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# The Curious Relationship Between "Self-Deportation" Policies and Naturalization Rates

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## THE CURIOUS RELATIONSHIP BETWEEN “SELF-DEPORTATION” POLICIES AND NATURALIZATION RATES

by  
Angela M. Banks\*

*Governor Mitt Romney has stated that the country’s immigration problems can be solved through “self-deportation.” Arizona, Alabama, Georgia, South Carolina, and Virginia agree. For example, K–12 public schools in Alabama are required to ascertain the immigration status of all enrolling students. Police officers in Arizona, Alabama, Georgia, South Carolina, and Virginia check the immigration status of all individuals booked into jail. These “self-deportation” laws and policies, also known as immigration enforcement through attrition, are designed to discourage and deter unauthorized migration. Yet these policies are having a broader impact; they are creating a hostile context of reception for immigrants regardless of their immigration status. Social scientists have found that immigrants’ structural and cultural environment—their context of reception—plays an important role in shaping their incorporation patterns, including naturalization rates.*

*Based on this social science research I offer a new argument about the impact of sub-federal immigration enforcement. Sub-federal immigration enforcement has overwhelmingly taken the form of “self-deportation” laws and policies. It is my contention that the growth of these policies may discourage eligible immigrants from naturalizing. The use of racial profiling to implement these policies shapes immigrants’ perceptions about the value of citizenship. It reveals that ethnicity, foreignness, and immigration status are often conflated, and that the social benefits of citizenship are not equally available to all. Recognition of this reality may cause some immigrants to conclude that the benefits of naturalization do not outweigh the costs. While “self-deportation” policies may successfully deter and discourage unauthorized migration, they may also discourage eligible Latino immigrants from naturalizing and becoming formal members of U.S. society.*

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## INTRODUCTION

Governor Mitt Romney has stated that the country's immigration problems can be solved through "self-deportation."<sup>1</sup> Arizona and states throughout the Southeast, like Alabama, Georgia, and South Carolina, agree.<sup>2</sup> For example, K–12 public schools in Alabama are required to ascertain the immigration status of all enrolling students.<sup>3</sup> Police officers

<sup>1</sup> Op-Ed., *A Weakness for Romney, GOP*, DENVER POST, June 25, 2012, at A17.

<sup>2</sup> See Beason–Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Adv. Legis. Serv. 535 (LexisNexis) [hereinafter Beason–Hammon Act]; Support Our Law Enforcement and Safe Neighborhoods Act (Arizona S.B. 1070), ch. 113, 2010 Ariz. Sess. Laws 450, amended by H.B. 2162, ch. 211, 2010 Ariz. Sess. Laws 1070; Illegal Immigration Reform and Enforcement Act of 2011, No. 252, 2011 Ga. Laws 794 [hereinafter Ga. Immigration Law]; An Illegal Immigration Reform Bill, No. 69, 2011 S.C. Acts 325 [hereinafter S.C. Immigration Law].

<sup>3</sup> Beason–Hammon Act § 28(a)(1).

in Arizona, Alabama, Indiana, North Carolina, Tennessee, and Virginia check the immigration status of all individuals booked into jail.<sup>4</sup> Additionally, in Arizona, Alabama, and South Carolina, if during a lawful stop, detention, or arrest a police officer has a reasonable suspicion that an individual is not lawfully present, the officer is required to ascertain the individual’s immigration status.<sup>5</sup> These states also require employers to use E-Verify to ensure that individuals hired are authorized to work in the United States.<sup>6</sup>

These “self-deportation” laws and policies, also known as immigration enforcement through attrition, are designed to discourage and deter unauthorized migration.<sup>7</sup> Yet these policies are having a broader impact; they are creating a hostile context of reception for all immigrants, regardless of immigration status. Social scientists have found that immigrants’ structural and cultural environment—their context of reception—plays an important role in shaping immigrants’ incorporation patterns, including naturalization rates.<sup>8</sup>

Based on this social science research I offer a new argument about the impact of sub-federal immigration enforcement. Immigration scholars have focused on the legal authority of states and localities to enact immigration-related laws,<sup>9</sup> the use of racial profiling in local

<sup>4</sup> ALA. CODE § 31-13-12(a) (LexisNexis Supp. 2011); ARIZ. REV. STAT. ANN. § 13-3906 (2010); IND. CODE ANN. § 11-10-1-2 (LexisNexis 2003); N.C. GEN. STAT. § 162-62 (2011); TENN. CODE ANN. § 40-7-123 (Supp. 2011); VA. CODE ANN. § 19.2-83.2 (2008).

<sup>5</sup> ALA. CODE § 31-13-12(a); Arizona S.B. 1070 § 2; S.C. Immigration Law § 6. The Supreme Court recently held that this provision of Arizona law is not preempted by federal law. *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012).

<sup>6</sup> ARIZ. REV. STAT. ANN. § 23-214 (2012); Beason-Hammon Act § 15(b); S.C. Immigration Law § 9(B).

<sup>7</sup> RANDY CAPPS ET AL., *MIGRATION POLICY INST., DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT* 6 (2011), available at <http://www.migrationpolicy.org/pubs/287g-divergence.pdf>; JESSICA M. VAUGHAN, *CTR. FOR IMMIGRATION STUDIES, ATTRITION THROUGH ENFORCEMENT: A COST-EFFECTIVE STRATEGY TO SHRINK THE ILLEGAL POPULATION* (Apr. 2006), available at <http://www.cis.org/articles/2006/back406.pdf>; Valerie Barney et al., *Peach Sheet, Professions and Business*, 23 GA. ST. U. L. REV. 247, 250–51 (2006).

<sup>8</sup> Throughout this Article I use the terms environment and context interchangeably to refer to the structural and cultural setting that immigrants encounter. See, e.g., IRENE BLOEMRAAD, *BECOMING A CITIZEN: INCORPORATING IMMIGRANTS AND REFUGEES IN THE UNITED STATES AND CANADA* (2006); Irene Bloemraad, *Becoming a Citizen in the United States and Canada: Structured Mobilization and Immigrant Political Incorporation*, 85 SOC. FORCES 667, 674 (2006) [hereinafter Bloemraad, *Becoming a Citizen*]; Irene Bloemraad, *Citizenship Lessons from the Past: The Contours of Immigrant Naturalization in the Early 20th Century*, 87 SOC. SCI. Q. 927, 928 (2006) [hereinafter Bloemraad, *Citizenship Lessons from the Past*]; John R. Logan et al., *The Political and Community Context of Immigrant Naturalisation in the United States*, 38 J. ETHNIC & MIGRATION STUD. 535 (2012); Jennifer Van Hook et al., *For Love or Money? Welfare Reform and Immigrant Naturalization*, 85 SOC. FORCES 643, 647 (2006).

<sup>9</sup> See, e.g., Nathan G. Cortez, *The Local Dilemma: Preemption and the Role of Federal Standards in State and Local Immigration Laws*, 61 SMU L. REV. 47 (2008); Karla Mari McKanders, *Welcome to Hazleton! “Illegal” Immigrants Beware: Local Immigration*

immigration enforcement,<sup>10</sup> and a breakdown of trust between law enforcement officials and immigrant communities.<sup>11</sup> It is my contention that the growth of state and local “self-deportation” laws and policies may discourage eligible immigrants from naturalizing. Naturalization rates for Mexican immigrants have remained disproportionately low. In 2010 only 10% of the 619,913 immigrants who naturalized were from Mexico.<sup>12</sup> This is despite Mexican immigrants accounting for 32.2% of immigrants eligible to naturalize.<sup>13</sup>

The use of racial profiling to implement “self-deportation” laws and policies shapes immigrants’ perceptions about the value of citizenship. It reveals that ethnicity, foreignness, and immigration status are often conflated, and that the social benefits of citizenship are not equally available to all. Recognition of this reality may cause some immigrants to conclude that the benefits of naturalization do not outweigh the costs.<sup>14</sup>

This Article proceeds in five parts. Part I explains the growth of local immigration enforcement and its concentration in the Southeast. This region of the United States has experienced rapid demographic changes due to immigration, which has prompted state and local government officials to become more active in immigration enforcement. Part II

*Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1, 26–27 (2007); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27; Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008); Victor C. Romero, *Devolution and Discrimination*, 58 N.Y.U. ANN. SURV. AM. L. 377 (2002); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57; Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627 (1997); Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619 (2008); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001).

<sup>10</sup> See, e.g., David A. Selden et al., *Placing S.B. 1070 and Racial Profiling into Context, and What S.B. 1070 Reveals About the Legislative Process in Arizona*, 43 ARIZ. ST. L.J. 523 (2011).

<sup>11</sup> A lack of trust can lead to decreased immigrant cooperation with law enforcement agents and therefore less police protection in immigrant communities. See Jennifer M. Chacón, *Border Exceptionalism in the Era of Moving Borders*, 38 FORDHAM URB. L.J. 129 (2010); Jacqueline Hagan et al., *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives*, 88 N.C. L. REV. 1799 (2010); Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F. L. REV. 307 (2009); Lisa R. Pruitt, *Latina/os, Locality, and Law in the Rural South*, 12 HARV. LATINO L. REV. 135 (2009); Virginia Martinez et al., *A Community Under Siege: The Impact of Anti-Immigrant Hysteria on Latinos*, 2 DEPAUL J. SOC. JUST. 101 (2008); Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639 (2011).

<sup>12</sup> OFFICE OF IMMIGRATION STATISTICS, DEP’T OF HOMELAND SEC., 2010 YEARBOOK OF IMMIGRATION STATISTICS 55 tbl.21 (Aug. 2011).

<sup>13</sup> NANCY RYTINA, OFFICE OF IMMIGRATION STATISTICS, DEP’T OF HOMELAND SEC., ESTIMATES OF THE LEGAL PERMANENT RESIDENT POPULATION IN 2010, at 4 tbl.4 (2011).

<sup>14</sup> See, e.g., Van Hook et al., *supra* note 8, at 647 (noting that immigrants are more likely to “pursue social and legal integration if they perceive the host society’s system of status attainment as open and social mobility possible”).

argues that immigrants naturalize in order to take advantage of the social and material benefits of citizenship. Immigrants’ structural and cultural environment, their context of reception, provides information about whether the social and material benefits of citizenship will be available to them. Part III describes one aspect of immigrants’ context of reception—state and local immigration enforcement policy. Part IV demonstrates that racial profiling and minor traffic violations are key aspects of state and local immigration enforcement strategies in the Southeast. Part V contends that these strategies create a hostile context of reception and reveal that citizenship may not provide all of the expected social benefits. “Self-deportation” policies may successfully deter and discourage unauthorized migration, but it may come at the cost of fewer Latino immigrants naturalizing and becoming formal members of U.S. society.

### I. IMMIGRATION IN THE SOUTHEAST

Unauthorized migration has become a significant political issue in the Southeast as the demographics in this part of the country have changed. Unauthorized migrants are blamed for increased criminal activity, depleting limited government resources, and reducing employment opportunities for Americans and lawful migrants.<sup>15</sup> The federal government’s failure to effectively limit or prevent unauthorized migration has led states to demand greater involvement in immigration enforcement. State laws encouraging unauthorized migrants to “self-deport” have become a popular choice. Within the Southeast this has meant state laws requiring public health officials, K-12 school officials, and law enforcement officers to determine the immigration status of individuals being served and report unauthorized migrants to Immigration and Customs Enforcement (ICE).<sup>16</sup> Legislators state that these laws are intended to discourage, reduce, and ultimately eliminate unauthorized migration.<sup>17</sup>

Between 1990 and 2010 the Southeast became a new destination for large-scale Latino immigration.<sup>18</sup> This Part describes the demographic changes that the region experienced in this time period and the legal responses to these changes.

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<sup>15</sup> See *infra* Part I.B.

<sup>16</sup> See, e.g., Beason-Hammon Act, 2011 Ala. Adv. Legis. Serv. 535 (LexisNexis); Ga. Immigration Law, 2011 Ga. Laws 794.

<sup>17</sup> See, e.g., Barney et al., *supra* note 7, at 251; VAUGHAN, *supra* note 7, at 13.

<sup>18</sup> HELEN B. MARROW, *NEW DESTINATION DREAMING: IMMIGRATION, RACE, AND LEGAL STATUS IN THE RURAL AMERICAN SOUTH* (2011).

### A. Demographics

Of the ten states with the largest Latino growth between 1990 and 2010, eight are located in the Southeast.<sup>19</sup> The increases these states have experienced range from nearly 400% to over 900%.<sup>20</sup>

STATE	1990–2010 % INCREASE
North Carolina	942.8%
Arkansas	836.1%
Tennessee	785.9%
Georgia	683.8%
South Carolina	671.4%
Alabama	653.6%
Kentucky	504.2%
Nevada	475.9%
Mississippi	411.5%
Minnesota	364.4%

As a result, states like North Carolina, Georgia, and Virginia have seen Latinos go from being 2% or less of the state's population to almost 9%.<sup>22</sup>

STATE	LATINO POPULATION 1990	LATINO POPULATION 2010
North Carolina	1.2%	8.4%
Arkansas	0.8%	6.4%
Tennessee	0.7%	4.6%
Georgia	1.7%	8.8%
South Carolina	0.9%	5.1%
Alabama	0.6%	3.9%
Kentucky	0.6%	3.1%
Mississippi	0.6%	2.7%
Virginia	2.6%	7.9%
Maryland	2.6%	8.2%

<sup>19</sup> See SHARON R. ENNIS ET AL., U.S. CENSUS BUREAU, THE HISPANIC POPULATION: 2010, at 6 tbl.2 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf>; BETTY GUZMÁN, U.S. CENSUS BUREAU, THE HISPANIC POPULATION: 2000, at 4 tbl.2 (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-3.pdf>.

<sup>20</sup> See ENNIS ET AL., *supra* note 19, at 6 tbl.2; GUZMÁN, *supra* note 19, at 4 tbl.2.

<sup>21</sup> See ENNIS ET AL., *supra* note 19, at 6 tbl.2; GUZMÁN, *supra* note 19, at 4 tbl.2.

<sup>22</sup> See ENNIS ET AL., *supra* note 19, at 6 tbl.2; GUZMÁN, *supra* note 19, at 4 tbl.2.

<sup>23</sup> See ENNIS ET AL., *supra* note 19, at 6 tbl.2; GUZMÁN, *supra* note 19, at 4 tbl.2.

A significant portion of the Latino population in southeastern states is comprised of U.S. citizens, green-card holders who are formally referred to as lawful permanent residents (LPRs), and nonimmigrants.<sup>24</sup> While southeastern states have a higher proportion of unauthorized migrants than traditional Latino immigrant destinations like California, Texas, and Florida, citizens and lawful migrants account for at least half of the Latino population in the Southeast.<sup>25</sup> Even if one were to assume that all unauthorized migrants in the Southeast are Latinos, approximately half of the Latino residents would still be citizens or lawful migrants.<sup>26</sup> For example, in 2010 unauthorized migrants accounted for 4.1% of North Carolina’s population and the Latino population was 8.4%.<sup>27</sup> Similarly in Georgia unauthorized migrants accounted for 4.7% of the state’s population and Latinos accounted for 8.8%.<sup>28</sup> Despite the variation of legal statuses represented within the Latino population, politicians often conflate Latinos and unauthorized migrants.<sup>29</sup> Conflating these two populations undermines the incorporation of lawfully present Latino immigrants.

The existence of an unauthorized migrant population in the Southeast has prompted calls for greater immigration enforcement by federal, state, and local officials. One of the concerns driving the need for greater immigration enforcement has been a perception that the unauthorized migrant population is causing an increase in violent crime.

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<sup>24</sup> See MARROW, *supra* note 18, at 6 map 3; JEFFREY S. PASSEL, PEW HISPANIC CTR., GROWING SHARE OF IMMIGRANTS CHOOSING NATURALIZATION 29–30 (2007), *available at* <http://www.pewhispanic.org/files/reports/74.pdf>. Lawful permanent residents are noncitizens who have been granted permission to reside in the United States indefinitely. Immigration and Nationality Act (INA), § 101(a)(15), 8 U.S.C. § 1101(a)(15) (2006). Nonimmigrants are noncitizens who have been granted permission to enter the United States for a specific purpose for a specified period of time. INA § 214, 8 U.S.C. § 1184. For example, a foreign student who is admitted pursuant to a student visa is a nonimmigrant. The student is admitted to attend school and is allowed to remain in the United States for a specified period of time.

<sup>25</sup> See MARROW, *supra* note 18, at 6–7 & map 3; *see infra* text accompanying notes 26–28.

<sup>26</sup> This assumption would overestimate the number of Latino unauthorized migrants because recent Department of Homeland Security statistics indicate that unauthorized migrants hail from Mexico, Central America, China, India, the Philippines, Brazil, and Korea. MICHAEL HOEFER ET AL., OFFICE OF IMMIGRATION STATISTICS, DEP’T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2010, at 4 tbl.3 (Feb. 2011), *available at* [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2010.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf). The percentage of unauthorized migrants from Mexico, Central and South America is high, but it is not 100%. *Id.* (estimating this portion of the unauthorized population to be approximately 80%).

<sup>27</sup> See ENNIS ET AL., *supra* note 19, at 6 tbl.2; HOEFER, *supra* note 26, at 4 tbl.4.

<sup>28</sup> See ENNIS ET AL., *supra* note 19, at 6 tbl.2; HOEFER, *supra* note 26, at 4 tbl.4.

<sup>29</sup> See, e.g., Plaintiffs’ Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction at 8, Cent. Ala. Fair Hous. Ctr. v. Magee, No. 2:11cv982-MHT (M.D. Ala. Nov. 18, 2011) (providing statements of Alabama legislators conflating Latino and unauthorized migrants).

*B. Crime*

A perceived connection between immigrants and crime dates back to the nineteenth century.<sup>30</sup> During that time period immigrants were blamed for increased criminal activity in cities like New York and Chicago.<sup>31</sup> Today immigrants, particularly unauthorized migrants, are blamed for drug-related crimes and drunk driving accidents. Social science research, however, shows that increased immigration does not lead to increased crime. As early as 1911 the Dillingham Commission concluded:

No satisfactory evidence has yet been produced to show that immigration has resulted in an increase in crime disproportionate to the increase in adult population. Such comparable statistics of crime and population as it has been possible to obtain indicate that immigrants are less prone to commit crime than are native Americans.<sup>32</sup>

In 1994 the United States Commission on Immigration Reform reached similar conclusions.<sup>33</sup> Additionally, crime rates declined in the 1990s and early 2000s despite historic highs in authorized and unauthorized migration.<sup>34</sup> Between 1994 and 2006 the foreign-born

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<sup>30</sup> Historically within the United States public sentiment has linked increased immigration with higher crime rates. In the early twentieth century this perception led to the enactment of the first comprehensive crime-based deportation regime. Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007); 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, 1024 (2010); Angela M. Banks, *The Normative & Historical Cases for Proportional Deportation*, 62 EMORY L.J. (forthcoming 2013) (manuscript at 17–21) (manuscript on file with author). In the 1980s this concern supported harsher immigration consequences for noncitizens convicted of aggravated felonies. Banks, *supra* (manuscript at 43). With increased concerns about unauthorized migration and immigrant criminality in the 1990s legislative reform expanded the aggravated felony definition and created harsher immigration consequences for noncitizens convicted of these crimes. *Id.*

<sup>31</sup> See, e.g., FREDERIC J. HASKIN, *THE IMMIGRANT: AN ASSET AND A LIABILITY* ch. 18 (1913) (discussing the “oft-repeated statement that the aliens coming to America are distinguished for their criminal tendencies”); CYRUS PEIRCE, *CRIME: ITS CAUSE AND CURE* 29–32 (Boston, Crosby, Nichols, & Co. 1854) (decrying the trend of immigrants to remain in large cities and proposing inducements to convince them to move to the rural west).

<sup>32</sup> S. Doc. No. 61-747, at 163 (1910).

<sup>33</sup> U.S. COMM’N ON IMMIGRATION REFORM, *U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY* 4 (1994).

<sup>34</sup> RUBÉN G. RUMBAUT & WALTER A. EWING, IMMIGRATION POLICY CTR., *THE MYTH OF IMMIGRANT CRIMINALITY AND THE PARADOX OF ASSIMILATION: INCARCERATION RATES AMONG NATIVE AND FOREIGN-BORN MEN* 4 (2007), available at [http://www.immigrationpolicy.org/sites/default/files/docs/Imm%20Criminality%20\(IPC\).pdf](http://www.immigrationpolicy.org/sites/default/files/docs/Imm%20Criminality%20(IPC).pdf); see also M. Kathleen Dingeman & Rubén G. Rumbaut, *The Immigration-Crime Nexus and Post-Deportation Experiences: En/Countering Stereotypes in Southern California and El Salvador*, 31 U. LA VERNE L. REV. 363, 372 (2010).

population increased 71% from 22 million to 38 million.<sup>35</sup> During this same time period there was a 34.2% decrease in the violent crime rate.<sup>36</sup> The homicide rate decreased 37.8%, the robbery rate dropped 40.8%, and the assault rate fell 31.9%.<sup>37</sup>

Despite this evidence, immigrant populations continue to be blamed for criminal activity in southeastern communities. For example, the Davidson County Sheriff’s Office in Tennessee identified the arrest of six unauthorized migrants for homicide during the summer of 2006 as the impetus for its 287(g) program.<sup>38</sup> The fact that several of these individuals had previously been arrested for misdemeanor crimes supported the community’s belief that 287(g) could be an effective tool for protecting public safety.<sup>39</sup> The sheriff in Gwinnett County, Georgia was motivated to enter into a 287(g) agreement to combat the expansion of Mexican cartels within the county.<sup>40</sup> Within the space of one week two sets of Mexican drug dealers were arrested in Gwinnett County on the same street.<sup>41</sup> One arrest led to one of the largest methamphetamine busts in history and the other led to a gun battle that ended with one person dead.<sup>42</sup> Gwinnett County Sheriff Butch Conway stated that an effective way to fight the cartels was to deport any “illegal” that commits a crime, even a traffic offense.<sup>43</sup> He stated that an individual could be a major in a cartel and if he is pulled over for no license he is going to be deported.<sup>44</sup> Sheriff Neil Warren in Cobb County, Georgia also saw a connection between the increase in unauthorized migration and methamphetamine activity in the metro Atlanta area.<sup>45</sup> In Manassas County, Virginia residents founded Help Save Manassas to deal with concerns about unauthorized migration. Help Save Manassas was worried about unauthorized migrants involved in gang-related murders, rapes,

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<sup>35</sup> Dingeman & Rumbaut, *supra* note 34, at 373.

<sup>36</sup> RUMBAUT & EWING, *supra* note 34, at 4.

<sup>37</sup> *Id.*

<sup>38</sup> DAVIDSON CNTY. SHERIFF’S OFFICE, 287(G) TWO-YEAR REVIEW 4 (2009), *available at* [http://blackburn.house.gov/UploadedFiles/287g\\_Two\\_Year\\_Review.pdf](http://blackburn.house.gov/UploadedFiles/287g_Two_Year_Review.pdf). The 287(g) program allows state and local law enforcement officials to enforce federal immigration law. *See infra* Part III.A for a more detailed discussion of the 287(g) program.

<sup>39</sup> *See* Daron Hall, Op-Ed., *The 287(g) Program Is Working, and Residents Are Safer Because of It*, TENNESSEAN, Aug. 12, 2008, *available at* 2008 WLNR 26372843.

