

Sanctuary Cities and Dog-Whistle Politics

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I. INTRODUCTION

Before July 1, 2015, the story of the Sanctuary City had been told in three acts.

Act One saw the rise of the Sanctuary City as a response to the perceived harshness of federal policy regarding El Salvadoran and Guatemalan refugees during the 1980s.¹ San Francisco, for example, troubled by the low rate of asylum grants to the Central American refugees,² adopted a policy in 1985 preventing local law enforcement from “caus[ing] their deportation.”³ Then in 1989, the city and county’s Board of Supervisors passed an ordinance preventing (unless otherwise required by law) law enforcement from acquiring information about immigration status, or relaying such information on to federal immigration officials.⁴

Act Two saw the resurgence of the Sanctuary City in response to the rise

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1. Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247, 252–53 (2011).

2. *Id.* at 253.

3. *Id.*

4. *Id.* at 252; *see also id.* at 258–59 (describing New York City’s sanctuary policy, first promulgated by executive order in 1989).

of the “crimmigration”⁵ enforcement regime in the late 1980s and 1990s⁶ and the federal government’s post-9/11 effort to enlist state and local law enforcement to engage in immigration enforcement activities.⁷ Cities like New Haven, Connecticut responded by establishing city- or police-level policies against cooperation with immigration enforcement officials.⁸ The New Haven Police Department issued a “general order” prohibiting officers from inquiring as to immigration status,⁹ and the city began allowing all

5. The term “crimmigration” was coined by Juliet Stumpf to describe the “merger” of criminal and immigration law. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 379–81 (2006). Jennifer Chacón has described “three distinct trends” that comprise “crimmigration”: “the increasingly harsh criminal consequences attached to violations of laws regulating migration, the use of removal as an adjunct to criminal punishment in cases involving noncitizens, and the rising reliance on criminal law enforcement actors and mechanisms in civil immigration proceedings.” Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 135–56 (2009). Other important contributions to the crimmigration literature include Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010); Mary Fan, *The Case for Crimmigration Reform*, 92 N.C. L. REV. 75 (2013); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457 (2014); and Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L.J. 599 (2015).

6. See Rachel E. Rosenbloom, *Policing Sex, Policing Immigrants: What Crimmigration’s Past Can Tell Us About its Present and its Future*, 104 CAL. L. REV. 149, 193–96 (2016) (tracing the origins of crimmigration to the 1950s, but recognizing a dramatic qualitative and quantitative change in crimmigration in recent decades due to changes in immigration law and the rise of mass incarceration and mass surveillance).

7. Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 601 (2008) (noting that many sanctuary policies “served as direct legislative and administrative responses to the federal government’s expanding efforts to enlist state and local police voluntarily in the enforcement of immigration laws in the years after the attacks of September 11, 2001”); but see Hing, *supra* note 1, at 253 (arguing that while it is tempting to see sanctuary ordinances like New Haven’s as “statements in opposition to federal immigration enforcement decisions” they should be understood as public safety measures). For descriptions of the federal effort to co-opt local law enforcement, see Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th “Pale of Law”*, 29 N.C. J. INT’L L. & COM. REG. 639, 656–57 (2004); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 87–88 (2005); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1085 (2004).

8. Stephanie M. Gomes, *Building Trust in our Communities: States Encourage their Residents to Speak Up in the Wake of the Federal Government’s Silence*, 33 QUINNIPIAC L. REV. 715, 733 (2015). See generally Mary M. Cheh, *Threading the Needle: Constitutional Ways for Local Governments to Refuse Cooperation with Civil Immigration Policies*, 16 UDC L. REV. 123 (2012).

9. Gomes, *supra* note 8; Hing, *supra* note 1, at 248–49.

residents, whether documented or undocumented, to obtain an “Elm City Identification Card.”¹⁰

Act Three saw a renewed resistance to federal co-opting of state and local law enforcement resources, with a particular focus on one legal tool—the immigration detainer by which federal immigration officials request state and local officials to prolong the detention of a prisoner otherwise entitled to release, to allow the transfer of custody to federal immigration officials.¹¹ The anti-detainer movement arose out of state and local resistance to the federal “Secure Communities” program, which linked federal crime databases with federal immigration databases, allowing federal immigration officials to identify suspected immigration violators soon after their booking into a local jail.¹² Secure Communities resulted in a ten-fold increase in the number of detainees placed, and advocates soon realized the battle against Secure Communities could be successfully waged by fighting the use of detainees.¹³

Each successive wave of sanctuary policies has been accompanied by controversy,¹⁴ and as such, legislation to strip sanctuary cities of their federal funding has been suggested or introduced.¹⁵ State legislatures have also sought to prohibit local sanctuary policies.¹⁶ Such controversy and calls

10. See Renee C. Redman, *National Identification Cards: Powerful Tools for Defining and Identifying Who Belongs in the United States*, 71 ALB. L. REV. 907, 921–25 (2008) (describing the Elm City ID as intended to signify “who ‘belongs’” as a community member); see also Gomes, *supra* note 8, at 735–38.

11. See generally, Christopher N. Lasch, *Enforcing the Limits of the Executive’s Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 165 (2008).

12. Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 155–56 (2013).

13. See *id.* at 154–63 (describing the rise of resistance to Secure Communities and the adoption of anti-detainer policies); Juliet P. Stumpf, *D(E)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259, 1276–81 (2015) (describing the rapid demise of Secure Communities following widespread anti-detainer policies based on judicial decisions as to the legality of prolonged detention).

14. E.g., Ben Arnoldy, ‘Sanctuary’ Cities for Illegals Draw Ire, CHRISTIAN SCI. MONITOR (Sept. 25, 2007), <http://www.csmonitor.com/2007/0925/p02s01-usju.html>; Kelley Beaucar Vlahos, ‘Sanctuary Cities’ Debate Helps Drive Agenda in Republican ‘08 Primary Race, FOX NEWS (Aug. 28, 2007), <http://www.foxnews.com/story/2007/08/28/sanctuary-cities-debate-helps-drive-agenda-in-republican-08-primary-race.html>.

15. E.g., Mobilizing Against Sanctuary Cities Act of 2011, H.R. 2057, 112th Cong. (2011); Accountability in Enforcing Immigration Laws Act of 2007, H.R. 3531, 110th Cong. (2007).

16. E.g., S.B. 2232, Reg. Sess. (Miss. 2012). The Mississippi legislation proposed in 2012 was based on model legislation prepared by the American Legislative Exchange Council (ALEC). R.L. Nave, *Promised Land: Are Mississippi’s Anti-Immigrant Efforts Bad for Business?*, JACKSON FREE PRESS (Mar. 28, 2012, 3:57 PM), <http://www.jacksonfreepress.com/news/2012/mar/28/promised-land-are-mississippi-anti-immigrant/>. ALEC’s model “No Sanctuary Cities for Illegal Immigrants Act,” on which

for action have often followed on the heels of some well-publicized event linking immigrants to crime.¹⁷

And so it would be once again in 2015. On July 1, a young woman's death on a pier in San Francisco reignited the long-running political debate over the wisdom of sanctuary city policies.¹⁸ This essay examines some of the rhetoric deployed in that debate, and in particular relies on Professor Ian Haney López's work focusing on the use of "dog-whistle politics," the practice of embedding coded racial appeals in a political message in order to promote policies of continued racial subordination.¹⁹

The larger project begun here is an examination of the narratives used to set political agendas and control policy across the crimmigration arena. Narrative is "humankind's basic tool for giving meaning to experience or observation."²⁰ It is the tool for pushing projects onto the political agenda, by casting events as representing problems that can be solved by political action.²¹ Narrative and rhetoric are deeply consequential for these reasons and others.²²

The particular narratives explored here—coded racial narratives—have a special place in the evolution of narrative. They are an example of what

Mississippi's proposal was based, was in 2011-12 the most popular model legislation prepared by ALEC, with some version being proposed in twenty-three state legislatures. Rebecca Leber, *Lawmakers in 23 States Introduced Secret Lobbying Group ALEC's Anti-Immigrant Bill*, THINK PROGRESS (Dec. 10, 2013, 3:43 PM), <http://thinkprogress.org/immigration/2013/12/10/3043381/alec-immigration-bills/> (citing Molly Jackman, *ALEC's Influence over Lawmaking in State Legislatures*, BROOKINGS (Dec. 6, 2013), <http://www.brookings.edu/research/articles/2013/12/06-american-legislative-exchange-council-jackman>).

17. *E.g.*, Hing, *supra* note 1, at 256 (noting that "as the media began linking crime to undocumented immigrants" in Montgomery County, Maryland, controversy over the police department's "don't ask" policy arose); Yliana Johansen, *The Media, Politics, and Policy: Taking Another Look at the Development of San Francisco's Policies on Immigrant Juvenile Offenders*, 15 U.C. DAVIS J. JUV. L. & POL'Y 125, 139-45 (2011) (describing controversy in San Francisco following a highly publicized triple murder).

18. Evan Sernoffsky et al., *Woman Mourned, Suspect Held in Random Killing on S.F. Pier*, SFGATE (July 2, 2015), <http://m.sfgate.com/news/article/Woman-killed-on-San-Francisco-pier-identified-6363401.php#photo-8249969>.

19. *See generally* IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* (2014).

20. Ty Alper et al., *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLINICAL L. REV. 1, 2 (2005).

21. *See generally* Deborah A. Stone, *Causal Stories and the Formation of Policy Agendas*, 104 POLI. SCI. Q. 281 (1989).

22. *See generally* Kevin R. Johnson & Joanna E. Cuevas Ingram, *Anatomy of a Modern-Day Lynching: The Relationship Between Hate Crimes Against Latina/os and the Debate over Immigration Reform*, 91 N.C. L. REV. 1613, 1616-17 (2013) (describing the impact of rhetoric deployed in the debate over comprehensive immigration reform).

Professor Reva Siegel describes as “status regime modernization.”²³ Professor Siegel demonstrated that civil rights reform, rather than “simply abolish[ing] a status regime,” produces more incremental change.²⁴ The narratives and rhetoric once used to justify and enforce a status hierarchy are called into question; narrative terrain once firmly held by the power elites is now contested.²⁵ And, rather than an abrupt abolition of status hierarchy, “status relationships will be translated from an older, socially contested idiom into a newer, more socially acceptable idiom.”²⁶

Professor Siegel and more recently Professor Michelle Alexander have traced the “preservation through transformation” of our racial “status regime,” from slavery to Reconstruction and the Jim Crow era.²⁷ Professor Alexander describes the most recent iteration of this racial regime modernization—mass incarceration, largely of African American men.²⁸ As the “rules of acceptable discourse” changed with the Civil Rights Movement, “segregationists distanced themselves from an explicitly racist agenda” and shifted to the “racially sanitized rhetoric of ‘cracking down on crime’ False”²⁹ Calls for “segregation forever” yielded to calls for “law and order.”³⁰

The shift from explicit racism to institutional racism in the criminal justice system has run parallel in the immigration justice system, where the currency of discourse, once backed by racial epithets,³¹ has likewise morphed to a colorblind³² discourse backed by law and order rhetoric.³³ With

23. Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2178–79 (1996).

