

UPDATING *BRIGNONI-PONCE*: A CRITICAL ANALYSIS OF RACE-BASED IMMIGRATION ENFORCEMENT

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INTRODUCTION

Under modern equal protection doctrine, the Supreme Court has held that racial classifications are constitutionally suspect and subject to strict scrutiny.¹ The Court has also held that noncitizens² are entitled to equal protection under the law.³ Yet, the Court held in *United States v. Brignoni-Ponce* that a trained law enforcement officer decid-

1. *See* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 472 (1989).

2. I use the term "noncitizen" to describe people who are not nationals of the United States. Under immigration law, noncitizens can either be nonimmigrants—who typically temporarily enter the United States on tourist, student, business, or temporary worker visas—or immigrants—whose stay in the country is more permanent. STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 9 (4th ed. 2005).

3. *Plyler v. Doe*, 457 U.S. 202, 212 (1981) (concluding the Fourteenth Amendment applies to all persons within a State); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1885) (concluding the Fourteenth Amendment applies to noncitizens).

ing whether to conduct an investigatory immigration stop may, “in light of his experience,” rely upon a person’s racial appearance.⁴

Advocacy organizations, scholars, and members of Congress have advocated for changing this policy. They argue that allowing immigration enforcement officers to consider race bolsters the perception that people who appear to be of a certain race—typically Latino, Asian, or Middle Eastern—lack full citizenship rights and that it is permissible to discriminate against them.⁵ They argue that any rational basis for considering a person’s appearance in these situations is outweighed by the harm it causes to the community through stigmatization and tense relations between minorities and law enforcement officers.⁶ Executive officials, despite their professed opposition to racial profiling, continue to allow the consideration of race while enforcing immigration laws and protecting the nation’s borders.⁷

This Note analyzes the legal permissibility of considering race as a factor in roving immigration investigatory stops by questioning whether the Court’s *Brignoni-Ponce* decision was well-reasoned, whether the Court would allow the consideration of race if this issue were decided today, and whether allowing the consideration of race discourages discrimination more effectively than prohibiting it. This Note exposes flaws in the Court’s reasoning in *Brignoni-Ponce* but determines that the Court would likely reach the same conclusion if it reconsidered the issue today. This Note goes on to argue that a statutory ban of the consideration of racial appearance in immigration enforcement would not change immigration enforcement officers’ reliance on race in practice. Thus, the rule under *Brignoni-Ponce* should continue in the hopes that it encourages an honest and forthright discussion of the role of race in immigration enforcement.

Part I analyzes the case law that created the current standard permitting race-based immigration enforcement, namely the Court’s decisions in *Terry v. Ohio* and *United States v. Brignoni-Ponce*. Part II provides some of the tools necessary to critique *Brignoni-Ponce*, in-

4. *United States v. Brignoni-Ponce*, 422 U.S. 873, 885–87 (1975).

5. See *infra* Part III.C. In this Note, I use “Latino” as a comprehensive term for persons of Mexican, Central American, and South American ancestry. Courts and commentators sometimes use the term “Hispanic,” which I preserved when quoting from those texts but otherwise replaced with “Latino.” Admittedly, either of these terms ignores the racial and cultural diversity of the Latino population, which includes people with various colors of skin, hair, and eyes. See Berta Esperanza Hernández-Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369, 404 (1994) [hereinafter Hernández-Truyol, *Building Bridges*].

6. See *infra* Part III.C.

7. See *infra* notes 138–143 and accompanying text.

cluding background information on how U.S. immigration policy and enforcement subordinates noncitizens, a description of the never-passed End Racial Profiling Act, and an analysis of courts' recent attempts to modify *Brignoni-Ponce*. Part III assesses the applicability of the Court's reasoning in *Brignoni-Ponce* to the modern environment, taking into consideration current demographic trends, a nuanced understanding of immigration, and the harm resulting from the permissible use of race. Part IV considers the practical impact of disallowing the consideration of race and concludes that permitting the consideration of race as a factor in deciding whether to make a stop is better than encouraging immigration law enforcement to mask their reliance on racial appearance.

I.

CURRENT LAW ON THE PERMISSIBLE USE OF RACE IN IMMIGRATION ENFORCEMENT

Investigatory stops allow law enforcement officers to stop a pedestrian or motorist and ask that person questions to determine whether or not criminal activity is about to occur.⁸ These stops cannot be conducted arbitrarily, thanks to the Fourth Amendment. However, the Court has construed the constitutional right to be free from governmental search and seizure as requiring only a reasonable suspicion to justify an investigatory stop.⁹ As such, a Border Patrol officer can stop a vehicle if the officer has reasonable suspicion to believe that at least one of the occupants is an undocumented immigrant.¹⁰ In *Brignoni-Ponce*, the Supreme Court held that the officer can consider the occupant's apparent ancestry in making this assessment.¹¹ In order to understand how this came to be the rule, this Part presents cases leading to *Brignoni-Ponce* and analyzes the decision itself.

A. *Search and Seizure Standard for Police Stops*

The Fourth Amendment provides that people have a right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."¹² This right is not to be violated except upon probable cause;¹³ however, the Court has held that certain searches and seizures are *reasonable* and therefore need only be justi-

8. See *Terry v. Ohio*, 392 U.S. 1, 9–10, 30–31 (1968).

9. *Id.*

10. *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975).

11. *Id.* at 885–86.

12. U.S. CONST. amend. IV.

13. *Id.*

fied by a “reasonable suspicion.”¹⁴ Both probable cause and reasonable suspicion depend on the totality of the circumstances and are applied on a case-by-case basis.¹⁵ Reasonable suspicion, however, requires a lesser likelihood of criminal activity than probable cause.¹⁶

The Court developed the reasonable suspicion standard in 1968 in *Terry v. Ohio*, holding that weapons found by a police officer while conducting an investigatory stop without probable cause were admissible in court.¹⁷ The Court justified deviating from the normal probable cause requirement by balancing the government’s legitimate investigatory interest against the defendants’ constitutionally protected interests; the Court still required particularized suspicion.¹⁸ This particular stop survived the Fourth Amendment because the behavior of co-defendants Terry and Chilton—walking past a storefront during the middle of the day several times—was sufficiently suspicious to offset their privacy interests.¹⁹ This determination relied heavily on the professed experience of the officer, who had been a police officer for thirty-nine years, despite his inability to articulate what first drew his eyes to Terry and Chilton.²⁰ The Court then decided that the officer had sufficient reason to suspect that he was dealing with armed and dangerous individuals and to fear for his and others’ safety.²¹ His decision to frisk Terry and Chilton was therefore reasonable. The Court later applied this reasonable suspicion standard to roving Border Patrol stops in *Brignoni-Ponce*.

