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Anatomy of a Modern-Day Lynching: The Relationship between Hate Crimes against Latina/os and the Debate over Immigration Reform

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ANATOMY OF A MODERN-DAY LYNCHING:
THE RELATIONSHIP BETWEEN HATE CRIMES
AGAINST LATINA/OS AND THE DEBATE
OVER IMMIGRATION REFORM*

KEVIN R. JOHNSON** & JOANNA E. CUEVAS INGRAM***

Our contribution to the “Race Trials” symposium considers the protracted legal battles to bring justice to the perpetrators of the killing of a young Mexican immigrant in rural Pennsylvania. From that sensational case, we attempt to draw more general civil rights lessons. The Article specifically contends that hate crimes directed at Latina/os, which have been at consistently high levels for the entire twenty-first century, are in no small part tied to the prolonged—and overheated—national debate over immigration.

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INTRODUCTION

At the dawn of the new millennium, Latina/o migration is figuratively and literally changing the face of communities across the country. These changes have brought forth different responses that are relevant to civil rights advocates. Hate crimes against Latina/os and immigrants, in addition to a racially charged debate over immigration and the proliferation of state immigration enforcement laws, represent a troubling response to the changing racial demographics of the United States.¹

Although frequently ignored or minimized, immigration enforcement, in ways similar to ordinary criminal law enforcement,² implicates core civil rights concerns of communities of color.³ Asians

1. See *infra* Part I.

2. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (analyzing how the modern criminal justice system functions as a system of racial control); DAVID A. HARRIS, *PROFILING IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* (2003) (looking critically at the history of racial profiling in criminal law enforcement); Symposium, *Race and Criminal Justice in the West*, 47 GONZ. L. REV. 241 (2012) (collecting articles on race and criminal justice in the Western United States). Symposium on *Racial Bias in the Criminal Justice System*, 35 SEATTLE U.L. REV. 615 (2012) (compiling articles analyzing racial bias in the criminal justice system).

3. Civil rights attorney Bill Tamayo made this observation nearly twenty years ago. See William R. Tamayo, *When the "Coloreds" Are Neither Black nor Citizens: The United States Civil Rights Movement and Global Migration*, 2 ASIAN L.J. 1, 2-3 (1995).

and Latinas/os, including U.S. citizens, long have complained of being unfairly targeted by federal authorities in immigration enforcement.⁴ Not surprisingly, new enforcement measures adopted by the federal and state governments have been accompanied by a corresponding increase in civil rights complaints.⁵

For more than a decade, Congress unfortunately has been unable to pass legislation meaningfully reforming the current immigration system.⁶ For reasons that will be laid out in the following pages, we unfortunately conclude that, absent such reform as well as other measures, the United States can expect racial tensions, at times erupting in violence, to continue to sporadically grab the national headlines. Effective immigration reform might help ameliorate the civil rights costs of the current immigration enforcement scheme.

While waiting for Congress to act, the nation should take steps to ensure that the justice system effectively, efficiently, and fairly responds to civil rights deprivations, including hate crimes against Latina/os and immigrants. Besides responding to civil rights deprivations linked directly and indirectly to the enforcement of the current immigration laws, the measures would generally help improve the justice system's responses to racially charged cases.

Our contribution to the "Race Trials" symposium considers the protracted legal battles to bring justice to the perpetrators of the killing of a young Mexican immigrant in rural Pennsylvania. From that sensational case, we attempt to draw more general civil rights lessons. The Article specifically contends that hate crimes directed at Latina/os, which have been at consistently high levels for the entire twenty-first century, are in no small part tied to the prolonged—and overheated—national debate over immigration.

History offers lessons about today's hate violence directed against immigrants and Latino/as. As the terrorizing of African Americans by the Ku Klux Klan for the century following the Civil

4. See Muneer I. Ahmad, *A Rage Shared by All: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1267–77 (2004) (noting the increased racial profiling of Arabs, Muslims, and South Asians after September 11, 2001); Kevin R. Johnson, *Racial Profiling After September 11: The Department of Justice's 2003 Guidelines*, 50 LOY. L. REV. 67, 70 (2004) (acknowledging that "racial profiling inflicts serious injuries on the dignity of African American[s] and Latina/os").

5. See *infra* text accompanying notes 19–36.

6. See *infra* text accompanying notes 11–25. In 2013, President Obama and a bipartisan group of U.S. Senators again proposed immigration reform. See Zachary A. Goldfarb & Rosalind Helderman, *Obama Urges Congress: Don't Dally on Immigration*, WASH. POST, Jan. 30, 2013, at A1.

War aptly demonstrates,⁷ hate violence has long been employed to maintain unequal power relationships in U.S. society, specifically racial subordination of minority groups by whites.⁸ This Article in no way suggests that the violence against Latina/os is identical to the violence directed at African Americans before and after the abolition of slavery for hundreds of years in the United States. That violence, however, serves a similar function of attempting to maintain racial hegemony in times of social ferment.⁹

Moreover, the nation's response to the hate violence historically directed at African Americans offers valuable lessons on what the United States must do with respect to the hate violence directed at Latina/os today. Just as it was necessary to combat and dismantle the violence that buttressed Jim Crow, strong federal intervention, including legislation, civil rights investigations, and criminal prosecutions, is necessary to halt the hate violence directed at Latina/os in the modern United States.

Part I of the Article provides background surrounding the divisive national debate over immigration reform. Part II provides the context surrounding the tragic killing of a Mexican immigrant by a group of white teenagers in rural Pennsylvania, as well as the subsequent state and federal efforts to punish the wrongdoers and local police who sought to cover up the crime and shield the teens from criminal prosecution. Although the U.S. government's efforts yielded decidedly mixed success, they nonetheless demonstrated a meaningful, visible public commitment to bringing justice to the

7. See *Virginia v. Black*, 538 U.S. 343, 352–57 (2003) (summarizing succinctly the Ku Klux Klan's history of terrorism).

8. See James B. Jacobs & Jessica S. Henry, *Criminal Law: The Social Construction of a Hate Crime Epidemic*, 86 J. CRIM. L. & CRIMINOLOGY 366, 387–91 (1996) (providing a capsule summary of the history of violence directed at Native Americans, African Americans, immigrants, religious minorities, women, and gays and lesbians in the United States); Terry A. Maroney, Note, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 564 (1998) (“Hate crime . . . has been a means of maintaining dominant power relationships throughout United States history.”).

9. See Mary Romero, *Racial Profiling and Immigration Law Enforcement: Rounding Up of Usual Suspects in the Latino Community*, 32 CRIT. SOC. 447, 450–51 (2006) (exploring “the ways that immigration raids function as a policing practice to maintain and reinforce subordinated status among working-class US citizens and legal residents of Mexican ancestry”). History offers many examples of how hate crimes can escalate into mass violence. Consider one little-known example: In a growing Los Angeles after the Civil War, hate mongering toward the Chinese was followed by what today would be characterized as hate crimes, followed by an outright massacre of Chinese immigrants. See SCOTT ZESCH, *THE CHINATOWN WAR: CHINESE LOS ANGELES AND THE MASSACRE OF 1871*, at 95–99, 122–50 (2012).

wrongdoers.¹⁰

Part III of the Article outlines a variety of possible reforms that might help punish and deter hate violence directed at Latina/os and immigrants. Many of the proposals are based on lessons learned from the legal dismantling of Jim Crow. The prescriptions all center on the need to address the deeply corrosive influence of race on the debate over immigration and, more generally, on the modern American justice system. They range from broad measures such as the enactment of comprehensive immigration reform to more focused remedies such as creating procedures designed to better enforce the ban on race-based peremptory challenges in jury selection.

I. HATE CRIMES AS A COST OF THE FAILURE OF CONGRESS TO PASS COMPREHENSIVE IMMIGRATION REFORM

The last major, truly comprehensive approach to immigration reform in the United States came more than twenty-five years ago, with congressional enactment of the Immigration Reform and Control Act of 1986.¹¹ In the intervening years, concern over the U.S. immigration laws has ebbed and flowed with the national economy, security worries, and population shifts. At various times, the perceived problems with immigration have resulted in angry public outbursts and unrest.

Hateful rhetoric directed at—especially, but not exclusively, Latina/o—immigrants has occasionally accompanied the national debate over immigration.¹² The tragedy of September 11, 2001, also contributed to the adoption of strict immigration enforcement and other measures in the name of national security, combined with an initial spike in hate crimes soon after that fateful day, directed at Arab and Muslim noncitizens and citizens.¹³

10. See *infra* Part II.B.

11. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in various sections of 8 U.S.C.). See STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 1158 (5th ed. 2009). There have been many incremental reforms over the years, with two major reforms, focused primarily on enforcement, in 1996, see *infra* note 52 and accompanying text, and in 2001, see USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of 8, 15, 18, 22, 42, 49, and 50 U.S.C.), but no significant across-the-board reforms to the U.S. immigration laws.

12. See MICHAEL A. OLIVAS, *NO UNDOCUMENTED CHILD LEFT BEHIND* 4 (2012); Kevin R. Johnson, *It's the Economy, Stupid: The Hijacking of the Debate over Immigration Reform by Monsters, Ghosts, and Goblins (or the War on Drugs, War on Terror, Narcoterrorists, Etc.)*, 13 CHAP. L. REV. 583, 608–13 (2010).

13. See, e.g., Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: Targeting of Arabs and Muslims*, 58 N.Y.U.

Congress, despite a great many attempts since 1986, has simply been unable to enact comprehensive immigration reform.¹⁴ This is the case even though there has long been persistent public concern with—to quote President Obama—the “broken immigration system,”¹⁵ a widely perceived need to facilitate the migration of labor needed in certain sectors of the economy (including the agriculture and service industries),¹⁶ generally shared concerns with the precarious legal status of the approximately eleven million undocumented immigrants who live and work in the United States (often leading to exploitation, labor and otherwise),¹⁷ and the

ANN. SURV. AM. L. 295, 295–301 (2002) (analyzing racial stereotyping of Arabs and Muslims before and after September 11); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 957 (2002) (reviewing different laws and policies enacted after September 11 against noncitizens); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576 (2002) (evaluating the use and effects of racial profiling policies before and after September 11); see also Ahmad, *supra* note 4, at 1265–77 (discussing increased incidence of private racial violence and racial profiling in the wake of the September 11 attacks); Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 MICH. J. RACE & L. 441, 442–44 (2002) (providing multiple accounts of anti-immigrant violence and harassment in wake of the September 11 attacks).

14. See Kevin R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L. REV. 1599, 1600–02 (2009). In the absence of congressional action, the Obama administration took a variety of incremental administrative reform measures. Some focused on enhanced enforcement efforts, such as the Secure Communities program, which seeks to facilitate the removal of noncitizens who come into contact with the state criminal justice system. See Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1850–52 (2011); Rachel R. Ray, *Insecure Communities: Examining Local Government Participation in US Immigration and Customs Enforcement's "Secure Communities" Program*, 10 SEATTLE J. SOC. JUST. 327, 331–35 (2011). Other programs pursued different goals. In June 2012, for example, the Obama administration announced that it would not seek to deport certain noncitizens brought to the United States as children. See Memorandum from Janet Napolitano, Sec'y of the Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs and Enforcement, Alejandro Mayorkas, Dir., U.S. Citizenship and Immigration Servs. & John Morton, Dir., U.S. Immigration and Customs Enforcement (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

15. Jesse Lee, *President Obama on Fixing the Broken Immigration System: "Getting Past the Two Poles of This Debate"*, WHITE HOUSE BLOG (July 1, 2010, 4:29 PM), <http://www.whitehouse.gov/blog/2010/07/01/president-obama-fixing-broken-immigration-system-getting-past-two-poles-debate>. See generally Gerald P. López, *Don't We Like Them Illegal?*, 45 U.C. DAVIS L. REV. 1711 (2012) (arguing that both the U.S. and Mexican governments benefit from the current system of migration and thus do not in fact view it as “broken”).

16. See KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* 133–37 (2007).

17. See JEFFREY PASSEL & D'VERA COHN, PEW HISPANIC CTR., U.S. UNAUTHORIZED IMMIGRATION FLOWS ARE DOWN SHARPLY SINCE MID-DECADE, at i

burgeoning awareness of the plight of undocumented college students.¹⁸

The failure of Congress to pass comprehensive immigration reform has had tangible negative consequences for Latina/os. Namely, because of the disparate racial impacts of the current immigration system and its enforcement, the failure to enact reform necessarily maintains and continues those racially disparate impacts, particularly, but not exclusively, on Latina/os.¹⁹ For example, a “shadow population” of millions of undocumented Mexican immigrants live in the “shadows” of American social life.²⁰ Barriers in access to basic identification, such as driver’s licenses (with undocumented immigrants ineligible for driver’s licenses in almost all of the states), disproportionately impacts Latina/o communities.²¹ Racial profiling in police stops,²² in combination with “Secure Communities”²³ and other immigration enforcement measures that utilize the criminal justice system, disproportionately impact Latinas/os through detentions and removals—and separation from friends, family, community, and employment in the United States.

(2010), available at <http://pewhispanic.org/reports/report.php?ReportID=126>. Approximately sixty percent of all undocumented immigrants are from Mexico. *Id.*

18. See Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757, 1757–58 (2009).

19. See 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 U.C. IRVINE L. REV. 313, 319, 339 (2012).

20. See George W. Bush, President of the United States, Address to the Nation on Immigration Reform, 42 WEEKLY COMP. PRES. DOC. 931, 931 (May 15, 2006) (“Illegal immigrants live in the shadows of our society. . . . The vast majority . . . are decent people who work hard, support their families, practice their faith, and lead responsible lives. They are a part of American life, but they are beyond the reach and protection of American law.”).

21. See, e.g., Maria Pabón López, *More than a License to Drive: State Restrictions on the Use of Driver’s Licenses by Noncitizens*, 29 S. ILL. U. L.J. 91, 96–97 (2004).

22. See generally 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 (2010) (analyzing racial profiling sanctioned by the Supreme Court in criminal and immigration enforcement).

23. See AARTI KOHLI, PETER L. MARKOWITZ & LISA CHAVEZ, CHIEF JUSTICE EARL WARREN INST. ON LAW & SOC. POLICY, *SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 1* (Oct. 2011), http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf; Ralph De La Cruz, *Report: Secure Communities Encourages Racial Profiling, Lack of Due Process*, FLA. CENTER FOR INVESTIGATIVE REPORTING (Oct. 20, 2011), <http://fcir.org/2011/10/20/report-secure-communities-encourages-racial-profiling-lack-of-due-process/>; Julia Preston, *Latinos Said to Bear Weight of a Deportation Program*, N.Y. TIMES, Oct. 18 2011, at A16; see also sources cited *supra* note 14 (analyzing the Secure Communities program).

