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RACIAL PROFILING IN THE WAR ON DRUGS MEETS THE IMMIGRATION REMOVAL PROCESS: THE CASE OF *MONCRIEFFE V. HOLDER*

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Introduction

In *Moncrieffe v. Holder*,[1] the Supreme Court held that the Board of Immigration Appeals could not remove a long-term lawful permanent resident from the United States based on a single misdemeanor conviction for possession of a small amount of marijuana. The decision clarified the meaning of an "aggravated felony"[2] for purposes of removal, an important question under the U.S. immigration laws.

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1. 133 S. Ct. 1678 (2013).

2. *See* Immigration and Nationality Act (INA) § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2012) (defining "aggravated felony" for purposes of the INA). One commentator summarized the steady expansion of the definition of an "aggravated felony" as follows:

> 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*

In the removal proceedings, Adrian Moncrieffe, a black immigrant from Jamaica, did not challenge his arrest and drug conviction. Consequently, the Supreme Court did not review the facts surrounding, or the lawfulness of, the criminal prosecution. Nonetheless, the traffic stop resulting in Moncrieffe's initial arrest, and the subsequent interactions with police, strongly suggest that race influenced the events leading to the criminal conviction.[3] An examination of the facts of his case highlights how the modern criminal justice system works in combination with immigration removal proceedings to disparately impact communities of color in the United States.

Over the last few decades, modern immigration enforcement has evolved into a tough, fast-moving criminal-immigration removal system. As Moncrieffe's case attests, undocumented immigrants are not the only noncitizens subject to possible removal from the United States. The U.S. government frequently threatens to remove long-term lawful permanent residents convicted of relatively minor crimes. Many of these lawful permanent residents have deep ties to the community—ties that include children who are U.S. citizens.[4]

The group of noncitizens subject to removal tends to be racially skewed. That is partially due to the fact that a significant percentage of immigrants are racial minorities.[5] Moreover, the ordinary operation of the criminal justice system produces racially disparate impacts, in no small part due to racial profiling in traffic stops that

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

Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1758–59 (2013) (emphasis added) (footnotes omitted).

3. *See Racial Profiling: Definition*, AM. CIVIL LIBERTIES UNION, *available at* http://www.aclu.org/racial-justice/racial-profiling-definition (last visited May 11, 2015) (defining racial profiling as the targeting by law enforcement of persons because of their perceived race). For the facts surrounding the traffic stop that led to the search, arrest, and conviction of Adrian Moncrieffe on marijuana charges, see *infra* Part II.

4. *See* Maritza I. Reyes, *Constitutionalizing Immigration Law: The Vital Role of Judicial Discretion in the Removal of Lawful Permanent Residents*, 84 TEMP. L. REV. 637, 639–40 (2012); Wilber A. Barillas, Note, *Collateral Damage: Drug Enforcement & Its Impact on the Deportation of Legal Permanent Residents*, 34 B.C. J.L. & SOC. JUST. 1, 1–4 (2014). *See generally* Shani M. King, *U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward A Functional Definition of Family That Protects Children's Fundamental Human Rights*, 41 COLUM. HUM. RTS. L. REV. 509 (2010) (analyzing impacts of removal on families, including those with U.S. citizen children); David B. Thronson, *You Can't Get Here from Here: Toward a More Child-Centered Immigration Law*, 14 VA. J. SOC. POL'Y & L. 58 (2006) (to the same effect); Marie Weisenberger, Comment, *Broken Families: A Call for Consideration of the Family of Illegal Immigrants in U.S. Immigration Enforcement Efforts*, 39 CAP. U. L. REV. 495 (2011).

5. *See infra* Part I.A–B.

are a staple of the "war on drugs."[6] This Article contends that the racially disparate impacts of the criminal justice system exacerbate the racially disparate impacts of the modern immigration removal system.[7] To illustrate this claim, I analyze how the racially-tinged stop, arrest, and conviction of Adrian Moncrieffe for drug possession led to the initiation of the proceedings to remove him from the United States. Ultimately, this analysis reveals how racial minorities find themselves in the crosshairs of both the modern criminal justice and immigration removal systems.

Part I of this Article places *Moncrieffe v. Holder* in its proper historical, legal, and regulatory context. It provides the necessary background about the emergence of "crimmigration" law, which is characterized by the tightening nexus between the criminal justice system and immigration enforcement.[8]

Part II provides the details of Adrian Moncrieffe's brush with police. Following a routine traffic stop, police officers questioned Moncrieffe and used a drug sniffing dog to search his car. Moncrieffe's interactions with the officers on the scene appear to have been shaped by his race and culminated in a criminal conviction. That conviction, in turn, resulted in Moncrieffe's placement in removal proceedings. After living in the United States for more than two decades, he faced possible deportation as a result of a dubious traffic stop, culminating in a minor criminal conviction.

Part III of this Article reviews the Supreme Court's decision in *Moncrieffe v. Holder*. The decision, similar to the Court's general criminal procedure and immigration jurisprudence, wholly ignored the racial dynamics of Moncrieffe's original stop, search, arrest, and conviction. The Court instead treated the matter as a routine—and race neutral—immigration removal matter, little different from the tens of thousands of such proceedings resulting in removal orders each year, with ninety-five percent of orders subjecting Latinos to deportation from the United States.[9]

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6. *See infra* text accompanying notes 54–58.

7. *See infra* Parts I–II.

8. *See generally* Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613 (2012) (analyzing the over-criminalization of immigration law); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105 (2012) (criticizing the growing reliance on the criminal law as a means of enforcing the U.S. immigration laws); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81 (2005) (discussing the consequences of the increasing interaction between the criminal justice system and the immigration laws); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U.L. REV. 367 (2006) (analyzing the increasing confluence of modern U.S. immigration law and criminal law and coining the phrase "crimmigration law").

9. *See infra* text accompanying notes 51–53.

Moncrieffe's story exemplifies how a racially disparate criminal justice system exacerbates racially disparate removals. Although Moncrieffe was fortunate enough to avoid deportation, many lawful permanent residents are not so lucky.[10] Still, *Moncrieffe v. Holder* inadvertently highlights significant issues of race in the modern immigration removal system. Namely, the symbiotic relationship between the modern criminal justice and immigration removal systems compound the racial disparities in immigration removals and demonstrate the need for careful consideration of reforms to immigration laws and their enforcement.[11]

I. THE CONTEMPORARY AMERICAN IMMIGRATION REMOVAL SYSTEM: IMMIGRATION ENFORCEMENT THROUGH RELIANCE ON CRIMINAL LAW ENFORCEMENT

A police stop of Adrian Moncrieffe's sport utility vehicle on the interstate in Georgia in 2006 triggered two separate, distinct, and independent, although inextricably related, legal processes. The first legal proceeding was Moncrieffe's criminal prosecution for possessing a small amount of marijuana, an offense to which he pleaded guilty in Georgia state court.[12] Based on this single conviction, the U.S. government initiated proceedings in immigration court seeking Moncrieffe's removal from the United States. The removal case eventually made it all the way to the Supreme Court.[13]

Because of the Executive Branch's contemporary border enforcement priorities, removal proceedings like Moncrieffe's are all too common. What is extremely uncommon about his case is that the Supreme Court intervened to halt the immigrant's removal.

This Part looks generally at how arrests and convictions for relatively minor crimes can result in the removal of noncitizens, including long-term, lawful permanent residents with deep ties to the United States. It also details how routine traffic stops can trigger removal, an exercise that demonstrates how the ordinary operation of the modern criminal justice system directly contributes to racially disparate immigration enforcement actions.

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10. *See infra* Part I.

11. *See, e.g.*, Mary Fan, *The Case for Crimmigration Reform*, 92 N.C. L. REV. 75, 132–47 (2013) (making the case for reform of the immigration law and its reliance on the criminal justice system for removal); s*ee also supra* note 8 (citing authorities noting the emergence of crimmigration law).

12. *See infra* Part II.

13. *See infra* Part III.

A. Modern Immigration Enforcement

Beginning in 1996, Congress passed a series of increasingly tough immigration enforcement laws. These laws greatly expanded the grounds for removal, making it virtually mandatory to remove a noncitizen convicted of an "aggravated felony"; over the years, Congress had added to the list of offenses that qualify as "aggravated felonies."[14] Congress also limited the forms of relief from removal available to noncitizens convicted of crimes; increased the use of mandatory detention for noncitizens convicted of crimes and awaiting deportation; and restricted—in many instances eliminating—judicial review of removal and related decisions for noncitizens convicted of crimes.[15] During roughly the same period, Congress, with the support of the President, appropriated record levels of funding to border enforcement.[16] Such appropriations allowed for the rapid militarization of the U.S./Mexico border through enhanced technology, extension of the border fence, and ever-increasing numbers of Border Patrol officers patrolling the region.[17]

One commentator aptly summarized contemporary developments in American immigration enforcement as follows:

> The deportation of "criminal aliens" is now the driving force in American immigration enforcement. In recent years, the Congress, the Department of Justice, the Department of Homeland Security, and the White House have all placed

14. *See supra* note 2 (quoting authority about the steady expansion of the definition of "aggravated felony" for purposes of removal under the immigration laws).

15. These changes to the immigration laws have been brought about by a series of pieces of immigration legislation enacted by Congress, including the REAL ID Act, Pub. L. 109-13, 119 Stat. 231, 302–311 (2005); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, Pub. L. No. 107-56, 115 Stat. 272, 342–362 (2001); and the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009, 3009–546 (1996).

16. *See* Gerald P. López, *Don't We Like Them Illegal?*, 45 U.C. DAVIS L. REV. 1711, 1780–97 (2012) (summarizing the expansion of border enforcement in the Clinton, Bush, and Obama administrations).

17. *See* Elvia R. Arriola, *Voices from the Barbed Wires of Despair: Women in the Maquiladoras, Latina Critical Legal Theory, and Gender at the U.S.-Mexico Border*, 49 DEPAUL L. REV. 729, 807–08 (2000); Megan L. Capasso, *An Attempt at a "12 Step Program": President Bush's Comprehensive Strategy to Rehabilitate California and Mexico's Addiction to Illegal Immigration: Does It Strike the Correct Societal Balance?*, 34 W. ST. U. L. REV. 87, 102 (2006); Suzy Khimm, *Want Tighter Border Security? You're Already Getting It*, WASH. POST (Jan. 29, 2013), *available at* http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/29/the-2007-immigration-bill-set-border-security-targets-weve-hit-most-of-them.

