Addressing Racial Bias in the Immigration System

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What is the effect of criminal and immigration policing being connected?

In 2018, approximately 50.3 percent of foreign-born people residing in the United States were Latinx[1], but Latinx people accounted for more than 91 percent of all interior arrests[2] made by Immigration and Customs Enforcement (ICE)[3]. Despite efforts to reduce racial bias, this disparity has persisted under both Republican and Democratic administrations. Why have attempts to address this disparity failed? And what kind of immigration policy could the Biden administration implement to break the cycle? In the article, "The Natural Persistence of Racial Disparities in Crime-Based Removals," Carrie Rosenbaum, a BIMI affiliate and UC Berkeley Law Lecturer, discusses why previous reforms failed to reduce racial bias and how all levels of government can work together to eliminate this disparity.

Policing and Immigration Enforcement:
Secure Communities Program

Rosenbaum argues that the racial disparity in the immigration system exists due to the link between the immigration enforcement system and the criminal justice system— this phenomenon is often referred to as "crimmigration."[4] Through "crimmigration," the practices of policing by both the criminal and immigration system, become reinforced and exacerbate the racially discriminatory outcome for non-citizen Latinx.

When criminal and immigration policing are merged, the practices are mutually reinforced and the consequences are compounded, yielding consistent racially disparate outcomes for noncitizen Latinx.[5]

The Secure Communities program, established in 2008 under the Bush administration, exemplifies crimmigration policy. The program directs local law enforcement agencies to enforce federal civil immigration laws in partnership with ICE, establishing an information-sharing system through which local police share the electronically stored fingerprint data of arrested individuals with ICE and the Department of Homeland Security (DHS). The database system enabled ICE to conduct federal immigration checks in county jails by cross-referencing locally collected fingerprint data with data from IDENT— also known as the Automated Biometric Identification System. IDENT data includes the fingerprints of

1 U.S. Census Bureau. 2018. American Community Survey 1-Year Estimate 2018: Selected Characteristics of the Foreign-Born Population By Period of Entry Into the United States (Table S0502).

2 Interior arrests are arrests not conducted by Customs and Border Enforcement (CBP).

3 TRAC Immigration. 2018. "Immigration and Customs Enforcement Arrests: ICE Data through May 2018."

4 Stumpf, Juliet. 2006. "The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power." American University Law Review 56(2): 367-419.

5 Rosenbaum, Carrie. 2017. "The Natural Persistence of Racial Disparities in Crime-Based Removals." University of St. Thomas Law Journal 13(3): 548.

applicants seeking immigration benefits, tourists, documented immigrants, and immigrants with known immigration law violations meaning that it stores data for most foreign-born people in the United States.[6] If an individual detained by local law enforcement was found with a match in the IDENT system they were detained by local authorities until ICE took them into custody.

The Secure Communities' insidious effects proved to be so successful, it continued under the Obama administration until 2014. Later in 2017, it was resurrected by the Trump's administration, only to finally be repealed by the Biden administration in January of 2021.

The Secure Communities program was purported to operate in a race neutral way by only targeting individuals who could pose a threat to the community.[7] However, it had the opposite effect, and Latinx noncitizens were the most affected as it resulted in disproportionate targeting of communities with a large Latinx population.[8] Eighty percent of the undocumented population in the U.S. were Latinx when Secure Communities went into full force in 2009[9], yet Latinx people made up 93 percent of individuals identified for deportation through Secure Communities as of 2011.[10] In comparison, in the same year only 2 percent of such individuals were from Asia[11] — despite Asian immigrants making up around 12 percent of the undocumented population.[12] Moreover, only one percent of individuals deported through Secure Communities were from Canada and Europe combined[13] — despite making up five percent of

"80% of the undocumented population in the U.S. were Latinx... yet, Latinx people made up 93% of individuals identified for deportation through Secure Communities as of 2011"

the undocumented population.[14] These statistics show the disproportionate impact of Secure Communities on Latinx communities.