Indeed, more than ninety-three percent of individuals arrested under Secure Communities are Latina/o.²⁴ And the harsh debate over immigration reform—that has persisted for years with no end in sight—has contributed to an environment in which hate crimes occur all too often.²⁵

A. States Take Immigration Enforcement into Their Own Hands

In a relatively recent development in U.S. history, state and local governments have acted aggressively to remedy what some observers contend is the failure of the U.S. government to enforce the immigration laws.²⁶ The settlement of immigrants in states in the South, such as Alabama, Georgia, and South Carolina, all which historically had seen relatively little immigration from Mexico,²⁷

24. See KOHLI, MARKOWITZ & CHAVEZ, *supra* note 23, at 2.

25. See *infra* Parts I.B–II.

26. See NAT'L CONFERENCE OF STATE LEGISLATURES, 2010 IMMIGRATION-RELATED BILLS AND RESOLUTIONS IN THE UNITED STATES (2010), available at <http://www.ncsl.org/default.aspx?tabid=20244> (“[S]tate legislatures continue to tackle immigration issues at an unprecedented rate.”); Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673, 1674–75 (2011) (observing the “unprecedented upheaval” in immigration regulation with states “furiously enacting immigration-related laws”); see also James A. Kraehenbuehl, Comment, *Lessons from the Past: How the Antebellum Fugitive Slave Debate Informs State Enforcement of Federal Immigration Law*, 78 U. CHI. L. REV. 1465, 1470–71 (2011) (“Supporters of [state immigration enforcement] laws contend that they are motivated by the federal government’s failure to fully enforce immigration law.” (footnote omitted)).

27. See Kevin R. Johnson, *The End of “Civil Rights” as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1492–93 (2002); Lisa R. Pruitt, *Latina/os, Locality, and Law in the Rural South*, 12 HARV. LATINO L. REV. 135, 137–39, 144 (2009). See generally BEING BROWN IN DIXIE: RACE, ETHNICITY, AND LATINO IMMIGRATION IN THE NEW SOUTH (Cameron D. Lippard and Charles A. Gallagher eds., 2011) (analyzing the increased movement of Mexican immigrants to the South); JOSÉ MARÍA MONTERO, *LATINOS AND THE U.S. SOUTH* (2008) (same). Mexican immigrants also have increasingly settled in the Midwest in recent years. See Sylvia R. Lazos Vargas, “*Latina/o-ization*” of the Midwest: *Cambio de Colores* (Change of Colors) as *Agromaquilas* Expand into the Heartland, 13 LA RAZA L.J. 343, 343–45 (2002); Laura Rothstein, *Introduction to the Symposium Issue on Immigration in the Heartland*, 40 BRANDEIS L.J. 849, 850 (2002); see also Guadalupe T. Luna, *Immigrants, Cops, and Slumlords in the Midwest*, 29 S. ILL. U. L.J. 61, 63 (2004) (“Latinas/os have long resided in the Midwest arriving from Texas, or other states, or from undocumented entry. The recent influx of immigrant Mexicans into the Midwest, nonetheless, differs from past historical trends on the basis of geographical designations.”). See generally ROBERT APONTE & MARCELO SILES, JULIAN SAMORA RESEARCH INST., *LATINOS IN THE HEARTLAND: THE BROWNING OF THE MIDWEST* (1994), <http://www.jsri.msu.edu/pdfs/r1/r105.pdf> (documenting the growth and distribution of Latina/os throughout Midwestern states). Illustrative of that fact, a large immigration raid in May 2008 at a meat processing plant in Postville, Iowa, made national headlines. See Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, LAW & CONTEMP. PROBS., Fall 2009, at 1, 30–34 [hereinafter Johnson, *Race and Class*].

fueled political pressure for the enactment of tough state immigration enforcement measures.²⁸ Each of those states saw their Hispanic populations increase dramatically, with Georgia's increasing by 96%, Alabama's by 145%, and South Carolina's by 148%, from 2000 to 2010.²⁹

At the same historic moment, political leaders and pundits have directed increasingly shrill rhetoric at "illegal aliens,"³⁰ a dehumanizing referent to people living in our communities, and "anchor babies,"³¹ a pejorative term used to refer to U.S. citizen children of

28. See *Hispanic Interest Coal. of Ala. v. Governor of Ala.*, 691 F.3d 1236, 1240–41 (11th Cir. 2012) (describing laws prohibiting undocumented aliens from attending public postsecondary educational institutions); *Ga. Latino Alliance for Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1256 (11th Cir. 2012) (discussing state laws that, among other things, criminalize the transporting of illegal aliens and authorize law enforcement officers to investigate and report an alien's immigration status); *United States v. Alabama*, 691 F.3d 1269, 1277–79 (11th Cir. 2012) (outlining state laws that, among other things, criminalize an alien's failure to carry a registration document or unauthorized seeking of work, authorize law enforcement officers to determine an individual's immigration status, and penalize harboring or employing undocumented aliens), *cert. denied*, No. 12-884, 2013 WL 210698 (Apr. 29, 2013); *United States v. South Carolina*, Nos. 2:11-2779, 2:11-2958, 2012 U.S. Dist. LEXIS 170752, at *9–10, *13–14, *16, *18–19, *24, *28 (D.S.C. Nov. 15, 2012) (describing state provisions that require aliens to carry registration documents, prohibit aliens "to allow themselves to be transported," give law enforcement officers power to transport undocumented immigrants to federal facilities, and introduce other enforcement mechanisms), *aff'd sub nom. United States v. Haley (In re Assa'Ad-Faltas)*, No. 12-1853, 2012 U.S. App. LEXIS 24382 (4th Cir. Nov. 26, 2012).

29. See PEW HISPANIC CTR., CENSUS 2010: 50 MILLION LATINOS: HISPANICS ACCOUNT FOR MORE THAN HALF OF NATION'S GROWTH IN PAST DECADE 2, tbl.2 (2011), available at <http://www.pewhispanic.org/files/reports/140.pdf>. North Carolina's population grew by 111% during the same period. See *id.*

30. See Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 *FORDHAM L. REV.* 1545, 1547–49 (2011); Kevin R. Johnson, "Aliens" and the U.S. Immigration Laws: *The Social and Legal Construction of Nonpersons*, 28 *U. MIAMI INTER-AM. L. REV.* 263, 264, 269, 276 (1996–97); see also Fatma Marouf, *Regrouping America: Immigration Policies and the Reduction of Prejudice*, 15 *HARV. LATINO L. REV.* 129, 151 (2012) ("The intense depersonalization of immigrants, especially undocumented immigrants, cultivates and compounds bias, undermining social cohesion: 'social interaction that is grounded in depersonalized perceptions may result in prejudice, discrimination, and intergroup conflict.'" (citation omitted)). See generally MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2003) (examining historically the emergence of "illegal aliens" in the modern United States); Kenzo S. Kawanabe, Note, *American Anti-Immigrant Rhetoric Against Asian Pacific Immigrants: The Present Repeats the Past*, 10 *GEO. IMMIGR. L.J.* 681 (1996) (analyzing similarities between anti-immigrant, anti-Asian rhetoric in late nineteenth and late twentieth centuries).

31. See Laura A. Hernandez, *Anchor Babies: Something Less than Equal Under the Equal Protection Clause*, 19 *S. CAL. REV. L. & SOC. JUST.* 331, 331 (2011); Stephen H. Legomsky, *Portraits of the Undocumented Immigrant: A Dialogue*, 44 *GA. L. REV.* 65, 86 n.52 (2009). For a careful analysis of the history surrounding birthright citizenship under

undocumented parents. Use of such terms often betrays a bias of the speaker toward greater immigration enforcement and adoption of more restrictive immigration and nationality laws. Advocates of the regulation of hate speech, which some consider terms like “illegal aliens” and “anchor babies” to be,³² contend that such speech demonizes groups of people of color and, by doing so, encourages figurative and literal violence against them.³³

Hate speech or not, dehumanizing characterizations of people make it easier to justify their harsh treatment, including the thousands of deportations and detentions of noncitizens under color of law, with devastating impacts on noncitizens, their families, and entire communities.³⁴ Not coincidentally, year in and year out, the vast majority of those deported from the United States are immigrants of color from the developing world.³⁵ This fact is not lost on the general public, which understands but seems generally unconcerned that certain communities are disparately affected by heightened immigration enforcement, or the minority communities directly affected.³⁶

B. Hate Crimes Directed at Latina/os

Similar in certain respect to the treatment of African Americans, Latina/os historically have been subject to social segregation and discrimination, as well as racial violence, in the United States,

the Fourteenth Amendment, see Garrett Epps, *The Citizenship Clause: A “Legislative History”*, 60 AM. U. L. REV. 331, 333–34 (2010).

32. For analysis of the use of racial code in the contemporary debate over immigration enforcement in the United States, 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, 378–81 (2012).

33. See Dhammika Dharmapala & Richard H. McAdams, *Words that Kill? An Economic Model of the Influence of Speech on Behavior (with Particular Reference to Hate Speech)*, 34 J. LEGAL STUD. 93, 95–96 (2005); see also Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2335 (1985) (noting how incidents of violence against racial minorities followed use of hate speech). See generally JEREMY WALDRON, *THE HARM IN HATE SPEECH* (2012) (making case for the regulation of hate speech); Symposium, *Hate Speech and Hate Crime*, 41 HARV. J. ON LEGIS. 389 (2004) (examining the relationship between hate speech and hate crimes).

34. See *supra* text accompanying notes 12–25.

35. See Johnson, *Race and Class*, *supra* note 27, at 17–18, 23–24. For example, in fiscal year 2008, nearly sixty-nine percent (246,851 of 358,886) of the noncitizens removed from the United States were from Mexico. U.S. DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2008, at 4 tbl.3 (2009), http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf.

36. See Johnson, *supra* note 19, at 317–20 (contending that opponents of comprehensive immigration reform advance colorblind arguments without concern for disproportionate impacts on Latino/as).

especially but not exclusively in the American Southwest.³⁷ Although not widely known, Anglos occasionally lynched Latina/os, particularly those of Mexican ancestry, as a form of social control in the eighteenth and early nineteenth centuries.³⁸ Latina/os often were systematically excluded from jury service in certain regions of the country until the middle of the twentieth century.³⁹

The Internet⁴⁰ has created new avenues for the spread of hateful

37. For scholarship documenting the history of discrimination against persons of Mexican ancestry in the United States, see generally RODOLFO ACUÑA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* (3d ed. 1988) (recounting the history of discrimination against Chicanos in the United States); TOMÁS ALMAGUER, *RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA* (1994) (exploring the manner in which race, racialization, and white supremacy became central organizing principles of social life in California); MARIO BARRERA, *RACE AND CLASS IN THE SOUTHWEST: A THEORY OF RACIAL INEQUALITY* (1979) (examining the role of structural discrimination, class dynamics, and colonialism in creating a system of racial inequality in the Southwest); DAVID MONTEJANO, *ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836–1986* (1987) (analyzing the history of discrimination against Mexicans by Anglos in Texas). Persons of Asian ancestry have also been the target of hate crimes throughout U.S. history. See Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1243, 1251–58 (1993) (reviewing various incidents of anti-Asian violence in the United States); see also Terri Yuh-lin Chen, *Hate Violence as Border Patrol: An American Theory of Hate Violence*, 7 ASIAN L.J. 69, 71 (2000) (“Violence has been an integral part of the histories and experiences of Asian Americans in the United States from our arrival in this nation to the present. Anti-Asian violence can occur at any given moment, but it is especially prevalent during periods of anti-immigrant sentiment.” (footnote omitted)). In a similar vein, violence against Muslims, Arabs, and South Asians plagued the nation after September 11, 2001. See sources cited *infra* note 203. Hate incidents continue to occur in the United States against individuals of various racial groups. In August 2012, for example, a white man in a white supremacist rock band killed six people after opening gunfire in a Sikh temple in Wisconsin. See Erica Goode & Serge F. Kovaleski, *A Killer Who Fed and Was Fueled by Hate*, N.Y. TIMES, Aug. 7, 2012, at A1.

38. See Richard Delgado, *The Law of the Noose: A History of Latino Lynching*, 44 HARV. C.R.-C.L. L. REV. 297, 298–305 (2009) (analyzing history of lynching of Latina/os in the United States and asking why it has been largely ignored in scholarly commentary).

39. See *infra* notes 150–57 and accompanying text.

40. See Nadia Yamel Flores-Yeffal, Guadalupe Vidales & April Plemons, *The Latino Cyber-Moral Panic Process in the United States*, 14 INFO., COMM. & SOC’Y 568, 569–70 (2011) (analyzing internet data reflecting “moral panic” about Latina/os in U.S. society); see also Christina Iturralde, *Rhetoric and Violence: Understanding Incidents of Hate Against Latinos*, 12 N.Y. CITY L. REV. 417, 419 (2009) (“The proliferation of hate speech and hate materials targeting Latinos is one of the most critical aspects of the growing trend in violence.”); Chon Noriega & Francisco J. Iribarren, *Social Networks for Hate Speech; Commercial Talk Radio and New Media* 24 (UCLA Chicano Studies Research Ctr., Working Paper No. 2, 2012), available at http://nhmc.org/sites/default/files/Social%20Networks%20for%20Hate%20Speech_UCLA%20CSRC.pdf?utm_source=Social+Networks&utm_campaign=Social+Networks&utm_medium=email (analyzing how social networks formed around conservative talk show radio shows can propagate hateful messages toward vulnerable groups, including Latina/os). For examples of high-pitched anti-immigrant sentiment on the Internet, see AMS. FOR LEGAL

speech about Latina/os, immigrants, and other “discrete and insular minorities.”⁴¹ Such messages no doubt have contributed to the overheated debate over immigration, as well as to the persistent incidence of hate crimes directed at Latina/os.⁴²

Hate crimes unfortunately have long been a general problem in American society, which the nation has only begun to address in earnest in recent years.⁴³ In response to two highly publicized hate murders, Congress in 2009 passed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, which broadened the federal definition of a hate crime subject to prosecution.⁴⁴ In hearings on the bill, witnesses, including U.S. Attorney General Eric Holder, testified before Congress that hate crimes against Latina/os helped justify the law.⁴⁵ Indeed, the first conviction after trial under the law was in a case involving a group of white men who drove a group of Hispanic

IMMIGRATION, www.alipac.us (last visited May 7, 2013); MICHELLE MALKIN, <http://michellemalkin.com> (last visited May 7, 2013); REPORTILLEGALS.COM, <http://www.reportillegals.com> (last visited May 7, 2013); VDARE, <http://www.vdare.com> (last visited May 7, 2013).

41. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”).

42. See LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUC. FUND, CAUSE FOR CONCERN: HATE CRIMES IN AMERICA, 2004 UPDATE 16–19 (2004) (noting that, “[i]n California and throughout the Southwest, long-existing antagonisms against Hispanics have been aggravated by the furor over immigration,” causing high rates of hate crimes against Hispanics).

43. See generally JACK LEVIN & JACK MCDEVITT, HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED (1993) (recognizing the escalating numbers of hate crimes and the difficulty in addressing such crimes when the bigotry that motivates them comes from the very mainstream of society).

44. Pub. L. No. 111-84, §§ 4701–4713, 123 Stat. 2835, 2835–44 (2009) (codified in scattered sections of 18 and 42 U.S.C.). For a brief history of federal hate crime law, see Christopher DiPompeo, Comment, *Federal Hate Crimes and United States v. Lopez: On Collision Course to Clarify Jurisdictional-Element Analysis*, 152 U. PA. L. REV. 617, 627–35 (2008); Margaret K. O’Leary, Note, *Have No Fear (of “Piling Inference Upon Inference”): How United States v. Comstock Can Save the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act*, 97 CORNELL L. REV. 931, 942–45 (2012); see also Kami Chavis Simmons, *Subverting Symbolism: The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act and Cooperative Federalism and a Functional Model of Federal-State Collaboration in the Prosecution of Hate Crimes*, 49 AM. CRIM. L. REV., no. 4 (forthcoming 2013) (manuscript at 7–24), available at <http://ssrn.com/abstract=2027632> (summarizing hate crimes data, legislation by state, and federal hate crime law).

45. See *Matthew Shepard Hate Crimes Prevention Act of 2009: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 4 (2009) (statement of Eric Holder, Jr., Att’y Gen. of the United States); *id.* at 29 (statement of Michael Lieberman, Washington Counsel, Anti-Defamation League).

victims off the road in rural Arkansas.⁴⁶

The 2010 hate crime statistics issued by the Federal Bureau of Investigation “reported that 66.6% of victims of ethnically motivated hate crimes in 2010 were ‘targeted because of an anti-Hispanic bias’—the highest percentage of such victims in at least the past decade.”⁴⁷ As the table below illustrates, Latina/os have suffered hate crimes at consistently high levels for more than a decade.⁴⁸

Table 1
Number of Hate Crimes Against Latina/os from 1999–2010⁴⁹

46. See *Arkansas Jury Finds Man Guilty of Federal Hate Crime Related to the Assault of Five Hispanic Men*, LA PRENSA (San Antonio, Tex.), May 20, 2011, at 4C; Press Release, U.S. Dep’t of Justice, 11-648, *Arkansas Jury Finds Man Guilty of Federal Hate Crime Related to the Assault of Five Hispanic Men: First Defendant to Be Convicted at Trial Under the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act* (May 19, 2011), available at <http://www.justice.gov/opa/pr/2011/May/11-crt-648.html>; Suzi Parker, *Judge Sentences Arkansas Men to Prison Under Hate Crimes Law*, REUTERS (Sept. 28, 2011, 7:57 PM), <http://www.reuters.com/article/2011/09/28/us-hate-crime-arkansas-idUSTRE78R6PG20110928>.

47. *FBI Hate Crime Statistics Report Finds Higher Percentages of Anti-Latino Hate Crimes in 2010*, HUFFINGTON POST (Nov. 14, 2011, 2:25 PM), http://www.huffingtonpost.com/2011/11/14/fbi-report-says-67-of-eth_n_1092976.html. In 2012, the Southern Poverty Law Center released a report showing an increase in the number of hate groups, despite a decrease in nativist extremist groups that it explained was in part due to “the co-optation of the immigration issue by state legislatures around the country passing draconian nativist laws like Alabama’s H.B. 56.” Mark Potok, *The Year in Hate & Extremism*, INTELLIGENCE REP., Spring 2012, at 39–40; see also Kim Severson, *Number of U.S. Hate Groups Is Rising, Report Says*, N.Y. TIMES, Mar. 8, 2012, at A17 (reporting the results of the Southern Poverty Law Center report). For analysis of the Alabama immigration enforcement law (H.B. 56), whose sponsors bragged that it was the toughest of all the state immigration enforcement laws, see Johnson, *supra* note 32, at 368. For sustained analysis of the role of police in classifying and investigating hate crimes, see generally JEANNINE BELL, *POLICING HATRED: LAW ENFORCEMENT, CIVIL RIGHTS, AND HATE CRIME* (2002).

48. See Iturralde, *supra* note 40, at 417–18; see also Thomas E. Perez, Asst. Att’y Gen., U.S. Dep’t of Justice, Civil Rights Div., *Civil Rights in 2011 and Beyond*, Clarence Clyde Ferguson, Jr. Annual Lecture to Howard Law School (Jan. 20, 2011), in 54 HOW. L.J. 425, 430 (“Hate crimes, the result of intolerance and misplaced fear, remain all too prevalent in communities across the country.”); Jenny Rivera, *The Continuum of Violence Against Latinas and Latinos*, 12 N.Y. CITY L. REV. 399, 402 (2009) (“The rhetoric and language of anti-immigrant hate has inflamed and divided communities. Violent actions and hate speech targeting Latinos have increased at the same time. The rhetoric has continued to depend on images that construct Latinos as noncitizens who take jobs from ‘real Americans’ and are a drain on local economies.” (footnotes omitted)).

49. This table was compiled from FBI Hate Crime Statistics. See *Hate Crimes Statistics, 2011*, CRIMINAL JUSTICE INFO. SERVS. DIV., FED. BUREAU OF INVESTIGATION, UNITED STATES DEP’T OF JUSTICE, <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2011> (last visited May 7, 2013).

Year	Number of Hate Crimes Against Latina/os
2010	534
2009	483
2008	561
2007	595
2006	576
2005	522
2004	475
2003	529
2002	480
2001	597
2000	557
1999	588

Sociologist Mary Romero contends that “[l]ocal, state, and national government participation in alarmist immigration rhetoric and laws embracing ‘alien immigrant,’ ‘criminal,’ and ‘terrorist’ as one in the same, lend legitimacy to a range of anti-immigration activities by civilians.”⁵⁰ Mass detentions and deportations, along with an unprecedented allocation of resources to immigration and border enforcement,⁵¹ increased with tough immigration reforms in 1996.⁵²

50. Mary Romero, *Are Your Papers in Order?: Racial Profiling, Vigilantes, and “America’s Toughest Sheriff”*, 14 HARV. LATINO L. REV. 337, 349 (2011); see also Martha Minow, *Regulating Hatred: Whose Speech, Whose Crimes, Whose Power?—An Essay for Kenneth Karst*, 47 UCLA L. REV. 1253, 1273 (2002) (“[T]he adoption of Proposition 187 in California made it a matter of public policy to attribute to immigrants blame for economic constraints in the state. How surprising then, are hate crimes against immigrants?”).

51. See *Removal Statistics*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/removal-statistics> (last visited May 7, 2013) (“In FY 2012, ICE removed 409,849 individuals.”).

52. See *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 and 18 U.S.C.); *Antiterrorism and Effective Death Penalty Act of 1996*, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 15, 18, 19, 21, 22, 28, 40, 42, 49 and 50 U.S.C.); see also PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP* 143 (1998) (characterizing the 1996 reforms as “the most radical reform of immigration law in decades—or perhaps ever”); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1935 (2000) (“[The 1996 immigration laws] have caused immense hardship and suffering to thousands of people and have sought to eliminate the judicial branch entirely from any meaningful role in decisions of the most fundamental kind.”); Teresa A. Miller, *Citizenship & Severity*:

Along with a drum-beat of advocacy for increasingly more aggressive military-style measures to deport “criminal aliens” and “terrorists” by the highest levels of the U.S. government,⁵³ these strict measures cement in the national imagination the conception of immigrants as a social evil that must be confronted with—and indeed deserve—harsh measures. Violent rhetoric, combined with punitive governmental treatment of immigrants under color of law, contributes to a tense, often hostile, environment ripe for nativist violence.⁵⁴

The fact that most “illegal aliens” are stereotyped as Mexican by immigration authorities influences the public consciousness and, in turn, impacts U.S. government policy toward immigration.⁵⁵ Sanctioned by the Supreme Court, immigration officers routinely consider physical appearance—specifically stereotypical “Mexican” or “Hispanic appearance”—in questioning a person about his immigration status.⁵⁶ Not coincidentally, a majority of the noncitizens arrested, detained, and removed by the U.S. immigration authorities are persons of color, with a large segment of this group comprised of natives of Mexico.⁵⁷ These facts in combination reinforce in the mind of the general public the propriety of race-based distinctions in immigration enforcement directed at persons of Mexican ancestry.

Recent Immigration Reform and the New Penology, 17 GEO. IMMIGR. L.J. 611, 616 (2003) (characterizing the 1996 immigration reforms as “harsh”); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1962 (2000) (criticizing the scope and impacts of the 1996 reforms).

53. See Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 MINN. L. REV. 1369, 1376–87 (2007) (detailing the changes in immigration policies made in the name of national security after September 11, 2001, and observing the disproportionate impacts on Latina/o immigrants).

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

55. See *supra* text accompanying notes 26–36. Roughly sixty percent of all undocumented immigrants are from Mexico. See PASSEL & COHN, *supra* note 17, at 4.

56. See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543, 563–64 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 885–87 (1975). See generally Johnson, *supra* note 22 (analyzing racial profiling sanctioned by the Supreme Court in criminal and immigration enforcement); Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675 (2000) (making the case against the use of racial profiles in the enforcement of the U.S. immigration laws). In *Arizona v. United States*, 132 S. Ct. 2492 (2012), the Supreme Court upheld in the face of a constitutional challenge a provision of Arizona’s S.B. 1070 that requires state and local police to verify the immigration status of any person about whom they have a “reasonable suspicion” is in the United States in violation of the U.S. immigration laws. *Id.* at 2507–10. Critics contend that enforcement of the provision will result in increasing racial profiling of Latina/os. See Gabriel J. Chin & Kevin R. Johnson, *Profiling’s Enabler: A High Court Ruling Underpins Arizona Immigration Law*, WASH. POST, July 13, 2010, at A15.

57. See *supra* notes 19–25 and accompanying text.

In sum, immigration enforcement under color of law that is by outward appearances based on race implicitly encourages race-based discrimination by private individuals against Latina/os and immigrants in American social life. Private citizens thus often support governmental reliance on race and, as a corollary, believe it permissible to rely on racial cues in private and social life.⁵⁸

C. *Hazleton: One Anti-Immigrant Outburst in Rural Pennsylvania*

The heated nature of the debate over immigration is exemplified by events in Hazleton, Pennsylvania, a hardscrabble rural town that in 2006 enacted a tough municipal immigration enforcement ordinance that generated national controversy.⁵⁹ The ordinance would have, among other things, barred landlords from renting housing to undocumented tenants. Informed observers feared that the law would increase housing discrimination against Latina/os, including U.S. citizens and lawful immigrants.⁶⁰

The following description of a political rally in Hazleton provides a sense of the raw emotion surrounding immigration existing in the community:

58. See *supra* notes 37–57 and accompanying text.

59. See *Lozano v. City of Hazleton*, 620 F.3d 170, 206 (3d Cir. 2010) (striking down a local immigration ordinance on grounds that it was preempted by federal immigration law), *vacated*, 131 S. Ct. 2958 (2011); see also *Keller v. City of Fremont*, 853 F. Supp. 2d 959, 973 (D. Neb. 2012) (enjoining enforcement of Fremont, Nebraska, ordinance that purported, among other things, to deny access to rental and other housing to undocumented immigrants). For analysis of the constitutionality of the Hazleton ordinance, see generally Ashleigh Bausch Varley & Mary C. Snow, *Don't You Dare Live Here: The Constitutionality of the Anti-Immigrant Employment and Housing Ordinances at Issue in Keller v. City of Fremont*, 45 CREIGHTON L. REV. 503 (2012) (analyzing constitutionality of immigration enforcement laws enacted in Fremont, Nebraska, which are similar to Hazleton's); Mark S. Grube, Note, *Preemption of Local Regulations Beyond Lozano v. City of Hazleton: Reconciling Local Enforcement with Federal Immigration Policy*, 95 CORNELL L. REV. 391 (2010); Eric L'Heureux Issadore, Note, *Is Immigration Still Exclusively a Federal Power? A Preemption Analysis on Legislation by Hazleton, Pennsylvania Regulating Illegal Immigration*, 52 VILL. L. REV. 331 (2007); Maria Marulanda, Note, *Preemption, Patchwork Immigration Laws, and the Potential for Brown Sundown Towns*, 79 FORDHAM L. REV. 321 (2011). There has been sustained debate over the extent to which state and local governments should be involved in immigration enforcement. See *infra* Part III.B.

60. See Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55, 98–110 (2009) (analyzing local ordinances like Hazleton's that prohibit the rental of housing to undocumented immigrants and concluding that such laws are likely to increase unlawful housing discrimination); Tom I. Romero, II, *No Brown Towns: Anti-Immigrant Ordinances and Equality of Educational Opportunity for Latina/os*, 12 J. GENDER RACE & JUST. 13, 17–34 (2008) (viewing local ordinances like Hazleton's as a form of racial exclusion).

[T]he anger displayed at the rally—held in support of Hazleton’s anti-immigration mayor, Lou Barletta—was enough to give anyone with a soul a serious case of the chills. . . . About 700 people attended the rally, *where some in attendance tried to link illegal Mexican immigrants with the 9/11 attacks. Other speakers accused illegal immigrants of carrying infectious diseases, increasing crime and lowering property values. If Alabama’s late segregationist Gov. George Wallace had been present, he would have wondered who hired away his speechwriters.*⁶¹

In allowing “Doe” (anonymous) plaintiffs to challenge the constitutionality of the Hazleton ordinance, the district court observed that “the intense public interest in the ordinance[] at times led to harassment and intimidation that created fear even among those with a more secure social and legal status than the anonymous plaintiffs.”⁶² A local activist advocating repeal of the Hazleton immigration ordinance received racist hate mail.⁶³ The district court concluded that the “record of hostility to the plaintiffs in the lawsuit and the climate of fear and hostility surrounding the debate over the [law]” justified keeping the plaintiffs’ identities anonymous,⁶⁴ an extraordinary measure that unfortunately represented a sign of the racial divide over immigration.