> criminals front and center in establishing immigration-enforcement priorities. . . . In effect, federal immigration enforcement has become a criminal removal system.[18]

The modern focus on the removal of noncitizens reflects the shifting political priorities concerning immigration enforcement. Public concern with immigration—especially from Mexico—has steadily increased over the last few decades.[19] Noncitizens convicted of crimes are especially unpopular with the general public.[20] Responding to sustained political pressure for greater immigration enforcement, the Executive Branch took increasingly aggressive measures, often emphasizing that it targets "criminal aliens."[21] As a result, the United States removed record numbers of noncitizens, including many minor criminal offenders as well as serious ones, in recent years.[22]

Over the past decade, Congress considered numerous immigration reform proposals.[23] Some of the proposals include components that focus on goals other than stricter border enforcement, such as offering a path to legalization for certain groups of undocumented immigrants.[24] As part of the political efforts to prod congressional action on immigration reform, the Obama administration has frequently expressed a commitment to heightened enforcement, which is consistent with its overall record of increasing removals.[25]

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18. Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1128 (2013) (emphasis added).

19. *See* John Ryan Syllaios, Note, *The Future of Discriminatory Local Ordinances Aimed at Regulating Illegal Immigration*, 16 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 639, 642–51 (2010).

20. *See* Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender and Class*, 42 UCLA L. REV. 1509, 1531–34 (1995).

21. *See* Kathleen Kim, *Introduction: Perspectives on Immigration Reform,* 44 LOY. L.A. L. REV. 1323, 1330–31 (2011).

22. *See* Brian Bennett, *U.S. Deported Record Number of Illegal Immigrants*, L.A. TIMES (Oct. 6, 2010), *available at* http://articles.latimes.com/2010/oct/06/nation/la-na-illegal-immigration-20101007. Recent years also have seen a number of state and local governments enacting legislation seeking to facilitate enforcement of the federal immigration laws. *See infra* Part I.B.2.

23. *See generally* Kevin R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L. REV. 1599 (2009) (articulating principles with which to evaluate possible comprehensive immigration reform proposals); María Pabón López & Natasha Ann Lacoste, *Immigration Reform in 2013–14: An Essay on the Senate's Bipartisan Plan, the House's Standards for Immigration Reform, Interest Convergence and Political Realities*, 17 HARV. LATINO L. REV. 121 (2014) (analyzing possible comprehensive immigration reform proposals).

24. *See id.* (citing sources analyzing possible immigration reform proposals and a proposed path to legalization for undocumented immigrants).

25. *See generally* Jordan Grossman, Note, *Hidden in Plain Sight: Examining the Obama Administration's Discreet Implementation of a Scaled-Down Version of Comprehensive Immigration Reform*,

1. Secure Communities

Building on the increasingly tough immigration enforcement measures passed by Congress, "Secure Communities,"[26] the Obama administration's signature immigration enforcement program, contributed significantly to the consistently high number of removals of noncitizens from the United States.[27] It required state and local law enforcement agencies to share information with the federal government about noncitizens who were arrested. It also required state and local agencies to detain noncitizens for possible immigration violations so that U.S. immigration authorities could consider possible removal. The program proved to be particularly efficient at boosting removal numbers.[28] After considerable—and prolonged—criticism, President Obama unceremoniously ended Secure Communities in 2014.[29]

When Secure Communities was in place, officials at the highest levels of the Obama administration regularly emphasized that the

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8 HARV. L. & POL'Y REV. 195 (2014) (examining the Obama administration's immigration and border enforcement record).

26. For explanation of the workings of Secure Communities, see Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 UC IRVINE L. REV. 247, 310–11 (2012); Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 207–08 (2013); Steven Papazian, Note, *Secure Communities, Sanctuary Laws, and Local Enforcement of Immigration Law: The Story of Los Angeles*, 21 S. CAL. REV. L. & SOC. JUST. 283, 300–04 (2012).

27. Critical analysis of the impacts of the Secure Communities program can be found in AARTI KOHLI ET AL., CHIEF JUSTICE EARL WARREN INSTITUTE ON LAW AND SOCIAL POLICY, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS (2011), *available at* www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf; Katarina Ramos, *Criminalizing Race in the Name of Secure Communities*, 48 CAL. W. L. REV. 317 (2012); Rachel R. Ray, *Insecure Communities: Examining Local Government Participation in U.S. Immigration and Customs Enforcement's "Secure Communities" Program*, 10 SEATTLE J. SOC. JUST. 327, 337–38 (2011). *See generally* Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011) (analyzing critically state and local government involvement in federal immigration enforcement). The Obama administration has focused on enforcement throughout President Obama's time in office, but it also added a formal deferred action program in 2012 with a proposed expansion in 2014; those programs promised limited relief from removal for certain groups of undocumented immigrants. *See* Nikki Hager, *Obama Administration and Immigration Policy: Immigration Enforcement Record in Recent Years—Analysis*, EURASIA REV. (Jan. 31, 2015), *available at* http://www.eurasiareview.com/31012015-obama-administration-immigration-policy-immigration-enforcement-record-recent-years-analysis/.

28. *See infra* Part I.A.2.

29. *See* Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec. to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enforcement, Megan Mack, Officer Office of Civil Rights and Civil Liberties, & Philip A. McNamara, Assistant Sec'y for Intergovernmental Affairs (Nov. 20, 2014) [hereinafter Johnson Memorandum], *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.

program targeted dangerous criminal noncitizens[30]—"gang bangers" is the racially-charged parlance favored by President Obama.[31] Despite that justification, Secure Communities led to the removal of many noncitizens charged with relatively minor criminal offenses.[32] These noncitizens could not reasonably pose serious safety risks to the public.

> [G]overnment records [as of early 2014] show[ ] that since President Obama took office, two-thirds of the nearly two million deportation cases involve people who had committed minor infractions, including traffic violations, or had no criminal record at all. Twenty percent—or about 394,000—of the cases involved people convicted of serious crimes, including drug-related offenses . . . .[33]

One empirical study found that, contrary to the claims of the Obama administration that Secure Communities was designed to promote public safety, the program did not focus on high crime areas but instead targeted communities with disproportionately Hispanic populations.[34]

Consider one memorable example of an effort by U.S. immigration authorities to remove a "criminal alien." In 2012, authorities threatened to remove an undocumented immigrant following an

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30. *See* Jared I. Albert, *Development in the Executive Branch: How Secure is Secure Communities? The Future of One of ICE's Most Controversial Programs*, 26 GEO. IMMIGR. L.J. 187, 193 (2011); Stephanie Kang, Note, *A Rose by Any Other Name: The Chilling Effect of ICE's "Secure" Communities Program*, 9 HASTINGS RACE & POVERTY L.J. 83, 106-08 (2012); Christi Parsons, *Obama Calls Himself the "Champion in Chief" of Immigration Reform*, L.A. TIMES (Mar. 6, 2014), *available at* http://articles.latimes.com/2014/mar/06/news/la-pn-obama-immigration-reform-champion-20140306.

31. *See* Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crime, Data Shows*, N.Y. TIMES, Apr. 7, 2014, at A1 ("With the Obama administration deporting illegal immigrants at a record place, *the President has said the government is going after 'criminals, gang bangers, people who are hurting the community, not after students, not after folks who are here just because they're trying to figure out how to feed their families.*' ") (emphasis added).

32. *See infra* text accompanying notes 33–36 (citing authorities).

33. Thompson & Cohen, *supra* note 31; *see* Editorial, *Immigration Bait and Switch*, N.Y. TIMES, Aug. 18, 2010, at A22 ("Immigration and Customs Enforcement records show that a vast majority, 79 percent, of people deported under Secure Communities had *no criminal records or had been picked up for low-level offenses, like traffic violations and juvenile mischief.*") (emphasis added); Kavitha Rajagopalan, *Deportation Program Casts Too Wide a Net Secure Communities is Doing More Than Sending the Worst Immigrants Home*, NEWSDAY (New York), June 24, 2011, at A34 ("Secure Communities purports to search for repeat illegal immigrant offenders or those charged with major crimes. *In practice, most people deported under the program have had no criminal record at all and were picked up on minor offenses, like speeding.*") (emphasis added).

34. *See* Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 89–90 (2013).

arrest for trespassing in Sacramento, California. Police arrested the immigrant in question while she sold homemade tamales in front of a Wal-Mart store to support her U.S. citizen children.[35] A public outcry to her threatened removal helped convince the U.S. government to not seek deportation of the "tamale lady," who by all accounts did not pose a serious threat to public safety and could not be reasonably characterized as a "gang banger."[36]

Cases like this are more common than one might imagine.[37] Secure Communities required mandatory reporting of noncitizens charged with minor crimes such as driving an automobile without a valid driver's license (or, in the case of the tamale lady, trespassing), as well as serious criminal offenses.[38] If public safety was in fact the true purpose of the program, its design and operation cast an overbroad net. Indeed, some state and local governments attempted to protect immigrants from the perceived excesses of Secure Communities by limiting local police cooperation with U.S. immigration authorities to reporting and detaining only serious criminal offenders.[39] Stiff state and local resistance to Secure Communities seemingly contributed to the Obama administration's decision to end the program.[40]

Given the prevalence of cases in which relatively minor violations of the law could result in possible removal,[41] the Obama administration's immigration enforcement agenda in fact operated to maximize removal numbers rather than to truly focus on the protection of the safety of the general public. The administration publicized consistently high numbers of removals and claimed that they demonstrated its commitment to immigration enforcement.[42]

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35. *See* Ruben Navarrette Jr., *Don't Deport the "Tamale Lady,"* CNN (Aug. 2, 2012), *available at* http://www.cnn.com/2012/08/01/opinion/navarrette-deportation-sacramento.

36. *See id.*

37. *See supra* text accompanying notes 30–34.

38. *See* Amelia Fischer, *Secure Communities, Racial Profiling & Suppression Law in Removal Proceedings,* 19 TEX. HISP. J.L. & POL'Y 63, 87 (2013); Julia Preston & Robert Gebeloff, *Unlicensed Drivers Who Risk More Than a Fine*, N.Y. TIMES, Dec. 10, 2010, at A1.