14. *See, e.g.*, *United States v. Arvizu*, 534 U.S. 266, 273, 277 (2002) (finding reasonable suspicion to stop Arvizu because he was traveling in a minivan on a dirt road often used by smugglers to avoid a Border Patrol checkpoint, he avoided looking at the Border Patrol officer following him, and the children’s knees in the back seat were high, as if packages were underneath them); *Adams v. Williams*, 407 U.S. 143, 146–47 (1972) (finding reasonable suspicion to stop Williams after the police officer received an uncorroborated tip that Williams had narcotics and a gun in his car).

15. *See Maryland v. Pringle*, 540 U.S. 366, 371 (“The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.”); *Arvizu*, 534 U.S. at 273.

16. *Arvizu*, 534 U.S. at 274 (“Although an officer’s reliance on a mere hunch is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.” (internal citations and quotations omitted)).

17. *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968).

18. *Id.* at 20–22 (“[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”).

19. *Id.* at 6.

20. *Id.* at 5.

21. *Id.* at 30–31.

The Court's opinion in *Terry* neglected to mention that both co-defendants were black and that the officer was white.²² It created a fictional world in which police officers form suspicions about individuals without considering that person's race.²³ Nearly thirty years later, the Court created a similar fiction in *Whren v. United States*.²⁴ The issue in *Whren* was whether the officer's consideration of race tainted a traffic violation stop based on probable cause.²⁵ The Court held that even if the officer's decision was influenced by race, the stop did not violate the Fourth Amendment as long as the officers had probable cause to believe the driver violated the law.²⁶ In short, the Court refused to inquire about the officer's subjective motivation for making the stop;²⁷ it preferred instead to present the "officer's actions as resting upon neutral facts untainted by racial bias."²⁸ As long as officers had probable cause to believe the driver had committed some traffic violation, they could decide to stop someone for "driving while Black" or "driving while Brown."²⁹ While *Terry* and *Whren* ignore the use of race in police officers' decisions, *Brignoni-Ponce*, discussed below, explicitly allows it to be a factor that creates reasonable suspicion in the context of immigration law enforcement.

B. Brignoni-Ponce: Reasonable Suspicion and Permissibility of Race as One of Many Factors

Decided in 1975, *Brignoni-Ponce* continues to be cited for the proposition that it is permissible to use race in immigration enforcement.³⁰ The case concerned a roving traffic stop by Border Patrol

22. Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 957, 964 (1999); see *Terry*, 392 U.S. at 5.

23. Thompson, *supra* note 22, at 971.

24. *Whren v. United States*, 517 U.S. 806 (1996).

25. See *id.* at 810.

26. *Id.* at 813.

27. *Id.* ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.")

28. Thompson, *supra* note 22, at 981–82.

29. Kevin R. Johnson, *The Case for African American and Latina/o Cooperation in Challenging Racial Profiling in Law Enforcement*, 55 Fla. L. Rev. 341, 343–44 (2003) [hereinafter Johnson, *Challenging Racial Profiling*].

30. See *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 (9th Cir. 2000); *United States v. Franco-Munoz*, 952 F.2d 1055, 1058 n.2 (9th Cir. 1991) (Norris, J., dissenting); *United States v. Amaya-Ramos*, No. CR-07-024-N-BLW, 2007 U.S. Dist. LEXIS 32465, at *6 (D. Idaho May 2, 2007); U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES 9 (2003), available at http://www.usdoj.gov/crt/split/documents/guidance_on_race.pdf [hereinafter DOJ RACE GUIDANCE]. However, the Ninth Circuit has questioned its application in certain racial contexts. See *infra* Part II.C. *Brignoni-Ponce* could be read as either supporting the express use of race, in opposition to the

officers to inquire about the immigration status of the vehicle's occupants near the Mexican border. The officers admitted that the only reason they decided to stop the car was that the three occupants appeared to be of Mexican descent.³¹ The government contended that this apparent ancestry was sufficient for officers to believe a person was an immigrant and thus to interrogate them under 8 U.S.C. § 1357(a)(1).³² The government further argued that, under 8 U.S.C. § 1357(a)(3), immigration enforcement officers could arbitrarily stop vehicles within 100 miles of the border.³³

The Court rejected both of these contentions. It held that a plaintiff's constitutional right for protection from unreasonable searches and seizures would be violated in cases where Border Patrol officers conducting a roving investigatory stop decided to stop a vehicle *solely* based on the "apparent Mexican ancestry" of vehicle occupants, no matter how close the vehicle is to the border.³⁴ However, officers need only have a reasonable suspicion that occupants of the vehicle are undocumented immigrants to constitutionally make such a stop.³⁵ Such a suspicion can be based partly, but not entirely, on the occupants' apparent Mexican ancestry.³⁶

In reaching these conclusions, the Court first engaged in the classic Fourth Amendment balancing test between "the public interest and

surreptitious racial motivation that may have been behind a situation such as *Terry*, or it could be read as permitting the consideration of apparent nationality as opposed to that of race. Thompson, *supra* note 22, at 977–78. Since race may be a proxy for nationality and vice versa, I read *Brignoni-Ponce* as allowing the express use of race.

31. *United States v. Brignoni-Ponce*, 422 U.S. 873, 875 (1975).

32. *Id.* at 877. Section 1357(a)(1) authorizes any officer or employee of the INS to, without warrant, "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States." 8 U.S.C. § 1357(a)(1).

33. *Brignoni-Ponce*, 422 U.S. at 877. The government based its argument for the 100-mile exception on 8 U.S.C. § 1357(a)(3), which authorizes any officer or employee of the INS to, without warrant, "board and search for aliens . . . any railway car, aircraft, conveyance, or vehicle" within 100 miles of the border. *See id.* *See generally* 8 C.F.R. § 287.1(a) (establishing the 100-mile exception).

34. *Brignoni-Ponce*, 422 U.S. at 886–87 (noting that the likelihood that any given person of Mexican ancestry is an alien "is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens").

35. *Brignoni-Ponce*, 422 U.S. at 881. I recognize that immigration laws repeatedly use the term "illegal alien." *See* Kris Kobach, *Immigration Nullification: In-State Tuition and Lawmakers Who Disregard the Law*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 473, 474 n.5 (2007). I use the term "undocumented immigrants" as opposed to "illegal aliens" because I believe the latter term incorrectly frames immigration discussions and is inherently racist by labeling a person, rather than his or her acts, as "illegal" and by associating the negative connotations of the word "alien" with immigrants. *See infra* notes 81–82 and accompanying text.