II. ANATOMY OF A MODERN-DAY LYNCHING

The average American probably would not consider the Pennsylvania countryside a place where many Mexican immigrants live, much less a hotbed of anti-immigrant, anti-Mexican sentiment. The events in Hazleton, Pennsylvania, however, reveal an underside to the local responses to an emerging Mexican immigrant population. Unfortunately, the hate killing of a young Mexican immigrant

61. Kevin R. Johnson, *A Handicapped, Not “Sleeping,” Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CALIF. L. REV. 1259, 1289 (2008) (emphasis added) (footnote omitted). A staunch defender of segregation of whites and African Americans, George Wallace in his inaugural speech as Governor of Alabama in 1963 famously emphatically proclaimed, “Segregation now! Segregation tomorrow! Segregation forever!” HARVARD SITKOFF, *THE STRUGGLE FOR BLACK EQUALITY, 1954–1992*, at 145 (2008).

62. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 508 (M.D. Pa. 2007), *aff’d in part*, 620 F.3d 170 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011).

63. See *Lozano*, 496 F. Supp. 2d at 509. One letter included a clipping from a newspaper describing the negative effects of undocumented immigration with the note “[s]ubhuman spic scum” and “[i]f it is brown, flush it down.” *Id.* at 510 (emphasis added) (citations omitted).

64. *Id.*

occurred in a small town near Hazleton not long after it entered the national immigration fray.

A. *The Beating of Luis Ramirez*

Over the last decade or so, jobs and relatively inexpensive housing had attracted an influx of Latina/o immigrants to Shenandoah, Pennsylvania, a small, working-class coal mining town within twenty miles of Hazelton.⁶⁵ Looking for work, Luis Ramirez moved to Shenandoah from Mexico.⁶⁶ One Saturday night in July 2008, a group of Shenandoah Valley High School football players beat Ramirez to death on the streets of that small town.⁶⁷

Early in the evening, the teens spent several hours drinking malt liquor near a creek in Shenandoah. They later were asked to leave a neighborhood Polish American block party when one of the teens got into an argument and had to be physically restrained by his friends.

At trial, testimony showed that the youth had previously frequently voiced their displeasure with the growing number of Latina/os in Shenandoah. They said things like, "Get them out of here," or "[I]t's not good for our [t]own."⁶⁸ One of the boys was known to wear a "Border Patrol" t-shirt and drove around town blasting "The White Man Marches On"—a white supremacist song that glorifies violence against minorities.⁶⁹

After getting thrown out of the block party, the group walked through a park and ran into Luis Ramirez, who was with Roxanne

65. See Iturralde, *supra* note 40, at 418 (noting "correlation between those localities that have been embroiled in debates focusing on local immigration enforcement policies and incidents of hate crimes against Latinos" (footnote omitted)).

66. See Michael Rubinkam, *Luis Ramirez Killers Found Not Guilty After Beating Mexican Immigrant to Death*, HUFFINGTON POST (May 2, 2009), http://www.huffingtonpost.com/2009/05/04/luis-ramirez-killers-foun_n_195535.html. For analysis of the Ramirez case, see generally María Pabón López, *An Essay Examining the Murder of Luis Ramírez and the Emergence of Hate Crimes Against Latino Immigrants in the United States*, 44 ARIZ. ST. L.J. 155 (2012).

67. The following factual summary borrows liberally from the court of appeals's description of the facts surrounding the killing. See *United States v. Piekarsky*, 687 F.3d 134, 136–38 (3d Cir.), *cert. denied*, 133 S. Ct. 549 (2012); see also *United States v. Moyer*, 674 F.3d 192, 199–200 (3d Cir.), *cert. denied*, 133 S. Ct. 165 (2012) (offering a more sanitized rendition of the facts in the appeal of convictions of police chief and officers in an attempted cover up of the crime). An insightful documentary on the beating death of Luis Ramirez sheds light on the events leading up to, culminating in, and following the tragedy. See Sam Dolnick, *After a New Immigrant's Killing, Conflict in a Coal Town*, N.Y. TIMES BLOG (Aug. 10, 2012), <http://lens.blogs.nytimes.com/2012/08/10/after-a-new-immigrants-killing-conflict-in-a-coal-town/>.

68. *Piekarsky*, 687 F.3d at 135.

69. *Id.*

Rector, a white woman.⁷⁰ One of the teens told Rector that it was too late for her to be out.⁷¹ Ramirez responded in Spanish.⁷² The teen yelled back: "This is Shenandoah. This is America. Go back to Mexico."⁷³ Another called Ramirez a "Spic."⁷⁴ Still another youth told Ramirez to "[g]et the fuck out of here."⁷⁵

The teens ran after Ramirez.⁷⁶ One of the football players started fighting with Ramirez, throwing him to the ground.⁷⁷ Another teen repeatedly punched Ramirez in the face, calling him a "fucking Spic."⁷⁸ While Ramirez was on the ground, the four teens kicked him repeatedly.⁷⁹ One of the teens later stated that "everybody else was kicking him in the upper part, in his head and his chest and his upper body."⁸⁰

A friend of Ramirez arrived and the beating ended.⁸¹ While the group began to walk away, a teen screamed, "Fucking Mexican."⁸² One of the teens threw a few more punches at Ramirez.⁸³ Another said, "Fuck you Spic."⁸⁴ Another teen chimed in defensively, "This isn't racial."⁸⁵

At this point, one of the teens turned and said, "Go home, you Mexican motherfucker."⁸⁶ Apparently provoked by these comments, Ramirez charged at him.⁸⁷ While the two fought, another teen punched Ramirez in the face, causing him to fall "like a brick" and hit his head on the concrete ground.⁸⁸

70. *Id.* at 137. It is possible that the fact that Ramirez was accompanied by a white woman contributed to the hostility of the interaction between Ramirez and the white teenagers, just as interracial relationships often inflamed anti-black hostility in the Jim Crow South. *See infra* note 105 and accompanying text (observing that lynching was a tool employed by whites to discourage intimate interracial relationships between African-American men and white women).

71. *Piekarsky*, 687 F.3d at 137.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

As Ramirez lay motionless, one of the teens kicked Ramirez in the head.⁸⁹ A loud “crack” could be heard.⁹⁰ The kick to Ramirez’s head caused him to go into convulsions.⁹¹ As the teens fled, one of them yelled, “Tell your fucking Mexican friends to get the fuck out of Shenandoah or you’re going to be fucking laying next to him.”⁹² Two days later, Luis Ramirez died.⁹³

The horror of the Ramirez killing by four upstanding youths attracted national attention. Several news stories equated the killing to a “lynching,”⁹⁴ invoking the sordid memories of the violent “lynch law” that helped subordinate African Americans in the Jim Crow South.⁹⁵

B. The Legal Fallout

1. The State Prosecution

The Ramirez killing spawned multiple criminal prosecutions. First, an all-white jury in Pennsylvania state court acquitted the white defendants of third-degree murder, aggravated assault, and related charges. Apparently swayed by the defense’s characterization of the encounter as “a street fight that ended tragically,”⁹⁶ the jury found the defendants guilty of the least serious criminal charge, simple assault, even though the brutal beating resulted in Luis Ramirez’s death.⁹⁷

The racial composition of the jury arguably affected the verdict in the state criminal prosecution. It appears that no Latina/os—and no people of color—served on the jury in a trial about the hate killing

89. *Id.* at 138.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. See Christopher J. Kelly, *Season’s Ideals So Absent*, TIMES-TRIB. (Scranton, PA) (Dec. 20, 2009), <http://thetimes-tribune.com/opinion/editorials-columns/christopher-j-kelly/season-s-ideals-so-absent-1.500800>; Ruben Navarette Jr., *Killing of Immigrant a Senseless, Barbaric Act*, CNN.COM (July 31, 2008), <http://www.cnn.com/2008/POLITICS/07/31/navarrette.fatalbeating/index.html>.

95. See *infra* text accompanying notes 104–05; *Shenandoah, Pennsylvania—“Lynching Teens” Cleared of Murdering Hispanic Immigrant Luis Ramirez*, POL. ARTICLES (May 6, 2009), <http://www.politicalarticles.net/blog/2009/05/06/shenandoah-pa-lynching-teens-cleared-of-murdering-hispanic-immigrant-luis-ramirez>.

96. Peter Bortner, *Shenandoah Murder Trial: Jury’s Verdict: Simple Assault*, REPUBLICAN HERALD (Pottsville, PA) (May 2, 2009), <http://www.freerepublic.com/focus/f-news/2242708/posts>; Rubinkam, *supra* note 66.

97. See Emanuella Grinberg, *Some Satisfied, Others Outraged with Verdict for Immigrant’s Death*, CNN.COM (May 2, 2009), http://articles.cnn.com/2009-05-02/justice/pa.immigrant.beating_1_brandon-piekarsky-derrick-donchak-teens?s=PM:CRIME.

of an immigrant from Mexico. One potential juror with a Spanish surname had been dismissed from the jury.⁹⁸

After the conclusion of the trial, the foreman of the jury went public to claim that the all-white jury was more sympathetic toward the young white defendants than to the Mexican immigrant victim. Indeed, he stated unequivocally that “some of the people on the jury were racist . . . [and] had their minds made up before the first day of the trial.”⁹⁹

2. The Federal Prosecutions

Recognizing that justice had not been done in the state prosecution, the U.S. Department of Justice intervened and brought a criminal civil rights prosecution against the perpetrators in federal court. After a trial, the jury found that two of the defendants violated Luis Ramirez’s civil rights; the judge sentenced them to nine years in prison, many years more than they had been sentenced on the state assault conviction.¹⁰⁰

The U.S. government next brought a criminal prosecution based on an alleged cover-up of the Ramirez killing by the former Shenandoah police chief and two officers, who sought to “protect” whom they apparently thought to be innocent teens.¹⁰¹ The jury acquitted the defendants of conspiracy to obstruct a federal investigation, but found the chief of police guilty of falsifying a police report.¹⁰² The jury also found one officer guilty of lying to the Federal Bureau of Investigation but acquitted him on other counts. Another police officer was cleared of all charges.¹⁰³

98. See Eric Deabill, *Jury Selection Begins in Shenandoah Beating Case*, PAHOMEPAGE (Apr. 22, 2009), http://pahompage.com/fulltext?nxd_id=80232&watch=1.

99. Ruben Navarrette, *When ‘Justice’ Isn’t*, REAL CLEAR POL. (May 13, 2009), http://www.realclearpolitics.com/articles/2009/05/13when_justice_isnt_96459.html (quoting jury foreman); see Christopher F. Bagnato, Comment, *Change Is Needed: How Latinos Are Affected by the Process of Jury Selection*, 29 CHICANO-LATINO L. REV. 59, 59–60 (2010).

100. See CNN Wire Staff, *Men Convicted of Hate Crime Sentenced to 9 Years in Prison*, CNN.COM (Feb. 23, 2011), http://articles.cnn.com/2011-02-23/justice/pennsylvania.hate.crime_1_derrick-donchak-brandon-piekarsky-federal-court?_s=PM:CRIME. The court of appeals affirmed the convictions. See *United States v. Piekarsky*, 687 F.3d 134, 136 (3d Cir.), cert. denied, 133 S. Ct. 549 (2012).

101. See Rubinkam, *supra* note 66.

102. See Sabrina Tavernise, *Former Police Chief Is Sentenced for Cover-Up in Mexican’s Death*, N.Y. TIMES, June 2, 2011, at A18.

103. See Sabrina Tavernise, *Jury Delivers Mixed Verdict for 3 Officers*, N.Y. TIMES, Jan. 28, 2011, at A21. The defendants unsuccessfully appealed their convictions. See *United States v. Moyer*, 674 F.3d 192, 199 (3d Cir.), cert. denied, 133 S. Ct. 165 (2012).

C. *The Ramirez Killing as a Modern Day Lynching*

The episode surrounding the killing of Luis Ramirez sounds eerily reminiscent of the violence directed at African Americans in the South during the height of Jim Crow.¹⁰⁴ During that era, violence was used to maintain the subordination of Blacks, and sympathetic state court juries refused to punish the white perpetrators of the violence.¹⁰⁵ Local police sought to protect the white perpetrators of brutality.

The similarities do not end there. The federal civil rights prosecution brought by the U.S. government resembled the prosecutions brought to combat violence against African Americans and civil rights workers in the South in the 1950s and 1960s. The aim was to remedy the problem of all-white juries reflexively acquitting white defendants accused of violence in state courts.¹⁰⁶

Nor does it appear to be mere coincidence that the tragic killing of Luis Ramirez came at a time of a prolonged, heated national debate over immigration—and a rapid proliferation of state and local immigration enforcement legislation passed after considerable

104. See Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 B.C. THIRD WORLD L.J. 81, 86 (2004) (referring to Jim Crow as “the period between the end of Reconstruction and the beginning of the modern civil rights movement, when African Americans were subject to state-sponsored discrimination in education, housing, employment, and public accommodations”). See generally C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (commemorative ed. 2001) (offering the definitive history of the emergence and maintenance of Jim Crow laws in the South).

105. See Kevin R. Johnson, *The Legacy of Jim Crow: The Enduring Taboo of Black-White Romance*, 84 TEX. L. REV. 739, 746–57 (2006) (summarizing how lynching buttressed ban on, among other things, black-white interracial relationships, especially between black men and white women, in Jim Crow America). See generally GRACE E. HALE, *MAKING WHITENESS: THE CULTURE OF SEGREGATION IN THE SOUTH 1890–1940*, at 199–239 (1998) (analyzing history of spectacle lynchings in the Jim Crow South). The effective equivalents of lynching of African Americans continue to occur sporadically today. See Anthony V. Alfieri, *Prosecuting Violence/Reconstructing Community*, 52 STAN. L. REV. 809, 822 (2000) (“‘By tying African American James Byrd to the bumper of their car and dragging his body for miles, his white supremacist killers traded on the evocative connotations of lynching.’” (quoting Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 464 (1999))); Charles J. Ogletree, Jr., *The Current Reparations Debate*, 36 U.C. DAVIS L. REV. 1051, 1062 (2003) (“Frighteningly, lynchings still occur, as was demonstrated by the murder of James Byrd, Jr. in Jasper, Texas, in 1998.”). See generally Gabriel J. Chin, *The Jena Six and the History of Racially Compromised Justice in Louisiana*, 44 HARV. C.R.-C.L. REV. 361 (2009) (analyzing mass incarceration of African Americans in modern United States as a form of social control); Joseph Kennedy, *The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights*, 44 HARV. C.R.-C.L. REV. 477 (2009) (same).