39. *See, e.g.*, CAL. GOV'T CODE § 7282 (2015) (California TRUST Act, which limits police cooperation with the U.S. government with respect to noncitizens arrested for minor crimes).

40. *See supra* text accompanying note 39. The announcement of the discontinuation of Secure Communities noted that an increasing number of state and local law enforcement agencies had refused to cooperate with federal immigration officials in the operation of the program. *See* Johnson Memorandum, *supra* note 29, at l.

41. *See supra* text accompanying notes 26–36.

42. *See* Kevin R. Johnson, *Immigration and Civil Rights: Is the "New" Birmingham the Same as the "Old" Birmingham?*, 21 WM. & MARY BILL RTS. J. 367, 375–76 (2012); Thompson & Cohen, *supra* note 31.

Pointing to removal rates, the administration regularly has called on Congress to enact comprehensive immigration reform.[43]

Somewhat surprisingly, the Supreme Court has not always acquiesced to the Obama administration's aggressive immigration enforcement-oriented efforts to remove "criminal aliens." In just the past few years, the Court, led by Chief Justice John Roberts, twice rejected attempts to remove long-term lawful permanent residents with deep ties to the community for what can only be reasonably characterized as minor drug convictions.[44]

Although the Obama administration in 2014 abolished Secure Communities,[45] it continues to make it a priority to remove noncitizens with certain types of criminal convictions.[46]

2. Racially Disparate Removals

The Obama administration's commitment to immigration enforcement contributed to a dramatic increase in the number of noncitizens removed from the United States. Today, the Department of Homeland Security regularly deports approximately 400,000 persons a year.[47] In fiscal year 2013, for example, the Department of Homeland Security removed approximately 438,000 noncitizens from the United States.[48] By way of comparison, removals in 1990 totaled a little over 30,000 a year.[49] Thus, removals

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43. *See* Mark Landler, *President Urges Speed on Immigration Plan, But Exposes Conflicts*, N.Y. TIMES, Jan. 30, 2013, at A1.

44. *See* Moncrieffe v. Holder, 133 S. Ct. 1678 (2013) (rejecting removal order based on the possession of a small amount of marijuana); Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010) (refusing to affirm removal order based on a criminal conviction for possession of one tablet of a prescription drug). For analysis of the Supreme Court's immigration decisions during the first five years of the Obama presidency, see Kevin R. Johnson, *Immigration in the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism*, 66 OKLA. L. REV. (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2480570.

45. *See supra* text accompanying note 29.

46. *See* Johnson Memorandum, *supra* note 29, at 2–3 (noting that, although Secure Communities has been discontinued, other programs would be directed at noncitizens convicted of criminal offenses that are a high priority for removal).

47. *See infra* text accompanying notes 48–53.

48. JOHN. F. SIMANSKI, U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2013 1 (2014), *available at* http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf. The Obama administration also has detained about 400,000 noncitizens a year as part of its immigration enforcement efforts. *See* César Cuauhtémoc García Hernández, *Immigration Detention as Punishment,* 61 UCLA L. REV. 1346, 1348, 1401 (2014).

49. *See* U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, 2011 YEARBOOK OF IMMIGRATION STATISTICS 102 (2012), *available at* https://www.dhs.gov/ sites/default/files/publications/immigrationstatistics/yearbook/2011/ois_yb_2011.pdf.

increased more than tenfold over the last twenty years, with the Obama administration reportedly deporting more noncitizens than any administration in American history.[50]

The United States removes a disproportionate number of immigrants from Mexico and Central America.[51] In fiscal year 2013, citizens of Mexico alone accounted for nearly seventy-two percent of all removals; deportations of noncitizens from Mexico, Guatemala, Honduras, and El Salvador constituted more than ninety-six percent of all removals.[52] By way of comparison, only seventeen percent of the total U.S. population is Hispanic and Mexicans constitute less than fourteen percent of lawful immigrants and roughly half of all undocumented immigrants.[53] Consequently, as the nation removes about 400,000 noncitizens (lawful and undocumented immigrants) annually, it deports hundreds of thousands of citizens from Mexico and Central America each year, with numbers starkly disproportionate to their representation in the general and immigrant populations.

In sum, racial minorities, predominantly Latinos, comprise a significant number of legal and undocumented immigrants in the United States. Police enforcement activities frequently target racial minorities, including Latinos. Under current enforcement priorities, these two factors ensure that Latinos are overwhelmingly represented in removal proceedings and currently constitute the vast majority of noncitizens removed from the United States.

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50. *See* Naomi Cobb, Comment, *Deferred Action for Childhood Arrivals (DACA): A Non-Legislative Means to an End That Misses the Bull's Eye*, 15 SCHOLAR 651, 664 n.69 (2013); Julia Preston, *Deportations by Courts Drop 47% in 5 Years*, N.Y. TIMES, Apr. 17, 2014, at A12. Statistical comparisons of the Obama administration's removal record with those of previous administrations have been questioned due to changes in the ways that the Executive Branch counts removals. *See* Brian Bennett, *Figures Skew Number Obama Deports; Immigrants beyond the Border Area are Less Likely to be Kicked Out Now*, L.A. TIMES, Apr. 2, 2014, at A1. Any changes in the tabulation of the administration's removal numbers, however, cannot change the fact that the U.S. government under President Obama's leadership has removed hundreds of thousands of noncitizens a year from the country.

51. *See, e.g.*, U.S. DEP'T OF HOMELAND SEC., *supra* note 49, at 103–04.

52. *See* SIMANSKI, *supra* note 48, at 1 ("The leading countries of origin for those removed from the United States in fiscal year 2013 were Mexico (72 percent), Guatemala (11 percent), Honduras (8.3 percent), and El Salvador (4.8 percent).").

53. *See* U.S. CENSUS BUREAU, *USA Quick Facts*, *available at* http://quickfacts.census.gov/qfd/states/00000.html (last revised Mar. 31, 2015) (noting that Hispanic or Latino population of United States in 2013 was 17.1 percent of total population); U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, U.S. LAWFUL PERMANENT RESIDENTS 2013 4 tbl.3 (2014), *available at* http://www.dhs.gov/sites/default/files/publications/ois_lpr_fr_2013.pdf (compiling data showing that 13.6 percent of lawful permanent residents came from Mexico); PEW RESEARCH CTR., *5 Facts About Illegal Immigration in the U.S.* (Nov. 18, 2014), *available at* http://www.pewresearch.org/fact-tank/2014/11/18/5-facts-about-illegal-immigration-in-the-u-s/ (stating that citizens of Mexico make up about half of all unauthorized immigrants in the United States, although their numbers have been declining in recent years).

B. Racial Profiling in Law Enforcement

Race long has been central to the operation of the U.S. criminal justice system. From the death penalty[54] to disproportionately harsh prison sentences for crack cocaine use, which is more popular among African Americans than whites for whom use of powder cocaine is more prevalent,[55] race significantly impacts crime and punishment in the United States. Critics often accuse local police departments of profiling African Americans, Latinos, and other racial minorities in law enforcement activities, including run-of-the-mill traffic stops.[56] Stops for "driving while black" and "driving while brown" are well-known staples of the nation's "war on drugs."[57] In

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54. *See, e.g.*, Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 434 (1995) ("[A]lthough African-Americans are the victims in half of the murders that occur each year in the United States, eighty-five percent of the condemned were sentenced to death for murders of white persons."); Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 SANTA CLARA L. REV. 519, 522 (1995) (arguing that race "matters greatly in decisions concerning the death penalty"); Randall L. Kennedy, McClesky v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1391 (1988) (asserting that, based on empirical research on race and capital sentencing, states value the lives of whites more highly than those of blacks).

55. *See* United States v. Armstrong, 517 U.S. 456, 470 (1996) (holding that African American defendants failed to make the threshold showing necessary to establish a violation of the Equal Protection Clause of the Fourteenth Amendment that similarly situated whites had not been prosecuted *despite the undisputed evidence that all of the cases with crack charges handled by local federal public defenders that year were brought against black defendants*). The Supreme Court's decision in *United States v. Armstrong* has been roundly criticized. *See, e.g.*, Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of* Armstrong, 73 CHI.-KENT L. REV. 605, 606 (1998) (contending that standard established by the Court in *Armstrong* is nearly impossible for many defendants with meritorious claims to satisfy).

56. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (detailing the re-emergence of a caste-like system in the United States with the incarceration of millions of African Americans, who are in effect relegated to a permanent second-class status in U.S. society); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999); RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1998); KATHERYN K. RUSSELL, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS (1998). For critical analysis of an extraordinary scandal in which local police focused drug enforcement efforts in a rural Texas town on African Americans who had been in interracial relationships, see Kevin R. Johnson, *Taking the "Garbage" Out in Tulia, Texas: The Taboo on Black-White Romance and Racial Profiling in the "War on Drugs,"* 2007 WIS. L. REV. 283.

57. *See, e.g.*, Samuel R. Gross & Katherine Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651 (2002); David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 265–69 (1999); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 342–54 (1998); Victor C. Romero, *Racial Profiling: "Driving While Mexican" and Affirmative Action*, 6 MICH. J. RACE & L. 195 (2000); Floyd Weatherspoon, *Ending Racial Profiling of Blacks in the Selective Enforcement of Laws: In Search of Viable Remedies*, 65 U. PITT. L. REV. 721, 724–25 (2004). *See generally* NAACP, BORN SUSPECT: STOP-AND-FRISK ABUSES & THE CONTINUED FIGHT TO END RACIAL PROFILING IN AMERICA (2014), *available at* http://naacp.3cdn.net/f25ade969b0d091f2f_q4m6vwqi6.pdf.

important respects, blacks and Latinos share common concerns with race-based policing.[58]

Because the criminal justice system generates racially disparate impacts, the Secure Communities program, which focused on noncitizens caught up in the criminal justice system, also resulted in racially disparate impacts.[59] It should not be surprising that when the federal removal machinery relies heavily upon state and local arrests to trigger immigration enforcement action, immigrants of color—with the largest component of this group being from Mexico and Central America—are disproportionately affected.[60]

Racially disparate arrest rates significantly contribute to disparate removals of noncitizens. State and local law enforcement agencies hand over noncitizens to federal immigration authorities, who then initiate removal proceedings against them.[61] In recent years, this practice resulted in excess of 300,000 of Latino immigrants being removed each year from the United States.[62] Secure Communities thus significantly increased the cumulative penalty triggered by the arrest of noncitizens, with noncitizens of color disparately affected due to the racially disparate impacts of state and local policing. It is likely that new federal removal programs that rely on state criminal convictions will continue to have severe impacts on immigrants of color.[63]

Besides the racial impacts created by criminal law enforcement efforts, the use of race in ordinary immigration enforcement activities has racially disparate impacts on Latinos as well. Public concern about the discriminatory enforcement of immigration laws—especially among Latino U.S. citizens and immigrants—contributes to the ferocious public debate over immigration, which has become a pressing civil rights concern to many Americans.[64]

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58. *See* Kevin R. Johnson, *The Case for Black and Latina/o Cooperation in Challenging Race Profiling in Law Enforcement*, 55 FLA. L. REV. 341, 357–63 (2003); *see, e.g.*, Chavez v. Illinois State Police, 251 F.3d 612 (7th Cir. 2001) (addressing claims of racial profiling brought by African Americans and Hispanics); Giron v. City of Alexander, 693 F. Supp. 2d 904 (E.D. Ark. 2010) (similar claims by Hispanics).