36. *Brignoni-Ponce*, 422 U.S. at 886–87.

the individual's right to personal security free from arbitrary interference by law officers" to determine whether the search in question was reasonable.³⁷ The Court accepted the government's argument that public interest demands effective measures to prevent undocumented immigrants from entering at the Mexican border.³⁸ Further, the Court accepted that eighty-five percent of the undocumented immigrants in the United States are from Mexico.³⁹

On the other side of the test, the Court found that an officer stopping a vehicle and questioning its occupants was only a modest intrusion on a person's individual liberty.⁴⁰ The stop usually takes less than a minute, is limited to the parts of the vehicle that can be seen, and only requires occupants to answer a few questions and possibly produce a document proving that person's right to be in the United States.⁴¹ By comparing these stops to "a limited search . . . for the protection of an officer investigating suspicious behavior of persons he reasonably believed to be armed and dangerous," the Court applied the "reasonable suspicion" standard adopted in *Terry v. Ohio*.⁴² Thus, the Court equated the possibility that undocumented immigrants might be in a car with the possibility that an officer might be in physical

37. *Id.* at 878 (citing *Terry v. Ohio*, 392 U.S. 1, 20–21 (1968); *Camara v. Municipal Court*, 387 U.S. 523, 536–37 (1967)). In *Almeida-Sanchez*, the Court held that the Fourth Amendment prohibited the use of roving patrols to search vehicles—not just to question occupants—without a warrant or probable cause except for at the border and its functional equivalents. *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973).

38. *Brignoni-Ponce*, 422 U.S. at 878–79. The Court's conclusions reflected the popular belief at the time about immigration. President Ford blamed Mexican immigrants for the poor state of the U.S. economy, and former CIA director William Colby even said that Mexican immigrants were a greater threat to the United States than the Soviet Union. RUDOLFO F. ACUNA, *ANYTHING BUT MEXICAN: CHICANOS IN TEMPORARY AMERICA* 114–15 (1996). Prior to the 1920s, Mexican nationals could cross the border without restriction largely due to the need for their labor. During the Depression, Mexicans were a scapegoat for the poor economic conditions and over half a million Mexican Americans were "repatriated." When the United States needed labor again, it began the Bracero Program, a temporary labor program for Mexicans from 1943 to 1964. The anti-immigrant sentiment reemerged in the 1970s. Tisha R. Tallman, *Liberty, Justice, and Equality: An Examination of Past, Present, and Proposed Immigration Policy Reform Legislation*, 30 N.C. J. INT'L L. & COM. REG. 869, 883–85 (2005).

39. *Brignoni-Ponce*, 422 U.S. at 879. As support, the Court cites records that 80% and 92% of the deportable immigrants arrested were from Mexico in 1970 and 1974, respectively. *Id.* at 879 n.5. The Court failed to entertain the possibility that the percentage of arrested deportable immigrants who were Mexican might be different than the percentage of deportable immigrants, arrested or not, who were Mexican.

40. *Id.* at 879–80.

41. *Id.* at 880.

42. *Id.*

danger. In doing so, the Court suggested that the presence of undocumented immigrants itself constitutes a threat to public safety. This reformulation of the public safety consideration helped the Court to justify the application of the reasonable suspicion standard instead of probable cause to roving immigration stops.⁴³

After deciding to use the reasonable suspicion standard, the Court then addressed the extent to which officers could use a person's apparent ancestry to justify a stop.⁴⁴ Thus, the Court did not, at least explicitly, take into consideration any intrusions into personal liberty caused by a race-based stop. The Court recognized that many native-born and naturalized citizens have physical characteristics identified with Mexican ancestry and that, even in the border area, a relatively small proportion of them are immigrants.⁴⁵ Therefore, officers would not be justified in stopping all Mexican-Americans to ask about their immigration status.⁴⁶ Yet, the Court still found that the "likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor."⁴⁷ The Court did not cite any statistics about the proportion of immigrants among persons of Mexican appearance to support this conclusion. Instead, the Court listed other factors that Border Patrol officers could rely on in forming a reasonable suspicion: (1) characteristics of the area where the vehicle is stopped; (2) proximity of that area to the border; (3) "usual patterns of traffic on that particular road"; (4) recent experience with immi-

43. *See id.* at 883. Justice Douglas concurred in the judgment but vigorously attacked the standard of "reasonable suspicion" adopted by the majority. *Id.* at 888–90 (Douglas, J., concurring in the judgment). He repeated the concern he voiced in his *Terry v. Ohio* dissent that a suspicion test, rather than a probable cause test, allows officers to "stop citizens on the highway on the flimsiest justifications and does not provide citizens sufficient protection from governmental intrusion." *Id.* at 890. He acknowledged that the extent to which the suspicion test restrains the police in practice will depend on the future decisions of the Court. *Id.*

44. *Id.* at 885–87 (majority opinion).

45. *Id.* at 886. According to the 1970 census and the INS figures for alien registration in 1970, persons registered as Mexican immigrants comprised 12.4% of the 1,619,064 persons of Mexican origin in Texas; 8.5% of the 111,049 persons of Mexican origin in New Mexico; 14.2% of the 239,811 persons of Mexican origin in Arizona; and 20.4% of the 1,857,267 persons of Mexican origin in California. *Id.* at 886 n.12. One commentator concludes from the Court's statistics that in 1975 "almost two of every three Mexicans in the four border states were undocumented." Robert Alan Culp, Note, *The Immigration and Naturalization Service and Racially Motivated Questioning: Does Equal Protection Pick Up Where the Fourth Amendment Left Off?*, 86 COLUM. L. REV. 800, 816 & n.124 (1986). However, U.S. Census Bureau information from 1980 suggests that really only one-eighth of the Latino population in those border states was undocumented. *Id.* at 817 n.125.

46. *Brignoni-Ponce*, 422 U.S. at 886–87.

