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Racially Biased Policing Practices in the United States Creates a High Risk of Deportation for Immigrants

Kiley Barnard¹

I. INTRODUCTION

After the summer of 2020, the United States has entered into a pronounced state of examination regarding its citizens' relationships with the police. More specifically, the police force has been under scrutiny when it comes to their interactions with minorities. That scrutiny has led to a wider understanding that racial profiling is an often used police practice, which can be destructive to the "foundation of American democracy and legitimacy of the police in maintaining social order."²

The two main issues that occur because of racially biased policing are under-policing and abusive policing.³ Studies have shown that "minorities are still more likely than white Americans to be arrested far beyond their numbers in the population, to be victimized by excessive police force, to be stopped, questioned, and frisked on the street, pulled over for humiliating searches while driving, or subjected to verbal abuse and harassment by police."⁴ In fact, according to the 2004 Report of the National Academies of Science Committee to Review Research on Police

¹ Associate Member (2020-2021), Immigration & Human Rights Law Review, University of Cincinnati College of Law.

² Jihong Solomon Zhao, Yung-Lien Lai, Ling Ren & Brian Lawton, *The Impact of Race/Ethnicity and Quality-of-Life Policing on Public Attitudes Toward Racially Biased Policing and Traffic Stops*, 61 CRIME & DELINQUENCY 350, 351 (2015).

³ Katherine J. Rosich, *Race, Ethnicity, and the Criminal Justice System*, at 13, Washington, DC: American Sociological Association (2007), <https://www.asanet.org/sites/default/files/savvy/images/press/docs/pdf/ASARaceCrime.pdf>.

⁴ *Id.*

Policy and Practices, “[t]here is a widespread perception of systematic police bias against racial and ethnic minority groups.”⁵

The biased criminal justice system can often lead to detrimental consequences for immigrants.⁶ For example, racially biased policing practices like stop and frisk based on racial profiling,⁷ are a gateway to deportation proceedings, which is the ultimate detrimental consequence for immigrants when dealing with the criminal justice system.⁸ Regardless of the consequences for immigrants, “Latinos are imprisoned at a rate of 1.4 times the rate of whites; [and] one study in California found that Latino drivers are 30% more likely than white drivers to be ticketed for driving offenses.”⁹

The heightened awareness of racially biased policing that comes from various studies and increased media coverage has enabled the American people to express their concerns and attitudes towards police interactions through protests, lobbying, lawsuits, and more. There has been a large increase in protests and lawsuits lately across the country to protest police violence and systemic racism after the police killings of Breonna Taylor and George Floyd in 2020.¹⁰ Those expressions have led to the public wanting more police reform to promote effectiveness, fairness, and accountability by the police.¹¹ Following major race riots in the

⁵ *Id.*

⁶ The Immigrant Justice Network and the National Immigrant Justice Center, *The Discriminatory and Broken Criminal Justice System has Cascading Immigration Consequences*, (2019), https://www.ilrc.org/sites/default/files/resources/criminal_racial_justice_backgrounder_final1.pdf

⁷ See *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013), finding that stop & frisk policing practices in New York City were unconstitutional.

⁸ The Immigrant Justice Network, *supra* note 6.

⁹ *Id.*

¹⁰ Julie Ciccolini and Ida Sawyer, “Kettling” Protesters in the Bronx: Systemic Police Brutality and Its Costs in the United States, (September 30, 2020),

¹¹ Rosich, *supra* note 3, at 13.

1960s, there have been many police reforms that have included “higher educational requirements, community policing, expanded programs for recruiting minorities and women into police forces, sensitivity training for officers, citizen review boards, applications of new crime analysis systems (*e.g.*, crime mapping), and internal police surveillance and audit systems.”¹² However, that has not appeared to solve everything since there are still problems occurring today that have led to lawsuits challenging racially biased policing practices.

This comment reviews the racially biased policing practices in the United States police and how those practices can lead to deportation for immigrants. Part II depicts the possible encounters between police and immigrants based on an immigrant’s race and spoken language. It also describes different court opinions that tend to allow the police to target immigrants based on their race and spoken language. Part III describes how the racially biased policing can lead to deportation for immigrants since any sort of interaction with the police and the criminal justice system can lead to a conviction, which will lead to deportation for even a minor offense. Finally, Part IV contains possible solutions for such racially biased policing practices that can include some police reforms and changes in legislation.

II. RACIAL DISPARITIES WITHIN INTERACTIONS BETWEEN LEGAL IMMIGRANTS AND POLICE IN THE UNITED STATES

*A. Race/Ethnicity*¹³

There have been challenges to racially biased policing practices targeting people with a Hispanic or Latinx appearance, although courts, such as the Northern District of Ohio,

¹² *Id.* at 12-13.