59. *See* Kang, *supra* note 30, at 101–02.

60. *See supra* Part I.A.2.

61. *See supra* Part I.A.1.

62. *See supra* text accompanying notes 51–53.

63. *See supra* text accompanying notes 45–46.

64. *See, e.g.*, Cristina M. Rodríguez, *Immigration, Civil Rights & the Evolution of the People*, 142 DAEDALUS 228 (2013) (exploring immigration as a civil rights issue).

1. Federal

As the disparate impacts of removals on Latinos suggests, the federal government is not color-blind in the enforcement of the immigration laws. Indeed, U.S. immigration enforcement officers at the ground level have long targeted Latinos for immigration stops.[65] The United States pursues aggressive race-based enforcement of this type throughout the country as well as at the U.S./Mexico border.[66]

Immigration enforcement's fixation on Mexican immigrants in its border enforcement efforts goes much further than the mere symbolism of Congress's continued extension of the fence along the nation's southern border.[67] Federal immigration enforcement officers, with the endorsement of the U.S. Supreme Court, routinely rely on "Mexican" or "Hispanic appearance," as factors when deciding to pursue ordinary enforcement actions.[68] This practice remains prevalent despite the vagueness of the terms "Mexican" and "Hispanic appearance" and despite the fact that many people who fall in this broad category are lawfully present in the United States (i.e., they are U.S. citizens or lawful permanent residents).[69]

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65. *See infra* text accompanying notes 67–70.

66. *See id.*

67. *See* Secure Fence Act, Pub L. No. 109-367, 120 Stat. 2638 (2006). *See generally* Pratheepan Gulasekaram, *Why a Wall?*, 2 UC IRVINE L. REV. 147 (2012) (analyzing the political and symbolic significance of the "border wall" between the United States and Mexico).

68. *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 562–63 (1976) (refusing to find a Fourth Amendment violation based on an immigration officer's decision to send a vehicle to secondary inspection at an immigration checkpoint miles from the border based on the apparent Mexican ancestry of the occupants of the vehicle); United States v. Brignoni-Ponce, 422 U.S. 873, 885-86 (1975) (holding that, consistent with the Fourth Amendment, "Mexican appearance" could be one factor among many that justifies a Border Patrol stop of a vehicle in the U.S./Mexico border region). *But see* United States v. Montero-Camargo, 208 F.3d 1122, 1135 (9th Cir. 2000) (en banc) (distinguishing *Martinez-Fuerte* and *Brignoni-Ponce* and holding that "Hispanic appearance" could not be a factor in an immigration stop in the U.S./Mexican border region in large part because large numbers of persons in the general population of that region, including U.S. citizens and lawful immigrants, fall into that broad category). *See also* Christian Briggs, Note, *The Reasonableness of a Race-Based Suspicion: The Fourth Amendment and the Costs and Benefits of Racial Profiling in Immigration Enforcement*, 88 S. CAL. L. REV 379 (2015) (evaluating the propriety under the Fourth Amendment of racial profiling in immigration enforcement). *See generally* Cheryl I. Harris & Devon W. Carbado, *Undocumented Criminal Procedure*, 58 UCLA L. Rev. 1543 (2011) (analyzing criminal procedure and immigration caselaw that allows for consideration of race not ordinarily permitted by the Fourth Amendment); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1009–45 (2010) (contending that the Supreme Court in *United States v. Brignoni-Ponce* authorized a form of racial profiling in immigration enforcement).

69. *See* Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L. Q. 675, 707–11 (2000).

Racial profiling of this variety, which relies on statistical probabilities rather than individualized suspicion, contributes to the consistently high removal rates of Latino immigrants.[70]

2. State and Local

Fears of discriminatory immigration enforcement are at their zenith when state and local law enforcement officers, rather than federal law enforcement, aggressively seek to enforce U.S. immigration laws.[71] Such efforts, through programs such as Secure Communities as well as through actions pursuant to state and local immigration enforcement laws, have increased significantly in recent years.[72]

Generally speaking, local political pressures are more enforcement-oriented than those existing at the national level,[73] and at times appear to be motivated by racial and anti-immigrant animus.[74] In addition, even with training, state and local law enforcement officers cannot reasonably be expected to have the same familiarity with U.S. immigration law that their federal immigration officers have.[75] State and local officers' limited understanding of immigration law makes fair, effective, and racially-neutral enforcement difficult. Moreover, state and local police agencies sometimes pursue their own immigration and law enforcement agendas, which creates distinct racially disparate impacts.[76]

The Supreme Court repeatedly and unequivocally has emphasized that the " '[p]ower to regulate immigration is

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70. *See infra* text accompanying notes 51–53.

71. *See supra* Part I.A.1; *infra* text accompanying notes 73–93.

72. *See* Maureen A. Sweeney, *Shadow Immigration Enforcement and its Constitutional Dangers*, 104 J. CRIM. L. & CRIMINOLOGY 227, 229–34 (2014) (analyzing increasingly common phenomenon of state and local law enforcement involvement in federal immigration enforcement and the resulting negative civil rights impacts on minority communities). Programs established pursuant to INA § 287(g), 8 U.S.C. § 1357(g), which allows for state and local training and cooperation with the federal government pursuant to agreements in immigration enforcement, has been challenged as contributing to racial profiling of Latinos in Georgia, where Adrian Moncrieffe was arrested. *See* ACLU OF GEORGIA, THE PERSISTENCE OF RACIAL PROFILING IN GWINNETT: TIME FOR ACCOUNTABILITY, TRANSPARENCY, AND AN END TO 287(G) (2010), *available at* http://www.acluga.org/download_file/view_inline/1504/260.

73. *See infra* text accompanying notes 81–87 (citing authorities).

74. *See id.*

75. *See, e.g.*, Castro-O'Ryan v. INS, 847 F.2d 1307, 1312 (9th Cir. 1988) ("With only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity.' ") (citation omitted).

76. *See infra* text accompanying notes 91–93 (discussing judicial finding of unconstitutional law enforcement activities directed at Latinos by a local law enforcement agency).

unquestionably . . . a federal power.' "[77] Despite the Court's emphatic endorsement of federal primacy over immigration, state and local governments enthusiastically pushed the envelope of immigration enforcement during the early years of this century.[78] As the Secure Communities program demonstrates,[79] involvement of state and local governments in immigration enforcement increased dramatically nationwide.[80] In addition to increased cooperation with federal immigration authorities, many states—including Alabama, Arizona, Georgia, and South Carolina—and localities—such as Farmer's Branch, Texas, Fremont, Nebraska, and Hazleton, Pennsylvania—enacted laws ostensibly designed to facilitate immigration enforcement.[81]

Concerns with the demographic changes in certain parts of the United States, especially in the South and Midwest, fueled tumultuous political movements culminating in the passage of a plethora of state and local immigration enforcement laws.[82] In turn, such laws struck fear in the hearts of immigrants and Latinos.[83] Because of the Supreme Court's unequivocal statements about the primacy of

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77. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1974 (2011) (citation omitted) (emphasis added); *see* Arizona v. United States, 132 S. Ct. 2492, 2498–99 (2012). For analysis of recent developments in federal preemption of state and local immigration enforcement laws, see Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601 (2013); Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703 (2013); Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074 (2013); Lucas Guttentag, *The Forgotten Equality Norm in Immigration Preemption: Discrimination, Harassment, and the Civil Rights Act of 1870*, 8 DUKE J. CONST. LAW & PUB. POL'Y 1 (2013); Kit Johnson & Peter J. Spiro, *Debates, Immigration Preemption after* United States v. Arizona, 161 U. PA. L. REV. ONLINE (2012), *available at* http://www.pennlawreview.com/debates/index.php?id=47; Karla Mari McKanders, *Federal Preemption and Immigrants' Rights*, 3 WAKE FOREST J. L. & POL'Y 333 (2013).

78. *See infra* text accompanying notes 79-81 (citing authorities).

79. *See supra* Part I.A.1.

80. For a collection of essays analyzing the impacts of the proliferation of state and local immigration enforcement laws, see STRANGE NEIGHBORS: THE ROLE OF STATES IN IMMIGRATION POLICY (Carissa Byrne Hessick & Gabriel J. Chin eds., 2014).

81. *See, e.g.*, Arizona v. United States, 132 S. Ct. 2492 (2012); City of Hazleton v. Lozano, 724 F.3d 297 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1491 (2014); Villas at Parkside Partners v. Farmers Branch, 726 F.3d 524 (5th Cir. 2013) (en banc), *cert. denied*, 134 S. Ct. 1491 (2014); United States v. South Carolina, 720 F.3d 531 (4th Cir. 2013); Keller v. City of Fremont, 719 F.3d 931 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 2140 (2014); United States v. Alabama, 691 F.3d 1269 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 2022 (2013); Georgia Latino Alliance for Hum. Rts. v. Governor of Georgia, 691 F.3d 1250 (11th Cir. 2012).

82. *See* Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609, 634–37 (2012).