106. See Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063, 1077–79 (1997); Christopher Slobogin, *Race-Based Defenses—The Insight of Traditional Analysis*, 54 ARK. L. REV. 739, 744 (2002).

acrimony in the region as well as the nation.¹⁰⁷ National agitation about immigration, and frequent allegations about the destruction of U.S. society by immigrants,¹⁰⁸ including in nearby Hazleton, almost unquestionably influenced the young men who told Luis Ramirez to “go back to Mexico” before kicking him to death.¹⁰⁹

As the need for this symposium attests, the killing of a young Mexican immigrant in Shenandoah, Pennsylvania unfortunately is not all that extraordinary.¹¹⁰ In 2008, white teens in Patchogue, New York engaged in what they characterized as the “sport” of “beaner hopping” and brutally killed an Ecuadoran immigrant.¹¹¹ In 2010, racial tensions led to violence against Mexican immigrants in Staten Island, New York.¹¹² In 2011, two anti-immigrant extremists were sentenced to death for the murder of a father and his young daughter, both of Mexican ancestry, in a home invasion in Arizona.¹¹³ These cases are the tip of the iceberg of hundreds of hate incidents annually

107. See *supra* Part I.A.

108. For popular books in this genre, see PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER* (1995); VICTOR DAVIS HANSON, *MEXIFORNIA: A STATE OF BECOMING* (2003); SAMUEL P. HUNTINGTON, *WHO ARE WE?: THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY* (2004); MICHELLE MALKIN, *INVASION: HOW AMERICA STILL WELCOMES TERRORISTS, CRIMINALS, AND OTHER FOREIGN MENACES TO OUR SHORES* (2002).

109. See *supra* Part II.A.

110. See, e.g., *United States v. Maybee*, No. 11-30006, 2011 WL 2784446, at *1-2 (W.D. Ark. July 15, 2011); Press Release, Dep't of Justice, Office of Pub. Affairs, *Arkansas Men Sentenced for Federal Hate Crimes Related to Assault of Five Hispanic Men* (Sept. 28, 2011), available at <http://www.justice.gov/opa/pr/2011/September/11-crt-1275.html>; Ann Simmons, *At Least 7 Youths Detained in Alleged Palmdale Hate-Crime Beating*, L.A. NOW (L.A. TIMES) (Mar. 30, 2012), <http://latimesblogs.latimes.com/lanow/2012/03/palmdale-teenager.html>; Mark Spivey, *Plainfield Man Sentenced to 9 Years in "Papi Hunting" Case*, COURIER NEWS (Bridgewater, NJ), Oct. 24, 2011, <http://www.mycentraljersey.com/article/20110811/NJNEWS/308100019/Plainfield-man-guilty-papi-hunting>; Lisa Brenner, *Skinheads Allegedly Threaten, Intimidate Latino Teens in Ojai*, LAIST (July 3, 2011), http://laist.com/2011/07/03/skinheads_allegedly_threaten_intimi.php.

111. See Cara Buckley, *Teenagers' Violent "Sport" Led to Killing on Long Island, Officials Say*, N.Y. TIMES, Nov. 21, 2008, at A26; see also S. POVERTY LAW CTR., *CLIMATE OF FEAR: LATINO IMMIGRANTS IN SUFFOLK COUNTY, N.Y.* 5 (2009) (noting that the killing of an Ecuadoran immigrant in Patchogue by “a gang of teenagers who called themselves the Caucasian Crew . . . highlighted a growing national problem—violent hatred directed at all suspected undocumented immigrants, Latinos in particular”). In Suffolk County, where Patchogue is located, local officials arguably had not done enough to calm racial tensions—and may have inflamed them—before and after the killing. See López, *supra* note 66, at 167–68.

112. See Kirk Semple, *Staten Island Neighborhood Reels After Wave of Attacks on Mexicans*, N.Y. TIMES, July 31, 2010, at A14.

113. See *Border Vigilante Murderer Sentenced to Death*, IMMIGRATIONPROF BLOG (Apr. 10, 2011), <http://lawprofessors.typepad.com/immigration/2011/04/border-vigilante-murder-sentenced-to-death.html>.

directed at Latina/os and immigrants in the United States.¹¹⁴

III. ADDRESSING HATE CRIMES DIRECTED AT LATINA/OS AND IMMIGRANTS

The trials involving the killing of Luis Ramirez, similar to many trials implicating issues of race, necessarily reflect deeper issues of racism in the modern United States. This is true whether it is the black defendant in a criminal case, such as the famous O.J. Simpson murder trial,¹¹⁵ or white defendants charged with hate crimes. Unfortunately, anti-immigrant, as well as anti-Latina/o, sentiment has plagued the United States throughout its history.¹¹⁶ Because race shapes all aspects of American social life, one can expect it to influence acts of racial hatred as well as how the justice system responds to such acts.

One important first step toward reducing hate crimes against Latina/os and immigrants is to frankly acknowledge that the public responses to the race of today's immigrants—and racism—contribute to formation of anti-immigrant sentiment and the commission of hate crimes.¹¹⁷ Unfortunately, even when presented with the racially disparate impacts of immigration enforcement, many advocates of ever-more aggressive immigration enforcement measures fervently deny that race has anything to do with the debate over immigration. Rather, they generally justify efforts to combat “illegal” immigration on the superficially appealing desire to enforce the rule of law.¹¹⁸

It is impossible to deny, however, that the enforcement of the immigration laws has racially disparate impacts on communities of color; the fact that many of today's immigrants are from Mexico unquestionably intensifies and complicates the debate over state

114. See *supra* Part I.B.

115. See Devon W. Carbado, *The Construction of O.J. Simpson as a Racial Victim*, 32 HARV. C.R.-C.L. L. REV. 49, 75–89 (1997).

116. See *supra* text accompanying notes 37–42. General anti-immigrant sentiment, at times marred by violence, also has a long history in the United States. For discussion of this history, see generally JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925* (2002 ed.); BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY* (1993); KEVIN R. JOHNSON, *THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS* (2004).

117. See generally Jennifer Gordon & R.A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 FORDHAM L. REV. 2493 (2007) (arguing that immigration law scholarship should address race in the analysis of U.S. immigration law); Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower and the Legal Indifference to the Race Critique*, 2000 U. ILL. L. REV. 525 (same).

118. See Johnson, *supra* note 19, at 315.

immigration laws.¹¹⁹ Such racial dimensions to immigration and immigration enforcement merit the nation's collective attention.

If the legitimate civil rights grievances of Latina/os and immigrants with the racially disparate impacts of immigration enforcement in the United States are not acknowledged, much less meaningfully addressed, one can expect that at some point the affected communities will respond.

In 2006, thousands of people in cities across the United States peacefully marched in protest of proposed punitive immigration reform legislation.¹²⁰ This represents one of many possible responses to the nation's failure to address the civil rights concerns of immigrants and Latina/o citizens. Alternatively, civil unrest, even violence like that following the May 1992 acquittal of the police officers who were caught on videotape beating African American Rodney King, which included large numbers of Latina/o immigrants as well as blacks, offers an example of a very different possible response, albeit a much less socially desirable one.¹²¹

A. *Enacting Comprehensive Immigration Reform*

Polls consistently show that a majority of Americans, as well as President Obama, believe that the current American immigration system is nothing less than "broken."¹²² Nonetheless, despite numerous efforts over many years, Congress has failed to enact comprehensive immigration reform.¹²³ Such reform can move the nation beyond blaming immigrants for the nation's problems and can begin to address the underlying issues influencing undocumented

119. See *supra* text accompanying notes 15–25.

120. See Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99, 99 (2007); Sylvia R. Lazos Vargas, *The Immigrant Rights Marches (Las Marchas): Did the "Gigante" (Giant) Wake Up or Does It Still Sleep Tonight?*, 7 NEV. L.J. 780, 781 (2007).

121. See, e.g., Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles"*, 66 S. CAL. L. REV. 1581, 1584–93 (1993); Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century*, 8 LA RAZA L.J. 42, 64–66 (1995); Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 967–70 (1995); Reginald Leamon Robinson, *"The Other Against Itself": Deconstructing the Violent Discourse Between Korean and African Americans*, 67 S. CAL. L. REV. 15, 17 (1993). Protests and near-violent confrontations with police in Anaheim, California, in July 2012, after police killings of two Latinos, further illustrate what could occur if racial tensions are not addressed. See *infra* note 193.

122. See Frank Sharry, *Latest Polls Confirm New Political Reality for Immigration Reform*, HUFFINGTON POST (June 29, 2012), http://www.huffingtonpost.com/frank-sharry/latest-polls-confirm-new_b_1638680.html.

123. See *supra* note 14 and accompanying text.

immigration, such as the widely held view that the current immigration laws are out of sync with the modern needs of the U.S. labor market.¹²⁴ Meaningful immigration reform would do much to dampen the rhetorical and actual violence regularly directed at Latina/os and immigrants in the United States.¹²⁵

Although economic insecurity often plays into fears about Latina/o and immigrant workers, hate crimes have been consistently high for at least the last decade, even before the recession.¹²⁶ The global economic downturn over the last few years did not result in much of a change in the number of hate crimes against Hispanics. However, national security fears, and the emphasis on controlling undocumented immigration as part of the “war on terror” after September 11, 2001, heightened social tensions.¹²⁷

Even if the recession may not appear to have led to an increase in hate crimes, the poor economy at the end of the first decade of the new millennium almost assuredly hampered the ability of the nation to engage in a rational public dialogue on the subject of immigration reform. Such a dialogue obviously is a precursor to meaningful reform. An overhaul of the U.S. immigration laws, in turn, holds the promise of transforming the mean-spirited national cacophony over immigration and refocusing energies on laws and policies that directly address economic development, public safety, and other important national priorities.¹²⁸

After the reelection of President Obama in 2012, there was renewed talk of the possibility of comprehensive immigration reform—in part spurred by the overwhelming support of Latina/o voters for the President.¹²⁹ Many political leaders and pundits blamed the aggressive positions taken on immigration enforcement by Republican candidates for alienating Latina/o voters.¹³⁰

124. See JOHNSON, *supra* note 16, at 131–67.

125. See Bill Ong Hing, *Reason over Hysteria*, 12 LOY. J. PUB. INT. L. 275, 276 (2011) (“We should gather ourselves and use [our] collective wisdom to address immigration policy and the need for reform in a thoughtful, reasonable manner.”); LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUC. FUND, CONFRONTING THE NEW FACES OF HATE: HATE CRIMES IN AMERICA 36 (2009), available at <http://www.civilrights.org/publications/hatecrimes> (calling for political leaders to set a civil tone for a “civil national discourse” on comprehensive immigration reform).

126. See *supra* text accompanying note 48–49.

127. See Johnson & Trujillo, *supra* note 53, at 1376–87.

128. See *supra* Part I.

129. See Julia Preston, *Immigrant Activists Cast a Wider Net*, N.Y. TIMES, Dec. 3, 2012, at A12.

130. See Julia Preston, *Praising Immigrants, Bush Leads Conservative Appeal for G.O.P. to Soften Tone*, N.Y. TIMES, Dec. 5, 2012, at A16. In early 2013, President Obama

Consequently, the time might be right politically for comprehensive immigration reform.

History suggests that congressional action can help to facilitate civil rights improvements in immigration. The end of Jim Crow America, for example, culminated with the passage of the Civil Rights Act of 1964¹³¹ and a plethora of other laws designed to bring about equality for African Americans and minorities generally. In a similar way, comprehensive immigration reform can begin to move the nation forward toward eliminating the racial caste system created and enforced by the U.S. immigration laws, a system that contributes to an environment in which hate crimes flourish.

B. Federal Preemption of State and Local Immigration Enforcement Measures

The conventional wisdom, as often expressed by the Supreme Court,¹³² has been that the U.S. government should be near-exclusively responsible for the regulation of immigration laws. In *De Canas v. Bica*,¹³³ for example, the Court in 1976 unequivocally stated that the “[p]ower to regulate immigration is unquestionably exclusively a federal power.”¹³⁴ At the same time, however, the Court rejected a federal preemption challenge to a California law imposing fines on employers of undocumented immigrants.¹³⁵ More recently, in *Arizona v. United States*,¹³⁶ the Court invalidated three of four provisions of Arizona’s immigration enforcement law as preempted by federal law, emphasizing the unquestioned federal power over

and a number of U.S. senators renewed the call for immigration reform. See Goldfarb & Helderman, *supra* note 6, at A1.

131. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a to 2000h-6 (2006 & Supp. 2009)).

132. See *infra* text accompanying notes 133–34.

133. 424 U.S. 351 (1976).

134. *Id.* at 354. In *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011), the Court quoted this language from *De Canas* while omitting the word “exclusively”—“In [*De Canas*], we recognized that the ‘[p]ower to regulate immigration is unquestionably . . . a federal power’ ” (omission in original)—and upheld an Arizona law that allowed the state to strip the business license of an employer found to have repeatedly hired undocumented immigrants. *Whiting*, 131 S. Ct. at 1974 (citation omitted).

135. The Court’s decision was before the passage of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in various sections of 8 U.S.C.), which prohibited the employment of undocumented immigrants and allowed for the imposition of sanctions on the employers of undocumented immigrants. See Immigration and Nationality Act § 274A, 8 U.S.C. § 1324a (2006).

136. 132 S. Ct. 2492 (2012).

immigration, while at the same time recognizing that there was room for regulation by the states. Together, the decisions leave unclear the limits of what a state can do when it comes to regulating immigration.

At least since the late nineteenth century, the federal government has comprehensively regulated immigration and, until recent years, remained the primary enforcer of the U.S. immigration laws, which makes sense given the national and international impacts of immigration policy and its enforcement.¹³⁷ Importantly, immigration laws and policies can have important foreign policy consequences for the nation, which the federal government can most appropriately consider and balance against other national concerns.¹³⁸

As recent judicial decisions demonstrate,¹³⁹ the Supreme Court and Congress have not been entirely clear about the boundaries of power between the federal and state governments on immigration enforcement. This lack of jurisdictional clarity, fueled by the failure of Congress to pass comprehensive immigration reform, partisan politics, and changing immigration patterns, has allowed, if not encouraged, the recent spate of state and local immigration enforcement laws.