<sup>40</sup> Dustin Inman Society, *287(g); Gwinnett County GA—ENFORCEMENT WORKS!*, YOUTUBE (May 20, 2009), <http://www.youtube.com/watch?v=EvkKTekM8Yo&noembed=1> (CBS Atlanta local news report).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Al Meyer, *Neil Warren at the Cobb County GOP Breakfast*, COBB COUNTY REPUBLICAN (Apr. 28, 2005), [http://theconservativesentinel.blogspot.com/2005\\_04\\_01\\_archive.html](http://theconservativesentinel.blogspot.com/2005_04_01_archive.html).

and child sexual assaults. To address these concerns Help Save Manassas lobbied for a 287(g) agreement.<sup>46</sup>

In addition to concerns about serious or violent crimes, drinking and driving cases involving unauthorized migrants became another justification for increased local immigration enforcement. Between 2003 and 2008 over one-third of the drunk driving charges in Johnston County, North Carolina have been levied against Latinos.<sup>47</sup> Stories such as that of Luciano Tellez captivate communities and serve as rallying cries for local immigration enforcement.<sup>48</sup> Mr. Tellez was an unauthorized migrant when he ran a stop sign, ran into another car, and caused an explosion. Mr. Tellez killed a man and a nine-year old boy and sped away from the scene of the accident. When his car was stopped it was littered with beer cans.<sup>49</sup> In another incident seven-year old Marcus Lassiter was killed when a stolen car driven by Hipolito Camora Hernandez hit him.<sup>50</sup> Hernandez was charged with second-degree murder, speeding, and driving while intoxicated.<sup>51</sup> Hernandez had been arrested previously for driving while intoxicated, but he was never convicted.<sup>52</sup> The article reporting this story does not mention Hernandez's immigration status, but Sheriff Bizzell is quoted saying, "If [Hernandez] hadn't been here to start with, that wouldn't have happened. A 7-year old that's playing in his front yard pays the ultimate price for another drunk Mexican."<sup>53</sup> Johnston County, North Carolina is not the only jurisdiction to experience drunk driving fatalities at the hands of unauthorized migrants. An unauthorized migrant who was driving while intoxicated killed Scott Gardner, a Gaston County, North Carolina high school teacher.<sup>54</sup> Mr. Gardner's wife was also in the vehicle and was left in critical

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<sup>46</sup> *Statement on New 287(g) Agreement*, HELP SAVE MANASSAS, <http://www.helpsave.manassas.org/index.php/press-releases/new-287g-agreement>.

<sup>47</sup> Kristin Collins, *Tolerance Wears Thin*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 7, 2008, at A1.

<sup>48</sup> Johnston County does not have a 287(g) agreement, but Sheriff Steve Bizzell brokered a deal with Wake County whereby some unauthorized migrants arrested in Johnston County are taken to Wake County where a 287(g) jail enforcement agreement exists. Sarah Ovaska, *Deportation Fear Fuels Fight*, NEWS & OBSERVER (Raleigh, N.C.), June 12, 2008, at A1.

<sup>49</sup> Collins, *supra* note 47.

<sup>50</sup> Ovaska, *supra* note 48.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Press Release, Richard Burr, U.S. Senator of N.C., *Burr, Dole Re-Introduce the Scott Gardner Act* (Mar. 13, 2007), [http://burr.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord\\_id=a36192c1-9e65-4863-9546-d1ce0de1bb6b](http://burr.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=a36192c1-9e65-4863-9546-d1ce0de1bb6b); Karen Shugart, *Driving While Hispanic*, CREATIVE LOAFING CHARLOTTE (Dec. 21, 2005), <http://clclt.com/charlotte/Content?oid=2360315>; *Illegal Immigrant Indicted for 2nd Degree Murder*, WECT (Aug. 1, 2005), <http://www.wect.com/Global/story.asp?S=3668666&nav=2gQccpas>.

condition.<sup>55</sup> The driver had several previous DUI convictions.<sup>56</sup> In Georgia, two car accidents in Cobb County involving unlicensed unauthorized migrants caused the death of a Cobb County deputy and the father of six children.<sup>57</sup> The Sheriff’s Department of Alamance County in North Carolina contends that DUIs are the number one killer of Latino males.<sup>58</sup> These accidents are used to highlight the importance of local immigration enforcement, specifically 287(g) agreements.<sup>59</sup>

Within the past twenty years, southeastern states have experienced a significant increase in the Latino population. This growth is the result of both births and immigration.<sup>60</sup> Part of that growth is due to unauthorized migration, and residents within the Southeast blame unauthorized migrants for drug-related criminal activity and drunk driving. Unauthorized migrants’ perceived disproportionate involvement in criminal activity has fueled support for state and local law enforcement officials to be involved in immigration enforcement.

As southeastern states have struggled to address the local challenges related to unauthorized migration, less attention has been paid to incorporating lawfully present Latinos (citizens, green-card holders/LPRs, and nonimmigrants) into the local communities in which they reside and work. Immigrant incorporation is achieved when immigrants are integrated into U.S. society such that it is difficult to differentiate their legal protections, access to public resources, educational outcomes, language skills, and job opportunities from those of native-born citizens.<sup>61</sup> Certain strategies and policies for addressing

<sup>55</sup> *Illegal Immigrant Indicted for 2nd Degree Murder*, *supra* note 54.

<sup>56</sup> *Id.*; Press Release, Richard Burr, *supra* note 54.

<sup>57</sup> Brian Feagans, *Bills Aim to Tighten Clamps on Illegals*, ATLANTA J. & CONST., Feb. 11, 2007, at D1.

<sup>58</sup> Karen Welsh, *Illegal Immigrants Filling Jails*, CAROLINA J. ONLINE (July 27, 2006), [http://www.carolinajournal.com/articles/display\\_story.html?id=3465](http://www.carolinajournal.com/articles/display_story.html?id=3465).

<sup>59</sup> These concerns also motivated the 287(g) agreement in Nashville, Tennessee. Amada Armenta, *From Sheriff’s Deputies to Immigration Officers: Screening Immigrant Status in a Tennessee Jail*, 34 LAW & POL’Y. 191, 196 (2012). Drunk driving and other forms of impaired driving are serious threats to public safety. Community outrage about drunk driving has been particularly vociferous when the drivers are immigrants, particularly unauthorized migrants. Drunk driving accidents involving citizens have not raised the same types of concerns within communities. When accidents have involved unauthorized migrants, the public has called for the broken immigration system to be reformed. Public officials contend that “only a lockdown on our borders could remedy this situation.” Shugart, *supra* note 54. When accidents involve Latino immigrant victims and United States citizen drunk drivers, no similar outrage is visible. *Id.* Drunk driving is serious no matter who is behind the wheel, but there is little justification for treating the crime differently when committed by unauthorized migrants rather than citizens.

<sup>60</sup> See Stephen Ceasar, *U.S. Hispanic Population Tops 50 Million*, L.A. TIMES, Mar. 25, 2011, (Nation) at 15.

<sup>61</sup> See RICHARD ALBA & VICTOR NEE, REMAKING THE AMERICAN MAINSTREAM: ASSIMILATION AND CONTEMPORARY IMMIGRATION 5–6, 11–12 (2003); ALEJANDRO PORTES & RUBÉN G. RUMBAUT, IMMIGRANT AMERICA: A PORTRAIT 13, 232–41 (3d ed. 2006)

unauthorized migration can undermine the immigrant incorporation process for lawfully present migrants. Part II uses social science theory on immigrant incorporation to explain how immigration enforcement strategies can undermine immigrant incorporation by discouraging green-card holders from naturalizing.

## II. IMMIGRANT INCORPORATION

### A. *Naturalization*

*E pluribus unum*, a melting pot, a tossed salad, a mosaic. These are all terms that are used to describe the various ways in which immigrants are incorporated into U.S. society.<sup>62</sup> The United States prides itself in being a country of immigrants that is simultaneously a cohesive nation-state. Whether or not immigrants are incorporated into U.S. society is an issue of importance to the government and social scientists. Federal agencies and courts have identified it as an important goal, and social scientists have investigated the processes by which incorporation occurs.

From 1795 to 1952, U.S. law treated immigration as a process by which foreign-born residents became citizens.<sup>63</sup> During this time period the naturalization process required applicants to submit a declaration of intent several years before actually naturalizing.<sup>64</sup> Once this declaration was submitted, the “intending citizen” had rights, benefits, and access to resources that were unavailable to immigrants who had not filed the

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[hereinafter PORTES & RUMBAUT, IMMIGRANT AMERICA]; ALEJANDRO PORTES & RUBÉN G. RUMBAUT, LEGACIES: THE STORY OF THE IMMIGRANT SECOND GENERATION 46–48 (2001) [hereinafter PORTES & RUMBAUT, LEGACIES].

<sup>62</sup> Throughout this paper I use the terms incorporated and assimilated interchangeably. Both terms refer to the cultural and structural inclusion of immigrants in American society. Cultural incorporation, also referred to as acculturation, is the process by which immigrants adopt the language, culture, ideals, values, and behaviors of the receiving society. PORTES & RUMBAUT, LEGACIES, *supra* note 61, at 46. Structural incorporation focuses on immigrants’ place within a society’s socioeconomic hierarchy. Alejandro Portes & Alejandro Rivas, *The Adaptation of Migrant Children*, 21 FUTURE OF CHILDREN 219 (2011), available at [http://futureofchildren.org/futureofchildren/publications/docs/21\\_01\\_10.pdf](http://futureofchildren.org/futureofchildren/publications/docs/21_01_10.pdf); see also MILTON M. GORDON, ASSIMILATION IN AMERICAN LIFE: THE ROLE OF RACE, RELIGION, AND NATIONAL ORIGINS (1964); Min Zhou, *Segmented Assimilation: Issues, Controversies, and Recent Research on the New Second Generation*, 31 INT’L MIGRATION REV. 975, 977 (1997). This is typically measured by examining educational attainment, residential concentration, intermarriage rates, and employment. PORTES & RUMBAUT, LEGACIES, *supra* note 61, at 46–50.

<sup>63</sup> HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 8 (2006).

<sup>64</sup> *Id.*; see also Nationality Act of 1940, ch. 876, 54 Stat. 1137; Naturalization Act of 1870, ch. 254, 16 Stat. 254; Naturalization Law of 1802, ch. 28, 2 Stat. 153, *amended by* Naturalization Act of 1870, ch. 54, 16 Stat. 254; Naturalization Act of 1798, ch. 54, 1 Stat. 556 (repealed 1802); U.S. Naturalization Act of 1795, ch. 20, 1 Stat. 414, *repealed by* Naturalization Act of 1798, 1 Stat. 556; U.S. Naturalization Law of 1790, ch.3, 1 Stat. 103, *repealed by* U.S. Naturalization Act of 1795, 1 Stat. 414.

declaration.<sup>65</sup> For example, intending citizens were eligible for land grants pursuant to the Homestead Act of 1862, occasionally granted diplomatic protection by the United States when abroad, and could vote until the early twentieth century.<sup>66</sup> Hiroshi Motomura contends that during this time period immigrants were seen as Americans in waiting.<sup>67</sup> There was a presumption that eligible immigrants would naturalize.<sup>68</sup> Immigration was viewed as a process that ended with naturalization. The extension of rights, benefits, and access to resources allowed immigrants to reap the material benefits of citizenship before that status was officially granted. U.S. law no longer extends these material benefits to intending citizens and the declaration of intention was made optional in 1952.<sup>69</sup> The process of becoming a citizen is no longer a gradual process, but immigrant incorporation remains a goal of U.S. immigration law. Naturalization is one way in which this goal is operationalized.<sup>70</sup>

In 1997 the U.S. Commission on Immigration Reform highlighted the importance of immigrant incorporation. The Commission referred to this process as Americanization.<sup>71</sup> Americanization was defined as “the process of integration by which immigrants become part of our communities,” it is the “civic incorporation of immigrants, that is the cultivation of a shared commitment to the American values of liberty, democracy, and equal opportunity.”<sup>72</sup> Naturalization plays an important part in this process. The Commission noted that “[n]aturalization is the most important act a legal immigrant undertakes in the process of becoming an American.”<sup>73</sup> President Bush’s Task Force on New Americans reiterated the importance of immigrant incorporation and naturalization in 2006. This task force was charged with strengthening

<sup>65</sup> MOTOMURA, *supra* note 63, at 8–9.

<sup>66</sup> *Id.* at 9.

<sup>67</sup> *Id.*

<sup>68</sup> This presumption only extended to those immigrants who were eligible for naturalization. Between 1790 and 1952 there were racial restrictions on naturalization. IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 42–43 (1996). There was no presumption that racially ineligible immigrants would become citizens.

<sup>69</sup> MOTOMURA, *supra* note 63, at 9, 116.

<sup>70</sup> T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 16 (1990) (“Although federal law does not require that resident aliens apply for naturalization, citizenship is clearly the intended end of the immigration process. Given the predominant American view that most foreigners would acquire U.S. citizenship if they could, resident aliens who choose not to naturalize are subject to criticism or suspicion.” (footnote omitted)).

<sup>71</sup> U.S. COMM’N ON IMMIGRATION REFORM, *BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY: EXECUTIVE SUMMARY* v–vii (1997); *see also Final Report of the Commission on Immigration Reform: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 105th Cong. 9–11 (1997) (statement of Hon. Shirley M. Hufstедler, Chair, U.S. Comm’n on Immigration Reform).

<sup>72</sup> U.S. COMM’N ON IMMIGRATION REFORM, *supra* note 71, at vi.

<sup>73</sup> *Id.* at xii.

federal, state, and local agency efforts “to help legal immigrants embrace the common core of American civic culture, learn our common language, and fully become Americans.”<sup>74</sup>

Immigration law and policy, historically and today, have viewed naturalization as an important goal of the immigration process. Naturalization symbolizes the complete incorporation of immigrants in American society. Failed incorporation threatens the realization of *e pluribus unum*.<sup>75</sup> The Supreme Court recognized the problems that arise when immigrants are not successfully incorporated into U.S. society. In *Plyler v. Doe* the Court stated that the existence of “a substantial ‘shadow population’” of unauthorized migrants

raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.<sup>76</sup>

If immigrants are failing to naturalize because they believe that they will not be able to fully reap the social benefits of citizenship, a fundamental immigration policy goal has been thwarted.

Immigrant incorporation has also been a perennial area of study for immigration scholars. Scholars initially studied the assimilation of Southern and Eastern European immigrants during the late 19th and early 20th century.<sup>77</sup> These immigrants were deemed “undesirable, unassimilable, and hostile or indifferent to American values.”<sup>78</sup> Once Southern and Eastern European immigrants successfully assimilated, scholars began to examine how that process occurred and whether it was unique to that historical moment and the characteristics of those immigrants.<sup>79</sup> These questions became relevant again when examining the trajectory of post-1965 immigrants who are overwhelmingly from

<sup>74</sup> TASK FORCE ON NEW AMERICANS, DEP’T OF HOMELAND SEC., BUILDING AN AMERICANIZATION MOVEMENT FOR THE TWENTY-FIRST CENTURY iv (2008).

<sup>75</sup> This is the national motto, which means “from many, one.” U.S. COMM’N ON IMMIGRATION REFORM, *supra* note 71, at v n.2. The Commission on Immigration Reform noted that this motto “has also come to mean the vital unity of our national community founded on individual freedom and the diversity that flows from it.” *Id.*

<sup>76</sup> *Plyler v. Doe*, 457 U.S. 202, 218–19 (1982).

<sup>77</sup> GORDON, *supra* note 62; ROBERT EZRA PARK, RACE AND CULTURE (1950); ROBERT E. PARK ET AL., THE CITY (1925); W. LLOYD WARNER & LEO SROLE, THE SOCIAL SYSTEMS OF AMERICAN ETHNIC GROUPS (1945).

<sup>78</sup> LEONARD DINNERSTEIN & DAVID M. REIMERS, ETHNIC AMERICANS: A HISTORY OF IMMIGRATION 96 (5th ed. 2009).

<sup>79</sup> See, e.g., TOMÁS R. JIMÉNEZ, REPLINISHED ETHNICITY: MEXICAN AMERICANS, IMMIGRATION, AND IDENTITY 140–41 (2010); MARROW, *supra* note 18; DOUGLAS S. MASSEY & MAGALY SÁNCHEZ R., BROKERED BOUNDARIES: CREATING IMMIGRANT IDENTITY IN ANTI-IMMIGRANT TIMES (2010); PORTES & RUMBAUT, IMMIGRANT AMERICA, *supra* note 61, at 91–93; PORTES & RUMBAUT, LEGACIES, *supra* note 61, at 44–49; MARY C. WATERS, BLACK IDENTITIES: WEST INDIAN IMMIGRANT DREAMS AND AMERICAN REALITIES (1999).

Asia, Africa, and Latin America. Would the differences in race, ethnicity, and labor market conditions make it harder for post-1965 immigrants to successfully assimilate? Recent theories on the incorporation of post-1965 immigrants focus on context of reception as an important factor. This section utilizes the context of reception model to examine the impact that local immigration enforcement strategies can have on naturalization rates.

### B. *Why Do Immigrants Naturalize?*

Not everyone can naturalize. Naturalization is available to noncitizens who are at least eighteen years old, have a green card, have resided in the United States continuously for five years, are persons of good moral character, are “attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States,” are able to read, write, and speak English, and are knowledgeable about U.S. history and government.<sup>80</sup>

Naturalization is the only means by which immigrants become full members of the American polity. Citizens have the most extensive bundle of rights within the United States. The rights to vote and remain in the United States are considered two of the most important rights.<sup>81</sup> Many scholars contend that access to the material benefits of citizenship shape naturalization decisions.<sup>82</sup> Yet naturalization also provides immigrants with social benefits, such a sense of acceptance and membership within the host society and social mobility.<sup>83</sup> The social environment that immigrants experience conveys valuable information about whether immigrants are welcome, whether the host society values immigrant contributions, and whether acceptance and mobility will be possible.<sup>84</sup> Immigrants are more likely to “pursue social and legal integration if they perceive the host society’s system of status attainment as open and social

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<sup>80</sup> Immigration and Nationality Act (INA) §§ 316, 334(b), 8 U.S.C. §§ 1427, 1445(b) (2006); 8 C.F.R. §§ 312.1–.5 (2012). The residence requirement is only three years if the individual is the spouse of a U.S. citizen. INA § 319, 8 U.S.C. § 1430.

<sup>81</sup> See, e.g., PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP* 163–75 (1998).

<sup>82</sup> See, e.g., DAVID JACOBSON, *RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP* 39–40, 65 (1996); GUILLERMINA JASSO & MARK R. ROSENZWEIG, *THE NEW CHOSEN PEOPLE: IMMIGRANTS IN THE UNITED STATES* 99–101 (1990); SCHUCK, *supra* note 81, at 164–75.

<sup>83</sup> John A. Garcia, *Political Integration of Mexican Immigrants: Explorations into the Naturalization Process*, 15 INT’L MIGRATION REV. 608, 617 (1981); Kerstin Gerst & Jeffrey A. Burr, *Welfare Use Among Older Hispanic Immigrants: The Effect of State and Federal Policy*, 30 POPULATION RES. & POL’Y REV. 129, 132 (2011). Naturalization can also generate new social networks and increase access to old social networks, which can assist with upward mobility. Irene Bloemraad, *The North American Naturalization Gap: An Institutional Approach to Citizenship Acquisition in the United States and Canada*, 36 INT’L MIGRATION REV. 193, 214 (2002); Logan et al., *supra* note 8, at 549; Van Hook et al., *supra* note 8, at 644, 647.

<sup>84</sup> Logan et al., *supra* note 8, at 549; Van Hook et al., *supra* note 8, at 647.

mobility possible.”<sup>85</sup> Immigrants use their environment to ascertain whether or not the United States is a place where they can do well.

The decision to naturalize has been conceptualized in two distinct ways. First, naturalization is seen as the culmination of the assimilation or incorporation process.<sup>86</sup> Naturalization marks integration into the “social, cultural and political life of the receiving society.”<sup>87</sup> This perception of naturalization is supported by research that explains who naturalizes by focusing on individual and community characteristics. Those most likely to naturalize are those who own homes, speak English, have lived in the United States longer, have more education, or live in immigrant communities with high naturalization rates.<sup>88</sup> These characteristics reflect acceptance and adherence to middle-class American values.<sup>89</sup> Second, naturalization is viewed as an instrumental or defensive decision. Within this conception of naturalization, immigrants naturalize in order to maintain or obtain access to material benefits uniquely available to citizens.<sup>90</sup> This has been referred to as defensive, instrumental, or

<sup>85</sup> Van Hook et al., *supra* note 8, at 647.

<sup>86</sup> See, e.g., Greta Gilbertson & Audrey Singer, *The Emergence of Protective Citizenship in the USA: Naturalization Among Dominican Immigrants in the Post-1996 Welfare Reform Era*, 26 ETHNIC & RACIAL STUD. 25, 26 (2003) (discussing this perspective); Robert C. Smith, *Transnational Localities: Community, Technology and the Politics of Membership Within the Context of Mexico and U.S. Migration*, in TRANSNATIONALISM FROM BELOW 196–97 (Michael Peter Smith & Luis Eduardo Guarnizo eds. 1998).

<sup>87</sup> Gilbertson & Singer, *supra* note 86, at 26.

<sup>88</sup> See, e.g., JASSO & ROSENZWEIG, *supra* note 82, at 101, 117–21; Guillermina Jasso & Mark R. Rosenzweig, *Family Reunification and the Immigration Multiplier: U.S. Immigration Law, Origin-Country Conditions, and the Reproduction of Immigrants*, 23 DEMOGRAPHY 291, 301–04 (1986); Zai Liang, *Social Contact, Social Capital, and the Naturalization Process: Evidence from Six Immigrant Groups*, 23 SOC. SCI. RES. 407, 431 (1994); Alejandro Portes & John W. Curtis, *Changing Flags: Naturalization and its Determinants Among Mexican Immigrants*, 21 INT’L MIGRATION REV. 352, 365–70 (1987); Philip Q. Yang, *Explaining Immigrant Naturalization*, 28 INT’L MIGRATION REV. 449, 464, 474 (1994).

<sup>89</sup> These characteristics are seen to matter because individuals with them understand the benefits of naturalizing more quickly than individuals without these characteristics. PORTES & RUMBAUT, *IMMIGRANT AMERICA*, *supra* note 61, at 144, 146. Research has consistently shown that there is less disparity in naturalization rates the longer individuals have resided in the United States. *Id.* at 146 (noting that “the passage of time leads inexorably to higher levels of naturalization”). Research has also noted that those with fewer individual resources and skills may find the naturalization process more difficult. *Id.* at 146. This mirrors another category of explanations for naturalization rates and that is regulatory and bureaucratic barriers. Mexican immigrants are predicted to have lower naturalization rates because they typically do not have the skills and resources that are associated with high naturalization rates. *Id.* at 144–46.

<sup>90</sup> See, e.g., Gilbertson & Singer, *supra* note 86, at 30; Audrey Singer & Greta Gilbertson, *Naturalization in the Wake of Anti-Immigrant Legislation: Dominicans in New York City* 3 (Carnegie Endowment for Int’l Peace, Working Paper No. 10, 2000), available at <http://carnegieendowment.org/files/dominican.pdf>.

protective naturalization.<sup>91</sup> Here, the decision to naturalize has nothing to do with identity or a sense of membership within the polity.

