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## **"Show Me Your Papers": An Equal Protection Violation of the Rights of Latino Men in Trump's America**

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## **“SHOW ME YOUR PAPERS”: AN EQUAL PROTECTION VIOLATION OF THE RIGHTS OF LATINO MEN IN TRUMP’S AMERICA**

*Monica Chawla\**

### **I. INTRODUCTION**

During the final presidential debate on October 19, 2016, Donald Trump said if he is elected president, his immigration plan will include deporting “bad hombres” who are bringing drugs and crime across the border.<sup>1</sup> Hombres is the Spanish word for men.<sup>2</sup> During the first month of Trump’s presidency, Trump called for the hiring of 10,000 more U.S. Immigration Customs and Enforcement (hereinafter “ICE”) officers, who in addition to more than 20,000 already on duty, planned to carry out his plan to arrest and deport greater numbers of undocumented immigrants.<sup>3</sup>

On January 25, 2017, President Trump issued Executive Order 13,768, Enhancing Public Safety in the Interior of the United States (hereinafter “EO”), which set forth the Administration’s immigration enforcement and removal priorities.<sup>4</sup> The Department of Homeland Security’s (hereinafter “DHS”) February 20, 2017 memorandum, Enforcement of the Immigration Laws to Serve the National Interest

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<sup>1</sup> Maya Rhodan, *Donald Trump Raises Eyebrows with ‘Bad Hombres’ Line*, TIME (Oct. 20, 2016), <http://time.com/4537847/donald-trump-bad-hombres/>.

<sup>2</sup> *Hombre*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/hombre> (last visited Nov. 15, 2018).

<sup>3</sup> Nicholas Kulish et al., *Immigration Agents Discover New Freedom to Deport Under Trump*, N.Y. TIMES (Feb. 25, 2017), <https://www.nytimes.com/2017/02/25/us/ice-immigrant-deportations-trump.html>.

<sup>4</sup> Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

(implementation memorandum), provided direction for the implementation of the policies set forth in the EO.<sup>5</sup>

The EO and implementation memorandum expanded ICE's enforcement focus to include removable aliens who (1) have been convicted of any criminal offense; (2) have been charged with any criminal offense that has not been resolved; (3) have committed acts which constitute a chargeable criminal offense; (4) have engaged in fraud or willful misrepresentation in connection with any official matter before a governmental agency; (5) have abused any program related to receipt of public benefits; (6) are subject to a final order of removal but have not complied with their legal obligation to depart the United States; or (7) in the judgment of an immigration officer, otherwise pose a risk to public safety or national security.<sup>6</sup>

The Department has directed that classes or categories of removable aliens are no longer exempted from potential enforcement.<sup>7</sup>

The rules during the Obama administration, which prioritized deportation of serious criminals, are no longer enforced.<sup>8</sup> Instead, ICE officers deport any undocumented individual regardless of criminal history.<sup>9</sup> In Southern California, for example, "officers detained 161 people with a wide range of felony and misdemeanor convictions, and 10 who had no criminal history at all."<sup>10</sup> ICE's newfound freedom was characterized by Trump as "taking the shackles off" agents and allowing them to freely pursue those they consider illegal

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<sup>5</sup> John Kelly, *Enforcement of the Immigration Laws to Serve the National Interest*, U.S. DEP'T HOMELAND SECURITY, Feb. 20, 2017, [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf).

<sup>6</sup> *Fiscal Year 2017 ICE Enforcement and Removal Operations Report*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, at 1, <https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf> (last visited Nov. 15, 2018).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Tal Kopan, *How Trump Changed the Rules to Arrest More Non-Criminal Immigrants*, CNN (Mar. 2, 2018, 9:20 AM), <https://www.cnn.com/2018/03/02/politics/ice-immigration-deportations/index.html> ("In Trump's first year, US Immigration and Customs Enforcement arrested 109,000 criminals and 46,000 people without criminal records—a 171% increase in the number of non-criminal individuals arrested over 2016.").

<sup>10</sup> Kulish et al., *supra* note 3.

immigrants.<sup>11</sup> Consequently, two memos released by the Department of Homeland Security, the parent agency of ICE and the Border Patrol, provided more details about how it would carry out its plan under the new administration.<sup>12</sup> This plan includes Trump's signature campaign pledge of building a wall along the entire southern border of the United States as well as speedier deportations and greater reliance on local police officers to arrest and deport illegal immigrants.<sup>13</sup>

In this post-election anti-immigration climate, on May 7, 2017, Senate Bill (hereinafter "SB") 4 was cleared for implementation by a Federal appeals court in Texas.<sup>14</sup> SB 4 contains a "show me your papers" provision, which requires officers to investigate any person's immigration status if they have a reasonable suspicion the person is illegally in the United States.<sup>15</sup> SB 4 and similar legislation in South Carolina, Alabama, Utah, and previously in Arizona has been challenged on equal protection grounds because Spanish speakers will be racially profiled by law enforcement when stopped for minor infractions such as traffic stops.<sup>16</sup> These laws were dubbed "show me your papers" laws after the first infamous attempt by Arizona lawmakers to target anyone suspected of being an illegal immigrant under the Support Our Law Enforcement and Safe Neighborhoods Act, or Arizona SB 1070.<sup>17</sup> While the goal of the legislation is to target "dangerous" illegal immigrants, its effect will inconvenience all Latino immigrants, even those who were born in the United States.<sup>18</sup> Texas state Representative, Rafael Achia, stated in an interview:

[Y]ou know, the state of Texas is 40 percent Latino. The people who are going to be asked for their papers are going to be Latinos, for the most part. It's going to

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<sup>11</sup> Kulish et al., *supra* note 3.

<sup>12</sup> Kelly, *supra* note 5.

<sup>13</sup> Kulish et al., *supra* note 3.

<sup>14</sup> Maggie Astor, *Texas' Ban on 'Sanctuary Cities' Can Begin, Appeals Court Rules*, N.Y. TIMES (Mar. 13, 2018), <https://www.nytimes.com/2018/03/13/us/texas-immigration-law-sb4.html>.

<sup>15</sup> Suzanne Gamboa, *Texas' SB4 Immigration Enforcement Law: 5 Things to Know*, NBC NEWS (May 11, 2017, 6:43 PM), <https://www.nbcnews.com/news/latino/texas-sb4-immigration-enforcement-law-5-things-know-n758126>.

<sup>16</sup> *Arizona's SB 1070*, ACLU, <https://www.aclu.org/issues/immigrants-rights/state-and-local-immigration-laws/arizonas-sb-1070> (last visited Nov. 15, 2018).

<sup>17</sup> *Id.*

<sup>18</sup> Ruben Navarrette, *How Arizona Law Hurts Hispanic Citizens*, CNN (June 26, 2012, 11:09 AM), <https://www.cnn.com/2012/06/26/opinion/navarrette-arizona-law-court/index.html>.

be people whose [sic]—who are not English—English speakers. It's going to be people who look differently. It's going to be people who are more brown.<sup>19</sup>

The Equal Protection Clause requires states to treat their citizens equally, and advocates have used it to combat discriminatory laws, policies, and government actions.<sup>20</sup> This Note argues that Latino males' equal protection rights under the Fourteenth Amendment are violated because these laws, while neutral on their face, were enacted with a discriminatory motive. The overwhelming majority of deportees are Latino males.<sup>21</sup> Moreover, these laws are enforced arbitrarily by law enforcement in such a way as to unfairly target Hispanic males, resulting in increased detentions and deportations of Latino men who are often the sole bread winners of their families, leaving scrambling family members behind.

This Note will be divided into six sections. Section II will examine data from government agencies such as ICE, which shows increasing numbers of Latino male deportations because of the government's recently expanded definition of acts which constitute a crime. Section III highlights the various "show me your papers" laws in various states and the cooperation agreements between the federal government and state governments to enforce the nation's immigration laws as a fortified front. Section IV outlines the traditional equal protection analysis and case law utilized by the courts when challenging a facially neutral law if it was enacted with intent to discriminate and results in such disparate effect. Section V establishes that "show me your papers" laws were enacted with discriminatory intent by legislators to target Latino males, which has resulted in a disparate effect and has caused an increase in deportations of Latino males, not females. Section VI analyzes "show me your papers" laws

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<sup>19</sup> Juan Gonzáles, *Show Me Your Papers, Texas-Style: Lawmakers Condemn SB4 as Greatest Legislative Threat to Immigrants*, DEMOCRACY NOW! (May 9, 2017), [https://www.democracynow.org/2017/5/9/show\\_me\\_your\\_papers\\_texas\\_style](https://www.democracynow.org/2017/5/9/show_me_your_papers_texas_style).

<sup>20</sup> See U.S. CONST. amend. XIV, § 1, which provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

<sup>21</sup> See discussion of the deportee statistics *infra* Section II.

under intermediate scrutiny and concludes that such laws fail intermediate scrutiny because the states' important government purpose of public safety depends solely on Latino males' stereotypes and there is no substantial relationship between the enforcement of "show me your paper laws" and the states' interest in public safety. In Section VII, possible solutions are discussed which will advise minorities, especially Latino males who are the most affected by such xenophobic legislation, to take an active role in the political process and vote against such laws and their legislators that endorsed such laws.

## II. INCREASING DEPORTATION OF LATINO MALES: CRIMMIGRATION

The first decade of the twenty-first century was a period where hundreds of thousands of Latino men were sent back to their countries of birth, forced to leave children and partners to struggle.<sup>22</sup> Although Asians and Europeans make up about a quarter of undocumented immigrants in the United States, over 97% of deportees are from Latin America or the Caribbean.<sup>23</sup> Despite the fact that about half of all undocumented immigrants are women, about 90% of deportees are men.<sup>24</sup> The gender skew happens because police officers are more likely to stop men.<sup>25</sup> As men are removed, women and children are left behind.<sup>26</sup> Deportations abruptly deprive Latino working families of male breadwinner wages that may have been meager but were, nevertheless, critical.<sup>27</sup> Female partners respond by trying to work two or three jobs, reducing their time to care for the very young and the infirm, which results in children bearing most of their parents' burdens.<sup>28</sup>

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<sup>22</sup> Tanya Golash-Boza & Pierrette Hondagneu-Sotelo, *Latino Immigrant Men and the Deportation Crisis: A Gendered Racial Removal Program*, 11 *LATINO STUDIES* 271, 285 (2012).

<sup>23</sup> Tanya Golash-Boza, *The Deportation Crisis for Latino Immigrant Men and Their Families*, SCHOLARS STRATEGY NETWORK (Apr. 9, 2014), <http://scholars.org/brief/deportation-crisis-latino-immigrant-men-and-their-families>.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Golash-Boza, *supra* note 23.

According to a Migration Policy Institute study, from a total of 32,000 immigrants in ICE custody on January 25, 2009, 91% were male and 9% were female.<sup>29</sup> Fifty-eight percent (18,690) of the 32,000 detainees held on January 25, 2009 did not plead or were not proven guilty of a crime; in other words, they did not have criminal convictions.<sup>30</sup> According to a Pew Research Center study, approximately 5.5 million United States children have at least one parent that is undocumented.<sup>31</sup> TracImmigration kept case-by-case records on deportations by ICE during 2012 and 2013.<sup>32</sup> Their report revealed that over nine out of ten ICE deportees were male.<sup>33</sup> In 2012, of 409,849 deported individuals, 94% were male and 6% were female.<sup>34</sup> In 2013, of 368,644 deported individuals, 93% were male and 7% were female.<sup>35</sup> Race also plays a significant factor in the increased deportation numbers.<sup>36</sup> Nearly two-thirds of all ICE deportees are citizens of Mexico.<sup>37</sup> Following Mexico are Guatemala, Honduras, El Salvador and the Dominican Republic.<sup>38</sup> Increasingly strict immigration policies have been shown to devastate Hispanic communities.<sup>39</sup>

Over the past two decades, the United States government has increasingly criminalized immigration offenses and has embedded harsher immigration consequences in an ever-expanding list of non-immigration criminal offenses.<sup>40</sup> The DHS classifies noncitizen offenders into three categories: Levels 1, 2, and 3, with Level 1

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<sup>29</sup> Donald Kerwin & Serena Yi-Ying Lin, *Immigration Detention: Can ICE Meet Its legal imperatives and Case Management Responsibilities* MIGRATION POL'Y INST., at 11, Sept. 2009, <https://www.migrationpolicy.org/research/immigrant-detention-can-ice-meet-its-legal-imperatives-and-case-management-responsibilities>.

<sup>30</sup> *Id.* at 20.

