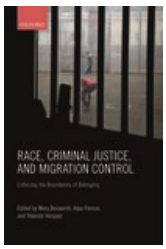

Race, Criminal Justice, and Migration Control: Enforcing the Boundaries of Belonging

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CHAPTER

10 Racialization through Enforcement

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Abstract

Immigration law and enforcement choices have enhanced the salience of Latino racial identity in the United States. Yet, to date, courts and administrative agencies have proven remarkably reluctant to confront head on the role of race in immigration enforcement practices. Courts improperly conflate legal nationality and 'national origin', thereby cloaking in legality impermissible profiling based on national origin. Courts also maintain the primacy of purported security concerns over the equal protection concerns raised by racial profiling in routine immigration enforcement activities. This, in turn, promotes racially motivated policing practices, reifying both racial distinctions and racial discrimination. Drawing on textual analysis of judicial decisions as well as on interviews with immigrants and immigrant justice organization staff in California, this chapter illustrates how courts contribute to racialized immigration enforcement practices, and explores how those practices affect individual immigrants' articulation of racial identity and their perceptions of race and racial hierarchy in their communities.

Keywords: race, policing, racial profiling, immigration, enforcement, constitutional criminal procedure, Fourth Amendment, stops, unauthorized migration, identity

Subject: Human Rights and Immigration, Criminal Law, Criminology and Criminal Justice

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Immigration law and enforcement practices are important forces in the construction of race in the United States. This has long been true, and an existing body of literature discusses the historical role of immigration law and immigration enforcement on racial formation (Haney-Lopez 2006; Ngai 2004). This chapter examines contemporary manifestations of this phenomenon at the level of legal doctrine and of everyday practices to help illuminate how Latino racial identity in the United States is understood by and produced through immigration law and responses to it. This brief chapter focuses on the Latino case, but it is important to note that the strong conflation of Latino identity and unauthorized immigration status in the United States not only operates to the detriment of Latinos, but also renders socially invisible

unauthorized migrants belonging to other white, black, and Asian racial groups and sub-groups. This impedes the development of social and legal policies needed to address the sometimes unique needs of the members of these groups. It also generates false oppositional narratives about Asian immigrant groups as legal and economically desirable (in moderation), and Latino immigrant groups as 'illegal' and economically undesirable. And it reifies white racial privilege by obscuring the existence of unauthorized migrants who are socially constructed as white. The topic of how these group identity constructions interact in a complex, constitutive way is the theme of ongoing research (Ashar et al. 2016), and will be discussed more fully in a later project. This chapter focuses on Latino racial identity, which has particular salience in the US context because unauthorized migrants are frequently stereotyped as Latino, and conversely, Latinos are frequently stereotyped as unauthorized migrants.

The first part of this chapter focuses on the doctrinal exceptions that allow for consideration of race in immigration policing, with attention to how this has both been taken for granted and come to define Latino racial identity. Over time, US courts have developed a unique line of reasoning to justify racially discriminatory practices in immigration enforcement. The resulting doctrinal exceptionalism authorizes race-based practices that impact individuals regardless of citizenship (Chacón 2010). Immigration enforcement exceptions to constitutional protections against racial profiling also have a way of migrating into mainstream criminal procedure, reducing legal protections against racial profiling in cases involving other marginalized racial groups outside the immigration context (Carbado and Harris 2011).

p. 160 These well-documented legal trends are also accompanied by less well-examined legal reasoning that isolates immigration enforcement practices from mainstream constitutional protections through a studied judicial and administrative refusal to acknowledge the workings of racial animus in immigration enforcement. By characterizing immigration enforcement practices as rooted in distinctions of national origin, and treating these distinctions both as proper and as distinct from racial discrimination, administrative agencies and judges incorrectly remove concerns of racial discrimination from consideration in evaluating immigration laws and legal practices. In fact, immigration law concerns itself with nationality, not national origin. National origin is used as a proxy for nationality in the street policing of immigration, but national origin and nationality are not the same thing. At the same time, racial discrimination and national origin discrimination are not hermetically sealed categories but overlap in complex and significant ways and are co-constitutive. Over-reliance on national origin profiling and a concomitant failure to acknowledge the racial dimensions of alleged 'national origin' discrimination in immigration enforcement ensure that racially discriminatory enforcement practices flourish within and outside the context of immigration. Racial profiling is naturalized by law. The first part of the chapter explores this naturalization of racial profiling in the context of immigration enforcement.

The second part of this chapter then shifts from law and legal doctrine to practice, exploring some of the ways in which Latino racial identity is produced on the ground in the United States through the enforcement of immigration law, and through political resistance to the violence engendered by immigration law. This section draws in part on interview data gathered over a period of three years with immigrants and immigrant justice organizations in Los Angeles and Orange Counties in Southern California (Ashar et al. 2016). These interviews illustrate how racial tropes are mobilized not just by politicians seeking substantial new restrictions on immigration and vigorous enforcement of existing immigration bars ('restrictionists'), but also by immigrants themselves. In the case of restrictionists, racial tropes are used to channel the political power of white nationalism. For immigrants and the organizations they work for and with, racial tropes generally are used to fuel political mobilization and to resist oppressive laws and practices, although some individuals express notions of racial identity that reflect their absorption of or alignment with restrictionist racial constructions. Taken as a whole, this chapter reveals the ways in which immigration law is operating as a central node for the production of Latino racial identity and the perpetuation of racial hierarchy in the United States.