¹³ While race and ethnicity are different, for the purpose of this comment, ethnicity will be included in racial profiling.

have deemed such practices to not be motivated by a discriminatory purpose.¹⁴ In *Farm Labor Organizing Committee v. United States Border Patrol*, Customs and Border Protection (“CBP”) agents specifically used policing practices that targeted immigrants based on their appearance. In *Farm Labor*, CBP agents gained contact with immigrants via CBP’s policing practices.¹⁵ The agents either interacted with immigrants themselves while patrolling their areas, or they had local law enforcement contact them after those local law enforcement officers encountered the immigrants themselves and determined there could be a need for CBP agents to meet them, which is called an “Other Agency (“OA”) Stop.”¹⁶ The Northern District of Ohio held that CBP’s encounter with such people is considered consensual as the immigrant is free to walk away at any point. Yet, CBP is also allowed to perform an immigration inspection and “ask about citizenship and the lawful right to be in the United States.”¹⁷

Those encounters may be considered consensual by the courts, but to affected immigrants they do not feel consensual. For example, one of the immigrants that encountered CBP on two occasions stated that he was personally affected by those experiences and felt intimidated when he saw CBP agents, which made him less likely to travel.¹⁸ Another encounter with CBP agents that involved an alleged consensual immigration inspection led to the immigrants being taken to a police station for further questioning after the immigrants refused to answer the questions during the immigration inspection.¹⁹ Encounters such as these

¹⁴ *Farm Labor Organizing Committee v. United States Border Patrol*, 162 F.Supp.3d 623 (N.D. Ohio 2016).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 629.

¹⁹ *Id.* at 633.

allow immigrants, and people who are Hispanic or Latinx presenting, to be exposed to racial profiling and police encounters.

Racially biased policing continues due to the widespread acceptance of the practice throughout the nation and within the legal system. The Supreme Court of the United States has held on multiple occasions that police can make racially based stops and decisions as long as race is not the only factor in the stop. The U.S. Supreme Court, in *United States v. Brignoni-Ponce*, determined that “the likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.”²⁰ However, the Sixth Circuit in *United States v. Grant*, held that the “racially-biased assumption that ... a man of color wearing dreadlocks ... must have been an illegal alien from Jamaica” in combination with the “long-discredited drug source city rationale” was insufficient to create reasonable, articulable suspicion.²¹ Additionally, the Tenth Circuit, in *United States v. Alarcon-Gonzalez*, has stated there was not reasonable suspicion that one particular Hispanic roofer (someone that works on roofs) was an immigrant just because the totality of the circumstances created a “reasonable basis for suspecting that some roofers [in a town] might be illegal aliens”²² Therefore, the precedents established that some circumstances may be insufficient by themselves to create reasonable suspicion, but “none of them hold that these circumstances are irrelevant or must be disregarded; many of them hold that they are valid factors in a determination of reasonable suspicion.”²³

However, recent cases have begun pushing back against this notion in an effort to prevent further racially biased policing

²⁰ *United States v. Brignoni-Ponce*, 422 U.S. 873, 887–88, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975).

²¹ *United States v. Grant*, 920 F.2d 376, 388 (6th Cir. 1990).

²² *United States v. Alarcon-Gonzalez*, 73 F.3d 289, 293 (10th Cir. 1996).

²³ *United States v. Vite-Espinoza*, 342 F.3d 462 (6th Cir. 2003).

against Hispanic or Latinx presenting people. For example, in *Ortega-Melendres v. Arpaio*²⁴, a class action lawsuit was filed on behalf of all Latinx drivers against the Sheriff of the Maricopa County Sheriff's Office ("MCSO") in Arizona alleging that they engaged in racial profiling and unlawful traffic stops of Latinx.²⁵ Citing Sheriff Arpaio's statements, the Plaintiffs claimed that the "MCSO engaged in practices of targeting persons who appeared Latinx for stops, interrogation, and arrests without reasonable suspicion, and the sweeps were aimed to 'go after illegals' . . . You go after them, and you lock them up."²⁶ Also, the Plaintiffs described how the different patrols and crime suppression sweeps targeted Latinx neighborhoods and day laborer sites, but only used single police encounters as evidence of such practices.²⁷ Courts usually find that single police encounters resulting in injury and death inflicted on the victim are "unfortunate," but "do[] not demonstrate a likely future injury and thus do[] not confer standing for injunctive relief."²⁸ However, in this case, the court held that the Plaintiffs sufficiently pled that the MCSO deputies stopped individuals "pursuant to an officially sanctioned policy, practice, or pattern of stopping, questioning, searching, and sometimes arresting Latinx persons without probable cause."²⁹ This differs from the usual holding because the court found the "same chain of events would likely reproduce the plaintiffs' injuries in the future" and that even though the plaintiffs had only endured single police encounters they had showed sufficient evidence outside of the stop itself to prove that the deputies stopped the plaintiffs based on racial profiling.³⁰

²⁴ *Ortega-Melendres v. Arpaio*, 836 F. Supp. 2d 959 (D. Ariz. 2011).