47. *Id.*

grant traffic there; (5) appearance of the vehicle; (6) number, appearance, and behavior of persons in the vehicle; and (7) “characteristic appearance of persons who live in Mexico.”⁴⁸ For this last factor, the Court suggested officers could rely on a person’s mode of dress or haircut.⁴⁹

C. *Martinez-Fuerte: Rejecting Stigmatization Concerns and Allowing Secondary Checkpoint Stops without Reasonable Suspicion*

The Court engaged in another Fourth Amendment balancing test about Border Patrol investigations just one year after *Brignoni-Ponce* was decided. In *Martinez-Fuerte*, the Court held that routine Border Patrol checkpoints that refer motorists to secondary inspection areas without a reasonable individualized suspicion are constitutional.⁵⁰ Certain plaintiffs claimed that, compared to the vehicle stop in *Brignoni-Ponce*, being referred to a secondary inspection point entailed an extra element of intrusiveness that resulted in the stigmatization of those diverted.⁵¹ The Court dismissed those claims and held that the secondary stops and questioning are a necessary element of Border Patrol discretion and that even referrals “made largely on the basis of apparent Mexican ancestry” do not violate the Constitution.⁵²

Justice Brennan, joined by Justice Marshall, vehemently dissented in *Martinez-Fuerte*.⁵³ Brennan first criticized the distinction the majority drew between roving stops that would have required at least reasonable suspicion and checkpoint secondary referrals that the majority decided need no justification.⁵⁴ He questioned “what actual experience supports my Brethren’s conclusion that referrals ‘should not be frightening or offensive because of their public and relatively

48. *Id.* at 884–85.

49. *Id.* at 885. Mode of dress, haircut, and even vehicle type can be proxies for race if people of a certain race share those particular characteristics while people of other races do not. For more discussion about proxies, see *infra* notes 71–76 and accompanying text. These factors, particularly vehicle type, can also be proxies for socioeconomic status. See *id.* at 889–90 (Douglas, J., concurring in the judgment) (noting that suspicious vehicles are also old vehicles).

50. *United States v. Martinez-Fuerte*, 428 U.S. 543, 550, 563 (1976). Checkpoint searches, however, must be justified by consent or probable cause in order to be constitutional. *United States v. Ortiz*, 422 U.S. 891, 896–97 (1975).

51. *Martinez-Fuerte*, 428 U.S. at 560.

52. See *id.* at 562–63.

53. *Id.* at 567 (Brennan, J., dissenting). Justice Brennan noted that it was the ninth decision of that term that eviscerated the Fourth Amendment protections against unreasonable searches and seizures. *Id.*

54. *Id.* at 570–71 (Brennan, J., dissenting).

routine nature.’”⁵⁵ He also criticized the majority’s reliance on Border Patrol practice and good faith not to refer motorists to secondary detentions based on Mexican ancestry alone, even though *Martinez-Fuerte* would permit this.⁵⁶ Even if requiring a reasonable suspicion based on more than just racial appearance would not affect the practice of secondary referrals because the Border Patrol was presumably already working within those limits, it would at least signal that the discretionary power of the Border Patrol was not limitless and would protect against possible future bad faith practice.⁵⁷

II.

BACKGROUND FOR CRITIQUING *BRIGNONI-PONCE* AND UNDERSTANDING THE JUDICIARY’S ROLE IN REVIEWING THE CONSIDERATION OF RACE

Immigration laws and their enforcement have operated over time to subordinate noncitizens and citizens who appear to be nonwhite. By permitting race to be considered, *Brignoni-Ponce* arguably perpetuates this trend. Senator Russell Feingold has repeatedly introduced the End Racial Profiling Act, which would prohibit the consideration of race for immigration enforcement, but this legislation has not gone far in the Senate.⁵⁸ Even without this legislation, many lower courts have critiqued immigration enforcement officers’ consideration of race, especially given the changing demographics of the United States, although this trend may have shifted some after the terrorist attacks of September 11, 2001.⁵⁹ This Part addresses each of these issues in turn, providing a context for critiquing and updating *Brignoni-Ponce* and for better understanding the dangers inherent in removing the review of racial considerations from judicial inquiry.

55. *Id.* at 572 (Brennan, J., dissenting) (quoting *id.* at 560 (majority opinion)). He also criticized the statistics the majority offered to support their claims that persons of Mexican appearance are not unduly burdened by the permissible consideration of racial appearance. *Id.* at 573 n.4 (Brennan, J., dissenting). For example, the majority did not indicate what percentage of secondary referrals are comprised of people of Mexican ancestry or that people of Mexican ancestry are not subjected to lengthier initial stops. *Id.*

56. *Id.* at 573 n.4 (Brennan, J., dissenting).

57. *See id.* (“Good faith on the part of law enforcement officials, however, has never sufficed in this tribunal to substitute as a safeguard for personal freedoms or to remit our duty to effectuate constitutional guarantees.”).

58. *See* End Racial Profiling Act (ERPA) of 2007, S. 2481, 110th Cong. (2007); ERPA of 2005, S. 2138, 109th Cong. (2005); ERPA of 2004, S. 2132, 108th Cong. (2004); ERPA of 2001, S. 989, 107th Cong. (2001); *infra* Part II.B.

59. *See* *United States v. Montero-Camargo*, 208 F.3d 1122, 1139 (9th Cir. 2000); *United States v. Manzo-Jurado*, 457 F.3d 928, 935 (9th Cir. 2006); *Habeeb v. Castloo*, 434 F. Supp. 2d 899, 905–06 (D. Mont. 2006); *infra* Part II.C.

A. *Using Immigration Laws and Enforcement to Subordinate “Others”*

Congress’s broad authority in setting immigration policy allows nativism, the casting of noncitizens as unaccepted “others,” to pervade immigration laws. Similarly, the government’s choices in how and where to enforce immigration laws primarily targets immigrants from Latin and South America. The result is suspicion and mistrust on behalf of Latinos toward the government and the Border Patrol specifically, taking a toll on the Latino community and impeding law enforcement.

1. *Plenary Power over Immigration Law*

U.S. immigration policies have long used the border to exclude certain groups of individuals considered “dangerous, unwanted, [and] undesirable.”⁶⁰ For example, the Alien and Sedition Acts of 1798 targeted people of French ethnicity and ideology; fear of Japanese and Japanese Americans during World War II spurred the internment of Japanese Americans; and, during the 1950s, fear of Communist enemies resulted in frequent interrogation of immigrants from Southeastern European countries.⁶¹ Even though these policies have rested on questionable rationales at best, the Supreme Court has accepted that Congress has plenary power over immigration laws due to national security concerns, sovereignty, and the political branches’ control over foreign policy.⁶² Accordingly, Congress has broad discretion to choose to exclude certain noncitizens.⁶³ Currently, the legislative and

60. Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CAL. L. REV. 1395, 1411 (1997).

61. Juan F. Perea, *Introduction to IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* 1, 1–2 (Juan F. Perea ed., New York University Press 1997).