1. *The Material and Social Benefits of Citizenship*

These two perspectives on naturalization reflect the different categories of benefits that citizenship offers. For those immigrants who view naturalization as an indication of complete incorporation into U.S. society the availability of the social benefits of citizenship will play an important role in the decision making process. For those who view naturalization as a means to a specific material end, the availability of the material benefits of citizenship will likely be decisive. In reality, individuals likely view naturalization as both a marker of incorporation and a means to material benefits.

The social science naturalization literature focused on the material benefits of citizenship in the wake of the 1996 immigration and welfare reforms. Scholars have debated whether linking more benefits to citizenship would cause eligible green-card holders to naturalize.<sup>92</sup> What has been examined less is the impact of differential access to the social benefits of citizenship. This section discusses the social and material benefits of citizenship and argues that both categories of benefits factor into immigrants’ decisions to naturalize.

A growing body of social science research contends that immigrants naturalize for defensive reasons—to retain or gain access to material benefits that are exclusively available to U.S. citizens.<sup>93</sup> This conception of the decision to naturalize has little to do with conceptions of identity or belonging. Here naturalization is viewed as a means to a material end.

The empirical evidence demonstrating defensive or instrumental naturalization is mixed. A number of scholars have found that naturalization rates increased after the enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), which eliminated green-card holders’ eligibility for federal

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<sup>91</sup> Gilbertson & Singer, *supra* note 86, at 29–30, 44–45.

<sup>92</sup> See *infra* Part II(B)(2) for further discussion of these research findings.

<sup>93</sup> See, e.g., GEORGE J. BORJAS, CTR. FOR IMMIGRATION STUDIES, THE IMPACT OF WELFARE REFORM ON IMMIGRANT WELFARE USE 9 (2002) [hereinafter BORJAS, THE IMPACT OF WELFARE REFORM], available at <http://www.cis.org/articles/2002/borjas.pdf>; Kelly Stamper Balistreri & Jennifer Van Hook, *The More Things Change the More They Stay the Same: Mexican Naturalization Before and After Welfare Reform*, 38 INT’L MIGRATION REV. 113 (2004); George J. Borjas, *Welfare Reform and Immigrant Participation in Welfare Programs*, 36 INT’L MIGRATION REV. 1093, 1094 (2002) [hereinafter Borjas, *Welfare Reform and Immigrant Participation*]; Gilbertson & Singer, *supra* note 86, at 30; Michael Jones-Correa, *Institutional and Contextual Factors in Immigrant Naturalization and Voting*, 5 CITIZENSHIP STUD. 41, 41 (2001); Paul M. Ong, *Defensive Naturalization and Anti-Immigrant Sentiment: Chinese Immigrants in Three Primate Metropolises*, 21 ASIAN AM. POL’Y REV. 39 (2011), available at [http://isites.harvard.edu/fs/docs/icb.topic855678.files/AAPR\\_2\\_15\\_11\\_FINAL%20\\_3\\_.pdf](http://isites.harvard.edu/fs/docs/icb.topic855678.files/AAPR_2_15_11_FINAL%20_3_.pdf).

welfare benefits.<sup>94</sup> Yet other scholars have found that access to welfare benefits does not increase the probability of naturalizing.<sup>95</sup> Access to welfare benefits however, is not the only material benefit of naturalization, and Congress restored green-card holders access to certain welfare benefits in 1997.<sup>96</sup> Other material benefits include voting rights, access to certain jobs, and exemption from U.S. immigration law.<sup>97</sup> Immigrants likely view each of these material benefits differently and consequently weigh them differently when deciding whether or not to naturalize. For example, Balistreri and Van Hook found some support for the proposition that immigrants naturalized “in response to policies that restrict the ability to sponsor their relatives for legal migration to the United States.”<sup>98</sup> Similarly Gilbertson and Singer’s qualitative study of Dominican immigrants in New York found that immigrants naturalized in order to facilitate transnational residence (unrestricted travel to and from the United States) and to be eligible for a broader range of jobs.<sup>99</sup>

The prospect of voting rights has also been considered a factor influencing naturalization decisions.<sup>100</sup> One response to a negative or hostile environment is to seek greater political engagement in order to facilitate change. Scholars and community organizations have noted that hostile contexts of reception can motivate some immigrants to naturalize.<sup>101</sup> The Coalition for Humane Immigrant Rights of Los Angeles contends that Proposition 187 motivated immigrants to naturalize so that they could vote its supporters out of office.<sup>102</sup> During the March 2006

<sup>94</sup> Pub. L. No. 104-193, §§ 402, 431(b), 110 Stat. 2105, 2262–65, 2274 (codified as amended at 8 U.S.C. §§ 1612, 1641(b)). For evidence that naturalization rates increased, see, for example, BORJAS, *THE IMPACT OF WELFARE REFORM*, *supra* note 93, at 9; George J. Borjas, *Welfare Reform and Immigration*, in *THE NEW WORLD OF WELFARE* 369, 379–81 (Rebecca M. Blank & Ron Haskins eds., 2001); Borjas, *Welfare Reform and Immigrant Participation*, *supra* note 93, at 1094; Gilbertson & Singer, *supra* note 86, at 43 (“The decline in concern about acquiring U.S. citizenship, in large part because many of the benefits that were ‘taken away’ from legal permanent residents have been restored.”).

<sup>95</sup> See, e.g., Balistreri & Van Hook, *supra* note 93, at 125–28; Van Hook et al., *supra* note 8, at 655.

<sup>96</sup> Michael Fix & Wendy Zimmermann, *All Under One Roof: Mixed-Status Families in an Era of Reform*, 35 INT’L MIGRATION REV. 397, 415 & n.12 (2001). Access is generally conditioned on five years of residence in the United States. See *President Announces Welfare Reform Agenda, Promising Foods Stamps for Legal Immigrants*, 79 INTERPRETER RELEASES 404, 404 (2002).

<sup>97</sup> See Gilbertson & Singer, *supra* note 86, at 30, 40; SCHUCK, *supra* note 81, at 166.

<sup>98</sup> Balistreri & Van Hook, *supra* note 93, at 128.

<sup>99</sup> Gilbertson & Singer, *supra* note 86, at 37–40.

<sup>100</sup> Jones-Correa, *supra* note 93, at 44–45.

<sup>101</sup> See, e.g., Michael Jones-Correa, *Under Two Flags: Dual Nationality in Latin America and Its Consequences for Naturalization in the United States*, 35 INT’L MIGRATION REV. 997, 1017 (2001).

<sup>102</sup> *Building Voting Power in California for Immigration Reform*, COALITION FOR HUMANE IMMIGRANT RTS. L.A., <http://www.chirla.org/node/36>. Proposition 187 made unauthorized migrants ineligible for government services like public education,

demonstrations, participants carried signs reading "Hoy Marchamos, Mañana Votamos ("Today We March, Tomorrow We Vote").<sup>103</sup> A variety of organizations undertook naturalization and voter registration drives after the marches.<sup>104</sup>

Some immigrants naturalize in order to obtain the material benefits that are exclusively available to U.S. citizens. Yet other immigrants appear to be motivated by the social benefits that citizenship offers. Less research has been done examining this motivation for naturalization, but scholars have found that citizenship offers a sense of membership in the polity, presumed belonging, social standing, and a tool for social mobility.<sup>105</sup> Research on immigrants' context of reception has found that immigrants are more likely to naturalize when they have a welcoming environment.<sup>106</sup> This type of environment signals that the social benefits of citizenship are available. Van Hook, Brown, and Bean compared the probability of different immigrants naturalizing to identify the impact of two factors: access to welfare benefits and environment.<sup>107</sup> The researchers found that the probability of naturalization was the same for welfare recipients and non-recipients, but that individuals in locations with more positive environments were more likely to naturalize.<sup>108</sup> Logan, Oh, and Darrah found a similar relationship between positive environments and naturalization decisions.<sup>109</sup> A welcoming public attitude increased the odds of naturalizing. This effect was present for white, black, Asian, and Latino immigrants, but it increased the odds of naturalization most for Latino and Asian immigrants.<sup>110</sup>

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healthcare, and welfare benefits. This law also required government officials to report suspected unauthorized migrants to immigration authorities. Proposition 187, 1994 Cal. Stat. A-317, *invalidated by* League of United Latin Am. Citizens v. Wilson, 997 F. Supp. 1244 (C.D. Cal. 1997).

<sup>103</sup> Ruth Milkman, *Labor and the New Immigrants Rights Movement: Lessons from California*, BORDER BATTLES (Jul. 28, 2006), <http://borderbattles.ssrc.org/Milkman/printable.html>.

<sup>104</sup> *Id.*

<sup>105</sup> See Bloemraad, *supra* note 83, at 213–14; Garcia, *supra* note 83, at 617; Gerst & Burr, *supra* note 83, at 132; Logan et al., *supra* note 8, at 549; Van Hook et al., *supra* note 8, at 647.

<sup>106</sup> Van Hook et al., *supra* note 8, at 644.

<sup>107</sup> State-level attitudes towards immigrants and immigration were used to measure context of reception. The researchers used a scale developed by previous researchers based on responses on the General Social Survey from 1995 to 1997. *Id.* at 653.

<sup>108</sup> *Id.* at 660.

<sup>109</sup> Logan et al., *supra* note 8, at 549. The researchers used the existence of a safety net for immigrants and public attitudes about immigrants to measure context of reception. The same surveys were used to measure public attitudes as were used by Van Hook et al. *Id.* at 544.

<sup>110</sup> *Id.* at 549 (effect was only a 1.4% increase in the odds of naturalizing for whites and, but 3% for Latinos, Asians, and blacks). Logan, Oh, and Darrah also found support for instrumental reasons for naturalizing. Immigrants in states with fewer restrictions on access to social services were less likely to naturalize. *Id.*

Recent work utilizing the context of reception model provides new opportunities to investigate the role that social benefits play in the naturalization decision-making process. The following section explains what constitutes an immigrant's context of reception and the role that it plays in immigrant incorporation.

## 2. *Context of Reception*

A context of reception approach to naturalization focuses on the role that the structural and cultural aspects of an immigrant's environment play in naturalization decisions "above and beyond the role played by . . . individual characteristics or motivations."<sup>111</sup> A growing number of scholars are taking this approach to studying naturalization and broader issues of immigrant incorporation.<sup>112</sup> In the area of naturalization Irene Bloemraad has found that tangible government support to recent immigrants positively shapes immigrants' context of reception and increases the likelihood of naturalization.<sup>113</sup> Bloemraad's research seeks to explain why Portuguese immigrants in Canada have significantly higher naturalization rates than Portuguese immigrants in the United States despite having similar characteristics. Bloemraad's research indicates that the different levels of institutional support in Canada and the United States explain the gap. In Canada the government "encourage[s] citizenship through symbolic support and instrumental aid to ethnic organizations and community leaders."<sup>114</sup> In the United States, the government plays virtually no role in encouraging noncitizens to naturalize. When the government plays an active role in providing information to noncitizens about the benefits of naturalizing and encourages them to do so, it results in higher naturalization rates. Bloemraad concludes that "[i]f naturalization is lower in the United States than in Canada, it might be less due to the type of immigrants America attracts than to the welcome they are given."<sup>115</sup>

Bloemraad's thesis has been extended to show that not only do government efforts that motivate immigrants to naturalize matter, so do other aspects of immigrants' context.<sup>116</sup> Sociologists have found that the

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<sup>111</sup> MARROW, *supra* note 18, at 9; PORTES & RUMBAUT, IMMIGRANT AMERICA, *supra* note 61, at 91–102.

<sup>112</sup> See, e.g., MARROW, *supra* note 18; Logan et al., *supra* note 8; Van Hook et al., *supra* note 8.

<sup>113</sup> Bloemraad, *supra* note 83, at 213–22; see also BLOEMRAAD, *supra* note 8; Bloemraad, *Becoming a Citizen*, *supra* note 8; Bloemraad, *Citizenship Lessons from the Past*, *supra* note 8.

<sup>114</sup> Bloemraad, *supra* note 83, at 193, 213–22.

<sup>115</sup> *Id.* at 224.

<sup>116</sup> See Balistreri & Van Hook, *supra* note 93; Logan et al., *supra* note 8; Van Hook et al., *supra* note 8, at 643, 647; see also Garcia, *supra* note 83 (earlier examination of the role of social identity in decisions to naturalize). This research expands the conversation about social contextual factors that influence naturalization decisions. For example, previous scholars have found that social capital, residential segregation,

more welcoming an immigrants’ context is the more likely immigrants are to naturalize.<sup>117</sup>

Context plays a similar role in the broader incorporation process. Social scientists have demonstrated that immigrant incorporation is context specific.<sup>118</sup> Four distinct dimensions of immigrants’ context or environment that have been studied are government policy, labor market conditions, existing ethnic or national communities, and reactions from the native population.<sup>119</sup> These dimensions shape the “framework of economic opportunities and legal options available to migrants once they arrive.”<sup>120</sup> It also affects the “moral resources made available by the government, employers, and the community.”<sup>121</sup> Each of these dimensions either facilitate or hinder an immigrant’s incorporation within American society because they channel “immigrants in different directions, often altering the link between individual skills and expected rewards.”<sup>122</sup> For example, welcoming immigration laws and “a viable economy with abundant jobs”<sup>123</sup> facilitate immigrants’ social and economic incorporation. Alternatively, harsh laws regulating immigration and the lives of immigrants or a bad economy make it difficult for immigrants to exploit the skills and motivation they have brought with them. Absent an opportunity to use their existing skills, immigrants risk having lower levels of educational and economic achievement, political participation, and sense of belonging within the United States.<sup>124</sup>

Each dimension of an immigrant’s context or environment operates at a national, regional, state, local, and interpersonal level.<sup>125</sup> For example, the focus of this Article, immigration enforcement, operates at

and employment-based interactions with citizens help explain which immigrants naturalize. *See, e.g.,* Liang, *supra* note 88, at 431.

<sup>117</sup> Logan et al., *supra* note 8, at 549; Van Hook et al., *supra* note 8, at 644; *see supra* text accompanying notes 106–10.

<sup>118</sup> *See* PORTES & RUMBAUT, *IMMIGRANT AMERICA*, *supra* note 61; *see also* MARROW, *supra* note 18, at 233; MASSEY & SÁNCHEZ R., *supra* note 79, at 36–40.

<sup>119</sup> *See* MARROW, *supra* note 18, at 233; PORTES & RUMBAUT, *IMMIGRANT AMERICA*, *supra* note 61, at 92–93.

<sup>120</sup> PORTES & RUMBAUT, *IMMIGRANT AMERICA*, *supra* note 61, at 93.

<sup>121</sup> Cecilia Menjívar, *Immigrant Kinship Networks and the Impact of the Receiving Context: Salvadorans in San Francisco in the Early 1990s*, 44 *SOC. PROBS.* 104, 106 (1997) (citing PORTES & RUMBAUT, *IMMIGRANT AMERICA*, *supra* note 61, at 93).

<sup>122</sup> Cecilia Menjívar, *Liminal Legality: Salvadoran and Guatemalan Immigrants’ Lives in the United States*, 111 *AM. J. SOC.* 999, 1002 (2006); *see also* PORTES & RUMBAUT, *IMMIGRANT AMERICA*, *supra* note 61, at 101.

<sup>123</sup> Menjívar, *supra* note 122, at 1002.

<sup>124</sup> *See* PORTES & RUMBAUT, *LEGACIES*, *supra* note 61.

<sup>125</sup> MARROW, *supra* note 18, at 233–34; Michael Jones-Correa & Katherine Fennelly, *Immigration Enforcement and Its Effects on Latino Lives in Two Rural North Carolina Communities*, *QUANTITATIVE INITIATIVE FOR POL’Y & SOC. RES.*, 32 (2011), <http://qipsr.as.uky.edu/sites/default/files/Correa-Enforcement%20Effects%20in%20NC%2011.02.pdf>.

a national, state, local, and interpersonal level. The federal government establishes immigration law and policy and federal officers enforce those laws and policies. State and local governments are increasingly enacting laws and adopting policies that regulate the lives of immigrants and at times implicate the enforcement of federal immigration law. The programs addressed in Part III, such as 287(g) and state laws requiring immigration status checks in jails, are examples of government policy operating at the state and local level. Finally, immigration enforcement operates at an interpersonal level. Immigrants interact with individual police officers, sheriffs, and ICE agents. These individual interactions contribute to the context that immigrants experience.<sup>126</sup>

The national, regional, state, local, and interpersonal levels of an immigrant's context can vary, and they can contradict or complement one another. For example, federal immigration policy could create a neutral environment or context while state and local policy creates a hostile environment that is reinforced by interpersonal experiences with local law enforcement officers. Alternatively federal immigration policy could create a hostile environment while state and local law and policy create a positive environment that is reinforced by individual experiences with law enforcement agents.<sup>127</sup> Much of the recent research utilizing the context of reception model has focused on national context. This Article adds to the growing scholarship that focuses on the ways in which local institutions contribute to immigrants' context.<sup>128</sup>

The use of minor traffic violations to ascertain immigration status in southeastern states is an example of national, state, and local law and policy reinforcing one another to create a hostile environment for immigrants.<sup>129</sup> State and local law enforcement officials implement this specific strategy, but the federal government concurs with this approach when ICE officials issue a detainer and institute removal proceedings against individuals whose only criminal offense is a minor traffic offense. As the Migration Policy Institute found in its research on 287(g) programs, there is substantial agreement about policy priorities between ICE and local law enforcement officials.<sup>130</sup> The use of minor traffic

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<sup>126</sup> See Armenta, *supra* note 59, at 204 (describing examples of local police officers enforcing federal immigration law and exercising discretion in ways that allowed unauthorized migrants to regularize their status).

<sup>127</sup> MARROW, *supra* note 18, at 234–35. Marrow refers to this as vertical differentiation. In her study of Latino immigrants in rural North Carolina she found that vertical differentiation complicated “any singular notion of what context meant for [immigrants’] experiences in the rural South on the ground.” *Id.* at 235. Sometimes the various components of the context of reception worked in concert and at other times they were “competing cross-pressures.” *Id.*

<sup>128</sup> See, e.g., MARROW, *supra* note 18; MASSEY & SÁNCHEZ R., *supra* note 79; PORTES & RUMBAUT, LEGACIES, *supra* note 61; Jones-Correa & Fennelly, *supra* note 125.

<sup>129</sup> See *infra* Part III.C.

<sup>130</sup> CAPPS ET AL., *supra* note 7, at 26.

offenses to identify unauthorized migrants is an example of national, state, and local policy working in concert in southeastern states.

This Article focuses on one dimension of the context that immigrants encounter in the United States: government policy in the form of immigration enforcement.<sup>131</sup> Sociologists have found government policy to be critically important in the lives of immigrants; it determines access to the United States, legal status, and access to economic and social resources.<sup>132</sup> Portes and Rumbaut have described government policies as “the first stage of the process of incorporation because it affects the probability of successful immigration and the framework of economic opportunities and legal options available to migrants once they arrive.”<sup>133</sup> Law, policy, and legal institutions determine immigrants’ legal status, which has become a critical factor for how freely immigrants are able to move throughout U.S. society and how they are perceived and treated by the native population.<sup>134</sup>

The research examining reasons for naturalizing demonstrates that both social and material benefits matter. What is less clear is how much each category of benefits matter and how much specific benefits within each category matter. Are material benefits always more important than social benefits? Are certain social benefits more important than certain material benefits? Additional research is needed to answer these questions and to get a better sense of the institutional and personal factors that shape the strength or weakness of specific material and social benefits. For example, do English language skills, length of time in the

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<sup>131</sup> Just as context can vary by levels of government, it can also vary by institutional space. For example, the context of reception created by law enforcement officials may differ from that created by K–12 schools or medical services agencies. MARROW, *supra* note 18, at 234–36.

<sup>132</sup> Governments can respond in three different ways to immigrants: exclusion, passive acceptance, and active encouragement. PORTES & RUMBAUT, LEGACIES, *supra* note 61, at 46. When exclusion is the basis for immigration policy individuals are unable to gain lawful admission to the United States. Any entry to the United States is clandestine, which leads to an underground existence once in the United States. Passive acceptance would describe United States policy towards most family-based and employment-based immigration. Here the government grants individuals legal access, but makes no additional effort to facilitate immigrants’ incorporation into society. *Id.* at 46–47. Unlike countries like Canada, the United States government does not provide resettlement resources for immigrants. This type of assistance is reserved for refugees who are granted asylum in the United States. This would be an example of active encouragement, where the government is active in facilitating immigrants’ resettlement. *Id.* at 47. Active encouragement also occurs when the government plays an active role in encouraging particular immigrant streams. An example would be the Bracero Program that took place between 1942 and 1964. See KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S. 1–3 (2010).

<sup>133</sup> PORTES & RUMBAUT, IMMIGRANT AMERICA, *supra* note 61, at 93.

<sup>134</sup> Based on field work with Salvadoran and Guatemalan immigrants, Cecilia Menjívar concluded that focusing on the legal aspect of immigrants’ context of reception was appropriate because legal status “emerged as paramount in the immigrants’ lives.” Menjívar, *supra* note 122, at 1003.

United States, educational attainment, or socioeconomic status make the social benefits of naturalization more or less important? While we don't have the answers to these questions yet, what we do know is that both categories of benefits matter.

The context that immigrants encounter provides information about the availability of both categories of benefits. The remainder of this Article focuses on how local immigration enforcement policy shapes immigrants' knowledge about the social benefits of citizenship and their expectations about the availability of such benefits.

### III. SUB-FEDERAL IMMIGRATION ENFORCEMENT

Since 1996, an increasing number of mechanisms have become available for state and local law enforcement officials to participate in immigration enforcement. The primary mechanisms have been 287(g) jail enforcement agreements, Secure Communities, and state laws requiring jail officials to ascertain and report immigration status. It is my contention that these mechanisms encourage the arrest of presumed unauthorized migrants so that an immigration status check can occur. The authority to stop and arrest an individual for minor traffic offenses gives state and local law enforcement officials a significant amount of power to indirectly ascertain immigration status.<sup>135</sup> This power has been exercised disproportionately in Latino communities. Enforcement strategies that rely on ethnic appearance can cause Latino immigrants to doubt that naturalization, absent a change in ethnic appearance, will facilitate social mobility and acceptance as full members of American society.<sup>136</sup>

By the 1990s the federal government's failure to control unauthorized migration had become an issue of national concern. California enacted Proposition 187 in 1994, which prevented unauthorized migrants from receiving government services like public education, health care, and welfare benefits.<sup>137</sup> Furthermore, Proposition

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<sup>135</sup> HIROSHI MOTOMURA, IMMIGRATION POLICY CENTER, PROSECUTORIAL DISCRETION IN CONTEXT: HOW DISCRETION IS EXERCISED THROUGHOUT OUR IMMIGRATION SYSTEM 4–5 (2012), available at [http://www.immigrationpolicy.org/sites/default/files/docs/motomura\\_-\\_discretion\\_in\\_context\\_04112.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/motomura_-_discretion_in_context_04112.pdf); see also Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1842–49 (2011) [hereinafter Motomura, *The Discretion That Matters*].

<sup>136</sup> See *infra* Parts IV and V for further discussion of the relationship between the use of ethnicity in immigration enforcement and perceptions about the available benefits of naturalization.