²⁵ Sunita Patel, *Jumping Hurdles to Sue the Police*, 104 MINN. L. REV. 2257, 2322 (2020).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 2328.

³⁰ *Id.*

Additionally, the court in *United States v. Montero-Camargo* determined that Hispanic appearance is not a relevant or appropriate factor to consider in determining reasonable suspicion.³¹ In *Montero-Camargo*, CBP agents allegedly pulled over two vehicles for reasonable suspicion based on the “high crime” area and immediately noted the appearances of the driver and passenger were Hispanic.³² The court noted: “[C]iting of an area as ‘high crime’ requires careful examination by the court, because such a description, unless properly limited and factually based, can easily serve as a proxy for race or ethnicity.”³³ The opinion also stated that courts “must be particularly careful to ensure that a ‘high crime’ area factor is not used with respect to entire neighborhoods or communities in which members of minority groups regularly go about their daily business, but is limited to specific, circumscribed locations where particular crimes occur with unusual regularity.”³⁴ Otherwise, using a “high crime” area description as a reason can go back to negatively affecting that particular minority and allowing for reasonable suspicion to be based on race or ethnicity.³⁵

Furthermore, the culture of fearing law enforcement officers among immigrant communities is heightened because of the way that immigration officials treat undocumented immigrants and racially profile foreigners.³⁶ This fear is strengthened by the fact that “Immigration and Customs Enforcement (“ICE”) officials do not have to follow search and seizure laws that violate the Fourth Amendment, even when outside of the 100-mile zone controlled by the CBP.”³⁷ For example, the “exclusionary rule

³¹ *United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Kelly L. Anderson, *Enforcing Rights for Immigrants Facing the Ultimate Criminal Penalty: Deportation*, 80 ALB. L. REV. 995, 1004 (2016).

³⁷ *Id.*

based on warrantless searches for criminal court proceedings does not apply in deportation proceedings,” allowing ICE officers to proceed in investigating those they believe to be illegal immigrants without a warrant, probable cause, or reasonable suspicion.³⁸ This can “lead ICE to racially profile both immigrants and non-immigrants, which violates antidiscrimination principles, and can simultaneously violate the rights of innocent U.S. citizens.”³⁹

Therefore, race and ethnicity have been factors which informed police interactions with immigrants. These will likely continue to be factors since the courts have determined race to be an acceptable factor for police to deem their suspicion reasonable. However, that is not the only factor that police use that discriminates against people with a Hispanic or Latinx appearance.

B. Spoken Language

In addition to and intertwining with the policing practices based solely on racial appearance, there are also policing practices based on language that can detrimentally affect immigrants and their citizenship status.⁴⁰ This is not common by itself, but language profiling is evidenced in a couple of cases. One such case, is *Ortega-Melendres v. Arpaio*, which involved a class action suit involving two siblings who were both United States citizens and were followed by officers during “a sweep solely because they had pulled into a gas station while listening to a Spanish-language radio station.”⁴¹ The Court held that because the police officers relied on language profiling to target Latinx people, the stops were unlawful.⁴²

Moreover, in *Farm Labor*, the policing practice for an OA stop enabled local law enforcement officers to contact CBP for

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Patel, *supra* note 26.

⁴¹ *Id.*

⁴² *Id.*

assistance “based solely on a need for language translation, absent any other circumstance” because CBP agents speak Spanish fluently.⁴³ Currently, the new policing practice only allows the CBP agents to be requested if there are other circumstances present besides simply needing translation.⁴⁴ However, this can still be problematic for the immigrants who mainly speak Spanish or are not fluent in the English language. As noted above, police discriminating against immigrants based solely on language is less common by itself but does commonly occur along with policing based on racial appearance.

III. POLICE INTERACTIONS CAN LEAD TO DEPORTATION

A. Scope and Background of Immigrant Deportation

As shown above, racially biased police practices can be seen throughout policing in the United States. Those policing practices can specifically affect immigrants as Latinx, or Hispanic appearing people can be specifically targeted through the racially biased policing practices. The targeting of Latinx or Hispanic appearing people can have many consequences for immigrants, including deportation.

Racially biased police practices can mean deportation for immigrants even with relatively minor infractions, especially if these immigrants are represented by an attorney not well versed in immigration law.⁴⁵ Documented and undocumented immigrants can be charged with and convicted of crimes; they also have the right to an attorney, and in the event that the immigrant cannot afford one—but only in criminal cases—an attorney will be provided by the court.⁴⁶ Criminal defense attorneys must inform

⁴³ *Farm Labor Organizing Committee v. United States Border Control*, *supra* note 13.

⁴⁴ *Id.*

⁴⁵ Anderson, *supra* note 37.

