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A Racialized Immigration Enforcement System: The Targeting and Criminalization of Latino Communities

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Executive Summary

While immigration policies are not explicitly written to discriminate or single out a specific racial or ethnic group, enforcement of these policies has resulted in unequal consequences for Latinos. Data tells a clear story of a racially targeted enforcement system. In FY18, more than 90% of the individuals detained and deported came from Mexico, Guatemala, Honduras, and El Salvador despite that population comprising only 70% of the noncitizen population (Fiscal Year 2018 ICE Report, 2019). Additionally, evidence shows that while 7% of non-citizens in the U.S. are Black, they make up 20% of those facing deportation on criminal grounds (Morgan-Trostle, Zheng, and Lipscombe, 2016). This brief explores the implications of a racialized immigration system that has restricted the freedom and rights of Latino communities and other communities of color. It also spotlights the need to undo harmful enforcement laws that have made it increasingly easier to stop, arrest, and deport people of color. The recommendations presented, if enacted, would place stronger accountability measures to hold immigration officials accountable for racial profiling, and do away with policies that punish and criminalize Latino and Black immigrants.

Background

The U.S. immigration system is primarily governed by the Immigration and Nationality Act (INA) of 1965, which has been amended several times over the years. Prior to its enactment, immigration laws historically favored western European countries, placing per country quotas that excluded non-white racial groups, specifically immigrants from China and Latin American countries (Cohn, 2020; History.com Editors, 2018). While immigration policy in the U.S. has a long history anchored in racial discrimination and inequality, legislation in the last thirty years has developed the infrastructure for the draconian enforcement system we know today (Brown, Jones, Becker, 2018).

One of the most notable pieces of legislation that transformed immigration policy in the U.S. is the Illegal Immigration and Immigrant Responsibility Act of 1996 (IIRIRA), which among many things created expedited removal, a process by which immigration officers can use broad discretion to deport certain persons without affording them due process, as well as expanded inadmissibility standards, which dictate who is and is not allowed to enter the country (American Immigration Council, 2020). Most notably, IIRIRA broadened the definition of criminal offenses considered for grounds of inadmissibility, IIRIRA created a way to use the criminal justice system as a funnel for deportation and detention. In many ways it set the groundwork for what is today known in academic spaces as, “crimmigration”, the study on the intersections of the immigration and criminal justice systems (Macias-Rojas, 2018).

The terrorist attacks on September 11, 2001, triggered another notable escalation in the racialization of immigration enforcement. The U.S. response to this tragedy equated immigrants to terrorists and created the agency that now governs immigration policy, the Department of Homeland Security (DHS) (Muzaffar Chishti, J. B. M. C. and J. B., 2021). Since the creation of the DHS, Congress has spent over $315 billion on immigration enforcement, at times requiring ICE to maintain a set number of beds, incentivizing detention of more people (Migration Policy Institute, 2021). The laws that outline how ICE conducts its job have given the agency broad discretion and equipped it with a growing

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number of tools to profile and criminalize immigrants, as well as engage local law enforcement to target specific groups.

Policy Problem

In 2018, two Latina U.S. citizens were detained and asked to show identification by a Customs and Border Protection (CBP) agent because they were speaking Spanish inside of a convenience store in Montana (Chappell, 2019). The women recorded the incident, capturing the officer confirming the reason he was questioning them. Two years after filing a lawsuit against CBP, the agency settled with the two women for an undisclosed amount. ICE records report 2,840 cases of U.S. citizens who were mistakenly identified for deportation, but researchers estimate that between 2003 and 2010 at least 20,000 U.S. citizens were mistakenly detained or deported (Stevens, 2011).

The U.S. carried out over four million deportations between 2007 and 2018 (Asad, 2020). In FY18, people of Latin American origin represented 92% of ICE removals despite comprising only 70% of the unauthorized population (Immigration and Customs Enforcement, 2019). There have been multiple lawsuits across the country from both authorized and unauthorized immigrants who report they were targeted based on their appearance, language, or place of employment. In some instances, ICE officers have entered a workplace site with an administrative warrant for specific people, and ended up arresting other undocumented workers, a process known as "collateral arrests" (Castillo, 2018). In the case of a 2017 ICE operation in a Philadelphia poultry plant, ICE officers drove past a company's "no trespassing" sign without a warrant and blocked exits with their vans. Witnesses reported observing the officers target people based on their ethnicity, even going as far as asking white employees to point them to the Latino workers (Surana, 2018). In this and other cases, deportation proceedings moved ahead, despite witness accounts of rights violations.