Immigration Exceptionalism and the Production of Racial Identity

> A deeply complicated, often volatile, relationship exists between racism directed toward citizens and that aimed at noncitizens.
>
> Johnson (1998: 1112)

p. 161 Kevin Johnson, one of the leading commentators on the role of race in US immigration law and its enforcement, has argued that 'the differential treatment of citizens and noncitizens serves as a "magic mirror" revealing how dominant society might treat domestic minorities if legal constraints were abrogated'. He argues that 'the harsh treatment of noncitizens of color reveals terrifying lessons about how society views citizens of color' (Johnson 1998: 1114). In his 1998 article, Johnson points out that, even at that time, scholars like Dinesh D'Souza were already claiming that racism was a diminishing force in American life, and that Peter Schuck and others were proclaiming race to be largely irrelevant in shaping immigration policy. Johnson himself took a different view. He argued that the historical and continuing practice of *de jure* national origin discrimination that was contained in immigration law provided a window into the continued salience of race in American politics.

In Johnson's view,

> [b]y barring admission of the outsider group that is subordinated domestically, society rationalizes the disparate treatment of the domestic racial minority group in question and reinforces that group's inferiority. Exclusion in the immigration laws must be viewed as an integral part of a larger mosaic of racial discrimination in American society.
>
> (Johnson 1998: 1153)

The events of the intervening twenty years and, most recently, the successful presidential campaign of Donald Trump have provided additional evidence in support of this view. President Trump launched his candidacy with a speech that involved a grotesque caricature of Mexican immigrants in the United States and used this express appeal to racial animus as the central justification for his campaign.[1]

But immigration law functions as more than just a site of displaced animus enacted into and justified by exclusionary policies. It also generates a host of *practices* that redound to the disadvantage of those citizens who share characteristics with immigrant communities. Citizens who are perceived to look and speak like foreign nationals and who live in immigrant communities are, in fact, subjected to the very same practices of enforcement that are aimed at their foreign national counterparts (Chacón 2010; Elias 2008; Gardner and Kohli 2009). They are racially profiled in ways that produce heightened law enforcement surveillance of their lives, they are questioned about their citizenship and required to prove their belonging in ways that individuals who are identified as 'white' are not, and they are sometimes erroneously detained and deported (Stevens 2011). Moreover, the relaxed legal standards that apply to enforcement practices in this context migrate over time into the legal doctrines governing the policing of other racially subordinated groups (Carbado and Harris 2011; Chacón 2010).

In the post-Civil Rights era in the United States, immigration law is one of the few exceptional areas of law
p. 162 where express and overt reliance on race is constitutionally ↳ permissible and frequently upheld. In a pair of cases from the late 1970s, a period of growing and hyper-inflated concerns over Mexican immigration (Chavez 2001), the Supreme Court blessed reliance on race as a factor to establish 'reasonable suspicion' for an investigative stop in immigration enforcement in the context of both roving patrols (*United States v. Brignoni-Ponce* (1975)) and checkpoint stops (*United States v. Martinez-Fuerte* (1976)). The racial characteristic in question in these cases was 'Mexican appearance'—a descriptor that is as legally nebulous

as it is socially meaningful in a world rife with stereotypes of Mexicans (Johnson 2010). Mexicans are as varied in appearance as the people of the globe, but judicial conceptions of Mexican appearance sweep in only poor people of small stature and darker skin tone and hair colour, particularly those speaking Spanish, or speaking heavily accented English, regardless of their actual nationality (Ortiz and Telles 2012). According to the court, such 'Mexican appearance', taken in conjunction with other characteristics, including geographic location, haircut, and mode of dress, can provide a basis for 'reasonable suspicion' that an individual lacks lawful immigration status (*U.S. v. Brignoni-Ponce* (1975)).[2] In fact, such markers speak to little beyond class and geography. They may provide weak evidence of national origin in the sense that they can provide imperfect clues to an individual's ancestral roots. But in a multi-racial, multi-ethnic, multilingual society like the United States, these indicators offer no meaningful information about nationality, and nationality (coupled with immigration status) is the only fact that actually matters for immigration law purposes.

The cases that validate racial profiling in immigration enforcement are old, but they remain good law and are still cited in government briefs in support of the legitimacy of immigration enforcement practices that rely on racial profiling. Even as the demography of the United States has changed to include a substantial number of citizens of Mexican descent,[3] profiling largely on the basis of apparent Mexican ancestry for immigration violations remains permissible. One lower federal appellate court, the Ninth Circuit Court of Appeals, has repudiated reliance on Mexican ancestry as a factor in immigration stops in Southern California, where the population of lawful residents of Mexican ancestry—and therefore, under the court's thin reasoning, bearing 'Mexican appearance'—is high (*U.S. v. Montero-Camargo* (2000)). But the same court upheld racial profiling in Montana, where the number of Mexican-Americans (and, again, presumably of individuals with what the court calls 'Mexican appearance') is low (*U.S. v. Manzo-Jurado* (2006)). Most other jurisdictions continue to treat Mexican appearance as a legitimate factor in developing suspicion of
p. 163 unlawful immigration status. And in recent decisions, the Supreme ↳ Court has also implicitly extended this permission to engage in extraordinary race-based policing practices to state and local law enforcement agents who have no formal role or training in immigration enforcement (*U.S. v. Arizona* (2012); Chacón 2012a).