24. *Id.* at 2179.

25. *Id.*

26. *Id.*

27. *Id.* at 2119, 2178–79; MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 20–57 (Rev. ed 2012).

28. ALEXANDER, *supra* note 27, at 189.

29. *Id.* at 43; *see also* HANEY LÓPEZ, *supra* note 19, at 56–57 (recounting Lee Atwater’s description of the Republican “Southern Strategy” and its evolution from explicit racial epithets to framing issues around “states’ rights” and “cutting taxes”).

30. ALEXANDER, *supra* note 27, at 40.

31. HANEY LÓPEZ, *supra* note 19, at 113.

32. Scholars have linked the power of colorblindness to affirm existing status hierarchies to its ahistoricism. *E.g.*, HANEY LÓPEZ, *supra* note 19, at 72–93 (describing how colorblindness came to be used “like a racial cudgel” to deny discrimination exists, cast whites as “racial victims,” and facilitate “dog-whistle racial appeals”); Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 *CAL. L. REV.* 77, 95 (2000) (“[T]he conventions of color blindness discourse make it possible for this society to characterize practices that enforce racial stratification as the product of ‘race-neutral’ and ‘nondiscriminatory’ principles of social distribution. This is one way in which color blindness discourse rationalizes racial

the linking of these two justice systems as crimmigration, the availability of race-based narratives in each threatens to compound the problem of subordination.³⁴

Exposing the role that intentional coded racial messages play in perpetuating subordination is of critical importance. Exposing and addressing race weakens the power of dog-whistle narratives: “[T]he research is clear that putting race front and center. . . helps reduce the power of coded racial appeals.”³⁵ Conversely, treating dog-whistle narratives as colorblind delivers affirmation of the non-racial thrust of the narrative—most commonly, a narrative of law and order—which is of course used to mask the racial subtext.³⁶ In this way, “colorblindness . . . helps give credence to dog whistle themes.”³⁷ Failing to identify coded racial messages may lead us too easily to believe that we inhabit a world in which explicit bias has yielded entirely to implicit, “subconscious” bias.³⁸ To say that coded messaging is a step away from explicit bias misses the point that such “modernized” rhetoric seeks to preserve the status regime hierarchy previously enforced through explicit bias.³⁹

Part Two of this article briefly recounts the death of Kathryn Steinle and the immediate political response. Part Three examines of how dog-whistle politics played a role in the narrative framing of the debate. Part Four concludes this article.

stratification.”).

33. E.g., NATALIA MOLINA, *HOW RACE IS MADE IN AMERICA: IMMIGRATION, CITIZENSHIP, AND THE HISTORICAL POWER OF RACIAL SCRIPTS* 142–44 (2014) (tracing the “historical production” of the seemingly colorblind term “illegal immigrant” to explicitly racial discourse previously used to describe immigrants negatively).

34. E.g., Kevin R. Johnson, *Race-Based Law Enforcement: The Racially Disparate Impacts of Crimmigration Law*, CASE W. RES. L. REV. (forthcoming) (urging crimmigration scholars to acknowledge and challenge the racially disproportionate impact of the crimmigration enforcement system, and linking racial disparities in the criminal and immigration enforcement systems), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2640755.

35. HANEY LÓPEZ, *supra* note 19, at 220; *see also supra* text accompanying note 29.

36. HANEY LÓPEZ, *supra* note 19, at 79.

37. *Id.*

38. *See* Darren Lenard Hutchinson, “Continually Reminded of Their Inferior Position”: *Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J. L. & POL’Y 23, 34, 41, 84 (2014) (arguing that implicit bias theory is useful but ultimately insufficient to explain continued individual and system acts of racial subordination).

39. HANEY LÓPEZ, *supra* note 19, at 92 (describing colorblindness as a “dog whistle” that explicitly seeks the “lofty goal . . . [of] racial justice” but actually “translates into opposition to integration”).

II. KATHRYN STEINLE'S DEATH REIGNITES THE SANCTUARY CITY DEBATE

On July 1, 2015, at around 6:30 p.m., a young woman named Kathryn “Kate” Steinle was shot and killed while visiting a popular tourist site, Pier 14, in San Francisco.⁴⁰ Ms. Steinle, thirty-two, was with her father and a family friend, and had just sent her mother a photograph of the three visitors to the Embarcadero.⁴¹ “There was a pop, and Kate went down,” her father said. She had been struck in the chest and died two hours later.⁴²

Police reported that the shooting “appeared to be random.”⁴³ Witnesses were able to share photos of a suspect, and police took Juan Francisco Lopez-Sanchez into custody one hour later.⁴⁴ What they learned next would ignite a fierce national debate over so-called “sanctuary cities.”⁴⁵ Mr. Lopez-Sanchez had a lengthy criminal record,⁴⁶ including seven felonies, and was an undocumented immigrant who had been deported from the country five times previously.⁴⁷ Three of his felony convictions were for illegally re-entering the United States after having been deported.⁴⁸ Worse still, Mr. Lopez Sanchez had completed his most recent sentence for illegal re-entry only months before he shot Kathryn Steinle, and would have been deported a sixth time but for a twenty-year-old warrant for a charge relating to a twenty-dollar marijuana sale in San Francisco.⁴⁹ Because of the war-

40. *Woman Fatally Shot at Pier 14 in San Francisco: Police*, NBC BAY AREA (July 1, 2015, 7:43 PM), <http://www.nbcbayarea.com/news/local/SFPD-Investigating-Shooting-on-Embarcadero-311351081.html>.

41. Sernoffsky, *supra* note 18.

42. *Id.*

43. *Id.*

44. *Id.*

45. Given the vast amount of coverage that the debate garnered, a truly comprehensive treatment was not feasible. Instead, I have tried to collect here a representative sampling of media accounts that expose the narratives deployed in the debate over sanctuary cities. *E.g.*, Louis Sahagun & Emily Alpert Reyes, *Fatal Shooting in San Francisco Ignites Immigration Policy Debate*, L.A. TIMES (July 4, 2015, 10:03 PM), <http://www.latimes.com/local/california/la-me-0705-sf-shooting-20150705-story.html#page=1>.

46. Chuck Ross, *Francisco Sanchez, Kate Steinle's Killer, Used 30 Aliases Over the Course of a 25-Year Life of Crime*, DAILY CALLER (July 8, 2015), <http://dailycaller.com/2015/07/08/francisco-sanchez-kate-steinles-killer-used-30-aliases-over-the-course-of-a-25-year-life-of-crime/>.

47. *See* Sahagun & Reyes, *supra* note 45.

48. Ross, *supra* note 46.

49. Evan Sernoffsky et al., *S.F. Drug Warrant Helped Accused Killer Stay in U.S.*, SFGATE (July 7, 2015, 9:11 AM), <http://www.sfgate.com/news/article/S-F-drug-warrant-helped-accused-killer-stay-in-6369360.php>.

rant, Mr. Lopez Sanchez was transferred from federal custody to the custody of the San Francisco Sheriff's Department (SFSD) on March 26, 2015.⁵⁰ The next day, the twenty-year-old drug charge was dismissed.⁵¹ "Once the SFSD confirmed that Mr. Lopez-Sanchez's federal prison time had been completed and that he had no active warrants, he was released from San Francisco County Jail on April 15, 2015."⁵²

Why was Mr. Lopez Sanchez released, given that he had been targeted for deportation? The answer, to many, lay in San Francisco's sanctuary city policy. Although the Department of Homeland Security had lodged an immigration "detainer" with the SFSD, a San Francisco ordinance states that the Sheriff "shall not detain an individual on the basis of a civil immigration detainer after that individual becomes eligible for release," except when the person has been convicted of a violent felony in the past seven years and is in custody on a pending violent felony—neither of which applied to Mr. Lopez-Sanchez.⁵³

The criminal case against Mr. Lopez-Sanchez immediately took a strange turn when Mr. Lopez-Sanchez consented to give interviews to the press. Speaking without an attorney, he admitted shooting Ms. Steinle but said it was an accident.⁵⁴ He said he "was wandering on Pier 14 after taking sleeping pills he found in a dumpster," when he found a gun wrapped in a t-shirt, picked it up and it went off.

He appeared disoriented and it was not clear whether he understood the questions in parts of the interview, which was conducted in English and Spanish. Lopez-Sanchez gave contradictory answers to reporters about what had happened and how he felt. He said he could not recall details of the shooting because he'd taken sleeping medication, but repeated several times that the shooting had been an accident and that the weapon had gone off on its own.⁵⁵

Other dimensions of the story emerged. Mr. Lopez-Sanchez was "home-

50. CITY & CTY. OF S.F., SAN FRANCISCO SHERIFF'S DEPARTMENT STATEMENT REGARDING JUAN FRANCISCO LOPEZ-SANCHEZ (2015), http://www.sfsheriff.com/files/SFSD_PR_RM_07_03_15.pdf.

51. *Id.*

52. *Id.*

53. Sernoffsky et al., *supra* note 49; SAN FRANCISCO SHERIFF'S DEPARTMENT STATEMENT, *supra* note 50 (citing S.F. Ordinance 130764 (Oct. 2013)); *see* S.F. Ordinance 204-13, File No. 130764 (Oct. 8, 2013), <http://lccr.com/wp-content/uploads/DueProcessForAllOrdinance.pdf>.

54. Cornell Barnard, *Man Accused in San Francisco Pier 14 Shooting Admits to Crime*, ABC7NEWS (July 5, 2015), <http://abc7news.com/news/exclusive-accused-sf-killer-admits-to-crime/830325/>.

55. Michael Pearson, *Suspect Tells TV Station He Killed San Francisco Woman*, CNN (July 7, 2015), <http://www.cnn.com/2015/07/06/us/san-francisco-killing/>.

less, penniless and living on the streets” after he was released by the SFSFSD in April.⁵⁶ He had a long history of drug abuse, including “huff[ing] glue.”⁵⁷ During the interview, he was described as “despondent,”⁵⁸ “frail and nervous,”⁵⁹ and at a later court appearance he was described as “weak and frail” and moving “very slowly as he entered the courtroom.”⁶⁰

Mr. Lopez-Sanchez’s claim that the shooting was accidental also proved viable, since the bullet that killed Ms. Steinle was determined to have ricocheted off the ground.⁶¹ A ballistics expert later testified that the gun was pointed at the ground when fired.⁶² And yet, although what happened quickly accumulated substantial factual complexity, the proposition that would be debated in the months following was grossly oversimplified: Was San Francisco’s sanctuary policy responsible for the death of Kathryn Steinle?