<sup>137</sup> Proposition 187 §§ 5–8, 1994 Cal. Stat. A-317, A-318 to A-320. Proposition 187 was permanently enjoined in *League of United Latin American Citizens v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997). The state of California initially appealed the decision, but later withdrew its appeal and decided to have the case decided in mediation. The mediation upheld the district court's decision and Proposition 187 was never enforced. *CA's Anti-Immigrant Proposition 187 Is Voided, Ending State's Five-Year Battle*

187 required government officials to report unauthorized migrants (and those presumed to be) to federal immigration authorities.<sup>138</sup> While other states did not follow suit until the 2000s, Proposition 187 was an early call for better federal enforcement of the nation’s immigration laws. One aspect of this call was a plea to allow state and local government officials to assist the federal government in enforcing immigration law.<sup>139</sup> This plea has been heeded with the enactment of federal and state law. In 1996 Congress enacted significant immigration reform through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).<sup>140</sup> IIRIRA included section 287(g), which allows the Department of Homeland Security to deputize state and local officials to enforce federal immigration law.<sup>141</sup> States took action by enacting laws requiring jail officials to ascertain the immigration status of all individuals booked and to report noncitizens to Immigration and Customs Enforcement (ICE).<sup>142</sup>

Today state and local law enforcement officials participate in immigration enforcement in two significant ways. First, they are authorized by the Department of Homeland Security (DHS) to perform the functions of an immigration officer. This is done through a 287(g) agreement between DHS and the state or locality. Second, local law enforcement officials exchange information with DHS for all individuals

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with *ACLU, Rights Groups, AM. CIV. LIBERTIES UNION* (JUL. 29 1999), <http://www.aclu.org/immigrants-rights/cas-anti-immigrant-proposition-187-voided-ending-states-five-year-battle-aclu-righ>.

<sup>138</sup> §§ 4, 9, 1994 Cal. Stat. at A-317 to A-318, A-320.

<sup>139</sup> Specific authorization for state and local participation in immigration enforcement was necessary because immigration enforcement has been deemed a federal power. In *Chae Chan Ping v. United States* and *Fong Yue Ting v. United States*, the Supreme Court held that the immigration power is a federal power. 130 U.S. 581 (1889); 149 U.S. 698 (1893). The U.S. Constitution does not explicitly delegate the immigration power. The only mention of immigration-related authority is Congress’ power to create a uniform naturalization law. U.S. CONST. art. I, § 8, cl. 4. To determine which level of government, and which branch of government, was authorized to exercise immigration authority, the Court examined the nature of the immigration power. The Court concluded that this power was intimately connected to foreign affairs, which is exclusively delegated to the federal government. Therefore immigration authority lies exclusively with the federal political branches of government. *Chae Chan Ping*, 130 U.S. at 604–09; *Fong Yue Ting*, 149 U.S. at 711–12. These holdings have provided the basis for decisions holding that state laws regulating immigration are preempted by federal law. *See, e.g., Lozano v. City of Hazelton*, 620 F.3d 170, 204–06 (3rd Cir. 2008), *vacated*, 131 S. Ct. 2958 (2011). The Supreme Court’s recent decision in *Arizona v. United States* reaffirms that the federal government has exclusive authority to regulate immigration. 132 S. Ct. 2492 (2012).

<sup>140</sup> Pub. L. No. 104-208, 110 Stat. 3009 (1996).

<sup>141</sup> Immigration and Nationality Act (INA) § 287(g), 8 U.S.C. § 1357(g) (2006).

<sup>142</sup> Arizona, Alabama, Indiana, North Carolina, Oklahoma, Tennessee, and Virginia have all enacted such laws. *See infra* text accompanying notes 182–91. Certain criminal acts make an individual deportable regardless of their immigration status. *See* INA § 237(a)(2), 8 U.S.C. § 1227(a)(2) (2006). Reporting all noncitizen criminals to ICE allows ICE to determine which, if any, of the noncitizens are deportable.

arrested who were born outside of the United States. This second approach is effectuated through state laws and Secure Communities.

A. 287(g)

287(g) is one of several programs within ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ICE ACCESS). These programs facilitate cooperation between ICE and state, local, and tribal law enforcement agencies.<sup>143</sup> Additional programs include Secure Communities and the Criminal Alien Program, which will be addressed below. Section 287(g) of the Immigration and Naturalization Act authorizes the Department of Homeland Security to enter into agreements with states and localities to have local law enforcement officials enforce federal immigration law.<sup>144</sup> This was a new innovation introduced in IIRAIRA in 1996.

It was 2002 before the first agreement was entered into and few additional agreements were entered into until 2007.<sup>145</sup> That year 27 agreements were concluded, 30 agreements were entered into in 2008, and an additional 10 in 2009 and 2010.<sup>146</sup> Over half of these agreements were entered into with southeastern states or localities.<sup>147</sup> As noted in Part I.A, this region experienced significant growth in the Latino population between 1990 and 2010. The Southeast became a new destination for large-scale Latino migration and in the first part of the twenty-first century this region responded by seeking greater opportunities for local immigration enforcement. 287(g) provides one option for such enforcement.

There are two types of 287(g) agreements: jail enforcement agreements and task force agreements. Jail enforcement agreements authorize local law enforcement agents to ascertain an inmate's immigration status, "communicate with ICE about immigrants in their

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<sup>143</sup> ICE ACCESS, ICE, <http://www.ice.gov/access/>.

<sup>144</sup> INA § 287(g), 8 U.S.C. § 1357(g).

<sup>145</sup> See CAPPs ET AL., *supra* note 7, at 9, 54–55. There were eight total 287(g) agreements before 2007. Those agreements were with Florida, Alabama, Los Angeles County Sheriff's Department (California), Arizona, San Bernardino County Sheriff's Department (California), Orange County Sheriff's Department (California), Riverside County Sheriff's Department (California), and Mecklenburg County Sheriff's Department (North Carolina). See *id.* at 54–55; FOIA Library, ICE <http://www.ice.gov/foia/library/> (collecting current and old agreements).

<sup>146</sup> See CAPPs ET AL., *supra* note 7, at 9, 54–55; *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, ICE, <http://www.ice.gov/news/library/factsheets/287g.htm#signed-moa> (showing in-force agreements); FOIA Library, *supra* note 145.

<sup>147</sup> 287(g) has grown quickly in the Southeast. The states with the most 287(g) agreements are Virginia with nine, Arizona and North Carolina with eight, and Arkansas and Georgia with five. *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, *supra* note 146; FOIA Library, *supra* note 145.

custody, issue ICE detainers, and transfer inmates to ICE custody.”<sup>148</sup> All of this takes place within the confines of a local jail. The first official inquiries about immigration status under a 287(g) jail enforcement program take place once an individual has been booked into the local jail.<sup>149</sup> As part of the typical booking process an inmate is asked her place of birth and nationality. When there is a 287(g) jail enforcement agreement in place any inmate who officers believe is foreign-born, based on inmate admission or other information, is screened.<sup>150</sup> The screening process entails checking DHS databases for information on immigration status and interviewing the inmate to ascertain immigration status.<sup>151</sup> Once an inmate’s immigration status has been determined the officer enters the information into ENFORCE, ICE’s database and case management system. If the officer determines the inmate is removable she can issue an ICE detainer, which allows the jail to hold the inmate for up to 48 hours until he or she can be transferred to ICE for removal processing.<sup>152</sup> The officer can also issue a Notice to Appear (NTA), which is the official charging document that initiates removal proceedings.<sup>153</sup> Pursuant to the 287(g) agreement, local law enforcement agents in jails have access to DHS databases, can issue ICE detainers, and issue NTAs.<sup>154</sup> Absent a 287(g) agreement the local law enforcement agents would not be able to engage in these activities.

Task force agreements authorize local law enforcement agents to enforce federal immigration law outside of jails.<sup>155</sup> For example, an officer could enforce immigration law on a highway, in a shopping mall, or at a workplace. These officers could approach any individual to inquire about immigration status as long as they have reasonable suspicion that an immigration law has been violated. Pursuant to a task force agreement local law enforcement agents are authorized to inquire about immigration status, access DHS databases, and issue ICE detainers and NTAs just like officers with a jail enforcement agreement. Local officers with a task force agreement have the additional authority to “issue arrest warrants for immigration violations and execute search warrants.”<sup>156</sup> The majority of the 287(g) agreements currently in force are

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<sup>148</sup> CAPPS ET AL., *supra* note 7, at 14.

<sup>149</sup> *Id.*; see also Am. Civil Liberties Union of N.C. Legal Found. & Immigration & Human Rights Pol’y Clinic, *The Policies and Politics of Local Immigration Enforcement Laws*, ACLU N.C., 23 (Feb. 2009), [http://www.acluofnorthcarolina.org/files/287gpolicyreview\\_0.pdf](http://www.acluofnorthcarolina.org/files/287gpolicyreview_0.pdf).

<sup>150</sup> CAPPS ET AL., *supra* note 7, at 14.

<sup>151</sup> *Id.* at 13. Questions used to ascertain immigration status include Where were you born?, When and where did you first enter the United States?, and Did you enter with or without authorization? *Id.*

<sup>152</sup> *Id.* at 13, 16 fig.1.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 13.

<sup>155</sup> *Id.* at 15.

<sup>156</sup> *Id.*

jail enforcement or hybrid agreements.<sup>157</sup> Pursuant to a hybrid agreement both jail enforcement and task force activities take place within one jurisdiction.<sup>158</sup>

287(g) jail enforcement agreements facilitate the use of minor criminal offenses as a tool for reducing the unauthorized migrant population. While patrol officers are not deputized to enforce immigration law, the deputized officers at the jail can check the immigration status of any individual the patrol officer arrests and books into jail. Patrol officers can use offenses like having a broken tail light, improper stop, or failing to dim headlights as a pretext for determining immigration status. This is the allegation that has been made in numerous southeastern states where 287(g) agreements are operating.<sup>159</sup>

### B. *Secure Communities*

Similar concerns exist about Secure Communities.<sup>160</sup> Unlike 287(g) agreements, Secure Communities does not involve deputizing local law enforcement agents to enforce immigration law. This program uses biometric information collected by local law enforcement agents to identify noncitizens with criminal convictions. All individuals booked into jail have their fingerprints taken. Traditionally those fingerprints are

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<sup>157</sup> *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, *supra* note 146.

<sup>158</sup> CAPPS ET AL., *supra* note 7, at 15. Fewer jurisdictions have local law enforcement agents deputized to enforce federal immigration law outside of jails.

<sup>159</sup> See, e.g., AM. CIVIL LIBERTIES UNION FOUND. OF GA., THE PERSISTENCE OF RACIAL PROFILING IN GWINNETT: TIME FOR ACCOUNTABILITY, TRANSPARENCY, AND AN END TO 287(G), at 5, 10–11 (2010), available at [http://www.acluga.org/download\\_file/view\\_inline/1504/260/](http://www.acluga.org/download_file/view_inline/1504/260/) [hereinafter ACLU GWINNETT]; AM. CIVIL LIBERTIES UNION FOUND. OF GA., TERROR & ISOLATION IN COBB: HOW UNCHECKED POLICE POWER UNDER 287(G) HAS TORN FAMILIES APART AND THREATENED PUBLIC SAFETY 9–16 (2009), available at [http://www.acluga.org/download\\_file/view\\_inline/1505/260/](http://www.acluga.org/download_file/view_inline/1505/260/) [hereinafter ACLU COBB]; A. ELENA LACAYO, NAT'L COUNCIL OF LA RAZA, ISSUE BRIEF NO. 21, THE IMPACT OF SECTION 287(G) OF THE IMMIGRATION AND NATIONALITY ACT ON THE LATINO COMMUNITY (2010), available at <http://www.nclr.org/images/uploads/publications/287gReportFinal.pdf>; SARAH WHITE & SALMUN KAZEROUNIAN, TENN. IMMIGRANT & REFUGEE RIGHTS COAL., THE FORGOTTEN CONSTITUTION: RACIAL PROFILING AND IMMIGRATION ENFORCEMENT IN BEDFORD COUNTY, TENNESSEE 6 (2011), available at <http://www.tnimmigrant.org/storage/The%20Forgotten%20Constitution.pdf>.

<sup>160</sup> One aspect of the Criminal Alien Program (CAP) raises similar concerns as well. CAP works to identify, process, and remove noncitizens convicted of crimes who are incarcerated in federal, state, and local jails and prisons. The program was created so that ICE could obtain custody of these individuals before they are released to the general public. The jail and prisons component of CAP assigns ICE agents to certain federal, state, and local jails and prisons. The ICE agents perform the same functions as local law enforcement officials acting pursuant to a 287(g) jail enforcement agreement. *Criminal Alien Program*, ICE, <http://www.ice.gov/criminal-alien-program/>. Thus for jails and prisons that have ICE agents assigned to them, local law enforcement agents are aware that arresting an individual that will be booked at one of these facilities will commence an immigration investigation.

shared with the FBI, and the FBI runs them through the Integrated Automated Fingerprint Identification System (IAFIS), a fingerprint and criminal history database. Pursuant to the Secure Communities program the same fingerprints are also sent to the Department of Homeland Security. DHS runs the fingerprints through the Automated Biometric Identification System (IDENT). IDENT is a database containing biometric-based immigration records. This includes records for individuals who have applied for a visa, been granted a visa, been admitted to the United States, or been removed from the United States. IDENT identifies any individual with an immigration record.<sup>161</sup> While IDENT identifies individuals with immigration records, it does not identify individuals who entered the United States without inspection and have evaded contact with immigration authorities.

If there is a hit on IDENT an Immigration Alien Query is sent to the ICE Law Enforcement Support Center (LESC). LESL sends its report to the local ICE Enforcement and Removal Office and that office determines whether or not to issue a detainer. A detainer authorizes a jail to hold the individual for an additional 48 hours so that ICE can retrieve them to begin removal proceedings.<sup>162</sup>

A predecessor to Secure Communities is the Criminal Alien Program (CAP). In this program local jail officials hold noncitizens until an ICE official can screen the individual and ascertain their immigration status.<sup>163</sup> After ICE conducts its review it determines whether or not to issue a detainer.<sup>164</sup> Unlike the 287(g) program, local law enforcement officers acting pursuant to Secure Communities and CAP are not deputized ICE agents—they do not have access to DHS databases to ascertain immigration status, and they do not have the authority to issue an ICE detainer or an NTA.<sup>165</sup> Federal immigration officials conduct these activities. Local enforcement officials only make federal officials aware of specific noncitizens.

The vast majority of individuals removed pursuant to Secure Communities have been individuals convicted of Level one, two, or three

<sup>161</sup> See DEP’T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT SECURE COMMUNITIES STANDARD OPERATING PROCEDURES 3 (2009), available at [http://www.ice.gov/doclib/foia/secure\\_communities/securecommunitiesops93009.pdf](http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesops93009.pdf); *Secure Communities*, ICE, [http://www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/).

<sup>162</sup> See 8 U.S.C. § 287(d); DEP’T OF HOMELAND SEC., *supra* note 161, at 4. In responding to an Immigration Alien Query LESL provides information on the individual’s immigration status. *Id.*

<sup>163</sup> TREVOR GARDNER II & AARTI KOHLI, CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY, THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM 1 (2009), available at [http://www.law.berkeley.edu/files/policybrief\\_irving\\_FINAL.pdf](http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf).

<sup>164</sup> *Id.*

<sup>165</sup> See *id.* at 2.

offenses—75%.<sup>166</sup> Yet less than half of those removed, 45%, were individuals convicted of Level one or two offenses.<sup>167</sup> Level one offenses include drug trafficking, national security crimes, murder, manslaughter, rape, robbery, kidnapping, and other violent crimes.<sup>168</sup> Level two offenses are minor drug and property offenses.<sup>169</sup> Examples include burglary, larceny, fraud, and money laundering.<sup>170</sup> Level three is all other offenses.<sup>171</sup>

These numbers support the main critique that has been raised about Secure Communities—it is not being used to identify and deport the most serious noncitizen criminals. ICE states that it “prioritizes the removal of criminal aliens, those who pose a threat to public safety, and repeat immigration violators.”<sup>172</sup> Immigrant advocates, think tanks, academics, and government officials have questioned ICE’s adherence to this policy. As of August 2011 Illinois, Massachusetts, and New York have tried to pull out of Secure Communities.<sup>173</sup> They contend that DHS misrepresented the program to them by stating that it would be used to identify and deport serious criminals when in fact it has been used to identify and deport unauthorized migrants who are crime victims, witnesses, and those with minor criminal convictions.<sup>174</sup>

The data support the conclusion that the majority of the individuals deported as a result of Secure Communities are convicted criminals. But they are not the serious threats to public safety and national security that is the stated goal of the program. Less than half of those deported have been convicted of Level one or two offenses.<sup>175</sup> Twenty-five percent were deported based on immigration violations such being a fugitive,

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<sup>166</sup> *IDENT/IAFIS Interoperability Monthly Statistics Through August 31, 2012*, ICE, 2 (2012), [http://www.ice.gov/doclib/foia/sc-stats/nationwide\\_interop\\_stats-fy2012-to-date.pdf](http://www.ice.gov/doclib/foia/sc-stats/nationwide_interop_stats-fy2012-to-date.pdf). Between its inception in October 2008 and August 2012, only 11,390 individuals who entered without inspection or violated the terms of their visa have been identified and removed as a result of Secure Communities. This represents roughly 5% of those removed pursuant to the program. *See id.*

<sup>167</sup> *Id.* Only 28% were convicted of Level one offenses. *Id.*

<sup>168</sup> *Template for Memorandum of Agreement*, ICE, 2 (July 31, 2011), [http://www.ice.gov/doclib/foia/secure\\_communities/securecommunitiesmoatemplate.pdf](http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesmoatemplate.pdf).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 3.

<sup>172</sup> *Secure Communities*, *supra* note 161.

<sup>173</sup> Chip Mitchell, *States May Have to Readopt Deportation Program*, NPR (Aug. 18, 2011), <http://www.npr.org/2011/08/18/139725801/states-may-have-to-re-adopt-deportation-program>.

<sup>174</sup> *Id.*; Julia Preston, *States Resisting Program Central to Obama’s Immigration Strategy*, N.Y. TIMES, May 6, 2011, at A18; Press Release, N.Y. Governor Andrew M. Cuomo, Governor Cuomo Suspends Participation in Federal Secure Communities Program (June 1, 2011), *available at* <http://www.governor.ny.gov/press/06012011FederalSecureCommunitiesProgram>.

<sup>175</sup> *IDENT/IAFIS Interoperability Monthly Statistics Through August 31, 2012*, *supra* note 166, at 2.

overstaying a visa, or entering without inspection.<sup>176</sup> Secure Communities has been an effective tool in increasing the number of noncitizens deported. Yet a number of states, particularly in the Southeast, want more enforcement and have enacted their own laws to facilitate greater immigration enforcement.

### C. State Laws

State laws to address immigration enforcement have focused on requiring jailers to ascertain the immigration status of foreign-born individuals booked into jail.<sup>177</sup> Arizona, Alabama, Indiana, North Carolina, Oklahoma, Tennessee, Virginia have all enacted such laws.<sup>178</sup> Tennessee requires that jailers verify the citizenship status of all individuals arrested, booked, or confined for any period of time in a county or municipal jail or detention facility. Officers are also required to report individuals who may be in violation of federal immigration law to the appropriate ICE field office.<sup>179</sup> Alabama’s June 2011 immigration law requires that any noncitizen “who is arrested and booked into custody shall have his or her immigration status determined” and verified by contacting the federal government.<sup>180</sup> Additionally when a state, county, or municipal law enforcement officer has reasonable suspicion that an individual encountered during a lawful stop, detention, or arrest is unlawfully present in the United States, the officer is required to make a reasonable attempt to determine the individual’s citizenship and immigration status.<sup>181</sup> North Carolina law requires any county or local jail to verify the immigration status of individuals detained on a felony or impaired driving charge.<sup>182</sup> Virginia requires the same of any individual booked into any jail.<sup>183</sup> In Prince William County, Virginia General Order 45 required Prince William County police officers to inquire about the

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<sup>176</sup> *Id.*

<sup>177</sup> Additional states have also required other government officials to ascertain and/or report immigration status. For example, Alabama requires school officials and healthcare professionals to ascertain immigration status. ALA. CODE § 31-13-7 (LexisNexis 2011); *id.* § 31-13-27, *invalidated by* Hispanic Interest Coal. of Ala. v. Governor of Ala., 691 F.3d 1236, 1244–49 (“In short, we do not find these justifications . . . substantial enough to justify the significant interference with the children’s right to education under *Plyler*[ v. *Doe*, 457 U.S. 202 (1982)]. We therefore conclude that [§ 31-13-27] violates the Equal Protection Clause.”).

<sup>178</sup> ALA. CODE § 31-13-12(b) (LexisNexis 2011); ARIZ. REV. STAT. ANN. § 13-3906 (2010); IND. CODE ANN. § 11-10-1-2 (LexisNexis 2012); N.C. GEN. STAT. § 162-62 (2011); OKLA. STAT. ANN. tit. 57, § 530.1 (West Supp. 2012); TENN. CODE ANN. § 40-7-123 (Supp. 2011); VA. CODE ANN. § 19.2-83.2 (2008).

<sup>179</sup> TENN. CODE ANN. § 40-7-123.

<sup>180</sup> ALA. CODE § 31-13-12(b).

<sup>181</sup> *Id.* § 31-13-12(a). Alabama’s law mirrors that of Arizona’s SB 1070 enacted in spring 2010. See Arizona S.B. 1070, § 2, 2010 Ariz. Sess. Laws 450, 451, *amended by* H.B. 2162, § 3, 2010 Ariz. Sess. Laws 1070, 1073.

<sup>182</sup> N.C. GEN. STAT. § 162-62.

<sup>183</sup> VA. CODE ANN. § 19.2-83.2.

citizenship or immigration status of persons lawfully detained for a violation of state or local law.<sup>184</sup> Officers did not have to arrest an individual in order to ascertain their immigration status; lawful detention was sufficient. This order was modified in July 2008 such that inquiring into immigration status is no longer mandatory.<sup>185</sup>

Pursuant to these state and local laws, local law enforcement officers are not deputized as federal immigration officials; they simply request information regarding immigration status from the Department of Homeland Security.<sup>186</sup> These laws are an effort to facilitate cooperation between federal, state, and local law enforcement officials.<sup>187</sup>

Regardless of the authority upon which local law enforcement officers are seeking immigration status information, the information is being gathered upon arrest and booking. Thus, whether a state or locality has a 287(g) agreement, participates in Secure Communities, or has state law requiring jail officials to ascertain immigration status, local law enforcement officials are playing an important role in immigration enforcement. Local law enforcement officials have a great deal of power in deciding whose immigration status will be checked because of the power and discretion they have to arrest. Officers know that an arrest, any arrest, will begin a process in which immigration status information will be gathered. For those who are interested in reducing the unauthorized migrant population within their jurisdiction arrests for minor traffic offenses are an easy way to check the immigration status of large portions of the population. The disproportionate use of this enforcement strategy in Latino communities has caused Latino immigrants to feel targeted based on their ethnicity.<sup>188</sup> These experiences can cause Latino immigrants to conclude that naturalization may not provide the social mobility and acceptance as a full member of society

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<sup>184</sup> THOMAS M. GUTERBOCK ET AL., EVALUATION STUDY OF PRINCE WILLIAM COUNTY POLICE ILLEGAL IMMIGRATION ENFORCEMENT POLICY: INTERIM REPORT 2009, at 18 (2009), available at <http://www.pwcgov.org/government/dept/police/Documents/10636.pdf>.

<sup>185</sup> *Id.* at 18–19.