The Supreme Court and the lower federal courts continue to uphold empirically unmoored reliance on racial profiling in immigration policing on the grounds that the government's extraordinary national security interests demand this. Courts treat reliance on Mexican appearance in immigration enforcement as something that is physically and genetically real, rather than as a racialized composite deeply connected to the long history of racial discrimination in the southwestern United States against individuals perceived to be of Mexican origin. Developing those historical connections would have elucidated why these particular enforcement strategies were and are so problematic. In *Brignoni-Ponce*, the Supreme Court concludes (without any supporting statistical evidence) that '[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor', although not the sole factor, in a 'reasonable' investigative stop. Reliance on Mexican appearance therefore can be part of a 'reasonable … seizure' under the Fourth Amendment of the US Constitution. The court never attempts to explain what is meant by Mexican appearance—but it does not need to because the notion draws from stereotypical assumptions about Mexican appearance that pervade the dominant culture. By endorsing reliance on characteristics descriptively defined only as 'Mexican' as a means of policing immigration status, the Court does not just endorse racial profiling; it also racializes Mexicans.

This approach to race and policing stands in contrast to the Supreme Court's approach to race and national origin in cases outside the Fourth Amendment immigration enforcement cases. For example, the Fifth and Fourteenth Amendments of the US Constitution require equal protection under the law. When the government (federal or state) draws legal distinctions on the basis of race, the court applies its highest level of scrutiny to determine whether the legal distinctions are sufficiently justified to withstand constitutional

challenge. In *Korematsu v. United States*—the infamous 1944 constitutional case upholding the internment of individuals of Japanese descent during the Second World War—the Supreme Court easily understood the challenged practices in that case to be *racially* discriminatory (although they shamefully found the discrimination to be justified). The court applied strict scrutiny to the federal order in question, with the explanation that 'all legal restrictions which curtail the civil rights of *a single racial group* are immediately suspect'. The court did not reason that this could not be racial discrimination because other individuals of Asian ancestry who spoke different languages were situated differently within the national community and were not targeted for internment. The court accepted that individuals of Japanese descent had been effectively racialized in this context, and that their targeting constituted invidious racial discrimination, even as it allowed the relevant racially discriminatory policy to persist because of the purported exigencies of national security.

That this appropriately contextual understanding of the legal category of 'race' persists in the equal
p. 164 protection jurisprudence was demonstrated as recently as March ↳ 2017, when the Supreme Court decided the case of *Peña-Rodriguez v. Colorado*. Peña-Rodriguez, a US citizen of Mexican descent, had been a defendant in a criminal trial where a jury convicted him of one misdemeanour count of unlawful sexual contact and two misdemeanour counts of harassment. After the trial, his counsel learned that one of the jurors had made statements expressing anti-Mexican animus during deliberations. Two jurors swore out affidavits indicating that another juror (a former police officer) had stated that Peña-Rodriguez must be guilty of the sexual assault charges at issue 'because he's Mexican, and Mexican men take whatever they want', and that 'Mexican men had a bravado that caused them to believe they could "do whatever they want" with women'. The question in the case was whether the Sixth Amendment's requirement of an impartial jury trumped Colorado's no-impeachment rule that prohibited the reconsideration of a criminal conviction based on post-conviction evidence concerning jury deliberations.

The government argued that reopening proceedings in the *Peña-Rodriguez* case based on such post-conviction evidence would be problematic and impracticable and was not constitutionally required. But both the government lawyers and counsel for Peña-Rodriguez—as well as all of the members of the various courts to review the question—were unified in treating this case as involving a question of racial discrimination. Despite the fact that the juror's comments were about 'Mexicans', everyone's proper working assumption was that Peña-Rodriguez was a case about impermissible racial discrimination. The Supreme Court took the same approach. It had no difficulty concluding that the anti-Mexican bias at issue in the case was racial bias. Justice Kennedy, writing for the majority, opined:

> Juror H. C.'s bias was based on petitioner's Hispanic identity, which the Court in prior cases has referred to as ethnicity, and that may be an instructive term here. Yet we have also used the language of race when discussing the relevant constitutional principles in cases involving Hispanic persons. Petitioner and respondent both refer to race, or to race and ethnicity, in this more expansive sense in their briefs to the Court. This opinion refers to the nature of the bias as racial in keeping with the primary terminology employed by the parties and used in our precedents.[4]

