

RESPONSE

THE REASONABLE LATINX: A RESPONSE TO PROFESSOR HENNING'S *THE REASONABLE BLACK CHILD: RACE, ADOLESCENCE, AND THE FOURTH AMENDMENT*

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In her article, The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment, Professor Kristin Henning makes a compelling argument for reconceptualizing that Amendment's "reasonable person" standard to better protect black youth. Professor Henning shows how the reasonable person standard has long been artificially narrow and selectively objective. She then explains how this approach to the standard has stunted the body of law rooted in the reasonable person doctrine, by failing to take into account both advances in science and the experiences of black people. Professor Henning describes how these doctrinal dynamics play out in police interactions with black youth, including how they cause unnecessary harm and disproportionate involvement with the criminal justice system. Professor Henning urges us to build on the Supreme Court's holding in J.D.B. v. North Carolina by expanding the "reasonable juvenile" concept to include the race of the child as well. Professor Henning anticipates and effectively counters objections to her proposal, including the argument that her proposal will lead to the "slippery slope" of an unlimited and presumably unmanageable number of standards courts must apply when determining Fourth Amendment reasonableness. Professor Henning ends by offering concrete steps that courts and police agencies can take to reconceptualize the reasonable person standard.

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Professor Henning is correct that we need to reconceptualize the reasonable person standard by requiring courts to more explicitly and meaningfully consider race. This Response argues that, as we do so, we can and should urge police and courts to explicitly consider Latinx ethnicity as well. This Response begins by arguing that considering all relevant demographic characteristics is in keeping with proper application of the Fourth Amendment reasonable person standard (at least in those contexts discussed in Professor Henning’s Article), as is clear when the import of the “totality of the circumstances” test is fully considered. Thus, considering Latinx ethnicity as well as race is not an expansion of Professor Henning’s proposal, notwithstanding the “slippery slope” objectors.

This Response then argues that we should specifically consider Latinx interactions with and treatment by the police, rather than subsuming ethnicity into race, as is often done when considering Latinx in the United States, particularly in the criminal justice context. The Response explains how this tendency has both reflected and contributed to a lack of data and analysis about the involvement of Latinx in the criminal justice system, including the impact of policing on Latinx.

Finally, this Response argues that greater understanding and explicit consideration of Latinx treatment by the police is long overdue and urgently needed. Latinx are a large segment of the United States population—nearly one in five people in the United States is Latinx, making Latinx, behind whites, the largest racial or ethnic group in American—and there is reason to believe they are disproportionately policed. In addition, erasing Latinx ethnicity masks disparities between black and white people in the criminal justice system. Moreover, while in some respects the experience of Latinx vis a vis the police overlaps with or is similar to the experience of African Americans and the police, the Latinx experience is unique. Addressing police-related concerns of African Americans thus is unlikely to fully address the police-related concerns of Latinx. Finally, the long history of mistreatment of Latinx by United States law enforcement, alongside the current anti-Latinx climate, underscores both the chronic and acute need for a more complete understanding of treatment of Latinx by the police.

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INTRODUCTION

Professor Kristin Henning's compelling article, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, provides a close examination of how both bias and the circumstances surrounding the lives of many black children shape how they perceive the police and how the police perceive them.¹ Professor Henning demonstrates that the law does not uniformly acknowledge the realities of these interactions and that this, in turn, contributes to disproportionate police intrusion and related disproportionate involvement with the criminal justice system among black youth.

To correct this, Professor Henning argues, courts should explicitly consider race and age in deciding whether a black child is behaving suspiciously enough to justify a police stop or search; whether a black child has consented to a search; and the level of threat posed by a black child. This, Professor Henning argues, would compel courts to take into account the relevant science—including research regarding juvenile brain development,² reaction to authority,³ and implicit bias⁴—and to “consider the commonsense judgments and inferences

1. See Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 AM. U. L. REV. 1513 (2018).

2. See *id.* at 1523–24 (discussing adolescents' particular vulnerability to coercion).

3. See *id.* at 1522 (explaining that few adults or children feel free to leave when an officer approaches, despite the legal right to do so).

4. See *id.* at 1543–47 (analyzing the ways implicit racial biases negatively affect officers' encounters with black youth, including a belief that they are dangerous, older, and more culpable).

that flow readily from the unique interplay between race and adolescence in the typical police-youth encounter.”⁵

The purpose of this Response is to underscore generally this appropriately expansive nature of Professor Henning’s proposal, and to highlight the need for courts to specifically consider Latinx ethnicity as well as race. Including consideration of Latinx ethnicity is not an expansion of Professor Henning’s proposal at all, much less an expansion that would warrant the “slippery slope” objection Professor Henning anticipates. When we read Professor Henning’s article as she means it to be read—as a call to break free from the historical mire that uplifts whiteness at the center of Fourth Amendment reasonableness when evaluating significant police encounters—we see that courts should consider not only race and age, but also, where applicable, ethnicity, national origin, and religion.

The need to consider more completely and specifically Latinx treatment by police is both long overdue and urgently needed. We have had a tendency to subsume ethnicity into race when considering Latinx in the United States, especially in the criminal justice context. This both reflects and perpetuates a lack of data and analysis about the involvement of Latinx in the criminal justice system, including interactions with police. While a similar Response could be written regarding other demographic cohorts, this Response focuses on Latinx for several reasons. First, Latinx are a very large segment of the United States population—nearly one in five people in the United States is Latinx, making Latinx, behind whites,⁶ the largest racial or ethnic group in America.⁷ There is reason to believe that this very large group is disproportionately policed. Second, erasing Latinx ethnicity masks disparities between black and white people in the criminal justice system and may make it more difficult for African Americans and Latinx to work together towards less harmful treatment by police. Third, while in some respects the Latinx experience vis-à-vis the police overlaps with or is essentially identical to the experiences of African Americans and police, in other respects the Latinx experience is

5. *Id.* at 1518.

6. Unless otherwise noted, “white” in this article will be used to reference non-Latinx white people.

7. *Facts for Features: Hispanic Heritage Month 2017*, U.S. CENSUS BUREAU, <https://www.census.gov/newsroom/facts-for-features/2017/hispanic-heritage.html> (last visited May 20, 2019); Antonio Flores, *How the U.S. Hispanic Population is Changing*, PEW RES. CTR. (Sept. 18, 2017), <http://www.pewresearch.org/fact-tank/2017/09/18/how-the-u-s-hispanic-population-is-changing>.

unique. Thus, addressing police-related concerns of African Americans is unlikely to fully address the police-related concerns of Latinx. Finally, the current anti-Latinx climate in the United States, combined with a history of law enforcement complicity in anti-Latinx discrimination and abuse, underscores that an explicit accounting of Latinx treatment by police is both long overdue and urgently needed.

I. PROFESSOR HENNING'S PROPOSAL FOR MAKING RACE AND AGE SALIENT IN THE CRIMINAL JUSTICE CONTEXT

A. *Making the Reasonable Person Standard Reasonable*

Professor Henning's article is an important contribution to our understanding of how legal standards shape police interactions with children in ways that, while neutral on the surface, are in fact deeply imbued with cultural biases and assumptions. Professor Henning seeks to make the law more sensible and equitable by exposing and modifying the "reasonable person" standard, which is putatively objective, but in fact shaped by highly subjective—and narrow—experiences.

The law has long applied a "reasonable man" standard to gauge the reasonableness of human conduct in a variety of legal contexts.⁸ In recent decades, the law has nominally shifted to a "reasonable person" standard, a nod to the flat erasure of half the human population built into the original standard. Although the terminology has shifted for the most part,⁹ the legal reasonableness of human behavior generally

8. See, e.g., Henning, *supra* note 1, at 1520 (stating that this was the original term to describe the "norms of dominate groups in society"); see also Ronald K.L. Collins, *Language, History and the Legal Process: A Profile of the "Reasonable Man,"* 8 RUTGERS-CAM. L.J. 311, 312–13 (1977) (indicating that the term originated at least 180 years ago).

9. See Robert S. Adler & Ellen R. Peirce, *The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 FORDHAM L. REV. 773, 807 n.212 (1993) (citing as informal evidence of the shift from "reasonable man" to "reasonable person" the fact that a Lexis search for the term "reasonable person" in federal appeals court opinions published after 1990 was not allowed to proceed because it would have retrieved more than 1000 cases, while the same search for "reasonable man" found only 86 cases). My research assistant's search of Supreme Court cases found that the most recent use of this term, outside of a direct quotation, was by Justice Roberts in *Heien v. North Carolina*. 135 S. Ct. 530, 536 (2014). There, Justice Roberts was referring back to a quotation he cited from a 1949 Supreme Court Case. *Id.* (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)). Justice Thomas similarly referred to the "reasonable man" in *Thompson v. Keohane*, in response to prior quotations using this term. 516 U.S. 99, 119 (1995). It appears that the most recent usage of the term on its own was in an opinion by Justice Blackman in 1988, in the case of *Michigan v. Chesternut*. 486 U.S. 567, 574 (1988).

continues to be measured against a benchmark that is male, adult, white, and entitled. This is illustrated in part by the fact that although the nominal standard has changed from “reasonable man” to “reasonable person,” some advocates and courts still ask for and apply a “reasonable woman” standard in cases involving sexual harassment and sexual assault.¹⁰ It is not clear that renaming the standard in these cases has expanded the underlying thinking.¹¹ While language matters, it is insufficient on its own to ensure more expansive or nuanced analyses that take into account a broader range of experiences.

A line of Supreme Court cases regarding legal treatment of children has raised the possibility that courts may be increasingly open to more realistic interpretations of certain constitutional criminal procedure standards. Most recently, in *J.D.B. v. North Carolina*,¹² the Supreme Court held that courts should explicitly consider age when deciding whether an individual is in “custody.”¹³ Under *Miranda v. Arizona*,¹⁴ being “in custody” triggers several individual rights and concomitant restrictions on police.¹⁵ Although limited to age, *J.D.B.* offers the promise that the perspectives and experiences of marginalized individuals and communities may play an increasing role in informing application of standards central to constitutional criminal procedure. Professor Henning’s proposal seeks to actualize this promise.

10. See, e.g., *Fuller v. Idaho Dep’t of Corr.*, 865 F.3d 1154, 1161–62 (9th Cir. 2017) (applying the “reasonable woman” standard in a case where a female employee was sexually assaulted by a male co-worker); *Van v. Black Angus Steakhouses, LLC*, No. 5:17-cv-06329-EJD, 2018 WL 6069815, at *8 (N.D. Cal. Nov. 20, 2018) (finding that in sexual harassment cases “the working environment must be ‘subjectively and objectively perceived as abusive,’ and the objective analysis is done ‘from the perspective of a reasonable’ woman” (quoting *Fuller*, 865 F.3d at 1161)); *Deresky v. B.J. McGlone & Co.*, No. 14-1930, 2018 WL 3425731, at *13 (D.N.J. July 16, 2018) (applying the “reasonable woman” standard in a sexual harassment case); see also Elissa L. Perry et al., *The Reasonable Woman Standard: Effects on Sexual Harassment Court Decisions*, 28 L. & HUM. BEHAV. 9, 11 (2004) (pointing out that the “reasonable woman” standard is used because men and women recognize harassment in different ways); Elizabeth L. Schoenfelt et al., *Reasonable Person versus Reasonable Woman: Does It Matter?*, 10 AM. U. J. GENDER, SOC. POL’Y & L. 633, 647–48 (2002) (discussing that some courts have used the “reasonable woman” standard because the “reasonable person” standard may be “prejudicial to women”).