<sup>31</sup> Julia Preston, *Study Sees More Young Citizens with Parents in the U.S. Illegally*, N.Y. TIMES (Apr. 14, 2009), <https://www.nytimes.com/2009/04/15/us/15immig.html>.

<sup>32</sup> *ICE Deportations: Gender, Age, and Country of Citizenship*, TRACIMMIGRATION (Apr. 9, 2014), <http://trac.syr.edu/immigration/reports/350/>.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *ICE Deportations*, *supra* at 32.

<sup>38</sup> *ICE Deportations*, *supra* at 32.

<sup>39</sup> Andrés Dae Keun Kwon, *Defending Criminal(ized) "Aliens" After Padilla: Toward A More Holistic Public Immigration Defense in the Era of Crimmigration*, 63 UCLA L. REV. 1034, 1047 (2016).

<sup>40</sup> Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1141 (2013).

involving the most serious crimes or aggravated felonies and Level 3 involving the least serious crimes or misdemeanors.<sup>41</sup> Level 2 and 3 offenses are considered to be nonviolent crimes.<sup>42</sup> These crimes include minor drug offenses, property offenses, such as burglary, larceny, fraud and money laundering, and misdemeanors.<sup>43</sup> Moreover, of ICE's three levels, the largest group removed is Level 3 (95,453 in fiscal year 2013), the group with the least serious crimes.<sup>44</sup> A vast range of non-serious, nonviolent offenses, such as turnstile jumping, possession of stolen bus transfers, or public urination, were not deportable for noncitizens, including long-time lawful permanent residents, twenty years ago; now, these minor offenses can expose noncitizens to removal, even retroactively.<sup>45</sup>

In the first 100 days of Trump's administration, between January 22 and April 29, 2017 alone, ICE made 41,000 arrests of individuals known or suspected to be in the country illegally.<sup>46</sup> This number represents a 38% increase from the same time period in 2016 when ICE arrested slightly more than 30,000 undocumented immigrants.<sup>47</sup> According to the year 2017 ICE report, ICE made routine arrests of more than 155,000 immigrants, 30% of whom were not criminals.<sup>48</sup> The final three months of the year, the rate of non-criminals arrested was even higher, at 35%.<sup>49</sup> That number was far lower, though, in 2016.<sup>50</sup> That year, the Obama administration arrested almost 110,000 immigrants, nearly 16% of whom were not criminals.<sup>51</sup> This data likely indicates an increasing pattern for the coming years of ICE agents' complete disregard of a criminal record as a consideration for detention and deportation. Specifically, Latino men risk

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<sup>41</sup> Adina B. Applebaum, *Challenging Crimmigration: Applying Padilla Negotiation Strategies Outside the Criminal Courtroom*, 6 GEO. J.L. & MOD. CRITICAL RACE PERSP. 217, 225 (2014).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 220.

<sup>44</sup> *Id.*

<sup>45</sup> Kwon, *supra* note 39, at 1044.

<sup>46</sup> Aria Bendix, *Immigrant Arrests Are Up, but Deportation Is Down*, ATLANTIC (May 17, 2017), <https://www.theatlantic.com/news/archive/2017/05/under-trump-immigrants-arrests-are-up-but-deportation-is-down/527103/>.

<sup>47</sup> *Id.*

<sup>48</sup> *Fiscal Year 2017 ICE Enforcement and Removal Operations Report*, *supra* note 6.

<sup>49</sup> *Fiscal Year 2017 ICE Enforcement and Removal Operations Report*, *supra* note 6.

<sup>50</sup> Kopan, *supra* note 9.

<sup>51</sup> Kopan, *supra* note 9.



deportation for minor offenses which does not ordinarily lead to jail time for other similarly-situated individuals.

### III. ANTI-LATINO MALE IMMIGRANT LEGISLATION

In the Trump administration, there is a newly found cooperation between state law enforcement agencies and federal immigration law enforcement, which makes minorities worried about racial profiling.<sup>52</sup> States and localities argue that the federal government is not properly enforcing federal immigration laws and ensuring the safety of the people within the states.<sup>53</sup> With only 20,000 employees overall, only a quarter of whom are available for raids at homes and worksites, ICE lacks the capacity to patrol the streets of U.S. cities and locate noncitizens eligible for deportation.<sup>54</sup> “Show me your papers” laws and similar agreements rely on cooperation between criminal law enforcement and immigration law enforcement to increase the number of future deportations of both criminal and non-criminal undocumented individuals.<sup>55</sup> Considering that the majority of deportees for violent and nonviolent offenses are Latino males, Latino males are worried about racial profiling by law enforcement.<sup>56</sup>

#### A. The Agreement Between Federal and State Governments to Increase Deportation of Illegal Immigrants

Section 287(g)(1) of the Immigration and Nationality Act (hereinafter “INA”), entitled “Powers of immigration officers and employees,” covers the state’s cooperative efforts with federal immigration officials.<sup>57</sup> In general, section 287(g)(1) states that the

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<sup>52</sup> Brian Bennet, *Not Just ‘Bad Hombres’: Trump is Targeting Up to 8 Million People for Deportation*, L.A. TIMES (Feb. 4, 2017, 12:00 PM), <http://www.latimes.com/politics/la-na-pol-trump-deportations-20170204-story.html>.

<sup>53</sup> Stephanie Condon, *Arizona Gov. Jan Brewer: Obama Isn’t Doing his Job*, CBS NEWS (May 21, 2010, 12:28 PM), <https://www.cbsnews.com/news/arizona-gov-jan-brewer-obama-isnt-doing-his-job>.

<sup>54</sup> Boza, *supra* note 23.

<sup>55</sup> Boza, *supra* note 23.

<sup>56</sup> Boza, *supra* note 23.

<sup>57</sup> See Immigration and Nationality Act of 1952, Pub. L. No. 94-550, § 287(a) (codified as amended 8 U.S.C. § 1357(g)(1)), which provides:

Notwithstanding section 1342 of title 31, United States Code, the Attorney General may enter into a written agreement with a State, or any political

DHS and state or local law enforcement officials, may enter into formal written agreements, often known as 287(g) agreements, which enable certain state or local police to enforce federal immigration laws that ICE agents usually enforce.<sup>58</sup> Section 287(g)(10) of the INA indicates that no formal agreement is necessary for state and local officers “to cooperate with the [Department of Homeland Security] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.”<sup>59</sup>

Under the Trump Administration, a January 2017 executive order asked DHS to enter into more 287(g) partnerships and target sanctuary cities, which are safe places for undocumented individuals where local officials choose not to actively enforce immigration laws unless a serious offense has been committed.<sup>60</sup> Between 2006 and 2015, more than 402,000 immigrants were identified for removal as a result of the program.<sup>61</sup>

Infamous for running the program was Arizona Sheriff Joe Arpaio, who used 287(g) to “justify massive sweeps during which Latinos were racially profiled and suffered civil rights abuses.”<sup>62</sup> Sheriff Joe Arpaio, who previously proclaimed himself as “America’s toughest Sheriff,” was convicted of criminal contempt for violating a 2011 order that barred Arpaio and his office from detaining individuals solely based on suspicions about their legal status.<sup>63</sup> Trump pardoned Arpaio via his first presidential pardon, which “amounts to a tacit

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subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers) may carry out such function at the expense of the State or political subdivision and to extent consistent with State and local law.

<sup>58</sup> *Id.*

<sup>59</sup> 8 U.S.C. § 1357(g)(10)(B) (2018).

<sup>60</sup> Maya Rhodan, *President Trump Wants Sheriffs to Help with Deportations. Here’s What Sheriffs Think*, TIME (Mar. 17, 2017), <http://time.com/4704084/donald-trump-immigration-sheriffs-287g/>; Tal Kopan, *What are Sanctuary Cities, and Can They Be Defunded?*, CNN (Mar. 26, 2018, 3:40 PM), <https://www.cnn.com/2017/01/25/politics/sanctuary-cities-explained/index.html> (discussing that sanctuary cities included Chicago, New York, and San Francisco).

<sup>61</sup> Rhodan, *supra* note 60.

<sup>62</sup> Rhodan, *supra* note 60.

<sup>63</sup> Ryan J. Reilly, *Trump Pardons Former Sheriff Joe Arpaio, Who Illegally Targeted Latinos*, HUFFINGTON POST (Aug. 26, 2017), [https://www.huffingtonpost.com/entry/trump-pardon-joe-arpaio\\_us\\_599da366e4b0a296083b9758](https://www.huffingtonpost.com/entry/trump-pardon-joe-arpaio_us_599da366e4b0a296083b9758).

endorsement of Arpaio's discriminatory tactics."<sup>64</sup> Enlisting local police officers with federal immigration tasks can have a severe impact on deportation as the mere racial profiling of Latino males can lead to widespread fears among these communities.

### **B. Arizona SB 1070: The Infamous First "Show Me Your Papers" Law**

Arizona and other states have pointed to section 287(g)(10)(b) to argue that the "show me your papers" laws are simply a form of "cooperation" with the federal government's immigration enforcement scheme.<sup>65</sup> The meaning of this term, "cooperate," stands at the center of the controversy over the authority of state and local officers to participate in immigration enforcement.<sup>66</sup>

Arizona is infamously known for the "Show Me Your Papers Law," also known as SB 1070.<sup>67</sup> The Arizona law, specifically section 2(b), states that it is a crime for an alien to be present in Arizona without proper documentation.<sup>68</sup> This section also permits state law enforcement officers to determine an individual's immigration status during a "lawful stop, detention or arrest" if the officer has a reasonable suspicion that the individual is an illegal immigrant.<sup>69</sup>

In June 2012, the U.S. Supreme Court, in *Arizona v. United States*,<sup>70</sup> upheld the provision requiring immigration status checks during law enforcement stops if reasonable suspicion existed.<sup>71</sup> However, the Court struck down three other provisions as violations of the Supremacy Clause of the United States Constitution.<sup>72</sup>

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<sup>64</sup> *Id.*

<sup>65</sup> Melissa Keaney & Alvaro M. Huerta, *Restrictionist States Rebuked: How Arizona v. United States Reins in States on Immigration*, 3 WAKE FOREST J.L. & POL'Y 249, 263 (2013).

<sup>66</sup> *Id.*

<sup>67</sup> Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES (Apr. 23, 2010), <https://www.nytimes.com/2010/04/24/us/politics/24immig.html>.

<sup>68</sup> S. 1070, § 2(b), 149th Leg., 2d Reg. Sess. (Ariz. 2010).

<sup>69</sup> *Id.*

<sup>70</sup> 567 U.S. 387 (2012).

<sup>71</sup> *Id.* at 413.

<sup>72</sup> *Id.* The Supreme Court struck down Section 3 of S.B. 1070, which made it a state crime to be unlawfully present in the United States and failing to register with the federal government; Section 5, which made it a misdemeanor state crime to seek work or to work without authorization to do so; and Section 6, which authorized warrantless arrests of aliens believed to be removable from the United States based on probable cause. *Id.*

Before SB 1070 could go into effect, it was stopped by a settlement between the State of Arizona and the American Civil Liberties Union (hereinafter “ACLU”).<sup>73</sup> Officers were no longer required but had the choice to inquire about immigration status and contact ICE as long as it did not prolong a stop.<sup>74</sup> Although a relief, this discretion by police officers remains alarming, especially under the current Trump administration.

### C. Copycat “Show Me Your Papers” Bills in Alabama, Georgia, Indiana, and Utah

In June of 2011, Alabama signed its own “show me your papers” bill, also known as HB 56 into law.<sup>75</sup> Section 12 of HB 56 states, “Upon any lawful stop, detention or arrest made by a law enforcement officer (state, county, or municipal) and reasonable suspicion exists that a person is an alien, unlawfully present, a reasonable attempt shall be made, when practical, to determine immigration status.”<sup>76</sup> Although, this section of the law has not been actively enforced after a settlement with the ACLU and other immigrant rights groups, new worries of abuse and arbitrary enforcement arise under the Trump presidency.<sup>77</sup>

A similarly worded Georgia law, Georgia HB 87, was mostly struck down.<sup>78</sup> However, the provision allowing state police officers to verify the immigration status of individuals who are lawfully detained during any stop or detention was upheld by the United States Court of Appeals for the Eleventh Circuit.<sup>79</sup> However, the three-judge

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<sup>73</sup> Michael Kiefer, *Arizona Settles Final Issues of SB 1070 Legal Fight*, A.Z. CENT. (Sept. 15, 2016), <https://www.azcentral.com/story/news/politics/immigration/2016/09/15/arizona-settlement-sb-1070-lawsuit-aclu-immigration/90424942/>.