As Peña-Rodriguez's racist juror's comments suggest, individuals use national origin descriptors not as the basis for describing legal categorical realities, but as the basis for groundless and sweeping generalizations about a particular 'race' of people. Individuals who deploy racist rhetoric about someone who is 'Mexican' or 'Japanese' are not particularly concerned about the niceties of whether they are using accurate national origin descriptors, and might use those labels to describe someone who is actually Guatemalan or Peruvian. They are using national origin descriptors to suggest that the individual in question is a social outsider, and they are doing so in a context that further expresses the sentiment that the outsider is inassimilable and inferior in ways that justify their exclusion. This sort of exclusion is certainly not about nationality, it is not really even about national origin; this is racism.

p. 165 Equal protection jurisprudence in the United States, unlike Fourth Amendment jurisprudence, rests upon an understanding of the intertwined nature of racial and national origin discrimination, as do US statutory anti-discrimination schemes. Title VII, for example, acknowledges the possibility of both racial and national origin discrimination, but treats them as the same evil. Title VII prohibits discrimination on the basis of 'sex, race, color, national origin, and religion'. All are equally impermissible because, among other things, to exclude 'color', 'national origin', and 'religion' from this list runs the risk of granting cover to particular manifestations of racism.

Some might argue that racial discrimination is distinct—that it can speak only to categories of race recognized by the US census: 'black', 'white', 'American Indian or Alaska Native', 'Asian', and 'Native Hawaiian or other Pacific Islander'. But a mere look at this list reveals the constructed nature of the racial categories themselves (Haney-Lopez 2006). Transplanted to other countries (and even within the United States), these racial categories would be nonsensical: overbroad in some categories, hyper-specific in others. Race only has meaning within a context because it is constructed by the social and political realities of that context (Omi and Winant 1994). The same can be said about national origin discrimination as it is challenged in the case law and regulated in statute.

Recent immigration enforcement highlights the ways that Fourth Amendment protections continue to be subverted in the context of immigration enforcement through judicially imagined distinctions between illegitimate race discrimination and purportedly legitimate national origin discrimination. One of the clearest examples is the Second Circuit's 2014 decision in the case *Maldonado v. Holder*. By refusing to see racism in certain discriminatory practices, the reasoning deployed by courts in cases like these opens up troubling new paths towards the legal legitimation of racial discrimination.

Maldonado involved a law enforcement action undertaken by the city police department of Danbury, Connecticut. Officers of the Danbury Police Department (DPD) disguised themselves in plain clothes and drove up to a park where a group of day labourers, the vast majority of whom were Spanish-speaking immigrants from Latin America (in this case, primarily Ecuador), were awaiting possible work. Plain-clothed DPD policemen 'hired' a group of these day labourers and asked them to get into the back of their vehicle, purportedly to drive them to work. The DPD officers then drove the vehicle full of workers to Immigration and Customs Enforcement officials who interrogated them about their immigration status and initiated deportation proceedings against them. The petitioners in the case sought to suppress evidence about their immigration status. They argued that they had been impermissibly profiled by the DPD on the basis of race and that DPD's unconstitutional reliance on race required the suppression of the evidence that was gathered as the fruits of their initial unconstitutional behaviour.

Because they were in an immigration court and not a criminal court, obtaining the remedy of suppression required not only that the petitioners establish a Fourth Amendment violation—that is, that their seizure was 'unreasonable' as a legal matter—but also that the violation was 'egregious' (*INS v. Lopez-Mendoza* (1984)). ↳
p. 166 In the past, various courts have held that profiling on the basis of race constitutes an egregious violation of the Fourth Amendment that could warrant the suppression of illegally seized evidence in immigration proceedings. In this case, however, the Second Circuit declined to suppress the evidence.

The court in *Maldonado* made a number of interpretive moves that encapsulate the elision of race that is occurring in immigration enforcement cases. First, the court ignored the role of race in DPD's selection of the enforcement site. As dissenting Judge Lynch noted, the geographic area that the DPD selected for its sting operation was chosen precisely because it was the place where Ecuadoran day labourers congregated. Other sites were not targeted. Still, the majority blithely reasoned that it was the petitioners who had selected themselves into the enforcement action by volunteering to work. By ignoring the deliberate consideration of race in site selection, the court erased DPD's racial profiling.

Second, and even more troublingly, the court acknowledged that profiling on the basis of race could constitute an 'egregious violation' of the US constitution's Fourth Amendment protections against unreasonable searches and seizures, but then faulted the petitioners for conflating race and national origin. The court stressed—quoting page six of the petitioners' brief—that:

> "DPD never targeted the city's better-assimilated Brazilian immigrant population, whose day laborers congregated at a different local site." This alleged disparity would seem to refute rather than suggest race-based animus.[5]

In other words, the court incorrectly suggested that because not all individuals with ancestral origins in Latin America had been targeted, there could be no finding of racial discrimination against a new and less 'assimilated' immigrant group from a distinct country in Latin America. This understanding of racial discrimination seems not only intentionally naive, but also flatly inconsistent with the contextual and grounded legal understanding of race that is reflected over decades of constitutional case law in cases involving equal protection claims.