⁴⁶ *Id.*

immigrants of the deportation consequences of a criminal conviction, but this rule was not a requirement until the U.S. Supreme Court decided it in the 2010 case of *Padilla v. Kentucky*.⁴⁷ Therefore, many immigrants' "rights to effective assistance of counsel have been violated for years, and many immigrants have been removed because their criminal defense attorneys did not advise them of the [possible] consequences of their convictions."⁴⁸ Even though it may be challenging for a defense attorney to "predict the impact of a particular conviction on a person's immigration status," immigrants are still entitled to effective assistance of counsel and that includes counsels' advice as to possible immigration consequences.⁴⁹ Thus, this disconnect between some defense attorneys inexperienced and unsophisticated in immigration law and the possible consequences of immigrant criminal convictions often leads to "ineffective assistance of counsel claims in post-conviction proceedings based on the inability of defense counsel to give proper immigration advice."⁵⁰

Deportation for immigrants is often the consequence of a criminal conviction because of the Immigration and Nationality Act ("INA").⁵¹ The INA states that "any alien who- (I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and (II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable."⁵² INA, 8 U.S.C.S. 5 1101, et seq., also requires that an applicant for

⁴⁷ *Id.*

⁴⁸ *Id.* at 1005.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 1001.

⁵² 8 U.S.C. §1227: Deportable aliens.

citizenship be "of good moral character."⁵³ In effect, criminal convictions can often lead to deportation, which can effect immigration status.⁵⁴

Deportation is a serious and negative consequence for immigrants. For some, deportation can be “just as severe of a consequence as the death penalty.”⁵⁵ This is because deportation can break up families and is a gateway that may “cause many to return to poverty and other unlivable conditions that they were escaping in the first place.”⁵⁶ Deportation in general can be life altering especially for those immigrants who have lived in the United States for many years, whose parents brought them here as very young children, such as Dreamers—children and young adults protected under the Obama Administration Deferred Action for Childhood Arrivals (“DACA”) policy.⁵⁷ Dreamers have created ties and relationships in the United States, may no longer speak the native language of their country of birth, and may no longer have familial ties in their native country.⁵⁸ Deportation of immigrants such as Dreamers, means these people are leaving their lives in the United States as they knew them and are “breaking their families apart and devastating young children and others who depend on their family members for economic and emotional support.”⁵⁹ Even with all of the devastations that can come with deportation, there is still a “lack of constitutional protections that immigrants have in the deportation process, [including that] they are not

⁵³ Clifford Clapp, *Latino Jury Nullification: Resisting Racially & Ethnically Biased Crimmigration through Civil Disobedience*, 17 Rutgers RACE & L. REV. 167, 171 (2016).

⁵⁴ *Id.* at 172.

⁵⁵ Anderson, *supra* note 37, at 1013.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

afforded a fair and impartial determination of relief in immigration court.”⁶⁰

Additionally, the targeting of those Hispanic/Latinx communities can also lead to psychological consequences, economic strain, and much more. Those psychological effects can play a major role in immigrants isolating themselves and not trusting the police because they are afraid to have any interaction with them as it may lead to their deportation. In addition to the consequences of deportation mentioned above, immigrants face a “lack of constitutional protections . . . in the deportation process, [and] are not afforded a fair and impartial determination of relief in immigration court.”⁶¹

That fear of deportation is illustrated through Trump Administration policies that frustrate and create barriers restricting the ease of immigration and deportation regulations.⁶² In fact, the Trump Administration stepped up its enforcement of immigration laws in a 2017 Executive Order.⁶³ The Executive Order to “Enhanc[e] Public Safety in the Interior of the United States” (“EPSIUS”) states that “interior enforcement of our Nation’s immigration laws is critically important to the national security and public safety of the United States.”⁶⁴ The EPSIUS also states that “many aliens who illegally enter the United States and those who overstay or otherwise violate the terms of their visas present a significant threat to national security and public safety,” especially for those who engage in criminal conduct.⁶⁵

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Donald J. Trump, *Executive Order: Enhancing Public Safety in the Interior of the United States*, The White House Section 1, (January 25, 2017), <https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/>.

⁶⁴ *Id.*

⁶⁵ *Id.*

The [EPSIUS] continues to allege that the Federal government, before this order, had been exempting “classes or categories of removable aliens from potential enforcement” and that the “purpose of this order is to direct executive departments and agencies [] to employ all lawful means to enforce the immigration laws of the United States.”⁶⁶

The EPSIUS, at the time of this writing, has contributed to the racially biased policing practices that can lead to the deportation of immigrants as it heavily promotes the criminalization of immigrants and allows the law enforcement agents to do so at any cost.⁶⁷

Additionally, the Trump Administration permitted the Director of ICE to hire another 10,000 officers to step up the enforcement of immigration laws.⁶⁸ The order also stated that

the Attorney General and the Secretary shall work together to develop and implement a program that ensures that adequate resources are devoted to the prosecution of criminal immigration offenses in the United States, and to develop cooperative strategies to reduce violent crime and the reach of transnational criminal organizations into the United States.⁶⁹

However, many statistics show that criminal offenses committed by immigrants are often non-violent, but those non-violent offenses can still lead to deportation for immigrants, as shown below.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at Section 7.