11. See, e.g., Schoenfelt et al., *supra* note 10, at 663–65 (conducting a study regarding the perceptions of jurors and finding no statistically significant difference in jurors’ perceptions of whether sexual harassment had occurred when applying the two standards).

12. 564 U.S. 261 (2011).

13. *Id.* at 277.

14. 384 U.S. 436 (1966).

15. See *id.* at 478–79 (describing the protections afforded to an individual who is taken into police custody, such as the right to remain silent and to have an attorney present).

Professor Henning proposes that we build on *J.D.B.* by *requiring* that both police officers and courts *explicitly consider* race and age in deciding: (1) whether police intrusion is justified; and (2) whether individuals meaningfully consented to police intrusion.¹⁶ She writes, for example, that “[t]o meaningfully account for [age and other relevant factors], courts should make explicit findings on the record concerning the effect of both race and relative immaturity on the voluntariness of the suspect’s consent.”¹⁷ Professor Henning makes clear throughout that this change in application of the standard is required not as a favor to black children but *to ensure that law is evidence-based and keeps up with science*.¹⁸ Professor Henning is not asking us literally to rename the reasonable person standard; she is asking instead for a change in thinking that is more profound, and perhaps even more difficult to achieve.

Professor Henning makes clear that this reconceptualization requires not only more sensibly applying the “reasonable person” standard, but also the “totality of circumstances” standard. She discusses the totality of circumstances test throughout her article¹⁹ and writes that she is not asking “courts to abandon the totality of the circumstances test altogether, but instead to refine the boundaries of that standard given what we now know about adolescent development, implicit racial bias, and the realities of police-black relations.”²⁰

Another critically-important piece of Professor Henning’s article is its argument that police will never recognize the salience of factors like race and age, and change their behavior accordingly, without “department-wide cultural shifts” that require “training, sustained professional development, police accountability, and positive community engagement with black youth.”²¹ Nominal legal standards are an important piece of shaping police culture, but as Professor

16. See Henning, *supra* note 1, at 1538, 1541.

17. *Id.* at 1538.

18. See, e.g., *id.* at 1543–47 (discussing the science of implicit bias and its impact on police decision-making).

19. See, e.g., *id.* at 1548 (arguing that, as currently used, the totality of the circumstances standard sanitizes racial considerations so as to allow officers to infer criminal intent from innocuous facts); *id.* at 1516–17 (marshaling the totality of circumstances test to show that black male teenagers fleeing police may *not* reflect consciousness of guilt); *id.* at 1535 (arguing that the totality of circumstances test is well suited to take into account subjective factors like age, education, intelligence, and knowledge of constitutional rights).

20. *Id.* at 1568.

21. *Id.* at 1571.

Henning's article underscores, courts and police are engaged in the iterative production of policing, with legal standards both reflecting and defining our view of the role of police.²² Legal standards influence department training and policies, and department training and policies shape how legal standards are applied in practice.²³ These practices have predictable consequences that both influence our concept of the criminal justice system and create and maintain police culture.

Thus, the essence of Professor Henning's argument is that police and judges must first understand and acknowledge the relevance and impact of factors like race and age in police interactions, and then make consideration of these factors explicit in Fourth Amendment analysis—both in applying the reasonable person standard and the totality of circumstances test.²⁴

B. *The Slippery Slope Objection*

Professor Henning anticipates several objections to her proposal and preemptively responds. One of those objections is that of the “slippery slope.”²⁵ This objection posits that the same rationale that Professor Henning uses in support of her argument for a reasonable black child standard might also apply to other racial and ethnic minorities, “most notably Latino Americans and Muslim Americans, given the current political backlash against immigrants.”²⁶ Therefore, Professor Henning's proposed standard opens the door to a “slippery slope,” in which the legal world is burdened with contending with the untidy world of diversity to account for the “unique experiences of other demographic groups.”²⁷ Playing the devil's advocate, Professor Henning asks rhetorically, “Must there be a reasonable Asian child standard? A reasonable Asian adult standard? Should the standard be different for black males and black women? Should the standard be different for black children and black adults?”²⁸

The slippery slope is a red herring. We are only on this figurative slope (with a figurative fish) because we stubbornly cling to the myth that a “reasonable person” is an objective reality. This, of course, is not

22. See generally *id.*; see also Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 776–81 (2012).

23. Henning, *supra* note 1, at 1572.

24. *Id.* at 1519.

25. *Id.* at 1570–71.

26. *Id.* at 1570.

27. *Id.* at 1570–71.

28. *Id.* at 1571.

the case, as many scholars and courts have recognized. The “reasonable person” is a heuristic—a device—that should help us apply the law in a way that reflects agreed-upon norms and is consistent, current, and fair, rather than arbitrary, political, or biased.²⁹ Applied properly, as Professor Victoria Nourse has written, the reasonable person standard should allow us to apply a hybrid subjective/objective standard that “takes into account the characteristics of a particular defendant while at the same time offering normative guidance.”³⁰

When we understand the reasonable person standard in this way, we begin to see that the real work applying the Fourth Amendment in the criminal procedure context is done by the “totality of the circumstances” test, which requires courts to consider *all* the circumstances that led to a particular decision or action implicating the Fourth Amendment.³¹ The totality of the circumstances test is employed in tandem with the reasonable person standard in a variety of Fourth Amendment contexts. Courts apply the totality of the circumstances test to determine, for example, whether a police officer has reasonable suspicion to conduct a *Terry* stop or has probable cause to arrest, and when a reasonable person should be deemed to have consented to police intrusion, or was seized.³² Properly applied, it

29. See Victoria Nourse, *After the Reasonable Man: Getting over the Subjectivity/Objectivity Question*, 11 NEW CRIM. L. REV. 33, 34 (2008) (describing how the reasonable person standard moderates majoritarian societal expectations); see also Adler & Peirce, *supra* note 9, at 807 (describing the reasonable man as an embodiment of the “shortcomings and weaknesses” that one’s society tolerates).

30. Henning, *supra* note 1, at 1534; see also Nourse, *supra* note 29, at 36 (arguing that a hybrid test reflects the “common sense” belief that no one wants a completely objective or subjective standard).

31. See *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (noting that in applying the totality of the circumstances test, the Court has “expressly disavowed any ‘litmus-paper test’ or single ‘sentence or . . . paragraph . . . rule,’ in recognition of the ‘endless variations in the facts and circumstances’ implicating the Fourth Amendment” (quoting *Florida v. Royer*, 460 U.S. 491, 506 (1983))).

32. See, e.g., *Illinois v. Gates*, 462 U.S. 213, 230–31 (1983) (describing a totality of the circumstances approach as more consistent with the Court’s probable cause jurisprudence); *Schneklath v. Bustamonte*, 412 U.S. 218, 226 (1973) (requiring a totality of the circumstance analysis when determining if a defendant’s consent was voluntary); *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) (finding that the reasonableness of an officer’s assessment of suspicion will turn on the totality of the officer’s observations as well as the commonsense judgments the officer makes about the meaning of those observations); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (“[A] person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”).

requires us to consider factors such as age, race, ethnicity, and gender.³³ Thus, when we consider factors such as race, age, and ethnicity in determining whether any given person's actions comport with that of the fictional "reasonable" person's actions, we are not on a slippery slope at all but on a more level playing field, where we should have been all along.

II. THE IMPORTANCE OF CONSIDERING LATINX ETHNICITY

In rejecting the slippery slope argument, Professor Henning delivers a call to action: "Our challenge as a society is to adopt a standard that does not penalize disadvantaged groups simply for being disadvantaged."³⁴ I could not agree more fully. As argued above, Professor Henning's proposal does not require literally (or merely) renaming the "reasonable person" standard, but rather reconceptualizing it and, in the process, making real the application of the totality of the circumstances test.

This Response argues the importance of understanding and considering the interplay of Latinx ethnicity and policing as we pursue Professor Henning's proposal. Considering Latinx ethnicity is not only consistent with Professor Henning's call to reconceptualize our application of both the reasonable person standard and the totality of circumstances standard; it is required. Professor Henning's proposal is to remake these legal standards so that they are culturally-normed—based on objective evidence and science—to include the people to whom they will be disproportionately applied.³⁵ This goal cannot be achieved unless Latinx ethnicity is explicitly and specifically addressed.

This section begins by discussing how our tendency to subsume Latinx ethnicity into race both reflects and exacerbates gaps in our knowledge about Latinx in the criminal justice system. This Response then argue that the need to specifically consider Latinx interactions with the police is both long overdue and urgent.

A. *What We Don't Know about Latinx and the Criminal Justice System*

There is abundant evidence that African Americans have consistently experienced disproportionately harmful policing and that many African American communities in the United States have been devastated by an American approach to criminal justice that is not only racist but

33. See, e.g., *Mendenhall*, 446 U.S. at 558 (finding age, education level, gender, and race relevant but not dispositive as part of the totality of the evidence to be considered in determining whether the individual was seized).

34. Henning, *supra* note 1, at 1571.

35. *Id.*

uniquely punitive, reflexively dehumanizing, and often brutal.³⁶ I, alongside countless others, have spent decades investigating, studying, writing about, litigating, and monitoring police misconduct, including

36. See, e.g., U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., U.S. ATTORNEY'S OFFICE N. DIST. OF ILL., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT (2017), <https://www.justice.gov/opa/file/925846/download> (finding a pattern and practice of police brutality that disproportionately impacts African Americans); U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015) [hereinafter INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT], https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (finding deliberate race discrimination in stops, searches, and uses of force); U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., U.S. ATTORNEY'S OFFICE DIST. OF N.J., INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 20–21 n.18 (2014) [hereinafter INVESTIGATION OF THE NEWARK POLICE DEPARTMENT], https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf (finding a pattern or practice of race disparities in unlawful stops, searches and uses of force); U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT (2011) [hereinafter INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT], https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf (finding racial disparities in a pattern or practice of unlawful stops, searches, and uses of force); see also Paul Butler, *One Hundred Years of Race and Crime*, 100 J. CRIM. L. & CRIMINOLOGY 1043, 1043–45 (2010) (detailing criminal justice issues black Americans have faced since 1910); PAUL BUTLER, CHOKEHOLD: [POLICING BLACK MEN] (2017) (discussing evidence and harm of race bias in policing); ANGELA J. DAVIS ET AL., POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT (Angela J. Davis ed., 2017) (discussing race discrimination and racial disparities throughout the criminal justice system); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 219 (2010) (“It is fair to say we have witnessed an evolution in the United States from a racial caste system based entirely on exploitation (slavery), to one based largely on subordination (Jim Crow), to one defined by marginalization (mass incarceration).”); JAMES FORMAN, LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017) (detailing the particular harm caused on black communities by harsh drug policies and enforcement practices); JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017) (highlighting role of legislatures and prosecutors in creating and enforcing harsh criminal laws in minority communities); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999) (arguing that the U.S. criminal justice system depends on the perpetuation of racial and class inequalities); Arthur Rizer & Lars Trautman, *The Conservative Case for Criminal Justice Reform*, GUARDIAN (Aug. 5, 2018, 6:00 AM), <https://www.theguardian.com/us-news/2018/aug/05/the-conservative-case-for-criminal-justice-reform> (“Communities of color, after all, are affected disproportionately by the current criminal justice system. African Americans and Hispanics together represent nearly [sixty percent] of the individuals incarcerated but only about [thirty percent] of the U.S. population.”). For a convenient listing of several studies, see Radley Balko, Opinion, *There’s Overwhelming Evidence that the Criminal Justice System is Racist. Here’s the Proof.*, WASH. POST (Sept. 18, 2018), <https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof>.

its impact on black communities in particular, in an attempt to highlight and help rectify its many harms.