83. *See id.* Hate crimes directed at Latinos also have occurred in some communities where anti-immigrant tensions have emerged. *See generally* Kevin R. Johnson & Joanna Cuevas Ingram, *Anatomy of a Modern Day Lynching: The Relationship Between Hate Crimes Against Latina/os and the Debate Over Immigration Reform*, 91 N.C. L. REV. 1613 (2013) (analyzing the relationship between hate crimes and the divisive debate over immigration reform); Maria Pabón López, *An Essay Examining the Murder of Luis Ramirez and the Emergence of Hate Crimes Against*

federal authority over immigration, courts frequently ruled that state and local immigration enforcement measures, in whole or in part, impermissibly intruded on the federal power to regulate immigration.[84]

In order to enhance immigration enforcement, some state laws require that state and local police officers directly assist the federal government in its immigration enforcement efforts. Section 2(B) of Arizona's S.B. 1070, popularly known as the "show your papers" law, is the most well-known example of this type of law.[85] It requires state and local law enforcement officers to verify the immigration status of persons whom they reasonably suspect are in the United States in violation of the federal immigration laws.[86] Officers necessarily exercise considerable discretion in making that all-important assessment—with few meaningful objective standards restricting what can be considered in making that determination.[87]

Although the Supreme Court invalidated central provisions of S.B. 1070 as conflicting with the federal power to regulate immigration, it declined to strike down section 2(B).[88] However, the Court left the door open to future challenges of the section as applied in individual cases by state and local law enforcement officers.[89] Commentators understandably expressed concern that the implementation of section 2(B) would increase the incidence of racial profiling of Latinos by local law enforcement agencies.[90]

Latino Immigrants in the United States, 44 ARIZ. ST. L. J. 155 (2012) (analyzing spate of hate crimes directed at Latino immigrants).

84. *See supra* note 81 (citing cases that, with one exception, invalidated core provisions of the laws).

85. *See* S.B. 1070, 49th Leg., 2d Sess. § 2(B) (Ariz. 2010).

86. *See id.*

87. *See id.*

88. *See* Arizona v. United States, 132 S. Ct. 2492, 2507–10 (2012).

89. *See id.*

90. *See, e.g.*, Kristina M. Campbell, *(Un)Reasonable Suspicion: Racial Profiling in Immigration Enforcement After* Arizona v. United States, 3 WAKE FOREST J. L. & POL'Y 367, 388–94 (2013); Marjorie Cohn, *Racial Profiling Legalized in Arizona*, 1 COLUM. J. RACE & L. 168, 170 (2012); Andrea Christina Nill, *Latinos and S.B. 1070: Demonization, Dehumanization, and Disenfranchisement*, 14 HARV. LATINO L. REV. 35, 49–52 (2011); David A. Selden et al., *Placing S.B. 1070 and Racial Profiling into Context, and What S.B. 1070 Reveals About the Legislative Process in Arizona*, 43 ARIZ. ST. L.J. 523, 525–43 (2011); *see also* Barbara Armacost, *Immigration Policing: Federalizing the Local* (Sept. 1, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2504042 (contending that increased role of state and local law enforcement in immigration enforcement results in increased racial profiling); McKanders, *supra* note 77, at 334 (noting the ongoing debate about whether *Arizona v. United States* will result in greater racial profiling in violation of Constitution). Georgia had a provision similar to section 2(B) of Arizona's SB 1070 in its state immigration enforcement law, which was upheld by the courts despite concerns that it would result in increased racial profiling of Latinos. *See* Georgia Latino Alliance for Hum. Rts. v. Governor of Arizona, 691 F.3d 1250, 1267–68 & n.12 (11th Cir. 2012).

Critics who fear that state and local immigration enforcement results in increased racial profiling appreciate that Latinos, many of whom are U.S. citizens and lawful immigrants, are frequently stereotyped as "foreigners," subject to possible removal from the country.[91] *Melendres v. Arpaio*,[92] a high-profile piece of civil rights litigation, illustrates concerns that state and local law police efforts to facilitate enforcement of the federal immigration laws will result in increased racial discrimination. In 2013, a district court ruled in that case that the Maricopa County (Arizona) Sheriff's Office, headed by controversial Sheriff Joe Arpaio, engaged in a pattern and practice of unconstitutionally targeting Latinos, including U.S. citizens and lawful permanent residents, in its law enforcement efforts.[93] The record of Sheriff Arpaio and cases like *Melendres v. Arpaio* demonstrate that the fears of racial discrimination in local immigration enforcement have a basis in fact.

II. "MONITORING TRAFFIC" ON THE INTERSTATE: THE RACIALLY SUSPECT TRAFFIC STOP, ARREST, AND CRIMINAL CONVICTION OF ADRIAN MONCRIEFFE

In *Moncrieffe v. Holder,* the Supreme Court did not examine the lawfulness of the stop, search, arrest, and conviction of Adrian Moncrieffe, a black immigrant from Jamaica.[94] Instead, the Court focused on the immigration consequences of the criminal conviction.[95] Nonetheless, Moncrieffe's state criminal conviction, which appears to have influenced by his race, triggered subsequent immigration removal proceedings.[96]

Part II examines the police report that documents Moncrieffe's arrest. The report itself includes a picture of Moncrieffe, which

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91. *See* Kevin R. Johnson *"Melting Pot" or "Ring of Fire"?: Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259, 1268 (1997).

92. 989 F. Supp. 2d 822 (D. Ariz. 2013), *aff'd in part, vacated and remanded in part*, 2015 U.S. App. LEXIS 6110 (9th Cir. Apr. 15, 2015).

93. *See id.* Sheriff Arpaio and his officers' reliance on race in law enforcement has been widely criticized. *See, e.g.*, Mary Romero, *Are Your Papers in Order?: Racial Profiling, Vigilantes, and "America's Toughest Sheriff,"* 14 HARV. LATINO L. REV. 337, 345–52 (2011); *see also* Johnson, *supra* note 82 (analyzing the civil rights impacts on Latinos of increased state and local efforts to regulate immigration through increased state and local law involvement in enforcement of the U.S. immigration laws). *See generally* Kristina M. Campbell, *Rising Arizona: The Legacy of the Jim Crow Southwest on Immigration Law and Policy After 100 Years of Statehood*, 24 BERKELEY LA RAZA L.J. 1 (2014) (summarizing the history of racism in Arizona and its impacts on modern immigration enforcement).

94. 133 S. Ct. 1678 (2013).

95. *See infra* Part III.

96. *See id.*

shows that he is a black man, who at the time of arrest wore his hair in dreadlocks.[97] Overall, the report leaves one with the strong impression that race played an important role in Moncrieffe's interactions with the police and thus in his criminal conviction.

A. The Traffic Stop of "Two B/M's" (Black Males)

On the night of June 13, 2006, in the City of Perry, Georgia, Police Officer Ron Brainard[98] was "monitoring traffic" on Interstate 75, an artery along the Eastern seaboard that includes a stretch extending from Georgia to Florida.[99] At approximately 11:15 p.m., the officer pulled over Adrian Moncrieffe, a resident of Palm Beach, Florida, as he drove south in a black Chevrolet Tahoe. Officer Brainard noted in the police report that he stopped the Chevrolet Tahoe because he observed that the dark tinting on the vehicle's windows appeared to violate Georgia law.[100] He later explained that he looked for:

> *[A]ny* violation of law that establishes probable cause to make a traffic stop. . . . [I]n this case, the vehicle passed me with an obvious tint violation. . . . *I particularly like the tint violation as a reason for stopping folks because it negates the argument that I stopped a particular sex or race.* If you can't see what's in the vehicle, they

97. *See* Perry (Georgia) Police Department Supplemental Narrative (June 14, 2006), on file with author [hereinafter Police Report]. The Police Report was provided in response to a public information request pursuant to GA. CODE ANN. §§ 50-18-70–50-18-77. For critical analysis on the use of police reports in immigration court proceedings, see Mary Holper, *Confronting Copis in Immigration Court*, 23 WM. & MARY BILL RTS. J. 675 (2015).

98. In October 2014, Officer Brainard described himself as having thirty-four years of experience in law enforcement, including working from 2000–08 with the Perry Police Department before moving to the Houston County Sherriff's Office. Memorandum from Ronald. R. Brainard to Laraya M. Parnell, at 1 (Oct. 14, 2014) (on file with author) [hereinafter Brainard Memo]. One of Brainard's positions at the Perry Police Department was as a "K9 Officer" member of the Proactive Criminal Enforcement Team. *See id.*

99. *See* Police Report, *supra* note 97, at 2. Racial profiling by law enforcement officers has been reported on Interstate 75. *See* Gene Callaham & William Anderson, *The Roots of Racial Profiling*, REASON.COM (Aug. 1, 2001), *available at* http://reason.com/archives/2001/08/01/the-roots-of-racial-profiling. I-75 has been characterized by officers as a drug corridor. *See* Jacqueline Ingles, *Narcotics Investigators: I-75 is A "Cocaine Corridor,"* WCTV (Mar. 30, 2009), http://www.wctv.tv/home/headlines/42152567.html. Several years after the Moncrieffe arrest, Officer Brainard wrote that "I75 is a corridor for criminal activity. . . . Narcotics are brought up from the west now . . . into Atlanta. We then see the mid-level shipments coming out of Atlanta going to cities throughout southern Georgia and Florida. The largest amount of money I have stopped was $200 grand. The largest drug seizure I had was 15 kilograms of cocaine." Brainard Memo, *supra* note 98, at 2.

100. *See* Police Report, *supra* note 97, at 3.

> certainly can't say you stopped them because they were a particular sex or race. In today's world, it seems to be the number one argument presented as a defense.[101]

Because Officer Brainard observed Moncrieffe's sport utility vehicle at night, it is uncertain what he could see physically that would lead him to believe that the tint on the Chevrolet Tahoe's windows was too dark.

After the traffic stop, Officer Brainard approached the vehicle and "saw the window roll down and *made contact with two B/M's* [black males][102] inside the vehicle. The driver was later identified as Adrian Moncrieffe, 12-19-1980 and the passenger as Keyaonta Robinson, 7-28-1987."[103] Brainard later "checked the tint with [his] meter and found it to be 3%, well below the legal limit."[104]

B. The Factors Leading to the Suspicion of Criminal Activity

After stopping the vehicle, Officer Brainard initially talked with Adrian Moncrieffe.[105] A number of statements by Moncrieffe in response to questioning, combined with the officer's observations and experience, contributed to the officer's suspicion that criminal activity was afoot.[106] It cannot be said for certain what role, if any, the fact that Moncrieffe and the passenger were black played in Officer Brainard's questioning and suspicions.