62. *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 606 (1889) (establishing the plenary power doctrine). “To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated.” *Id.*

63. *Id.* The Court has gradually chipped away at the plenary power doctrine, recognizing that this power is “subject to important constitutional limitations.” *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (citing *INS v. Chadha*, 462 U.S. 919, 941–42 (1983); *The Chinese Exclusion Case*, 130 U.S. at 604); see *Mathews v. Diaz*, 426 U.S. 67, 80–83 (1976) (reviewing Congress’s decision to limit Medicare to legal permanent residents who have been in the United States for at least five years and finding that it falls within Congress’s plenary power over immigration and was a reasonable policy); Hiroshima Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 560 (1990) (describing the evolution of the plenary power doctrine). However, the Court does

executive branches are using immigration laws and enforcement as a primary weapon in the “war on terrorism.”⁶⁴

2. *Nativistic Racism, Subordination, and Immigration Laws*

When the Court deferred to Congress’ decision to exclude Chinese immigrants in 1889, it characterized the Chinese as “foreigners of a different race” who “will not assimilate with us.”⁶⁵ This is an example of what is called nativistic or differentialist racism. Nativistic racism subordinates foreigners by emphasizing the “otherness” of their characteristics and the threat they pose to American values and way of life.⁶⁶ Nativistic racism does not necessarily focus on biological heredity but on the “insurmountability of cultural differences,” emphasizing the “otherness” of the targeted group.⁶⁷ The claimed purpose of such racism is to protect America from the changes foreigners would bring to social, political, and cultural institutions by immigrating to the United States.⁶⁸ For example, only four years ago Professor Samuel Huntington made the nativist argument that immigration from Latin America threatened to destroy the fabric of U.S. culture.⁶⁹

not recognize a substantive right for noncitizens to come to or remain in the United States. *See Zadvydas*, 533 U.S. at 703 (Scalia, J., dissenting).

64. *See* Marie A. Taylor, *Immigration Enforcement Post-September 11: Safeguarding the Civil Rights of Middle Eastern-American and Immigrant Communities*, 17 GEO. IMMIGR. L.J. 63, 64–65 (“[T]he country’s immigration policies [are] in the forefront of debates on balancing of national security concerns and protecting civil liberties.”). By January 2003, all nonimmigrant male nationals over the age of sixteen from certain listed Middle Eastern countries were subject to special registration. Asli U. Bali, *Changes in Immigration Law and Practice After September 11: A Practitioner’s Perspective*, 2 CARDOZO PUB. L. POL’Y & ETHICS J. 161, 171–72 (2003). The Department of Justice also initiated a series of immigration enforcement programs that encourage state and local officers to use racial profiling when attempting to apprehend undocumented immigrants. *Id.* at 169. For instance, the Absconder Apprehension Initiative prioritizes the apprehension of undocumented immigrations based on their national origin. Memorandum from the Deputy Attorney Gen. on Guidance for Absconder Apprehension Initiative to Comm’r of the Immigration and Naturalization Serv., Dir. of the Fed. Bureau of Investigation, Dir. of the U.S. Marshals Serv., and U.S. Attorneys (Jan. 25, 2002), available at <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/doj/abscondr012502mem.pdf>.

65. *The Chinese Exclusion Case*, 130 U.S. at 606.

66. *See* Perea, *supra* note 61, at 1–2.

67. Chang & Aoki, *supra* note 60, at 1401.

68. *See* Néstor P. Rodríguez, *The Social Construction of the U.S.-Mexico Border, in IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES*, *supra* note 61, at 223, 227.

69. Samuel P. Huntington, *The Hispanic Challenge*, FOREIGN POL’Y, Mar./Apr. 2004, at 30. The first few sentences of the article encapsulate nativism:

“The persistent inflow of Hispanic immigrants threatens to divide the United States into two peoples, two cultures, and two languages. Unlike past immigrant groups, Mexicans and other Latinos have not assimilated into mainstream U.S. culture, form-

While arguments as inflammatory as Huntington's meet much scholarly and lay critique,⁷⁰ modern nativism also operates through the law by using seemingly unobjectionable symbols, or proxies, associated with differing national origin to exclude and subordinate foreigners.⁷¹ For example, the Supreme Court held in 1954 that potential jurors could not be excluded solely on the basis of Mexican descent.⁷² However, excluding jurors based on their ability to speak Spanish is permitted and could in effect exclude potential jurors based on national origin.⁷³ The Court in *Strauder v. West Virginia* went so far as to suggest various proxies that the State could use to effectively keep African Americans off of juries without violating the Constitution.⁷⁴ These suggestions included confining jury selection "to freeholders . . . or to persons having educational qualifications":⁷⁵ two conditions which many African Americans could not meet in the late 1800s.

Undocumented status can also serve as a proxy for race.⁷⁶ Rather than state that immigration policy is geared towards keeping Latinos or Middle Easterners out of the country, the government can cite economic or security concerns to justify making it difficult for certain noncitizens to have legal status.⁷⁷ Applicants can be excluded on

ing instead their own political and linguistic enclaves—from Los Angeles to Miami—and rejecting the Anglo-Protestant values that built the American dream. The United States ignores this challenge at its peril." *Id.*

70. David Montejano, *Who is Samuel Huntington?*, TEX. OBSERVER, Aug. 13, 2004, at 12 (describing reaction of intellectuals to Huntington's article).

71. See Perea, *supra* note 61, at 4–5 (discussing proxies such as language and undocumented status).

72. *Hernandez v. Texas*, 347 U.S. 475, 482 (1954).

73. See *Hernandez v. New York*, 500 U.S. 352, 371–72 (1991).

74. *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880).

75. *Id.*

76. See Leti Volpp, "Obnoxious To Their Very Nature": Asian Americans and Constitutional Citizenship, 8 ASIAN L.J. 71, 82 (2001) ("[C]itizenship has served as a proxy for race, so that 'American' is equated with being white.").