Third, after constructing a fictive, bright line distinction between 'race' and 'national origin' in a case where one was clearly interchangeable with the other from the perspective of the DPD officers, the court in *Maldonado* reasoned that, far from being *prohibited* in immigration enforcement, national origin discrimination is *essential* to immigration enforcement. The court wrote that rules prohibiting such discrimination:

> would in effect require ICE to stop only the specific individuals it already knows are here illegally, and render egregious (and therefore forbidden) ICE raids on sweatshops, forced brothels, and other settings in which illegal aliens are exploited and threatened—and much worse … No system of immigration enforcement can run under these constraints.[6]

It is difficult to understate the mirror-world quality of this statement. The court suggests that it actually would be *wrong* to require individualized suspicion in immigration enforcement efforts, and that the ability
p. 167 to profile groups on the basis of their ↳ presumed national origin is essential to protecting immigrants. Given that individualized suspicion is a touchstone of reasonableness in most Fourth Amendment analyses, the court's express endorsement of group-based profiling as the key to enforcement is a stunning inversion of the dictates of equal protection.

The reasoning in *Maldonado* encapsulates a larger legal reality in which at the same moment that law enforcement agencies at all levels of government overtly repudiate race-based policing practices, they continue to champion 'national origin' profiling in the immigration context. The reasoning behind this paradox is neatly illustrated by the US Department of Justice's guidelines on racial profiling.

Broadly stated, the Department of Justice guidelines prohibit federal law enforcement officers from making investigative stops that rely on 'race, ethnicity, gender, national origin, religion, sexual orientation, or gender identity to any degree, except that officers may rely on the listed characteristics in a specific suspect description'. Footnote one of the document distinguishes nationality—which is an individual's country of nationality and which can obviously be a legal basis for enforcement distinctions in certain contexts—and national origin, which the memo defines as 'an individual's, or his or her ancestor's, country of birth or origin, or an individual's possession of the physical, cultural or linguistic characteristics commonly associated with a particular country'. National origin, like race, is purportedly off limits as the basis for investigative and enforcement activities, even while nationality may be legally relevant in certain enforcement contexts. The *Maldonado* case illustrates a common, sloppy conflation of the concepts of nationality and national origin—a conflation that allows law enforcement to rely on stereotyping as an investigative and enforcement technique.

The Supreme Court's immigration enforcement jurisprudence and the distillation of those cases in the federal government's own guidelines on racial profiling exacerbate the problems that flow from such deficient reasoning. Footnote two of the federal guidelines on racial profiling explains that its restrictions on racial profiling do not apply at all 'to interdiction activities in the vicinity of the border, or to protective, inspection, or screening activities', thereby inscribing practices of race and national origin discrimination into immigration enforcement in the border region, notwithstanding the fact that the border region in the United States is increasingly populated by lawfully present residents and citizens of Latin American descent. While it is not at all obvious that constitutional tolerance for racial profiling can and should extend as far as the memo's exemptions suggest, at present, immigration policing and interdiction efforts in the border region are in fact regulated differently; racial profiling is tolerated. *Maldonado* and cases like it then extend this questionable tolerance for racial profiling far beyond the 'vicinity of the border'. Although colour-blind racism is certainly at work in the practices of immigration policing (Bonilla-Silva 2009; Douglas et al. 2015), it is important to acknowledge the full extent to which the law tolerates overt reliance on race in this realm.

Unsurprisingly, the behaviour of law enforcement agents on the ground reflects this judicial and administrative tolerance of profiling. The combination of policies that explicitly tolerate racial profiling in immigration enforcement and judicial decision-making that remains wilfully oblivious to the
p. 168 impermissible profiling that exceeds even ↳ the already over-generous legal limits produces an immigration enforcement system comfortably reliant on racial stereotypes in its functioning. The operative stereotypes reinforce images of those perceived to be Mexicans as outsiders. Mexican-ness itself is policed based on appearance, language, and geographies of residence and workplace, broadly sweeping in all Latinos who fit the stereotype. That is to say, while immigration law and policy choices in the period from 1924 to 1965 helped to transform Mexicans into the 'iconic illegal alien' (Ngai 2004), in the decades since, enforcement practices have ensured that Latinos who fit stereotyped notions of Mexican-ness have been subsumed under the umbrella of 'illegals'. As immigration enforcement efforts have proliferated and become more widespread (Chacón 2012b), these interactions play an ever-expanding role in shaping racial identity in the United States.