1. Air Fresheners

In the initial contact with the "two B/M's," Officer Brainard smelled "a strong odor of an air freshener like it was just sprayed in

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101. Brainard Memo, *supra* note 98, at 1–2 (emphasis added). Police officers in Georgia routinely rely on window tint violations as a basis for traffic stops. *See, e.g.*, Ciak v. State, 597 S.E.2d 392, 395 (Ga. 2004); Beville v. State, 745 S.E.2d 858, 862 (Ga. Ct. App. 2013); Montero v. State, 537 S.E.2d 429, 431 (Ga. Ct. App. 2000).

102. *See* Police Report, *supra* note 97, at 1. Brainard later confirmed that the reference to "B/M's" in the police report was to "black males." Brainard Memo, *supra* note 97, at 2.

103. *See* Police Report, *supra* note 97, at 3. Georgia, like other states, has seen allegations of racial profiling by police, including in the well-known case of black filmmaker Tyler Perry. *See, e.g.*, *Atlanta Police Clear White Officers of Profiling in Tyler Perry Case*, CNN (Sept. 12, 2012), *available at* http://www.cnn.com/2012/09/11/showbiz/tyler-perry-profiling-case; McRae v. Hogan, 732 S.E. 2d 853 (Ga. Ct. App. 2012) (remanding case for further consideration of claims of racial profiling of blacks by police).

104. *See* Police Report, *supra* note 97, at 3.

105. *See id.*

106. *See id.* at 3–5.

the vehicle."[107] He observed an air freshener hanging on the rearview mirror of the Chevrolet Tahoe.[108] Another freshener hung on the clothes hook in the rear passenger seat, which the police report described as "a strange location for a hanging air freshener."[109]

2. The Age of Moncrieffe's "Friend"

Officer Brainard stated in the police report that he was suspicious of Moncrieffe's claim that he was friends with the passenger, Keyaonta Robinson.[110] The stated reason for the suspicion was that Moncrieffe was "several years older"—in actuality about six-and-a-half years older—than Robinson.[111] The report did not offer any further explanation about why the officer questioned the friendship or why it might lead to the conclusion that criminal activity was afoot.

3. Ownership of the Chevrolet Tahoe

The police report states that Officer Brainard doubted Moncrieffe's statement that the Chevrolet Tahoe belonged to his father.[112] For reasons not fully explained in the police report,[113] Officer Brainard based his doubt on the speaker and stereo system in the vehicle.[114] The report states that the system led the officer to believe that Moncrieffe operated the vehicle more than his father did.[115] It was uncertain why this speculation, even if true, was salient, especially in light of the fact that the vehicle registration listed Moncrieffe's father as the legal owner of the Chevrolet Tahoe.

4. Excessive Luggage

Moncrieffe told Officer Brainard that he had driven from Palm Beach to visit his daughter for three days in Atlanta. According to

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107. *Id.* at 3.
108. *See id.*
109. *Id.*
110. *See id.*
111. *Id.*
112. *See id.*
113. *See id.*
114. *See id.*
115. *See id.*

the police report, Moncrieffe "claimed to [make this trip] once a month,"[116] thus insinuating that this was a travel pattern indicative of drug trafficking. The travel might also suggest that Moncrieffe is a dutiful parent. Officer Brainard later elaborated that he was suspicious that the luggage and stereo speakers were in the back seat, leaving room in the trunk for drugs. No contraband, however, was found in the subsequent search of the trunk.[117]

Officer Brainard commented in the report that Moncrieffe had "more luggage than would be necessary for a three day trip."[118]

5. Bringing a Friend to Visit His Daughter

Officer Brainard wrote in the police report that he thought it out of the ordinary that Moncrieffe "was taking a friend to hang with him while allegedly visiting his daughter in Atlanta."[119] A desire to have company on a long drive, however, would seem to be an innocent, and entirely plausible, explanation for Moncrieffe having Robinson accompany him on the road trip.

* * * *

Although the report claimed that Moncrieffe's statements and Officer Brainard's observations raised suspicion, all these statements, as well as what the officer observed, could have innocent explanations. For example, how often has a person packed what others characterize as excessive luggage for a trip? Is an abundance of air freshener in a vehicle on a warm Georgia summer night especially odd? Why is it suspicious to bring a friend or acquaintance on a long drive?

The fact that Officer Brainard recited a series of innocent factors in the police report as raising suspicions of unlawful activity suggests that he hoped to conjure up a basis to justify a search of the sport utility vehicle. The totality of the circumstances outlined in the police report to this point would not seem to provide the probable cause necessary for a search.[120]

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116. *Id.*
117. *See id.* at 3–5.
118. *Id* at 3.
119. *Id.*
120. *See id.* at 3–5.

C. The Interview of the Passenger, the Subsequent Search, and Moncrieffe's Arrest

Officer Brainard initially talked with Moncrieffe outside the vehicle. The officer later explained that he followed this practice so that the driver's story could be secured and compared to the passenger's statements.[121] The practice also allowed any masking odor to dissipate; "in this case, after a few minutes, the cologne was gone and the marijuana could be plainly smelled."[122]

Officer Brainard next returned to the Chevrolet Tahoe to question the passenger, Keyaonta Robinson.[123] According to the police report, the officer "detected the odor of marijuana inside the vehicle."[124] The smell of marijuana led to further questioning of Robinson and Moncrieffe and ultimately culminated in a search of the Chevrolet Tahoe.

Officer Brainard "asked Robinson about the trip and his answers mostly mirrored Moncrieffe [sic]."[125] The consistency of the statements of the two men might well indicate that both had told the officer the truth.

When the officer asked Robinson if he and Moncrieffe had "smoked marijuana in the vehicle . . . . [Robinson's] eyes opened wide in surprise and answered no."[126] Officer Brainard wrote in the report that he observed signs of an "adrenaline dump in that [Robinson's] breathing became quick and shallow and you could see him visibly shaking."[127] Such a reaction, however, would be understandable even if Robinson had not smoked marijuana and was completely innocent of wrongdoing. At this point, Officer Brainard "asked [Robinson] to step out of the vehicle."[128] He searched Robinson but did not uncover any contraband or drug paraphernalia.[129]

Officer Brainard further questioned Moncrieffe, who was standing with another officer, "FTO Kessler," who had arrived on the scene in a separate patrol car.[130] Officer Brainard asked Moncrieffe

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121. *See* Brainard Memo, *supra* note 98, at 3.
122. *See id.*
123. *See* Police Report, *supra* note 97, at 3.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *See id.* at 4.
130. *See id.* Kessler and Brainard constituted the Police Department's Proactive Criminal Enforcement Team; according to Officer Brainard, Kessler would come to assist when Officer Brainard made a traffic stop, and vice versa. Brainard Memo, *supra* note 98, at 2.

if he and Robinson had smoked marijuana. Moncrieffe admitted to having smoked a "blunt"—a marijuana cigarette—earlier in the day.[131]

Officer Brainard next searched Moncrieffe. He did not find contraband or anything suspicious.[132] "Both [Moncrieffe and Robinson] were handcuffed at that point for [the officers'] safety. They were told they were in investigative custody pending the final investigation. *Moncrieffe admitted that there was more marijuana in the vehicle.*"[133]

Based on the odor of marijuana and Moncrieffe's statements, Officer Brainard next had "K9 Rex," a police dog evidently trained to search for drugs,[134] sniff the exterior of the Chevrolet Tahoe.[135] The fact that a drug sniffing dog accompanied Officer Brainard on the patrol suggests that drug interdiction was one of the reasons that the officer spent the evening "monitoring traffic" on the interstate.[136] The dog "gave a change of behavior on the driver's door section, then a final response by sitting on the driver door."[137]

Officer Brainard summarized the fruits of the search of the vehicle in the police report as follows:

> A plastic bag tied in a knot was found on the passenger floor board and contained several different items that could be used as masking odors. At least two large bottles of Super Scented Fresheners were found throughout the vehicle. I noted tooling on many screws throughout the vehicle. The driver door had a plate that allows access to the natural void in the door. I pulled that plate back and found the void empty, however, a very strong odor of marijuana could be smelled. I could also smell

131. Police Report, *supra* note 97, at 4.

132. *See id.*

133. The police report does not explain why Moncrieffe made this spontaneous incriminating statement. It could be that he wanted to avoid Officer Brainard being surprised upon finding a small amount of contraband in the search of the vehicle.

134. For further analysis of the lawfulness of police use of drug sniffing dogs to establish probable cause, see Illinois v. Caballes, 543 U.S. 405 (2005) (holding that the use of drug sniffing dog during a lawful traffic stop for speeding (which led to the discovery of drugs) did not violate the Fourth Amendment); Irus Braverman, *Passing the Sniff Test: Police Dogs as Surveillance Technology*, 61 BUFF. L. REV. 81 (2013); *see also* Rodriguez v. United States, 2015 U.S. LEXIS 2807 (U.S. Sup. Ct. Apr. 21, 2015) (holding that a dog sniff after completion of a traffic stop violates the Fourth Amendment); Florida v. Harris, 133 S. Ct. 1050 (2013) (reversing unanimously a Florida Supreme Court ruling that required a log of a drug sniffing dog's performance before finding probable cause to search a vehicle after the dog alerted to the vehicle). During Officer Perry's stint with the Perry Police Department, a drug sniffing canine regularly accompanied him on patrol. *See* Brainard Memo, *supra* note 98, at 1–2.

135. *See* Police Report, *supra* note 97, at 4.

136. *See supra* text accompanying notes 98–99.