Notwithstanding the primacy of race in shaping (and being shaped by) the criminal justice system, there are reasons to believe, as discussed below, that concepts of Latinx national origin and ethnicity also shape (and are shaped by) policing. Yet, in comparison to what we know about race, we know remarkably little about the Latinx experience within the criminal justice system, particularly in police interactions.

This lack of knowledge is in large part because information about Latinx ethnicity often is not even collected or reported. Less than thirty percent of states publicly report a “Hispanic” or “Latino” category for arrest statistics, with only twenty percent publishing this data regularly.³⁷ As noted below, data collected about police interactions with Latinx can be too deficient to determine the nature and propriety of those interactions even in the context of a federal pattern or practice investigation.³⁸

According to the Urban Institute, prison population statistics provide the most complete picture on Latinx involvement with the criminal justice system.³⁹ And yet only seventy-five percent of states publicly report prison population statistics on race and ethnicity that include a “Hispanic” or “Latino” category.⁴⁰

In some states, Latinx have been entirely erased from the prison picture. According to the Sentencing Project:

In four states, data on ethnicity is not reported to the Bureau of Justice Statistics, nor is it provided in the state department of corrections’ individual annual reports. These states are Alabama, Maryland, Montana, and Vermont. There are most assuredly people

37. Sarah Eppler-Epstein, *We Don’t Know How Many Latinos are Affected by the Criminal Justice System*, URB. INST. (Oct. 17, 2016), <https://www.urban.org/urban-wire/we-dont-know-how-many-latinos-are-affected-criminal-justice-system>; see also Sarah Eppler-Epstein et al., *The Alarming Lack of Data on Latinos in the Criminal Justice System*, URB. INST. (Dec. 2016), <http://apps.urban.org/features/latino-criminal-justice-data> (reporting that, while forty states report race on arrest records, only fifteen states report ethnicity).

38. In 2014, for the first time in twenty-five years, the FBI began capturing Latinx in their crime data statistics. See Roque Planas, *FBI to Track Latino Arrests for Uniform Crime Report*, HUFFINGTON POST (June 25, 2013, 11:56 AM), https://www.huffingtonpost.com/2013/06/25/fbi-latino-arrests_n_3492521. The FBI recognizes that many jurisdictions do not capture or report such data, making FBI crime statistics incomplete and inaccurate. See *Arrests by Race and Ethnicity, 2017: Table 43A n.2*, FBI, <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-43>.

39. Eppler-Epstein, *supra* note 37.

40. *Id.*

in prison in these states who are Hispanic, but since the state does not record this information, the exact number is unknown.⁴¹

As discussed further below, this lack of information masks disparate treatment of African Americans and compromises the ability to advocate for better treatment or even understand police interactions with Latinx. As the Urban Institute said in 2016, “if you’re not counted, you don’t count.”⁴²

Why do we know so relatively little about Latinx in the criminal justice system? Part of the reason is the complexity of collecting and analyzing data about a group whose ethnicity sometimes seems at odds with its official “race.” In some instances, Latinx are counted with non-Latinx whites because they are of the same “white” race.⁴³ In other instances, they are included with African Americans as “people of color.”⁴⁴

The high rate of immigrants among Latinx, including undocumented immigrants, further complicates data collection and analysis, given the difficulty of counting people who may be hiding their status, if not literally hiding.⁴⁵ Yet another complicating factor is Latinx identity. This topic could fill bookshelves on its own, but for the purposes of this Response, it is important to note at least that while many Latinx identify as Latinx but not white, other Latinx identify as

41. ASHLEY NELLIS, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 4 (2016), <http://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>.

42. Eppler-Epstein, *supra* note 37.

43. *See infra* Section II.B.2.

44. A report focused entirely on criminal justice policies and Latinx, for example, includes the statistic: “African Americans and Latinos make up [seventy percent] of students arrested or referred to law enforcement in the 2009–10 school year,” and notes that a “2011 meta-analysis of [forty] different reports found that suspects of color are more likely to be arrested than white suspects (but did not differentiate between Latinos and other people of color).” CALIFORNIANS FOR SAFETY & JUSTICE, LATINO VOICES: THE IMPACTS OF CRIME AND CRIMINAL JUSTICE POLICIES ON LATINOS 11 (2014) [hereinafter LATINO VOICES], https://safeandjust.org/wp-content/uploads/LatinoReport_7.8.14v1-2.pdf. This same report noted that “more nuanced studies” of Latinos are needed to “capture a more accurate picture” of Latinos vis a vis the criminal justice system. *Id.*

45. Approximately 34.4% of Latinx individuals are immigrants, compared to 13.5% of the overall U.S. population. *See* Flores, *supra* note 7; Gustavo López et al., *Key Findings About U.S. Immigrants*, PEW RES. CTR. (Nov. 30, 2018), <http://www.pewresearch.org/fact-tank/2018/11/30/key-findings-about-u-s-immigrants>. Approximately 8.4 million undocumented Latinx immigrants reside in the United States. *See* Jeffrey Passel & D’Vera Cohn, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade*, PEW RES. CTR. (Nov. 27, 2018), <http://www.pewhispanic.org/2018/11/27/u-s-unauthorized-immigrant-total-dips-to-lowest-level-in-a-decade>.

Latinx and white, or Latinx and black.⁴⁶ Still others, even those of recent Latinx ancestry, identify as white or black but *not* Latinx.⁴⁷

These complicating dynamics do not create an insurmountable obstacle to a much fuller understanding of the Latinx experience with law enforcement and criminal justice. For example, we *can* separate Latinx from the overall white demographic, we just have not done so with any regularity.⁴⁸

At root, the reason more progress has not been made on understanding how Latinx are policed is the lack of an effective demand for it. There has not been sufficient pressure applied to the criminal justice system, at any level, demanding that the Latinx experience at the hands of police and in the criminal justice system be specifically documented and explored.

There are many reasons for the lack of an effective demand, and a full exploration of them would go far beyond the scope of this Response.⁴⁹ Speaking at least for myself, one reason is that, given the

46. Approximately three percent of Latinx people consider themselves black. See Paul Taylor et al., *When Labels Don't Fit: Hispanics and Their Views of Identity*, PEW RES. CTR. (Apr. 4, 2012), <http://www.pewhispanic.org/2012/04/04/when-labels-dont-fit-hispanics-and-their-views-of-identity> (describing the different ways members of the Latinx community identify their race).

47. See Ian Haney López, *White Latinos*, 6 HARV. LATINO L. REV. 1, 1 (2003) (commenting that leaders in the Latino community “are often white in terms of how they see themselves and how they are regarded by others within and outside of their community”); Eric Liu, *Why are Hispanics Identifying as White?*, CNN (May 30, 2014, 9:51 AM), <https://www.cnn.com/2014/05/29/opinion/liu-study-hispanics-favor-whiteness> (citing a Pew Research Center study that showed “significant numbers of Hispanics are now identifying as white”); Carlos Lozada, Opinion, *Who is Latino?*, WASH. POST (June 21, 2013), https://www.washingtonpost.com/opinions/who-is-latino/2013/06/21/bcd6f71a-d6a4-11e2-b05f-3ea3f0e7bb5a_story.html; see also Mireya Navarro, *For Many Latinos, Racial Identity Is More Culture than Color*, N.Y. TIMES (Jan. 13, 2012), <https://www.nytimes.com/2012/01/14/us/for-many-latinos-race-is-more-culture-than-color.html> (“Latinos, as a group in this country, tend to identify themselves more by their ethnicity, meaning a shared set of cultural traits, like language or customs.”).

48. See, e.g., LATINO VOICES, *supra* note 44, at 11 (noting that over the past few decades “data collectors have begun to separate Latinos from the overall white demographic, allowing for more nuanced studies, but those need to be conducted more consistently to broadly capture a more accurate understanding”).

49. One rationale, for example, could be the sense among some that it is not in Latinx’ interest to know more about Latinx in the criminal justice system. If it turns out that Latinx are over-represented in the criminal justice system, highlighting this fact could result in broader association of Latinx with crime, reinforcing stereotypes and actually building implicit biases. While I do not find this argument persuasive, given both the potential gains for Latinx and others to be had from more data, and the negative associations that already exist between Latinx and crime (both discussed

lack of useable data, it has sometimes seemed best to forge ahead to address harmful police practices in the hopes that correcting policing misconduct would help all communities of color, including Latinx, rather than taking the time to undertake the perhaps impossible task of determining how Latinx in particular were being treated by the police.⁵⁰ Thus, in conducting police misconduct investigations across the country, we in the Civil Rights Division sometimes were unable to make findings about Latinx that were as expansive as those we were able to make about African Americans.⁵¹ Unless treatment of Latinx was the central focus of the investigation,⁵² we generally did not conduct primary data collection to better document police interactions with Latinx. In most cases it would have been impossible to make up for a police department's lack of data collection, and even where it would be possible to recreate some datasets, it would significantly prolong an

below), it is an argument well-worth further exploration. If nothing else, it may inform how we frame and present future findings.

50. See, e.g., Richard Delgado, *Four Reservations on Civil Rights Reasoning by Analogy: The Case of Latinos and Other Nonblack Groups*, 112 COLUM. L. REV. 1883, 1899–1900 (2012) (discussing black-white binary paradigm of race in which concerns of other groups are viewed as peripheral).

51. See, e.g., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, *supra* note 36, at 66 n.44 (“Although the state-mandated racial profiling data collected during traffic stops captures ethnicity in addition to race, most other FPD reports capture race only. As a result, these figures for non-African Americans include not only whites, but also non-black Latinos. That FPD’s data collection methods do not consistently capture ethnicity does not affect this report’s analysis of the disparate impact imposed on African Americans, but it has prevented an analysis of whether FPD practices also disparately impact Latinos.”); U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., RE: UNITED STATES’ INVESTIGATION OF ALAMANCE COUNTY SHERIFF’S OFFICE 7 (2011), <https://www.justice.gov/iso/opa/resources/171201291812462488198.pdf> (“Additionally, the number of Latinos booked into jail for minor offenses is masked because under ACSO policy minor traffic offenses are logged into a book and detainees are listed only as either ‘b[lack]’ or ‘w[hite].’” (alterations in original)); INVESTIGATION OF THE NEWARK POLICE DEPARTMENT, *supra* note 36, at 20–21 n.18 (2014) (“[B]ecause the NPD’s stop data did not track ethnicity until January of 2014, this investigation did not include an analysis of stops of Hispanics in Newark. Further inquiry is necessary to determine more conclusively whether the NPD’s police activities have a disparate impact on Hispanics.”).