⁶⁹ *Id.* at Section 11.

B. Convictions Allow Deportation and Affect Immigration Status Regardless of Severity

Because even minor contact with the criminal system can result in deportation, racially biased policing practices place immigrants of color at a greater risk of both criminal arrest and prolonged immigration detention and deportation.⁷⁰ Criminal convictions are one of the many reasons that the United States removes immigrants from the country.⁷¹ At the time of this writing, the criminal convictions that can allow immigrants to be deported can vary, but the two main categories are aggravated felonies and “crimes involving moral turpitude.”⁷² And the INA also “enumerates certain crimes that serve as independent grounds of deportation, even if they are not classified in one of those two categories.”⁷³ Aggravated felonies include “murder, rape, many sex crimes involving minors, drug trafficking, weapons trafficking, fraud involving at least a certain amount, money laundering or tax evasion involving at least a certain amount, espionage, and treason.”⁷⁴

The moral turpitude crimes are harder to clarify as there is no comprehensive list of crimes that are included.⁷⁵ In general, crimes of moral turpitude include crimes involving fraud, theft, dishonesty, or an intent to harm people and thus might include offenses such as “domestic violence or other forms of assault, as well as DUI if it caused injuries.”⁷⁶ However, “Section 212(h) of the Immigration and Nationality Act provides the possibility of a

⁷⁰ The Immigrant Justice Network, *supra* note 6.

⁷¹ Justia, *Criminal Ground for Deportation*, Justia (April 2019), <https://www.justia.com/immigration/deportation-removal/criminal-grounds-for-deportation/>.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

waiver for certain foreign nationals who do not pose a threat to national security.”⁷⁷ Also, immigrants that have permanent residency immigration status “must meet additional requirements to get a waiver,” including continuous legal status for at least seven years before the start of the deportation proceedings and the absence of any aggravated felonies on their record.⁷⁸ If the crime committed involved moral turpitude and it occurred fifteen years prior to applying for permanent residency, then a judge can grant a waiver of deportation.⁷⁹

Although only consideration of serious crime convictions should weigh heavily in a case that may lead to deportation, there are still minor convictions that lead to deportations, and sometimes immigrants are deported when no convictions ever occurred.⁸⁰ In fact, from 2009 to 2017 “about half of ICE’s [deportations] were people who had not committed any crime at all.”⁸¹ But even of those who committed a crime, “the most serious offense for sixty percent of them was a victimless crime—most commonly an immigration offense, traffic infraction, or vice crimes like illicit drugs.”⁸²

Some of the non-violent crimes that immigrants can be convicted of include that may lead to deportation are traffic violations and crimes involving money, such as writing bad checks.⁸³ For example, Mayra Machado, an immigrant, was pulled over for a routine traffic stop in Arkansas and it turned out that she

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ David J. Bier, *60% of Deported “Criminal Aliens” Committed Only Victimless Crimes*, Cato (June 6, 2018), <https://www.cato.org/blog/60-deported-criminal-aliens-committed-only-victimless-crimes-few-violent-crimes>.

⁸² *Id.*

⁸³ Teresa Wiltz, *What Crimes Are Eligible for Deportation?*, Stateline Article (December 21, 2016), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/12/21/what-crimes-are-eligible-for-deportation>.

had an unpaid ticket for failure to yield.⁸⁴ Ms. Machado also “spent four months in boot camp for writing bad checks” as a teenager, so now at age 31, she is a single mother of three and “faces imminent deportation to El Salvador, the battle-scarred country she fled when she was 5 years old.”⁸⁵ Thus, even though she was in the country legally, served her sentence, years later she was subjected to deportation.⁸⁶ The federal government claims targets noncitizens who are serious or repeat offenders, immigrants with minor offenses are often deported as well.⁸⁷

Additionally, the distribution of convicted immigrants vary between four specific categories of crimes consisting of violent crimes, property crimes, crimes with possible victims, and crimes without victims.⁸⁸ Many convictions are less violent crimes.⁸⁹ Even the assault crimes category can be misleading since this category also includes assaults in which “no weapon was used or no serious or aggravated injury resulted.”⁹⁰ The assault crime category also includes “stalking, intimidation, coercion, and hazing” where no injuries occurred.⁹¹

Research further indicates that serious crimes committed by noncitizens are rare.⁹² There are roughly 1.9 million noncitizens “eligible for deportation based on their criminal history” and “of those, thirty-seven percent, or roughly 300,000 noncitizens, were convicted of a felony, which can range from murder to attempting to re-enter the country illegally.”⁹³ Additionally, “another forty-

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Bier, *supra* note 81.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Wiltz, *supra* note 84.