137. *Id.*

> a strong odor of marijuana in the rear cargo area of the vehicle; however, nothing was located in that area. In the center console, I removed the interior liner of the storage area and found a plastic bag of green leafy material suspected to be marijuana. Inside that bag, I saw a smaller dime bag with marijuana, and a second sandwich size bag with marijuana. It was my opinion these bags were packaged for sale. Between the passenger seat and center console, I located a brown wallet. *Inside the wallet were three separate bundles of US currency. I have seen money separated out like this in the past when making narcotics arrest. [sic] The money is bundled this way specifically so the carrier can remember what he has and where specific bundles go to or come from.* I counted out the money and found it to be $1050. When asked, Moncrieffe believed he had approximately $1500. The marijuana and money was seized based on the three separate packs of marijuana and other indicators observed.[138]

According to the police report, FTO Kessler ran a criminal background check on the two occupants of the Chevrolet Tahoe.[139] That check revealed that "Moncrieffe had a history that included narcotics sales. Robinson only had a history of narcotics use."[140] Officer Brainard later acknowledged that the criminal records database that the Perry Police Department utilized showed arrests as well as criminal convictions.[141]

The officer concluded that there was not sufficient evidence to charge Robinson with a crime; he later was released.[142] Moncrieffe was not so lucky. The "Application for Warrant" for his arrest stated the following:

> Narrative:
>
> Said accused did possess Marijuana, a Controlled Substance, in an amount or packaged indicative of distribution, in violation of the Georgia Controlled Substances Act.

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138. *Id.* (emphasis added). Although there does not appear to be any forfeiture of assets in Moncrieffe's case, commentators have observed that the war on drugs has been fueled in no small part by asset forfeitures in connection with drug arrests. *See* Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 50–56 (1998). *See also Drug Forfeiture Laws Work for You!*, THE DISTRICT ATTORNEY OF HOUSTON COUNTY, http://www.houstonda.org/houston-county-law-school/drug-forfeiture-laws-work-for-you.html (last visited May 28, 2015).

139. *See* Police Report, *supra* note 97, at 4.

140. *Id.*

141. *See* Brainard Memo, *supra* note 98, at 4.

142. Police Report, *supra* note 97, at 4–5.

> Probable Cause:
>
> I made traffic stop [sic] for a tint violation on the vehicle driven by Moncrieffe. The tint was 3%. During the stop, marijuana was smelled inside the vehicle. Moncrieffe then admitted marijuana was in the vehicle. K9 Rex conducted a free air sniff with a positive alert on the exterior of the vehicle. During the search, three bags of marijuana packaged for sale was [sic] located under the center console in a hidden compartment. In addition, $1050 cash was located in Moncrieffe's wallet in three separated bundles.[143]

D. The Conviction

The Supreme Court briefly summarized Adrian Moncrieffe's criminal proceedings in the Georgia state court system subsequent to the arrest as follows:

> During a 2007 traffic stop, police found 1.3 grams of marijuana in his car. This is the equivalent of about two or three marijuana cigarettes. Moncrieffe pleaded guilty to possession of marijuana with intent to distribute, a violation of Ga. Code Ann. § 16-13-30(j)(1) (2007). Under a Georgia statute providing more lenient treatment to first-time offenders, §42-8-60(a) (1997), the trial court withheld entering a judgment of conviction or imposing any term of imprisonment, and instead required that Moncrieffe complete five years of probation, after which his charge will be expunged altogether . . . .[144]

Moncrieffe later stated that his attorney did not advise him that the plea agreement and conviction could result in his removal from the United States.[145] That failure runs afoul of the Supreme Court's decision in *Padilla v. Kentucky*.[146]

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143. *Id.* at 6.

144. Moncrieffe v. Holder, 133 S. Ct. 1678, 1683 (2013). One of the conditions of Moncrieffe's probation was "banishment from Houston County except to drive thru on I-75." Brief for the Petitioner, Moncrieffe v. Holder, 133 S. Ct. 1678 app. at 14 (capitals in original deleted), *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-702_petitioner.authcheckdam.pdf.

145. *See* Nina Totenberg, *Justices Say U.S. Improperly Deported Man Over Marijuana*, NPR, (Apr. 23, 2013), *available at* http://www.npr.org/2013/04/23/178651009/justices-say-u-s-improperly-deported-man-over-marijuana.

146. 559 U.S. 356 (2010) (holding that failure to advise a noncitizen of the possible removal resulting from a plea agreement and conviction violates the right to effective assistance of counsel under the Sixth Amendment). In *Chaidez v. United States*, 133 S. Ct. 1103, 1106–13

The facts leading to Adrian Moncrieffe's criminal conviction suggest that race played a subtle, yet salient, role in the interactions between the police officer and Moncrieffe. The next section considers the facts suggesting that race influenced the police interactions.

E. The Suggestion of Racial Profiling in the Traffic Stop and Search

Race permeates the series of interactions between the officer and the occupants of the vehicle and subsequent search of Adrian Moncrieffe's Chevrolet Tahoe. The police report initially specified that Moncrieffe and his passenger were "two B/M's."[147] It cannot be said with certainty how, if at all, the race of the driver and passenger influenced Officer Brainard's decision to stop the vehicle, his interactions with, and questioning of, Adrian Moncrieffe and Keyaonta Robinson, and his suspicion of unlawful activity. However, at a minimum, the officer found the race of the two men worth mentioning at the outset of the police report.

The alleged window tint violation, a preferred reason of Officer Brainard for a traffic stop, seems dubious given that the stop was at night.[148] Moreover, it bore little relevance to the subsequent questioning, search, arrest, and ultimate drug conviction of Moncrieffe.[149]

A series of innocent factors, including the finding of air fresheners in the vehicle and a variety of other factually-based speculations, raised the officer's initial suspicions.[150] Only after he stopped and questioned Moncrieffe did Officer Brainard smell the odor of marijuana in the vehicle.[151] He then obtained admissions from Moncrieffe that he had smoked marijuana earlier in the day and that there was marijuana in the vehicle.[152] A drug-sniffing dog happened to be accompanying Officer Brainard, indicating that drug interdiction was one reason he was monitoring traffic on the interstate.[153]

There are hints that Officer Brainard relied on race in the stop, interviews of the two men, and search of the vehicle. Moncrieffe's initial encounter with police was the result of a traffic stop wholly

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(2013), the Supreme Court held that the holding in *Padilla* did not apply retroactively to plea agreements, such as Moncrieffe's, entered before the decision.

147. *See supra* text accompanying notes 102–103.
148. *See supra* text accompanying notes 100–101.
149. *See supra* Part II.A.–D.
150. *See supra* Part II.B.
151. *See supra* text accompanying notes 123–124.
152. *See supra* text accompanying notes 131.
153. *See supra* text accompanying notes 98–99.

unrelated to the drug offense for which he was eventually arrested.[154] Given Officer Brainard's statement that he looked for "any violation of law,"[155] it seems that the window tint violation might have been a pretext to justify a traffic stop based on a hunch—especially because such a violation was admittedly his preferred basis for a stop.[156] The police report does not suggest that Moncrieffe was driving in excess of the speed limit or otherwise violating the traffic laws.

Reliance on a possible window tint violation for the traffic stop probably did not run afoul of the Fourth Amendment.[157] This is true even if the officer's reliance on that suspected violation served as a pretext for the stop.[158] The Supreme Court has held that, under the Fourth Amendment, police may stop a vehicle if a "totality of the circumstances" supports a "reasonable suspicion" that the law has been violated.[159] In reviewing the circumstances offered by police to justify a stop, even if based on some innocent facts, the Court ordinarily finds that the judgment of the police officer is entitled to deference.[160] In *United States v.*

154. *See supra* text accompanying notes 98–104.

155. *See supra* text accompanying note 101.

156. *See id.*

157. *See* Whren v. United States, 517 U.S. 806, 817–19 (1996) (holding that, consistent with the Fourth Amendment, police officer may rely on a traffic violation, even if pretextual, for a stop based on race, to make a traffic stop). A claim under the Equal Protection Clause of the Fourteenth Amendment may prevail if it is established that a police officer *intentionally* discriminated on the basis of race in making the stop. *See id.* at 813. Such a discriminatory intent is difficult to prove. *See generally* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (criticizing requirement of Washington v. Davis, 426 U.S. 229 (1976) that a discriminatory intent must be established to prove an Equal Protection violation). For analysis of the racial dimensions of the Supreme Court's Fourth Amendment jurisprudence, see generally Devon W. Carbado, *[E]Racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002).

158. *See id.*

159. *See* United States v. Sokolow, 490 U.S. 1, 7–8 (1989) (holding that the Fourth Amendment is satisfied if a law enforcement officer's action is supported by reasonable suspicion that criminal activity "may be afoot") (citation omitted).

160. *See, e.g.*, Ornelas v. United States, 517 U.S. 690, 699 (1996) ("A trial judge views the facts of a particular case in light of the distinctive features and events of the community; likewise, a police officer views the facts through the lens of his police experience and expertise. *The background facts provide a context for the historical facts, and when seen together yield inferences that deserve deference.*") (emphasis added); United State v. Dopolito, 713 F.3d 141, 150–53 (1st Cir. 2013); United States v. Santos, 403 F.3d 1120, 1133–34 (10th Cir. 2005); *see also* Navarette v. California, 134 S. Ct. 1683, 1687 (2014) (stating that the reasonable suspicion "standard takes into account 'the totality of the circumstances—the whole picture' ") (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)); United States v. Arvizu, 534 U.S. 266, 273 (2002) ("When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing.") (citation omitted). Criticism of the discretion given

Arvizu,[161] for example, the Supreme Court held that the U.S. Court of Appeals for the Ninth Circuit erred in finding that "innocent" factors in a Border Patrol officer's overall set of factors for a traffic stop could not be weighed in evaluating whether the totality of the circumstances justified the stop under the Fourth Amendment.