Priority Enforcement Program (PEP)

In 2015, former President Obama replaced Secure Communities with the Priority Enforcement Program (PEP), which aimed to decrease racial and ethnic disparities in criminal immigration enforcement. The Priority Enforcement Program aimed to only deport serious criminals, branding itself with the unofficial tagline, "Felons, not families."[15] It established three classes of "priority noncitizens" for deportation. The priority one classification included threats to national security, border security, and public safety— such as suspects of terrorism, undocumented   security, border security, and public safety— such as suspects of terrorism, undocumented immigrants arrested at the border, gang members, and anyone convicted of a felony or "aggravated felony."[16] The priority two classification included non-citizens who have been convicted of three or more misdemeanors; convicted of one "significant

6 Department of Homeland Security. 2012. Privacy Impact Assessment for the Automated Biometric Identification System. https://www.dhs.gov/sites/default/files/publications/privacy-pia-nppd-ident-december2012.pdf

7 Rosenbaum. "Racial Disparities in Crime-Based Removals." 536.

8 Rosenbaum. "Racial Disparities in Crime-Based Removals." 536

9 Passel, Jeffrey S, and D'vera Cohn. 2017. "As Mexican Share Declined, U.S. Unauthorized Immigrant Population Fell in 2015 Below Recession Level." Pew Research Center. https://www.pewresearch.org/fact-tank/2017/04/25/as-mexican-share-declined-u-s-unauthorized-imm grant-popula-tion-fell-in-2015-below-recession-level/.

10 Kohli, Aarti, Peter L. Markowitz, and Lisa Chavez. 2011. "Secure Communities by the Numbers: An Analysis of Demographics and Due Process." The Chief Justice Earl Warren Institute on Law and Social Policy. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3527648

11 Kohli, Markowitz, and Chavez. "Secure Communities by the Numbers."

12   Passel and Cohn. "As Mexican Share Declined."

13 Kohli, Markowitz, and Chavez. "Secure Communities by the Numbers."

14 Passel and Cohn. "As Mexican Share Declined."

15 The White House. 2014. Remarks by the President in Address to the Nation on Immigration. https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-President-address-nation-immigration.

16   Title 8— Aliens and Nationality, 8 U.S.C. § §1101 (2022) https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1101&num=0&edition=prelim

"The racial bias in policing influenced deportation removals since criminal arrests remained the bridge to immigration enforcement."

misdemeanor;"[17] arrested anywhere in the US and unable to prove that they had resided in the US since before January 1, 2014; or found to have committed immigration fraud.[18] The priority three classification included immigrants who had already been issued a final removal order. [19]

Whereas under Secure Communities, noncitizens would be referred to ICE after being arrested, under PEP noncitizens were only supposed to be referred to ICE after being convicted of an offense falling into a priority category. The implementation of priority classifications was intended to remove racial bias by targeting "serious" criminals– however, it did not resolve the previous racialized criminal immigration enforcement issues. In 2016, 91.6 percent of ICE interior arrests were Latinx individuals.[20]

PEP's Failure to Address Racial Disparities:

Rosenbaum argues that the reason that racial disparities persisted under both the Secure Communities program and PEP is that each program tied immigration enforcement to the criminal justice system—a system notorious for its unequal treatment of racial minorities.

The racial bias in policing influenced deportation removals since criminal arrests remained the bridge to immigration enforcement. Rosenbaum argues that Latinx individuals have a higher chance of being arrested and convicted for criminal conduct, leading to disproportionate rates of deportation in the Latinx community.

Since "priority noncitizens" classifications utilities criminality to classify the priority of individuals for deportation it established the rhetoric that reinforced the criminalization of Latinx immigrants as it dehumanized them and reduced them to their supposed crime – as if people who commit felonies/crimes are not also parents, family members, etc. In addition, "prirority noncitizens" categories and definitions disguised PEP's failure to address the racial bias as some of the categories were vague and discriminatory – making it easier for Latinx communities to be targeted by biased policing. For example, the classification of "gang member" is heavily racialized and rooted in racial profiling as it derives from the "tough on crime" rhetoric which was utilized during Nixon and Reagan's presidency to justify the mass incarceration of people of color.[21] These classifications appear to be colorblind; however, they perpetuate the racial injustices in the crimmigration pipeline – making it more socially acceptable to then arrest and deport Latinx individuals, reproducing race marginalization.