With the 2016 presidential election already in swing, there was no dearth of commentary. The candidates weighed in immediately. First and loudest was Donald Trump, who just weeks earlier had launched his campaign with racially charged invective, disparaging Mexican immigrants as criminals: “They’re bringing drugs. They’re bringing crime. They’re rapists.”⁶³ Almost as an afterthought, Trump had added: “And some, I assume, are good people.”⁶⁴ His comments immediately alienated Latinos and others, causing business partners, celebrity associates, and Republicans to back away from him.⁶⁵ Against this backdrop, Trump predictably saw Ms. Steinle’s

56. Dan Moraine, *San Francisco Jailers Dumped a Prisoner and Kathryn Steinle Died*, SACRAMENTO BEE (July 11, 2015), <http://www.sacbee.com/opinion/opn-columns-blogs/dan-morain/article27008524.html>.

57. *Id.*

58. Evan Sernoffsky, *Pier Killing Suspect, in Jailhouse Interview, Admits Firing Gun*, SFGATE (July 6, 2015), <http://www.sfgate.com/news/article/Pier-killing-suspect-admits-firing-gun-in-6367607.php>.

59. Barnard, *supra* note 54.

60. Aaron Pero, *Raw Video: Pier 14 Shooting Suspect in Court*, KRON4 (July 22, 2015, 9:53 AM), <http://kron4.com/2015/07/22/raw-video-pier-14-shooting-suspect-in-court/>.

61. Thomas Peele, *Kate Steinle Killing: Ballistics Expert Calls Fatal Shot Accident*, SAN JOSE MERCURY NEWS (Aug. 27, 2015), http://www.mercurynews.com/immigration/ci_28714857/kate-steinle-killing-ballistics-expert-calls-fatal-shot.

62. *Id.*

63. *Donald Trump Transcript: ‘Our Country Needs a Truly Great Leader’*, WALL STREET J. (June 16, 2015), <http://blogs.wsj.com/washwire/2015/06/16/donald-trump-transcript-our-country-needs-a-truly-great-leader/>.

64. *Id.*

65. Doug Stanglin, *Trump: San Francisco Shooting Case for Securing Border*, USA TODAY (July 4, 2015), <http://www.usatoday.com/story/news/nation/2015/07/04/donald->

death as “another example of why we must secure our border immediately.”⁶⁶ Describing the killing as a “totally preventable act of violence” that took place “[because] of our unsafe border,” Trump reiterated his call for a “great wall” on the Mexican border.⁶⁷

Other Republican presidential candidates were quick to criticize San Francisco’s sanctuary policy.⁶⁸ Jeb Bush proposed to “eliminate sanctuary cities” by depriving them of law enforcement funding “until they change their policies.”⁶⁹ Rick Perry likewise urged the denial of federal funds to jurisdictions with sanctuary policies,⁷⁰ as did Mike Huckabee.⁷¹ Marco Rubio decried Ms. Steinle’s death as “just one more example of how all this is . . . completely out of control, here you have liberal local officials, people refuse to comply with the law and refuse to turn someone over and, as a result, you had a loss of life.”⁷² Rand Paul likewise described sanctuary policies as having “flouted” immigration law, stating there “ought to be a revolution of folks saying, ‘We want you to obey the law.’”⁷³ “No sanctuary cities,” said Ben Carson, adding: “You have to turn off the spigot that dispenses the goodies. If there’s nothing for them to come here for, they’re not going to risk coming in here.”⁷⁴

trump-san-francisco-killing-whipping-post/29694403/ (noting cancelled contracts by Univision, NBC, Macy’s, and NASCAR; lost associations with celebrities Flo Rida, Jonathan Scott, and Shikara; and critical remarks from Republicans George Pataki, Marco Rubio, and Rick Perry).

66. *Id.*

67. *Id.*; see *Donald Trump Transcript*, *supra* note 63 (“I would build a great wall . . . I will build a great, great wall on our southern border. And I will have Mexico pay for that wall.”).

68. Patricia Mazzei, *Jeb Bush, Marco Rubio Oppose ‘Sanctuary’ Cities — But Some Consider Miami to be One*, MIAMI HERALD (July 13, 2015), <http://www.miamiherald.com/news/politics-government/elections-2016/article27146281.html#storylink=cpy>.

69. *Id.*

70. Nick Gass, *‘Sanctuary Cities’ Under Fire in 2016 Campaign, Congress*, POLITICO (July 9, 2015), <http://www.politico.com/story/2015/07/sanctuary-cities-under-fire-in-2016-campaign-congress-119933#ixzz3xf2dnjB7>.

71. *Huckabee: Sanctuary Cities a Formal Way of Breaking the Law*, FOX NEWS (July 13, 2015), <http://www.foxnews.com/transcript/2015/07/13/huckabee-sanctuary-cities-formal-way-breaking-law/>.

72. *Sen. Rubio: Sanctuary Cities “Completely out of Control”*, FOX NEWS (July 9, 2015), http://video.foxnews.com/v/4345986747001/sen-rubio-sanctuary-cities-completely-out-of-control/?playlist_id=2114913880001#sp=show-clips/daytime.

73. Gass, *supra* note 70.

74. Mark Hensch, *Ben Carson: ‘No Sanctuary Cities’*, HILL (July 8, 2015), <http://thehill.com/blogs/ballot-box/presidential-races/247197-ben-carson-no-sanctuary-cities>.

On the Democrats' side, Hillary Clinton's dodgy answer in a CNN interview⁷⁵ produced headlines going in different directions.⁷⁶ In contrast, candidate Martin O'Malley firmly defended sanctuary cities, saying local officials should neither be "blamed for the Federal Government's inability to fix our broken immigration system" nor "held responsible for doing the Federal Government's job."⁷⁷ Bernie Sanders and Jim Webb appear not to have made public comments, but were noted by the media to have previously voted against measures to punish sanctuary cities.⁷⁸

In Congress, Republicans hastily drafted and introduced a bill titled "Enforce the Law for Sanctuary Cities," which would prevent sanctuary jurisdictions from receiving certain federal funds.⁷⁹ For the most part, support

75. When asked whether she still supported sanctuary cities after Steinle's death, Clinton responded:

Well, what should be done is any city should listen to the Department of Homeland Security, which as I understand it, urged them to deport this man again after he got out of prison another time. Here's a case where we've deported, we've deported, we've deported. He ends back up in our country and I think the city made a mistake. The city made a mistake, not to deport someone that the federal government strongly felt should be deported.

So I have absolutely no support for a city that ignores the strong evidence that should be acted on.

However, there are - like if it were a first-time traffic citation, if it were something minor, a misdemeanor, that's entirely different. This man had already been deported five times. And he should have been deported at the request of the federal government.

CNN Exclusive: Hillary Clinton's First National Interview of 2016 Race, CNN (July 7, 2015), <http://cnnpressroom.blogs.cnn.com/2015/07/07/cnn-exclusive-hillary-clintons-first-national-interview-of-2016-race/>.

76. Compare Elise Foley, *Hillary Clinton Piles on San Francisco Officials, Putting Sanctuary Cities Under Even More Heat*, HUFFINGTON POST (July 7, 2015), http://www.huffingtonpost.com/2015/07/07/sanctuary-cities_n_7749406.html, with Shikha Dalmia, *How Donald Trump Pressured Hillary Clinton to Sell Out Latino Immigrants*, WEEK (July 10, 2015), <http://theweek.com/articles/565645/how-donald-trump-pressured-hillary-clinton-sell-latino-immigrants>, with Suzanne Gamboa, *Clinton Campaign: Sanctuary Cities Can Help Public Safety*, NBC NEWS (July 9, 2015), <http://www.nbcnews.com/news/latino/clinton-campaign-sanctuary-cities-can-help-public-safety-n389186>.

77. Jesse Byrnes, *O'Malley Defends 'Sanctuary Cities'*, HILL (July 10, 2015), <http://thehill.com/blogs/ballot-box/presidential-races/247571-omalley-defends-sanctuary-cities>.

78. Gass, *supra* note 70.

79. H.R. 3009, 114th Cong. (2015) (defining sanctuary jurisdictions as those having "any law, policy, or procedure in contravention of subsection (a) or (b) of section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1373); or prohibit[ing] State or local law enforcement officials from gathering information regarding

and opposition for the bill (and other proposed legislation)—and the rhetoric deployed in expressing support or opposition—split cleanly along party lines, just as the debate among the presidential candidates had.⁸⁰ Republicans largely supported punitive measures against sanctuary cities⁸¹ (such as the withholding of federal funds) while Democrats mainly opposed them.⁸² Those who bucked party lines came under fire immediately.⁸³ Ultimately, the anti-sanctuary law dubbed by Democrats the “Donald Trump Act”⁸⁴ cleared the House of Representatives in July, but its Senate counterpart failed in October.⁸⁵ Senator and Republican presidential candidate Ted

the citizenship or immigration status, lawful or unlawful, of any individual”).

80. See James Beattie, *The ‘Donald Trump Act’ Just Passed the House by a Landslide, and Obama Doesn’t Like it One Bit*, W. JOURNALISM (July 24, 2015, 6:22 PM), <http://www.westernjournalism.com/the-donald-trump-act-just-passed-the-house-by-a-landslide-and-obama-doesnt-like-it-one-bit/>.

81. E.g., Press Release, Representative Charlie Dent (R-Pa.), Dent says: “Sanctuary Cities Must Follow the Law or Face Consequences”—Votes for House Bill to Hold Municipalities Accountable for Failing to Follow Federal Law (July 23, 2015), http://dent.house.gov/?p=PressReleases&ContentRecord_id=D0152685-ED4C-497B-B7C4-3A27AD494362; Press Release, Representative Paul Gosar (R-Ariz.), Rep. Gosar Cracks Down on Sanctuary Cities, Illegal Immigrant Releases (July 10, 2015), <http://gosar.house.gov/press-release/rep-gosar-cracks-down-sanctuary-cities-illegal-immigrant-releases>; Press Release, Representative Lynn Westmoreland (R-Ga.), Westmoreland: Innocent Americans are the ones paying the price for Sanctuary Cities (July 23, 2015) (“Sanctuary city policies must be stopped immediately.”), <http://westmoreland.house.gov/press-releases/westmoreland-innocent-americans-are-the-ones-paying-the-price-for-sanctuary-cities/>.

82. E.g., Press Release, Representative Judy Chu (D-Cal.), Rep. Chu: Anti-Immigrant Sanctuary Cities Bill Plays on Fear and Undermines Community Safety (July 23, 2015), <https://chu.house.gov/press-release/rep-chu-anti-immigrant-sanctuary-cities-bill-plays-fear-and-undermines-community>; Press Release, Representative Jim McGovern (D-Mass.), McGovern: House GOP’s Anti-Immigrant Bill Hurts Local Police Efforts to Keep Communities Safe (July 23, 2015), <http://mcgovern.house.gov/media-center/press-releases/mcgovern-house-gop-s-anti-immigrant-bill-hurts-local-police-efforts-to>; Floor Speech, Representative Linda T. Sánchez, Oppose Enforce the Law for Sanctuary Cities Act (July 22, 2015), <http://votesmart.org/public-statement/1003832/oppose-enforce-the-law-for-sanctuary-cities-act#.VuxWsOIrK1t>.