The Production and Resistance of Racial Hierarchy

The construction of Latinos as a racial group has not sprung only from choices made by courts and lawmakers. It relies more broadly on state actors making discretionary enforcement decisions, and is reflected in and reinforced by individuals' own characterizations and understandings of their treatment by state actors. This section briefly explores some of the ways that racial identity is constructed within immigrant communities as manifestations of and in response to repressive state practices (Romero 2008; Sanchez and Romero 2010). The discussion is necessarily cursory, but seeks to illustrate a set of themes that will be further developed in later work.[7]

Defining and being defined by enforcement

Research suggests that individual law enforcement agents rely more heavily on Latino racial identity in targeting individuals for enforcement in jurisdictions where restrictive immigration policies are in place (Gardner and Kohli 2009; Weissman et al. 2009). Some studies have demonstrated that in states and localities with more restrictive immigration laws and policies, Latinos are more likely to be targeted for law enforcement investigation and enforcement measures (Armenta 2016; Gardner and Kohli 2009; Southern Poverty Law Center 2009; US Department of Justice 2012; Weissman 2009). The effects are so palpable that scholars have traced out the negative health effects such policies have on Latinos in these jurisdictions
p. 169 (Almeida et al. 2016; ↳ Flores et al. 2008). As previously explained, existing legal doctrines are not designed to deter racial profiling in cases where criminal prosecutions are not an important goal. Much of the immigration enforcement-related profiling occurs precisely because federal, state, and local law enforcement agents presume that Latino identity is synonymous with non-citizen status and seek to channel individuals into immigration proceedings where illegally secured evidence will often be admissible (Chacón 2010). At the systemic level, these individual enforcement choices can signal a message of non-belonging to most Latino residents.

Developments in California help to illustrate how laws that purport to disfavour individuals on the basis of immigration status can be experienced on the ground as a form of racial profiling, even in jurisdictions that adopt some immigrant-friendly policies and practices. In 2013, California enacted legislation enabling unauthorized migrants to obtain state driver's licences. But for almost two decades prior to that, unauthorized migrants had been barred by state law from receiving California driver's licences. Beginning in 1994, with the passage of Proposition 187, the state stopped issuing driver's licences to individuals who were present in the United States without authorization (Grad 2014). Many unauthorized immigrants who were long-time residents of the state were therefore driving without a licence.

When individuals are driving without a licence, the police can impound their vehicles and make the vehicle owners pay a fine to reclaim the vehicles. Among other things, this practice is a source of revenue for the department. Because police in California were aware that unauthorized migrants were unlikely to have a licence, they could (and apparently did) target them for licence checks. This practice is a quintessential example of how immigration enforcement measures combine with ordinary street policing of criminal laws to create distinctive negative effects for foreign nationals in the criminal justice system. This can occur even in jurisdictions such as Los Angeles—a county that limits its enforcement cooperation with federal immigration enforcement agencies and that has long purported to police in a way that is blind to immigration status (Gates 1979).

Interviews with a number of residents of Los Angeles County suggest that the pre-2013 driver's licence policy encouraged police to target unauthorized migrants for enforcement. This targeting was achieved not through probable cause concerning immigration status, but through broad racial profiling. For example, Erasmo,[8] a middle-aged Mexican national living in Los Angeles, indicated that police relied on race to make stops. He explained:

> One is detained because one is seen as Latino. [When the police stop you] they don't know your status yet; whether you're an immigrant or not. I've seen people who are Latino, who have their license. They're not immigrants and they've been pulled over. The first thing [the police] ask for is the license. When [the police] see that you have a license, they just give you a pretext or a random fee. They'll say, 'I pulled you over because you don't make a complete stop, because you didn't turn correctly. Try to do it right.' And that's it. They don't even fine you after that. When one is Latino, they'll pull you over just to investigate whether one is licensed or not. Sometimes even though you don't do anything, they'll pull you over.

p. 170 Erasmo's description of the sequence of events is resonant of the plaintiffs' arguments in *U.S. v. Arizona* that S.B. 1070—a law that encouraged state and local police to engage in investigations of immigration status—would promote racial profiling (Johnson 2012). By creating incentives for stopping unauthorized immigrants, the law promotes a police practice of stopping anyone perceived as an unauthorized immigrant. As Erasmo observed, because Latinos are stereotyped as unauthorized migrants, they are targeted for these stops.

Erasmo is not alone in his assessment of how police rely on Latino racial identity to shape their enforcement decisions. Many other respondents described their perception of a policy of racial profiling around auto stops, and all of these individuals described the targeting as based on 'Latino' identity, sometimes in combination with markers of class (like the kind of car driven). This suggests that foreign nationals are thinking about Latino identity as something more salient than national origin and as something that drives law enforcement practices in everyday street policing. They do not describe the practices as aimed at particular nationalities but, rather, as aimed at 'Latinos'.[9]

Interview data as well as publically available information from the websites of immigrant-serving organizations suggest that this understanding is shared by many of the organizers, attorneys, and activists at immigrant-serving organizations working in Southern California and throughout the country. Immigrant-serving organizations and their clients and constituents have a shared narrative of the work done by racial identity in this context. That shared narrative is shaped by exposure to law enforcement practices, but it also generates a lens for understanding those practices, and an organizing tool for responding to them. By highlighting the ways that immigration enforcement efforts contribute to racialized law enforcement practices that affect Latinos, immigrants and immigrant-serving organizations are able to stregthen their political alliances with the broader Latino community.