<sup>74</sup> Nigel Duara, *Arizona’s Once-Feared Immigration Law, SB 1070, Loses Most Of Its Power In Settlement*, L.A. TIMES (Sept. 15, 2016), <http://www.latimes.com/nation/la-na-arizona-law-20160915-snap-story.html>.

<sup>75</sup> H.R. 56, § 22, 2011 Leg., Reg. Sess. (Ala. 2011).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 4.

<sup>78</sup> H.R. 87, § 8, 151st Gen. Assemb., Reg. Sess. (Ga. 2011); Leslie Berestein Rojas, *Post Supreme Court, The State of State Immigration Enforcement Laws*, SOUTHERN CAL. PUB. RADIO (Aug. 24, 2012), <https://www.scpr.org/blogs/multiamerican/2012/08/24/9810/post-supreme-court-the-state-of-state-immigration-/>.

<sup>79</sup> *Ga. Latino All. for Human Rights v. Governor of Ga.*, 691 F.3d 1250 (11th Cir. 2012).

panel was concerned that racial profiling would result and create potential future lawsuits.<sup>80</sup>

Similarly, section 4 of Indiana Senate Bill 590's "show me your papers" provision went into effect, but a judge voiced her concerns regarding further judicial scrutiny in case of racial profiling.<sup>81</sup>

Utah also enacted its own "show me your papers" law known as HB 497.<sup>82</sup> A settlement was reached between the state and the ACLU and other immigrant right groups, which reinstated the rule that individuals cannot be stopped solely based on their immigration status.<sup>83</sup> However, concerns regarding racial profiling of Latino males during traffic stops remain even post-settlement. After a brief break from states enacting "show me your papers" legislation, newfound tension between legislators and increasing illegal immigration caused Texas to institute its own "show me your papers law" in the wake of Trump's election as President.<sup>84</sup>

#### **D. Texas' Recent Enactment of SB4 and Current Legal Challenges**

In Texas, the Republican-dominated Texas legislature enacted SB 4, but the state's major cities—San Antonio, Austin, Dallas, Houston and El Paso—fought this bill.<sup>85</sup> On March 13, 2018, a three-judge panel of the Fifth Circuit unanimously ruled in favor of the majority of the bill, including the "show me your papers" provision, and almost completely reversed a federal judge's temporary block of SB 4 in August 2017.<sup>86</sup> In the wake of the Fifth Circuit court's ruling, every law officer on the streets can now question anyone they come in contact with about their immigration status, which includes ordinary

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<sup>80</sup> *Id.*

<sup>81</sup> *Buquer v. City of Indianapolis*, No. 1:11-cv-00708-SEB-MJD, 2013 WL 1332137 (S.D. Ind. Mar. 28, 2013).

<sup>82</sup> H.R. 497, § 4, 95th Leg., Gen. Sess. (Utah 2011).

<sup>83</sup> Adela de la Torre, *Civil Rights Groups Celebrate Undoing of Utah Anti-Immigrant Law*, NAT'L IMMIGR. L. CTR., Nov. 25, 2014, <https://www.nilc.org/2014/11/25/nr112514/>.

<sup>84</sup> Julián Aguilar, *Trump Administration Weighs in on Sanctuary Cities Court Battle*, TEX. TRIBUNE (June 23, 2017), <https://www.texastribune.org/2017/06/23/trump-administration-weighs-sb4-court-battle/>.

<sup>85</sup> S. 4, § 1, 85th Leg. (Tex. 2016); John Burnett, *'Show Me Your Papers' Law Temporarily Blocked by Federal Judge*, NAT'L PUB. RADIO (Aug. 31, 2017, 7:37 AM), <https://www.npr.org/2017/08/31/547510929/show-me-your-papers-law-temporarily-blocked-by-federal-judge>.

<sup>86</sup> *City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018).

interactions with the public, such as traffic stops and an officer's questioning of a witness of a crime.<sup>87</sup>

Local law enforcement officials have a great deal of discretion in deciding whose immigration status will be checked and whether arrests will be made.<sup>88</sup> Officers know that any arrest will begin a process which gathers immigration status information.<sup>89</sup> For those who are interested in reducing the unauthorized migrant population within their jurisdiction, arrests for minor traffic offenses are an easy way to check the immigration status of large portions of the population.<sup>90</sup> The disproportionate use of this enforcement strategy in Latino communities has caused Latino immigrants to feel targeted based on their ethnicity.<sup>91</sup> The possibilities for abuse of power by local law enforcement via racial profiling of Latino men are immense if SB 4 is carried out to its full extent.<sup>92</sup> This indiscriminate use of the law in this anti-immigrant political climate would upset the cooperation between law enforcement and the public, leading to less cooperation and more harmful, lasting effects on communities.

#### IV. EQUAL PROTECTION ANALYSIS: INTERMEDIATE SCRUTINY

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution prohibits states from denying any person within its territory the equal protection of the laws.<sup>93</sup> This means that a state must treat an individual in the same manner as others in similar conditions and circumstances.<sup>94</sup> The first step is to identify the classification that a government action creates.<sup>95</sup> To successfully

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<sup>87</sup> Nick Jimenez, *As SB4 Goes Into Practice In Texas Law Enforcement Carries Heavy Burden*, CALLER TIMES (Mar. 16, 2018), <https://www.caller.com/story/news/columnists/nick-jimenez/2018/03/16/jimenez-sb-4-goes-into-practice-texas-law-enforcement-carries-heavy-burden/432034002/>.

<sup>88</sup> Angela M. Banks, *The Curious Relationship Between "Self-Deportation" Policies and Naturalization Rates*, 16 LEWIS & CLARK L. REV. 1149, 1180 (2012).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Jimenez, *supra* note 87.

<sup>93</sup> U.S. CONST. amend. XIV. § 1.

<sup>94</sup> *Reed v. Reed*, 404 U.S. 71, 77 (1971) (invalidating a mandatory provision of the Idaho probate code because a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the objectives of the legislation, so that all persons similarly circumstanced shall be treated alike").

<sup>95</sup> *Id.* at 76.

challenge a law that is facially neutral but creates a disparate impact, an individual must show that the government intended to discriminate against the affected group.<sup>96</sup>

The Supreme Court has made it clear that different levels of scrutiny will apply to different types of classifications.<sup>97</sup> A law is subject to intermediate scrutiny if it burdens a “quasi-suspect” class, such as gender.<sup>98</sup> The government has the burden of proving that the statutory classification is substantially related to a legitimate government objective.<sup>99</sup> Thus, a law fails intermediate scrutiny if it does not substantially advance a government objective, or if the objective is not legitimate (e.g., based on stereotype, bias, or animus).<sup>100</sup>

#### **A. Classifications Based on Gender: Discriminatory Intent and Effect**

*Personnel Administrator of Massachusetts v. Feeney*<sup>101</sup> was the first sex discrimination case under the equal protection clause as applied to a facially neutral statute.<sup>102</sup> In *Feeney*, a Massachusetts statute allowed for all veterans who qualify for state civil service

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<sup>96</sup> *Washington v. Davis*, 426 U.S. 229, 238-44 (1976) (upholding a job-related employment test that white people passed in proportionately greater numbers than black candidates in the absence of a showing that racial discrimination entered into the establishment or formulation of the test).

<sup>97</sup> *Craig v. Boren*, 429 U.S. 190, 197-98 (1976) (holding that statistical evidence of incidents of drunken driving among males and females was insufficient to support gender-based discrimination arising from Oklahoma statute prohibiting the sale of 3.2% beer to males under the age of 21 and females under the age of 18).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *See, e.g., Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) (invalidating a statute based on archaic and overbroad generalizations concerning the financial position of servicewomen); *Frontiero v. Richardson*, 411 U.S. 677, 689 (1973) (invalidating a statute based on archaic and overbroad generalizations based on working women); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 (1975) (invalidating a statute because there was no justification to use a gender requirement in determining eligibility for certain governmental entitlements); *Stanton v. Stanton*, 421 U.S. 7 (1975) (reasoning that similarly, increasingly outdated misconceptions concerning the role of females in the home rather than in the “marketplace and the world of ideas” were rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy).

<sup>101</sup> 442 U.S. 256 (1979). Although strict scrutiny may also apply in the race context of discrimination against Latinos, this Note will focus solely on the intermediate scrutiny standard in the context of gender, specifically towards Latino males.

<sup>102</sup> *Id.* at 259.

positions to be considered ahead of any qualifying nonveterans.<sup>103</sup> However, the plaintiff, a female nonveteran, was always ranked below male veterans who had achieved lower scores on the civil service exam.<sup>104</sup> There was clear evidence that the civil service job preferences to veterans adversely impacted more women than men; however, the Court held that the plaintiff failed to prove that the statute “in any way reflect[ed] a purpose to discriminate on the basis of sex.”<sup>105</sup> The Court rejected the argument that discriminatory purpose was established solely by the foreseeability of the disproportionate impact on women, holding that discriminatory intent must be proven in addition to discriminatory impact.<sup>106</sup>

The Court held that when faced with a statute which is gender-neutral on its face, a two-fold inquiry is appropriate.<sup>107</sup> The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based.<sup>108</sup> If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects purposeful gender-based discrimination.<sup>109</sup> The Court expanded the definition of “discriminatory purpose,” which implies more than intent as volition or intent as awareness of consequences.<sup>110</sup> The purpose must imply that the state legislature selected or reaffirmed a particular course of action at least in part “because of,” not merely “in spite of,” its adverse effects upon an identifiable group.<sup>111</sup> The Court held that there was no evidence to demonstrate that the preference for male veterans was based on the purpose to keep women in a stereotypic and predefined space in the Massachusetts Civil Service.<sup>112</sup>

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 264.

<sup>105</sup> *Id.* at 277.

<sup>106</sup> *Feeney*, 442 U.S. at 277.

<sup>107</sup> *Id.* at 274.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 279.

<sup>111</sup> *Feeney*, 442 U.S. at 279.

<sup>112</sup> *Id.*



**B. State's Burden: Important Governmental Purpose and Substantially Related Means**

Under intermediate scrutiny, when the party alleging discrimination proves the existence of purposeful discrimination, the burden shifts to the legislature to show an important government purpose for such law and a substantial relationship between the means used and the purpose.<sup>113</sup>

**1. Important Governmental Purpose**

In *United States v. Virginia*,<sup>114</sup> the Court appeared to apply a more stringent level of scrutiny to sex-based classifications, requiring that classifications predicated on sex must present an “exceedingly persuasive justification.”<sup>115</sup> The Supreme Court held that the school’s all-male admissions policy violated the Equal Protection Clause and that the proposed remedy—the Virginia Women’s Leadership Institute (hereinafter “VWIL”) at Mary Baldwin College—did not remedy the constitutional violation.<sup>116</sup> The Court rejected the state’s contention that single-sex education furthered an important governmental objective by providing “important educational benefits” contributing to a “diversity in educational approaches.”<sup>117</sup> The Court viewed this as a post-hoc rationalization rather than a genuine objective because the school’s exclusion of women dated back to a time when women were excluded from all institutions of higher education in Virginia.<sup>118</sup>

The Court highlighted that it does not need to accept governmental objectives offered at face value but is allowed to examine the legislative scheme and its history to determine whether the asserted purpose was a goal at its creation or merely a pretense by the legislature.<sup>119</sup> Some government interests have been upheld by lower federal courts as important, such as a statute which drew a distinction between exposure of the male and female breast because it served the important government objective of ensuring public safety and deterring crime, property values and maintenance of the quality of

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<sup>113</sup> *Craig v. Boren*, 429 U.S. 190, 197 (1976).

<sup>114</sup> 518 U.S. 515 (1996).

<sup>115</sup> *Id.* at 524.

<sup>116</sup> *Id.* at 534.

<sup>117</sup> *Id.* at 539.