In a controversial move, the Obama administration challenged a number of state immigration enforcement laws, including laws passed by Alabama, Arizona, and South Carolina, contending that they are

137. See KEVIN R. JOHNSON ET AL., UNDERSTANDING IMMIGRATION LAW 90 (2009). There has been sustained academic debate over whether state and local governments should be afforded increased powers to regulate immigration. See *id.* at 117–75. Compare Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57 (supporting greater state involvement in immigration regulation), with Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001) (opposing greater state involvement).

138. See, e.g., *United States v. Arizona*, 641 F.3d 339, 353–54 (9th Cir. 2011) (summarizing negative U.S. foreign policy consequences of Arizona's S.B. 1070 and the fact that the governments of many nations condemned the law), *aff'd in part, rev'd in part on other grounds*, 132 S. Ct. 2492 (2012); see also *Arizona v. United States*, 132 S. Ct. at 2498 ("It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not 50 separate states."). See generally Mary Fan, *Rebellious State Crimmigration Enforcement and the Foreign Affairs Power*, 89 WASH. U. L. REV. 1269 (2012) (contending that state immigration enforcement laws can undermine federal foreign relations prerogatives).

139. See *supra* text accompanying notes 134–36; see also Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 265–78 (2011) (reviewing case law establishing conventional view that federal government has exclusive power to regulate immigration).

preempted by federal law.¹⁴⁰ Although couched in terms of state infringement of federal regulatory power, challenges like these, if successful, may limit civil rights abuses of Latinas/os and immigrants by state and local governments.¹⁴¹

Discriminatory animus can also be seen at times in the divisive campaigns for state immigration enforcement laws. Anglos and Latina/os are frequently polarized along racial lines with respect to their perspectives on the laws.¹⁴² For example, in enjoining Alabama's immigration enforcement law as applied to the state's mobile home statute, a district court found that "there is evidence that the legislative debate on H.B. 56 was laced with derogatory comments about Hispanics. This evidence reinforces the contention that the term illegal immigrants (the purported target of H.B. 56) was just racially discriminatory code for Hispanics."¹⁴³ In another case, a federal court struck down a Farmers Branch, Texas, ordinance prohibiting the rental of housing to undocumented immigrants, "conclud[ing] that the ordinance's sole purpose is *not* to regulate housing but to exclude undocumented aliens, specifically Latinos, from the City of Farmers Branch."¹⁴⁴

140. See *United States v. Alabama*, 691 F.3d 1269, 1279 (11th Cir. 2012), *cert. denied*, No. 12-884, 2013 WL 210698 (Apr. 29, 2013); *United States v. South Carolina*, 840 F. Supp. 2d 898, 927 (D.S.C. 2011), *modified on reh'g*, Nos. 2:11-2958, 2:11-2779, 2012 WL 5897321 (D.S.C. Nov. 15, 2012); *United States v. Arizona*, 703 F. Supp. 2d 980, 998 (D. Ariz.), *aff'd in part, rev'd in part*, 689 F.3d 1132 (9th Cir. 2010).

141. See generally Mary D. Fan, *Post-Racial Proxies: Resurgent State and Local Anti-"Alien" Laws and Unity-Rebuilding Frames for Antidiscrimination Values*, 32 CARDOZO L. REV. 905 (2011) (contending that challenges to state and local immigration enforcement laws on federal preemption grounds can further anti-discrimination principles).

142. Anti-Mexican, anti-immigrant sentiment has often contributed to the passage of state immigration enforcement laws in the past. For example, after a 1994 campaign marred by such sentiment, California voters in a racially polarized vote overwhelmingly passed Proposition 187, an immigration enforcement initiative that was barred from going into effect by an injunction issued by a federal court. See *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 786-87 (C.D. Cal. 1995); see also Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 650-61 (1995) (arguing that race played a role in the passage of the proposition).

143. *Cent. Ala. Fair Hous. Ctr. v. Magee*, 835 F. Supp. 2d 1165, 1193 (M.D. Ala. 2011); see also *supra* note 47 (describing Alabama's H.B. 56).

144. *Villas at Parkside Partners v. City of Farmers Branch*, 675 F.3d 802, 804 (5th Cir.), *rehearing en banc granted*, 688 F.3d 801 (5th Cir. 2012); see Iturralde, *supra* note 40, at 419 ("Stereotypes and negative images of the Latino immigrant are often associated with the term 'illegal alien.' Targeting the undocumented is usually a pretext for anti-Latino motives . . ."); see also Leticia Saucedo, *Mexicans, Immigrants, Cultural Narratives, and National Origin*, 44 ARIZ. ST. L.J. 305, 314-24 (2012) (summarizing cultural narratives of Mexican immigrant workers in the United States); *supra* text accompanying notes 31-36

Moreover, state and local government involvement in enforcement of the U.S. immigration laws might hamper the ability of those governments to effectively pursue peculiarly state and local public safety and other goals, namely ordinary criminal law enforcement. Specifically, as a number of local governments have concluded, fears of deportation may chill the reporting of crimes by immigrants, as well as cooperation in investigations and prosecutions with local police, which in turn undermines effective policing.¹⁴⁵

The Supreme Court had the opportunity to provide clearer guidance about the limits of state immigration enforcement power in addressing the constitutionality of Arizona's S.B. 1070, an immigration landmark of the twenty-first century.¹⁴⁶ Although the Court reaffirmed federal primacy over immigration enforcement, it let stand a provision of the Arizona law that critics vigorously claimed would permit, if not encourage, racial profiling by state and local police.¹⁴⁷ Once again, the Court demonstrated a degree of ambivalence about the role of the states in immigration enforcement, with that lack of decisiveness possibly being read as inviting further state action in this area.

Again, there is historical precedent for a clear ruling from the Supreme Court to help expand and protect the civil rights for

(discussing racially tinged terminology in debate over immigration). For analysis of the lawfulness of the Farmers Branch ordinance, see Nathan G. Cortez, *The Local Dilemma: Preemption and the Role of Federal Standards in State and Local Immigration Laws*, 61 SMU L. REV. 47, 61–63 (2008); Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2060–63 (2008); Rose Cuison Villazor, *Rediscovering Oyama v. California: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979, 981–84, 1026–32 (2010).

145. See Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 1 U.C. IRVINE L. REV. 247, 253, 303 (2012) (noting that public safety is the purpose of many municipal “sanctuary” policies with the basic hope of “creat[ing] good relations and trust with immigrant communities”). State and local governments can, however, play a constructive role in facilitating the integration of immigrants into the community. See Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 581–90 (2008).

146. See *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012) (invalidating three of four provisions of Arizona law before the Court). For an outline of the myriad of legal issues raised by the Arizona law known popularly as S.B. 1070, see generally Gabriel J. Chin et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47 (2010).

147. See *Arizona*, 132 S. Ct. at 2498–2500, 2507–10 (refusing to disturb section 2(B) of Arizona's S.B. 1070); Kevin R. Johnson, *Online Symposium: The Debate over Immigration Reform Is Not Over Until It's Over*, SCOTUSBLOG (June 25, 2012, 8:14 PM), <http://www.scotusblog.com/2012/06/online-symposium-the-debate-over-immigration-reform-is-not-over-until-its-over>.

minorities. A unanimous Court in *Brown v. Board of Education*¹⁴⁸ emphatically invalidated the “separate but equal” doctrine that buttressed Jim Crow and helped move the civil rights movement forward. By clarifying federal primacy over immigration, the Court could help begin to address the negative civil rights consequences of state involvement in immigration enforcement.

C. *Reforms to Ensure More Diverse Juries*

The remaining proposals in Part III are designed to promote more effective enforcement of the prohibition of hate crimes as well as to improve the operation of the justice system.¹⁴⁹

In courtrooms across the United States today, Latina/os, as well as African Americans, are severely underrepresented on juries,¹⁵⁰ a fact that undercuts the ideal of the jury as a fundamental characteristic of the nation’s commitment to democracy.¹⁵¹ This flaw is exemplified by the fact that an all-white jury acquitted the white defendants of the most serious charges in the state court prosecution of the individuals who beat Luis Ramirez to death.¹⁵²

Historically, more heterogeneous juries are perceived as being less likely than all-white juries to strive to protect, rather than punish, white defendants accused of hate crimes.¹⁵³ This may have been a problem with regard to the all-white jury in the state criminal prosecution of the white teens in the Luis Ramirez case.¹⁵⁴

Diverse juries are more likely to afford an impartial trial to minority defendants in criminal cases.¹⁵⁵ For similar reasons, the

148. 347 U.S. 483 (1954). See generally RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (2d ed. 2004).

149. See Eric Bleich, *The Rise of Hate Crime Laws in Liberal Democracies*, 37 J. ETHNIC & MINORITY STUD. 917, 927–29 (2011) (arguing that “judicious enforcement is . . . critical to the success” of hate crime laws).

150. See, e.g., Robert Walters & Mark Curriden, *A Jury of One’s Peers? Investigating Underrepresentation in Jury Venires*, JUDGES’ J., Fall 2004, at 17, 19 (describing the underrepresentation of Latina/os on jury venires in Dallas and Houston, Texas); Mark McDonald, *Why Few Latinos Serve on Juries: Only 1 in 5 Register to Vote*, PHIL. DAILY NEWS, Aug. 14, 1990, at 13 (describing similar phenomenon in Philadelphia).

151. See *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946) (emphasizing that “[t]he American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community”).

152. See *supra* text accompanying notes 96–99.

153. See Nancy S. Marder, *The Interplay of Race and False Claims of Jury Nullification*, 32 U. MICH. J.L. REF. 285, 321 (1999).

154. See *supra* text accompanying notes 96–99.

155. See, e.g., Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J.

decisions of representative juries are more likely to be accepted by the public at large, especially minority communities, as more legitimate than those of less representative juries.¹⁵⁶

Just as it has been for African Americans, the exclusion of Latina/os from jury service has been a longstanding problem in the United States. In the 1954 case of *Hernandez v. Texas*,¹⁵⁷ the Supreme Court held that U.S. citizens of Mexican ancestry could not be intentionally excluded from jury service on account of race and national origin.¹⁵⁸ However, Latina/os today are disproportionately excluded from jury service through more subtle mechanisms.

1. Policing Discriminatory Peremptory Challenges

The Supreme Court's landmark decision in *Batson v. Kentucky*¹⁵⁹ bars the use of peremptory challenges to strike prospective jurors on account of their race. After two decades of experience with various efforts to implement the decision, a large body of scholarly commentary has emerged concluding that *Batson's* application by state and federal courts has failed to end discriminatory jury strikes.¹⁶⁰

PERSONALITY & SOC. PSYCHOL. 597, 606 (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=940788 (finding that heterogeneous juries "deliberated longer and considered a wider range of information" than homogenous juries); see also William J. Bowers et al., *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant Is Black and the Victim Is White*, 53 DEPAUL L. REV. 1497, 1501 (2004) (finding, in a study of capital jury trials involving a black defendant and a white victim, that juries with no black male jurors imposed death sentences in more than seventy-one percent of cases, whereas when at least one African American served on the jury, a death penalty was imposed in less than forty-three percent of cases).

156. See JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 45 (1977) (opining that the "best way to minimize bias is to impanel a representative cross-section of the community; without such a cross-section, doubts about the jury's partiality will persist"); Jeffrey Abramson, *Two Ideals of Jury Deliberation*, 1998 U. CHI. LEGAL F. 125, 130-31 ("[O]nly a representative jury has the credentials to render a *legitimate* verdict acceptable to the entire community.").

157. 347 U.S. 475 (1954). See generally "COLORED MEN" AND "HOMBRES AQUÍ": *HERNANDEZ V. TEXAS* AND THE EMERGENCE OF MEXICAN-AMERICAN LAWYERING (Michael A. Olivas ed., 2006) (collecting essays critically analyzing the Supreme Court's decision in *Hernandez v. Texas*).

158. *Hernandez*, 347 U.S. at 479.

159. 476 U.S. 76 (1986); see *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991) (extending *Batson* to civil actions as well as criminal prosecutions).

160. See, e.g., Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 172-73 (1989) (arguing that *Batson* peremptory challenges are incompatible with the Equal Protection Clause); Symposium, *Batson at Twenty-Five: Perspectives on the Landmark, Reflections on Its Legacy*, 97 IOWA L. REV. 1393 (2012) (collecting scholarship on the applications of *Batson*); Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury*

One obstacle to impartial prosecution of hate crimes—as well as other criminal prosecutions implicating matters of race—is the failure to establish procedures that adequately police *Batson*'s ban on race-based strikes of jurors.¹⁶¹ *Batson* requires a party who challenges a peremptory strike to first establish “that the totality of the relevant facts gives rise to an inference of discriminatory purpose.”¹⁶² Once a *prima facie* case has been established, the burden shifts to the opposing party to proffer a nondiscriminatory justification for the peremptory challenge.¹⁶³ The court then must take into account “all relevant circumstances” and decide whether the strike was exercised with an intent to discriminate on the basis of race.¹⁶⁴

The implementation of *Batson* unfortunately has been hobbled by state court acceptance of peremptory strikes of prospective jurors when the prosecution's proffered justifications are highly correlated with race.¹⁶⁵ The Supreme Court at various times has intervened in an

Selection: Denying that Race Still Matters, 1994 WIS. L. REV. 511, 524–25 (arguing that the burdens of proving claims of racially motivated peremptory challenges are too great for *Batson* and its progeny to be effective); Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 REV. LITIG. 209, 214 (2003) (arguing that courts and attorneys have not effectively utilized anti-discrimination principles in applying the *Batson* doctrine); Alafair S. Burke, *Prosecutors and Peremptories*, 97 IOWA L. REV. 1467, 1473 (2012) (arguing that prosecutors should implement voluntary reforms to minimize the use of racially discriminatory peremptory challenges); Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 59 (1993) (arguing judges want to believe “racially neutral” reasons for peremptory strikes, rather than racially discriminatory reasons); Nancy Leong, *Civilizing Batson*, 97 IOWA L. REV. 1561, 1576 (2012) (arguing that *Batson* doctrine would be enriched if peremptory strikes were litigated civilly by struck jurors); see also *Rice v. Collins*, 546 U.S. 333, 343 (2006) (Breyer, J., concurring) (criticizing “*Batson*'s fundamental failings”).