<sup>186</sup> Local law enforcement officers seeking immigration status information submit a request to the ICE Law Enforcement Support Center located in Vermont. *Law Enforcement Support Center*, ICE, <http://www.ice.gov/lesc/>.

<sup>187</sup> Arizona's law providing for such cooperation was the subject of the Supreme Court's 2012 decision in *Arizona v. United States*, 132 S. Ct. 2492 (2012). The federal government argued that Arizona was preempted from enacting a law requiring local law enforcement officials to ascertain the immigration status of individuals lawfully stopped, detained, or arrested. *Id.* at 2507–08. The legal challenge was filed before the law went into force and lower courts had enjoined the law. *Id.* at 2498. The Supreme Court concluded that it was too early to determine whether federal law preempted Arizona's law. *Id.* In theory it was possible that the law could operate without conflicting with or obstructing the federal law. The Court noted that there may be additional constitutional problems with the state provision after it comes into force, but the Court was not willing to make predictions. *Id.* at 2507–10.

<sup>188</sup> See *infra* Part IV.C.2.

that it provides for other naturalized citizens. As long as they appear Latino, law enforcement officials, and others, will perceive them as foreign and unauthorized.<sup>189</sup>

#### IV. ENFORCEMENT THROUGH TRAFFIC STOPS

Within the Southeast, traffic offenses have become the predominant means of identifying deportable noncitizens pursuant to 287(g) agreements. In this Part, I contend that traffic stops for minor traffic violations are being used as a pretext to ascertain immigration status. This immigration enforcement strategy is used disproportionately in Latino communities and creates a hostile environment, which can shape Latino immigrants’ expectations regarding naturalization and social mobility.

Thirty percent of all ICE detainers issued nationwide in 2010 pursuant to 287(g) agreements were based on traffic offenses.<sup>190</sup> Half of these cases came out of southeastern states.<sup>191</sup> Of the traffic-based detainers issued throughout the country, 90% were pursuant to a jail enforcement agreement, 9% pursuant to a hybrid agreement, and less than 1% were based on a task force agreement.<sup>192</sup> The southeastern figures are the same.<sup>193</sup> These numbers suggest that the police officers responsible for the most traffic-based arrests leading to ICE detainers were patrol officers with no specific authority or mandate to enforce immigration law. Patrol officers do not need 287(g) authority to support

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<sup>189</sup> See *infra* Part IV for further discussion about the perceived foreignness of Latinos in the United States.

<sup>190</sup> See CAPPS ET AL., *supra* note 7, at 58–59. ICE data tracked traffic offenses separately from other offenses until June 2010. Regardless of how serious the traffic offense was it was tracked in the separate category of traffic offenses. Traffic offenses could include driving without a license or having a broken tail light, in addition to more serious offenses like vehicular homicide or driving under the influence. ICE’s priorities indicate that Level one and two offenders are “serious criminals,” while Level three and traffic offenders are not. Based on ICE’s prioritization, I treat the traffic offenses as not serious offenses. *Id.* at 18 n.54. See, e.g., Memorandum of Agreement Between Immigration & Customs Enforcement of the Dep’t of Homeland Sec. and Maricopa Cnty. Sheriff’s Office 17 (Oct. 26, 2009), available at [http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r\\_287gmaricopacountyso102609.pdf](http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r_287gmaricopacountyso102609.pdf) [hereinafter Maricopa 287(g) Agreement]; Memorandum of Agreement Between Immigration & Customs Enforcement of the Dep’t of Homeland Sec. and Pima Cnty. Sheriff’s Dep’t 17 (Oct. 15, 2009), [http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r\\_287gpimacounty101509.pdf](http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r_287gpimacounty101509.pdf) [hereinafter Pima 287(g) Agreement].

<sup>191</sup> The Migration Policy Institute has noted that the ten sites with the largest share of detainers for traffic violations were in the Southeast. CAPPS ET AL., *supra* note 7, at 2, 58–59.

<sup>192</sup> See *id.* at 58–59. The ten jurisdictions with the highest number of traffic-based detainers had jail enforcement agreements. *Id.*; *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, *supra* note 146.

<sup>193</sup> CAPPS ET AL., *supra* note 7, at 58–59.

immigration enforcement; they just need to operate within a jurisdiction in which the immigration status of all arrested individuals is checked.

### A. *Discretion*

287(g), Secure Communities, and state law requiring immigration status checks of all individuals booked into jail are powerful tools for local law enforcement agents interested in reducing the number of unauthorized migrants living within their jurisdiction. Patrol officers have a significant amount of discretion to decide whom to arrest and detain.<sup>194</sup> This discretion allows local law enforcement officials to determine whose immigration status will be checked.

#### 1. *Enforcement Priorities*

Jail enforcement agreements identify priorities for arrest and detention, but local law enforcement agents are not prohibited from pursuing low priority noncitizens.<sup>195</sup> The agreements only state that “[r]esources should be prioritized” in accordance with the enforcement priorities.<sup>196</sup> The highest priority is Level one criminal aliens, followed by Level two, and Level three. Level one includes “[a]liens who have been convicted of or arrested for major drug offenses and/or violent offenses such as murder, manslaughter, rape, robbery, and kidnapping.”<sup>197</sup> Level two is “[a]liens who have been convicted of or arrested for minor drug offenses and/or mainly property offenses such as burglary, larceny, fraud, and money laundering.”<sup>198</sup> Level three is noncitizens “who have been convicted of or arrested for other offenses.”<sup>199</sup> Nothing in the 287(g) agreement prohibits local law enforcement officers from using the program to identify unauthorized migrants through traffic violations.

Statistics from southeastern states indicate that these priorities are not being operationalized. In southeastern states operating with 287(g) jail or hybrid enforcement agreements 38.2% of detainees issued were based on Level two and Level three offenses.<sup>200</sup> Level one offenses only accounted for 15.4% of detainees issued.<sup>201</sup>

ICE retains supervisory authority over local law enforcement officers operating pursuant to 287(g).<sup>202</sup> The failure of ICE officials to discourage

<sup>194</sup> MOTOMURA, *supra* note 135, at 4–5; *see also* Motomura, *The Discretion That Matters*, *supra* note 135, at 1829, 1842–49.

<sup>195</sup> *See, e.g.*, Maricopa 287(g) Agreement, *supra*, note 190, at 17; Pima 287(g) Agreement, *supra*, note 190, at 17.

<sup>196</sup> Maricopa 287(g) Agreement, *supra*, note 190, at 17.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> CAPPS ET AL., *supra* note 7, at 58–59.

<sup>201</sup> *Id.* The remaining detainees were based on traffic offenses, other offenses, or no offenses, which are recorded separately. *Id.*

<sup>202</sup> *See, e.g.*, Maricopa 287(g) Agreement, *supra* note 190, at 6.

traffic offense-based arrests suggests that this approach is acceptable to ICE. The Migration Policy Institute found that there was significant agreement between ICE supervisors and local jurisdictions.<sup>203</sup> In jurisdictions like Cobb County, where there is a high number of traffic offense-based arrests, ICE supervisors reported that “ICE and the 287(g) jurisdictions together have sufficient resources to detain and remove all unauthorized immigrants identified by 287(g) officers, regardless of the severity of the criminal offenses.”<sup>204</sup> These supervisors also contended that traffic violations represented “a public safety threat significant enough to warrant removal.”<sup>205</sup> This sentiment is shared by various local jurisdictions that seek to apprehend as many unauthorized migrants as possible.<sup>206</sup> The Davidson County Sheriff’s office in Tennessee contends that “processing misdemeanors makes the Nashville community safer.”<sup>207</sup> This conclusion is based on data that “75 percent of vehicular homicides by illegal aliens would have been prevented if their previous misdemeanor arrests had led to deportation.”<sup>208</sup> Sheriffs in Frederick, Cobb, and Gwinnett counties expressed similar sentiments. Charles Jenkins, the Sheriff in Frederick County, Maryland, testified before Congress that “the enormous increase in crime in the United States . . . can be tied directly to the unchecked flow of illegal immigrants through our southern border with Mexico.”<sup>209</sup> The Cobb County Sheriff’s Office website states, “If someone is here illegally and commits a crime, whether a misdemeanor or a felony, they should be subject to deportation.”<sup>210</sup> Gwinnett County Sheriff Butch Conway contends that unlicensed drivers are a public safety threat: “Those people that haven’t shown a proficiency in driving, I think they are dangerous out on the road.”<sup>211</sup>

In jurisdictions where ICE supervisors take a different position, there are fewer traffic offense-based arrests. For example, ICE supervisors in Prince William County, Maryland have steered officers toward Level one and Level two offenders and away from traffic offenses.<sup>212</sup> In Prince William County, the ICE supervisors see civil immigration enforcement as an important, but secondary priority. The first priority is gangs, drugs,

<sup>203</sup> CAPPS ET AL., *supra* note 7, at 25.

<sup>204</sup> *Id.* at 26.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 10.

<sup>207</sup> DAVIDSON CNTY. SHERIFF’S OFFICE, *supra* note 38, at 14.

<sup>208</sup> *Id.*

<sup>209</sup> *Examining 287(g): The Role of State and Local Law Enforcement in Immigration Law: Hearing Before the H. Comm. on Homeland Sec.*, 111th Cong. 20 (2010) (statement of Charles A. Jenkins, Sheriff, Frederick Cnty., Md.).

<sup>210</sup> *Immigration and Customs Enforcement Frequently Asked Questions*, COBB CNTY. SHERIFF’S OFF. (Aug. 1, 2012), <http://www.cobbsheriff.org/news/08-01-12%20%20287%28g%29%20Frequently%20Asked%20Questions%20and%20Stats.htm>.

<sup>211</sup> Andria Simmons, *Is Sheriff a Hero or Racial Profiler?*, ATLANTA J. & CONST., Oct. 12, 2009, at A1.

<sup>212</sup> CAPPS ET AL., *supra* note 7, at 25.

smuggling, and national security threats rather than generally identifying unauthorized migrants.<sup>213</sup>

Regional ICE offices play an important role in determining local law enforcement's priorities in immigration enforcement. In numerous jurisdictions, the supervisory ICE officials appear to have concluded that they have the resources to pursue Level three noncitizens.<sup>214</sup> As a result, traffic stops have become an important immigration enforcement tool.

## 2. Citation or Custodial Arrest?

In jurisdictions where identifying unauthorized migrants is viewed as an appropriate goal for 287(g) programs, the significant discretion that local law enforcement officers have to stop and arrest an individual is an asset.<sup>215</sup> The manner in which this discretion is exercised has led to critiques that law enforcement agents are using traffic offenses and other misdemeanors as a pretext for ascertaining immigration status. Driving without a license is a traffic violation, but officers have the discretion to either issue a citation or arrest an individual who does not have a driver's license. Tennessee has a "cite and release" statute. Law enforcement officers are required to issue a citation for driving without a license, but are allowed to arrest an individual and take him into custody if there is a "reasonable likelihood that the offense would continue," a "reasonable likelihood . . . that the arrested person will fail to appear in court," or "[t]he person arrested cannot or will not offer satisfactory evidence of identification."<sup>216</sup> North Carolina, Virginia, and Georgia have similar "cite

<sup>213</sup> *Id.*

<sup>214</sup> *But see* Tom Smith, 'Our Hands Are Tied': Officers Frustrated with Lack of Federal Support on Immigration Law, *TIMESDAILY.COM*, (Jan. 27, 2012), <http://www.timesdaily.com/stories/Our-hands-are-tied,186911> (reporting that the ICE office in Huntsville, Alabama is only willing to issue detainers for individuals identified by local law enforcement officials if they have a felony charge).

<sup>215</sup> *See, e.g.*, MOTOMURA, *supra* note 135, at 4–5; Motomura, *The Discretion That Matters*, *supra* note 135, at 1842–49.

<sup>216</sup> TENN. CODE ANN. § 40-7-118 (2006); *see* NASHVILLE METRO. POLICE DEP'T, GENERAL ORDER NO. 05-14, STATE MISDEMEANOR ARREST CITATIONS 2–3 (June 22, 2005), *available at* [http://www.tnimmigrant.org/storage/misc/Metro\\_PD\\_Policy\\_on\\_Arrests\\_vs\\_Citations%206-2008.pdf](http://www.tnimmigrant.org/storage/misc/Metro_PD_Policy_on_Arrests_vs_Citations%206-2008.pdf). The Nashville Metropolitan Police Department internal policy states that officers shall issue citations for state misdemeanor offenses when the "officer has reasonable proof of the identity of the suspected misdemeanant." *Id.* at 1. Alternatively when the individual arrested "cannot or will not offer satisfactory evidence of identification" the officer is prohibited from issuing a citation and must physically arrest the individual. *Id.* at 2–3. What forms of identification are considered valid has been an issue in Tennessee. Nashville Police Department's internal policy states that photo identifications like government, employee, military, or school identification are preferred. *Id.* at 4. Other acceptable, but less desirable, forms of identification include computer verified information, vehicle registrations and titles, government food or housing documents, voter registration cards, club/fraternal/service organization membership cards, social security cards, birth certificates, jail identification, parole/probation documents, and rent or utility receipts. *Id.* Identification documents from an immigrant's country of origin have not always been accepted as satisfactory identification. For example,

and release” statutes.<sup>217</sup> In Virginia, officers are allowed to arrest a driver if the officer reasonably believes the driver will disregard the summons or will cause harm to himself or another person.<sup>218</sup> Georgia has been concerned about unauthorized migrants driving without driver’s licenses and enacted harsher penalties to address driving without a license. State law requires that an individual guilty of driving without a license be fingerprinted and imprisoned for two days to twelve months.<sup>219</sup> A fine between \$500 and \$1,000 can also be imposed.<sup>220</sup>

The discretion that officers exercise in deciding whether to issue a citation or arrest a driver determines whether or not a driver’s immigration status will be checked. This discretion bolsters the role that patrol officers without 287(g) task force authority can play in immigration enforcement. Officers who exercise that discretion in ways

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Juana Villegas was stopped for a traffic violation. Julia Preston, *Immigrant, Pregnant, Is Jailed Under Pact*, N.Y. TIMES, July 20, 2008, at A13. Juana did not have a driver’s license, but provided a valid consular identification card, which contains a photo. 287(g) in *Tennessee*, TENN. IMMIGRANT & REFUGEE RTS. COAL., <http://www.tnimmigrant.org/287g>. The officer did not accept this as valid identification, allegedly stating that he believed that she was “illegal,” and he arrested her. *Id.*; Preston, *supra*. Juana Villegas was also nine months pregnant and gave birth with sheriff’s officers standing guard at her hospital bed where her feet were frequently cuffed to the bed. Preston, *supra*. When consular identification cards and other forms of identification are accepted as satisfactory identification unauthorized migrants avoid a custodial arrest and the mandatory immigration status check that accompanies a custodial arrest.

<sup>217</sup> N.C. GEN. STAT. § 20-35 (2011) (driving without a license is a Class 2 misdemeanor); N.C. GEN. STAT. § 15A-302 (authorizing the issuance of a citation for misdemeanors); N.C. GEN. STAT. § 15A-401 (authorizing an officer to arrest without a warrant if the officer has probable cause that an offense was committed in her presence); VA. CODE ANN. § 19.2-74.A.1 (2008) (requiring officer to issue a summons for Class 1 and 2 misdemeanors and release the detained individual); VA. CODE ANN. § 46.2-300 (2010) (first offense of driving without a license is a Class 2 misdemeanor, second offense is a Class 1 misdemeanor); GA. CODE ANN. § 17-4-20 (2008) (general arrest authority), GA. CODE ANN. § 17-4-23 (authority to issue a citation for motor vehicle violations in lieu of custodial arrest); *Brock v. State*, 396 S.E.2d 785, 786 (Ga. Ct. App. 1990) (holding that GA. CODE ANN. § 17-4-23(a) retains officer’s ability to effectuate a custodial arrest when a citation is allowed). In a case involving a driver with a Mexican driver’s license who failed to maintain his lane, the Georgia Court of Appeals held that the officer was within his statutory discretion to arrest the driver for failure to maintain his lane. *Lopez v. State*, 650 S.E.2d 430, 432–33 (Ga. Ct. App. 2007). While the driver, Lopez, had a valid Mexican driver’s license he could not provide his Georgia residential address. The Court concluded that the decision to arrest under these circumstances was not an abuse of the officer’s discretion. *Id.* at 433.

<sup>218</sup> VA. CODE ANN. § 19.2-74.A.1. Georgia statute does not provide guidelines or criteria regarding when a custodial arrest is allowed or appropriate. North Carolina statute only provides such guidelines for misdemeanors that do not occur in the presence of an officer. In those instances an arrest is allowed if the individual will not be apprehended immediately unless arrested or the individual may cause injury to himself or others or damage property unless arrested. N.C. GEN. STAT. § 15A-401(b)(2)(b).

<sup>219</sup> GA. CODE ANN. § 40-5-121 (2011).

<sup>220</sup> *Id.*

that target Latino communities perpetuate the idea that Latinos are foreigners in the United States regardless of their birthplace or citizenship status.

*B. Pretext*

Whether a state or local jurisdiction has a 287(g) agreement, participates in Secure Communities, the Criminal Alien Program, or has a state law requiring jailers to ascertain immigration status, law enforcement officials can use minor traffic offenses as a pretext for ascertaining immigration status. With an increasing number of states requiring individuals to prove lawful residence in the United States to obtain a driver's license, traffic offenses have become an important immigration enforcement tool.<sup>221</sup> Once stopped for a traffic offense the inability to provide a driver's license or adequate identification allows a patrol officer to arrest the driver. Residents of Latino communities believe that they are subject to extra patrols in which they are stopped "to verify they are wearing a seatbelt that is visibly fastened, for driving less than 5 mph over the speed limit, or for no reason at all."<sup>222</sup> Statistics from certain jurisdictions support this perception.<sup>223</sup>

In localities such as Bedford County, Tennessee, residents contend that they encounter roadblocks and extra patrols in Latino communities and near Latino grocery stores and markets.<sup>224</sup> At the roadblocks, vehicles were stopped to check for driver's licenses and identification. Since these checks occurred at roadblocks, the law enforcement officers did not have to identify a specific traffic violation before approaching the vehicle.<sup>225</sup> Decisions to place numerous roadblocks in Latino communities are perceived by members of these communities as an indication that law enforcement officials believe individuals within these communities are likely to be unauthorized migrants. Such actions perpetuate the idea that those of Latino descent are foreigners and unauthorized.

These stops allow law enforcement officers to check for a driver's license and arrest the driver if she is unable to produce one. Once arrested, the immigration status check begins at the jail. Since these patrol officers are not operating pursuant to a 287(g) task force agreement, they have no authority to stop an individual to inquire about

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<sup>221</sup> Kevin R. Johnson, *Driver's Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 NEV. L.J. 213 (2004).

<sup>222</sup> WHITE & KAZEROUNIAN, *supra* note 159, at 6.

<sup>223</sup> See *infra* text accompanying notes 234–40.

<sup>224</sup> WHITE & KAZEROUNIAN, *supra* note 159, at 6; see also ACLU COBB, *supra* note 159, at 110–11 (reporting similar incidents); ACLU GWINNETT, *supra* note 159, at 16 (same).

<sup>225</sup> It is unclear what the nature of the roadblocks at issue were, but police officers can conduct administrative searches such as sobriety or border checkpoints without having individualized suspicion of unlawful activity. See Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 255 (2011); see also *United States v. Martinez-Fuerte*, 428 U.S. 543, 562, 566 (1976).

their immigration status. Traffic violations provide a legitimate basis for patrol officers to stop an individual and potentially arrest him, at which point an immigration status determination will be made at the jail.

The significant number of traffic offenses and misdemeanors underlying ICE detainers in recent years suggests that law enforcement officials rely on pretextual traffic stops to identify deportable noncitizens. In Irving, Texas, which participates in the Criminal Alien Program, 98% of the individuals arrested and detained by ICE had been “charged with misdemeanor offenses.”<sup>226</sup> Thirty percent of the ICE detainers issued pursuant to 287(g) agreements in 2010 were based on traffic offenses.<sup>227</sup> Yet, in certain southeastern jurisdictions, traffic offenses account for over half of all ICE detainers issued in 2010.<sup>228</sup> For example, in Cobb County, Georgia 67% of the ICE detainers issued were due to a traffic offense.<sup>229</sup> The figure for Davidson County in Tennessee was 57%, and it was 52% in Mecklenburg County, North Carolina.<sup>230</sup>

In numerous jurisdictions throughout the Southeast minor traffic offenses are being used to identify unauthorized migrants. The targeted use of this enforcement strategy in Latino communities leaves its residents with the impression that they are being targeted. The perception of targeting contributes to a hostile environment. Drivers are not being stopped because a broken tail light is a public safety threat, but because the officer wants to check the driver’s immigration status. Enforcement strategies that alienate Latinos based on their ethnicity and presumed immigration status negatively shape Latino immigrants’ perceptions about their possible social mobility within U.S. society.

### C. Racial Profiling

The U.S. Department of Justice has defined “racial profiling” as the invidious use of race or ethnicity as a criterion in conducting stops, searches and other law enforcement investigative procedures. It is premised on the erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity.<sup>231</sup>

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<sup>226</sup> GARDNER & KOHLI, *supra* note 163, at 2. Within the same time period the Irving police arrested significantly higher numbers of Latinos for Class-C misdemeanors than they did African Americans or Whites. *Id.* at 5 & fig.1. Class-C misdemeanors are the least serious group of misdemeanors. TEX. PENAL CODE ANN. § 12.03 (West 2011).

<sup>227</sup> *See supra* note 190.

<sup>228</sup> CAPPS ET AL., *supra* note 7, at 58–59.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES 1 (2003), *available at* [http://www.justice.gov/crt/about/spl/documents/guidance\\_on\\_race.pdf](http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf); *see also* DEBORAH RAMIREZ ET AL., A

Many individuals within Latino communities in the Southeast believe that Latinos are stopped for minor traffic violations so that the officers can ascertain the driver's immigration status. Recent data analyzed by the Warren Institute at Berkeley Law School and the Department of Justice supports the existence of racial profiling in Arizona and nationwide.<sup>232</sup> The Warren Institute has found that since the inception of Secure Communities, 93% of the individuals identified for deportation through Secure Communities have been Latinos.<sup>233</sup> Even if the majority of individuals identified for deportation are unauthorized migrants, in 2010 Latinos only accounted for approximately 78% of the unauthorized migrant population.<sup>234</sup> The Department of Justice has concluded that the Maricopa County Sheriff's Office (MCSO) engaged in pervasive and systematic racial profiling. MCSO participated in Secure Communities and had 287(g) jail enforcement and task force agreements until December 2011.<sup>235</sup> Based on a statistical analysis of the MCSO's immigration enforcement program, Latino drivers were four to nine times more likely to be subject to a traffic stop than similarly situated

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RESOURCE GUIDE ON RACIAL PROFILING DATA COLLECTION SYSTEMS: PROMISING PRACTICES AND LESSONS LEARNED 3 (2000), available at <http://www.ncjrs.gov/pdffiles1/bja/184768.pdf> (defining "racial profiling" as "any police-initiated action that relies on the race, ethnicity, or national origin rather than the behavior of an individual or information that leads the police to a particular individual who has been identified as being, or having been, engaged in criminal activity.").