⁹³ *Id.*

seven percent, or about 390,000, were convicted of a significant misdemeanor, such as drunken driving” but a misdemeanor can vary state by state and can be “anything from shoplifting to minor drug possession” and even some traffic violations.⁹⁴

An arrest does not always lead to a conviction, and an arrest alone will likely only affect the good moral character evaluation in a citizenship application.⁹⁵ Some diversion programs and/or deferred prosecution or sentencing do not always count as convictions, but some form of community service may count as a conviction depending on the circumstances.⁹⁶ A juvenile conviction does not always count as a conviction “unless you were charged as an adult, nor does a violation or infraction count as a conviction.”⁹⁷ However, a judge does not need to formally find the immigrant guilty as a plea deal or a no contest plea can still constitute a conviction for purposes of deportation.⁹⁸ Sometimes “a guilty plea is officially withdrawn once a defendant completes certain requirements, but this will not undo its immigration consequences as a conviction.”⁹⁹ Nor will an expungement of the offense undo its immigration consequences as foreign nationals “need to disclose any crimes that have been expunged from their record, and they are treated in the same way as other crimes.”¹⁰⁰

However, sometimes “vacating a conviction can prevent any immigration consequences.”¹⁰¹ Vacating a conviction essentially means to dismiss a conviction and it is not considered a

⁹⁴ *Id.*

⁹⁵ Justia, *Pleading Guilty or No Contest*, Justia (April 2019), <https://www.justia.com/immigration/deportation-removal/pleading-guilty-or-no-contest/>.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

conviction for immigration purposes in some circumstances, while expunging a conviction means it deletes the record but does not remove the underlying conviction.¹⁰² Vacating a conviction for cause might deter deportation if a judge finds that the conviction was unconstitutional.¹⁰³ This can happen if the immigrant was denied the right to counsel or if the “criminal attorney fail[ed] to advise [the immigrant] about the immigration consequences of a plea bargain, [which] is automatically considered ineffective assistance of counsel and will support vacating a conviction for cause.”¹⁰⁴

Finally, another option to deter deportation is to receive “a pardon from the prisoner review board, the state governor, or any other state agency that holds this authority.”¹⁰⁵ Pardons will stop the immigration effects of a criminal conviction, but usually take a long time and are very rare.¹⁰⁶ Unfortunately, sometimes an immigrant may be deported before the pardon is granted.¹⁰⁷

C. Plea Deals can also Affect Immigration Status

Many immigrants are often tempted to plead guilty or no contest. This is because criminal defense lawyers may urge their clients to plead for lesser offenses rather than risk being charged with a higher offense at trial.¹⁰⁸ However, criminal lawyers who understand immigration law will know that pleading guilty or no

¹⁰² U.S. Citizenship and Immigration Services (USCIS), Policy Manual Vol. 12 Part F Ch. 2 (2021), <https://www.uscis.gov/policy-manual/volume-12-part-f-chapter-2>.

¹⁰³ Justia, *supra* note 99.

¹⁰⁴ *Id.* However, this rule applies only to convictions from 2010 or later.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

contest, regardless of the lesser offense, can still subject the immigrant to deportation.¹⁰⁹ According to Justia,

many criminal attorneys “are constitutionally required to advise foreign national defendants about the immigration consequences of their decisions, [but] they often lack a thorough grasp of immigration law and its nuances,” which is very important to know when having an immigrant client because the smallest convictions can lead to their deportation.¹¹⁰

Regardless of the efforts to decriminalize certain conduct such as marijuana possession and traffic infractions, many people are continually deported for conduct which has been decriminalized in certain states.¹¹¹ Because of the draconian definition of “conviction” in federal immigration law, many pleas still trigger deportation even after a plea has been dismissed upon successful completion of a diversion program.¹¹² Even if the defendants are innocent, they may choose to plead guilty “because the risk of trial is too high, or they don’t have the money for bail.”¹¹³ Research shows that people within Black and Latinx communities “are more likely than individuals within White communities to be denied bail, and if bail is set, it tends to be a higher monetary amount for minorities,” which is why many Latinx defendants tend to plead guilty so they do not have to remain in jail.¹¹⁴ Additionally, even if the guilty plea does not have any further criminal consequences, it may still have severe immigration consequences as that immigrant “could be transferred

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² The Immigrant Justice Network, *supra* note 6.