83. See, e.g., Seung Min Kim, *Feinstein Under Fire from Immigration Advocates*, POLITICO (Aug. 3, 2015, 5:13 AM), <http://www.politico.com/story/2015/08/feinstein-under-fire-from-immigration-advocates-120911> (describing backlash against Senators Barbara Boxer (D-Cal.) and Dianne Feinstein (D-Cal.) after they suggested they would write legislation requiring localities to notify federal immigration officials of the impending release of noncitizen convicted felons).

84. Mike Lillis, *Democrats Slam Sanctuary City Legislation, Labeling it ‘The Donald Trump Act’*, HILL (July 22, 2015, 3:05 PM), <http://thehill.com/homenews/house/248837-house-dems-pan-the-donald-trump-act>; Sánchez, *supra* note 82.

85. Elise Foley, *Senate Republicans Fail in Push to Punish ‘Sanctuary Cities’—*

Cruz immediately vowed to press forward with “Kate’s Law,” legislation he had introduced in July that would establish harsh mandatory minimum sentences for noncitizens re-entering the country after having been previously removed.⁸⁶

The sanctuary city debate was of course not limited to the national political scene, but spilled over into state and local politics as well. Just hours after the defeat of the “Enforce the Law for Sanctuary Cities,” San Francisco’s Board of Supervisors unanimously reaffirmed its sanctuary policy, passing a resolution rejecting the federal government’s “Priority Enforcement Program” and discouraging the SFSD from providing notice to federal immigration officials of the impending release of noncitizen prisoners.⁸⁷ Meanwhile, several state legislatures moved to enact anti-sanctuary legislation.⁸⁸ On October 29, 2015, North Carolina enacted the “Protect North Carolina Workers Act,” which contained provisions prohibiting the adoption of sanctuary ordinances.⁸⁹ Michigan,⁹⁰ Wisconsin,⁹¹ and Florida⁹²

Democrats Called the Bill ‘The Donald Trump Act.’, HUFFINGTON POST (Oct. 20, 2015, 2:57 PM), http://www.huffingtonpost.com/entry/senate-republicans-sanctuary-cities_us_56265805e4b08589ef48f859.

86. S. 1762, 114th Cong. § 1 (referred to the Committee on the Judiciary, July 14, 2015), <https://www.congress.gov/bill/114th-congress/senate-bill/1762>; Caroline May, *Ted Cruz Continues Push for Kate’s Law*, BREITBART (Oct. 22, 2015), <http://www.breitbart.com/big-government/2015/10/22/ted-cruz-continues-push-kates-law/>.

87. Lee Romney, *In Face of Criticism, S.F. Supervisor Reaffirms City’s Sanctuary Policies*, L.A. TIMES (Oct. 25, 2015), <http://www.latimes.com/local/california/la-me-sf-sanctuary-20151026-story.html>; Natalie Johnson, *San Francisco Passes Resolution Upholding Sanctuary Policies Despite Kate Steinle Murder*, DAILY SIGNAL (Oct. 22, 2015), <http://dailysignal.com/2015/10/21/san-francisco-passes-resolution-upholding-sanctuary-policies-despite-kate-steinle-murder/>.

88. Kerry Picket, *GOP Senators Set to Introduce Anti-Sanctuary Cities Legislation*, DAILY CALLER (Oct. 17, 2015, 3:27 PM), <http://dailycaller.com/2015/10/17/gop-senators-set-to-introduce-anti-sanctuary-cities-legislation/>.

89. Protect North Carolina Workers Act, 2015 N.C. Sess. Laws 294, art. 6, ch. 153A sec. 15.(a), § 153A-145.5 (2015); Protect North Carolina Workers Act, 2015 N.C. Sess. Laws 294, art. 8, ch. 108A sec. 15.(b), § 160A-499.4 (2015). The legislation defines sanctuary ordinances as those that prohibit the gathering or sharing of “information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”

90. See S.445, 98 Leg., Sess., 2015–2016 (Mich. 2015), <http://www.legislature.mi.gov/documents/2015-2016/billintroduced/Senate/pdf/2015-SIB-0445.pdf>; see also Jonathan Oosting, *Push to Ban ‘Sanctuary Cities’ in Michigan Faces Criticism from Immigrant Advocates*, MLIVE.COM (Sept. 30, 2015), http://www.mlive.com/lansing-news/index.ssf/2015/09/immigrant_advocates_blast_bill.html.

91. Assemb. B. 450, 2015–2016 Legis. (Wis. 2015); see also Greg Neumann, *UPDATE: Massive Crowd Fills Hearing on Bill to Ban Immigrant Sanctuary Cities in Wisconsin*, WKOW.COM (Jan. 20, 2016),

were among those states considering similar legislation. Massachusetts, meanwhile, pondered statewide “TRUST” legislation that would limit cooperation with immigration officials.⁹³ In Texas, Governor Greg Abbott, invoking Ms. Steinle’s death, warned Dallas County Sheriff Lupe Valdez that “‘Sanctuary City’ policies . . . will no longer be tolerated in Texas,”⁹⁴ and a week later threatened to withhold all criminal justice grants from Dallas County sheriffs—including funding for body-worn cameras—if Dallas County continued to “refuse to cooperate” with federal immigration enforcement.⁹⁵

<http://www.wkow.com/story/31013482/2016/01/20/wkow> (last updated Feb. 4, 2016, 1:20 PM).

92. H.R. 675, 2016 Leg., Reg. Sess. (Fl. 2016) passed the state house in February 2016, but was declared “all but dead” in the Florida Senate a week later. Michael Auslen, *Florida House Passes Ban on ‘Sanctuary Cities’ for Undocumented Immigrants*, MIAMI HERALD (Feb. 3, 2016, 7:50 PM), <http://www.miamiherald.com/news/politics-government/state-politics/article58298398.html>; Jeff Schweers, *Florida Legislation to Force Detention of Illegal Immigrants Hits Dead End*, TAMPA BAY TRIB. (Feb. 9, 2016), <http://www.tbo.com/news/politics/florida-legislation-to-force-detention-of-illegal-immigrants-hits-dead-end-20160209/>; Editorial, *Leave the Immigrant Round-Ups to the Feds*, MIAMI HERALD (Feb. 1, 2016, 7:47 PM), <http://www.miamiherald.com/opinion/editorials/article57811533.html>.

93. S. 1258, 189th Gen. Court, (Mass. 2015–2016) (proposing a prohibition of Massachusetts law enforcement from “arrest[ing] or detain[ing] an individual solely on the basis of a civil immigration detainer or an administrative warrant”); *see also* Shira Schoenberg, *‘Trust Act’ Revives Debate Over Massachusetts Enforcement Of Immigration Law*, MASSLIVE (Feb. 4, 2016, 1:45 PM), http://www.masslive.com/politics/index.ssf/2016/02/trust_act_revives_debate_over.html.

94. Letter from Governor Greg Abbott, Governor of Texas, to Lupe Valdez, Dallas County Sheriff (Oct. 26, 2015), http://gov.texas.gov/files/press-office/DallasCounty_FederalImmigrationDetainer_10262015.pdf.

95. Letter from Greg Abbott, Governor of Texas, to Lupe Valdez, Dallas County Sheriff (Nov. 4, 2015), http://gov.texas.gov/files/press-office/SheriffValdezLtr_11042015.pdf; *see also* Brandi Grissom & Dianne Solis, *Gov. Abbott Doubles Down On Sanctuary Cities, Vows to Withhold Grant Funds to Sheriffs*, DALL. MORNING NEWS (Nov. 4, 2015, 12:32 PM), <http://trailblazersblog.dallasnews.com/2015/11/gov-abbott-doubles-down-on-sanctuary-cities-vows-to-withhold-grant-funds-to-sheriffs.html/>. Governor Abbott expressed concern about Dallas County not honoring immigration detainees. In fact, Dallas County had declined detainees in only two cases in 2014 and 2015. Morgan Smith & Jay Root, *Jails Refused to Hold Thousands of Immigrants for Feds*, TEX. TRIB. (Jan. 15, 2016), <http://www.texastribune.org/2016/01/15/34-texas-counties-declined-hold-deportable-immigra/>.

III. DOG-WHISTLE POLITICS IN THE RETELLING OF MS. STEINLE'S STORY

“But hey, a white girl got shot. We have to do something.”⁹⁶

The intended irony of these words was amplified by the author's unmasking of a racial dimension of the Kathryn Steinle narrative that, while unspoken, was nonetheless palpable from the outset. The absence of an overt reliance on race in the retelling of Kathryn Steinle's tale is unsurprising, for, as Professor Ian Haney López has demonstrated, today's “dog-whistle politics” relies on coded racial appeals to inject race into political debate.⁹⁷

A. Donald Trump and Dog-Whistle Politics

Donald Trump's exploitation of Ms. Steinle's death is an example of such dog-whistle politics.⁹⁸ Trump, of course, is no stranger to the tech-

96. Betsy Woodruff, *Is Kate's Law a Terrible Idea? Criminal-Justice Reform Advocates Warn that the Bill, Named After a Woman Killed by an Undocumented Immigrant, Might Do More Harm than Good*, DAILY BEAST (Sept. 11, 2015), <http://www.thedailybeast.com/articles/2015/09/11/is-kate-s-law-a-terrible-idea.html>

97. See generally, HANEY LÓPEZ, *supra* note 19.

98. An argument can be made that Trump's rhetoric is too overtly racial to deserve the dog-whistle label. *E.g.*, Eugene Robinson, *Trump's Dance with Bigotry*, ST. LOUIS AM. (March 10, 2016), http://www.stlamerican.com/news/columnists/eugene/article_f9e5bffe-e652-11e5-8968-73ea8b694eaa.html (“Trump doesn't tweet dog whistles, he blasts fog-horns.”). See also Dick Polman, *The Party of Trump: Racism Without the Dog Whistle*, NEWSWORKS (Mar. 2, 2016), <http://www.newsworks.org/index.php/local/national-interest/91503-the-party-of-trump-racism-without-the-dog-whistle> (arguing that Trump has “ditched the dog whistle and stripped away the code words”). However, Trump appears careful never to rely explicitly on race. Instead, his technique is to layer proxy upon proxy, all the while denying his own reliance on race or even on proxies for race. When speaking of immigration, Trump begins with the “great wall,” substituting Mexicans for immigrants more generally, and then moves to crime, substituting a law and order narrative for one that is explicitly about Mexicans. Interspersed with this dog-whistle approach, Trump injects explicit affirmations about his “love” for “the Mexican people.” *E.g.*, Nick Allen, *Donald Trump: 'I Love Mexican People'*, TELEGRAPH (July 24, 2015), <http://www.telegraph.co.uk/news/worldnews/us-politics/11759669/Donald-Trump-I-love-Mexican-people.html>; Melanie Eversley, *Trump: 'I Love the Mexican People'*, USA TODAY (July 2, 2015), <http://www.usatoday.com/story/news/2015/07/02/donald-trump-campaign/29599835/>; Amanda Sakuma, *Donald Trump: 'I Love the Mexican People'*, MSNBC (June 25, 2015), <http://www.msnbc.com/jose-diaz-balart/trump-univision-cant-break-iron-clad-contract>. Trump has similarly relied on dog whistling in his call for the ban of all Muslims from the United States (which relied on law-and-order and national security proxies following a mass shooting in San Bernardino, California). See *Donald J. Trump*

nique. As Professor Haney López has commented, Trump “avoids racial epithets and direct references to race, preferring to talk of immigration, nationality, and criminal behavior; these are, though, coded terms. In fact, his basic message is a racial one: this is a white country, under threat from invading minorities.”⁹⁹