Fear of deportation in Latino communities has increased significantly during the past two presidential administrations. The Obama administration deported more immigrants than any other president, and during the Trump Administration, high profile ICE operations targeted Latino communities (Canizales, Vallejo, 2021). This fear extends beyond the undocumented population, affecting both naturalized and U.S. born citizens. In 2007 Pew Research found about 41% of Latinos feared they would be deported, whereas in 2018 that increased to 48% (Asad, 2020).

The racial profiling of Latinos in immigration enforcement has negative ripple effects on public health and public safety across the country. For example, a 2013 report led by the University of Illinois in Chicago randomly surveyed 2,004 Latinos from Chicago, Houston, Phoenix, and Arizona, and found that 44% share that they were less likely to contact police officers if they had fallen victim of a crime because they feared being questioned about their immigration status (Theodore, 2013). This percentage increased to 70% among those who identified as undocumented.

Other reports demonstrate a change in the number of Latinos seeking health care in communities with higher deportation numbers. A 2021 medical journal study documented the correlation between the filing of I-247 forms, an initial step to detain undocumented immigrants, and a decline in regular medical care visits among all Hispanic adults (Greenwood, 2021). A possible contributing factor to this finding, is the 2019 Public Charge rule, implemented under the Trump administration and removed by the Biden administration in early 2021. This rule made modifications to the long-standing public charge rule historically used to assess the likelihood that a person looking to immigrate to the U.S. would become dependent on government assistance in the future (Inadmissibility on Public Charge Grounds, 2019). Under the 2019 provisions, immigrants were subject to harsher criteria, and the public narrative on this change had a chilling effect that caused millions of immigrant families to discontinue health care visits, insurance, and other health care related services (La Rochelle, Wallis, and Montoya-Williams, 2021).

Pervasive and profoundly unfair practices in immigration enforcement have historically been driven by race rather than legality, disproportionately impacting Latino and Black communities.

As the COVID-19 pandemic has demonstrated, reticence to engage with health care and public safety undermines the health and safety of everyone in a community.

Racial Profiling and Immigration Enforcement

The U.S. has a history of anti-Latino, and specifically anti-Mexican (Blakemore, 2018), immigration policies, but legislative actions over the last thirty-years have exacerbated that problem by making it easier for immigration enforcement to carry out a race-driven agenda under the guise of colorblindness. Mechanisms like expedited removal, a process defined in the 1996 IIRIRA law, allow low level immigration agents to deport a noncitizen at their discretion without granting due process protections if the individual is apprehended within 100 miles of the border (American Immigration Council, 2020). IIRIRA also expanded the category of crimes that are considered for grounds of inadmissibility, placing many immigrants, including legal permanent residents, at greater risk of deportation regardless of the severity of the crime. Furthermore, it authorized mandatory, and in some cases prolonged detention during deportation proceedings for immigrants who have already served their criminal sentences (Parker, 2020). This is one way the immigration system has been merged with the criminal justice system, resulting in greater risk of Black and Latino communities being stopped and detained because they are overpoliced (Reyes, 2021; Black Immigrant Lives, n.d.).

With very few checks on how these provisions of the law play out in real life, ICE agents often use language and appearance to determine whether a person may be a target for deportation. The bar is very high for proving racial profiling (Surana, 2018), even when ICE officers pull over or interrogate people without a warrant or sufficient proof to assume that person could be undocumented. Criminologists have found immigration agents routinely ignore the Fourth Amendment constitutional protections against illegal search and seizure, especially within the 100-mile zone (Wolfgang Keppley, 2020).

A notable supreme court case, United States v. Brignoni-Ponce of 1975, is often cited and used to support the racial profiling tendencies within ICE and CBP, stating that "... the likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor" (Weiss, 2010). This court decision influenced Arizona's highly criticized law, SB 1070, which required local law enforcement to ask individuals about their immigration status, should the officer have reason to believe the person is undocumented

(Support Our Law Enforcement and Safe Neighborhoods Act, 2010). This bill was only one example of the ways local authorities have become more involved in helping to enforce federal level immigration policies and further criminalize
Latino immigrants. Statistics and news reports document how immigration policies are increasingly enforced by race rather than legality, and how certain policies and programs are being used to continue this pattern (Menjivar, 2021).