While searching the vehicle, Officer Brainard found a small amount of marijuana, specifically the equivalent of a few marijuana cigarettes, and a little more than $1,000 in cash.[162] Based on those facts, along with the other factors previously discussed and his experience in previous narcotics arrests, the officer speculated that Moncrieffe sold marijuana.[163] It is unclear whether the fact that Moncrieffe was black contributed to the speculation.[164] Officer Brainard considered the amount of cash and its bundling to justify his suspicions.[165]

All said, the stop, arrest, and conviction of Adrian Moncrieffe may well have been consistent with current Fourth Amendment doctrine. The suspected window tint violation arguably satisfied the Constitution's reasonable suspicion requirement for a traffic stop even if a pretext for the officer's decision to stop the vehicle.[166] The alleged smell of marijuana in all likelihood provided the probable cause necessary to justify the search of the vehicle. The contraband found by police, even though only a small amount, was sufficient evidence to lead to Moncrieffe's arrest and criminal conviction.[167]

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by the Supreme Court to police officers and trial courts in the reasonable suspicion determination can be found in Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War: Racial Profiling and* Arvizu, 47 VILL. L. REV. 851, 889–93 (2002) and Tracey Maclin, Terry v. Ohio's *Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1306–20 (1998). Further analysis of the evidence of racial profiling can be found in Lewis R. Katz, *"Lonesome Road": Driving Without the Fourth Amendment*, 36 SEATTLE U.L. REV. 1413 (2013); Sean Childers, Note, *Discrimination During Traffic Stops: How an Economic Account Justifying Racial Profiling Falls Short*, 87 N.Y.U. L. REV. 1025, 1032–33 (2012); Melissa Whitney, Note, *The Statistical Evidence of Racial Profiling in Traffic Stops and Searches: Rethinking the Use of Statistics to Prove Discriminatory Intent*, 49 B.C. L. REV. 263 (2008).

161. 534 U.S. 266, 274–78 (2002); *see* Erik Luna, *Hydraulic Pressures and Slight Deviations*, 2008-2009 CATO SUP. CT. REV. 133, 156 (2009) ("Reasonable suspicion can even be provided by a series of innocuous facts, collectively amounting to lawful activity subject to innocent explanation, so long as law enforcement could infer criminal activity was afoot. It can be suspicious, for example, when a driver does not look over at a patrol car, based on that officer's 'experience' that 'most persons look over' and give him a 'friendly wave.' ") (internal citation omitted).

162. *See supra* text accompanying note 138.

163. *See id.*

164. However, having money on hand no doubt proved helpful when Moncrieffe had to bail himself out of jail on a controlled substances charge while away from his home state.

165. *See supra* text accompanying notes 138.

166. *See supra* text accompanying notes 157–161.

167. See *id.*

Still, race appeared to play a role in Moncrieffe's interactions with the police. At a minimum, the specifics of the interactions with Officer Brainard and the two "B/Ms" warrant concern.

III. THE REMOVAL CASE IN THE SUPREME COURT

A traffic stop on an interstate highway initiated a series of events that took Adrian Moncrieffe through the Georgia criminal justice system before his case percolated through the U.S. immigration removal system all the way to the Supreme Court. The Court in turn reviewed his case as a straightforward immigration removal case, ignoring the racial overtones to Moncrieffe's stop, arrest, and criminal conviction.[168] Indeed, from reading the Court's opinion, one could not say for certain that Moncrieffe was black, even though that fact may well have triggered the initial traffic stop and shaped the subsequent interactions with the police that culminated in the criminal conviction.[169]

The Supreme Court matter-of-factly described the removal proceedings as follows:

> Petitioner Adrian Moncrieffe is a Jamaican citizen who came to the United States legally in 1984, when he was three . . . alleging that this Georgia conviction constituted an aggravated felony, the Federal Government sought to deport Moncrieffe. . . . An Immigration Judge agreed and ordered Moncrieffe removed. . . . The Board of Immigration Appeals (BIA) affirmed that conclusion on appeal . . . .[170]

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168. *See supra* Part II.

169. In this respect, the Court's decision is reminiscent of its decision rejecting a claim that racial profiling violated the Fourth Amendment. *See* Johnson, *supra* note 69, at 1060 (stating that the Supreme Court observed in *United States v. Whren*, 517 U.S. 806, 810 (1996) that "the problem of pretextual stops based on the race of the occupants of an automobile came up in the briefs and oral argument. Nevertheless, in restating the facts of the case the Court failed to mention that Whren and Brown were African-American, one of the central facts of the entire case and its briefing. The Court instead delayed mentioning this most salient fact until later in the opinion in introducing the legal analysis of the Fourth Amendment claim: 'Petitioners [Whren and Brown], who are both black, . . . contend that police officers might decide which motorists to stop based on decidedly impermissible factors, such as the race of the car's occupants.' ") (footnotes omitted).

170. Moncrieffe v. Holder, 133 S. Ct. 1678, 1683 (2013) (citations omitted). Possession of such a small amount of marijuana for personal use would not violate current law in several states. *See* Brandy Zadrozny, *From Dry to High: Your Guide to State Pot Laws*, DAILY BEAST (Jan. 29, 2014), http:/www.thedailybeast.com/articles/2014/01/29/from-dry-to-high-your-guide-to-state-pot-laws.html (reporting that by that time, sixteen states had decriminalized the possession of small amounts of marijuana).

In an opinion by well-known conservative jurist Edith Jones, the U.S. Court of Appeals for the Fifth Circuit denied Moncrieffe's petition for review of the removal order.[171]

In a 7-2 decision,[172] the Supreme Court resolved a split among the circuits, in an opinion by Justice Sonia Sotomayor.[173] The split centered on whether a conviction under a state statute that simultaneously criminalizes conduct classified by both the federal Controlled Substance Act's felony and misdemeanor provisions may constitute a felony, thereby making the crime an "aggravated felony" under U.S. immigration law.[174] Following the so-called categorical approach to the classification of state criminal offenses as aggravated felonies,[175] the Court held that the misdemeanor conviction under state law criminalizing mere possession of a small amount of marijuana for personal use, as well as possession for sale, failed to constitute an aggravated felony for purposes of removal.[176]

In *Moncrieffe v. Holder*, a Supreme Court known for its conservatism rejected,[177] for the second time in the last five Terms,[178] the U.S. government's contention that a relatively minor drug offense constituted an aggravated felony for purposes of the immigration laws. The Court previously held in *Carachuri-Rosendo v. Holder*[179] that a conviction for unlawful possession of one tablet of a prescription drug by an immigrant from Mexico failed to constitute an aggravated felony under the immigration laws. Those decisions together

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171. *See* Moncrieffe v. Holder, 662 F.3d 387 (5th Cir. 2011). The immigration court proceedings were held in Oakdale, Louisiana, the location of the immigrant detention facility in which the U.S. government detained Moncrieffe, which is within the jurisdiction of the Fifth Circuit.

172. *See Moncrieffe v. Holder*, 133 S. Ct. at 1678.

173. *See id.* at 1684 n.3 (noting circuit conflict).

174. *See id.* at 1683–85.

175. *See, e.g.*, Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting the Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669 (2011); Jennifer Lee Koh, *The Whole Better Than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257 (2012); Laura Jean Eichten, Comment, *A Felony, I Presume? 21 USC § 841(b)'s Mitigating Provision and the Categorical Approach in Immigration Proceedings*, 79 U. CHI. L. REV. 1093 (2012). The Court also followed the categorical approach in an analogous setting the same Term in *Descamps v. United States*, 133 S. Ct. 2276 (2013). The Board of Immigration Appeals subsequently offered guidance on the application of the Supreme Court's categorical approach in *Moncrieffe v. Holder* in *In re Martin Chairez-Castrejon*, 26 I. & N. Dec. 349 (B.I.A. 2014).

176. *See Moncrieffe v. Holder*, 133 S. Ct. at 1686–87. Importantly, the Court reserved the discretionary authority to remove Moncrieffe from the United States based on the minor drug offense. *See* Victor C. Romero, *A Meditation on* Moncrieffe: *On Marijuana, Misdemeanants, and Migrants*, 49 GONZ. L. REV. 23, 32–33 (2013/14).

177. *See* H. Jefferson Powell, *About the Irrational: The Roberts Court and the Future of Constitutional Law*, 86 WASH L REV. 217, 218 (2011).

178. *See infra* text accompanying note 177 (discussing *Carachuri-Rosendo v. Holder*).

179. 560 S. Ct. 563 (2010).

demonstrate the Court's reluctance to subject long-term lawful permanent residents of the United States to the equivalent of mandatory removal based on small time drug convictions. In both circumstances, the Court rejected the agency's interpretation of the immigration laws that would have resulted in removal of a lawful permanent resident from the United States.[180]

Moncrieffe v. Holder is an important sign of the modern immigration times. Although the facts leading to the criminal conviction were not before the Court, the police report strongly suggests that race played an important role in the conviction and near removal of a long-term lawful permanent resident from the United States.[181]

Adrian Moncrieffe's story does not appear to be out of the ordinary. Racial profiling in traffic stops at the heart of the war on drugs disparately affects people of color.[182] By relying on local and state law enforcement to trigger immigration proceedings, the federal immigration removal machinery frequently amplifies the racially disparate impacts.[183] The separation of these two seemingly race neutral systems obscures the relationship and magnitude of the racially disparate impacts they create.[184] Nonetheless, these systems operating together adversely impact communities of color.[185]

Moncrieffe v. Holder appears to be the tip of the proverbial iceberg. Today, immigration removals fall disproportionately on communities of color.[186] By focusing on "criminal aliens" in removal efforts,[187] the Executive Branch exacerbates the racially disparate impacts created by the criminal justice system. When the U.S. government relies on state and federal criminal convictions in immigration enforcement and removal proceedings, it multiplies the racial impact of the criminal justice system.[188]

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180. *See supra* text accompanying notes 172–176, 179.

181. *See supra* Part II.

182. *See supra* Part I.B.

183. *See supra* Part I.A.

184. *See supra* Part I. *See generally* Kevin R. Johnson, *A Case Study of Color-Blindness: The Racially Disparate Impacts of Arizona's S.B. 1070 and the Failure of Comprehensive Immigration Reform*, 2 UC IRVINE L. REV. 313 (2012) (analyzing how the color blindness of the modern immigration laws masks racially disparate impacts).

185. *See supra* Part I.

186. *See supra* Part I.A.2.

187. *See supra* Part II.

188. *See id.*

CONCLUSION

The travails of Adrian Moncrieffe exemplify how criminal law enforcement and immigration enforcement align to the detriment of minorities, particularly black and Latino immigrants. Immigration reform, either through legislation or change in Executive Branch enforcement priorities and practices, is in order. These reforms should seek to remove the taint of race from the removal process. At a minimum, attention should be paid to the racially disparate impacts of the modern immigration removal process, its increasing reliance on criminal activity to trigger removal proceedings, and the adverse social consequences of removal of long term residents from family, friends, and community in the United States.[189]

189. *See supra* text accompanying note 4 (citing authorities).