77. These concerns, however, do not always conceal the racist aspects of immigration policy. For example, the Immigration Act of 1990 encouraged immigration from northwestern European countries such as Ireland. Dennis Conway, *Are There New Complexities in Global Migration Systems of Consequence for the United States "Nation-State"?*, 2 IND. J. GLOBAL LEGAL STUD. 31, 41–42 (1994) (citing Immigration Act of 1990, Pub. L. No. 101-649, § 132, 104 Stat. 4978, 5000 (codified as amended at 8 U.S.C. § 1153 (Supp. V 1993)). At the same time, the Border Patrol was constructing a gate in order to curb illegal border crossings near San Diego. JOSEPH NEVINS, OPERATION GATEKEEPER: THE RISE OF THE "ILLEGAL ALIEN" AND THE MAKING OF THE U.S.-MEXICO BOUNDARY 3 (2002). The Border Patrol continues to spend a disproportionate amount of its budget on border enforcement despite the fact that nearly half of undocumented immigrants crossed legally and overstayed their visas. PEW HISPANIC CENTER, MODES OF ENTRY FOR THE UNAUTHORIZED MIGRANT POPULATION 4 (2006), <http://pewhispanic.org/files/factsheets/19.pdf> [hereinafter MODES OF ENTRY].

grounds of health, criminal record, foreign policy concerns, or likelihood of becoming a public charge.⁷⁸ Even if they are admissible, quotas on the number of visas granted per year are listed per country and can result in major backlogs, depending on the nationality of the applicant.⁷⁹ For example, as of February 2008, Mexican and Filipino applicants who are unmarried sons or daughters of U.S. citizens and filed their applications after 1993 are still waiting for visa numbers.⁸⁰ Of course, if a noncitizen decides to come to the United States illegally instead of waiting for the process to work, he or she would be subject to removal proceedings if immigration enforcement officials ever learned of his or her presence.

The terminology used in immigration supports these nativistic notions. “Alien” is a common term in government to refer to noncitizens, but this term carries negative connotations such as “contrary, hostile, strange, [and] unsuitable,” and definitions such as “unlike one’s own; strange” and “opposed; hostile.”⁸¹ Similarly, the term “illegal” frequently implies that undocumented immigrants are criminals instead of in violation of *civil* law.⁸² The names of Border Patrol operations provide another prime example of nativistic language. Such names include “Operation Return to Sender” (2006), implying that the federal government is essentially placing a stamp on human beings, and “Operation Predator” (2003) and “Operation Game Day” (2003), which imply that apprehending immigrants is a game or a hunt.⁸³

78. Immigration and Nationality Act (INA) of 1990 § 212(a)(1)–(4), 8 U.S.C. § 1182(a)(1)–(4).

79. See INA §§ 201–202; U.S. Dep’t of State, Visa Bulletin for February 2008 (Feb. 2008), http://travel.state.gov/visa/frvi/bulletin/bulletin_3925.html.

80. U.S. Dep’t of State, Visa Bulletin for February 2008 (Feb. 2008), http://travel.state.gov/visa/frvi/bulletin/bulletin_3925.html. Chinese and Indian applicants in that category have available visa numbers if their applications were filed prior to 2002. *Id.*

81. Rodríguez, *supra* note 68, at 230–33 (noting that unlike their European counterparts, immigrants from Mexico are known as “aliens”) (internal quotations omitted).

82. NEVINS, *supra* note 77, at 9; see Berta Esperanza Hernández-Truyol, *Reconciling Rights in Collision: An International Human Rights Strategy*, in IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES, *supra* note 61, at 254, 254–55 (noting the use of Proposition 187’s use of the term “illegal aliens” in order to promote fear of “others/outsideers”). Unless quoting sources, I use the term “undocumented immigrants” or “undocumented population” to describe the population who otherwise could be termed “illegal immigrant,” “illegal alien,” “illegal,” or worse.

83. BORDER NETWORK FOR HUMAN RIGHTS, “BEHIND EVERY ABUSE IS A COMMUNITY”: U.S./MEXICO BORDER REPORT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING THE UNITED STATES’ COMPLIANCE WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 15 (2006), available at http://www.borderaction.org/PDFs/BNHR_Report_to_HRC.pdf [hereinafter BNHR REPORT TO UNHRC].

Even the former policy to release non-Mexican undocumented immigrants after they received a notice to appear in court was called “catch and release,” comparing people to fish.⁸⁴ This language dehumanizes and demeans undocumented immigrants.

Some of the groups who are currently subordinated by nativistic immigration policies are Asians, Latinos, and, particularly since September 11, Middle Easterners.⁸⁵ Framing this issue in terms of nativistic racism avoids the debate of what constitutes race as opposed to ethnicity. Through this lens, it does not matter whether the Court was attempting to deliver a race-neutral decision by focusing on a person’s perceived *nationality*.⁸⁶ Accordingly, this Note adopts a definition of racial profiling that includes considering a person’s perceived race, ethnicity, national origin, or religion.⁸⁷ Any of these types of profiling would fall under the notion of nativistic racism—subordination by excluding the “other.”

3. *Immigration Enforcement and Racial Profiling*

While an investigatory immigration stop that is solely based on race is prohibited under current law, the Supreme Court has endorsed the consideration of race coupled with other factors.⁸⁸ Some argue that this has resulted not only in widespread racial discrimination⁸⁹ but also in mistrust of government and law enforcement in some communities.⁹⁰ These communities include both immigrants—documented and not—and citizens.⁹¹

84. *Accountability for Security Gaps: Hearing Before the H. Comm. on Homeland Security*, 110th Cong. (2007) [hereinafter *Accountability for Security Gaps Hearing*] (testimony of Michael Chertoff, Sec’y, Department of Homeland Security), available at http://www.dhs.gov/xnews/testimony/testimony_1189114519132.shtm. This policy has been replaced by “catch and remove,” which requires all undocumented immigrants to be detained until they can be removed to their countries of origin. *Id.*

85. See Johnson, *Challenging Racial Profiling*, *supra* note 29, 351–52; Perea, *supra* note 61, at 2. I often call these “targeted groups.”

86. See Thompson, *supra* note 22, at 978.

87. See *infra* note 144 and accompanying text (describing the definition of racial profiling adopted in the End Racial Profiling Act). Racial profiling depends on a law enforcement officer’s perception. Stops based on ethnicity, national origin, or religion may include other factors besides phenotype.

88. *United States v. Brignoni-Ponce*, 422 U.S. 873, 881–87 (1975).

89. See BNHR REPORT TO UNHRC, *supra* note 83, at 15.

90. See End Racial Profiling Act (ERPA) of 2007, S. 2481, 110th Cong. § 2(a)(15) (2007) (“Racial profiling damages law enforcement and the criminal justice system as a whole by undermining public confidence and trust in the police, the courts, and the criminal law.”).