Resisting/reinforcing categories

Unsurprisingly, in reaction to a homogenizing and often negative racial rhetoric, some individuals of Latin American origin attempt to insulate themselves from harsh state practices or to gain the benefits of assimilation by distancing themselves from other Latinos. Alondra, a middle-aged woman from Peru, entered the United States over fifteen years ago when her husband was granted a temporary work visa. That visa has long since expired, but Alondra has remained. In conversations, she acknowledges the deep racism experienced by Latinos in the United States even as she simultaneously distances herself in some ways from that group. In an interview in November 2014, for example, she stated that the neighbourhood where she lives:

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> is a middle class community. Here you don't find many immigrants. It is not a *barrio* of immigrants. There are few Latinos. The Latinos are in the restaurants, cooking. It is a calm *barrio.* The people we know here are very agreeable … But for Hispanic people, they probably prefer to be in Van Nuys or in Canoga Park [more predominantly Latino neighbourhoods].

Alondra has many features, including her phenotype and language preference, that mark her as 'Latina' in the United States, and she identifies as part of that group. At the same time, however, she implicitly connects the 'calmness' of her neighbourhood with the scarcity of Latinos, who are only present to do menial work, not to live. Alondra herself has chosen not to live in what she calls an 'immigrant city'. In characterizing her neighbourhood and choices as she does, Alondra unconsciously echoes conservative commentators and immigration restrictionists (Chacón 2007), and reinforces the negative narratives of Latino identity that justify the very exclusionary immigration laws and discriminatory law enforcement practices that have had such a negative effect on her own life. She raises no questions as to whether Latinos (or '*Hispanos*') are an identifiable group or whether she is part of it—but she persistently raises the issue of

the intra-group distinctions among Latinos in the United States and often distinguishes herself from Latinos of lower socio-economic status. In this way, she offers a class-based narrative that allows her to distinguish herself from other Latinos who she views as less desirable residents. In so doing, she constructs an understanding of Latino identity that is easier to square with her own self-perception, but that also inadvertently reinforces the negative racial narratives that ensnare her. Interviews reveal that even Latinos who eschew such distancing strategies sometimes practise them, sometimes apparently unconsciously. This, in turn, contributes to negative constructions of Latino racial identity in the United States.

Citizenship and (relative) political power are additional wedges that individuals use to resist the negative ascriptions of Latino identity. Like class-based distinctions, these resistance strategies also shore up the negative stereotypes of the Latino identity that the individual seeks to resist.

Latinos in law enforcement provide a case study of this process in action. Many Latino immigrants interviewed in Southern California in the 2014–2016 period express surprise and dismay that Latinos in law enforcement and other positions of power fail to demonstrate solidarity with them. They often viewed Latino police officers as imposing on them harsher treatment than law enforcement officials of other races. For example, Fatima, an unauthorized immigrant from Mexico described a car accident in which the other driver was at fault. She recounted:

> [F]our police, patrollers, showed up. They were Latinos. They spoke Spanish, like me. Shouldn't they have come to talk to me? It was me who got hit. They should have been asking me if I was ok. But no, because he [the driver of the vehicle that struck her] was an American, they went to him, talked to him.

The race of the officers might be seen as irrelevant to her underlying complaint: as the victim in the accident, perhaps she should have been addressed first. She might have attributed the sequence of events to gender or random luck. But Fatima was particularly aggrieved because the acts were perpetrated by Latinos,
p. 172 and she quickly ↳ makes clear her concern that the Latino officer in question treated her worse because of her race:

> I said, 'What do you think? Because you see the color of my skin and that I don't speak English, you think that I am less significant? I'm not less significant. I am not doing anything wrong by asking for insurance.'

After a protracted discussion in which the officer refuses to help Fatima, she recounts:

> Then in English he [the police officer] says to the American [driver], 'I don't believe *these people*.' (Emphasis in original)

She later recounts a series of more positive experiences with white officers. She mentions a time when her husband was stopped with expired licence tags. The interviewer asked whether the officer was 'a gringo' (common slang for white Americans), and Fatima answered, '[y]es, *American* American', using the term American twice to specify whiteness, or true American-ness, as opposed to the Latino officers she previously tangled with. She recounts her conversation with the officer:

> 'Ok, look: this is a warning. But look, you need to go to the DMV and pay for new tags.' Ok. That was it. So you come to realize that the majority of the police officers that are Hispanic are always going to be more racist with their race.

Fatima ultimately gave three examples of positive interactions with white officers in contrast to her negative interaction with Latino officers. Her experience is echoed in other interviews. The notion that

Latinos in positions of (relative) authority are particularly harsh in their treatment of their co-ethnic immigrants also carries over to other contexts such as work and school.

Fatima's words highlight how Latino citizens with relatively greater power than similarly situated foreign nationals are sometimes perceived by unauthorized migrants as particularly unlikely to help them. These anecdotes may reflect actual practice; perhaps their own efforts to escape the negative consequences of Latino identity drive some Latinos to distance themselves from more marginalized Latinos (Heyman 2002). Alternatively, Latinos with relatively greater power may simply be failing to meet higher expectations for fair treatment that their co-ethnics impose upon them. Latinos may be more attentive to injustices wrought by people from whom they expect greater sympathy. It may be a combination of these factors, or something else entirely. What is clear is that individuals who are perceived as and identify as Latino can engage in conduct that signals their own internalization of the negative stereotypes associated with Latino identity.