With Trump, this racial message has a long history. For example, when five youths of color were charged in the infamous Central Park Jogger case of 1989, Trump described New York City as a “world ruled by the law of the streets, as roving bands of wild criminals roam our neighborhoods,” lamented the “complete breakdown of life as we knew it,” and called for a return of the death penalty.¹⁰⁰ Just as Trump’s response to the rape and as-

Statement on Preventing Muslim Immigration (Dec. 7, 2015), <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration> (quoting Trump as saying that “our country cannot be the victims of horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect for human life”); Jeremy Diamond, *Donald Trump: Ban all Muslim Travel to U.S.*, CNN (Dec. 8, 2015), <http://www.cnn.com/2015/12/07/politics/donald-trump-muslim-ban-immigration/>. Here again, Trump disavowed a blanket attitude against Muslims, pointing to his “excellent relationship” with the Muslim community and to his “many Muslim friends.” E.g., Ed Mazza, *Donald Trump Claims ‘Many Muslim Friends’ Agree With Him*, HUFFINGTON POST (Dec. 9, 2015), http://www.huffingtonpost.com/entry/donald-trump-muslim-friends_us_5668eb43e4b0f290e522021c; Rebecca Perring, *Donald Trump: My Relationship with the Muslim Community is EXCELLENT*, SUNDAY EXPRESS (Dec. 14, 2015), <http://www.express.co.uk/news/world/626458/Donald-Trump-Muslim-ban-immigration-friends-Islam-radicalisation-US-republican>. Trump’s treatment of Black Lives Matter and other protestors at his political rallies presents a third example of dog whistling on the campaign trail. While never explicitly deploying racial epithets, Trump has encouraged the violent ouster of African American, Latino, and Muslim protestors, layering in coded messages that the protestors are “thugs,” “not good people,” “bad for our country,” jobless, and “contribute nothing.” Kate Linthicum & Kurtis Lee, *How Black, Latino and Muslim College Students Organized to Stop Trump’s Rally in Chicago*, L.A. TIMES (Mar. 12, 2016), <http://www.latimes.com/politics/la-na-trump-protesters-20160312-story.html>; Ashley Soley-Cerro & Kareen Wynter, *Violence Erupts at Donald Trump Rally in St. Louis; At Least 32 People Arrested*, KTLA5 (Mar. 11, 2016), <http://ktla.com/2016/03/11/violence-erupts-at-donald-trump-rally-in-st-louis/>. See generally Michael Finnegan, *Donald Trump has a History of Endorsing Violence Against Protesters*, L.A. TIMES (March 13, 2016), <http://www.latimes.com/politics/la-na-trump-protester-violence-20160311-story.html>; *Escalating Aggression Marks Trump’s Rally Rhetoric*, RACHEL MADDOW SHOW (March 11, 2016), <http://www.msnbc.com/rachel-maddow/watch/escalating-aggression-marks-trump-s-rhetoric-642743363967>.

99. Stephen A. Nuño, *Opinion: Trump is Latest Pied Piper of Dog Whistle Politics*, NBC NEWS (July 23, 2015), <http://www.nbcnews.com/news/latino/opinion-trump-latest-pied-piper-dog-whistle-politics-n397326>.

100. Alexander Burns, *Donald Trump’s Instinct for Racially Charged Rhetoric, Before His Presidential Bid*, N.Y. TIMES (July 31, 2015), <http://www.nytimes.com/2015/08/01/nyregion/trumps-instinct-for-racially-charged-rhetoric->

sault of the white investment banker in 1989 was criticized as racially coded, so has his exploitation of Ms. Steinle's death.¹⁰¹ When he seized on Ms. Steinle's death to renew his calls for a "great wall" on the Mexican border,¹⁰² Ms. Steinle's family expressed disapproval of Trump's seizing upon her death for political gain.¹⁰³ That did not stop Trump, however, from telling and re-telling the racially coded story of the death of "that beautiful woman"¹⁰⁴—"Kate, beautiful Kate"¹⁰⁵—at the hands of an "animal"¹⁰⁶ at political rallies, to the delight of his white supporters.¹⁰⁷

B. Fox News and Dog-Whistle Politics

Fox News married its coverage of Ms. Steinle's death with implicit racial messages. As one writer described it, "conservative talk radio and Fox News [we]re practically vibrating with delight over this story."¹⁰⁸ A week

before-his-presidential-bid.html (providing copy of the famous full-page ad Trump ran in the New York Times, and collecting other incidents of Trump's "racially charged rhetoric").

101. *E.g., id.* (quoting those who say Trump "fuel[ed] a lynch mob" and was part of a white "rush to judgment").

102. Trump's full statement on Ms. Steinle's death was as follows:

This senseless and totally preventable act of violence committed by an illegal immigrant is yet another example of why we must secure our border immediately. This is an absolutely disgraceful situation and I am the only one that can fix it. Nobody else has the guts to even talk about it. That won't happen if I become President. The American people deserve a wall to protect our jobs, economy and our safety. I am the only candidate who would build it. I will Make America Great Again!

Donald Trump Pledges To 'Secure Our Border' Following San Francisco Pier 14 Fatal Shooting, CBS SF BAY AREA (July 3, 2015, 3:19 PM), <http://sanfrancisco.cbslocal.com/2015/07/03/donald-trump-pledges-to-secure-our-border-following-san-francisco-pier-14-fatal-shooting-immigration-tourist/>.

103. *E.g., Matthew Keys, Kate Steinle's Family Laments Trump Using Her Murder as Political Fodder*, BLOT MAG. (July 6, 2015), <http://www.theblot.com/kate-steinles-family-laments-trumps-using-her-murder-as-political-fodder-7746835>.

104. Evan Osnos, *The Fearful and the Frustrated: Donald Trump's Nationalist Coalition Takes Shape—For Now*, NEW YORKER (Aug. 31, 2015), <http://www.newyorker.com/magazine/2015/08/31/the-fearful-and-the-frustrated>.

105. *Id.*

106. Burns, *supra* note 100 (noting Trump's repeated use of "this animal" to refer to Mr. Lopez Sanchez).

107. *See generally* Osnos, *supra* note 104 (describing Trump's "phantasmagorical visions of marauding immigrants" as "part of a genre in which immigration and race are intermingled," and noting that "[w]hen Trump started emphasizing the mortal threat posed by undocumented immigration, America's white nationalists rejoiced").

108. Paul Waldman, *The New Willie Horton?*, WASH. POST (July 8, 2015),

after Ms. Steinle's death, Fox ran a story—essentially the same story three times—concerning the Obama administration's failure to reach out to the Steinle family.¹⁰⁹ This “news” gave Fox the chance to exploit the racial aspects of Ms. Steinle's shooting. Here, as it did on every occasion when Ms. Steinle's death was featured, Fox took the opportunity to juxtapose pictures of the white-skinned, fair-haired, smiling Ms. Steinle with the grim mug shot of the brown-skinned Mr. Lopez-Sanchez.¹¹⁰ (see Figure 1 below).



Fig. 1¹¹¹

Ms. Steinle's photograph next to the mug shot of Mr. Lopez Sanchez.

But more importantly, Fox News was able to multiply the race effect by contrasting the failure of America's first African American president to reach out to the bereaved white family with his previous attention to the

<https://www.washingtonpost.com/blogs/plum-line/wp/2015/07/08/the-new-willie-horton/>.

109. *Does White House Cherry Pick Which Tragedies to Highlight?*, FOX NEWS: THE FIVE (July 10, 2015), <http://www.foxnews.com/transcript/2015/07/10/does-white-house-cherry-pick-which-tragedies-to-highlight/>; *Kate Steinle's Brother: 'The System Has Failed My Sister Miserably'*, FOX NEWS: KELLY FILE (July 13, 2015), <http://www.foxnews.com/transcript/2015/07/13/kate-steinle-brother-system-has-failed-my-sister-miserably/>; *Where is White House Outcry After Kate Steinle Murder? Plus, Huckabee Says He Would Deny Federal Funding for Sanctuary Cities*, FOX NEWS: KELLY FILE (July 9, 2015), <http://www.foxnews.com/transcript/2015/07/09/where-is-white-house-outcry-after-kate-steinle-murder-plus-huckabee-says-would/>.

110. *Does White House Cherry Pick*, *supra* note 109.

111. *Id.*

deaths of three African Americans: Michael Brown,¹¹² Freddie Gray,¹¹³ and Trayvon Martin.¹¹⁴ Megyn Kelly of Fox News's "The Kelly File" described President Obama's silence as being

[in] stark contrast to what we saw after Michael Brown was killed in Ferguson, Missouri. A man we now know was attacking a police officer at the time of his death. His funeral saw three Obama officials in attendance, his death drew comments from President Obama personally. And the administration also sent in the DOJ and 40 FBI agents dispatched to Missouri after Michael Brown was killed.

Where is the swarm of agents in San Francisco? Then there was Freddie Gray in Baltimore, a repeat drug offender who was killed in police custody. Here again his funeral was attended by three Obama administration officials and again the President spoke personally to Freddie Gray's death. And again, sent the DOJ in to investigate. When Trayvon Martin was killed in Florida, the President spoke to his death which was later ruled to be in self-defense. But Kate Steinle, nothing. No comments, no swarm of FBI agents, no DOJ investigation, nothing. Why?¹¹⁵

The next day, on "The Five," the network replayed significant portions of this segment, and asked whether President Obama "cherry pick[ed] which tragedies to highlight."¹¹⁶ Three days later the story was "breaking" again, with Megyn Kelly decrying the Obama administration's silence.¹¹⁷ Behind Ms. Kelly, photographs of the white Ms. Steinle and her family were first replaced by the mug shot of Mr. Lopez Sanchez.¹¹⁸ Then, as Kelly lamented the President's inaction, the photos of Michael Brown, Freddie Gray and Trayvon Martin appeared behind her talking head. (Figs. 2-4).

112. Michael Brown was killed by a white police officer in Ferguson, Missouri. *See generally* Hutchinson, *supra* note 38, at 110–14.

113. Freddie Gray died while in police custody in Baltimore, Maryland. *See* David A. Graham, *The Mysterious Death of Freddie Gray*, ATLANTIC (Apr. 22, 2015), <http://www.theatlantic.com/politics/archive/2015/04/the-mysterious-death-of-freddie-gray/391119/>.