¹¹³ *Id.*

¹¹⁴ *Id.*

immediately to immigration detention, and face deportation.”¹¹⁵
This is all a result of harsh immigration law and policies that
“undercut the commitment to reentry and rehabilitation that many
cities and states are making.”¹¹⁶

As previously stated, even “an expunged or sealed conviction is still a conviction for immigration purposes,” and oftentimes “even a pardon cannot remove the immigration consequences of all convictions.”¹¹⁷ Because of this and the harsh realities of immigrants interacting with the criminal justice system in any way, when an immigrant is going to plead guilty, the attorney must inform the immigrant of the possible consequences. In fact, the Supreme Court in *Padilla v. Kentucky* held that “not only is an attorney required to notify that defendant of immigration consequences, but it is so fundamental to adequate representation that failure to do so qualifies as ineffective assistance of counsel.”¹¹⁸ For example, in *Aguilera-Enriquez v. Immigration & Naturalization Serv.*, the Petitioner was an immigrant from Mexico that went to Mexico on vacation but came back to the U.S. and was caught with cocaine.¹¹⁹ He pled guilty in the United States District Court for the Western District of Texas on one count of knowingly possessing a quantity of cocaine.¹²⁰ However, neither his “appointed counsel nor the District Court informed him that a narcotics conviction would almost certainly lead to his deportation” so the court found that the lack of information was ineffective assistance of counsel.¹²¹ Thus, immigrants need to have lawyers who are informed of immigration laws because

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Clapp, *supra* note 54, at 172.

¹¹⁹ *Aguilera-Enriquez v. Immigration & Naturalization Serv.*, 516 F.2d 565 (6th Cir. 1975).

¹²⁰ *Id.*

¹²¹ *Id.*

immigrants can face deportation even for a minor conviction as evidenced in *Aguilera-Enriquez*.¹²²

IV. SOLUTIONS: POLICE AND LEGISLATIVE REFORM POLICIES

A. Police Reform

Part of the collective solution to the issues addressed must include sustainable comprehensive police reforms. To make successful changes within police practices that are deeply rooted in policies that discriminate against immigrants of color will require recognition and acknowledgment of the anti-immigration policies that saturate policing today.¹²³ Since United States law enforcement is ingrained with policies and practices that specifically target immigrants and other minorities, the “reform efforts cannot simply be cosmetic or by buzzword (*e.g.*, “all police must receive implicit bias training,” and “all police must wear body cameras”).”¹²⁴ Although those requirements could be useful in some ways, policing practices need to be radically reformed in other ways for those requirements to be truly beneficial. Comprehensive reform could include changing the policies for hiring law enforcement, restructuring detention procedures, offering diversity training programs, shifting pay structures within law enforcement, and truly eliminating the biased law enforcement officers that are currently running the system.¹²⁵

In order to achieve these goals and provide some of these reformations within the police system, there needs to be a change in the ways that police are trained in such a way that exposes new officers to different racial encounters that they are likely to meet while on the job. Many areas within the United States have already

¹²² *Id.*

¹²³ Andre Douglas Pond Cimmings, *Reforming Policing*, 10 DREXEL L. REV. 573 (2017).

¹²⁴ *Id.*

¹²⁵ *Id.* at 590.

begun such police reform in a variety of ways. For example, in Illinois, The University of Illinois' Police Training Institute created a "Policing in a Multiracial Society Project" in which "a nine-hour police training unit exposes new police recruits to ideas that they may have never before encountered, such as individual, racial, and cultural bias."¹²⁶ That training unit questions the new law enforcement officers' own racial bias and asks them to "consider their own and others' innate racial biases, and suggests to these new recruits that potential harm can accrue from these biases."¹²⁷ The training was developed to "challenge new police recruits by educating them about race and racism, introduc[e] them to critical race theory, and instruct[] them in ways to deescalate potentially volatile encounters with members of minority groups."¹²⁸

Since this program has only been available since 2011, it is still developing and changing based on feedback from the recruits taken both before the program and after the program.¹²⁹ There has been valuable feedback that continues to change the program for the better; such changes include "giving recruits more time to share their ideas and attitudes about race and policing; bringing in [minority] speakers who were arrested, convicted and jailed for crimes they didn't commit; and role-playing with an experienced team of trainers who walk young recruits through a variety of potentially volatile scenarios."¹³⁰

While this program has not been fully deemed "successful" in making a guaranteed change, it is still allowing for the new police recruits to start thinking about racially biased policing.¹³¹ It forces the new recruits to think differently and engage in

¹²⁶ *Id.* at 591.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Diana Yates, *Police Training Institute challenges police recruits' racial biases* (August, 1, 2016), <https://news.illinois.edu/view/6367/388568>.

¹³⁰ *Id.*

¹³¹ *Id.*

challenging racially based situations that they will more than likely face when in the field, and it explains to them how to handle those difficult situations.¹³² Programs such as this could be implemented throughout the United States and be enhanced to teach recruits about each minority group since the challenges and consequences of criminal convictions are different for each distinct group of minorities.

Furthermore, there could be an addition to this training that requires police officers to undergo continual educational courses on the constitution and different case law since case law can change. Since police officers deal with enforcing the law, it is only right that they also know and understand the different aspects of the law regarding the Constitution. By doing so, United States police will be better equipped at enforcing such laws and less likely to over-police.

Additionally, or instead of more/different police training, there could be more attention paid to the hiring process and the selection of officers. By having a more comprehensive and detailed hiring process that focuses on the backgrounds and codes of conduct/integrity of the applicants, those who already have a strong racial bias could be scrutinized and weeded out. By doing so, the police force will have less and less officers that have strong racial biases, which will hopefully lead to less racially biased policing.