52. See, e.g., U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., RE: UNITED STATES’ INVESTIGATION OF THE MARICOPA COUNTY SHERIFF’S OFFICE (Dec. 15, 2011) [hereinafter MARICOPA COUNTY FINDINGS LETTER], https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf (finding that the Maricopa County Sheriff’s Office unlawfully targets, stops, detains, and arrests Latinos, and engages in discriminatory policing and jailing practices used against Latinos, such as discriminatory traffic stops and punishments for failure to understand English commands).

investigation. So, we did the best we could and made findings where we could regarding Latinx, reasoning that the Latinx experience was likely very similar to the African American experience. To put it in terms relevant to this response: the hope has been that a “reasonable black child” standard would help Latinx children as well.⁵³

B. Why We Need to Specifically Consider Latinx Ethnicity

I continue to believe that this “lift all boats” approach to correcting policing disparities is largely valid. Notwithstanding the often unique Latinx experience with police and the criminal justice system, many policing dynamics, perceptions, and responses are broadly and similarly experienced by both black and Latinx people, and the remedies are likewise the same.⁵⁴

But I, like many others, am becoming increasingly ill-at-ease with gliding over police treatment of Latinx specifically.⁵⁵ While the erasure

53. It may be difficult to disentangle the hope that addressing the concerns of African Americans would also address the concerns of Latinx from a sense that perhaps the concerns of African Americans about policing and criminal justice *should* take primacy over the concerns of Latinx. As Richard Delgado writes, some may be concerned that focusing attention on nonblack minority groups will “dilute effort or empathy that ought, by right, to be reserved for Blacks, the group most deeply wounded by racism and the one about whom America has, deservedly, the most troubled social conscience.” Delgado, *supra* note 50, at 1901. In this view, “[o]nce America finishes reckoning with its transgressions toward this group, then and only then will attention properly turn towards redress for ones whose suffering has been lighter.” *Id.* As discussed below, while this is an understandable viewpoint, it overlooks the significant and unique harms experienced by Latinx in the criminal justice system and may actually undermine efforts to reduce harm and achieve greater equity for African Americans as well as Latinx.

54. See, e.g., Kevin R. Johnson, *The Case for African American and Latina/o Cooperation in Challenging Race Profiling in Law Enforcement*, in BEGINNING A NEW MILLENNIUM OF CHICANA AND CHICANO SCHOLARSHIP: SELECTED PROCEEDINGS OF THE 2001 NACCS CONFERENCE 63, 63–64 (Garcia ed., 2006).

55. See Juleyka Lantigua-Williams, *Criminal Justice is Becoming a ‘Latino Issue,’* ATLANTIC (Sep. 20, 2016), <https://www.theatlantic.com/politics/archive/2016/09/why-criminal-justice-is-becoming-a-latino-issue/500864> (explaining that information that could help amend Latinx’ relationship with law enforcement has not been gathered). Eric Rodriguez, Vice President of Policy and Advocacy for UnidosUS, formerly the National Council of La Raza (NCLR), said this effort can and should be in collaboration with advocacy for more just treatment of African Americans, a way to augment, not detract from that effort:

The movement for black lives is doing something important, elevating all minority lives. And that’s a critical part of the solution But if our response is narrow and limited, the national response will be narrow and limited as well. And that’s problematic as we move toward a country that is increasingly diverse.

of Latinx ethnicity in these conversations has always been unfortunate and problematic, we have tolerated it. There are at least four reasons why we should no longer do so.

First, there are reasons to believe that Latinx are disproportionately policed and have uniquely disproportionate involvement in the criminal justice system. Second, the lack of data about Latinx in the criminal justice system masks disparities between black and white involvement in the criminal justice system and may make it more difficult for black and Latinx groups to work together to reduce police harm. Third, a failure to explicitly consider Latinx experiences with police causes us to overlook the unique elements of those interactions and undermines courts' ability to undertake the cultural norming that Professor Henning persuasively argues is so critical.

Finally, within the United States, there is a history of viewing Latinx as both criminal by nature and a threat to our "American way of life." Law enforcement has historically exacerbated the harm of these views, including being complicit in mistreatment of and violence against Latinx that has at times been intense. The current anti-Latinx sentiment being fomented at the highest levels of government can be viewed as a particularly egregious outbreak, and perhaps expansion, of this historical hostility. Latinx in the United States thus are not only situationally unique but historically unique. An effective remedy to policing harm and discrimination must take into account this particular history.

1. *Latinx disproportionate involvement in policing and the criminal justice system*

The gaps in our knowledge about Latinx in the criminal justice system are particularly surprising given the portion of the United States population that is Latinx; that Latinx are over-represented throughout the criminal justice system; and that, as a group, Latinx have unique features that impact how they fare in the criminal justice system.

We often overlook what a large portion of people in the United States are Latinx. Nearly one in five people—eighteen percent—in the United States is Latinx.⁵⁶ This group of 58 million is the second largest racial or ethnic group in the United States (behind whites), and that

Kenya Downs, *Why Aren't More People Talking About Latinos Killed by Police?*, PBS NEWSHOUR (July 14, 2016, 1:21 PM), <https://www.pbs.org/newshour/nation/black-men-were-unarmed-people-killed-police-last-week>.

56. Flores, *supra* note 7.

number is growing.⁵⁷ Thus, even if policed proportionately, Latinx would comprise a significant number of those policed in the United States.

But we would expect Latinx to be disproportionately policed, for several reasons. First, young people are disproportionately policed, and Latinx are disproportionately young; Latinx are the youngest group among large racial and ethnic groups in the United States.⁵⁸ A full twenty-five percent of the United States' 54 million K-12 students are Latinx.⁵⁹ The median age of Latinx born in the United States is nineteen, while the median age of Latinx overall is twenty-eight.⁶⁰

We would also expect Latinx to be disproportionately policed because they are disproportionately of a lower socioeconomic status.⁶¹ The Latinx community has less wealth, education, and income than white people.⁶² Latinx tend to be concentrated in jobs that have low wages and low educational requirements, and this gap is widening between Latinx and whites.⁶³ Only fifteen percent of employed Latinx over the age of twenty-five have a college degree, about half the rate of whites.⁶⁴ The median net worth of Latinx households is about one-tenth that of white households, and Latinx are twice as likely as whites to live in poverty.⁶⁵ Latinx born in the United States, however, are faring better economically than those who immigrated.⁶⁶ Latinx born

57. *Id.*

58. *Id.*; see also Maggie Fox, *Police Killings Hit People of Color Hardest, Study Finds*, NBC NEWS (May 8, 2018, 8:00 AM), <https://www.nbcnews.com/health/health-news/police-killings-hit-people-color-hardest-study-finds-n872086> (stating that police violence has a disproportionate effect on young people).

59. Mark Hugo Lopez et al., *Key Facts About Young Latinos, One of the Nation's Fastest-Growing Populations*, PEW RES. CTR. (Sept. 13, 2018), <http://www.pewresearch.org/fact-tank/2018/09/13/key-facts-about-young-latinos>.

60. Flores, *supra* note 7.

61. See, e.g., Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 457 (1999) (arguing that policing efforts focus on poor people in poor places).

62. See Lisa J. Dettling et al., *Recent Trends in Wealth-Holding by Race and Ethnicity: Evidence from the Survey of Consumer Finances*, BD. GOVERNORS FED. RES. SYS. (Sept. 27, 2017), <https://www.federalreserve.gov/econres/notes/feds-notes/recent-trends-in-wealth-holding-by-race-and-ethnicity-evidence-from-the-survey-of-consumer-finances-20170927.htm>.

63. *Id.*

64. Angelo Amenta, *Issue Brief Rough Draft: Hispanic/Latino Socioeconomic Status and Class* (Mar. 3, 2016), <https://academiccommons.columbia.edu/doi/10.7916/D88G8M52>.

65. U.S. CONG. JOINT ECON. COMM., *THE ECONOMIC STATE OF THE LATINO COMMUNITY IN AMERICA 1* (2015), https://www.jec.senate.gov/public/_cache/files/2d162187-e1cc-4629-a39e-7f0853194280/jec-hispanic-report-final.pdf.

66. *Id.*

in the United States are twice as likely to have a college degree compared to Latinx born outside the United States.⁶⁷

Thus, even if we set aside the impact of the ethnic/national origin biases or stereotypes that are discussed below, we would expect Latinx to be disproportionately policed. And, notwithstanding the egregious gaps in current data, what we *do* know comports with this expectation: Latinx are over-represented in the criminal justice system and disproportionately subjected to police intrusion and abuse.⁶⁸ Latinx are more likely to be imprisoned than whites; less likely to be released on their own recognizance; and more likely to be incarcerated after being convicted of property or drug crimes than whites.⁶⁹ They report being the subjects of police use of force more than twice the rate of whites and are searched at a higher rate than whites.⁷⁰ In a few instances Latinx appear more compromised in the criminal justice system than African Americans, although in most respects disparities are more extreme for African Americans. In some contexts, Latinx are more likely to be the victims of deadly police violence than African Americans.⁷¹ Another study showed that, when given the option to post bail, only thirty-three percent of Latinx defendants were able to do so, compared with forty-seven percent of African Americans.⁷²

67. *Id.*

68. *See, e.g.*, MARICOPA COUNTY FINDINGS LETTER, *supra* note 52, at 6 (explaining how Maricopa County sheriffs' practices disproportionately harm the Latinx community).

69. Latinx are imprisoned at a rate that is 1.4 times the rate of whites. Nellis, *supra* note 41, at 3. In California, Latinx males are imprisoned at a rate 1.7 times that of white males. LATINO VOICES, *supra* note 44, at 13. A nationwide study found that Latinx felony defendants in urban courts are less likely to be released on their own recognizance. *Id.* at 11–12. The likelihood of incarceration for Latinx in urban courts across the country is forty-four percent higher for Latinx than whites for property crimes and fifty-three percent higher for drug crimes. *Id.* at 13.

70. A 2005 federal study found that Latinx reported being a victim of police force at twice the rates of whites. LATINO VOICES, *supra* note 44, at 20. A 2004 study in California found that the Latinx arrest rate was 1.5 times higher than that of whites. *Id.* Several studies have found that police officers search Latinx male drivers more often than white male drivers. *Id.*; *see also* Downs, *supra* note 55 (reporting that Hispanics represent twenty-three percent of searches and almost thirty-percent of all arrests).

71. One study showed that in neighborhoods with high levels of income inequality (such as gentrifying neighborhoods), Latinx men appear to be at higher risk than black men of being killed during interactions with police. Gerry Everding, *Young Hispanic Men May Face Greatest Risk from Police Shootings, Study Finds*, SOURCE: HUMAN. & SOC'Y (March 29, 2018), <https://source.wustl.edu/2018/03/young-hispanic-men-may-face-greatest-risk-from-police-shootings-study-finds>.

72. LATINO VOICES, *supra* note 44, at 12.

2. *How the failure to consider Latinx ethnicity masks disproportionate treatment of African Americans*

The lack of data on Latinx interactions with the police causes us to underestimate the harm our criminal justice system causes to African Americans. It is broadly understood that the criminal justice system has caused more harm in black communities than in white communities across the United States.⁷³ But in many instances, disparities in how black people are treated in the criminal justice system may be even more extreme than we think. This is because when we erase Latinx ethnicity, most Latinx get categorized as “white.” This masks racial disparities between non-Latinx whites and African Americans.