<sup>118</sup> *Id.*

<sup>119</sup> *United States v. Virginia*, 518 U.S. at 535-36.

urban life.<sup>120</sup> In contrast, the Seventh Circuit, in *Mary Beth G. v. City of Chicago*,<sup>121</sup> struck down a policy of conducting body cavity searches of female arrestees but not male arrestees because the city failed to demonstrate that the number of items found in searching women was sufficiently greater than those found by searching men.<sup>122</sup> The city failed to show why the presence of the vaginal cavity made it necessary to strip search only women to achieve its objective of ensuring the security of the City lockups and unnecessary to search the body cavities of males, which can be and occasionally are used to conceal weapons or contraband.<sup>123</sup> Therefore, the city could not justify its grossly disparate treatment.<sup>124</sup>

The Supreme Court has held that some objectives predicated on stereotypical conceptions of gender roles fail to qualify as important governmental objectives.<sup>125</sup> In *Stanton v. Stanton*,<sup>126</sup> the Court first gave notice that parties could not rely on stereotypes in sex discrimination cases to strike down a law based on stereotypes of the role of women in the home.<sup>127</sup> The Court could not perceive anything rational in the distinction drawn by the Utah statute which resulted in the father's support liability for his daughter to age 18 and for his son to age 21.<sup>128</sup> The distinction was based on the notion that girls were thought to "marry early" without a need to further their education.<sup>129</sup> This criterion was wholly unrelated to the objective of that statute which was to avoid possible litigation between family members.<sup>130</sup>

The Supreme Court strengthened and extended its position in *Mississippi University for Women v. Hogan*<sup>131</sup> and held that intermediate scrutiny applies regardless of whether gender is the target of discriminatory policy.<sup>132</sup> The Court struck down an all-female admissions policy because it could not be justified on the asserted

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<sup>120</sup> Buzzetti v. City of N.Y., 140 F.3d 134, 143 (2d Cir. 1998).

<sup>121</sup> 723 F.2d 1263 (7th Cir. 1983).

<sup>122</sup> *Id.* at 1263.

<sup>123</sup> *Id.* at 1274.

<sup>124</sup> *Id.*

<sup>125</sup> Miss. Univ. for Women v. Hogan, 458 U.S. 718, 729 (1982).

<sup>126</sup> 421 U.S. 7 (1975).

<sup>127</sup> *Id.* at 10.

<sup>128</sup> *Id.* at 15.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> 458 U.S. 718 (1982).

<sup>132</sup> *Id.* at 728.

ground that it compensated for past discrimination against women and, therefore, constituted educational affirmative action.<sup>133</sup> A state could evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefitted by the classification actually suffered a disadvantage related to the classification.<sup>134</sup> Rather than compensating for discriminatory barriers faced by women, the school's policy tended to perpetuate the stereotyped view of nursing as an exclusively woman's job.<sup>135</sup> Moreover, the State did not show that the gender-based classification was substantially and directly related to its proposed compensatory objective.<sup>136</sup> To the contrary, the university's policy of permitting men to attend classes as auditors fatally undermined its claim that women, at least those in the School of Nursing, were adversely affected by the presence of men.<sup>137</sup> Thus, the State has fallen far short of establishing the "exceedingly persuasive justification" needed to sustain the gender-based classification.<sup>138</sup>

Similarly, the Supreme Court in *Orr v. Orr*<sup>139</sup> struck down a statute that allowed women, but not men, to receive alimony as part of a divorce, as it was based upon stereotypical views of gender roles whereby a wife plays a dependent role and the male is the breadwinner.<sup>140</sup> The legislative purpose claimed by the state was to provide help for needy spouses, using sex as a proxy for need.<sup>141</sup> The other is a goal of compensating women for past discrimination during marriage, which left them unprepared to fend for themselves in the working world following divorce.<sup>142</sup> However, since individualized hearings already took place and helped determine which women were in fact discriminated against vis-à-vis their husbands, as well as which family units defied the stereotype and left the husband dependent on the wife, there was no need for Alabama's gender based distinction in the statute.<sup>143</sup>

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 730.

<sup>136</sup> *Hogan*, 458 U.S. at 730.

<sup>137</sup> *Id.* at 731.

<sup>138</sup> *Id.*

<sup>139</sup> 440 U.S. 268 (1979).

<sup>140</sup> *Id.* at 279.

<sup>141</sup> *Id.* at 280.

<sup>142</sup> *Id.* at 282.

<sup>143</sup> *Id.*

A similar statute was struck down in *Wengler v. Druggists Mutual Ins.*<sup>144</sup> where the Court held that a state law which granted widows financial benefits automatically, but required widowers to show economic dependence or physical incapacitation, relied on stereotypes about financial capabilities of men and women.<sup>145</sup> The claimed justification for not treating men and women alike, that women are generally dependent on male wage earners and that it is more efficient to presume dependency in the case of women than to engage in case-by-case determinations, while individualized inquiries in the few cases in which men might be dependent are not prohibitively costly.<sup>146</sup> The classification did not further the important governmental objective of providing for needy spouses which could be done without a gender distinction in the statute.<sup>147</sup>

The Ninth Circuit in *Latta v. Otter*<sup>148</sup> struck down Idaho's and Nevada's same-sex marriage ban laws as unconstitutional, noting that such laws drew on "archaic and stereotypic notions" about the roles and abilities of both sexes and did not further the claimed important governmental interest of protecting the traditional institution of marriage.<sup>149</sup> District courts have also struck down statutes based on gender stereotypes, such as *Sassman v. Brown*,<sup>150</sup> where the court held that excluding male prisoners from California's Alternative Custody Program violated the Equal Protection Clause because gender stereotyping was used in allowing female prisoners to apply for release from prison to serve the last 24 months of their sentence in the community.<sup>151</sup>

The legislature's purpose for the program was to reduce recidivism for female offenders and ameliorating the disproportionate burdens they face in prison, particularly by treating the lasting effects of separation from their children, and trauma, abuse, and addiction.<sup>152</sup> However, the application process already provided a highly individualized case-by-case analysis to determine individual inmate qualifications and therefore there was no reason for the State to rely on

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<sup>144</sup> 446 U.S. 142 (1980).

<sup>145</sup> *Id.* at 151-52.

<sup>146</sup> *Id.* at 151.

<sup>147</sup> *Id.* at 152.

<sup>148</sup> 771 F.3d 456 (9th Cir. 2014).

<sup>149</sup> *Id.* at 475.

<sup>150</sup> 99 F. Supp. 3d 1223 (E.D. Cal. 2015).

<sup>151</sup> *Id.* at 1247.

<sup>152</sup> *Id.* at 1235.

gender as a proxy.<sup>153</sup> Therefore, the State did not offer a persuasive explanation as to how excluding male offenders from the ACP furthered any of its objectives.<sup>154</sup>

## 2. *Substantially Related Means*

In addition to the requirement that a sex-based classification be instituted in furtherance of an important governmental objective, intermediate scrutiny requires that the means employed substantially relate to that objective.<sup>155</sup>

The Supreme Court in *Nguyen v. Immigration and Naturalization Service*<sup>156</sup> upheld a provision in the Immigration and Nationality Act that required American unwed fathers, but not American unwed mothers, to take affirmative steps to establish parenthood to confer United States citizenship upon children when the male parent was not a United States citizen.<sup>157</sup> The majority determined that the statute satisfied both prongs of the traditional intermediate scrutiny test by identifying two important governmental objectives: (1) the importance of ensuring that a biological parent-child relationship exists; and (2) the importance of ensuring that the child and citizen-parent have the opportunity to develop a relationship with “real, everyday ties.”<sup>158</sup>

The Court also found that the statute was substantially related to both of these objectives because it was designed to acknowledge “real” differences regarding how men and women are situated in relation to the birth process rather than to reflect a stereotypical view of either sex, which would clearly offend equal protection.<sup>159</sup> For example, unlike a mother, a father “need not be present at the birth” and may not even know that the child was conceived or born.<sup>160</sup> As such, the majority upheld the sex-specific affirmative requirement as an “unremarkable step of ensuring that such an opportunity for the

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<sup>153</sup> *Id.* at 1236.

<sup>154</sup> *Id.*

<sup>155</sup> *Craig v. Boren*, 429 U.S. 190, 197 (1976).

<sup>156</sup> 533 U.S. 53 (2001).

<sup>157</sup> *Id.* at 60.

<sup>158</sup> *Id.* at 62, 64.

<sup>159</sup> *Id.* at 73.

<sup>160</sup> *Id.* at 65.

father and child to be in a relationship exists between father and child before citizenship is conferred.”<sup>161</sup>

In a dissenting opinion, Justice O’Connor sharply criticized the majority and asserted that this approach condoned the stereotype that mothers must care for children while fathers may ignore them.<sup>162</sup> She added that the Court failed to require a close enough means/end fit, given that DNA testing would also allow Congress to achieve its goal in a sex-neutral manner, and therefore pass under heightened scrutiny.<sup>163</sup> The availability of sex-neutral alternatives to a sex-based classification is often highly probative of the validity of the classification.<sup>164</sup>

## V. SHOW ME YOUR PAPERS LAWS: A QUASI-SUSPECT CLASSIFICATION

All over America, Latino immigrants are moving to areas of the country that, until now, have not seen a major influx of Latino immigrants.<sup>165</sup> These states are responding by enacting their own anti-immigrant laws which, in addition to targeting undocumented immigrants, are also directed toward all Latinos who are perceived as unwilling to assimilate to American cultural values.<sup>166</sup> The general public, including legislators, often conflates the different categories of immigration status, such as longstanding citizens, naturalized citizens and lawful permanent residents, and assumes that Latino is synonymous with “illegal.”<sup>167</sup>

### A. Show Me Your Papers Laws: Intent to Discriminate Against a Criminal Alien

Many states and municipalities are passing immigration ordinances based on the false belief that immigrants, mainly Latino immigrants, are making their cities and states unstable by contributing to higher crime rates, increasing delinquency, and placing a drain on

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<sup>161</sup> *Nguyen*, 533 U.S. at 66-67.

<sup>162</sup> *Id.* at 86-87 (O’Connor, J., dissenting).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. J. RACIAL & ETHNIC JUST. 163, 165 (2010).

<sup>166</sup> *Id.* at 166.

<sup>167</sup> *Id.* at 165.

local resources.<sup>168</sup> These laws are presumptively valid if passed under states' Tenth Amendment police powers to protect the health, safety, and welfare of the community.<sup>169</sup> The facially neutral language of these laws makes it difficult to discern any underlying discriminatory motives.<sup>170</sup>

However, courts have interpreted discriminatory intent from actions of the states. For example, in *Doe v. Village of Mamaroneck*,<sup>171</sup> the Village's response to issues such as prostitution, drug dealing, public intoxication, urination and defecation, and other criminal activity was to increase the police presence.<sup>172</sup> The Village blamed illegal immigrants and day laborers for such offenses; however, the police records at trial revealed that no day laborers were arrested.<sup>173</sup> The court held that such unfounded allegations of crime being committed by illegal immigrants were evidence of the Village's intent to discriminate.<sup>174</sup> Additionally, the court found the statements made by city officials which compared day laborers to "locusts" and "takers" who "won't ever give back to the community" were evidence of discriminatory intent.<sup>175</sup> Proof of discriminatory intent also included evidence that the Village herded laborers onto a single site, used excessive police presence at that site, suddenly enforced various local traffic ordinances, and harassed these individuals.<sup>176</sup>

Similarly, in Arizona, the notorious first "show me your papers" law was enacted following the murder of rancher Robert Krentz on March 27, 2010.<sup>177</sup> In response to the murder, Russel Pearce, the sponsor of SB 1070, said that the murder was committed by an "illegal alien," which caused a wave of anxiety in the community against illegal immigrants until Governor Brewer signed the bill into action in mid-April.<sup>178</sup> Pearce stated that Arizona's SB 1070 will enable law enforcement officials to take "the handcuffs off of law

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<sup>168</sup> *Id.* at 190.

<sup>169</sup> U.S. CONST. amend. X; *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905).

<sup>170</sup> McKanders, *supra* note 165.

<sup>171</sup> 462 F. Supp. 2d 520 (S.D.N.Y. 2006).

<sup>172</sup> *See generally id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 549-50.

<sup>175</sup> *Id.* at 533.

<sup>176</sup> *Mamaroneck*, 462 F. Supp. 2d at 546-47.

<sup>177</sup> Terry Greene Sterling, *Arizona's Immigration Law's Origin: Who Killed Robert Krentz?*, DAILY BEAST (July 7, 2010), <https://www.thedailybeast.com/arizona-immigration-laws-origin-who-killed-robert-krentz>.