114. Trayvon Martin was an African American teenager who was killed while unarmed by a vigilante in Florida in 2012. *See* Hutchinson, *supra* note 38, at 92–101; *see also* Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C.L. REV. 1555, 1556–59 (2013).

115. *Where is White House Outcry After Kate Steinle Murder?*, *supra* note 109.

116. *Does White House Cherry Pick?*, *supra* note 109.

117. *Kate Steinle's Brother*, *supra* note 109.

118. *Id.*



Fig. 2¹¹⁹

Fox News Host Megyn Kelly: “Last week funeral services were held for 32-year-old Kate Steinle shot and killed while out for a walk in a popular pier in San Francisco.”



Fig. 3¹²⁰

Fox News Host Megyn Kelly: “Police say this man pulled the trigger. An illegal immigrant who had been deported five times and had wrapped up a string of felonies in this country.”

119. *Id.*

120. *Id.*



Fig. 4¹²¹

Fox News Host Megyn Kelly: “. . . President Obama has personally addressed the deaths of Trayvon Martin in Florida, Michael Brown in Ferguson, Missouri and Freddie Gray in Baltimore, Maryland.”

Later, Kelly sought to exploit another racial fault line by contrasting protests and riots following the killing of African American men with the “civilized route” taken by the Steinle family, and once again implying that President Obama was responsive to African Americans but not to White Americans:

You know, [Ms. Steinle’s brother] told me a story last week after Kate’s memorial service. The family and those there to remember her took all the flower[s] and brought them out to a convalescent center to help those who were hurting. They didn’t riot. They didn’t protest in the street. They didn’t burn anything. That in other cases has gotten the White House’s attention. And it is as if, if you take a civilized route, if you take the respectful, quiet, sad but objectioning route. You get ignored. I mean, there are people in this country who are angry enough over this case to riot, to burn something, to protest. But they’re not doing that. And the message the White House seems to be sending is, therefore, you will be ignored.¹²²

121. *Id.*

122. *Id.*

C. A Latino Wille Horton

The exploitation of Ms. Steinle's death by Fox News and Donald Trump brings back memories of the exploitation of the story of Willie Horton by the George H.W. Bush campaign in 1988.¹²³ A campaign ad featured the story of Horton, an African American man and convicted murderer who, while on a furlough from prison, stabbed a man and raped his fiancée during a home invasion.¹²⁴ Such stories capitalize on fear of a racialized "other."¹²⁵ As Professor Haney López has written:

The image of a black man breaking into a home and raping a white woman conjured the hoariest of racist narratives: the vile and violent black rapist victimizing white purity. The Horton case thus played directly into the dog whistle depiction of blacks as depraved criminals and law-abiding whites as their innocent victims.¹²⁶

The Steinle case presented the same possibilities, and some have explicitly said that "the rhetoric of the Willie Horton ad mirrors the rhetoric candidates have taken with regard to illegal immigration."¹²⁷ Certainly the treatment of race in the Steinle story by both Fox News and Donald Trump bears a resemblance to the use of race in the Willie Horton ad:

In keeping with dog whistle strategy, when the Bush team introduced the Horton story . . . the campaign left the crucial racial element to be conveyed by images, but took great pains to never say expressly that Horton was black and his victims were white. Likewise, media stories on Horton and the furlough program very rarely referenced race directly. Reporters seemed to be following a colorblind script, refusing to mention what lay plainly in view.¹²⁸

While never explicitly invoking race, the use of images and rhetoric successfully conveyed the racial script, "[s]toking fears that white women will be raped and murdered by racial minorities"¹²⁹

123. See, e.g., Paul Waldman, *The New Willie Horton?*, WASH. POST (July 8, 2015), <https://www.washingtonpost.com/blogs/plum-line/wp/2015/07/08/the-new-willie-horton/>.

124. HANEY LÓPEZ, *supra* note 19, at 94–95.

125. *Id.*

126. *Id.* at 106.

127. Emma Roller, *Willie Horton's Heirs*, N.Y. TIMES (Jan. 12, 2016), <http://www.nytimes.com/2016/01/12/opinion/campaign-stops/ads-from-donald-trump-and-ted-cruz-play-to-racist-fears.html>.

128. HANEY LÓPEZ, *supra* note 19, at 176.

129. Amanda Marcotte, *Bill O'Reilly Defends Donald Trump's Scare-Mongering About Immigrants*, SLATE (July 7, 2015),

“People choose causal stories not only to shift the blame but to enable themselves to appear to be able to remedy the problem.”¹³⁰ Ultimately, the narrative spun out by Donald Trump is that he alone is the one who can build a wall to protect “beautiful [white] Kate” from the brown “animal” who killed her.¹³¹ When confronted with the racial implications of his repeated casting of immigrants as criminals, Trump predictably belittled the suggestion, saying that he had become a “whipping post” for talking about immigrant crime: “People don’t want to talk about it, and if you talk about it, you’re a racist.”¹³²

While Donald Trump’s telling of the Steinle story was geared to implicate one particular remedy—his election to President—Fox News also told the Steinle narrative to call for desired remedies.¹³³ For Fox News, stoking fears of violence by non-whites against whites worked on two narrative levels. First, like Trump, Fox News used the Steinle story to create an anti-sanctuary narrative of non-white violence against whites that dovetailed with broader anti-immigrant agenda.¹³⁴ Second, Fox News was able to promote its broader anti-Obama agenda by laying the blame for sanctuary

http://www.slate.com/blogs/xx_factor/2015/07/07/bill_o_reilly_defends_donald_trump_suggests_immigrants_are_coming_to_kill.html.

130. Stone, *supra* note 21, at 297.

131. Trump essentially has written a story which envisions a possible world in which he is the hero in a classic tale of “dualistic, invasive, combat mythology culminating in a shootout Apocalypse” ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 83 (2002) (quoting ELAINE PAGELS, *THE ORIGIN OF SATAN* 37 (1995)).

132. Stanglin, *supra* note 65. Trump’s response fit the pattern of dog-whistle politics described by Professor Haney López: “(1) punch racism into the conversation through references to culture, behavior, and class; (2) parry claims of race-baiting by insisting that absent a direct reference to biology or the use of a racial epithet, there can be no racism; [and] (3) kick up the racial attack by calling any critics the real racists for mentioning race and thereby ‘playing the race card.’” HANEY LÓPEZ, *supra* note 19, at 130.

133. See generally Theodore Schleifer, *Brad Steinle: Trump ‘Sensationalizing’ Sister’s Death*, CNN (Jul. 14, 2015), <http://www.cnn.com/2015/07/14/politics/donald-trump-kate-steinle-san-francisco/>; Solange Uwimana, *STUDY: On Fox News, Immigrants are Synonymous with Criminality*, MEDIAMATTERS (Oct. 27, 2011), <http://mediamatters.org/blog/2011/10/27/study-on-fox-news-immigrants-are-synonymous-wit/164316>.

134. See Solange Uwimana, *REPORT: In Immigration Coverage, Fox Shuns Pro-Immigrant Voices*, MEDIAMATTERS (Oct. 27, 2011), <http://mediamatters.org/research/2011/10/27/report-in-immigration-coverage-fox-shuns-pro-imm/183143> (reporting that over a 14-month period, 62 percent of Fox News guests espoused anti-immigrant views, while only 18 percent held pro-immigrant views); Elise Foley, *Republicans Who Trust Fox News Likely to Oppose Immigration Reform: Poll*, HUFFINGTON POST (June 10, 2014), http://www.huffingtonpost.com/2014/06/10/fox-news-immigration-poll_n_5475540.html (“[T]rusting Fox News was ‘the most powerful independent predictor of opposition to a path to citizenship.’”).

cities and for white victimization at President Obama's feet. Obama, according to Fox News, was sympathetic to Michael Brown, an African American man "we now know was attacking a police officer"—a white officer (though this was left unspoken).¹³⁵ Worse yet, Obama was sympathetic to those who rioted, protested in the street, or burned things¹³⁶—acts of violence which were understood (though again not explicitly said) to be instigated by non-whites and directed at whites.¹³⁷ Yet Obama would not give his "attention" to those who would "take a civilized route . . . [a] respectful, quiet, sad but objectioning route."¹³⁸ As in Donald Trump's story, whites in the Fox News version of the story are civilized victims, while non-whites are violent animals. For Fox News, this trope worked not only in the story of Ms. Steinle's death at the hands of Mr. Lopez Sanchez, but also in the larger story of President Obama's villainous siding with violent African Americans against civilized, sad, white victims.¹³⁹

D. Jamiel Shaw's Story

While Donald Trump was using Ms. Steinle's death to political advantage, he also deployed—though in significantly different ways—the story of the death of Jamiel "Jas" Shaw, Jr., a young African American who had been killed in 2008 by an undocumented immigrant.¹⁴⁰ The Shaw story

135. *Kate Steinle's Brother*, *supra* note 109.

136. *Id.*

137. Cf. Eddie Scarry, *Ingraham: Media, 'Thugs' Have Made Ferguson 'Its Own Reality Show'*, MEDIAITE (Aug. 19, 2014) <http://www.mediaite.com/tv/ingraham-media-thugs-have-made-ferguson-its-own-reality-show/> (quoting conservative commentator Laura Ingraham on "Fox and Friends" implying that Ferguson looters are "thugs" who are local to the area: "We now know that thugs are thugs I don't think we have commuters coming from the West Coast . . . to loot.").

138. *Kate Steinle's Brother*, *supra* note 109.

139. While Donald Trump's story created a hero (himself), the Fox News version was focused on a villain (President Obama).