Criminalizing Immigration

Over many decades, immigrants have been rigorously equated to criminals. But just how did immigration become a criminal offense and how has the current system kept people in unlawful status despite living in the U.S. for decades? Section 1325 of the INA, which was modified in 1996 as part of the IIRIRA legislative package, shifted unauthorized border crossing from an administrative to a federal criminal offense, a move that aimed to decrease migration from Mexico (Little, 2019). Under this provision, the first unauthorized entrance is a federal misdemeanor and a felony on the second (Freeman, 2019). Not only has this policy separated families, but it has also labeled a significantly larger share of immigrants as "criminals," making it difficult for them to apply for asylum or to adjust their status to permanent immigrant visas based on available family-based eligibility (Freeman, 2019).

Furthermore, policies that punish re-entry into the U.S. have also enforced the criminal narrative of Black and Latino immigrants and

placed additional barriers on those looking to obtain authorized status. In addition to the creation of expedited removal and expanding the list of crimes, the 1996 IIRIRA laws created three- and ten-year bans to re-entry for anybody who has resided in the U.S. without authorization for longer than six months (Unlawful Presence, 2020). Even when immigrants have options to apply for permanent legal status, they are often deterred for fear of being punished by leaving the country.

Section 287(g) of the INA, also enacted by the 1996 laws, created a program that permitted federal immigration officials to enter contracts with local law authorities to help enforce federal immigration policies, known as 287(g) agreements. In practice, this gives local police authorities the power to question individuals on their immigration status and detain them to transfer to ICE agents, should they suspect them of having an unauthorized presence. The implementation of these programs is a concrete example of how the immigration and criminal justice system have been merged and used as a tool to target already over policed Black and Brown immigrant communities. These agreements have contributed to the increase in the targeting of the Black and Latino population with little to no criminal convictions (Perkins, M., Mansour, C. C., Bailey, B., & Swain, A., n.d.).

A 2011 investigation by the Department of Justice concluded that, after entering a 287(g) contract, the Maricopa County Sheriff's Office conducted multiple constitutional violations (The 287 (g) Program, 2021). This included the racial profiling of Latinos, specifically targeting Latino populated neighborhoods. In 2012 in Alamance County, another 287(g) participant, Latino drivers were six times more likely to be stopped than non-Latinos (Hinds, Norton, 2020). The partnership between local law enforcement and immigration agents has further incentivized the racial profiling of Latino communities. The overlap between the immigration and criminal justice system the 287(g) programs perpetuate, create a systemic pipeline to detain and deport people of color.

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Conclusion and Recommendation

The criminalization of the U.S. immigration system is deeply rooted in racialized, anti-Mexican rhetoric, a decision that has resulted in policies and practices that use detention and fail to set the proper accountability mechanisms. Analyzing the U.S. immigration system through a structural racism lens reveals how enforcement practices unfairly target Black and Latino people in the U.S., causing them to be overrepresented in rates of detention and deportation compared to their white counterparts. Immigration reform must include a plan to decriminalize and remove racial profiling within the enforcement system. Deportation, and the looming threat of detention and deportation impacts both immigrants without status, as well as impacting the quality of life of Latino and Black citizens, and those living with undocumented family members. As decision-makers quarrel over the future of the U.S. immigration system, they must consider the harm and implications of upholding a system that dehumanizes and punishes Latino immigrants. The following are possible steps to help reform immigration enforcement in the U.S.:

- Implement accountability mechanisms to hold ICE and CBP agents accountable for patterns of racial profiling and constitutional violations.
- Repeal section 1325 of the INA to return to the pre-1996 wording of the Act, which defined crossing the border without authorization as a civil offense, enforced through administrative or legal proceedings as opposed to a federal crime.
- End the 287(g) program and prohibit the cooperation of local law enforcement with the Department of Homeland Security.
- Eliminate the three- and ten-year bans to help open access to permanent status for those who would otherwise be eligible to apply for that status.

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