<sup>178</sup> *Id.*

enforcement,” and instead they will “put them on the bad guy.”<sup>179</sup> His use of the word “guy” is a perpetual theme when discussing “show me your papers” legislation in the illegal immigration context, which conflates the term “illegal immigrant” with Latino male.<sup>180</sup> However, it is still unclear to this day who killed Krentz.<sup>181</sup> The trackers followed a set of footprints south, toward the border, but on May 3, 2018, the Arizona Daily Star reported that “high-ranking government officials” said the killing was “not random” and authorities were focusing on a suspect who, whatever his nationality, was in the United States, not in Mexico.<sup>182</sup>

Anti-immigrant and, in particular, anti-Latino sentiment has been rampant and on the rise in Arizona since before SB 1070.<sup>183</sup> In 2000, policies were introduced, such as Proposition 203, which banned bilingual education for most children.<sup>184</sup> It was followed by Proposition 200, which mandated state and local verification of immigration status of all residents to access social safety-net programs in 2004.<sup>185</sup> In 2006, Proposition 100, which made unauthorized immigrants charged with “serious felony offenses” ineligible for bail, was soon followed by Proposition 300, which required verification of immigration status to access certain state funded services.<sup>186</sup> Similarly, Proposition 103 was introduced which sought to make English the official language of Arizona.<sup>187</sup>

In 2007, HB 2471 was introduced, which denied K-12 public education and health services to United States children of unauthorized immigrants.<sup>188</sup> In the employment context, measures such as E-Verify required employers to check a potential employee’s immigration status in Arizona, otherwise the employer could be punished.<sup>189</sup> Birthright

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<sup>179</sup> CNN Wire Staff, *Arizona Governor Signs Immigration Bill*, CNN (Apr. 24, 2010), <http://www.cnn.com/2010/POLITICS/04/23/obama.immigration/index.html>.

<sup>180</sup> McKanders, *supra* 165.

<sup>181</sup> Nathan Thornburgh Douglas, *Border Crackdowns and the Battle for Arizona*, TIME (June 14, 2010), <http://content.time.com/time/magazine/article/0,9171,1993872,00.html>.

<sup>182</sup> *Id.*

<sup>183</sup> *Along Racial Lines: The Genesis of Arizona’s SB 1070 Is a Cautionary Tale of Race-Based Immigration Policy*, NAT’L IMMIGRATION L. CTR., Oct. 2016, <https://www.nilc.org/wp-content/uploads/2016/10/Along-Racial-Lines-SB1070-2016-10-28.pdf>.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Along Racial Lines*, *supra* note 183.

<sup>189</sup> *Along Racial Lines*, *supra* note 183.



bills were introduced to eliminate birthright citizenship for children of unauthorized immigrants in Arizona in 2008.<sup>190</sup> In 2010, Arizona introduced HB 2281 which banned ethnic studies programs.<sup>191</sup> These policies purposefully targeted Latino communities in Arizona.<sup>192</sup>

The hyper criminalization of immigrants has fueled a false perception that violent criminals are flooding across the border to terrorize Americans.<sup>193</sup> This fearmongering tactic has been used to justify the strict immigration enforcement measures of SB 1070 and its copycats.<sup>194</sup> Former Arizona Governor Jan Brewer is notorious for utilizing fear of illegal immigrants to pass stringent immigration laws, such as SB 1070.<sup>195</sup> In 2010, the same year of the passage of SB 1070, she stated that the majority of the people coming to Arizona and trespassing are becoming drug mules, and the drug cartels have taken control of immigration.<sup>196</sup> She added that they are breaking the law when they are trespassing and when they pack marijuana and other drugs on their backs.<sup>197</sup> The metaphor most often used by Pearce, the sponsor of SB 1070, during the legislative debate on the bill was “immigrants are criminals.”<sup>198</sup> In the months leading up to the vote on SB 1070, Pearce fabricated statistics and made insidious claims in emails that framed unauthorized immigrants as criminals such as: “[G]angs [of violent illegal aliens] that roam our streets robbing, stealing, injuring, and killing our citizens,” “[d]aily accounts of illegal aliens raping our women and children,” “50% of the homicides in Phoenix involve illegal aliens,” and “100 sex predators crossing [the] border daily.”<sup>199</sup>

In another email between Pearce and Kris Kobach, who is the author of SB 1070 (and was on Trump’s transition team in 2018), Kobach advised Pearce to change the provision that included the words “lawful contact” to “a[ny] stop, detention, or [ar]rest, in the

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<sup>190</sup> *Along Racial Lines*, *supra* note 183.

<sup>191</sup> *Along Racial Lines*, *supra* note 183.

<sup>192</sup> *Along Racial Lines*, *supra* note 183.

<sup>193</sup> *Along Racial Lines*, *supra* note 183, at 4.

<sup>194</sup> *Along Racial Lines*, *supra* note 183, at 4.

<sup>195</sup> CNN Wire Staff, *Arizona’s Brewer: Most Illegal Immigrants are “Drug Mules”*, CNN (June 27, 2010, 1:01 PM), <http://www.cnn.com/2010/US/06/25/arizona.immigrants.drugs/index.html>.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Along Racial Lines*, *supra* note 183.

<sup>199</sup> *Along Racial Lines*, *supra* note 183, at 4.

enforcement [of] a violation of any title or section of the Arizona code . . . or any county or municipal ordinance.”<sup>200</sup> Kobach further stated in the email that this change would allow police to use violations of property codes, such as cars on blocks in the yards, or rental codes, such as too many occupants of a rental accommodation, to initiate queries.<sup>201</sup> David Leopold, president-elect of the American Immigration Lawyers Association, found the email “chilling” because Kobach recommended tweaking the law in a manner that would appear to allow profiling by using property and rental codes to ferret out undocumented people based on stereotypes that unauthorized aliens tend to overcrowd apartments and put their cars on blocks.<sup>202</sup> Kobach’s intent by tweaking the words “any contact” was to target mostly Latino males, not females, by using stereotypical notions of undocumented individuals to allow law enforcement to stop more Latino males.

Similarly, in Oklahoma, United States Representative John Sullivan encouraged Tulsa’s city council to pass a measure that would deputize local sheriffs to enforce immigration law.<sup>203</sup> In support of this measure, Sullivan stated “[he wanted] to create fear in rapists, drunk drivers, drug dealers and people who conceal weapons.”<sup>204</sup> As rape is most often a crime committed by men against women, conflating rape with drug dealing and weapons while empowering state sheriffs to enforce immigration laws further spreads the idea that Latino males are criminals.

In Texas, after passing SB 4, State Representative Rafael Anchia spoke regarding the anti-Latino immigrant sentiment in Texas, which showed a clear intent by the legislature to target Latinos out of the political process.<sup>205</sup> He stated that SB 4 comes one week after judicial court opinions found Texas was intentionally discriminating against Latinos in the redistricting and photo ID context.<sup>206</sup>

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<sup>200</sup> *Along Racial Lines*, *supra* note 183, at 8.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> Kari Huus, *Turmoil in Tulsa: The Illegal Immigration Wreck*, NBC NEWS (July 17, 2007, 7:31 PM), <http://www.nbcnews.com/id/19466978/print/1/displaymode/1098/>.

<sup>204</sup> *Id.*

<sup>205</sup> Gonzáles, *supra* 19.

<sup>206</sup> Gonzáles, *supra* 19; *Perez v. Abbott*, 274 F. Supp. 3d 624, 649 n.40 (W.D. Tex. 2017) (a three-judge federal court in San Antonio ruling that Texas’s 2013 congressional redistricting maps were enacted with “racially discriminatory intent” against Latino and African American voters); *Veasey v. Abbott*, 265 F. Supp. 3d 684, 691 n.9 (S.D. Tex. 2017) (ruling, on August

Donald Trump, during his run for the presidency, made various remarks, mostly via Twitter, targeting Mexican nationals and Latino males at-large.<sup>207</sup> On June 16, 2015, in his speech announcing his candidacy, he stated: “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. And some, I assume, are good people.”<sup>208</sup> Finally, in his final presidential debate on October 19, 2016, Trump reiterated his support for a border wall when asked about illegal immigration and stated: “We have some bad hombres here, and we’re going to get them out.”<sup>209</sup> By using the Spanish term for a man while talking about illegal immigration, the President perpetuated the stereotype that Latino males are criminals and illegal immigrants. “Show me your papers” laws are a result of a course of action by state legislatures to fight “illegal immigrant crime,” but it is often a pretext to solely target and deport Latino males in the community.

### **B. Disparate Impact on Latino Males: Attrition Through Enforcement**

Most “show me your papers” laws do not solely target Latino male drivers but also include labor provisions which prevent Latino males from obtaining employment and providing for their families.<sup>210</sup> The intent behind these provisions is “attrition through enforcement.”<sup>211</sup> This attrition policy aims to make life harsh for undocumented immigrants and their families so that they “self-deport” themselves to their home countries.<sup>212</sup> However, these policies in

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23, that Texas’ voter ID law, amended by the state legislature in 2017, had a “discriminatory purpose” against minority voters).

<sup>207</sup> Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016), <http://time.com/4473972/donald-trump-mexico-meeting-insult/>.

<sup>208</sup> *Id.*

<sup>209</sup> Rhodan, *supra* note 1.

<sup>210</sup> S. 1070, 149th Leg., 2d Reg. Sess. (Ariz. 2010); ARIZ. REV. STAT. ANN. § 13-2928(A), (B) (2010) (making it a class 1 misdemeanor to attempt to hire or pick up day laborers if the driver is impeding the flow of traffic, or for the worker to get into the car under these circumstances).

<sup>211</sup> S. 1070, 149th Leg., 2d Reg. Sess. (Ariz. 2010); ARIZ. REV. STAT. ANN. § 13-2928(A), (B) (2010).

<sup>212</sup> Marshall Fitz, *Arizona’s ‘Show Me Your Papers’ Law in the U.S. Supreme Court: What’s at Stake*, CTR. FOR AM. PROGRESS (Apr. 4, 2012), <https://www.americanprogress.org/>

Arizona and other parts of the country have failed and seemingly backfired.<sup>213</sup> These policies have created a hostile state for all people of color regardless of citizenship because people are either staying put and going further underground or moving to a more welcoming state.<sup>214</sup> As of April 13, 2007, legislatures in eighteen states had enacted fifty-seven immigration-related bills, and at least 1,169 bills had been introduced throughout all fifty states.<sup>215</sup> Employment of undocumented workers was again the most common focus of the introduced bills; it was the subject of 199 of the 1,169 bills.<sup>216</sup>

Section 6 of SB 1070 outlined the penalties for employers who hired unauthorized aliens.<sup>217</sup> Section 8 required state employers to verify the status of every employee using a federal electronic verification system.<sup>218</sup> Additionally, section 5 made it illegal to pick up day laborers, transport an undocumented immigrant, and to work without papers.<sup>219</sup> Furthermore, the bill allowed state police to arrest individuals without a warrant if they believe the person is in the country illegally.<sup>220</sup>

In a column for the Arizona Republic, E.J. Montini recalled an interview from 2006 in which Russel Pearce explained the “attrition through enforcement” strategy that would become the stated goal of SB 1070: “Disneyland taught us that if you shut down the rides[,] people leave the amusement park.”<sup>221</sup> The intent of the law, as

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issues/immigration/news/2012/04/04/11394/arizonas-show-me-your-papers-law-in-the-u-s-supreme-court-whats-at-stake/.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> Karla Mari McKanders, *Welcome to Hazleton! “Illegal” Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1, 3 (2007).

<sup>216</sup> *Id.*

<sup>217</sup> S. 1070, 149th Leg., 2d Reg. Sess. (Ariz. 2010); ARIZ. REV. STAT. ANN. § 23-212(6) (2010) (“An employer shall not knowingly employ an unauthorized alien.”).

<sup>218</sup> S. 1070, 149th Leg., 2d Reg. Sess. (Ariz. 2010); ARIZ. REV. STAT. ANN. § 23-214(A) (2010) (“[An] employer, after hiring an employee, shall verify the employment eligibility of the employee through the e-verify and shall keep a record of the verification for the duration of the employee’s employment or at least three years.”).

<sup>219</sup> S. 1070, 149th Leg., 2d Reg. Sess. (Ariz. 2010); ARIZ. REV. STAT. ANN. § 13-2928(C) (2010) (“It is unlawful for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state.”).

<sup>220</sup> S. 1070, 149th Leg., 2d Reg. Sess. (Ariz. 2010); ARIZ. REV. STAT. ANN. § 13-2928 (2010) (making it a class 1 misdemeanor to attempt to hire or pick up day laborers if the driver is impeding the flow of traffic, or for the worker to get into the car under these circumstances).