B. Legislative Reform

There must also be specific legislative reforms to eliminate racial bias and the targeting of immigrants within the United States justice system. One form of legislative reform could include changing immigration laws within the INA to narrow the definition of an aggravated felony. As discussed previously, “the current broad definition relegates noncitizens convicted of a plethora of crimes—many of which in fact are neither felonies or particularly

¹³² *Id.*

serious— to mandatory detention and removal.”¹³³ Those convictions also render immigrants ineligible for most forms of relief from deportation, so to narrow the definition to specific convictions and crimes would help prohibit the impact of bias against immigrants as they would not be in danger of deportation every time they interact with the criminal justice system. However, this legislative reformation may be hard to accomplish since Congress “has regularly passed increasingly harsh legislation designed to punish ‘criminal aliens.’”¹³⁴ Since Congress’ creation of the aggravated felony removal standard, they have constantly expanded the aggravated felony definition:

When Congress first enacted the aggravated felony removal category in 1988, only three serious crimes were included: murder, drug trafficking, and firearms trafficking. The current list—now at twenty-eight offenses, some of which create further sub-categories—includes crimes that are neither aggravated nor felonies under criminal law. Misdemeanor drug possession with a one-year sentence can qualify as an aggravated felony, as does a year of probation with a suspended sentence for pulling hair—a misdemeanor under Georgia law. Convictions for selling ten dollars worth of marijuana, theft of a ten-dollar video game, shoplifting fifteen dollars worth of baby clothes, and forging a check for less than twenty dollars have all been held to be aggravated felonies. Aggravated felonies trigger mandatory detention, deportation without the possibility of almost all forms of discretionary relief [from removal],

¹³³ Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 Case W. Res. L. Rev. 993, 1033 (2016).

¹³⁴ *Id.*

including asylum and cancellation of removal, and a permanent bar on lawful reentry.¹³⁵

Therefore, narrowing the definition of an aggravated felony to specific crimes could help limit or prohibit bias against immigrants because they would not be subjected to such harsh consequences. But that definition change will be a challenge since the definition appears to only be expanding through legislation and court decisions.

Additionally, reducing or restructuring detention procedures could be another tool to limit the bias against immigrants within the police force and the criminal justice system. Congress has quotas for law enforcement to reach regarding immigrant detentions.¹³⁶ The congressional quotas “require the detention of certain numbers of immigrants and in effect mandate immigration arrests and detentions,” which arguably enables and incentivizes law enforcement to target immigrants, and they do so based on their own racial bias.¹³⁷ Without the incentives within the quotas to “over enforce” immigration laws, the detention of immigrants will likely lessen.¹³⁸

V. CONCLUSION

Racially biased policing practices creates a high risk of deportation for immigrants. Minorities, such as immigrants, are far more likely to be arrested than white people and that can be detrimental for immigrants as any sort of interaction with the criminal justice system can lead to deportation.¹³⁹ The arrests of immigrants can often occur simply due to their racial appearance or to their speaking of a foreign language, such as Spanish, and that has been proven as an acceptable factor through the United

¹³⁵ *Id.* at 1034.

¹³⁶ *Id.*

¹³⁷ *Id.* at 1035.

¹³⁸ *Id.*

¹³⁹ Rosich, *supra* note 3.

States Supreme Court for reasonable suspicion if it is not the only factor taken into consideration.¹⁴⁰

When police can have reasonable suspicion based on Latinx/Hispanic appearance that creates an even higher risk of deportation for immigrants since that means police will often interact more with immigrants and arrest and charge them with even minor crimes, and those minor crimes can cause immigrants to be deported. The INA sets out the laws for immigration deportation and allows for deportation when an immigrant is convicted of an aggravated felony or a crime involving moral turpitude.¹⁴¹ Congress has continuously expanded the crimes that can be defined as an aggravated felony and moral turpitude crimes also have an exhaustive list.¹⁴² Thus, there is a multitude of crimes, including traffic violations, that can cause immigrants to be deported¹⁴³, which means that the smallest encounter with police can lead to deportation.

Deportation of immigrants can be extremely harmful as they can lose everything they have ever known—their family, friends, jobs, and more—and be sent back to a country of birth that no longer has any cultural, familial, or economic importance in their lives. However, there are reformations that can occur within the legal system to help with the specific targeting of immigrants, such as some prior stated police and legislative reforms. The various police and legislative reforms discussed above could begin the process of eliminating racially biased targeting of immigrants of color and eliminate the detrimental deportation of immigrants, especially those who have only committed minor offenses or have been in the United States for many years of their lives.

¹⁴⁰ *United States v. Brignoni-Ponce*, *supra* note 22.

¹⁴¹ Justia, *supra* note 71.

¹⁴² Johnson, *supra* note 134.

¹⁴³ Wiltz, *supra* note 84.