As put by the Urban Institute in the context of prisons:

A state’s failure to collect and report ethnicity data affects not only Latinos but the entire criminal justice system. States that only count people as “black” or “white” likely label most of their Latino prison population “white,” artificially inflating the number of “white” people in prison and masking the white/black disparity in the criminal justice system.⁷⁴

More generally, a failure to better understand and consider the interactions between Latinx and police specifically makes it more difficult for Latinx and African Americans to combat harmful police conduct. While it may seem counterintuitive, our lack of knowledge about and consideration of Latinx interactions with police causes us to parse discriminatory police conduct by demographic group, rather than

73. See *supra* notes 49–53 and accompanying text.

74. Eppler-Epstein et al., *supra* note 37 (“Artificially inflating the number of ‘white’ people in prison would make white/black disparities appear less extreme than they actually are. So, comprehensive data around ethnicity doesn’t just affect Latinos.”); Nellis, *supra* note 41, at 4 (“[G]iven the absence or unreliability of ethnicity data in some states, the racial/ethnic disparities in those states may be understated. Since most Hispanics in those instances would be counted in the white prison population, the white rate of incarceration would therefore appear higher than is the case, and consequently the black/white and Hispanic/white ratios of disparity would be lower as well.”). Thirteen states do not include Hispanics in any kind of criminal justice racial data. Eppler-Epstein et al., *supra* note 37; Amy Yurkanin, *Black and White: Alabama Prisons Don’t Count Hispanic Inmates*, AL.COM (May 16, 2017), https://www.al.com/news/index.ssf/2017/05/black_and_white_alabama_prison.html (reporting that Alabama prisons reported zero Hispanic prisoners, overestimating the white population in the prison and underestimating the minority count). The same problem occurs in federal data on criminal arrests. See, e.g., Lynda Garcia, *The War on Marijuana Has a Latino Data Problem*, ACLU (June 14, 2013, 11:49 AM), <https://www.aclu.org/blog/smart-justice/sentencing-reform/war-marijuana-has-latino-data-problem> (explaining that the disparity between black and white arrests would be even larger if Latino arrests were not counted as white in the FBI’s Uniform Crime Reports).

consider the totality of that misconduct and confront it holistically and in solidarity with all those whose rights have been routinely disregarded.⁷⁵

3. *Unique elements of Latinx police interactions*

As noted above, in many respects, Latinx share their policing and criminal justice experience with African Americans. But in other respects, the Latinx experience is distinct. Most prominently, immigration and language impact Latinx differently.

While approximately thirty-seven million Latinx were born in the United States, over nineteen million were born elsewhere.⁷⁶ The immigrant experience of Latinx generally impacts Latinx interactions with police, even for Latinx who are not undocumented immigrants—or even immigrants at all.⁷⁷ In one survey, “[seventy] percent of undocumented immigrants reported that they are less likely to contact law enforcement authorities if they were victims of a crime,” while forty-four percent of *all* Latinx “reported they are less likely to contact police officers if they have been the victim of a crime because they fear that police officers will use this interaction as an opportunity to inquire into their immigration status *or [the immigration status] of people they know.*”⁷⁸ Similarly, forty-five percent of Latinx “are less likely to voluntarily offer information about crimes . . . [or] to report a crime” out of fear of police asking them *or people they know* about their

75. See, e.g., Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CAL. L. REV. 1213, 1256 (1997) (arguing that effectively countering racism requires mutual understanding of the particularities of each other’s conditions and of the particular ways in which white racism affects members of different groups).

76. Antonio Flores, *Facts on U.S. Latinos, 2015: Statistical Portrait of Hispanics in the United States*, PEW RES. CTR. (Sept. 18, 2017), <http://www.pewhispanic.org/2017/09/18/facts-on-u-s-latinos>.

77. Latinx currently include the only group that, in some contexts, may be explicitly and lawfully profiled by law enforcement pursuant to a Supreme Court opinion. The Supreme Court held that profiling Mexicans near the United States-Mexico border is lawful because of their link to unauthorized immigration. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975) (finding that “[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor” in determining whether to seize the individual pursuant to the Fourth Amendment); see also *Developments in the Law, Policing Immigrant Communities*, 128 HARV. L. REV. 1771, 1784–85 (2015) (describing how immigration enforcement undermines trust in Latino and immigrant communities).

78. NIK THEODORE, *INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT* i (2013), https://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF (emphasis added).

immigration status.⁷⁹ This dynamic has particular salience for Latinx children who are United States citizens but whose parents or other family members may not be.⁸⁰

Not surprisingly, in 2013, thirty-eight percent of Latinx reported that they feel more under suspicion “now that local law enforcement authorities have become involved in immigration enforcement.”⁸¹ Perhaps more surprising to some is that twenty-six percent of U.S.-born Latinx respondents felt this way.⁸²

Limited English skills also have a distinct impact on Latinx. Approximately thirty-seven million Latinx speak Spanish at home; thirty-five million Latinx are English-proficient.⁸³ A lack of adequate interpretation services compromises the right to a fair trial, the right to counsel, and general access to justice.⁸⁴ It may also impact the ability

79. *Id.*

80. A popular schoolyard song at a local elementary school with many Latinx/newly-arrived immigrant students seems to capture how children can translate stories and warnings heard from grown-ups and link experiences of immigration and deportation with policing. The song, as relayed to me by my children, included the lines:

I don't want to go to Mexico no more, more, more;
There's a big fat policeman at my door, door, door,
If you open the door he'll get mud on the floor;
I don't want to go to Mexico no more, more, more.

This song appears to be widely known; a version of it can be found online. *See I Don't Want to Go to Mexico*, BUSSONGS.COM, <https://bussongs.com/songs/i-dont-want-to-go-to-mexico> (last visited May 20, 2019). It is easy to see how parental admonitions and whispered conversations may have led children to warn each other not to let the police in for fear of being returned to Mexico. It is an easy step from there to see how what started as an adult fear of “la migra,” (immigration enforcement officers) was translated by children into a more knowable form, “the police,” and how this would shape immigrant children’s concept of local law enforcement from a very young age. This song predates our current era of intensive “family separation.”

81. THEODORE, *supra* note 78, at 12.

82. *Id.*

83. *Id.*

84. *See, e.g.*, AM. BAR ASS'N, STANDARDS FOR LANGUAGE ACCESS IN COURTS 1–2 (2012), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_standards_for_language_access_proposal.authcheckdam.pdf (recommending translation services for courts to adopt in light of the evidence that non-English speakers suffer “devastating consequences” in the legal system); Laura Abel, *Language Access in State Courts*, BRENNAN CTR. FOR JUST. 1 (2009) (“At least 13 million of [limited-English proficiency] people live in states that do not require their courts to provide interpreters to LEP individuals in most types of civil cases. Another 6 million live in states that undercut their commitment to provide interpreters by charging for them.”); Rebecca Beitsch, *How Bad Translation by Court Interpreters Can Turn Misunderstanding into Injustice*, PBS (Aug. 17, 2016, 4:19 PM), <https://www.pbs.org/newshour/nation/bad-translation-by-court->

to follow police orders in the field or to understand or exercise the right to avoid police intrusion.⁸⁵ Interpreter skills are lacking in states across the country, but with little data on the frequency—or consequences—of interactions between police and limited-English-proficient Latinx, it is impossible to assess the full breadth of the problem or the harm it is causing.⁸⁶

Alongside the role that language and immigration play in Latinx interactions with police, there are persistent negative stereotypes about Latinx, as well as historical hostility by United States law enforcement and others towards Latinx. These latter elements are discussed in the next section.

For courts to undertake the kind of cultural norming Professor Henning proposes in individual criminal cases, courts must understand and consider these elements where relevant. For example, a court refusing to find reasonable suspicion for a stop based in part on the flight of a defendant black man cited to a study of the Boston Police Department that documented a pattern of racial profiling of black males in the city of Boston.⁸⁷ The court reasoned that in such circumstances:

interpreters-injustice (“Because many states and localities don’t use tested court interpreters and ignore federal rules for when interpreters are required, many criminal defendants and civil litigants with limited English skills are not equipped to navigate the complex legal system, jeopardizing their constitutional rights.”).

85. See *United States v. Botello-Rosales*, 728 F.3d 865, 867–68 (9th Cir. 2013) (holding that providing *Miranda* warnings correctly in English and incorrectly in Spanish failed to reasonably convey to defendant his right to appointed counsel); Jason Tashea, *Miranda in Translation: ABA Pilot Project Tests Tools to Help Police Deliver Effective Miranda Warnings in Spanish*, ABAJ. (Nov. 2018), http://www.abajournal.com/magazine/article/miranda_warning_spanish (describing the implications of having no universal translation of *Miranda* and the ABA’s effort to develop a standardized Spanish-language *Miranda* warning for police officers in the field).

86. See, e.g., U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., RE: INVESTIGATION OF THE EAST HAVEN POLICE DEPARTMENT 16 (2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/12/19/easthaven_findletter_12-19-11.pdf (noting that East Haven police have no formal policy for interacting with limited-English Spanish speakers on the street); INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT, *supra* note 36, at 42 (“Language barriers, and the often closely related cultural barriers, can put cases and lives at risk and create safety, evidentiary, and ethical challenges for officers and others. Such barriers can prevent LEP individuals from understanding their rights, complying with the law, assisting law enforcement and receiving meaningful access to law enforcement services and information.”); see also SUSAN SHAH ET AL., OVERCOMING LANGUAGE BARRIERS: SOLUTIONS FOR LAW ENFORCEMENT (2007), https://www.lep.gov/resources/vera_translating_justice_final.pdf (providing an overview of problems raised by police interaction with limited-English speakers, and outlining suggestions for improvement).

87. *Commonwealth v. Warren*, 58 N.E.3d 333, 342 (Mass. 2016).

[F]light is not necessarily probative of a suspect's state of mind or consciousness of guilt. Rather, the finding that black males in Boston are disproportionately and repeatedly targeted for [field interrogations and observations] suggests a reason for flight totally unrelated to consciousness of guilt. Such an individual, when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity.⁸⁸

To allow courts to apply the same evidence-based cultural norming for Latinx, we must have similar studies and courts must consider them. Too often, the studies have not been done and, in some instances, cannot feasibly be done, because we have too little data about how Latinx are policed.

4. *History of criminalizing Latinx and seeing Latinx as a threat to the "American way of life"*

There is a history within the United States of criminalizing Latinx and painting Latinx as a threat to the "American way of life." When these sentiments have reached a crescendo, they have sometimes erupted in intense violence against Latinx. Law enforcement has often been complicit in this. Given the current national climate, including anti-Latinx sentiment being fomented at the highest levels of government, it is particularly incumbent upon us now to better understand whether law enforcement is acting to protect Latinx or to exacerbate the harm of prejudice. Our lack of attention to the Latinx-police experience undermines our ability to do so.