91. According to reports of immigration enforcement abuse collected by the American Friends Service Committee’s Immigration Law Enforcement Monitoring Project in 1997, victims of such abuse were 61.1% undocumented immigrants, 16.8% United

Many Latinos who are U.S. citizens or who are in the country legally are routinely stopped and questioned about their citizenship, making them feel as though they do not have the right to be in their own community.⁹² A majority of residents in Arizona border communities reported that they felt that Border Patrol agents stopped people for simply having brown skin.⁹³ Similarly, many residents of South Texas believe that Border Patrol agents “systematically stop and detain too many blameless Hispanics.”⁹⁴ Some Latinos have even filed class action lawsuits seeking declaratory or injunctive relief for the discriminatory actions of the Border Patrol, but these suits have been dismissed due to lack of standing.⁹⁵

Immigration enforcement policy has also had disparate impact on other racial groups. For example, from April 1999 to April 2000, 95%—or seventy-nine of eighty-three—Amtrak passengers arrested by the Border Patrol in Havre, Montana, were not from countries with “sizable Caucasian populations.”⁹⁶ Forty-five of these passengers were from Mexico, and the others were from Asia, Africa, and South and Central America.⁹⁷ Immigration enforcement agents at airports often presume that persons of African ancestry are entering the coun-

States citizens, 9.7% legal residents, 8% asylum seekers, and 4.4% other. Am. Friends Service Comm., *Abuse Will Not Be Tolerated: A Call for Accountability Amid Increasing Human Rights Abuses Along the South Texas/Mexico Border* (1998), reprinted in Interhemispheric Resource Ctr., 6 BORDERLINES 3 (Nov. 1998), available at <http://americas.irc-online.org/borderlines/PDFs/bl50.pdf> (last visited May 24, 2008).

92. See BORDER ACTION NETWORK, JUSTICE ON THE LINE: THE UNEQUAL IMPACTS OF BORDER PATROL ACTIVITIES IN ARIZONA BORDER COMMUNITIES 3 (2004), http://www.borderaction.org/PDFs/justice_on_the_line.pdf [hereinafter JUSTICE ON THE LINE].

93. The results of the survey were that 41% in Pirtleville, 66% in Naco, 70% in Nogales, and 77% in Douglas felt they were stopped just for having brown skin. *Id.*

94. S. 989: *The End Racial Profiling Act of 2001: Hearing Before the Subcomm. on the Constitution, Federalism, and Property Rights of the S. Comm. on the Judiciary*, 107th Cong. 115 (2001) [hereinafter *ERPA Hearing*] (statement of National Council of La Raza).

95. In *Hodgers-Durgin v. De La Vina*, the court held the named Latino plaintiffs did not show sufficient likelihood that the Border Patrol in Arizona would commit future stops violating their Fourth Amendment rights. 199 F.3d 1037, 1044 (9th Cir. 1999). Each plaintiff had only been stopped once by the Border Patrol in a ten year period. *Id.*; see also *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 95 F. Supp. 2d 723, 733 (N.D. Ohio 2000) (finding that Latino plaintiffs did not have standing to enjoin state patrol officers from stopping Latino motorists and interrogating them about their immigration status).

96. *Some Suspect Racial Profiling in Border Patrol's Checks on Amtrak*, BISMARCK TRIB., May 21, 2000. The Border Patrol explained that “[a]gents rely heavily on their experience” and do not only consider a person’s race. *Id.*

97. *Id.*; see also *infra* notes 184–96 and accompanying text (discussing the arrest of Abdul Ameer Yousef Habeeb in Havre, Montana).

try unlawfully.⁹⁸ Courts have permitted the consideration of Asian appearance as one of many factors to justify interrogation by immigration enforcement officers.⁹⁹ An enforcement policy in Portland, Oregon, that targeted Asian tourists in order to ask them about their immigration status resulted in a major airline cancelling direct flights from Japan to the newly nick-named “Deportland.”¹⁰⁰

Additionally, Middle Easterners and South Asians have been profiled as terrorists and have received disparate treatment because of their racial appearance.¹⁰¹ This treatment intensified after September 11, 2001.¹⁰² For example, the government adopted a “hold until cleared” policy that resulted in Middle Eastern men being held in extreme detention conditions, sometimes for months after the point at which they could have been deported, so that the FBI could confirm that they were not suspected of terrorist activities.¹⁰³ Middle Easterners and South Asians have also been profiled at airports and sub-

98. Johnson, *Challenging Racial Profiling*, *supra* note 29, at 349–50 (describing incidents where African American citizens have been detained and strip-searched at airports by immigration officers who accused them of having false immigration documents or of not being U.S. citizens).

99. *See* Cheung Tin Wong v. INS, 468 F.2d 1123, 1127–28 (D.C. Cir. 1972); *In re King & Yang*, 16 I. & N. Dec. 502, 504–05 (BIA 1978).

100. Johnson, *Challenging Racial Profiling*, *supra* note 29, at 352.

101. *Id.* at 351 & n.56.

102. Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 295–96 (2002).

103. These conditions included being “smashed into walls, repeatedly stripped and searched, and often denied basic legal rights and religious privileges.” Richard A. Serrano, *9/11 Prisoner Abuse Suit Could Be Landmark; Rounded Up, Muslim Immigrants Were Beaten in Jail*, L.A. TIMES, Nov. 20, 2006, at A1. Eighty-four of the estimated 1200 September 11 detainees were held in the Metropolitan Detention Center in Brooklyn, New York, where they “were held under the most restrictive conditions possible, which included lockdown for at least 23 hours per day, extremely limited access to telephones, and restrictive escort procedures any time the detainees were moved outside their cells.” OFFICE OF INSPECTOR GEN., U.S. DEP’T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 157 (2003), available at <http://www.usdoj.gov/oig/special/0306/full.pdf> (internal quotations omitted). Of the 762 September 11 detainees whose cases the Inspector General reviewed, about 33% were from Pakistan, 15% were from Egypt, and most others were from other Middle Eastern countries. *Id.* at 21. The legality of the “hold until cleared” policy and the conditions of September 11 detainees’ detention is currently being litigated. *See* Iqbal v. Hasty, 490 F.3d 143, 177–78 (2d Cir. 2007) (denying defendants’ motion to dismiss all of plaintiff’s claims except for procedural due process), *petition for cert. filed*, 76 U.S.L.W. 3499 (U.S. Mar. 7, 2008) (No. 07-1150); *Turkmen v. Ashcroft*, No. 02 CV 2307 (JG), 2006 U.S. Dist. LEXIS 39170, at *2–4 (E.D.N.Y. June 14, 2006) (dismissing plaintiffs Fourth Amendment and Fifth Amendment claims but preserving conditions claims), *appealed and argued before the Second Circuit*, Feb. 14, 2008.

jected to heightened security screening, pre-boarding searches, and interrogations.¹⁰⁴ In some cases they have even been denied passage.¹⁰⁵