<sup>232</sup> The Center for Immigration Studies (CIS) has critiqued the methodology of this report. See, e.g., W.D. Reasoner & Jessica Vaughan, *Secure Communities by the Numbers, Revisited: Analyzing the Analysis (Part 2 of 3)*, CENTER FOR IMMIGR. STUD. (Mar. 2012), <http://www.cis.org/articles/2012/reasoner-vaughan-secure-communities-PART-2.pdf>. CIS contends that the Warren Institute should not have assumed that all individuals from Latin American countries are Latinos. Using the same methodology CIS found that 92.6% of those identified for deportation were Latino. *Id.* at 4. CIS seeks to distinguish non-mestizo Amerindians from Spanish-speaking Latinos. While these are important distinctions to make within Latin American country populations, in the United States these groups tend to be grouped together as Latino. The broad application of this term has been critiqued as grouping dissimilar individuals together based on country of origin, yet this practice has persisted. See, e.g., MASSEY & SÁNCHEZ R., *supra* note 79. Current usage of the term Latino in the United States seriously undermines this aspect of CIS' critique.

<sup>233</sup> AARTI KOHLI ET AL., *SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS* 5–6 (2011), available at [http://www.law.berkeley.edu/files/Secure\\_Communities\\_by\\_the\\_Numbers.pdf](http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf).

<sup>234</sup> HOEFER ET AL., *supra* note 26, at 4.

<sup>235</sup> The Department of Homeland Security did not renew Maricopa County Sheriff's Office's 287(g) task force agreement in 2009; it terminated the office's 287(g) jail enforcement agreement in December 2011 and restricted the office's access to Secure Communities in December 2011. Randal C. Archibold, *Immigration Hard-Liner Has His Wings Clipped*, N.Y. TIMES, Oct. 7, 2009, at A14; Press Release, Dep't of Homeland Sec., *Statement by Secretary Napolitano on DOJ's Findings of Discriminatory Policing in Maricopa County*, (Dec. 15, 2011), available at <http://www.dhs.gov/news/2011/12/15/secretary-napolitano-doj-finding-discriminatory-policing-maricopa-county>; see also Editorial, *The Case Against Sheriff Arpaio*, N.Y. TIMES, Dec. 17, 2011, at A24.

non-Latino drivers.<sup>236</sup> The expert conducting the statistical analysis noted that this was “the most egregious racial profiling in the United States that he has ever personally seen in the course of his work, observed in litigation, or reviewed in professional literature.”<sup>237</sup> Additionally the DOJ found that the MCSO’s Human Smuggling Unit stopped, detained, and/or arrested Latino drivers without adequate cause.<sup>238</sup> Approximately 20% of the traffic-related incident reports from this unit “contained information indicating that the stops, almost all of which involved Latino drivers, were conducted without reasonable suspicion or probable cause.”<sup>239</sup>

The use of racial profiling creates a hostile environment because Latino immigrants feel harassed, disrespected, and unwelcome.<sup>240</sup> This enforcement strategy legitimates law enforcement agents seeing Latinos as potential “illegal immigrants” rather than lawful residents or citizens because of their ethnic appearance. These types of pretextual traffic stops perpetuate the idea that Latino appearance is linked to foreignness.<sup>241</sup> The long-term consequence of this enforcement strategy is to leave Latino immigrants with the impression that naturalization will not provide the same opportunities for social mobility that it provides to other immigrants because they will always be perceived as foreign and possibly “illegal.” While racial profiling has generally been condemned as a legitimate police practice, its legal status in immigration enforcement is less clear. The following sections provide an analysis of the jurisprudence that supports the use of pretextual traffic stops to enforce immigration law and examples of racial profiling as an immigration enforcement strategy.

### 1. *Legal Support for Racial Profiling*

While the United States Supreme Court has not endorsed racial profiling in the immigration context, it has given immigration enforcement officers a great deal of latitude in using ethnicity to establish reasonable suspicion of unlawful presence in the United States. There are few legal checks to constrain immigration enforcement officers’ use of ethnicity to identify unauthorized migrants. The legal

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<sup>236</sup> Letter from Thomas E. Perez, Ass’t. Atty. Gen. of the U.S., Civil Rights Div., U.S. Dept. of Justice, to Bill Montgomery, Cnty. Atty. for Maricopa Cnty., Ariz. 6 (Dec. 15, 2011), *available at* [http://www.justice.gov/crt/about/spl/documents/mcso\\_findletter\\_12-15-11.pdf](http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf).

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *See, e.g.,* WHITE & KAZEROUNIAN, *supra* note 159, at 6; ACLU COBB, *supra* note 159; ACLU GWINNETT, *supra* note 159; LACAYO, *supra* note 159.

<sup>241</sup> *See* JIMÉNEZ, *supra* note 79, at 140–41; MIA TUAN, FOREVER FOREIGNERS OR HONORARY WHITES?: THE ASIAN ETHNIC EXPERIENCE TODAY 250 (1998); Fatma E. Marouf, *Regrouping America: Immigration Policies and the Reduction of Prejudice*, 15 HARV. LATINO L. REV. 129, 157–63 (2012).

system's failure to provide sufficient checks exacerbates the hostile environment in which Latino immigrants live.

In 1996, the U.S. Supreme Court held that pretextual stops do not violate the Fourth Amendment. In *United States v. Whren* the Court decided that probable cause that a traffic violation is occurring is a per se justification for a stop.<sup>242</sup> Once it is determined that an officer has probable cause to make the traffic stop the Fourth Amendment inquiry is over.<sup>243</sup> If officers use minor traffic violations as a pretext to determine if a driver has a driver's license or has violated other traffic laws like wearing a seatbelt there is no Fourth Amendment problem unless there was no probable cause for the initial stop.<sup>244</sup> The significant amount of discretion that officers have to make traffic stops means that considerations such as race could "seep into the [probable cause] calculus."<sup>245</sup> The Supreme Court has acknowledged this possibility and contends that the Equal Protection Clause provides the basis for addressing concerns about racial profiling.<sup>246</sup> In the immigration context few legal protections exist to combat racial profiling.

In 1975, the Court held that "Mexican appearance" is a relevant, although insufficient, factor giving rise to probable cause that an individual is unlawfully present in the United States.<sup>247</sup> The Immigration and Naturalization Act empowers immigration enforcement officers to "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States."<sup>248</sup> In *United States v. Brignoni-Ponce*,<sup>249</sup> the Court applied the Fourth Amendment reasonable suspicion standard to Border Patrol stops. The Court held that the Border Patrol is only authorized to stop individuals "if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be

<sup>242</sup> 517 U.S. 806 (1996).

<sup>243</sup> Janet Koven Levit, *Pretextual Traffic Stops: United States v. Whren and the Death of Terry v. Ohio*, 28 LOY. U. CHI. L.J. 145, 165 (1996).

<sup>244</sup> Anecdotal information suggests that probable cause may not exist in a number of traffic stops involving Latino drivers. Latino drivers in Tennessee and Georgia have reported being pulled over and not told the reason for the stop. After the drivers provide a driver's license they are released. ACLU COBB, *supra* note 159; ACLU GWINNETT, *supra* note 159; WHITE & KAZEROUNIAN, *supra* note 159. To the extent these types of stops are occurring, the Fourth Amendment rights of the drivers are being violated. ACLU GWINNETT, *supra* note 159, at 18. In such cases the drivers believe that they have been stopped because of their Latino appearance. ACLU COBB, *supra* note 159, at 9–11; ACLU GWINNETT, *supra* note 159, at 12, 16.

<sup>245</sup> Levit, *supra* note 243, at 167.

<sup>246</sup> *Whren*, 517 U.S. at 813.

<sup>247</sup> *United States v. Brignoni-Ponce*, 422 U.S. 873, 887 (1975).

<sup>248</sup> Immigration and Nationality Act (INA) § 287(a)(1), 8 U.S.C. § 1357(a)(1) (2006).

<sup>249</sup> 422 U.S. 873.

illegally in the country.”<sup>250</sup> “Mexican appearance” alone does not create reasonable suspicion of unlawful presence. The Court noted that “[l]arge numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small portion of them are aliens.”<sup>251</sup> Yet the Court concluded that “Mexican appearance” is a relevant factor because the “likelihood that any given person of Mexican ancestry is an alien is high.”<sup>252</sup>

Despite the incongruence of these statements, current law allows immigration enforcement officers to consider ethnicity as a factor in establishing reasonable suspicion regarding immigration status. Ethnicity is one of many factors that officers can consider because “Mexican appearance” alone “does not justify stopping all Mexican-Americans to ask if they are aliens.”<sup>253</sup> Some of the other factors include “characteristics of the area in which [the officers] encounter a vehicle,”<sup>254</sup> “the driver’s behavior,”<sup>255</sup> “[a]spects of the vehicle,”<sup>256</sup> and “characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut.”<sup>257</sup>

The Court’s conclusion regarding the relevance of “Mexican appearance” was based on the government’s estimate that 85% of unauthorized migrants in the United States at the time were from

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<sup>250</sup> *Brignoni-Ponce*, 422 U.S. at 884. The Court had earlier held that probable cause was needed for Border Patrol officers to search vehicles at a fixed checkpoint or pursuant to a roving-patrol search. *United States v. Ortiz*, 422 U.S. 891 (1975) (fixed checkpoints); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (roving patrols). In 1976 the Court distinguished between searches and stops in which an individual is asked about their immigration status. In the latter situation, Border Patrol officers do not need individualized suspicion to stop and question an individual at a fixed checkpoint. *United States v. Martinez-Fuerte*, 428 U.S. 543, 562 (1976). Even if the stop is based “largely on the basis of apparent Mexican ancestry” the Court “perceive[d] no constitutional violation.” *Id.* at 563. *Brignoni-Ponce*’s requirement of individualized reasonable suspicion for stops pursuant to a roving-patrol survived *Martinez-Fuerte*. The Court specifically noted that criteria sustaining the stop and questioning in *Martinez-Fuerte* “would not sustain a roving-patrol stop.” *Id.*

<sup>251</sup> *Brignoni-Ponce*, 422 U.S. at 886.

<sup>252</sup> *Id.* at 886–87.

<sup>253</sup> *Id.* at 887.

<sup>254</sup> *Id.* at 884.

<sup>255</sup> *Id.* at 885. Examples of “[t]he driver’s behavior” include driving erratically or obviously attempting to evade officers. *Id.*

<sup>256</sup> *Id.* “Aspects of the vehicle” includes factors such as “certain station wagons, with large compartments for fold-down seats or spare tires,” a “heavily loaded” appearance, a large number of passengers, or if the officers notice individuals trying to hide. *Id.*

<sup>257</sup> *Id.*; see also Chacón, *supra* note 11, at 145–46; Gabriel J. Chin et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47, 70–72 (2010); Johnson, *supra* note 30, at 1024.

Mexico.<sup>258</sup> It is doubtful that these numbers were correct. The 1981 final report of the U.S. Select Commission on Immigration and Refugee Policy stated, “Mexican nationals probably account for less than half of the undocumented/illegal population.”<sup>259</sup> In 2010, the Department of Homeland Security estimated that Mexican nationals account for 61% of the unauthorized migrant population.<sup>260</sup> While the Mexican percentage of the unauthorized migrant population has increased since 1975, the majority of individuals in the United States of Mexican ancestry are U.S. citizens or lawfully present migrants.

In 2010, approximately 78% of the unauthorized migrants in the United States were from Mexico, Central America, and South America. Based on these types of statistics, the Supreme Court and others conclude that it is more likely that a Latino is an unauthorized migrant. Yet the overwhelming majority of Latinos in the United States are U.S. citizens or lawfully present migrants. Available statistics suggest that 83.5% of the Latino population in the United States is within these categories.<sup>261</sup> Approximately 74% of the Latino population are U.S. citizens, either by birth or naturalization, and 9.5% are lawful migrants.<sup>262</sup> Based on the logic offered by the U.S. Supreme Court, lower courts, and law enforcement officials, that ethnicity is a relevant factor in identifying unauthorized migrants, being an African-American is probative of being an NBA player. The majority of NBA players are African-American; therefore being African-American is relevant in determining if a specific individual is an NBA player. Since the majority of African-Americans are not NBA players, race does not provide particularly useful information regarding NBA player status. Factors such as height and athletic ability are much more probative. Similarly, Mexican appearance is being used as a factor for ascertaining immigration status when other factors are much more probative.

The Ninth Circuit agreed and held that “Hispanic appearance,” even when considered with other factors, does not assist in establishing reasonable suspicion of being unlawfully present.<sup>263</sup> In *United States v. Montero-Camargo* the court acknowledged *Brignoni-Ponce*’s statement on

<sup>258</sup> Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 694 (2000).

<sup>259</sup> SELECT COMM’N ON IMMIGRATION AND REFUGEE POL’Y, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 36 (1981), reprinted in H. AND S. COMMS. ON THE JUDICIARY, 97TH CONG., JOINT COMM. PRINT NO. 8 (1981). This statement was based on data from the U.S. Census Bureau. Johnson, *supra* note 258, at 695 & n.96.

<sup>260</sup> HOEFER ET AL., *supra* note 26, at 4.

<sup>261</sup> *Id.*; U.S. Census Bureau, *2010 American Community Survey 1-Year Estimates: Sex by Age by Citizenship Status (Hispanic or Latino)*, AMERICAN FACTFINDER (2010), [http://factfinder2.census.gov/bkmk/table/1.0/en/ACS/10\\_1YR/B05003I](http://factfinder2.census.gov/bkmk/table/1.0/en/ACS/10_1YR/B05003I).

<sup>262</sup> HOEFER ET AL., *supra* note 26, at 4; U.S. Census Bureau, *supra* note 260. Lawful migrants includes individuals present pursuant to both immigrant and nonimmigrant visas.

<sup>263</sup> *United States v. Montero-Camargo*, 208 F.3d 1122, 1131 (9th Cir. 2000).

the matter but held that the Supreme Court’s decision was based on “outdated demographic information.”<sup>264</sup> At the time the Ninth Circuit issued its decision, the Latino population throughout the country had grown tremendously such that Latinos were a majority or substantial part of the population in many parts of the country, particularly those near the border.<sup>265</sup> Based on this demographic information, the court concluded that the likelihood that anyone 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.”<sup>266</sup> The court emphasized the need for individualized suspicion and concluded that “Hispanic appearance is of little or no use in determining which particular individuals among the vast Hispanic populace should be stopped by law enforcement officials on the lookout for illegal aliens.”<sup>267</sup> This approach has not been adopted outside of the Ninth Circuit.

The Supreme Court’s tolerance for the use of ethnicity in establishing reasonable suspicion of unlawful presence reinforces the idea that ethnicity is a marker of foreignness and immigration status. Approval of the connection between ethnicity, foreignness, and immigration status undermines the idea that the social benefits of citizenship are equally available to all.

## 2. *Racial Profiling in Practice*

The continued use of Latino appearance as a factor in determining who is unlawfully present in the United States disproportionately burdens one segment of the population, the majority of whom are U.S. citizens or lawful immigrants.<sup>268</sup> As the Latino population in the United States has grown more diverse, the relevance of “Mexican appearance” has been expanded to Latino appearance.<sup>269</sup> As with the Mexican ancestry population, the majority of the Latino population in the United States is comprised of U.S. citizens and lawful immigrants.<sup>270</sup> Yet the perception of foreignness continues to attach to Latino ethnicity. Research by social psychologists demonstrates “‘a very consistent and robust’ association

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<sup>264</sup> *Id.* at 1132.

<sup>265</sup> *Id.* at 1133.

<sup>266</sup> *Id.* at 1132.

<sup>267</sup> *Id.* at 1134.

<sup>268</sup> Justice Brennan raised a similar concern in his dissent in *Martinez-Fuerte*. He noted that the Court’s decision authorized the Border Patrol to “target motorists of Mexican appearance. The process will then inescapably discriminate against citizens of Mexican ancestry and Mexican aliens lawfully in this country for no other reason than that they unavoidably possess the same ‘suspicious’ physical and grooming characteristics of illegal Mexican aliens.” *United States v. Martinez-Fuerte*, 428 U.S. 543, 572 (1976) (Brennan, J., dissenting).

<sup>269</sup> Johnson, *supra* note 258, at 698.

<sup>270</sup> SETH MOTEL & EILEEN PATTEN, PEW HISPANIC CTR., THE 10 LARGEST HISPANIC ORIGIN GROUPS: CHARACTERISTICS, RANKINGS, TOP COUNTIES 10 (2012), <http://www.pewhispanic.org/files/2012/06/The-10-Largest-Hispanic-Origin-Groups.pdf>.

between American identity and Whiteness.”<sup>271</sup> A study of Caucasian Americans and Latino Americans found that both groups explicitly and implicitly saw Latino Americans as less American than Caucasian Americans.<sup>272</sup> Other studies have found similar results for Asian Americans and African Americans.<sup>273</sup> The scholars involved in this research conclude that the research findings suggest that “a very basic right to a national identity is not equally available to all Americans,” because “national identity is more readily granted to members of the dominant ethnic group than to members of an ethnic minority.”<sup>274</sup> For Latinos in the United States, this can mean being perceived as a noncitizen rather than a citizen.

In 2008, the Pew Hispanic Center reported that approximately 9% of Latino adults in the United States (native-born, U.S. citizens, and immigrants) had been asked about their immigration status by a police officer or other government official in the last year.<sup>275</sup> Citizens have even been apprehended by ICE and held for questioning. The Warren Institute found that 1.6% of individuals apprehended by ICE pursuant to Secure Communities were U.S. citizens.<sup>276</sup> Despite naturalizing and becoming U.S. citizens, some Latino citizens are subject to apprehension by ICE because local law enforcement agents target them and ICE databases are incomplete.<sup>277</sup> Knowledge that one can be arrested and subsequently detained by ICE despite being a U.S. citizen suggests that naturalization will not provide a presumption of belonging or preclude

<sup>271</sup> Marouf, *supra* note 241, at 157 (quoting Thierry Devos & Mahzarin R. Banaji, *American = White?*, 88 J. PERSONALITY & SOC. PSYCHOL. 447, 463 (2005)).

<sup>272</sup> Thierry Devos et al., *Say “Adios” to the American Dream? The Interplay Between Ethnic and National Identity Among Latino and Caucasian Americans*, 16 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 37 (2010).

<sup>273</sup> Marouf, *supra* note 241, at 157–58 (citing studies).

<sup>274</sup> Devos et al., *supra* note 272, at 47; *see also* JIMÉNEZ, *supra* note 79, at 160; TUAN, *supra* note 241, at 18.

<sup>275</sup> MARK HUGO LOPEZ & SUSAN MINUSHKIN, PEW HISPANIC CTR., 2008 NATIONAL SURVEY OF LATINOS: HISPANICS SEE THEIR SITUATION IN THE U.S. DETERIORATING; OPPOSE KEY IMMIGRATION ENFORCEMENT MEASURES 9 (2008), *available at* <http://pewhispanic.org/files/reports/93.pdf>. The rate was higher for Latinos 18 to 29 years old—15%—and significantly lower for those over age 55—4%. *Id.* The figures dropped to 5% of Latino adults in the United States in 2010, however, the figure for Latino men was 8%. MARK HUGO LOPEZ ET AL., PEW HISPANIC CTR., ILLEGAL IMMIGRATION BACKLASH WORRIES, DIVIDES LATINOS 12 (2010), *available at* <http://www.pewhispanic.org/files/reports/128.pdf>.

<sup>276</sup> KOHLI ET AL., *supra* note 233, at 4. ICE Director John Morton responded to this information by stating that “[i]t would be irresponsible for us not to investigate someone who is suspected of a crime and has some record of being foreign born.” Julia Preston, *Latinos Said to Bear Weight of a Deportation Program*, N.Y. TIMES, Oct. 19, 2011, at A16. *See also supra* note 232.

<sup>277</sup> *See, e.g.*, Julia Preston, *Immigration Crackdown Also Snares Americans*, N.Y. TIMES, Dec. 14, 2011, at A20.

one from ICE’s jurisdiction.<sup>278</sup> Denial of these benefits of citizenship may cause some Latino immigrants to conclude that the benefits of naturalization do not outweigh the costs.<sup>279</sup>

Latino residents of Bedford County in Tennessee feel that regardless of immigration status one is “marked out if you have dark skin, hair, or if you speak English with [an] accent.”<sup>280</sup> In Alabama it has been alleged that 58% of the vehicle searches done by one specific state trooper were conducted with Latino motorists, even though Latinos account for only 2% of Alabama’s population.<sup>281</sup> In Shelbyville, Tennessee, public records indicate that the local police department arrested a disproportionate number of Latino drivers for traffic violations in the first quarter of 2011.<sup>282</sup> Thirty-five percent of those arrested were Latino, even though Latinos only make up approximately 20% of Shelbyville’s population.<sup>283</sup> As has been reported in other jurisdictions, it appears that a few officers made the majority of the arrests of Latino drivers.<sup>284</sup> Four officers were responsible for 62% of the arrests of Latino drivers for traffic violations.<sup>285</sup> Shelbyville officers are not assigned a specific area to patrol, but rather patrol throughout the city. This suggests “that some officers may be intentionally targeting Latino drivers for traffic stops and arrests, perhaps in order to facilitate detention by ICE.”<sup>286</sup>

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<sup>278</sup> ICE only has jurisdiction over noncitizens. See Immigration and Nationality Act (INA) § 237(a), 8 U.S.C. § 1227(a) (2006).

<sup>279</sup> The costs associated with naturalization include time, money, and a potential risk of being deported. The filing fee for a naturalization application is \$595 plus an \$85.00 biometric fee. 8 C.F.R. §§ 103.7(b)(1)(i)(C), 103.7(b)(1)(i)(XX) (2012). Applicants frequently pay for English classes and classes on U.S. history and civics. MIGRATION POLICY INST., IMMIGRATION FEE INCREASES IN CONTEXT 1 (2007), available at [http://www.migrationpolicy.org/pubs/FS15\\_CitizenshipFees2007.pdf](http://www.migrationpolicy.org/pubs/FS15_CitizenshipFees2007.pdf). Other costs include photographs and hiring an attorney to prepare the application. *Id.* Time is spent gathering the necessary information for the application and putting it together. A potential risk is involved because one of the naturalization requirements is being a person of good moral character. If during the process of reviewing the application the government concludes that an individual does not have good moral character due to a criminal conviction, the applicant may be eligible for deportation. Now the applicant is facing deportation proceedings rather than a naturalization ceremony. See Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 IND. L.J. 1571 (2012); Anthony Lewis, Op-Ed., *Rays of Hope*, N.Y. TIMES, Feb. 10, 2001, at A15 (describing how this happened to Mary Anne Gerhis).

<sup>280</sup> WHITE & KAZEROUNIAN, *supra* note 159, at 6.

<sup>281</sup> Daniel C. Vock, *Police Join Feds to Tackle Immigration*, PEW CHARITABLE TR. (Nov. 27, 2007), <http://www.pewstates.org/projects/stateline/headlines/police-join-feds-to-tackle-immigration-85899386665>.

<sup>282</sup> WHITE & KAZEROUNIAN, *supra* note 159, at 6.

<sup>283</sup> *Id.* Latinos also accounted for 39% of the arrests for driving license violations. *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 7.