<sup>221</sup> *Along Racial Lines*, *supra* note 183 (alteration in original).

explained by its sponsor, was to make the daily activities of unauthorized immigrants so impossible that they would leave the country voluntarily and others would choose not to come at all.<sup>222</sup>

The right to work is tantamount to the right to reside in a state or city, and thereby the right to reside in the United States.<sup>223</sup> When this right is denied, immigrants, documented and undocumented, are forced to move because they do not feel welcome in their communities and represented in the political process.<sup>224</sup> Legislators often rely on the stereotype of the Latino male as the breadwinner to enact anti-immigrant employment legislation to promulgate their own discriminatory motives, which results in increased deportations of Latino males and their families.<sup>225</sup>

## VI. “SHOW ME YOUR PAPERS” LAWS: INTERMEDIATE SCRUTINY ANALYSIS

### A. Important Governmental Purpose

“Show me your papers” legislation relies on “archaic and stereotypic notions” that the Latino male is both an undocumented criminal who threatens the safety of the communities and a day laborer who is the breadwinner of his family. The Supreme Court has held that some objectives predicated on stereotypical conceptions of gender roles fail to qualify as important governmental objectives.<sup>226</sup> Additionally, the fact that the classification expressly discriminates against men rather than women does not protect it from scrutiny.<sup>227</sup> Therefore, a state interest cannot possibly rise to the level of importance required, for “show me your papers” statutes to be upheld, under an intermediate scrutiny analysis because these statutes are based solely on stereotypes instead of an important governmental purpose.

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<sup>222</sup> *Along Racial Lines*, *supra* note 183.

<sup>223</sup> *McKanders*, *supra* note 215, at 15.

<sup>224</sup> *McKanders*, *supra* note 215, at 15.

<sup>225</sup> *Boza*, *supra* note 23.

<sup>226</sup> *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729 (1982).

<sup>227</sup> *Craig v. Boren*, 429 U.S. 190, 197 (1976).

### 1. *Federal Preemption*

The United States Government, aided by politically driven propaganda delivered via mass media outlets, has carefully constructed and reified a narrative that describes Latino males, more specifically Mexican males, as poor, dirty, lazy, drunk, gangbanger, cholo, illegal, ignorant, and criminal.<sup>228</sup> The government has used this narrative as a scapegoat to justify deportation, unlawful search and seizures, and violation of due process of the law.<sup>229</sup> Part of the strategy used by the DHS, and previously by the INS, to deport mass numbers of “illegal” immigrants was gaining political and public support.<sup>230</sup> This strategy involved enumerative and surveying practices that, when compiled statistically, were used not only to criminalize “illegal immigrants” behavior but also to portray their existence as dangerous.<sup>231</sup>

The Constitution grants Congress the primary power over immigration and citizenship status.<sup>232</sup> ICE, as indicated on its website, considers its goal to protect the safety and security of the communities it serves, indicating that its responsibilities are the highest priority of any law enforcement agency.<sup>233</sup> To achieve this goal, in 2011, through an executive order the “Secure Communities” program in cooperation with state and local law enforcement officers was enacted.<sup>234</sup> Under the program, local police officers were required to submit fingerprints of any individual arrested or booked for a criminal offense to ICE for removal proceedings.<sup>235</sup> The website states, in bold print, that it is the “federal government, not the state or local law enforcement agency, [that] determines what immigration enforcement action, if any, is appropriate.”<sup>236</sup> State legislators have seized the opportunity presented by Secure Communities agreements to make anti-immigrant bills their top priority in the name of public safety.<sup>237</sup>

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<sup>228</sup> Cristina C. Santamaría Graff, *‘Build That Wall!’: Manufacturing The Enemy, Yet Again*, 30 INT’L J. QUALITATIVE STUDIES IN EDUC. 999, 1000 (2017).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 1002.

<sup>231</sup> *Id.*

<sup>232</sup> U.S. CONST. art. I, § 8, cl. 4.

<sup>233</sup> *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Mar. 20, 2018), <https://www.ice.gov/secure-communities>.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> Andrea Elizondo & Chenelle Hammonds, *Senate Bill 4—Impact, Implications, and Emotions*, AUSTIN LEGIS. INTERNSHIP PROGRAM (May 10, 2017), <https://gcswwlegislativeintern>

However, when applying heightened scrutiny, it is difficult to locate an important state interest, especially because the state interest of enforcing federal immigration laws is federally preempted.<sup>238</sup> The national government's interest in promoting uniform laws in the immigration field, together with their standard implementation, must outweigh the states' subsidiary interest in enforcement which stems largely from the lawful exercise of their own police power and which can be independently realized.<sup>239</sup> Second, "show me your papers" laws in Texas are unnecessary and do not amount to an important state interest because law enforcement agencies are already going above and beyond to comply with ICE, DHS and United States Customs and Border Protection (hereinafter "CBP").<sup>240</sup> Between fiscal years 2014 and 2016, Texas fulfilled 35,632 of the 58,452 ICE detainer requests it received, more than any other state, according to statistics compiled by the Transactional Records Access Clearinghouse at Syracuse University.<sup>241</sup> The next largest number of fulfilled detainer requests came from California with 15,211.<sup>242</sup>

## 2. *Stereotypes of Latino males*

Nonetheless, even if "show me your papers" laws are found necessary for states and are not federally preempted by the courts, these laws do not pass intermediate scrutiny because the state's classification relies on stereotypical notions that Latino males are criminals, day laborers and undocumented immigrants. Public perception of minorities is fairly negative, and the media reinforces these stereotypes by portraying Latino males as criminals, which is a problem that needs to be controlled.<sup>243</sup> This belief is further

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s.wordpress.com/2017/05/10/senate-bill-4-impact-implications-and-emotions/.

<sup>238</sup> *Arizona v. United States*, 567 U.S. 390, 410 (2012) (finding Section 3 preempted because the Federal Government has occupied the field of alien registration, meaning that all state action, even complementary state regulation is impermissible; also finding Section 6 of S.B. 1070 preempted by federal law because it created an "obstacle to the full purposes and objectives of Congress.").

<sup>239</sup> *Id.* at 399.

<sup>240</sup> Rick Jervis, *Texas Sanctuary Cities Bill Could Impact Locals*, USA TODAY (Apr. 27, 2017), <https://www.usatoday.com/story/news/2017/04/27/texas-sanctuary-cities-bill-trump/100988254/>.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> Nancy E. Walker et. al., *Lost Opportunities: The Reality of Latinos in the U.S. Criminal Justice System*, NAT'L COUNCIL LA RAZA 1, 2 (2004).

strengthened by erroneous correlation statistics between crime and undocumented individuals which fuels anti-immigrant agendas.<sup>244</sup>

Finally, under an intermediate scrutiny analysis, a state will fail to argue that it has an important state interest of public safety because such interest is based on racial and gender stereotypes. Additionally, under these laws there is no individualized analysis of each person's case which may develop in a potential claim for acquired citizenship or asylum.<sup>245</sup>

### **i. The Stereotype of Latino Males as Criminals**

Pejorative phrases and terms proliferated in the media describing Latinos as “third-world invaders” or the Latino culture as “lawless.”<sup>246</sup> The conflation of Latino men and undocumented immigrants as criminals is a growing and unsupported misperception, promulgated by both the media and society as-a-whole.<sup>247</sup> By the 2000s, Latino males were equated with drug cartels as either those trafficking drugs or those being smuggled with drugs.<sup>248</sup>

The stereotype of the Latino male as a criminal who threatens the community is used by politicians to drive their own anti-Latino male immigration agendas, such as “show me your papers” laws, which refer to the acts of a few illegal immigrants to promulgate the stereotype.<sup>249</sup> Fictitious numbers on immigrant crime used by the media have undoubtedly fueled the stereotype that illegal immigrants are dangerous criminals.<sup>250</sup> Under a program called “Operation Streamline,” the government criminalizes lower misdemeanor immigration offenses; resulting in a surge of criminal immigration convictions that reached 9,350 in March 2008.<sup>251</sup> At this rate, the

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<sup>244</sup> David L. Wilson, *The Illusion of Immigrant Criminality: Getting the Numbers Wrong*, PRISON LEGAL NEWS (July 15, 2009), <https://www.prisonlegalnews.org/news/2009/jul/15/the-illusion-of-immigrant-criminality-getting-the-numbers-wrong/>.

<sup>245</sup> *Report on the Constitutionality of Arizona Immigration Law S.B. 1070*, N.Y.C. B., July 2010, <http://www.nycbar.org/pdf/report/uploads/20071951-ReportonArizonaImmigrationLawSB1070.pdf>.

<sup>246</sup> Christina Iturralde, *Rhetoric and Violence: Understanding Incidents of Hate Against Latinos*, 12 N.Y. CITY L. REV. 417, 423-24 (2009).

<sup>247</sup> *Id.* at 424.

<sup>248</sup> Santamaría Graff, *supra* note 228, at 1002.

<sup>249</sup> Santamaría Graff, *supra* note 228, at 1000.

<sup>250</sup> Santamaría Graff, *supra* note 228, at 1000.

<sup>251</sup> Wilson, *supra* note 244, at 1-2.



number of immigrant convicts would increase by more than 100,000 for the year.<sup>252</sup> The typical sentence, however, is one month, so the increase at any given time would be less than 10,000 prisoners, a fraction of a percent of the overall United States prison population.<sup>253</sup>

Texas governor Greg Abbott, when signing SB 4 into effect in 2017, stated, “As governor, my top priority is public safety, and this bill furthers that objective by keeping dangerous criminals off our streets.”<sup>254</sup> This bill emerged at a time when Donald Trump made combating illegal immigration a priority.<sup>255</sup> In 2010, Governor Jan Brewer of Arizona signed the Support Our Law Enforcement and Safe Neighborhoods Act, which was deemed the nation’s toughest bill on illegal immigration, requiring law enforcement officials to check the immigration status of any individual they suspect to be in the country illegally.<sup>256</sup> At the signing of the bill, Jan Brewer stated:

Border violence and crime due to illegal immigration are critically important issues to the people of our state[.] There is no higher priority than protecting the citizens of Arizona. We cannot sacrifice our safety to the murderous greed of the drug cartels. We cannot stand idly by as drop houses, kidnappings and violence compromise our quality of life.<sup>257</sup>

However, Brewer and proponents of SB 170 overlooked the fact that crime rates had already been falling in Arizona for years, despite the presence of unauthorized immigrants and a century worth of research that demonstrated that immigrants were less likely to commit crimes or be behind bars than the native-born.<sup>258</sup> In 2018, Donald Trump’s re-election campaign released a provocative video featuring an undocumented male immigrant accused of killing two Northern California sheriff’s deputies during a crime spree in October

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<sup>252</sup> Wilson, *supra* note 244, at 1-2.

<sup>253</sup> Wilson, *supra* note 244, at 1-2.

<sup>254</sup> Jon Herskovitz, *Texas Governor Signs into Law Bill to Punish ‘Sanctuary Cities’*, REUTERS (May 7, 2017), <https://www.reuters.com/article/us-usa-immigration-texas/texas-governor-signs-into-law-bill-to-punish-sanctuary-cities-idUSKBN18402L>.

<sup>255</sup> *Id.*

<sup>256</sup> Mariano Castillo, *Crime Stats Test Rationale Behind Arizona Immigration Law*, CNN (Apr. 29, 2010, 10:42 PM), <http://www.cnn.com/2010/CRIME/04/29/arizona.immigration.crime/index.html>.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

2014.<sup>259</sup> This video utilized one accused killer to promulgate the stereotype that all male undocumented immigrants are largely violent.<sup>260</sup>

The stereotypes of immigrants, both legal and illegal, as criminals are false according to a 2015 National Academy of Science study which found that: “Immigrants are in fact much less likely to commit crime than natives, and the presence of large numbers of immigrants seems to lower crime rates.”<sup>261</sup> Similarly, in March 2017, a study by Cato Institute found that “[i]llegal immigrants are 44 percent less likely to be incarcerated than natives,”<sup>262</sup> and “[l]egal immigrants are 69 percent less likely to be incarcerated than natives.”<sup>263</sup> A July 2015 report by the American Immigration Council analyzing data from the 2010 Census found that about 1.6% of all immigrant males, regardless of status, were incarcerated between 18 and 39 years old as compared to 3.3% of the native born population.<sup>264</sup> Specifically, for Mexican men ages 18 to 39, the incarceration rate in 2010 was 2.8% compared to 10.7% for native born men in the same age group.<sup>265</sup>

A senior researcher at the American Immigration Council stated that immigrants come to the United States to build better lives for themselves and their children and are very motivated to not blow that opportunity by getting in trouble with the police.<sup>266</sup> Additionally, while the immigrant population has gone up from 7.9% to 13.1%, and the number of unauthorized immigrants went up from 3.5 million to 11.2 million, violent crime, such as murder, rape and aggravated assault, has also decreased between 1990 to 2013 by 48% in cities and regions with high immigrant concentration.<sup>267</sup> For example, cities like

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<sup>259</sup> Chris Nichols, *Provocative Trump Ad Gives Wrong Impression on Immigration*, POLITIFACT CAL. (Jan. 23, 2018, 1:41 PM), <http://www.politifact.com/california/article/2018/jan/23/provocative-trump-campaign-ad-gives-wrong-impressi/>; Donald J. Trump for President, *Complicit*, YOUTUBE (Jan. 22, 2018), [https://www.youtube.com/watch?time\\_continue=2&v=1xOH6cKdhmg](https://www.youtube.com/watch?time_continue=2&v=1xOH6cKdhmg).