Despite the emphasis on crime-based prioritization for deportation, the majority of those deported were for repeated misdemeanors.[22] Only 20 percent of the 2 million people deported during the Obama administration were deported for serious crimes.[23] As a result, minor offenders from the Latinx community were disproportionately affected by the "priority noncitizens" categorization. Under PEP, the Secure Communities notification component persisted, which channeled these minor offenders to the immigration removal system by allowing arrestees' information to be shared with ICE. The information-sharing system connects the criminal justice and immigration systems further, incentivizing racial inequities in the criminal immigration police.

17   U.S. Department of Homeland Security Washington, DC. 2014. Policies for the Apprehension, Deten tion and Removal of Undocumented Immigrants. H.R. 2. 110th Congress, 1st Session.
https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf

18   Rosenbaum. "Racial Disparities in Crime-Based Removals." 542; U.S. Congress. House of Representatives. 2007. Fair Minimum Wage Act of 2007. H.R. 2. 110th Congress, 1st Session.

19 Rosenbaum. "Racial Disparities in Crime-Based Removals." 542

20 TRAC Immigration. "Immigration and Customs Enforcement Arrests."

21 Rosenbaum. "Racial Disparities in Crime-Based Removals." 553.

22 Rosenbaum. "Racial Disparities in Crime-Based Removals." 554.

23 John, Arit I.2014. "Obama Isn't Deporting 'Gangbanger' Immigrants, But Ones Who Run Red Lights.."The Atlantic, April 07.

Recommendations for Decreasing Racial Inequality in Immigration Enforcement

In the United States, policies around immigration enforcement fall squarely under the purview of the executive branch. Given that President Biden has made racial justice a foundational piece of his platform, his inauguration presents a new opportunity to address racial inequality in immigration enforcement policy.

President Biden repealed Secure Communities on his first day in office, but it is unclear what will replace it. The interim enforcement priorities,[24] however, resemble PEP in their focus on threats to national security, public safety, and border security. Even though we may be tempted to dismantle whatever immigration policies former President Trump put in place (that is, Secure Communities) in favor of whatever former President Obama put in place (namely PEP), the reality is that neither is fair or equitable. Reducing the racial inequalities in immigration enforcement will require a new approach.

As long as the criminal justice system and policing are afflicted with racial bias, the immigration enforcement system should be disconnected from it. As Rosenbaum argues, it is the continued connection between the criminal justice system and the immigration enforcement system that has driven the persistence of racial inequalities in immigration arrests and deportations. To reduce the disproportionate effects of immigration enforcement on Latinx immigrants living in the United States, the criminal enforcement and immigration enforcement must be disconnected. Divorcing the criminal and immigration systems should include changing the policies that make a non-citizen deportable, and ending programs that allow ICE to deputize local law enforcement agencies.[25]

There are other steps that the federal government can take to reduce racial bias in immigration enforcement, even while it remains linked to the criminal justice system. One significant step would be to redefine what counts as a deportable offense through three specific changes:

1. Stop equating multiple non-deportable misdemeanor offenses with one deportable offense. This policy of deporting people over multiple minor violations disproportionately harms Latinx noncitizens who do not pose public safety threats. Furthermore, the policy is unfair because unlike someone accused of a deportable felony offense, someone accused of a misdemeanor is not necessarily entitled to legal representation. Without a lawyer, a noncitizen charged with a misdemeanor might be more likely to be convicted, allowing misdemeanor convictions to pile up and result in deportation.

2. Exclude traffic-related offenses. Racial discrimination in police traffic stops and searches are well-documented.[26] While Latinx drivers are pulled over at rates on par with their white counterparts, during traffic stops, Latinx drivers are more often subjected to searches for little-to-no reason.[27] This results in the disproportionate criminalization of Latinx people, including Latinx noncitizens.