The history of painting Latinx as inherently criminal is longstanding. In words equally true today, sociologist and author Alfredo Mirandé wrote in 1980 that:

Chicanos have typically been victims of police abuse and injustice, but they have been portrayed as a violent and criminally prone people. The image of the Mexican throughout history, in fact, has been that of a ruthless, bloodthirsty, and treacherous outlaw.

88. *Id.* Other courts have echoed this reasoning. *See, e.g.*, *United States v. Smith*, 794 F.3d 681, 687–88 (7th Cir. 2015) (acknowledging both "the relevance of race in everyday police encounters with citizens" and "empirical data demonstrating the existence of racial profiling, police brutality, and other racial disparities in the criminal justice system" as factors in determining whether a seizure occurred); *Miles v. United States*, 181 A.3d 633, 641–44, 641 n.14 (D.C. 2018) (relying upon several studies supporting that, compared to members of other racial groups, African American men are more likely to be subjected to police force and concluding that the African American defendant could have reasonably fled for a reason other than consciousness of guilt).

Although taking various forms such as the “greasy *bandido*” of the Old West, the zoot-suit or pachuco gangs of the 1940s, or contemporary “lowriders” and youth gang members, the image persists, nonetheless. Even today there is much more media and public interest in issues such as Chicano gang violence and criminality than in police abuse or denial of equal protection of the law.⁸⁹

Like black men, and as we have recently been reminded by President Trump, Mexican men have long been presented as “rapists” who threaten white women.⁹⁰

Stephen F. Austin, founder of the Texas Rangers, wrote in the early nineteenth century that “the Anglo-American foundation, the nucleous [sic] of republicanism, is to be broken up, and its place supplied by a population of Indians, Mexicans, and *renegados*, all mixed together, and all the *natural enemies of white men and civilization*.”⁹¹

In at least some parts of this country, positioning Latinx as antithetical to the putative “Anglo-American foundation” of the United States is historically intertwined with condoning police abuse of Latinx. As Mirandé writes: “For the Chicano people the Texas Rangers . . . are the epitome of police abuse and brutality” and “became a corps that enjoyed the tacit sanction of the white community to do to Mexicans in the name of the law what others did extralegally.”⁹² The Texas Rangers, created in 1823 by Austin, exist to this day as Texas’s state law enforcement agency, although they are currently known more for lending their name to a major league baseball team than for their history of violence against Mexicans, especially extrajudicial killings, or for enforcing “Juan Crow” laws and norms, the Latinx version of Jim Crow, in Texas.⁹³

While Latinx have not had an experience comparable to slavery or mass lynching that African Americans have collectively endured, Latinx did experience an era of intense mob violence, including

89. ALFREDO MIRANDÉ, GRINGO JUSTICE 17 (1987) (citations omitted).

90. See, e.g., ARNOLDO DE LEÓN, THEY CALLED THEM GREASERS: ANGLO ATTITUDES TOWARD MEXICANS IN TEXAS, 1821–1900 10 (1983).

91. MIRANDÉ, *supra* note 89, at 3–4.

92. *Id.* at 20 (citation omitted) (quoting DE LEÓN, *supra* note 90, at 75–76).

93. See, e.g., WILLIAM D. CARRIGAN & CLIVE WEBB, FORGOTTEN DEAD: MOB VIOLENCE AGAINST MEXICANS IN THE UNITED STATES, 1848–1928, at 91 (2013); MONICA MUNOZ MARTINEZ, THE INJUSTICE NEVER LEAVES YOU: ANTI-MEXICAN VIOLENCE IN TEXAS 6–7, 10–11 (2018); George T. Diaz, *A Review of The Lynching of Mexicans in the Texas Borderlands*, S. SPACES (June 14, 2018), <https://southernspaces.org/2018/review-lynching-mexicans-texas-borderlands> (outlining discriminatory laws and norms against Mexicans in Texas in the nineteenth and twentieth centuries).

lynching, at the beginning of the twentieth century.⁹⁴ This violence was often condoned, and sometimes committed, by law enforcement with impunity.⁹⁵ As one author wrote:

The killing of Mexicans . . . through the border in these last four years is almost incredible Some rangers have degenerated into common man-killers. There is no penalty for killing, for no jury along the border would ever convict a white man for shooting a Mexican Reading over the Secret Service records makes you feel almost as though there were an open game season on Mexicans along the border.⁹⁶

There is little public knowledge about this history of horrific Mexican lynchings in the United States, although there have been recent efforts to create broader awareness of these lynchings and the dynamics that caused them.⁹⁷

The complicity of law enforcement is also evident in the West Coast “zoot suit” riots that occurred during World War II. Sailors on leave in California repeatedly attacked young Latinx “zoot-suiters,” having been encouraged to do so by local police.⁹⁸ The riots only ended when military authorities declared Los Angeles off-limits for enlisted personnel, and the

94. See, e.g., CARRIGAN & WEBB, *supra* note 93, at 63, 81. In sickening detail, *Forgotten Dead* conveys how systematic and yet adaptive lynchings became during this time period. It observes that “mobs lynching Mexicans tended to execute their victims by shooting,” relating one 1926 report from the *New York Times* of the lynching of three black men in Aiken, South Carolina, who were taken by a mob from a jail and then “were released in a wood, and *in Mexican style*, shot down as they ran.” *Id.* at 74 (emphasis added).

95. LATINOS AND CRIMINAL JUSTICE: AN ENCYCLOPEDIA 49 (José Luis Morín ed., 2016).

96. MIRANDÉ, *supra* note 89, at 20–21 (quoting CAREY MCWILLIAMS, NORTH FROM MEXICO: THE SPANISH-SPEAKING PEOPLE OF THE UNITED STATES 112 (1968)). Latinx have also been subjected to Jim Crow-like discriminatory laws that were enforced by police. Many laws that discriminated on the basis of race included Latinx with African Americans. Texas courthouses, for example, had whites-only restrooms, with facilities elsewhere on the grounds labelled “Colored Men” and “Hombres Aqui.” *Hernandez v. Texas*, 347 U.S. 475, 479–80 (1954). In 1855, California passed an anti-vagrancy act, known as the “Greaser Act,” that allowed officers to arrest for vagrancy or loitering “all persons who are commonly known as ‘Greasers’ or the issue of Spanish or Indian blood . . . and who go armed and are not peaceable and quiet persons.” ROBERT F. HEIZER & ALAN J. ALMQUIST, *THE OTHER CALIFORNIANS: PREJUDICE AND DISCRIMINATION UNDER SPAIN, MEXICO, AND THE UNITED STATES TO 1920*, at 151 (1971).

97. Simon Romero, *Lynch Mobs Killed Latinos Across the West. The Fight to Remember These Atrocities is Just Starting.*, N.Y. TIMES (Mar. 2, 2019), <https://www.nytimes.com/2019/03/02/us/porvenir-massacre-texas-mexicans.html>.

98. MIRANDÉ, *supra* note 89, at 170.

Los Angeles City Council prohibited wearing “zoot suits,” the clothing favored by many young Mexican-American men at the time.⁹⁹

Alongside law enforcement’s complicity in mob violence against Latinx, Latinx have also long complained of more routine abuse by local law enforcement. Nearly fifty years ago, the U.S. Commission on Civil Rights issued a report on Mexican Americans and the criminal justice system in the southwest. In language that rings true today, the Commission concluded that:

Mexican American citizens are subject to unduly harsh treatment by law enforcement officers, . . . they are often arrested on insufficient grounds, receive physical and verbal abuse, and penalties which are disproportionately severe. We have found them to be deprived of proper use of bail and of adequate representation by counsel. They are substantially underrepresented on grand and petit juries and excluded from full participation in law enforcement agencies, especially in supervisory positions.¹⁰⁰

The Commission documented:

[F]requent allegations that law enforcement officers discriminated against Mexican Americans. Such discrimination includes more frequent use of excessive force against Mexican Americans than against Anglos, discriminatory treatment of juveniles, and harassment and discourteous treatment toward Mexican Americans in general. Complaints also were heard that police protection in Mexican American neighborhoods was less adequate than in other areas. The Commission’s investigations showed that belief in law enforcement prejudice is widespread and is indicative of a serious problem of police-community relations between the police and Mexican Americans in the Southwest.¹⁰¹

“[E]specially problematic” areas in 1970 remain true today: “unequal treatment of juveniles, lack of courtesy and respect, inequalities in the treatment of traffic violations, excessive arrests for ‘investigation’ and ‘stop and frisk’ practices, harassment of narcotics addicts, and inadequate police protection.”¹⁰² The Commission Report documents the Department of Justice closing its investigation of a Latinx man who was shot and killed by a San Antonio police officer

99. *Id.*; Khanya Khondlo Mtshali, *This Outfit Defined an Era, Created a Riot, and Was Banned by the Government*, TIMELINE (May 17, 2018), <https://timeline.com/the-zoot-suit-was-a-symbol-of-black-and-latinx-creativity-and-defiance-b7b4f2a36474>.

100. U.S. COMM’N ON CIVIL RIGHTS, MEXICAN AMERICANS AND THE ADMINISTRATION OF JUSTICE IN THE SOUTHWEST iii (1970).

101. *Id.* at 13.

102. MIRANDÉ, *supra* note 89, at 149–50.

on the grounds that “prosecution of a white police officer for the shooting of a Mexican would have little chance of a successful prosecution in the Southern District of Texas.”¹⁰³

Among the “large number of complaints of discriminatory treatment of juveniles” were complaints that: “Anglo juveniles were often released to their parents without being charged, whereas Chicanos who committed the same or similar offenses were jailed or placed in reform school.”¹⁰⁴

Ten years after the United States Commission on Civil Rights Report, the Mexican American Legal Defense and Education Fund (MALDEF) called police violence against Latinx an “epidemic,” noting that in the previous two years, law enforcement officers had killed at least thirty-two Latinx.¹⁰⁵ According to MALDEF, police abuse was “a severe, widespread and, for Mexican-Americans, highly emotional phenomenon.”¹⁰⁶

As discussed above, Latinx interactions with law enforcement are shaped in part by the Latinx intersection with immigration. This dynamic reflects not only current realities but a long history of federal law-enforcement-sanctioned abuse and failure to protect. Alongside their experience with local police, Latinx have a unique experience with United States Customs and Border Patrol and Immigration and Customs Enforcement (formally INS). Documented incidents, such as Latinx immigrants being chased into rivers by U.S. border patrolmen who then watched them drown¹⁰⁷ or being shot for throwing rocks,¹⁰⁸

103. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 100, at 32–33.

104. MIRANDÉ, *supra* note 89, at 150.

105. *Id.* at 1–2.

106. *Id.*; *see also id.* at 2 (citing additional books and studies related to police abuse of Latinx individuals).

107. *Id.* at 181.