<sup>286</sup> *Id.*

Latino drivers report being stopped frequently for minor traffic violations or being stopped without probable cause of wrongdoing.<sup>287</sup> For example, in Georgia individuals report being pulled over for crossing the white line, expired registration, improper or incomplete stop at a stop sign, and failing to dim headlights.<sup>288</sup> The officers' conduct during traffic stops has given some drivers pause as to whether the stop was a pretext to ascertain immigration status. For example, Gabriel was ticketed for an improper stop at a stop sign. Gabriel had been extra careful to make a full and complete stop at the intersection because he knew this was an area frequented by county police officers.<sup>289</sup> The officers did not tell Gabriel the reason for the stop, but they issued him a ticket for an improper stop and arrested him for driving without a driver's license.<sup>290</sup> Gabriel noticed several cars passed through the stop sign without making a complete stop before he was pulled over. None of those cars were stopped by the police officers and Gabriel thinks that the fact that the individuals in those vehicles appeared Caucasian was relevant in the officer's decision to leave them alone.<sup>291</sup> Similarly, Rogerio was stopped for driving on a closed road in a residential area. Before the police officer asked for a driver's license, he asked Rogerio about his immigration status, whether he had an alien registration card, visa, or passport.<sup>292</sup> Another example involves a Tennessee Highway Patrol State Trooper who pulled over a Latino driver for speeding. The driver immediately showed the officer his valid driver's license and proof of insurance. At this point the officer asked for the driver's green card. The driver inquired about the officer's authority to investigate immigration status, to which the officer "demanded proof of his citizenship, stating that he 'knew' the driver 'was an illegal.'"<sup>293</sup> The driver was issued a citation for driving without a license, no proof of insurance, and no seatbelt, even though the driver had provided a license, evidence of insurance, and was visibly wearing a seatbelt.<sup>294</sup>

Latino drivers also report being pulled over for reasons that are not clear and then given a citation or arrested for traffic violations such as driving without a license. Other drivers are not arrested or issued a citation, but they are never provided with an explanation for the stop.<sup>295</sup>

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<sup>287</sup> Organizations such as the ACLU, the National Council of La Raza, and the Tennessee Immigrant and Refugee Rights Coalition have documented allegations of racial profiling in southeastern states related to local immigration enforcement. ACLU COBB, *supra* note 159, at 9–13; ACLU GWINNETT, *supra* note 159, at 10–16; LACAYO, *supra* note 159, at 13–19; WHITE & KAZEROUNIAN, *supra* note 159, at 6–7.

<sup>288</sup> ACLU COBB, *supra* note 159, at 9–13; ACLU GWINNETT, *supra* note 159, at 14.

<sup>289</sup> ACLU COBB, *supra* note 159, at 10–11.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* at 12.

<sup>293</sup> WHITE & KAZEROUNIAN, *supra* note 159, at 7.

<sup>294</sup> *Id.*

<sup>295</sup> ACLU GWINNETT, *supra* note 159, at 10–11.

For example, a Gwinnett County sheriff pulled Juan over as he was leaving work. Juan asked the officer several times why he had been stopped. The officer never answered Juan, but requested his driver’s license and “screamed at him for asking questions.”<sup>296</sup> Juan produced a valid driver’s license and was subsequently released. The officer never issued Juan a citation or explained the reason for the stop.<sup>297</sup>

While these examples may be written off as mere anecdotes, they represent a perception that exists amongst many Latino immigrants—that they are targeted for immigration enforcement because of their ethnicity.<sup>298</sup> The Homeland Security Task Force on Secure Communities acknowledged the importance of this perception and recommended that ICE withhold enforcement action for individuals identified through Secure Communities based on a minor traffic offense.<sup>299</sup> The Task Force noted that such a policy would “reduce the risk of racial profiling or other distortions of standard arrest practices followed by arresting or correctional officers.”<sup>300</sup>

The perception of racial profiling not only contributes to a hostile environment, it “could very well cast a shadow on the brightness of the American Dream.”<sup>301</sup> More specifically, it suggests that the social mobility benefits of citizenship may not be equally available. Sociologists Massey and Sánchez R. found that while Latino immigrants see the United States as a land of opportunity, they also see it as a place of great inequality.<sup>302</sup> Their perceptions of inequality were based on “the high degree of prejudice in the United States against minorities, the poor, and those who do not speak English.”<sup>303</sup> The targeting of those with a Latino appearance for immigration status checks also perpetuates the idea that Latinos are foreigners. Ethnic appearance is visible in a way that citizenship status is not. The benefits of presumed belonging and membership within the polity that generally attach to citizenship are unavailable as long as one’s appearance suggests that one is a foreigner. These perceptions of the United States not only contribute to a hostile environment, but also imply that naturalization may not facilitate social mobility.

<sup>296</sup> *Id.* at 5.

<sup>297</sup> *Id.*

<sup>298</sup> ACLU COBB, *supra* note 159; ACLU GWINNETT, *supra* note 159; KOHLI ET AL., *supra* note 233, at 6; LACAYO, *supra* note 159, at 6; Rights Working Grp., Faces of Racial Profiling: A Report from Communities Across America 5–7 (2010), available at <http://www.rightsworkinggroup.org/sites/default/files/ReportText.pdf>; WHITE & KAZEROUNIAN, *supra* note 159, at 6–7.

<sup>299</sup> TASK FORCE ON SECURE COMTYS., HOMELAND SEC. ADVISORY COUNCIL, FINDINGS AND RECOMMENDATIONS 22 (2011), available at <http://www.dhs.gov/xlibrary/assets/hsac-task-force-on-secure-communities-findings-and-recommendations-report.pdf>.

<sup>300</sup> *Id.*

<sup>301</sup> MASSEY & SÁNCHEZ R., *supra* note 79, at 124.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

## V. DECIDING TO NATURALIZE

Citizenship is often viewed as the ultimate sign of successful incorporation into U.S. society.<sup>304</sup> Many have heard people tell stories about their older relatives who eagerly awaited the opportunity to naturalize because it signaled becoming American. They were anxious to claim this identity and so they naturalized at the first available moment. This perception of naturalization has been challenged by the idea of defensive, instrumental, or protective naturalization that was discussed in Part II. Pursuant to this conception of naturalization, immigrants become citizens to reap the material benefits of citizenship.<sup>305</sup> This Article uses the growing research on the social benefits of naturalization to offer an additional perspective on the relationship between naturalization and incorporation. Rather than seeing the decision to naturalize as a rational calculation of material costs and benefits, naturalization can also be understood as a statement about immigrants' sense of acceptance and opportunity for mobility within the United States. Exploring these aspects of naturalization opens up a wider range of policy options to encourage naturalization. It also provides a basis for evaluating existing immigrant- and immigration-related policy.

This Part contends that the social and material benefits of citizenship matter in naturalization decisions, and that immigrants' environment provides insight on the relationship between naturalization, perceived belonging, and social mobility. The use of minor traffic violations to ascertain immigration status contributes to a hostile environment by perpetuating the idea that Latinos are foreigners and likely "illegal aliens."<sup>306</sup> Repeated experiences with this message suggest that naturalization will do little to increase Latino immigrants' perceived belonging and opportunities for social mobility in the United States.<sup>307</sup>

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<sup>304</sup> Naturalization is often discussed as "a signifier of assimilation." Gilbertson & Singer, *supra* note 86, at 26 (citing Smith, *supra* note 86, at 197). This conception of naturalization "corresponds to a national model of citizenship which sees immigrants as incorporating as citizens of a single nation-state. According to this view, immigrants shed their 'traditional' way of life and integrate into the social, cultural and political life of the receiving society while severing ties to the origin country. . . . This perspective suggests that immigrants become full members of the host society and that the logical end point of the integration of immigrants into the receiving society is single nation-state citizenship." *Id.* (citations omitted).

<sup>305</sup> See, e.g., BORJAS, The Impact of Welfare Reform, *supra* note 93, at 9; Balistreri & Van Hook, *supra* note 93; Borjas, *Welfare Reform and Immigrant Participation*, *supra* note 93, at 1094; Gilbertson & Singer, *supra* note 86, at 30, 44; Jones-Correa, *supra* note 93, at 41; Ong, *supra* note 93; Adrian D. Pantoja et al., *Citizens by Choice, Voters by Necessity: Patterns in Political Mobilization by Naturalized Latinos*, 54 POL. RES. Q. 729, 730 (2001).

<sup>306</sup> Marouf, *supra* note 241, at 132-33 (noting "persistent association between American identity and Whiteness").

<sup>307</sup> See Jiménez, *supra* note 79, at 140-41 Tuan, *supra* note 241, at 18; T. Alexander Aleinikoff & Rubén G. Rumbaut, *Terms of Belonging: Are Models of Membership Self-Fulfilling Prophecies?*, 13 GEO. IMMIGR. L.J. 1, 24 (1998).

A. *Variation in Naturalization Rates*

Since 1990 a greater portion of immigrants eligible to naturalize are doing so, but the rate for Mexicans is disproportionately low. In 1990, 37% of the lawfully present foreign-born population had naturalized.<sup>308</sup> By 2005 the percentage had increased to 52%.<sup>309</sup> This increase has been attributed to a larger number of eligible immigrants and a greater likelihood that those eligible will seek citizenship.<sup>310</sup> Yet these naturalization rates are not even across countries of origin. For example, Mexican immigrants accounted for 35% of immigrants eligible to naturalize in 2005 yet only accounted for 13% of immigrants who naturalized that year.<sup>311</sup> Asian immigrants who constituted 19% of eligible immigrants made up 39% of the immigrants who naturalized in 2005.<sup>312</sup> Central Americans' rates are closer to that of Mexicans. In 2005, Central Americans accounted for 8% of eligible immigrants but only 5% of immigrants who naturalized that year.<sup>313</sup> A similar trend is noticeable since 1995.<sup>314</sup>

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<sup>308</sup> PASSEL, *supra* note 24, at i.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.* See also Balistreri & Van Hook, *supra* note 93, at 114.

<sup>311</sup> OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., 2005 YEARBOOK OF IMMIGRATION STATISTICS 53, 55 (2006); PASSEL, *supra* note 24, at 27.

<sup>312</sup> OFFICE OF IMMIGRATION STATISTICS, *supra* note 311, at 53 (showing percent who naturalized); PASSEL, *supra* note 24, at 27 (showing percent eligible).

<sup>313</sup> OFFICE OF IMMIGRATION STATISTICS, *supra* note 311, at 53–55 (showing number naturalized from Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama); PASSEL, *supra* note 24, at 27 (showing percent eligible).

<sup>314</sup> PASSEL, *supra* note 24, at 27. In 2000, Mexico, Ecuador, Honduras, El Salvador, and Guatemala each had below average naturalization rates ranging from 29.1%–44.3%. PORTES & RUMBAUT, IMMIGRANT AMERICA, *supra* note 61, at 145 (percentage of each immigrant group that are naturalized citizens).

YEAR	PERCENT OF LPRS ELIGIBLE TO NATURALIZE	PERCENT OF INDIVIDUALS NATURALIZED
2010	32.2	10.8
2009	32.7	15.0
2008	33.3	22.2
2007	33.7	18.5
2006	32.1	12.0
2005	35.2	12.8
2004	29.8	11.9

The trend of disproportionately low naturalization rates for Mexican immigrants has continued, although it has reversed somewhat for Central American immigrants since 2007.<sup>316</sup> The enactment of the Nicaraguan Adjustment and Central American Relief Act (NACARA) in 1997<sup>317</sup> may help to explain the increase in Central American naturalization rates. NACARA made it easier for certain Central American and Eastern European nationals to adjust their status to LPR and relaxed the standards for discretionary relief from deportation.<sup>318</sup> Congress' enactment of NACARA can be seen as neutralizing a negative environment for Central American immigrants. By providing increased access to LPR status, Central American migrants were given an explicit message of welcome.

The disproportionately low naturalization rates for Mexican immigrants have been an issue of interest for immigration scholars because they suggest that Mexican immigrants are less incorporated in the United States than other immigrants.<sup>319</sup> Lower naturalization rates mean that a smaller percentage of Mexican immigrants have the full bundle of legal rights and social benefits of citizenship.

Scholars have offered a variety of explanations for the differences in naturalization rates. These explanations have focused on the individual

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<sup>315</sup> OFFICE OF IMMIGRATION STATISTICS, *supra* note 12, at 53, 55; RYTINA, *supra* note 13, at 4; NANCY RYTINA, OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., ESTIMATES OF THE LEGAL PERMANENT RESIDENT POPULATION IN 2009, at 4 (2010); NANCY RYTINA, OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., ESTIMATES OF THE LEGAL PERMANENT RESIDENT POPULATION IN 2008, at 4 (2009); NANCY RYTINA, OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., ESTIMATES OF THE LEGAL PERMANENT RESIDENT POPULATION IN 2007, at 4 (2009); NANCY RYTINA, OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., ESTIMATES OF THE LEGAL PERMANENT RESIDENT POPULATION IN 2006, at 4 (2008); NANCY F. RYTINA, OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., ESTIMATES OF THE LEGAL PERMANENT RESIDENT POPULATION AND POPULATION ELIGIBLE TO NATURALIZE IN 2004, at 4 (2006); PASSEL, *supra* note 24, at 27.

<sup>316</sup> OFFICE OF IMMIGRATION STATISTICS, *supra* note 12, at 53–55.

<sup>317</sup> Pub. L. No. 105-100, 111 Stat. 2193 (1997).

<sup>318</sup> Gabrielle M. Buckley, *Immigration and Nationality*, 32 INT'L LAW. 471, 480 (1998).

<sup>319</sup> See, e.g., SCHUCK, *supra* note 81, at 168–70; JACOBSON, *supra* note 82, at 65.

skills and resources of the immigrant, regulatory or bureaucratic barriers to naturalization, the relative costs and benefits of naturalizing, and more recently, immigrants' context or environment.<sup>320</sup> This section contends that immigrants' context provides valuable information about the availability of the social benefits of citizenship. The literature evaluating the costs and benefits of naturalizing has focused on the material benefits of citizenship. Insufficient attention has been given to the role that the social benefits of citizenship play in individual decisions to naturalize. The context that immigrants encounter not only explicitly or implicitly encourages naturalization; it also provides important information about the likelihood of social mobility and being perceived as a member of society. A context in which nativity, foreignness, and immigration status are closely connected to ethnicity can lead immigrants to conclude that a change in citizenship status absent a change in ethnicity will do little to increase their perception of belonging or opportunities for social mobility.

The cost-benefit theory of naturalization posits that noncitizens do not naturalize because they do not see the benefits of U.S. citizenship outweighing the costs. There are two variations of this argument. First, citizenship offers few benefits that are not already available to green card holders so there is no incentive to naturalize.<sup>321</sup> Second, citizenship does offer unique benefits, but immigrants are unaware of them. Once immigrants become aware of the citizenship benefits, they naturalize.<sup>322</sup> One of the most significant costs of becoming a United States citizen can be losing citizenship in one's home country. Citizenship in many countries around the world is required to own property or participate in society in other significant ways. If these states do not recognize dual citizenship, becoming a United States citizen can mean losing important

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<sup>320</sup> Bloemraad, *Citizenship Lessons from the Past*, *supra* note 8, at 928; *see also* Jasso & Rosenzweig, *supra* note 82, at 116–21; MICHAEL JONES-CORREA, *BETWEEN TWO NATIONS: THE POLITICAL PREDICAMENT OF LATINOS IN NEW YORK CITY* (1998); SCHUCK, *supra* note 81, at 169–70; Robert R. Alvarez, *A Profile of the Citizenship Process Among Hispanics in the United States*, 21 INT'L MIGRATION REV. 327–28 (1987); Bloemraad, *supra* note 8; Peggy Levitt & Nina Glick Schiller, *Conceptualizing Simultaneity: A Transnational Social Field Perspective on Society*, 38 INT'L MIGRATION REV. 1002, 1024–26 (2004); Louis DeSipio, *Building America, One Person at a Time: Naturalization and the Political Behavior of the Naturalized in Contemporary American Politics*, in *E PLURIBUS UNUM?: CONTEMPORARY AND HISTORICAL PERSPECTIVES ON IMMIGRANT POLITICAL INCORPORATION* 67–106 (Gary Gerstle & John Mollenkopf eds., 2001); David S. North, *The Long Grey Welcome: A Study of the American Naturalization Program*, 21 INT'L MIGRATION REV. 311 (1987); Alejandro Portes & Rafael Mozo, *The Political Adaptation Process of Cubans and Other Ethnic Minorities in the United States: A Preliminary Analysis*, 19 INT'L MIGRATION REV. 35, 46 (1985); Carole J. Uhlaner et al., *Political Participation of Ethnic Minorities in the 1980s*, 11 POL. BEHAV. 195 (1989); Yang, *supra* note 88, at 474.

<sup>321</sup> *See, e.g.*, JACOBSON, *supra* note 82, at 40, 65; SCHUCK, *supra* note 81, at 168–70; YASEMIN NUHOGLU SOYSAL, *LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE* 123–24 (1994).

<sup>322</sup> Van Hook et al., *supra* note 8, at 647.

rights in the home country.<sup>323</sup> Countries like El Salvador have recognized dual citizenship since 1983, but Mexico, the Dominican Republic, Guatemala, and Brazil only began to recognize dual citizenship in the mid- to late-1990s.<sup>324</sup> Bolivia, Chile, and Honduras have only done so since 2004, 2005, and 2003, respectively.<sup>325</sup> While this was a significant cost historically, today Mexican immigrants and numerous Central American and South American immigrants no longer face this cost.

This section focuses on the second version of the cost–benefit thesis because of the significant social and material benefits that are uniquely available to citizens. For example, only citizens who are seen as full members of society can vote in state and federal elections, can sponsor a broader range of relatives for immigrant status, have access to certain social welfare benefits, and have an absolutely secure right to enter and remain in the United States. Research examining the role of immigrants' environment on naturalization decisions provides new insights into the cost–benefit analysis of immigrants' naturalization decisions.

### B. *Context of Reception & Naturalization Decisions*

The social science research on naturalization indicates that both the social and material benefits of citizenship are important factors in naturalization decisions. So, while access to voting rights, employment opportunities, the ability to freely enter the United States, and greater ability to sponsor relatives for green cards influence naturalization decisions, so does a welcoming environment.<sup>326</sup> The disproportionate use of traffic stops to ascertain immigration status in Latino communities perpetuates the idea that Latinos are foreigners in the United States regardless of their birthplace or citizenship status.<sup>327</sup> This suggests that fewer of the social benefits of naturalization will be available. The court decisions permitting the use of ethnicity to establish suspicion of unauthorized immigration status without sufficient oversight for abuse perpetuates the idea that Latinos are foreigners.

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<sup>323</sup> See Cristina Escobar, *Extraterritorial Political Rights and Dual Citizenship in Latin America*, 42 *LATIN AM. RES. REV.*, Oct. 2007, at 41, 50–51; Gilbertson & Singer, *supra* note 86, at 30.

<sup>324</sup> Escobar, *supra* note 323, at 51; Michael Jones-Correa, *Under Two Flags: Dual Nationality in Latin America and Its Consequences for Naturalization in the United States*, 35 *INT'L MIGRATION REV.* 997, 999 (2001).

<sup>325</sup> Escobar, *supra* note 323, at 51.

<sup>326</sup> Gilbertson & Singer, *supra* note 86; Logan et al., *supra* note 8, at 549; Van Hook et al., *supra* note 8, at 660.

<sup>327</sup> See Chacón, *supra* note 11; Johnson, *supra* note 258, at 694–95; Stephen H. Legomsky, *The Ethnic and Religious Profiling of Noncitizens: National Security and International Human Rights*, 25 *B.C. THIRD WORLD L.J.* 161, 178 (2005); Mary Romero & Marwah Serag, *Violation of Latino Civil Rights Resulting from INS and Local Police's Use of Race, Culture and Class Profiling: The Case of the Chandler Roundup in Arizona*, 52 *CLEV. ST. L. REV.* 75.

The burden of proving lawful presence is not felt equally by all immigrants, or by immigrants alone. The use of minor traffic offenses as a basis for ascertaining immigration status appears to be used disproportionately in Latino communities.<sup>328</sup> In 2008 the Pew Hispanic Center reported that approximately 9% of adult Latinos, citizens and immigrants alike, had been stopped by the police or other authorities and asked about their immigration status in the past year.<sup>329</sup> The rates were similar for native-born Latinos and foreign-born Latinos.<sup>330</sup> Eight percent of native-born Latinos compared to 10% of foreign-born Latinos had been stopped for an immigration status inquiry.<sup>331</sup>

Citizenship status does not protect Latinos from the burden of proving that they are lawfully present in the United States. Four U.S. citizens have been detained in Los Angeles County, California pursuant to Secure Communities.<sup>332</sup> The individuals were arrested for criminal offenses and detained additional days pursuant to ICE detainers. For example, Antonio Montejano was arrested and charged with petty theft. Mr. Montejano was holiday shopping with his four children when his youngest daughter begged for a ten dollar bottle of cologne.<sup>333</sup> Mr. Montejano said he “inadvertently dropped it into a bag of things he had already bought. As he left the store, he was arrested.”<sup>334</sup> He had no criminal record so he expected to post bail quickly. Mr. Montejano had his driver’s license and other legal identification, but because of an immigration detainer he was denied bail and held after the criminal case concluded.<sup>335</sup> He was held for two days before he saw a judge on the criminal case. At that time he pleaded guilty, the fine was waived, and “he was ordered released.”<sup>336</sup> Mr. Montejano was held for an additional two nights on the immigration detainer. He repeatedly told officers that he was an American citizen, but to no avail.<sup>337</sup> Once his lawyers sent ICE his U.S. passport and birth certificate he was released.<sup>338</sup> Mr. Montejano concluded that the police did not believe him when he told them he was an American citizen because “I look Mexican one hundred percent.”<sup>339</sup>

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<sup>328</sup> See, e.g., ACLU COBB, *supra* note 159; ACLU GWINNETT, *supra* note 159; LACAYO, *supra* note 159; White & Kazerounian, *supra* note 159.

<sup>329</sup> LOPEZ & MINUSHKIN, *supra* note 275, at 9. See *supra* note 275 for 2010 figures.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> Paloma Esquivel, *Immigration Enforcement Snares Citizens*, L.A. TIMES, Dec. 15, 2011, (LATEXtra) at 3.

<sup>333</sup> Preston, *supra* note 277.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> Esquivel, *supra* note 332.

<sup>337</sup> *Id.*

<sup>338</sup> Preston, *supra* note 277.

<sup>339</sup> *Id.* ICE issued a detainer for Mr. Montejano because immigration officials had failed to recognize his citizenship in the past and incorrectly deported him to Mexico in 1996. His records within the DHS database had not been corrected. *Id.*

Romy Campos found herself in a similar situation when she was arrested on a minor misdemeanor charge.<sup>340</sup> She was denied bail and transferred to a Los Angeles County jail pursuant to an ICE detainer.<sup>341</sup> Her public defender told her there was nothing he could do to lift the detainer. Ms. Campos did not understand why ICE could not “see in my file or something that I’m a citizen.”<sup>342</sup> She was released after an American Civil Liberties Union lawyer provided ICE with her Florida birth certificate.<sup>343</sup> The experience left her feeling “misused completely, I felt nonimportant, I just felt violated by my own country.”<sup>344</sup>

The fact that individuals appear to be Latino is relevant for an immigration stop and inquiry. In *Brignoni-Ponce* the U.S. Supreme Court held that “Mexican appearance” is a relevant factor in establishing reasonable suspicion of unlawful presence.<sup>345</sup> While the Court held that “Mexican appearance” alone is insufficient to establish reasonable suspicion, the Court’s jurisprudence provides very little judicial monitoring of immigration enforcement officials.<sup>346</sup> Individuals and organizations within Latino communities believe that ethnicity is the only basis for the pretextual stops and few jurisdictions have allayed these concerns.<sup>347</sup>

The use of ethnicity, exclusively or primarily, as a basis for establishing reasonable suspicion of unlawful presence reinforces the idea that those with a Latino appearance are foreign, and likely to be unauthorized migrants. This use of ethnicity suggests that citizenship provides little protection from the negative attitudes and police encounters that Latino immigrants experience as immigrants. The concern that citizenship will provide insufficient protection against ICE immigration inquiries tracks the notion of second-class citizenship within the United States. Legal scholars have long noted that the rights

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

<sup>344</sup> *Id.* Ms. Campos is a citizen of the United States and Spain and had a Department of Homeland Security record because she once entered the United States on her Spanish passport. *Id.* An additional example comes from Alabama. Sixty-six U.S. citizens have been imprisoned in Alabama pursuant to the Beason-Hammon Alabama Taxpayer and Citizen Protection Act of 2011. Moises Naim, *Alabama Immigration Law Ensnares People You Wouldn’t Expect*, DAILY BEAST (Dec. 17, 2011), <http://www.thedailybeast.com/articles/2011/12/17/alabama-immigration-law-ensnares-people-you-wouldn-t-expect.html>. The individuals were imprisoned for not having papers with them establishing that they were legal residents of the United States. *Id.* Half of these individuals were black. *Id.*

<sup>345</sup> *United States v. Brignoni-Ponce*, 422 U.S. 873, 887 (1975).