3. Make the definition of "gang member" more narrow. In many police jurisdictions across America, people can be added to a database of suspected gang members just based on the color of their clothes, or the areas that they are seen spending time in.[28] These databases lead to the disproportionate criminalization of low-income people of color based on arbitrary judgements.

Furthermore, the federal government must increase the transparency of immigration enforcement by

24 Mayorkas, Alejandro N. 2021. "Guidelines for the Enforcement of Civil Immigration Law." Washington, D.C. U.S. Department of Homeland Security. https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf

25 For details on specific programs connecting local law enforcement to federal immigration enforcement, see: https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2021-01/Policy-brief_disentanglement_Jan2021_FINAL.pdf

26 Lofstrom, Magnus, Joseph Hayes, Brandon Martin, and Deepak Premkumar. 2021. "Racial Disparities in Law Enforcement Stops." Public Policy Institute of California. https://www.ppic.org/publication/racial-disparities-in-law-enforcement-stops/

27 Pierson, Emma et al. 2020. "A large-scale analysis of racial disparities in police stops across the United States." Nature Human Behavior Vol. 4. https://doi.org/10.1038/s41562-020-0858-1.

28 Chabria, Anita and Leila Miller. Reformers want California police to stop using a gang database seen as racially biased." Los Angeles Times. June 24. Retrieved February 14, 2022. https://www.latimes.com/california/story/2020-06-24/california-police-urged-to-stop-using-gang-database-deemed-biased.

releasing data about arrests and deportations. Releasing data would allow researchers, policy institutes, and legal advocates to monitor racial discrimination in immigration enforcement. PEP had promised to do this, but as Rosenbaum notes, these promises remained unfulfilled.

State and local governments can enact policies to protect noncitizen community members from undue, racially biased criminalization and deportation. This strategy is known as "immigrant covering."[29] One impactful policy would be to allow undocumented people to legally obtain drivers' licenses. This would sharply reduce the amount of undocumented drivers who are penalized for driving without a license, keeping them out of the criminal justice system.[30] Another strategy, already adopted by California, is to cap the penalty for misdemeanor crimes at 364 days–less than one year. This helps immigrants because any offense punishable by at least one year in jail is considered a deportable offense. This sentencing policy ensures that a single misdemeanor does not result in deportation for non-citizen defendants.[31]

The most ambitious strategy that state and local governments could undertake would be to reduce racially disparate outcomes in policing at-large. Many experts have published recommendations on how to reduce racial bias in policing.[32] BIMI-affiliate Rosenbaum suggests restricting police officers' broad discretion to arrest. Restricting this power would reduce the number of individuals, including Latinx non-

citizens, who are arrested by local and state police. This is important because preventing the arrests of non-citizens means preventing the sharing of non-citizens' biometric data with ICE.

As a society, we know that racial bias is unacceptable. We need to address persistent racial bias in our immigration policy. Every level of government–federal, state, and local–can take steps to combat racial disparities in immigration enforcement, and it is their responsibility to do so.

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29 Stella B. Elias. 2017. "Immigrant Covering." William & Mary Law Review volume 58 (issue 3):pg765-pg865.

30 Elias. "Immigrant Covering." 773.

31 Brady, Kathy. 2014. "California Defines Misdemeanor as Maximum 364 Days." Immigrant Legal Resource Center. https://www.ilrc.org/sites/default/files/resources/cal_misd_364_days_7_2014_pdf.pdf

32   The Oklahoma Advisory Committee to the U.S. Commission on Civil Rights. 2021. Racial Disparities in Policing: An Advisory Memorandum of the Oklahoma Advisory Committee to the U.S. Commission on Civil Rights. Oklahoma: United States Commission on Civil Rights. https://www.usccr.gov/files/2021/05-26-OK-SAC-Advisory-Memorandum-Racial-Disparities-in-Policing.pdf.; Eaglin, Jessica and Danyelle Solomon. 2015. "Reducing Racial Disparities and Ethnic Disparities in Jails: Recommendations for Local Practice." Brennan Center for Justice. Retrieved February 14, 2022. https://www.brennancenter.org/sites/default/files/2019-08/Report_Racial%20Disparities%20Report%20062515.pdf

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