108. *See, e.g.*, Brian Bennett & Joseph Tanfani, *A Family Outing, Then a Deadly Border Patrol Shooting*, L.A. TIMES (Oct. 18, 2014, 12:00 PM), <https://www.latimes.com/nation/la-na-border-shooting-20141019-story.html> (stating that ten individuals were killed in rock-throwing incidents in the last eight years, and recounting an incident where agents pulled their boat next to a family picnic on the Mexican side of border and began shooting—killing one—after claiming that individuals on the shore were throwing rocks, which witnesses deny); Kristine Phillips, *U.S. Border Agent Who Repeatedly Shot Mexican Teen Through a Fence Acquitted of Murder*, WASH. POST (Apr. 24, 2018), <https://www.washingtonpost.com/news/post-nation/wp/2018/04/24/u-s-border-agent-who-repeatedly-shot-mexican-teen-through-a-fence-acquitted-of-murder> (describing an incident where a Border Patrol agent shot and killed a sixteen-year old boy through a fence along the border between Arizona and Mexico after the boy and others threw rocks at the agent); *see also* Erin Durkin, *US Agents Arrested 42 Migrants on American Side of the Border, Official Says*, GUARDIAN (Nov. 26, 2018, 12:52 PM), <https://www.theguardian.com/us-news/2018/nov/26/border-mexico-us-migrants->

may fuel a fear that law enforcement may be more likely to decamp, deport, or dehumanize than to protect.

Current police-Latinx interactions should be viewed against this historical backdrop. Specifically, this history may help us understand with more particularity the causes and potential consequences of the current “othering” and dehumanization of Latinx. This in turn might prompt a greater sense of urgency about the need to stem these sentiments.

5. *Current anti-Latinx climate*

Latinx, whether recent immigrants or among those who have been here longer than the United States has been a country, are facing demonization that is perhaps unprecedented, at least to the extent that we have never before had a President so intent on fomenting dehumanization of Latinx people. The Trump administration has been called “the most anti-Latino administration in US history.”¹⁰⁹ Latinx are used as political fodder and scapegoats and bear the brunt of some of the most deplorable policies and actions this administration has taken.¹¹⁰ Since before he was elected, Trump has whipped up crowds with exhortations to “Build the Wall” at the United States border with Mexico to keep out immigrant “rapists” and “criminals” seeking to come into the United States.¹¹¹ He has said that without a

immigration (reporting that agents released tear gas on migrants after being attacked with rocks).

109. Mario T. García, Opinion, *We’re Seeing the Most Anti-Latino Administration in US History*, NAT’L CATH. REP. (Feb. 14, 2018), <https://www.nronline.org/news/opinion/ncr-today/were-seeing-most-anti-latino-administration-us-history>.

110. See, e.g., Colby Itkowitz, *An Expert on ‘Dangerous Speech’ Explains How Trump’s Rhetoric and the Recent Spate of Violence Are and Aren’t Linked*, WASH. POST (Oct. 29, 2018), <https://www.washingtonpost.com/politics/2018/10/29/professor-who-defined-dangerous-speech-how-trumps-rhetoric-pittsburgh-are-linked> (noting that President Trump’s rhetoric has dehumanized Latinxs, “paint[ing] Mexicans as a great threat, individually and collectively”); Carmen Perez & Rachel O’Leary Carmona, *How Trump Is Dehumanizing Latinos*, CNN (May 29, 2018, 4:44 AM), <https://www.cnn.com/2018/05/27/opinions/how-trump-is-dehumanizing-latinos-perez-oleary-carmona> (reporting that Customs Enforcement separated 700 Latinx children from their parents or guardians after the families tried to cross the border and that the Department of Health and Human Services lost approximately 1,500 Latinx children in the U.S. foster care system).

111. See, e.g., Amber Phillips, *“They’re Rapists.” President Trump’s Campaign Launch Speech Two Years Later, Annotated*, WASH. POST (June 16, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/06/16/theyre-rapists-presidents-trump-campaign-launch-speech-two-years-later-annotated> (“When Mexico sends its people, they’re not sending their best . . . They’re sending people that have lots of problems, and they’re bringing those problems with [them]. They’re bringing drugs. They’re bringing crime. They’re rapists.”).

wall “we’re not going to have a country.”¹¹² He has said of Latinx immigrants, “These aren’t people. These are animals.”¹¹³ Trump demanded that a judge who ruled against him recuse himself, on the basis of the judge’s Mexican heritage.¹¹⁴ He asked a man carrying a Mexican flag at a rally why he was not in Mexico.¹¹⁵ He routinely refers to members of the mostly Latinx gang MS-13 as “animals” and has repeatedly misstated their prevalence and their activities, ignoring the fact that they primarily victimize Latinx immigrant communities.¹¹⁶ In a pre-2018 midterm election advertisement tweeted by Trump, called “the most racially charged national political ad in [thirty] years,” Trump and the Republican Party depict Democrats as plotting to help Central American invaders overrun the nation with cop killers.¹¹⁷

These sustained attacks by Trump, his functionaries, and his media mouthpieces appear to be impacting how Latinx are treated, including an increase in unlawful discrimination and hate crimes, a decrease in

112. Kristina Davis, *President Trump Says Without Border Wall “We’re Not Going to Have a Country,”* SAN DIEGO UNION-TRIB. (Mar. 13, 2018, 6:00 PM), <https://www.sandiegouniontribune.com/news/border-baja-california/sd-me-trump-border-20180313-story.html>.

113. Gregory Korte & Alan Gomez, *Trump Ramps up Rhetoric on Undocumented Immigrants: “These Aren’t People. These Are Animals,”* USA TODAY (May 17, 2018, 6:13 PM), <https://www.usatoday.com/story/news/politics/2018/05/16/trump-immigrants-animals-mexico-democrats-sanctuary-cities/617252002>.

114. Eliza Collins, *Trump on Judge Curiel: He’s ‘Very Pro-Mexico,’* USA TODAY (June 3, 2016, 6:40 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2016/06/03/donald-trump-judge-curiel-hillary-clinton/85363920>.

115. Davis, *supra* note 112.

116. See, e.g., Sahil Chinoy et al., *Opinion, MS-13 Is Far from the ‘Infestation’ Trump Describes*, N.Y. TIMES (July 3, 2018), <https://www.nytimes.com/interactive/2018/06/27/opinion/trump-ms13-immigration.html> (reporting that MS-13 comprises only one percent of gang members in the United States and that most MS-13 recruits are teenagers already living in the United States—not migrants); Hannah Dreier, *I’ve Been Reporting on MS-13 for a Year. Here Are the 5 Things Trump Gets Most Wrong*, PROPUBLICA (June 25, 2018, 5:00 AM), <https://www.propublica.org/article/ms-13-immigration-facts-what-trump-administration-gets-wrong> (debunking President Trump’s assertions that MS-13 strives to frustrate immigration law, poses as families at the border, continues to grow as an organization, and targets specific communities, as well as refuting the efficacy of immigration raids and deportation as means of combatting MS-13); David A. Graham, *Does Trump Know What ICE Does?*, ATLANTIC (July 3, 2018), <https://www.theatlantic.com/politics/archive/2018/07/does-trump-know-what-ice-does/564371> (highlighting President Trump’s tweets about MS-13 in which he describes MS-13’s prevalence as an “infestation” and recalls “watch[ing] ICE liberate towns from the grasp of MS-13”).

117. Stephen Collinson, *Trump Shocks with Racist New Ad Days Before Midterms*, CNN (Nov. 1, 2018, 8:53 AM), <https://www.cnn.com/2018/10/31/politics/donald-trump-immigration-paul-ryan-midterms/index.html>.

Latinx’ (and others’) ¹¹⁸ physical safety, and social marginalization. But the data here is limited as well. In the fall of 2018, the FBI reported that hate crimes have increased for the third straight year—in each of those years, the percentage of reported hate crimes motivated by anti-Latinx bias has increased slightly. ¹¹⁹ This increase occurred notwithstanding the broad reluctance of many Latinx—especially immigrants—to report being the victim of a crime—in part because of the climate of fear of deportation that the Trump administration has created. ¹²⁰ In California, reported hate crimes against Latinx went up fifty percent from 2016 to 2018. ¹²¹ National Crime Victimization Survey data from 2012 to 2016 found that Latinx were the victims in more than twenty percent of suspected hate crimes. ¹²² Anecdotes of abuse increasingly abound: families who have been in the United States for generations told to go back to Mexico; demands to speak English; petty ethnicity-based insults and unlawful discrimination. ¹²³

118. It appears that the fear of the “caravan” of Latinx people coming to the United States fomented by Trump and others played a role in the anti-Semitic mass shooting outside Pittsburgh that killed eleven people. See Dara Lind, *The Conspiracy Theory that Led to the Pittsburgh Synagogue Shooting, Explained*, VOX (Oct. 29, 2018, 3:20 PM), <https://www.vox.com/2018/10/29/18037580/pittsburgh-shooter-anti-semitism-racist-jewish-caravan> (describing the attack as “characteristic of Trump-era xenophobia, which is generally expressed toward Muslims and Latinos”).

119. Compare U.S. DEP’T OF JUSTICE, UNIF. CRIME REPORTING PROGRAM, HATE CRIME STATISTICS, 2017 3 (2018), <https://ucr.fbi.gov/hate-crime/2017/topic-pages/incidents-and-offenses.pdf> (10.9%), with U.S. DEP’T OF JUSTICE, UNIF. CRIME REPORTING PROGRAM, HATE CRIME STATISTICS, 2016 3 (2017), <https://ucr.fbi.gov/hate-crime/2016/topic-pages/incidentsandoffenses.pdf> (10.6%), and U.S. DEP’T OF JUSTICE, HATE CRIME STATISTICS, UNIF. CRIME REPORTING PROGRAM, 2015 3 (2016), https://ucr.fbi.gov/hate-crime/2015/topic-pages/incidentsandoffenses_final.pdf (9.4%).

120. Brendan Campbell et al., *Rising Hate Drives Latinos and Immigrants into Silence*, CTR. FOR PUB. INTEGRITY (Aug. 22, 2018), <https://www.publicintegrity.org/2018/08/22/22119/rising-hate-drives-latinos-and-immigrants-silence>.

121. Maria Hinojosa, *Hate Crimes Against Latinos Increase in California*, NPR (July 15, 2018, 8:18 AM), <https://www.npr.org/2018/07/15/629212976/hate-crimes-against-latinos-increase-in-california>.

122. Campbell et al., *supra* note 120.

123. *Id.*; see also Esther J. Cepeda, *Cepeda: Anti-Latino Rhetoric Is Building Walls in Schools*, MERCURY NEWS (May 27, 2017, 5:00 PM), <https://www.mercurynews.com/2017/05/27/cepeda-anti-latino-rhetoric-is-building-walls-in-schools> (observing that disparate treatment of Latinx adversely affects Latinx students, especially Latino males); Adeel Hassan, *Police May Seek Hate-Crime Charge in Attack on Latino Mayor*, N.Y. TIMES (July 24, 2018), <https://www.nytimes.com/2018/07/24/us/jimmy-matta-attack-sanctuary-city.html> (recounting a physical and verbal assault on Latino mayor by white man at a party, who allegedly said “we’re not going to let you Latino illegals take over our city”); German Lopez, *FBI: Reported Hate Crimes Increased by 17 Percent in*

We know little about the impact that this current climate and rhetoric may be having on law enforcement interactions with Latinx—whether in terms of law enforcement treatment of Latinx or Latinx’ ability or willingness to avail themselves of law enforcement protection (not to mention law enforcement’s willingness to protect Latinx). What we do know is troubling.