<sup>346</sup> Johnson, *supra* note 258, at 694–96 (discussing cases).

<sup>347</sup> See, e.g., DAVIDSON CNTY. SHERIFF’S OFFICE, *supra* note 38, at 11, 13; *Sheriff Conway’s Rebuttal to ACLU on Racial Profiling*, GWINNETT COUNTY SHERIFF’S OFF., <http://www.gwinnettcountysheriff.com/index.php/287g/sheriff-conways-rebuttal>; see also *supra* text accompanying notes 267–96.

associated with citizenship are often experienced differently based on factors such as race, ethnicity, gender, social class, and sexual orientation.<sup>348</sup> Despite the grant of formal citizenship within the United States certain groups have “remained excluded and marginalized in many significant respects.”<sup>349</sup> The second-class citizenship critique contends that “the extension of the formal status of citizenship alone can mask real oppression and thereby represents a largely empty husk.”<sup>350</sup> Given the history of second-class citizenship in the United States, there is little guarantee that formal citizenship status will be an effective shield against the negative attitudes and police encounters that some Latino immigrants experience. For example, one respondent in the research by Professors Massey and Sánchez R. noted “I never would say I am American because nobody would believe me.”<sup>351</sup> As Latino immigrants’ “Mexican appearance” continues to be a legitimate proxy for unauthorized immigration status, the legal status of citizenship will provide minimal social benefits.<sup>352</sup>

### C. *Alternative Explanations*

#### 1. *Naturalization as a Response to a Hostile Context*

Immigrants may respond to a hostile environment in a variety of ways. The argument presented in this Article focuses on rejecting naturalization because the full range of social benefits may not be available. It is also possible that Latino immigrants would respond to such hostility by naturalizing in order to play a more prominent role in the political process to change the government policies that create or contribute to a hostile environment. In the wake of Proposition 187 in California,<sup>353</sup> Mexican immigrants across the country naturalized at increasing numbers. In 1994, 46,186 Mexican immigrants naturalized.<sup>354</sup> That number increased to 79,614 in 1995 and to 217,418 in 1996.<sup>355</sup> Latino immigrants exercised agency by naturalizing as a response to the injustices experienced. While this undoubtedly explains why numerous Latino immigrants naturalize, it does not help to explain the disproportionate naturalization rates. If this was a primary motivator for naturalization, Mexican immigrants’ naturalization rate should be on par

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<sup>348</sup> See, e.g., LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 87–89 (2006).

<sup>349</sup> *Id.* at 87.

<sup>350</sup> *Id.* at 88; see also *The Civil Rights Cases*, 109 U.S. 3, 26–62 (1883) (Harlan, J., dissenting).

<sup>351</sup> MASSEY & SÁNCHEZ R., *supra* note 79, at 207.

<sup>352</sup> See *supra* Part IV.B.

<sup>353</sup> Proposition 187, 1994 Cal. Stat. A-317, *invalidated by* League of United Latin Am. Citizens v. Wilson, 997 F. Supp. 1244 (C.D. Cal. 1997).

<sup>354</sup> IMMIGRATION & NATURALIZATION SERV., DEP’T OF JUSTICE, 1996 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 152 (1997).

<sup>355</sup> *Id.*

with, if not higher than, that of other nationalities. Yet this is not the case.<sup>356</sup> In 2010, only 10.8% of those who naturalized were Mexican immigrants while 32.2% of those eligible to naturalize were Mexican immigrants.<sup>357</sup> These numbers suggest that a hostile environment is not serving as a sufficient motivator for naturalization. Pantoja and Gershon actually found that Latinos with a “positive political orientation” or positive feelings about the US political system were more likely to naturalize than those without such orientation or feelings.<sup>358</sup>

## 2. *Does Legal Status Matter?*

Immigrants may perceive their environment as more or less hostile depending on their immigration status. To the extent the enforcement strategies creating a hostile environment are intended to discourage unauthorized migration, those who are lawfully present may not experience the enforcement strategies as hostile. For example, a German executive with Mercedes-Benz was arrested outside of Tuscaloosa, Alabama pursuant to the 2011 immigration law enacted in Alabama.<sup>359</sup> The executive was the subject of a traffic stop and he was only able to produce a German identification card. He was arrested for not having proper identification pursuant to the state law.<sup>360</sup> Only after he was able to retrieve his passport, visa, and German driver’s license from his hotel was he released from prison.<sup>361</sup> Whether this executive experienced his arrest and detention as hostile could depend on his pre-existing ideas about unauthorized migration and the appropriate strategies for addressing it. The fact that he was released after presenting his passport, visa, and German driver’s license may have mitigated the negative experience.

Lawfully present migrants may share the opinions and feelings underlying the increase in local immigration enforcement. Even if these individuals are stopped for minor traffic violations they will generally be able to demonstrate lawful presence. Lawfully present migrants may view the stops as minor annoyances that are necessary to root out

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<sup>356</sup> See *supra* Part V.A.

<sup>357</sup> OFFICE OF IMMIGRATION STATISTICS, *supra* note 12, at 53–55; RYTINA, *supra* note 13, at 4.

<sup>358</sup> Adrian D. Pantoja & Sarah Allen Gershon, *Political Orientations and Naturalization Among Latino and Latina Immigrants*, 87 SOC. SCI. Q. 1171, 1178–80 (2006).

<sup>359</sup> Naim, *supra* note 344.

<sup>360</sup> *Id.*

<sup>361</sup> *Id.* A similar incident occurred with a Japanese worker at an Alabama Honda plant. The Japanese worker appears to have been stopped at a roadblock and ticketed. The reason for the ticket is unknown. The worker had his passport and an international driver’s license. Jay Reeves, *Alabama Immigration Law Leads To Charge For Japanese Honda Employee*, HUFFINGTON POST (Nov. 30, 2011), [http://www.huffingtonpost.com/2011/11/30/alabama-immigration-law-honda\\_n\\_1121650.html](http://www.huffingtonpost.com/2011/11/30/alabama-immigration-law-honda_n_1121650.html).

unauthorized migrants who make it hard for lawfully present migrants.<sup>362</sup> Alternatively if one is an unauthorized migrant, then one is the intended target of the enforcement strategies and may view the environment as more hostile. While immigration status can impact whether or not certain enforcement strategies are experienced as creating a hostile environment, the message that certain immigrants are a threat to national security, public safety, or the American way of life is received by all, authorized immigrants, unauthorized migrants, and citizens alike.

Research shows that hostility targeted at “illegal immigrants” reaches beyond the target and impacts the lives of individuals perceived to be unlawfully present.<sup>363</sup> The Pew Hispanic Center reports that 36% of Latino respondents reported that immigration status is the biggest cause of anti-Latino bias.<sup>364</sup> Professor Gerald Neuman has noted:

[T]he discourse of legal status permits coded discussion in which listeners will understand that reference is being made, not to aliens in the abstract, but to the particular foreign group that is the principal focus of current hostility. A background of legal or social disapproval of racial, religious or political discrimination creates strong incentives for such coding.<sup>365</sup>

Public discourse and immigration enforcement strategies often conflate being Latino and being an unauthorized migrant.<sup>366</sup> Individuals who seem Latino, based on skin color, surname, or language, regardless of their immigration status, can be on the receiving end of the hostility directed toward “illegal immigrants.”<sup>367</sup> For example, over 60% of the anti-Latino abuses recorded by the Coalition for Humane Immigrant Rights of Los Angeles after the passage of Proposition 187 in California were directed against citizens or green-card holders.<sup>368</sup>

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<sup>362</sup> See, e.g., PEW HISPANIC CENTER, 2007 NATIONAL SURVEY OF LATINOS: AS ILLEGAL IMMIGRATION ISSUE HEATS UP, HISPANICS FEEL A CHILL 2–3, 14 (2007), available at <http://www.pewhispanic.org/files/reports/84.pdf>.

<sup>363</sup> Tanya Broder & Clara Luz Navarro, *A Street Without an Exit: Excerpts from the Lives of Latinas in Post-187 California*, 7 HASTINGS WOMEN’S L.J. 275 (1996).

<sup>364</sup> LOPEZ ET AL., *supra* note 275, at 9.

<sup>365</sup> Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. Rev. 1425, 1429 (1995).

<sup>366</sup> Broder and Navarro note that while Proposition 187 in California was “[t]outed as an attack only on ‘illegal immigrants,’ the initiative’s effect has extended far beyond the intended target, giving license to expressions of hatred against Latinos and Asians, including legal residents and United States citizens.” Broder & Navarro, *supra* note 363, at 278.

<sup>367</sup> JIMÉNEZ, *supra* note 79, at 141 (“In a context of heavy Mexican immigration, skin color and sometimes surname become markers of ethnic origin, nativity, and even legal status in such a way that Mexican Americans become the direct targets of nativism.”).

<sup>368</sup> Broder & Navarro, *supra* note 363, at 278 n.11 (citing COALITION FOR HUMANE IMMIGRANT RIGHTS OF LOS ANGELES (CHIRLA), HATE UNLEASHED: LOS ANGELES IN THE AFTERMATH OF 187 16 (1995), reprinted in Nancy Cervantes et al., *Hate Unleashed: Los Angeles in the Aftermath of Proposition 187*, 17 CHICANO-LATINO L. REV. 1, 20 (1995)).

Pedro Ramírez's experience with Border Patrol demonstrates the ways in which efforts targeting unauthorized migrants impact the lives of citizens and authorized migrants. Ramírez is a 52-year-old, Mexican-American educator with a master's degree.<sup>369</sup> He lives in an upper-middle-class area in Santa Maria, California. One afternoon, after doing yard work at a rental property he owned, Ramírez was pulled over by Border Patrol. The agent approached Ramírez in Spanish and Ramírez responded, "May I help you?"<sup>370</sup> To this the agent responded by asking Ramírez for identification and if he spoke English. Ramírez provided a driver's license and the agent asked for additional identification. Ramírez provided a social security card, at which point the agent asked for additional identification. Ramírez responded by pulling out his American Express card and said, "Don't leave home without it."<sup>371</sup> Ramírez felt he was being harassed because he was a "Mexican needing a haircut and a shave on a Friday afternoon with a bandanna around his neck, with an old pickup truck loaded with mowers and edgers and stuff like that."<sup>372</sup> Ramírez got the Border Patrol agent's license plate number and badge number and sent several letters about the incident. He received several responses that essentially said, "Oops, sorry."<sup>373</sup>

Ramírez's experience is not unique, social scientists have documented the use of skin color and surnames to mark Mexican Americans as foreign, and often as unauthorized migrants.<sup>374</sup> This has led some immigrants to conclude that "no matter what they do to regularize their status in this country and no matter how many became citizens, immigrants and their children will continue to be unwelcome here."<sup>375</sup>

### 3. *Variation Between Context of Reception Components*

While local immigration enforcement strategies may contribute to a hostile environment, other components of an immigrant's environment may neutralize the hostility. As noted in Part II, an immigrant's environment has national, regional, state, local, and interpersonal components.<sup>376</sup> Additionally an immigrant's environment includes educational institutions, public health institutions, employers, social welfare institutions, and electoral politics.<sup>377</sup> While local immigration enforcement strategies may suggest that the full range of social benefits of citizenship are not available, other components of one's environment could provide conflicting information. For example, decisions by schools or social welfare institutions not to check immigration status may suggest

<sup>369</sup> JIMÉNEZ, *supra* note 79, at 159.

<sup>370</sup> *Id.*

<sup>371</sup> *Id.* at 160.

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> *See, e.g., id.* at 154–60.

<sup>375</sup> Broder & Navarro, *supra* note 363, at 283.

<sup>376</sup> *See supra* text accompanying notes 127–28.

<sup>377</sup> MARROW, *supra* note 18, at 233–36.

that Latinos are able to move about society without being presumed to be foreign or unlawfully present. Additional research is necessary to better understand the interplay between these different components of an immigrant’s environment.<sup>378</sup> For example, it may be that communities utilizing racial profiling and minor traffic offenses as immigration enforcement strategies could reduce the negative impact on naturalization decisions if schools, social welfare institutions, and other community entities provided a more positive environment.

The previous three sections have provided interesting questions for future research to better understand the role of social benefits in immigrants’ naturalization decisions. Current research does demonstrate that a hostile environment matters. It is my contention that the use of racial profiling and minor traffic offenses to identify unauthorized migrants creates a hostile environment. As long as government officials and the general public view Latino ethnicity as a proxy for unauthorized immigration status, citizenship provides Latinos with little protection against presumptions of unauthorized immigration status. Those with a “Mexican appearance” will still experience pretextual traffic stops. While these stops may last longer for noncitizens than for citizens, the initial stop will still occur and potentially jeopardize Latinos’ sense of belonging within the United States.

The Supreme Court’s analysis in *Brignoni-Ponce* reinforces the marginal sense of belonging that Latinos can experience. Despite acknowledging that the majority of Latinos in the United States are citizens or lawful immigrants, the Court concluded that because Mexicans accounted for the majority of the unauthorized migrant population “Mexican appearance” is relevant.<sup>379</sup> A host of factors other than ethnic appearance are relevant for determining immigration status. The Court identified some in *Brignoni-Ponce* including “characteristics of the area in which [the officers] encounter a vehicle,”<sup>380</sup> “the driver’s behavior,”<sup>381</sup> “[a]spects of the vehicle,”<sup>382</sup> and “characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut.”<sup>383</sup> The difficulty in listing accurate indicators of

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<sup>378</sup> See *id. passim* (one of the few studies delineating different dimensions or components of context of reception and exploring what they mean for Latino immigrants in North Carolina).

<sup>379</sup> United States v. Brignoni-Ponce, 422 U.S. 873, 886–87 (1975).

<sup>380</sup> *Id.* at 884.

<sup>381</sup> *Id.* at 885. Examples of “the driver’s behavior” include driving erratically or obviously attempting to evade officers. *Id.*

<sup>382</sup> *Id.* “Aspects of the vehicle” includes factors such as “certain station wagons, with large compartments for fold-down seats or spare tires,” a “heavily loaded” appearance, a large number of passengers, or if the officers notice individuals trying to hide. *Id.*

<sup>383</sup> *Id.*; see also Chacón, *supra* note 11, at 145–46; Chin et al., *supra* note 257, at 70–71; Johnson, *supra* note 30, at 1024. The use of ethnicity is complicated in new destination areas in the Southeast where the portion of the Latino population that is

unauthorized immigration status is that many factors will similarly identify poor migrants.<sup>384</sup> For example, those who have jobs that pay cash and live in areas and units that are occupied by young men who migrated without spouses or children could describe poor lawfully present migrants as well as unauthorized migrants. There are provisions for individuals with these types of characteristics to be lawfully present in the United States. For example, H2-A visas are available for seasonal agricultural workers who may fit this description.<sup>385</sup> Additionally individuals admitted as green-card holders based on a family petition may have these characteristics. It may be less likely that these individuals would immigrate without their spouses and children, but uncertainty about economic prospects may cause families to send one family member at a time.<sup>386</sup> Using these factors as proxies for unauthorized migrants could similarly contribute to a hostile environment and dampen a green-card holder's interest in naturalizing.

#### D. *A Different Way Forward*

A more effective strategy for identifying unauthorized migrants that has less potential for discouraging naturalization is workplace enforcement. By identifying individuals who are working without valid social security numbers the government can more accurately target individuals who are in fact unauthorized migrants. Rather than deputizing local law enforcement officials to enforce immigration law, the federal government could deputize state officials to conduct workplace audits. The increased use of E-Verify is a step in this direction. E-Verify is an internet-based system for determining employee eligibility to work in the United States. The system accesses Social Security Administration and Department of Homeland Security records to

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unauthorized is higher than it is nationally or in older destination locations. *See supra* text accompanying notes 25–29.

<sup>384</sup> In *United States v. Magana*, Border Patrol officers explained that they had reasonable suspicion to stop Magana's truck because "[t]he six passengers appeared to be farm workers, one of whom wore a hat which the officers emphasized was indicative of someone who came from the Mexican state of Jalisco. They stated that such hats, while often worn by illegal aliens, were seldom worn by anyone who had lived in the United States for very long because it would bring them to the attention of the INS." 797 F.2d 777, 781 (9th Cir. 1986). In *Farm Labor Organizing Committee v. Ohio State Highway Patrol*, an Ohio State Highway Patrol officer testified that "he became suspicious that a motorist was an illegal alien if the motorist was going to pick crops, was coming from Florida or Texas, had little money, was driving an older vehicle, and/or was wearing old clothes." 95 F. Supp. 2d 723, 736 (N.D. Ohio 2000). *See Johnson, supra* note 258, at 699–700 (noting that in practice the Border Patrol's profile for unauthorized migrants is based on class and race factors).

<sup>385</sup> Immigration and Nationality Act (INA) § 101(a)(15)(H)(ii)(a), 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2006).

<sup>386</sup> It is not uncommon for the husband in a family to immigrate first and once established send for his wife and children. PORTES & RUMBAUT, *IMMIGRANT AMERICA, supra* note 61, at 357.

determine employment eligibility.<sup>387</sup> Numerous states are requiring certain categories of employers or all employers to utilize this program.<sup>388</sup>

E-Verify and workplace enforcement more generally are not without their problems.<sup>389</sup> For example, the accuracy of the system has been called into question. In 2007, DHS commissioned an independent evaluation of E-Verify. The evaluators concluded that the accuracy rates did not meet the requirements established in the 1986 immigration reforms introducing employer liability.<sup>390</sup> The Office of Inspector General estimated that approximately 7% of the Social Security records for noncitizens were incorrect.<sup>391</sup> These individuals were actually U.S. citizens whose files mischaracterized them as noncitizens.<sup>392</sup> E-Verify provides a tentative confirmation of eligibility to work or a tentative non-confirmation of authority to work. Tentative non-confirmations are the result of an employee not being authorized to work, out of date records at the Social Security Administration, or an input error by the employer.<sup>393</sup> Foreign-born workers are 30 times more likely to receive an incorrect tentative non-confirmation than native-born workers, and 10% of authorized foreign-workers receive tentative non-confirmations.<sup>394</sup> These errors can limit the employment opportunities of individuals. Another challenge with workplace enforcement is which employers will be targeted for government audits. If only employers who employ large numbers of Latino migrants are the subject of government audits, similar concerns regarding racial profiling could develop. Workplace enforcement, however, can provide a more tailored approach to identifying unauthorized migrants. It can limit the conflation of Latino

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<sup>387</sup> *E-Verify FAQ*, NAT'L CONF. STATE LEGISLATURES (Nov. 4, 2011), <http://www.ncsl.org/?tabid=13127>.

<sup>388</sup> Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Louisiana, Mississippi, Missouri, Nebraska, North Carolina, Oklahoma, South Carolina, Tennessee, Utah, and Virginia all require public employers to utilize E-Verify. *See id.* As of November 2011 Alabama, Arizona, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Utah also require certain private employers to use E-Verify as well. *Id.*

<sup>389</sup> *See* Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103 (2009).

<sup>390</sup> WESTAT, FINDINGS OF THE WEB BASIC PILOT EVALUATION 56 (2007), *available at* <http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf>.

<sup>391</sup> OFFICE OF INSPECTOR GEN., CONGRESSIONAL RESPONSE REPORT: ACCURACY OF THE SOCIAL SECURITY ADMINISTRATION'S NUMIDENT FILE ii (2006), *available at* <http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-08-06-26100.pdf>.

<sup>392</sup> *Id.*

<sup>393</sup> Naomi Barrowclough, Note, *E-Verify: Long-Awaited 'Magic Bullet' or Weak Attempt to Substitute Technology for Comprehensive Reform?*, 62 RUTGERS L. REV. 791, 812 n.160 (2010) (citing *Electronic Employment Verification Systems: Needed Safeguards to Protect Privacy and Prevent Misuse: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec. & Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. 49 (2008) (statement of Johnathan “Jock” Scharfen)).

<sup>394</sup> *Id.* at 812.

ethnicity with unauthorized immigration status.<sup>395</sup> It is this conflation that undermines the social benefits that Latino immigrants can expect to obtain by becoming citizens.

### CONCLUSION

Immigration enforcement is undoubtedly an important goal, but so is the incorporation of immigrants. The growth of “self-deportation” policies undermines Latino immigrant incorporation. The use of racial profiling and minor traffic violations in immigration enforcement is contributing to a hostile environment for Mexican immigrants, which reduces the likelihood that eligible Mexican immigrants will naturalize. The disproportionate use of pretextual traffic stops in Latino communities perpetuates the idea that those with a Latino appearance are foreign and likely unauthorized. The connection made between Latino appearance, foreign birth, and immigration status suggests that a change in citizenship status absent a change in ethnicity will do little to facilitate the social and economic mobility expected to come with citizenship.

Social science research has demonstrated that decisions to naturalize are shaped not only by the material benefits of citizenship, but also by the social benefits of citizenship. Immigrants obtain valuable information about whether immigrants are welcome, whether the host society values immigrant contributions, and whether acceptance and mobility will be possible from the structural and cultural aspects of their environment. Immigrants are more likely to naturalize when they believe that they will be able to take advantage of the full range of citizenship benefits. Further research is needed to determine how immigrants value the material benefits of citizenship compared to the social benefits. Are there contexts in which one set of benefits outweighs another? Are certain types of material and social benefits more important than others? Empirical research on these and related questions will assist in developing immigration policy that better balances our society’s desire for enforcing federal immigration law and facilitating immigrant incorporation.

Efforts to enforce federal immigration law and identify unauthorized migrants are felt by citizens, authorized migrants, and unauthorized migrants when ethnicity is used as the primary, or a significant, factor. The use of this strategy may enable ICE to identify a greater number of unauthorized migrants, but it will come at the cost of alienating potential

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<sup>395</sup> Identifying serious criminals, those in Secure Communities Level one and two categories, is a legitimate enforcement priority and local law enforcement officers could play a role in identifying these individuals. This could be accomplished by revising 287(g) jail agreements to only apply to individuals charged with Level one and two crimes or to focus on individuals who are incarcerated after a conviction for a Level one or two crime. These alternatives would allow for a more robust system for identifying serious criminals who are noncitizens and remove the incentive for officers to use minor traffic offenses as a pretext for ascertaining immigration status.

citizens and limiting the incorporation of Latino immigrants in the United States.