161. See Carmina Ocampo, *No Justice for Vincent Then, No Justice for Luis Now*, NEW AM. MEDIA (May 8, 2009) http://news.newamericamedia.org/news/view_article.html?article_id=9e2048d40c455fde88d57b3f8e8819ca (noting the acquittals of white defendants by all-white juries in state hate crime prosecutions); see also Tania Tetlow, *Discriminatory Acquittal*, 18 WM. & MARY BILL RTS. J. 75, 78–79 (2009) (“When juries sanction lynchings, hate crimes, rape and domestic violence[,] ... they restrict the freedoms of crime victims and the communities to which they belong. Discriminatory acquittals send a message that government will provide less protection from violence based on race or gender.”).

162. *Batson*, 476 U.S. at 94.

163. See *id.* at 94, 97.

164. *Id.* at 96–97.

165. See, e.g., *State v. Bolton*, 49 P.3d 468, 479, 481 (Kan. 2002) (finding that the prosecutor's challenge of a potential juror who, like the African American defendant, had hair braided in “cornrows,” was race neutral even though “the vast majority of those with [cornrows] are African American”); *State v. Williams*, 97 S.W.3d 462, 471–72 (Mo. 2003) (allowing prospective juror to be struck on grounds of “physical appearance” when both he and the defendant were black). But see *McCormick v. State*, 803 N.E.2d 1108, 1110–11 (Ind. 2004) (holding that one of the prosecution's proffered reasons for a peremptory

attempt to ensure full compliance with *Batson*. For example, the Court rejected the California standard for establishing a prima facie case of purposeful discrimination in jury selection and held that it was more restrictive than required by *Batson*.¹⁶⁶ Similarly, in *Miller-El v. Dretke*,¹⁶⁷ the Court found that, in a state criminal case in which a conviction had been upheld by the Court of Criminal Appeals of Texas, the prosecution's striking of ten of eleven African American prospective jurors through peremptory challenges raised an inference of impermissible racial discrimination.¹⁶⁸

The outright abolition of peremptory strikes is one possible solution to the problem of discriminatory challenges.¹⁶⁹ The trial bar, however, stubbornly defends the continued availability of peremptory strikes in the hands of trial lawyers as an important tool in jury selection.¹⁷⁰

Offering a less drastic alternative to abolition, Professors Jeffrey Bellin and Junichi Semitsu opine that judges may be inhibited from finding a *Batson* violation because to do so in effect condemns lawyers who frequently appear before them of having violated the

strike—that an African-American venire member “would find it ‘difficult . . . passing judgment on . . . a member of ones [sic] own in the community’”—was not race neutral and that the prosecutor’s peremptory strike impermissibly tainted the entire jury selection process and entitled the defendant to a new trial).

166. See *Johnson v. California*, 545 U.S. 162, 173 (2005); see also *Snyder v. Louisiana*, 552 U.S. 472, 486 (2008) (reversing Louisiana Supreme Court’s failure to find a *Batson* violation in the use of peremptory challenges to strike African American jurors).

167. 545 U.S. 231 (2005). The Court explained that factors outside “the four corners of a given case” might be weighed, including statistical analysis of the jury pool, comparison of struck and empanelled jurors, disparate questioning, and evidence of historical discrimination, in determining whether the prosecutor had violated *Batson*. See *id.* at 240.

168. *Id.* at 265–66.

169. See *Batson*, 476 U.S. at 103 (Marshall, J., concurring); see also Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809, 812 (1997) (observing that “the peremptory challenge is inimical to our most fundamental precepts of an impartial jury”); Nancy S. Marder, *Batson Revisited*, 97 IOWA L. REV. 1585, 1607 (2012) (noting that “[t]he elimination of the peremptory would improve the jury process in several significant ways”); Theodore McMillian & Christopher J. Petrini, *Batson v. Kentucky: A Promise Unfulfilled*, 58 UMKC L. REV. 361, 374 (1990) (recommending “that the system of peremptory challenges be eliminated altogether”); Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1148 (1994) (proposing “that the government’s peremptory challenge in criminal cases . . . be abolished and replaced with an expanded for-cause system”).

170. See Tanya E. Coke, Note, *Lady Justice May Be Blind, But Is She a Soul Sister? Race-Neutrality and the Ideal of Representative Juries*, 69 N.Y.U. L. REV. 327, 376 (1994) (noting that “trial lawyers are loathe to give [peremptory challenges] up”).

U.S. Constitution.¹⁷¹ To minimize such inhibitions, they propose that courts require the attorney to rebut the inference of discriminatory motive by offering a more specific neutral and reasonable justification for a strike.¹⁷² Instead of requiring proof that the strike was a pretext for an intent to discriminate, the court should determine whether the strikes in their entirety, as well as voir dire selection patterns, rebut the inference of invidious discrimination.¹⁷³

Other proposals to help facilitate the impaneling of more representative juries are geared toward addressing unconscious racial bias by attorneys in jury selection and jurors in deciding cases.¹⁷⁴ They include judicial warnings about stereotyping before jury selection; the use of questionnaires that directly address implicit juror bias; and increased time for jury selection to help avoid undue reliance by attorneys on racial stereotypes.¹⁷⁵

In total, the law and policy surrounding peremptory challenges is in dire need of reform to better achieve the promise of *Batson*. Improvements could help address bias in jury selection, ensure more diverse juries to allow for more impartial prosecutions of hate crimes, and generally enhance the perceived legitimacy of jury verdicts.

2. Allowing Non-English Speakers to Serve on Juries

In 2009, more than one-fifth of the U.S. population over age five spoke a language other than English in the home.¹⁷⁶ As a consequence, the near-universal requirement in state and federal

171. Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1113–16 (2011).

172. *See id.* at 1121.

173. *See id.* at 1122.

174. Cf. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995) (explaining, in the context of Title VII claims, how stereotypes subtly influence adoption of discriminatory attitudes). *See generally* Charles L. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (contending that modern Equal Protection doctrine fails to adequately remedy unconscious racism).

175. *See* Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179, 1183–84 (2003); Jean Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the "Blind" Peremptory*, 29 U. MICH. J.L. REFORM 981, 1015–16 (1996).

176. U.S. CENSUS BUREAU, C16005, NATIVITY BY LANGUAGE SPOKEN AT HOME BY ABILITY TO SPEAK ENGLISH FOR THE POPULATION 5 YEARS AND OVER (2011), available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_1YR_C16005&prodType=table.

courts that a juror speak English¹⁷⁷ is an important obstacle to impaneling a jury that represents a true cross-section of the community.

Language in modern American society is highly correlated with race and national origin.¹⁷⁸ As one commentator has observed, discrimination based on language ability is “nothing less than discrimination on the basis of national origin.”¹⁷⁹ Requiring English language proficiency for jury service often disproportionately excludes Latina/os from service and contributes to their underrepresentation on juries.¹⁸⁰

To make matters worse, the Supreme Court, in a criminal prosecution of a Latino defendant, found that a prosecutor who used peremptory challenges to strike Spanish-speaking jurors on the grounds that they were bilingual (i.e., spoke Spanish as well as English) and might not adhere to the official translation of Spanish into English at the trial, did not run afoul of *Batson*.¹⁸¹ Obviously, allowing bilingual Spanish speakers to be removed from juries through peremptory challenges will likely result in fewer Latina/o jurors. Scholars, not surprisingly, have roundly criticized the decision.¹⁸²

There would, of course, be costs to allowing non-English speakers to serve on juries. Accurate and timely translations—and thus the employment of translators—would be necessary so that the jurors could understand the testimony and other evidence in the case. Using available translation technology might help to reduce costs.

177. See, e.g., 28 U.S.C. § 1865(b)(2)–(3) (2006) (requiring a juror to “read, write, and understand . . . English” and “speak the English language”).

178. See Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CALIF. L. REV. 863, 874 (1993) (“[T]he inability to speak English coincides neatly with race.”).

179. Stephen M. Cutler, *A Trait-Based Approach to National Origin Claims Under Title VII*, 94 YALE L.J. 1164, 1164, 1174–76, 1185 (1985).

180. See Hiroshi Furukai, *Critical Evaluations of Hispanic Participation on the Grand Jury: Key-Man Selection, Jurymantering, Language, and Representative Quotas*, 5 TEX. HISP. J.L. & POL’Y 7, 34–35, 39 (2002); Kevin R. Johnson, *Hernandez v. Texas: Legacies of Justice and Injustice*, 25 CHICANO-LATINO L. REV. 153, 189–91 (2005).

181. *Hernandez v. New York*, 500 U.S. 352, 352, 369 (1991) (plurality opinion); see, e.g., *Pemberthy v. Beyer*, 19 F.3d 857, 865 (3d Cir. 1994) (Alito, J., majority opinion).

182. For examples of such scholarship, see generally Marina Hsieh, “*Language-Qualifying*” Juries to Exclude Bilingual Speakers, 66 BROOK. L. REV. 1181 (2001); Miguel A. Méndez, *Hernandez: The Wrong Message at the Wrong Time*, 4 STAN. L. & POL’Y REV. 193 (1993); Juan F. Perea, *Hernandez v. New York: Courts, Prosecutors, and the Fear of Spanish*, 21 HOFSTRA L. REV. 1 (1992); Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 WIS. L. REV. 761.

Such technology is often employed in international meetings, as well as tribunals, involving participants who speak different languages. Translation of witness testimony into English is common. Any costs, however, would be outweighed by the benefits of more representative juries rendering more trusted and legitimate results, which are particularly important when deciding racially-charged matters such as hate crimes.

3. Noncitizen Jury Service

Approximately thirteen percent (forty million people) of the U.S. population is foreign-born, and fifty-six percent of this group are not U.S. citizens.¹⁸³ In the last decade, nearly half of the largest 100 metropolitan areas in the United States saw fifty percent increases in their foreign-born populations; nine metropolitan areas experienced an increase in the immigrant population of more than 100%, including Scranton-Wilkes-Barre, Pennsylvania, where the white defendants were tried for the beating death of Luis Ramirez.¹⁸⁴

Noncitizens today cannot serve on American juries.¹⁸⁵ This has not always been the rule. At one time, English law, and the law of some U.S. states, authorized juries in disputes between noncitizens to be comprised of an equal number of citizens and noncitizens.¹⁸⁶ The aim was to attempt to provide for impartial adjudication of disputes involving foreigners.

In important respects, jury service, like voting, epitomizes the nation's robust commitment to democratic institutions.¹⁸⁷ Until the early twentieth century, noncitizens in many states enjoyed the right to vote.¹⁸⁸ Several municipalities in modern times have returned to

183. See U.S. CENSUS BUREAU, THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2010, at 1–2 (May 2012), <http://www.census.gov/prod/2012pubs/acs-19.pdf>.

184. See Nate Berg, *Suburbia: Land of Immigrants*, THE ATLANTIC CITIES (Oct. 18, 2011), <http://www.theatlanticcities.com/neighborhoods/2011/10/suburbia-land-of-immigrants/309/>.

185. See 28 U.S.C. § 1865(b)(1) (2006) (requiring a juror to be “a citizen of the United States”).

186. See generally Lewis H. LaRue, *A Jury of One's Peers*, 33 WASH. & LEE L. REV. 841, 848–51 (1976) (discussing the inclusion of Jewish aliens as jurors in English courts in the thirteenth and fourteenth centuries); Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury de Medietate Linguae: A History and a Proposal for Change*, 74 B.U. L. REV. 777, 783–89 (1994) (discussing the history of the use of the mixed jury in England).

187. See Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 217–54 (1995) (arguing that jury service, like voting, is a political, rather than a civil, right).

188. See Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 LAW & INEQUALITY 271, 273 (2000); Jamin B. Raskin,

allowing noncitizen residents to vote in school district elections.¹⁸⁹

Allowing noncitizens who meet certain requirements—such as a certain duration of residency—to serve on juries would allow for juries to be far more representative of the community, which includes noncitizens, than juries currently are. More inclusive juror eligibility also would allow a larger percentage of the Latina/o population to be eligible for jury service. Better community representation also might help promote the impartiality of juries as well as improve the perceived legitimacy of their decisions,¹⁹⁰ a particularly important matter in racially charged hate crime prosecutions.

D. Federal, State, and Local Responses to Hate Crimes

1. Federal Responses

After the state prosecution failed to bring justice to the men who killed Luis Ramirez, the U.S. government stepped in to prosecute them, as well as police officers involved in an alleged cover-up.¹⁹¹ Although the prosecutions ultimately met with mixed success, the federal government's intervention ensured some modicum of adherence to the rule of law. It also demonstrated to the affected communities that the U.S. government was committed to prosecute the perpetrators of hate crimes.

Federal prosecutions, like those pursued in the aftermath of the failed state prosecution of Luis Ramirez,¹⁹² can help attempt to bring to justice the perpetrators of hate crimes when the states prove unable to do so. Several other contemporary federal prosecutions involving alleged police misconduct in the treatment of Latina/os drive this point home.¹⁹³

Legal Aliens, Local Citizens: The Historical, Constitutional, and Theoretical Meanings of Alien Suffrage, 141 U. PA. L. REV. 1391, 1395 (1993).

189. See Tara Kini, Comment, *Sharing the Vote: Noncitizen Voting Rights in Local School Board Elections*, 93 CALIF. L. REV. 271, 271 n.1 (2005). See generally RON HAYDUK, *DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES* (2006) (arguing for the extension of the vote to noncitizen residents).

190. See *supra* notes 149–57 and accompanying text.

191. See *supra* Part II.B.

192. The U.S. government also has challenged state laws that arguably infringe on the civil rights of immigrants and minorities. See *supra* note 28 and accompanying text.

193. Claims of police abuse are different from hate crimes but, in certain instances, may touch on similar racially charged issues. See Daniel B. Woods, *Why Anaheim, Known for Disney and the Angels, Erupted in Violence this Week*, CHRISTIAN SCI. MONITOR (July 26, 2012), <http://www.csmonitor.com/USA/2012/0726/Why-Anaheim-Known-for-Disney-and-the-Angels-erupted-in-violence-this-week> (analyzing protests in Anaheim, California, after fatal shooting by police of young Latino man inflamed racial tensions in the community).