The Maricopa County Sheriff’s office was, until recently, headed by Sheriff Joe Arpaio.¹²⁴ In 2012, Sheriff Arpaio was sued successfully by the United States Department of Justice and the ACLU for discriminating against Latinx.¹²⁵ He was found to have led one of the worst “racial profiling” campaigns against Latinx ever seen.¹²⁶ He ordered his officers to use their police powers to detain without suspicion and otherwise violate the rights of individuals they believed to be undocumented. This belief, the DOJ and a federal court found, was often based on Latinx appearance.¹²⁷ Sheriff Arpaio was held in

2017, VOX (Nov. 13, 2018, 1:10 PM), <https://www.vox.com/policy-and-politics/2018/11/13/18091646/fbi-hate-crimes-2017> (noting that reported anti-Latinx hate crimes rose by twenty-four percent in 2017); Liam Stack, *After Attack on Latinos, Prosecutor Calls Utah’s Hate Crime Law ‘Worthless,’* N.Y. TIMES (Dec. 4, 2018), <https://www.nytimes.com/2018/12/04/us/utah-hate-crime.html> (describing how a Utah man walked into a store, announced he wanted to “kill Mexicans,” and then beat the Mexican business owner and his son); Jody Agius Vallejo, *The Effect Racist Rhetoric Has on Young Latinos, and Why All Americans Should Care*, CONVERSATION (Apr. 26, 2016, 6:01 AM), <http://theconversation.com/the-effect-racist-rhetoric-has-on-young-latinos-and-why-all-americans-should-care-57408> (recalling the story of an American-born Latino whose neighbor called the police on him to report that “an unauthorized Mexican immigrant . . . was casing the neighborhood”).

124. Melissa Etehad, *Joe Arpaio, Former Sheriff in Arizona, Is Found Guilty of Criminal Contempt*, L.A. TIMES (July 31, 2017, 5:55 PM), <https://www.latimes.com/nation/la-na-joe-arpaio-verdict-20170706-story.html>.

125. See, e.g., Jason Ryan, *Justice Department Sues Sheriff Joe Arpaio in Civil Rights Case*, ABC NEWS (May 10, 2012, 2:30 PM), <https://abcnews.go.com/Blotter/justice-department-sues-sheriff-joe-arpaio-civil-rights/story?id=16321622> (reporting that Sheriff Arpaio’s words and actions cultivated a culture of bias and racism against Latinx, manifesting particularly in the high number of traffic stops of Latinx and emails between sheriff’s office employees); Press Release, Am. Civil Liberties Union, *Sheriff Arpaio Sued Over Racial Profiling of Latinos in Maricopa County* (July 16, 2008), <https://www.aclu.org/news/sheriff-arpaio-sued-over-racial-profiling-latinos-maricopa-county> (recalling that Sheriff Arpaio “believes appearance alone is sufficient reason to stop and question individuals regarding their immigration status” and that he “directed his deputies to target people they perceive as immigrants in so-called ‘crime suppression sweeps’”).

126. MARICOPA COUNTY FINDINGS LETTER, *supra* note 52, at 6.

127. See *Melendres v. Arpaio*, 989 F. Supp. 2d 822, 870 (D. Ariz. 2013) (“At trial, Sheriff Arpaio was referred to media interviews in which he commented that a factor

criminal contempt by a federal judge because of his failure to follow court orders to stop violating the law.¹²⁸

Throughout his tenure Sheriff Arpaio spoke of Latinx in dehumanizing terms and embraced racism.¹²⁹ In 2007 for example, Sheriff Arpaio said it was an honor for his Sheriff's Department to be compared to the Ku Klux Klan and for his detention center holding Latinx immigrants to be called a concentration camp.¹³⁰ While many in law enforcement distanced themselves from Sheriff Arpaio and the tactics of the Maricopa Sheriff's Department, the Sheriff enjoyed considerable support from the public, and from law enforcement in particular, attributed largely to his anti-Latinx stance.¹³¹ Although Sheriff Arpaio was defeated in his run for re-election in 2016,¹³² his

the MCSO considered in evaluating whether a person is in the country legally is whether 'they look like they came from another country,' . . . or 'look like they just came from Mexico,' . . ." (citations omitted)); MARICOPA COUNTY FINDINGS LETTER, *supra* note 52, at 11 ("Labeling as 'intelligence' a letter explicitly equating skin color with law-breaking and instructing a subordinate to address it are striking examples of how Sheriff Arpaio has promoted a culture of bias in his organization and clearly communicated to his officers that biased policing would not only be tolerated, but encouraged.").

128. Megan Cassidy, *Former Maricopa County Sheriff Joe Arpaio Guilty of Criminal Contempt*, AZCENTRAL (July 31, 2017, 11:25 AM), <https://www.azcentral.com/story/news/local/phoenix/2017/07/31/maricopa-county-sheriff-joe-arpaio-found-guilty-criminal-contempt-court/486278001>; *Sheriff Joe Arpaio Guilty of Contempt for Ignoring Order to Stop Racial Profiling*, GUARDIAN (July 31, 2017, 3:21 PM), <https://www.theguardian.com/us-news/2017/jul/31/joe-arpaio-convicted-contempt-immigration-patrols>.

129. See Catherine Lizette Gonzalez, *A History of Violence: Joe Arpaio's Racist Crusade Against Latinxs*, COLORLINES (Aug. 28, 2017, 1:51 PM), <https://www.colorlines.com/articles/history-violence-joe-arpaio-racist-crusade-against-latinxs> ("Arpaio grew in popularity among proponents of the strong borders movement for his staunch opposition to undocumented immigration.").

130. Greg Price, *Joe Arpaio Was Honored by KKK Comparison Years Before Trump Pardoned Him*, NEWSWEEK (Aug. 30, 2017, 12:38 PM), <https://www.newsweek.com/arpaio-trump-kkk-pardon-657134> (Arpaio said, "Well, you know, they call you KKK. They did me. I think it's an honor, right? Means we're doing something."); Julia Carrie Wong & Lauren Gambino, *Donald Trump Pardons Joe Arpaio, Former Sheriff Convicted in Racial Profiling Case*, GUARDIAN (Aug. 26, 2017, 12:33 AM), <https://www.theguardian.com/us-news/2017/aug/25/donald-trump-joe-arpaio-pardon-arizona-sheriff> (noting that he proudly compared a detention center which primarily held Latinx to a "concentration camp").

131. Michael Kiefer, *How Joe Arpaio Became One of America's Most Polarizing Lawmen*, AZCENTRAL (Aug. 28, 2017, 2:31 PM), <https://www.azcentral.com/story/news/local/phoenix/2017/08/28/z-how-joe-arpaio-became-one-americas-most-polarizing-lawmen/608861001>.

132. See, e.g., Bill Chappell, *Maricopa Sheriff Joe Arpaio Loses Re-Election Fight*, NPR (Nov. 9, 2016), <https://www.npr.org/sections/thetwo-way/2016/11/09/501388042/>

pardon by President Trump in 2017, who called Arpaio “an American Patriot” when pardoning him, was viewed as a sign of support by the administration for continued crack downs on illegal immigration.¹³³

Against this local and national backdrop, the Phoenix Police Department, located in Maricopa County, had twice as many officer-involved shootings in 2018 compared to 2017, apparently largely against Latinx.¹³⁴ This increase can be correlated more closely with anti-Latinx rhetoric and policies than with public safety need. Crime has not risen in Phoenix, and Phoenix police have shot far more people than the combined total for the three cities closest to it in size.¹³⁵ Phoenix police union and (some) city leaders say that the deadly spike in Phoenix police violence is because Phoenix has a more violent population with more people who “want to pull guns and knives on the cops.”¹³⁶ Proponents of this explanation offer no evidence in support of it, raising the question of whether it is an assertion that stems more from anti-Latinx rhetoric and stereotypes than fact. This in turn raises the question of whether anti-Latinx rhetoric is creating

maricopa-sheriff-joe-arpaio-loses-reelection-fight (noting that Sheriff Joe was defeated by Paul Penzone two weeks after he was charged with criminal contempt).

133. Julie Hirschfeld Davis & Maggie Haberman, *Trump Pardons Joe Arpaio, Who Became Face of Crackdown on Illegal Immigration*, N.Y. TIMES (Aug. 25, 2017), <https://www.nytimes.com/2017/08/25/us/politics/joe-arpaio-trump-pardon-sheriff-arizona.html>.

134. See Richard A. Oppel Jr., *How Phoenix Explains a Rise in Police Violence: It's the Civilians' Fault*, N.Y. TIMES (Dec. 10, 2018), <https://www.nytimes.com/2018/12/10/us/phoenix-police-shootings.html>. The last names and descriptions of shooting indicate victims are Latinx, and over forty percent of Phoenix's population is Latinx, although it is believed that the Latinx population in Phoenix is undercounted, as it is everywhere else. See Eugene Scott, *Phoenix Still Sixth-Largest City in U.S.; Officials Say Population Undercounted*, AZCENTRAL (June 27, 2014, 9:39 AM), <https://www.azcentral.com/story/news/local/phoenix/2014/06/27/phoenix-population-likely-undercounted-costing-city-millions/11479515>.

135. These cities are Philadelphia, San Antonio, and San Diego. Oppel Jr., *supra* note 134. Note that San Antonio and San Diego, in particular, have large Latinx populations. San Diego's population is thirty-four percent Latinx. *QuickFacts*, U.S. CENSUS BUREAU (July 1, 2018) <https://www.census.gov/quickfacts/table/sandiegocalifornia,US/PST045218#PST045218>. San Antonio's population is sixty-four percent Latinx. *QuickFacts*, U.S. CENSUS BUREAU (July 1, 2018) <https://www.census.gov/quickfacts/table/sanantoniocitytexas,US/PST045218>.

136. Oppel Jr., *supra* note 134 (quoting Ken Crane, the president of the Phoenix Law Enforcement Association).

new biases, implicit or explicit, and unreasonable threat assessments,¹³⁷ among Phoenix police towards Latinx, that are translating into Phoenix police being too quick to pull the trigger. In other words, Phoenix could be an example of anti-Latinx rhetoric contributing to unnecessary police shootings of Latinx people. More work is needed to have a better sense of whether this is the case and how to respond to it in Phoenix, to identify whether it is happening in other jurisdictions, and to prevent similar dynamics from developing elsewhere.

CONCLUSION

When Professor Henning's proposal is read as she intends, as a call for explicit consideration of *all* salient circumstances in the totality of circumstances standard—including not only race and age but also ethnicity—the task at hand regarding Latinx becomes clear: we must recognize that Latinx people and communities have unique circumstances and histories with the police and criminal justice system that impact how they perceive and are perceived by the police, and must take those factors into account when assessing the propriety of police intrusions regarding Latinx.

We must also acknowledge that we know too little about Latinx interactions with the police and criminal justice system, in part because of our tendency to erase ethnicity from these discussions. This lack of information not only makes it difficult to culturally norm police interactions with Latinx, it also makes it more difficult to evaluate current public treatment of Latinx, including what role police may be playing. The first step towards remedying this problem is to insist upon consideration of Latinx ethnicity as we collect, analyze and discuss qualitative and quantitative data about their interactions with the police.

137. See Henning, *supra* note 1, at 1545–47 (citing empirical research on implicit bias that suggests police are more likely to interpret ambiguous behavior by blacks as violent and aggressive than the same behavior exhibited by whites).