Taken collectively, these moments reflect the complexity of Latino racial identity in the United States, which is driven by differences in skin colour, class, occupational strata, English language ability, and immigration status (López 2013). They also help to illustrate the ways that profiling practices 'bind and reif[y] the concepts of race and criminality, fixing them into the subconscious of the profiled, the profiler, and society at large' (Gardner 2014). Finally, they demonstrate the degree to which immigrants' own racial understandings often implicitly reinforce the notion that American identity tracks 'white' racial identity.

p. 173 Fatima's words provide a fairly typical example of how immigrants' own perceptions of Latino identity reinforce notions of true American identity as 'white'. Fatima and other immigrants often used terminology that identified whiteness as the racial norm of US citizenship. They used the term 'American' (*Americano*) to refer only to white Americans. When interviewees talk about members of other racial groups, they use descriptors: black, African-American, Asian, *Chino* (used broadly to describe all individuals of perceived East Asian descent), and Latino. So, for example, when Erasmo recounts one of his experiences with a police officer in Los Angeles, he notes that '[t]he police officer was Asian and he was generous. He gave me an opportunity.' Only whites are identified by interviewees as 'Americans' unmodified. Even in the heart of 'progressive' California, the language of interviewees reflects a vision of the work race is still doing in the United States to sort insiders from outsiders, and Americans from *American* Americans.

Conclusion

Latino racial identity is real and tangible to those living in the United States today. Immigration law and law enforcement choices have enhanced the salience of this racial category not only in immigration enforcement but in every aspect of law enforcement, and, indeed, in a whole host of interactions between government actors and individual residents. Immigrants understand this to be true. They mobilize against racialized enforcement in expressly racial terms. They also sometimes engage in distancing strategies that can inadvertently fuel the negative stereotypes associated with Latino identity and feed the discriminatory practices driven by those stereotypes.

Yet, to date, courts and administrative agencies have proven remarkably inept at confronting head on the role of race in immigration enforcement practices. Courts improperly conflate legal nationality and 'national origin' and maintain the primacy of purported security concerns over the equal protection concerns raised by racial profiling in run-of-the-mill immigration enforcement activities. Sometimes, as in *Maldonado*, judges go so far as to suggest that such discriminatory enforcement efforts are essential to protecting immigrants in 'brothels' and 'sweatshops'. In fact, there is nothing protective about discrimination, and discriminatory enforcement creates the very conditions in which immigrant exploitation flourishes (Chacón 2006).

President Donald Trump, who stereotyped ‘Mexicans’ as ‘rapists’ and ‘murderers’ in announcing his campaign and who has vowed to deport two to three million people in his first term, took office in January 2017. The aggressive immigration enforcement practices that such a policy will require will impact not just unauthorized migrants, but many long-term residents and citizens. This includes the tens of thousands of Latinos who voted for Donald Trump, most likely with the hope and belief that their own citizenship status and assimilation would protect them from the racial intolerance that Trump’s campaign rhetoric has
p. 174 legitimated. Since the US legal system so often allows impermissible racial profiling in immigration ↳ enforcement to go unacknowledged and without remedy, those voters will have very little recourse if events prove them wrong.

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Notes

1 In his announcement speech, Trump stated: 'When Mexico sends its people, they are not sending their best. They are not sending you. They are sending people that have lots of problems, and they are bringing those problems to us. They are bringing drugs and they are bringing crime, and they're rapists. Some, I assume, are good people.' *Time*, 16 June 2015. Available at: http://time.com/3923128/donald-trump-announcement-speech/.

2 The Court in *Brignoni-Ponce* did reject reliance on Mexican appearance alone, but then undercut any potential protection against racial profiling by adding that appearance taken in conjunction with factors such as haircut could serve as the basis for reasonable suspicion of immigration violations.

3 The US Census Bureau reports that Hispanics make up 17.6 per cent of the US population and that 63.4 per cent of these individuals are of Mexican ancestry. United States Census Bureau, Hispanic Heritage Month 2016, 12 October 2016.

Available at: http://www.census.gov/newsroom/facts-for-features/2016/cb16-ff16.html. Los Angeles County has the largest population of Hispanics in the country.

4 137 S.Ct. 855, 863 (2017).

5 763 F.3d. at 162.

6 763 F.3d. at 162.

7 Among other sources, this section draws on over a hundred interviews that I and other members of a research team have done in the period 2014–2017 with grants from the Russell Sage Foundation (Award Number: 88-14-06) and the National Science Foundation Law and Social Sciences program (Award Number: SES-1535501). We spoke with the representatives of immigrant-serving organizations in the Southern California area and immigrants who are in some way affiliated with these organizations. Our research team will be publishing more detailed accounts of its findings in later publications. Because of her extensive role in spearheading the collection of the interview data relied upon in this chapter, the Principal Investigator on the project, Susan Bibler Coutin, is a credited co-author.

8 The names of individuals identified in this chapter have been changed.

9 Indeed, Beth Baker-Cristales (2004) has noted that Salvadoran immigrants who previously identified themselves in class terms come to adopt such racial and ethnic designations after living in the United States for a substantial period of time.