In 2012, the Justice Department indicted four East Haven, Connecticut, police officers for years of systematically violating the civil rights of Latina/os and immigrants.¹⁹⁴ Until recently, one might have wondered why there had not been much federal attention paid to the well-publicized civil rights abuses by the Maricopa County Sheriff's Office in Arizona, led by the controversial Sheriff Joe Arpaio.¹⁹⁵ In late 2011, the Department of Justice issued a stinging report documenting the rampant violation of civil rights of immigrants and Latina/os in Maricopa County.¹⁹⁶ The report further found a "pervasive culture of discriminatory bias against Latinos [in the Maricopa County Sheriff's Office] that reaches the highest levels of the agency."¹⁹⁷ The Justice Department ultimately filed a civil rights action against the Office and Sheriff Arpaio for an alleged pattern and practice of civil rights violations.¹⁹⁸

Scholars have recognized similarities between hate crimes and crimes against humanity, which have been subject to high-profile prosecutions in international tribunals. In both instances, the acts of violence are "made possible by group encouragement [with] each bias crime encourag[ing] further acts of violence."¹⁹⁹ Hate crimes reinforce discrimination against unpopular groups and invite broader social

194. See Peter Applebome, *Police Gang Tyrannized Latinos, Indictment Says*, N.Y. TIMES, Jan. 25, 2012, at A1.

195. See, e.g., Romero, *supra* note 50, at 349–52; William Finnegan, *Sheriff Joe*, THE NEW YORKER, July 20, 2009, at 42.

196. See Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice Civil Rights Div., to Bill Montgomery, Maricopa Cnty. Att'y (Dec. 15, 2011) [hereinafter Perez, Maricopa County Letter]. Similarly, the Department of Justice has alleged that the Alamance County Sheriff's Department in North Carolina engaged in widespread civil rights violations of Latina/os and immigrants. See Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice Civil Rights Div., to Clyde Albright, Cnty. Att'y, Alamance County, and Chuck Kitchen, Turrentine Law Firm (Sept. 18, 2012), <http://www.justice.gov/iso/opa/resources/171201291812462488198.pdf>; David Zucchino, *Sheriff's Treatment of Latinos Splits Town; A North Carolina Lawman Practices Discriminatory Policing, the Justice Department Says*, L.A. TIMES, Nov. 24, 2012, at A13.

197. Perez, Maricopa County Letter, *supra* note 196, at 10.

198. See Complaint, United States v. Maricopa County, No. 2:12-CV-00981-LOA (D. Ariz. May 10, 2012). The complaint was later dismissed. Order, United States v. Maricopa County, No. CV-12-00981-PHX-ROS (D. Ariz. Dec. 12, 2012). In July 2012, Arpaio and the Maricopa County Sheriff's Office stood trial in a civil rights class action for allegedly engaging in a pattern and practice of racial profiling of Latina/os in ordinary criminal law and immigration enforcement. See Fernanda Santos, *Confronted in Court with His Own Words, Sheriff Denies Profiling*, N.Y. TIMES, July 25, 2012, at A11.

199. See Allison Marston Danner, *Bias Crimes and Crimes Against Humanity: Culpability in Context*, 6 BUFF. CRIM. L. REV. 389, 418 (2002).

acceptance of violence against the most vulnerable in society.²⁰⁰ Consistent with this view, the Supreme Court upheld a penalty enhancement for hate crimes, reasoning that the targeting of individuals on the basis of race is especially worthy of condemnation and punishment.²⁰¹

Recall that defense attorneys portrayed the violence against Luis Ramirez as nothing more than a street fight gone awry with police officers accused of acting to protect the “innocent” teens charged with the homicide.²⁰² This seemingly rational explanation of the gruesome—and deadly—beating helps legitimize nothing less than pathological violence. “[W]hen a bias-motivated crime is seen as being ‘rational’ in some way, the bias required for condemnation becomes invisible.”²⁰³

Besides increased federal prosecutions, a reinvigorated U.S. Commission on Civil Rights,²⁰⁴ which was created under the Civil Rights Act of 1957 as part of the efforts to protect the civil rights of minorities,²⁰⁵ could help to effectively address hate crimes. Increased funding for investigations by the Commission, in collaboration with

200. See *id.* at 405–06, 418–19, 432; Lu-in Wang, *The Transforming Power of “Hate”: Social Cognition Theory and the Harms of Bias-Related Crime*, 71 S. CAL. L. REV. 47, 115, 125 (1997).

201. See *Wisconsin v. Mitchell*, 508 U.S. 476, 487–88 (1993).

202. See *supra* text accompanying notes 96–99.

203. Lu-in Wang, “Suitable Targets”? *Parallels and Connections Between “Hate” Crimes and “Driving While Black”*, 6 MICH. J. RACE & L. 209, 216 (2001). For analysis of the dehumanization of victims of the violence directed at Arabs and Muslims after September 11, 2001, that made their treatment appear rational and justifiable, see Ahmad, *supra* note 4, at 1265–77, 1295, and Ong Hing, *supra* note 14, at 442–44.

204. For a history of the U.S. Commission on Civil Rights, and stinging criticism of President George W. Bush for his efforts to stifle the commission from investigating potential civil rights violations, see generally MARY FRANCES BERRY, AND JUSTICE FOR ALL: THE UNITED STATES COMMISSION ON CIVIL RIGHTS AND THE CONTINUING STRUGGLE FOR FREEDOM IN AMERICA (2009). Because of the politicization of the Commission by several presidential administrations, one civil rights organization called for the formation of a new commission on civil and human rights. See THE LEADERSHIP CONFERENCE, RESTORING THE CONSCIENCE OF A NATION: A REPORT ON THE U.S. COMMISSION ON CIVIL RIGHTS 42–45 (2009), available at <http://www.civilrights.org/publications/reports/commission/>. See generally Debate, *The Future of the United States Commission on Civil Rights*, 159 U. PA. L. REV. PENNUMBRA 127 (2010) (discussing whether Commission’s mandate should be expanded to include human rights); Jocelyn C. Frye et al., Comment, *The Rise and Fall of the Commission on Civil Rights*, 22 HARV. C.R.-C.L. L. REV. 449 (1987) (analyzing controversy over Commission’s work during the Reagan administration). But see Kenneth L. Marcus, *The Right Frontier for Civil Rights Reform*, 19 GEO. MASON U. C.R. L.J. 77 (2009) (defending Commission’s positions in opposition to affirmative action during Bush administration).

205. Pub. L. No. 85-315, 71 Stat. 634 (codified as amended in scattered sections of 42 U.S.C.). See generally FOSTER RHEA DULLES, THE CIVIL RIGHTS COMMISSION: 1957–1965 (1968) (describing the history of the Civil Rights Commission).

federal law enforcement authorities, could assist in remedying the failure of local law enforcement to effectively police and better deter hate crimes.²⁰⁶ In addition, making hate crimes a priority of the Commission in terms of investigations, reporting, and recommendations would do much to bring hate crimes into the national eye. Such actions by the Commission also might help foster a renewed national, state, and local community dialogue on how to provide relief in cases involving the violation of the civil rights of immigrants and Latina/os.

A reinvigorated Commission could create a standard online reporting form and database to streamline complaint and investigation management. It could also provide clear standards to help fund potential hate crime victims, and communities and local human rights commissions.²⁰⁷ A newly reinvigorated Commission could also hold regular review meetings with the federal, state, and local law enforcement authorities, as well as immigrant rights and civil rights advocates, to review quarterly hate crime statistics, and identify common criminal patterns where they do exist. The Commission could also fund full-scale investigations in communities with high rates of hate violence, making recommendations based on restorative justice principles.²⁰⁸

2. State and Local Responses

Solutions for broader community engagement, such as local civil and human rights commissions, could also help combat hate crimes. A growing number of cities and counties have created commissions to

206. The Commission has issued informative reports on immigration and related civil rights matters. See, e.g., ARIZ. ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, TRAGEDY ALONG THE ARIZONA-MEXICO BORDER: UNDOCUMENTED IMMIGRANTS FACE THE DESERT (Aug. 23, 2002), <http://www.law.umaryland.edu/marshall/usccr/documents/cr182t67b.pdf>; U.S. COMM'N ON CIVIL RIGHTS, BRIEFING ON BOUNDARIES OF JUSTICE: IMMIGRATION POLICIES POST-SEPTEMBER 11TH (Oct. 12, 2001), <http://www.law.umaryland.edu/marshall/usccr/documents/cr182im6.pdf>. Alternatively, truth commissions on the hate killings of Latina/os and immigrants might also be a possibility. Professor Sherrilyn A. Ifill has called for a truth and reconciliation commission to investigate the lynchings of African Americans in the United States. See Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 LAW & INEQUALITY 263, 271-72 (2003).

207. See *infra* Part III.D.2.

208. See generally Robert B. Coates et al., *Responding to Hate Crimes Through Restorative Justice Dialogue*, 9 CONTEMP. JUST. REV. 7 (2006) (reporting on a two-year study of communities that use restorative justice principles to deal with hate crimes); Theo Gavrielides, *Contextualizing Restorative Justice for Hate Crime*, 27 J. INTERPERSONAL VIOLENCE 3624 (2012) (analyzing the efficacy of restorative justice principles to deal with certain types of hate crimes).

investigate hate crimes.²⁰⁹ Such institutions raise public awareness of these crimes, help push communities to change discriminatory policies and practices, and create a space for dialogue that may facilitate the healing of communities from the social trauma caused by hate violence.

The San Francisco Human Rights Commission has a division known as the San Francisco Coalition Against Hate Violence²¹⁰ that documents hate crimes.²¹¹ Eugene, Oregon's Human Rights Commission²¹² launched the Human Rights City Project to address hate crimes and protect immigrant rights.²¹³ The Los Angeles County Human Relations Commission also focuses on hate crimes.²¹⁴ Its experience is illustrative. In 2010, there were fifteen hate crime reports against Latina/os and forty-five against Mexicans.²¹⁵ Twenty crimes included anti-immigrant slurs, including a familiar one—"Go back to Mexico."²¹⁶ In one incident, a suspect attacked a Latino family, yelling, "I'll be right back with a strap to kill all ya'll fuckin' wetbacks."²¹⁷ In another incident, a suspect screamed at the employees in a Taco Bell: "Fuck you, Mexicans! You're the beaner that's taking the Americans' money and their jobs. Go back to your

209. See, e.g., *Equity and Human Rights*, CITY OF EUGENE, OR, <http://www.eugene-or.gov/index.aspx?NID=525> (last visited May 7, 2013); *Hate Crimes Project*, L.A. CNTY. COMM'N ON HUMAN RELATIONS, <http://www.lahumanrelations.org/about/index.htm> (last visited May 7, 2013); *Maryland Human Rights Commission*, MONTGOMERY CNTY. OFFICE OF HUMAN RIGHTS, <http://www.montgomerycountymd.gov/humanrights/index.html> (last visited May 7, 2013); *San Francisco Coalition Against Hate Violence*, S.F. HUMAN RIGHTS COMM'N, <http://www.sf-hrc.org/index.aspx?page=130> (last visited May 7, 2013); see also Lesley Wexler, *The Promise and Limits of Local Human Rights Internationalism*, 37 FORDHAM URB. L.J. 599, 620 (2010) (noting that Eugene, Oregon, had designated itself a "human rights city").

210. See *San Francisco Coalition Against Hate Violence*, *supra* note 209.

211. See *Special Investigations Div: Hate Crimes Stats 2011*, S.F. POLICE DEP'T, <http://www.sf-police.org/index.aspx?page=3750> (last visited May 7, 2013); *Special Investigations Div: Hate Crimes Stats 2010*, S.F. POLICE DEP'T, <http://www.sf-police.org/index.aspx?page=3379> (last visited May 7, 2013). The Commission also oversees compliance with the municipal ordinance prohibiting municipal support to U.S. immigration authorities. See *Sanctuary City Ordinance*, S.F., CAL., ADMIN. CODE 12H, available at <http://www.sfgsa.org/index.aspx?page=1069>.

212. See *Human Rights Commission*, CITY OF EUGENE, OR, <http://www.eugene-or.gov/index.aspx?NID=526> (last visited May 7, 2013).

213. See "What Is the 'Human Rights City Project'?", THE HUMAN RIGHTS CITY PROJECT, EUGENE, OR, <http://www.humanrightscity.com> (last visited May 7, 2013).

214. See L.A. CNTY. COMM'N ON HUMAN RELATIONS, 2010 HATE CRIME REPORT, http://lahumanrelations.org/hatecrime/reports/2010_hateCrimeReport.pdf.

215. *Id.* at 9.

216. *Id.* at 21.

217. *Id.* at 22.

country!”²¹⁸

Documentation by local human and civil rights commissions can help shed light on how hate speech often legitimizes violence against Latina/o and immigrant communities. Such commissions can also create a meaningful space for communities to attempt to grapple with hate crimes at the local level. In short, state and local, as well as federal, efforts to shed light on civil rights abuses and hate crimes of immigrants and Latina/os are necessary. Continued vigilance is essential as the tensions of race and class that give rise to hate crimes are unlikely to be remedied in the near future.

CONCLUSION

The new millennium has seen consistently high levels of hate crimes against Latina/os and immigrants.²¹⁹ The killing of Luis Ramirez, an immigrant from Mexico, in the small town of Shenandoah, Pennsylvania, is just one extremely disturbing example.²²⁰ As discussed in this Article, this and other tragic killings of Latina/o immigrants have occurred as an indirect result of the volatile national debate over immigration filled with violent rhetoric, new settlement patterns of Latina/o immigrants, and the passage of immigration enforcement laws by a growing number of states.

This Article has discussed measures designed to reduce, remedy, and deter hate violence against Latina/os and immigrants.²²¹ Many of them draw on lessons from the measures taken to dismantle Jim Crow. They include a clearer demarcation of federal versus state power over immigration regulation, criminal justice reforms that directly seek to promote more fair and impartial adjudication in “race trials,” increased federal prosecutions of hate crimes, the reinvigoration of the U.S. Commission on Civil Rights, and the creation of local human rights commissions to investigate hate crimes.

More generally, congressional enactment of comprehensive immigration reform²²² could help transform the national debate over immigration from one defined by rhetorical violence against Latina/os and immigrants, which creates an environment in which hate crimes thrive, to a constructive national conversation about how to create a more civil society composed of diverse peoples. Unless the United

218. *Id.*

219. *See supra* Part I.B.

220. *See supra* Part II.

221. *See supra* Part III.

222. *See supra* Part III.A.

States acts aggressively in a timely manner, the nation unfortunately can expect the high-pitched debate over immigration, and the multifaceted violent responses to immigrants and Latina/os, to continue.