<sup>260</sup> Nichols, *supra* note 259.

<sup>261</sup> Chris Nichols, *MOSTLY TRUE: Undocumented Immigrants Less Likely To Commit Crimes Than U.S Citizens*, POLITIFACT CAL. (Aug. 3, 2017), <http://www.politifact.com/california/statements/2017/aug/03/antonio-villaraigosa/mostly-true-undocumented-immigrants-less-likely-co/>.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> Nichols, *supra* note 261.

<sup>267</sup> Nichols, *supra* note 261.

Hazleton, Pennsylvania have attempted to blame a new wave of immigrants for a perceived increase in criminal activity.<sup>268</sup> The city's perception was misplaced because Hazleton's crime statistics showed that overall crime in the city declined, and the crime rate is now less than half of the nationwide average.<sup>269</sup> Finally, the overwhelming predominance of Latino deportees with minor or nonviolent convictions, rather than serious convictions, does not match ICE's stated goal of focusing removals on aliens who are violent criminals and felons and who pose a serious risk to public safety.<sup>270</sup>

## ii. The Stereotype of the Latino Male as a Day Laborer

"Show me your papers" laws contain attrition through enforcement policies, such as e-verify and day laborer provisions, which set out criminal penalties for any employer who hires undocumented individuals.<sup>271</sup> These policies rely on stereotypes that Latino males work as day laborers and are the breadwinners in their homes. By enacting such laws, biased legislators are hopeful that the Latino males will not find employment and will self-deport back to their home countries. The stereotype that men are the primary, sole breadwinners while women are stereotyped as dependent mothers and housewives has been weakened by an increased participation of women in the work force.<sup>272</sup>

According to a report by the Center for American Progress in 2015, 42% of all United States women were the breadwinners earning at least half of their family's income for their households and 22% were co-breadwinners.<sup>273</sup> The report stated that the days of stay-at-home mothers are long past and that women are crucial economic

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<sup>268</sup> Rubén G. Rumbaut, *Report On the City of Hazleton's Premise, in the Illegal Immigration Relief Act Ordinance, that Illegal Immigrants Contribute to Higher Crime Rates*, U. CAL., <https://www.aclupa.org/files/5213/1404/6697/Rumbautreportonordinance.pdf> (last visited Nov. 15, 2018).

<sup>269</sup> *Id.*

<sup>270</sup> Applebaum, *supra* note 41.

<sup>271</sup> S. 1070, 149th Leg., 2d Reg. Sess. (Ariz. 2010); ARIZ. REV. STAT. ANN. § 23-212(6) (2010); *Id.* § 23-214(B).

<sup>272</sup> Sylvia Chant, *Researching Gender, Families and Households In Latin America: From the 20th Into the 21st Century*, 21 BULL. LATIN AM. RES. 545, 545-49 (2006).

<sup>273</sup> Sarah Jane Glynn, *Breadwinning Mothers Are Increasingly the U.S. Norm*, CTR. FOR AM. PROGRESS (Dec. 19, 2016), <https://www.americanprogress.org/issues/women/reports/2016/12/19/295203/breadwinning-mothers-are-increasingly-the-u-s-norm/>.

actors for their families, local communities, and the overall economy.<sup>274</sup> According to the report, a greater share of Latinas were more likely than whites to be the breadwinners in 2015 by 40.5% versus 37.4%.<sup>275</sup> However, Latinas also were less likely to be co-breadwinners when compared with white mothers 18.6% to 24.7% because Latinas were less likely to be married (40.4%) compared to their white counterparts (55.8%).<sup>276</sup> Therefore, while these laws attempt to target and deport the male breadwinners of the family based on the stereotypical notion of a Latino dad, they fail to take into account that an increasing number of Latino households are actually controlled by women.

Another stereotype in anti-day laborer sections of “show me your papers” legislation is that the Latino male is a rowdy day laborer who destroys the peace of communities. Complaints of day laborers often perpetuate the stereotype that Latino male day laborers harass women, urinate in public, and litter.<sup>277</sup> However, today the image of the immigrant day laborer is increasingly female.<sup>278</sup> A new study by the Worker’s Justice Project and Cornell’s Worker Institute attempted to shed light on these overlooked women in day labor by surveying a sample of 80 women and finding that while most were Latinas over the age of 30 who reported working as housekeepers, some 80% also worked stereotypical Latino male jobs, such as construction, warehouse, and food processing sectors.<sup>279</sup> The future is female, even in day laboring.

“Show me your papers” laws also rely on the stereotype that illegal undocumented Latino males work in construction or in the fields as farm workers. However, according to a 2014 Pew Hispanic Center survey, undocumented immigrants as a whole were more likely to work in the service industry by 22% as compared to the agriculture industry, which employed only 5% of undocumented immigrants.<sup>280</sup>

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<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> Eugene W. Fields, *Day Laborers Have found Loopholes in Orange*, ORANGE COUNTY REGISTER (Feb. 24, 2012, 4:13 PM), <https://www.ocregister.com/2012/02/24/day-laborers-have-found-loopholes-in-orange/>.

<sup>278</sup> Michelle Chen, *Women Day Laborers Are Tired of Waiting for Work, and for Justice*, NATION (Aug. 5, 2016), <https://www.thenation.com/article/women-day-laborers-are-tired-of-waiting-for-work-and-for-justice/>.

<sup>279</sup> *Id.*

<sup>280</sup> Jeffrey Passel & D’Vera Cohn, *Size of U.S. Unauthorized Immigrant Workforce Stable After the Great Recession*, PEW RES. CTR. (Nov. 3, 2016), <http://www.pewhispanic.org/2016/>

Leisure/hospitality employed 18% of undocumented immigrants, the construction industry employed 16%, and manufacturing employed 13%. Education and health services and wholesale and retail employed 12% each while transportation and utilities employed 3% of unauthorized immigrants.<sup>281</sup> Similarly, another 2006 national survey estimated the number of day laborers nationwide was 120,000, which is a tiny fraction of the estimated 11 million illegal immigrants.<sup>282</sup>

The Supreme Court has held that some objectives predicated on stereotypical conceptions of gender roles fail to qualify as important governmental objectives.<sup>283</sup> Therefore, while safety of the communities is a government interest, it cannot be used as a pretense to enact legislation which targets all Latino males in an effort to force individuals to self-deport and free communities of the Latino presence. In this case, public safety does not rise to the level of an important state interest as required in a heightened scrutiny analysis to uphold a discriminatory classification based on gender.

#### **B. Substantially Related Means: Over Inclusiveness and Under Inclusiveness**

“Show me your papers” legislation continues to be enacted as an apparent response by legislators to high levels of illegal immigration and crimes committed by unauthorized immigrants.<sup>284</sup> However, immigrants, both documented and undocumented, the majority of whom are Latino, actually have lower rates of crime and incarceration than their native born counterparts.<sup>285</sup> For the past two decades, “the same time period that legal and illegal immigration reached and surpassed historic highs, national crime rates declined—most notably in cities and regions of high immigrant concentration.”<sup>286</sup> “Show me your papers” laws are not specifically tailored to ensure public safety by targeting dangerous illegal criminals but instead are

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11/03/industries-of-unauthorized-immigrant-workers/.

<sup>281</sup> *Id.*

<sup>282</sup> Fernanda Santos, *Coming to Terms With the Men on the Corner*, N.Y. TIMES (Dec. 17, 2006), <https://www.nytimes.com/2006/12/17/nyregion/nyregionspecial2/17Rday.html>.

<sup>283</sup> *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729 (1982).

<sup>284</sup> Santamaría Graff, *supra* note 228.

<sup>285</sup> Nichols, *supra* note 261.

<sup>286</sup> Mary Kathleen Dingeman & Rubén G. Rumbaut, *The Immigration-Crime Nexus and Post-Deportation Experiences: En/Countering Stereotypes in Southern California and El Salvador*, 31 U. LA VERNE L. REV. 364, 372 (2010).

drafted in such a broad way to target any Latino male walking on the street regardless of immigration status.

***1. Over Inclusiveness: Show Me Your Papers Laws Mostly Target Law Abiding Latino Males***

Since the 1980s, the government has increasingly expanded the scope of criminal laws in the immigration area by adding the number of criminal charges that are considered removable offenses.<sup>287</sup> Most deportees with criminal backgrounds are not, as commonly imagined, cold-blooded MS-13 gang members poisoning cities' streets and fueling an international drug war.<sup>288</sup> Such individuals exist but are a small minority.<sup>289</sup> Instead, a significant number of those deported with criminal convictions, and likely the majority, have been convicted only of relatively minor or nonviolent crimes, such as unlawful entry or reentry, drug possession, or traffic violations.<sup>290</sup> Police officers can stop any person for minor traffic violations, including unsafe lane changes, broken tail lights, and cracked windshields, and potentially arrest such person for the infraction.<sup>291</sup> These low-level convictions frequently result in automatic removal proceedings, form grounds for inadmissibility, and are considered aggravated felonies or crimes of moral turpitude that require deportation and banishment.<sup>292</sup> Indiana's Attorney General, Greg Zoeller, who was opposed to Indiana's "show me your papers" law SB 590, stated that law enforcement resources are better put to use by "[w]orking collaboratively across state lines and international borders to fight human and drug trafficking, money laundering and consumer fraud . . . than arresting landscapers and nannies."<sup>293</sup>

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<sup>287</sup> Appelbaum, *supra* note 41, at 224.

<sup>288</sup> Appelbaum, *supra* note 41, at 219-20.

<sup>289</sup> Appelbaum, *supra* note 41, at 219-20.

<sup>290</sup> Appelbaum, *supra* note 41, at 219-20.

<sup>291</sup> Doris Marie Provine, *Should Local Police be on the Front Lines of Immigration Enforcement?*, SCHOLARS STRATEGY NETWORK (July 1, 2013), <http://www.scholarsstrategy-network.org/brief/should-local-police-be-front-lines-immigration-enforcement>.

<sup>292</sup> Applebaum, *supra* note 41, at 220.

<sup>293</sup> Ali Noorani, *Indiana Gets Real on Immigration*, CNN (Aug. 3, 2012, 11:20 PM), <https://www.cnn.com/2012/08/03/opinion/noorani-indiana-immigration/index.html>.

The everyday realities of law enforcement make the abuse of discretionary powers under “show me your papers” laws a reality.<sup>294</sup> An officer who sees an unauthorized immigrant as a threat might find excuses to stop and arrest individuals who just “look illegal.”<sup>295</sup> Considering the majority of deportations in the United States are for individuals who hail from Latin American countries including Mexico; Latino immigrant men in public spaces are most likely to be targeted.<sup>296</sup>

“Show me your papers” laws are drafted with a very broad intent to target not only criminals but also law-abiding citizens and offer no guidance as to when “reasonable suspicion” of unlawful presence exists.<sup>297</sup> At the passage of SB 1070, Jan Brewer was asked what criteria will be used to establish reasonable suspicion of someone’s legal status.<sup>298</sup> She replied, “I don’t know. I do not know what an illegal immigrant looks like.”<sup>299</sup> In addition, with the incorporation of failure to register or carry documentation laws, anyone appearing foreign and not just “illegal criminals” can arguably be lawfully stopped and asked about his or her registration documents as a pretext for determining immigration status.<sup>300</sup> Defenders of SB 1070 contend that, under Section 2 of SB 1070, as amended by HB 2162, race, color, or national origin may not be considered in determining an individual’s immigration status.<sup>301</sup> This amendment, although clearly necessary in order to avoid a *prima facie* finding of unconstitutionality, reveals nothing of the kind of examination the inquiring official is to make, which could also involve a person being stopped because of reasonable suspicion caused by his language or because of his Hispanic last name.<sup>302</sup>

According to a Latino Decisions survey, when Latinos were asked if it would be more or less likely that legal, not illegal

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<sup>294</sup> Provine, *supra* note 291.

<sup>295</sup> Provine, *supra* note 291.

<sup>296</sup> Boza, *supra* note 23.

<sup>297</sup> *Report on the Constitutionality of Arizona Immigration Law S.B. 1070*, *supra* note 245, at 3.

<sup>298</sup> CNN Wire Staff, *supra* note 195.