140. Shaw's death brought the Los Angeles Police Department's "Special Order 40," signed by Chief Darryl Gates in 1979, under scrutiny. Office of the Chief of Police, *Special Order No. 40: Undocumented Aliens*, L.A. POLICE DEP'T (Nov. 27, 1979), www.lapdonline.org/assets/pdf/SO_40.pdf. Special Order 40 prevents LAPD officers from initiating action to discover the immigration status of a person and from enforcing federal immigration law. *Id.* After Shaw's death, his family called for Special Order 40 to be rescinded. *E.g.*, Andrew Blankstein & Richard Winton, *Ask and Deport, Family Urges*, L.A. TIMES (Apr. 9, 2008), <http://www.latimes.com/local/la-me-specialorder9apr09-story.html>; Jack Dunphy, *'Special Order 40' on Trial*, NAT'L REV. (Apr. 21, 2008), <http://www.nationalreview.com/article/224242/special-order-40-trial-jack-dunphy>. Additional legislative efforts to revise Special Order 40, and a lawsuit brought by the Shaw family, both failed. Phil Willon, *'Jamiel's Law' Misses Ballot—Officials Say Backers Failed to Gather Enough Voter Signatures*, L.A. TIMES (Dec. 12, 2008),

fell into the lap of the Trump campaign because of Trump's public reaction to Ms. Steinle's death.¹⁴¹ After Mr. Shaw's father told Fox News that "Trump's comments about immigrants [after Kathryn Steinle's death] made him 'happy for the first time,'" the Trump campaign reached out to the Shaw family through Fox News.¹⁴² Mr. Shaw's father began making appearances with Trump, first in Los Angeles on July 10, 2015, at an event heavily protested based on Trump's anti-immigrant rhetoric,¹⁴³ and then in Las Vegas and Phoenix (where Trump was preceded on the stage by Sheriff Joe Arpaio) the next day.¹⁴⁴

It might be tempting to read the quick incorporation of Jas Shaw's narrative into the Trump stump speech against immigration as a sign that Trump's use of the Steinle story was not a "white fear" narrative after all. The better interpretation is that telling Jas Shaw's story allowed Trump to tell the "white fear" Steinle story while insulating Trump to some degree from reprisal. "Amid the strategies of the new racism, a key symbolic move is to find non-whites willing to espouse, or at least provide cover for, dog

<http://articles.latimes.com/2008/dec/12/local/me-jamiel12>; Victoria Kim, *L.A. County Sheriff Can't be Sued for Releasing Illegal Immigrant Accused of Killing Football Star, Judge Rules*, L.A. TIMES (May 26, 2010), <http://latimesblogs.latimes.com/lanow/2010/05/la-sheriff-cant-be-used-to-releasing-illegal-immigrant-accused-of-killing-football-star-judge-rules.html>. Los Angeles Police Department officials have reaffirmed Special Order 40 numerous times since Shaw's death. Tim Rutten, *The Enduring Wisdom of Special Order 40*, L.A. TIMES (Dec. 23, 2009), <http://articles.latimes.com/2009/dec/23/opinion/la-oe-rutten23-2009dec23> (describing statements of LAPD Chief Charlie Beck); News Release, Los Angeles Police Dep't, *Understanding Special Order #40* (Jan. 27, 2011), http://www.lapdonline.org/newsroom/news_view/47036.

141. See Ryan Parry, *EXCLUSIVE: 'My Son was Murdered by a Mexican Illegal Immigrant, Just Like Kathryn Steinle - It's Time People Listened to Trump,' says Mother of Gunned-Down Teenage Football Star*, DAILYMAIL (July 7, 2015, 4:58 PM), <http://www.dailymail.co.uk/news/article-3152794/My-son-murdered-Mexican-illegal-immigrant-just-like-Kathryn-Steinle-s-time-people-listened-Donald-Trump-says-mother-gunned-teenage-football-star.html>.

142. Melissa Pamer, Kareen Wynter, & Kirk Hawkins, *Slain Football Player Jamiel Shaw's Father: Donald Trump 'Is Telling the Truth' on Immigration*, KTLA5 (July 10, 2015, 1:06 PM), <http://ktla.com/2015/07/10/family-of-jamiel-shaw-jr-teen-fatally-shot-by-undocumented-gang-member-to-meet-with-donald-trump/>.

143. Kate Linthicum, Richard Winton, & Kurtis Lee, *In L.A. to Campaign, an Unrepentant Trump Predicts: 'I Will Win the Hispanic Vote'*, L.A. TIMES (July 10, 2015, 9:16 PM), <http://www.latimes.com/local/lanow/la-me-ln-donald-trump-immigration-20150710-story.html>.

144. Nicholas Fandos, *Donald Trump Defiantly Rallies a New 'Silent Majority' in a Visit to Arizona*, N.Y. TIMES (July 11, 2015), http://www.nytimes.com/2015/07/12/us/politics/donald-trump-defiantly-rallies-a-new-silent-majority-in-a-visit-to-arizona.html?_r=0.

whistle views.”¹⁴⁵ Pushing forward the Shaw narrative gave the Trump campaign the potential to accomplish several goals: to promote the anti-Latino (and more specifically, anti-Mexican)¹⁴⁶ narrative that would justify a “great wall” on the southern border with Mexico; to court the African American vote; to divide African American voters from Latino voters; and of course to “shield against accusations of racism.”¹⁴⁷

Any doubt as to the Trump campaign’s motives should be resolved by the specifics of its uses of the Shaw narrative. On February 12, 2016, on the eve of the South Carolina primary, the Trump campaign released a television advertisement¹⁴⁸ that was immediately identified as evocative of the well-known “Willie Horton” ad.¹⁴⁹ The ad begins with a voiceover: “Jas Shaw was a 17-year-old football star who was gunned down just outside his home. His killer—an illegal immigrant gang member who just got out of prison.”¹⁵⁰ It continues with Mr. Shaw’s father espousing Trump’s anti-immigration views, and concluding, “I believe Donald Trump wants to make us great again, and he loves America.”¹⁵¹

The release of the Shaw commercial in South Carolina, on the eve of a primary in which African American voters comprise a quarter of the electorate,¹⁵² was cynical at best.¹⁵³ Racial imagery is visible in Trump’s de-

145. HANEY LÓPEZ, *supra* note 19, at 119–20.

146. Jamiel Shaw was described in one news story as a teenage boy gunned down by an illegal Mexican immigrant in strikingly similar circumstances to how Kathryn Steinle died. Parry, *supra* note 141.

147. See HANEY LÓPEZ, *supra* note 19, at 122–23.

148. *Jamiel-TV Spot*, TRUMP (Feb. 12, 2016), <http://www.donaldjtrump.com/media/jamiel-tv-spot>.

149. See Maggie Haberman, *New Donald Trump Ad Highlights Father of Teenager Killed by Illegal Immigrant*, N.Y. TIMES (Feb. 12, 2016, 8:12 PM ET), <http://www.nytimes.com/politics/first-draft/2016/02/12/new-donald-trump-ad-highlights-father-of-teenager-killed-by-illegal-immigrant/>; see also Isaac Bailey, *Will Trump Ad Fool Black Voters?*, CNN (Feb. 19, 2016, 6:35 PM ET), <http://www.cnn.com/2016/02/19/opinions/black-father-backing-trump-bailey/index.html> (noting comparison to Willie Horton ad, and concluding that “Trump is playing to those same fears; only this time, he’s using the heartbreaking story of black voters like Shaw to do to others what was done to black people”).

150. *Jamiel - TV Spot*, *supra* note 148.

151. *Id.* The delivery of these words by an African American man served to diffuse the dog-whistle rhetoric inherent in the Trump campaign slogan, “Make America Great Again,” which implicitly called for a return to a “great” America that existed before the advent of President Obama. See generally HANEY LÓPEZ, *supra* note 20.

152. Jenna Johnson, *Donald Trump’s Latest Ad Features Father of Teen Killed by an Illegal Immigrant*, WASH. POST (Feb. 13, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/02/13/donald-trumps-latest-ad-features-father-of-teen-killed-by-an-illegal-immigrant/>.

153. While the Shaw commercial’s release may have targeted African American vot-

scription of “beautiful Kate,” as contrasted with the campaign’s depiction of Jamiel Shaw as a “football star.”¹⁵⁴ Each racialized group has its place in the hierarchy that is reinforced by these narratives.¹⁵⁵

IV. CONCLUSION

Two choices led from the “facts” of what happened on July 1, 2015 to the race-based narratives produced by Donald Trump and Fox News.

The first might be termed the agenda-setting choice. The casting of Ms. Steinle’s death as a causal story transforms it into a “problem” to be put on

ers, the use of the Shaw narrative predated the South Carolina primary, and was told largely to audiences of “white supremacists and white nationalists frantically praying for a Trump presidency.” Bailey, *supra* note 149; accord Osnos, *supra* note 104.

154. The black male athlete has been a persistent stereotype in media and culture. “Exemplary black male imagery . . . articulates criteria of inclusion that tend to be comical, musical, or athletic in content and character.” Helán E. Page, “Black Male” Imagery and Media Containment of African American Men, 99 AM. ANTHROPOLOGIST 99, 102 (1997); see also J. Cristor, R. Lee & M. Hunt, *Race and Ideology: African American Images in Television Advertising*, 14 J. PUB. POL’Y & MARKETING 48, 50 (1995) (“One of the most common contemporary stereotypes is that of the African American athlete.”); Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 FORDHAM URB. L.J. 615, 644–52 (1995) (describing the “mythical African-American athlete”); Scott G. Thompson, *Big, Bad, Black and Gay? Overcoming the Shackles of the Socially Constructed Black Masculine*, 1 GEO. J.L. & MOD. CRITICAL RACE PERSP. 297, 299–300 (2009) (“[T]oday, the conception of the Black male as violent, hyper-sexual, and super-athletic seem essential to us—an ingrained and natural part of what it means to be a Black male.”).

One trenchant summary of prevailing stereotypes is particularly apt here: “[B]lack is ghetto, black is dumb, black is poor, black is athletic, black is baggy jeans and gold teeth as opposed to being beautiful.” Harold A. McDougall, *For Critical Race Practitioners: Race, Racism and American Law (4th Ed.)* by Derrick A. Bell, Jr., 46 How. L.J. 1, 48 (2002) (quoting Prof. McDougall’s student, Damon Roberts). Of course, it should be noted that the description of “beautiful Kate” equally relies on gender stereotypes to cast Ms. Steinle as the quintessential female victim. Lisa A. Binder, “With More Than Admiration He Admired”: Images of Beauty and Defilement in Judicial Narratives of Rape, 18 HARV. WOMEN’S L.J. 265, 280–81 (1995) (“[W]omen are still valued for, and judged according to, their physical attractiveness; the death of a beautiful woman is more moving than that of a plain one. . . Moral and physical beauty converge in cases of violent crime against women . . .”).

Trump’s epithets thus serve to elevate his own gender and racial superiority by portraying Trump as the white male hero who can protect not only the beautiful white women of the world but also African American inner-city youth who, by virtue of their athleticism, might yet make good for themselves, but for the threat of marauding Mexican immigrants.

155. See Binder, *supra* note 154, at 281 (noting that because the “beauty-beast paradigm” prescribes “which victims are sympathetic and which defendants reprehensible,” it is “grounded in notions of inclusion and exclusion which have the potential to lapse into persecution of difference”).

the political agenda.¹⁵⁶ The structure of narrative then demands that “efforts” be taken to address the problem.¹⁵⁷ Here, the causal story put San Francisco’s sanctuary policy squarely on the political agenda as the “problem” against which efforts would need to be taken.¹⁵⁸ The dominance of this narrative among nearly all politicians (save for Martin O’Malley, who instead promoted a narrative that would cast federal failures in immigration policy as the “problem”¹⁵⁹ to be placed on the agenda) is striking when one considers the abundance of alternative narratives that readily presented themselves as possible explanations of “what happened,” narratives which might serve to put other issues—homelessness,¹⁶⁰ gun control,¹⁶¹ mental illness, addiction and drug policy,¹⁶² and the legality of detainer practices¹⁶³—on the agenda. Also overlooked, of course, was the most simple and obvious explanation—but the least productive in terms of agenda setting—that Ms. Steinle’s death was simply a tragic accident.

