political-divide/Content?oid=4230756.

446. *Id.*

447. John Cheves, *Immigration Bill Would Cost State $40 Million a Year*, LEXINGTON HERALD LEADER (Jan. 14, 2011), http://www.kentucky.com/news/politics-government/article44074908.html; *KY SB6 2011 – Regular Session*, LEGISCAN, https://legiscan.com/KY/bill/SB6/2011 (last visited May 1, 2018). Significantly, Kentucky's racing industry itself has been lobbying Congress to restore a visa exemption in the H2B program that supplied the industry with seasonal workers with stables. Tom Eblen, *Will Trump's Immigration Policies Cause Labor Shortage in Kentucky's Horse Racing Industry?*, LEXINGTON HERALD LEADER (Dec. 10, 2016), http://www.kentucky.com/news/local/news-columns-blogs/tom-eblen/article120179178.html.

448. *See* Natalie Kitroeff & Geoffrey Mohan, *Wages Rise on California Farms. Americans Still Don't Want the Job*, L.A. Times (Mar. 17, 2017), http://www.latimes.com/projects/la-fi-farms-immigration/; Patrick Gillespie, *America's Immigrant Economy: More Work, Less Pay*, CNN MONEY (Aug. 19, 2016), http://money.cnn.com/2016/08/19/news/economy/us-immigrant-economy/index.html.

political goal of self-deportation, just as the NYPD relied on the deterrent effect of *Terry* to decrease the presence of young men of color. Given the grave impact on immigrant communities, advocacy groups must come armed in mounting a response to these initiatives.

Because both "Show Me Your Papers" and "Can't Stop Me from Asking" are equally likely to survive facial Constitutional challenges based on recent trends and the confines of federalism laid out in *Arizona v. United States*, the challenge for advocacy groups is to lay a framework by which the anticipated racialized enforcement can be measured and litigated. This long-term mechanism of data collection, however, is best coupled with short-term engagement by industries that employ large immigrant numbers.

Ultimately, the Administration dictates ICE priorities and charts the course for immigration enforcement. However, state initiatives to encourage "self-deportation" further widen racial rifts between community and authorities when they give carte blanche to immigration enforcement-minded officers. Advocacy groups and the public alike must be aware of the effect of the policing tools that states co-opt to achieve attrition through enforcement. States that enact anti-immigrant legislation will in time discover the grave consequences of immigrant erasure and will have inflicted countless injuries to Latino communities in the process. Until these consequences are widely felt, however, advocates must call attention to the efforts of states to use *Terry* as a sword to encourage self-deportation—relying on a high volume of lawful non-consensual encounters to erode trust among immigrant communities—to erase entire communities from the nation of immigrants.