<sup>299</sup> CNN Wire Staff, *supra* note 195.

<sup>300</sup> *Report on the Constitutionality of Arizona Immigration Law S.B. 1070*, *supra* note 245, at 23.

<sup>301</sup> *Report on the Constitutionality of Arizona Immigration Law S.B. 1070*, *supra* note 245, at 21.

<sup>302</sup> *Report on the Constitutionality of Arizona Immigration Law S.B. 1070*, *supra* note 245, at 21.

immigrants, will also be stopped and questioned by police under SB 1070, 79% believed that it would be likely.<sup>303</sup> Similarly, in 2017, a Texas poll showed that 72% of Latinos believe that Hispanics who are citizens will still be targeted and affected by laws that target or penalize undocumented immigrants.<sup>304</sup> While the goals of the legislation are to target unauthorized populations, it is clear that the effects of the legislation are affecting migration behavior of Latinos by expelling the majority of Hispanic males and their families from these states.<sup>305</sup>

“Show me your papers” laws do not further the state interest of public safety but instead lead to more dangerous communities.<sup>306</sup> SB 1070 was enacted in response to an increasingly large Hispanic presence in Arizona.<sup>307</sup> Latinos in 2008 represented 30% of the Arizona population.<sup>308</sup> In cities like Tucson, Arizona, in 2011, Latinos represented 41% of the population.<sup>309</sup> Similarly, in 2018, the Latino population in Texas was 40%.<sup>310</sup> Laws like SB 4 and SB 1070 destroy the relationship between local law enforcement and these Latino immigrant communities.<sup>311</sup> Where there is trust in police, immigrants are more likely to report crimes, serve as witnesses or otherwise cooperate with law enforcement without fear of deportation.<sup>312</sup> However, when police officers act as ICE agents, it causes mistrust and fear between the police and minority communities, especially the Hispanic community.<sup>313</sup> Houston Police Chief, Art Acevedo, has

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<sup>303</sup> Angela Maria Kelley et. al., *Latinos Voice Continued Concerns About S.B 1070*, CTR. FOR AM. PROGRESS ACTION FUND (Aug. 3, 2012), <https://www.americanprogressaction.org/issues/immigration/news/2012/08/03/11962/latinos-voice-continued-concerns-about-s-b-1070/>.

<sup>304</sup> Latino Decisions, *New Poll: 89% of Texas Latinos Want Dream Act Passed; Oppose SB4*, LATINO DECISIONS (Oct. 04, 2017), <http://www.latinodecisions.com/blog/2017/10/04/new-poll-89-of-texas-latinos-want-dream-act-passed-oppose-sb4/>.

<sup>305</sup> Brian Latimer, *State Anti-Immigration Laws Discourage All Latinos from Moving In*, NBC NEWS (Mar. 30, 2016), <https://www.nbcnews.com/news/latino/state-anti-immigration-laws-discourage-all-latinos-moving-n547396>.

<sup>306</sup> Herskovitz, *supra* note 254, at 3.

<sup>307</sup> Alyson Zepeda, *Arizona's Hispanic Population Grows in 2010 Census*, INSIDE TUCSON BUS. (Mar. 18, 2011), [https://www.insidetucsonbusiness.com/news/top\\_stories/arizona-s-hispanic-population-grows-in-census/article\\_2c0b0a18-50dd-11e0-bff5-001cc4c002e0.html](https://www.insidetucsonbusiness.com/news/top_stories/arizona-s-hispanic-population-grows-in-census/article_2c0b0a18-50dd-11e0-bff5-001cc4c002e0.html).

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> Anna Núñez, *Immigration 101: What is SB 4, Texas' Immigration Law*, AMERICA'S VOICE (Mar. 21, 2018), <https://americasvoice.org/blog/sb4-texas-immigration-law/>.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*



reported that Latinos in his city have reported 13% fewer violent crimes, 43% fewer rapes and sexual assaults, 12% fewer aggravated assaults, and 12% fewer robberies in the first three months of 2017 compared to the same time period from 2016.<sup>314</sup> This is during a period when reports of violent crime and sexual assault by non-Hispanics increased.<sup>315</sup> In July 2017, Fort Worth reported a string of at least a dozen robberies targeting Hispanics, specifically because they “don’t call the police.”<sup>316</sup>

Governor Greg Abbott has tried to falsely claim that SB 4 is only targeted towards criminals and that those who have not done anything wrong have “nothing to be concerned about.”<sup>317</sup> Police can ask anyone who is detained for any reason for their immigration status, including drivers and passengers stopped for minor traffic infractions, victims who have called the police to report crimes, and witnesses to crimes.<sup>318</sup> An example is an undocumented woman arrested for seeking a protective order against her boyfriend.<sup>319</sup> Another example is an undocumented man, named Marcos Antonio Huete, who was hit by an SUV while riding a bike.<sup>320</sup> He was placed in a deportation proceeding after police inquired about his immigration status before rendering medical aid.<sup>321</sup> Turning law enforcement officers into deportation agents decreases the Latino community’s trust which results in failure to report a crime or request help because of fear of deportation.

## 2. *Under Inclusiveness: Show Me Your Papers Laws Do Not Target Criminals*

“Show me your papers” laws are also under inclusive because they focus only on Latino males as criminals but not undocumented females who disrupt public safety. In fact, Latinas make up one of the fastest-growing groups imprisoned and are 69% more likely to be

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<sup>314</sup> *Id.*

<sup>315</sup> Núñez, *supra* note 310.

<sup>316</sup> Núñez, *supra* note 310.

<sup>317</sup> Núñez, *supra* note 310.

<sup>318</sup> Núñez, *supra* note 310.

<sup>319</sup> Núñez, *supra* note 310.

<sup>320</sup> Núñez, *supra* note 310.

<sup>321</sup> Núñez, *supra* note 310.

incarcerated than white women.<sup>322</sup> Hispanic women represent 16% of all females incarcerated under state or federal jurisdiction.<sup>323</sup> Women in state prisons in 2003 were more likely than men to be incarcerated for drug offenses (29% versus 19%) or property offense (30% versus 20%) and less likely than men to be incarcerated for a violent offense (35% versus 53%).<sup>324</sup> However, deportation data show that undocumented Latinas fly under the radar, and, despite the fact that about half of all undocumented immigrants are women, about 90% of deportees are men.<sup>325</sup> These statistics are skewed because males are more likely to be stopped by police officers than females.<sup>326</sup>

The important state interest of public safety is not substantially related to the very broadly written “show me your papers” reasonable suspicion standard because it does not solely target dangerous illegal criminals, but the standard targets Latino males merely because they “look illegal.” Because there is no test provided to police officers, the likelihood of racial profiling is very high, which will have a disruptive effect on the communities.

## VII. LOOKING AHEAD: POSSIBLE SOLUTIONS

As a wave of immigrants keep entering America’s gates, nativists feel threatened and at risk of “losing their land.”<sup>327</sup> Copycat legislation similar to “show me your papers” laws will continue to be enacted in today’s political climate.<sup>328</sup> Attrition through enforcement policies cannot be upheld by courts without identifying the underlying racially xenophobic motives of their legislators.<sup>329</sup> The courts, including the Supreme Court, cannot examine the constitutionality of policies, such as SB 1070, section-by-section but instead must take into account the statutory scheme as a whole in light of the anti-immigrant climate.<sup>330</sup> The ACLU and similar civil rights organizations have been

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<sup>322</sup> *Women in the Criminal Justice System*, SENTENCING PROJECT, May 2007, <http://www.sentencingproject.org/wp-content/uploads/2016/01/Women-in-the-Criminal-Justice-System-Briefing-Sheets.pdf>.

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> Boza, *supra* note 23.

<sup>326</sup> Boza, *supra* note 23.

<sup>327</sup> *Along Racial Lines*, *supra* note 183.

<sup>328</sup> *Along Racial Lines*, *supra* note 183, at 2.

<sup>329</sup> *Along Racial Lines*, *supra* note 183, at 9.

<sup>330</sup> *Along Racial Lines*, *supra* note 183, at 2.

at the forefront of litigation in preparing briefs and arguing for the immigrant community.<sup>331</sup> These organizations also provide indispensable aid for undocumented individuals via instructive presentations in different languages, such as a “know your rights” informative lectures, which help immigrants understand their rights if they are stopped by ICE or police regarding immigration status.<sup>332</sup> Sharing these pamphlets helps individuals to stay informed about their rights and prevents decision-making based on misconceptions of the law.

Another solution is for Latino immigrant groups to work together to increase voting and civic engagement among Latino voters.<sup>333</sup> Groups such as One Arizona Coalition (hereinafter “One Arizona”) were started as a response to SB 1070 and helped register Hispanics to vote, including young people and single women.<sup>334</sup> These voter registration drives have helped bring about major victories for Latinos, such as the recall of state Senate President, Russell Pearce, the lead sponsor of SB 1070, in 2011.<sup>335</sup> In the same year, state legislators voted down five immigration bills, which made it difficult to pass other anti-immigration bills.<sup>336</sup> Most recently, One Arizona has helped Latinos build the political power they needed to elect candidates who reflect their values to school boards, city councils and the state legislature.<sup>337</sup> These efforts led to major local policy changes, including the recent approval by the Phoenix City Council of a municipal identification card that will help undocumented immigrants and others living in Phoenix access city services.<sup>338</sup> There is power in numbers and by ensuring that all Latinos who are eligible to vote perform their civic duties, anti-immigrant legislation will be a thing of the past.

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<sup>331</sup> *ACLU Joins Lawsuit Challenging Anti-Immigrant Law SB4*, ACLU (May 25, 2017), <https://www.aclu.org/news/aclu-joins-lawsuit-challenging-anti-immigrant-law-sb4>.

<sup>332</sup> *Know Your Rights: Stopped by Police, Immigration Agents, or FBI*, ACLU, Dec. 2016, <https://www.aclu.org/files/kyr/MKG17-KYR-PoliceImmigrationFBI-OnePager-English-v01.pdf>.

<sup>333</sup> Griselda Navarez, *Awakened by SB 1070, One Arizona Now a Model for Latino Voter Registration*, NBC NEWS (Sept. 28, 2016), <https://www.nbcnews.com/news/latino/awakened-sb1070-one-arizona-now-model-latino-voter-registration-n647891>.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> Navarez, *supra* note 333.

## VIII. CONCLUSION

This Note argues that “show me your papers” laws and similar legislation violate Latino males’ equal protection rights because, although the laws are facially neutral, they were enacted with an intent to discriminate and caused a disparate impact on Latino males.<sup>339</sup> Such laws are subject to an intermediate scrutiny analysis, and the only way to uphold them is if the state can show an important state interest for such laws that is substantially related to that interest.<sup>340</sup> However, these statutes fail the intermediate scrutiny analysis and, therefore, are unconstitutional.

This Note argues that “show me your papers” laws fail to show both an important state interest because legislators solely relied on stereotypical views of Latino men as criminals and not on factual data. The Supreme Court has held that stereotypical notions of gender are not important state interests.<sup>341</sup> In addition, the government’s interest in enacting these laws is not substantially related to its public safety goals because such laws were drafted so broadly that any Latino male can become a target of law enforcement harassment.<sup>342</sup> A police officer cannot tell based on one’s appearance whether the person is undocumented, and these laws will force police officers to partake in racial profiling of Latino males.<sup>343</sup>

Mass deportation has torn apart and undermined many of American Latino families.<sup>344</sup> Already, the first decade of the twenty-first century has become a period when hundreds of thousands of Latino men have been sent back to their countries of birth, leaving children and partners struggling.<sup>345</sup> Affected children, mostly citizens, not only are growing up in greater economic privation, but they also know that the United States government is responsible for exiling their fathers based on unfounded stereotypes.<sup>346</sup> However, there is hope that these children will become a new generation of voters who can vote against similar anti-immigrant bills and legislators who attempt to

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<sup>339</sup> *Personnel Admin. of Mass. v. Feeney*, 442 U.S. 256 (1979).

<sup>340</sup> *Craig v. Boren*, 429 U.S. at 190 (1976).

<sup>341</sup> *Miss. Univ. for Women v. Hogan*, 458 U.S. at 718 (1982).

<sup>342</sup> *Report on the Constitutionality of Arizona Immigration Law S.B. 1070*, *supra* note 245.

<sup>343</sup> *Provine*, *supra* note 291.

<sup>344</sup> *Boza*, *supra* note 23.

<sup>345</sup> *Boza*, *supra* note 23.

<sup>346</sup> *Boza*, *supra* note 23.

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perpetuate their own xenophobic agendas using public safety as an excuse.