The ease with which the agenda-setting move was accomplished betrays the depth of the identification of immigrants with criminality. For, even putting aside the numerous alternative narratives available to explain the “cause” of Ms. Steinle’s death, the choice of the sanctuary city narrative is noteworthy for its location of narrative agency somewhere other than in Mr. Lopez Sanchez himself. If *he* was to blame, then this could be a narrative with an individual villain who is personally responsible, and the “system” would not be to blame. Instead, in order to shift blame to San Francisco’s sanctuary policy, it became necessary to erase Mr. Lopez-Sanchez of individual identity, and cast him as the faceless “animal.”¹⁶⁴ In short, it was necessary that he take on the role of the “criminal alien.”

156. Stone, *supra* note 21, at 283.

157. Alper et al., *supra* note 20, at 22.

158. Stone, *supra* note 21, at 297; *see also* Gass, *supra* note 70.

159. *See* Byrnes *supra* note 77, and accompanying text.

160. *See* Moraine, *supra* note 56 (“The far more complex issue involves society’s failure to confront homelessness. Once San Francisco jailers dumped Sanchez, anyone could have guessed something terrible could happen.”).

161. *San Francisco to Remain a Sanctuary City*, MSNBC (Oct. 23, 2015), <http://www.msnbc.com/jos—d-az-balart/watch/san-francisco-to-remain-a-sanctuary-city-550190147955> (quoting San Francisco Supervisor David Campos: “You know, this has become an immigration issue, and yet, no one is talking about gun control”).

162. Professor García Hernández’s insightful blog post shortly after Ms. Steinle’s death noted that the “only reason [Mr. Lopez Sanchez] wasn’t removed when the federal government had him in its possession was because of a desire to prosecute people for low-level drug offenses that are decades old.” César Cuauhtémoc García Hernández, *Migrants, Detainers, & Sanctuary Cities*, CRIMMIGRATION (July 9, 2015), <http://crimmigration.com/2015/07/09/migrants-detainers-sanctuary-cities/>.

163. *Id.*

164. *See* Burns, *supra* note 100, and accompanying text.

This identification has been constructed for years—the crimmigration era continued to solidify the identification¹⁶⁵ but did not create it.¹⁶⁶ And the identification is all the more troubling because of its disconnection from reality:

For more than a century, innumerable studies have confirmed two simple yet powerful truths about the relationship between immigration and crime: immigrants are less likely to commit serious crimes or be behind bars than the native-born, and high rates of immigration are associated with lower rates of violent crime and property crime. This holds true for both legal immigrants and the unauthorized, regardless of their country of origin or level of education.¹⁶⁷

But this evidence be damned—nearly every politician quickly moved to a narrative in which San Francisco’s sanctuary policy was the root of the problem, meaning nearly every politician assumed the identification of immigrants with criminals.

The second choice was the reliance on race, the resort to dog-whistle politics. This choice, while not unexpected,¹⁶⁸ is harmful in and of itself, for as Professor Haney López has written:

Dog whistle politics turns people’s lives into nightmares. People just like us. People whose heights of joy and depths of pain are no less real than our own, even as their humanity is rendered invisible by slurs about their behavior and culture. In our inability to recognize their hu-

165. See Angélica Cházaro, *Challenging the “Criminal Alien” Paradigm*, 63 UCLA L. REV. 594 (2016) (urging an intersectional understanding of criminal justice reform and immigration reform, and encouraging scholars and practitioners to defend the “criminal alien” against immigration enforcement efforts); Mariela Olivares, *New Efforts to Push Private Prisons out of Immigration Detention*, CRIMMIGRATION (Oct. 27, 2015, 4:00 AM), <http://crimmigration.com/2015/10/27/new-efforts-to-push-private-prisons-out-of-immigration-detention/> (noting intersectional approach to criminal justice and immigration reform).

166. See generally Nicholas De Genova, *Immigration “Reform” and the Production of Migrant “Illegality”*, in CONSTRUCTING IMMIGRANT “ILLEGALITY”—CRITIQUES, EXPERIENCES, AND RESPONSES 37–62 (Cecilia Menjívar & Daniel Kanstroom, eds., 2014); Vázquez, *supra* note 5, at 632–50 (describing the rise of the crimmigration regime and the shift from “illegal alien” to “criminal alien.”).

167. WALTER A. EWING, DANIEL E. MARTÍNEZ, & RUBÉN G. RUMBAUT, THE CRIMINALIZATION OF IMMIGRATION IN THE UNITED STATES 1 (July 2015) http://immigrationpolicy.org/sites/default/files/docs/the_criminalization_of_immigration_in_the_united_states_final.pdf.

168. See HANEY LÓPEZ, *supra* note 19, at 120–23 (describing the use of dog-whistle politics and the construction of an “‘illegal alien’ threat”—“decades in the making, [and] currently operat[ing] with a potency that rivals or exceeds the racial scapegoating of African Americans”).

manity, we as a nation have lost part of our own.¹⁶⁹

For Donald Trump, the reach for dog-whistle rhetoric was a familiar one and a basic one: Divide the “wild criminals,” and the “animals,” from the “beautiful” people¹⁷⁰ (and the football stars)¹⁷¹ and divide them on a racial axis.¹⁷² It is a simple move Trump makes as readily when disparaging Mexican or Muslim immigrants as when he is reviling African American youth.¹⁷³ For Fox News as well, the dog-whistle politics served to link white fear of Latinos (through Ms. Steinle’s story) and white fear of African Americans (through the invocation of the Michael Brown, Trayvon Martin, and Freddie Gray stories).¹⁷⁴

* * *

As noted above, this essay is meant to be the beginning of an exploration of the narrative and rhetoric used to construct and support the crimmigration regime. I began with this particular case study because the immediate surfacing of racial narratives that took place in the aftermath of Ms. Steinle’s death reveals the centrality of race in the development and perpetuation of the crimmigration enforcement system.

The debate over sanctuary policies is of course just one site for political contests related to crimmigration, the narratives promoted in other contested areas should also be mined; doing so will likely reveal similar racial rhetoric at work. My colleague, Professor César Cuauhtémoc García Hernández, for example, has written that “[c]rimmigration law’s fascination with imprisonment is a key illustration of dog-whistle politics in action.”¹⁷⁵ This suggests a study of the narratives at play in setting detention policy would be valuable. Other colleagues, Professor Debora Ortega and Professor Lisa Graybill, after working with women and children jailed at the “South Texas Family Residential Center” in Dilley, Texas, concluded (as did I) that “every step of the process” for these women seeking asylum from the violence prevailing the Northern Triangle countries of El Salvador, Guatemala, and Honduras “was fraught with gender- and racial-based

169. *Id.* at 125.

170. Burns, *supra* note 100.

171. *Jamiel-TV Spot*, *supra* note 148.

172. *See supra* section III.A.

173. *See generally id.* (discussing how Trump gains support by further dividing the races and preying on individuals prejudices).

174. *See supra* section III.B.

175. César Cuauhtémoc García Hernández, *Dog Whistle Crimmigration*, CRIMMIGRATION (May 15, 2015), <http://crimmigration.com/2014/05/15/dog-whistle-crimmigration/>.

injustice and a kind of subtle violence.”¹⁷⁶ The rhetoric used to construct and support this “continued dehumanization of brown-skinned women and children seeking refuge from violence”¹⁷⁷ is well worth examining. These are just examples. Crimmigration’s reach is long,¹⁷⁸ and there is much to be studied.

The implications of this narrative study extend beyond crimmigration. That the “otherness” of Latinos and African Americans was explicitly linked in Fox News’s fear-based narrative, and the otherness of Latinos, African Americans, and Muslims implicitly linked through Donald Trump’s invocation of similar narratives over time,¹⁷⁹ reaffirms a truth recognized by Dean Kevin Johnson: “Foreign and domestic racial subordination . . . find themselves inextricably linked.”¹⁸⁰ This deceptively simple pronouncement implicates a massive undertaking. The narratives once used to construct and perpetuate the mass incarceration (largely of African American men)—a horror we have yet to undo—are finding purchase now in the crimmigration arena.¹⁸¹ Just as with mass incarceration, a narrative centered on criminal conduct replaced an explicit reliance on race to create “a legal, social, and economic boundary between ‘us’ and ‘them,’”¹⁸² even so in today’s crimmigration world “[s]tressing illegality provides a way to

176. Debora M. Ortega, Lisa Graybill, & Christopher N. Lasch, *Enacting and Sustaining Trauma and Violence Through Policy Enforcement: Family Immigration Detention*, 30 *AFFILIA: J. WOMEN & SOC. WORK* 281, 284 (2015).

177. *Id.* at 285.

178. See, e.g., Annie Lai, *Confronting Proxy Criminalization*, 92 *DENV. U.L. REV.* 879, 896 (2015) (examining how the “proxy criminalization” of immigrations through driver’s license laws “becomes a way by which the law reaffirms racial salience and racial hierarchy.”); Cecilia Menjívar & Leisy J. Abrego, *Legal Violence: Immigration Law and the Lives of Central American Immigrants*, 117 *AM. J. SOC.* 1380 (2012) (examining the effects of crimmigration “on three central and interrelated areas of immigrants’ lives—work, family, and school—to expose how the criminalization of immigrants at the federal, state, and local levels is not only exclusionary but also generates violent effects for individual immigrants and their families, affecting everyday lives and long-term incorporation processes”).

179. Trump’s support for the death penalty and for militarization of the police is another aspect of this narrative rooted in white fear. See Jill Colvin, *Trump Endorsed by Police Union After Proposing Muslim Ban*, *ASSOCIATED PRESS* (Dec. 10, 2015, 10:05 PM) <http://bigstory.ap.org/article/40c12d3f7ec04c9bade18f3ac907acd2/new-england-police-union-endorses-donald-trump> (explaining that Trump called for the death penalty for anyone who kills a police officer, and cautioned the police union members that “they’re taking away the military equipment . . . We’ve got to let our police have the finest equipment and the finest training and if we don’t we’re making a tremendous mistake as a country.”).

180. Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 *IND. L.J.* 1111, 1119 (1998).

181. See *id.* at 1141.

182. ALEXANDER, *supra* note 27, at 18.

seed racial fears without directly referencing race.”¹⁸³

“Narratives act as cultural filters,” writes my colleague, Professor Robin Walker Sterling, quoting the proverb: “Until the lion learns how to write, every story will glorify the hunter.”¹⁸⁴ The first step toward the lion’s story is seeing the hunter’s story for what it is.

183. HANEY LÓPEZ, *supra* note 19, at 122–23; *see also id.* at 123 (noting that “[i]n the Democratic response to race-baiting around immigration, one sees a trajectory distressingly similar to that which produced racialized mass incarceration. . . . Democrats responded by adopting the same discourse, and often by offering their own draconian policies. Again, the Clinton administration led the way.”).

184. The Race Prof Blog, *Narrative and the Transforming Power of Alternative Constitution Day—Professor Robin Walker Sterling Contributes to the Alternative Constitution Day Symposium*, LPB NETWORK (Feb. 12, 2016), <http://lawprofessors.typepad.com/racelawprof/2016/02/narrative-and-the-transforming-power-of-alternative-constitution-day.html#>.