Case law developing the standard for and the permissible consideration of vehicle occupants' apparent race in Border Patrol stops has dealt primarily with Latino plaintiffs.¹⁰⁶ Current figures estimate that 57% (5.3 million) of the United States' undocumented immigrant population is from Mexico and another 23% (2.2 million) is from other Latin American countries.¹⁰⁷ While a large majority of undocumented immigrants are from Latin America, an even larger majority of Latinos in the United States (approximately 90%) are here legally.¹⁰⁸ Indeed, many Latinos' ancestors have lived in the southwest and other parts of the country for almost 500 years.¹⁰⁹

The four states that border Mexico—California, Arizona, New Mexico, and Texas—are the states with the highest percentage of Latino population, ranging between 25% and 42%.¹¹⁰ The counties with

104. Charu A. Chandrasekhar, *Flying While Brown: Federal Civil Rights Remedies to Post-9/11 Airline Racial Profiling of South Asians*, 10 *ASIAN L.J.* 215, 217–18 (2003); AMERICAN-ARAB ANTI-DISCRIMINATION COMM., REPORT ON HATE CRIMES AND DISCRIMINATION AGAINST ARAB AMERICANS: THE POST-SEPTEMBER 11TH BACKLASH, SEPTEMBER 11, 2001–OCTOBER 11, 2002, at 19–31 (2003), available at http://www.adc.org/hatecrimes/pdf/2003_report_web.pdf [hereinafter ADC HATE CRIMES REPORT].

105. Chandrasekhar, *supra* note 104 at 217–18; ADC HATE CRIMES REPORT, *supra* note 104, at 19–29.

106. Again, the cases reveal the difficulty of distinguishing between race, ethnicity, and national origin. *Brignoni-Ponce* focused on the plaintiffs' "Mexican appearance." 422 U.S. 873, 887 (1975). Later cases referred to plaintiffs' "Hispanic appearance." See *United States v. Montero-Camargo*, 208 F.3d 1122, 1128 (9th Cir. 2000). I refer to "Latino appearance." However, all of these terms are problematic in that not all Hispanics or Latinos share similar phenotype or hair color. Most likely, Border Patrol officers think of a brown-skin, dark-haired person as Latino.

107. JEFFREY S. PASSEL, RANDY CAPPS & MICHAEL FIX, URBAN INST. IMMIGRATION STUDIES PROGRAM, UNDOCUMENTED IMMIGRANTS: FACTS AND FIGURES (2004), http://www.urban.org/UploadedPDF/1000587_undoc_immigrants_facts.pdf (last visited June 19, 2008) [hereinafter UNDOCUMENTED IMMIGRANTS: FACTS AND FIGURES]. As of 2002, there are an estimated 9.3 million undocumented immigrants in the United States, representing 26% of the total foreign-born population. *Id.*

108. Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 *WASH. U. L.Q.* 675, 709 (2000) [hereinafter Johnson, *Against Racial Profiling in Immigration Enforcement*].

109. Rodríguez, *supra* note 68, at 230.

110. In 2000, Hispanics made up 42.1% of the population in New Mexico, 32.4% in California, 32% in Texas, and 25.3% in Arizona. U.S. CENSUS BUREAU, CENSUS 2000 BRIEF: THE HISPANIC POPULATION 4 (2000) [hereinafter U.S. CENSUS BUREAU, HISPANIC POPULATION], <http://www.census.gov/prod/2001pubs/c2kbr01-3.pdf> (last visited April 10, 2007). One commentator estimates that one-eighth of the Latino population in these border states is undocumented. Culp, *supra* note 45, at 817 n.125.

the highest proportions of Latinos also are along the U.S. border with Mexico.¹¹¹ Accordingly, most of the cases discussed in this Note originated in the southern parts of the Fifth, Ninth, and Tenth Circuits.¹¹² This is not only because of the large Latino population, but also because most Border Patrol agents are stationed along the U.S.-Mexican border.

4. *Immigration Enforcement in Practice: The Border Patrol*

The Border Patrol was established in 1924 and is the uniformed law enforcement agency of the United States Customs and Border Protection (CBP).¹¹³ Its primary mission remains detecting and preventing the “illegal entry of aliens into the country,” although its *priority* mission is preventing terrorists and terrorists’ weapons from entering the country.¹¹⁴ To enable them to do this, Border Patrol officers have the power to board “any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle” within 100 miles of the U.S. external border¹¹⁵ and to interrogate without warrant “any alien or person believed to be an alien as to his right to be or to remain in the United States.”¹¹⁶

The Border Patrol has expanded from 6500 agents in 1997 to more than 14,000 agents today,¹¹⁷ and it is responsible for over 95% of undocumented immigrant apprehensions.¹¹⁸ As of 1997, 92% of those agents were stationed in the nine sectors across the southwest border.¹¹⁹ Accordingly, the Border Patrol apprehended 1.5 million

111. U.S. CENSUS BUREAU, HISPANIC POPULATION, *supra* note 110, at 5. As of 2000, Hispanics were the majority in thirty-four Texas counties, nine New Mexico counties, two Arizona counties, and two California counties. *Id.*

112. See *supra* Parts I.B–C; *infra* Part II.C.

113. Steve Helfand, *Desensitization to Border Violence & the Bivens Remedy to Effectuate Systemic Change*, 12 LA RAZA L.J. 87, 87 (2000); CBP Border Patrol Overview, http://www.cbp.gov/xp/cgov/border_security/border_patrol/border_patrol_ohs/overview.xml [hereinafter CBP Border Patrol Overview] (last visited Feb. 3, 2008).

114. CBP Border Patrol Overview, *supra* note 113.

115. 8 U.S.C. § 1357(a)(3) (2006); 8 C.F.R. 287.1(a)(2) (2006).

116. 8 U.S.C. § 1357(a)(1) (2006).

117. *Accountability for Security Gaps Hearing*, *supra* note 84 (testimony of Michael Chertoff, Sec’y, Department of Homeland Security); Helfand, *supra* note 113, at 88 n.5. By the end of 2008, the DHS expects to have more than 18,300 Border Patrol officers, over double the number in 2001. *Accountability for Security Gaps Hearing*, *supra* note 84 (testimony of Michael Chertoff, Sec’y, Department of Homeland Security).

118. Helfand, *supra* note 113, at 88.

119. U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-98-21, ILLEGAL IMMIGRATION: SOUTHWEST BORDER STRATEGY RESULTS INCLUSIVE; MORE EVALUATION NEEDED 7 (1997) [hereinafter GAO, ILLEGAL IMMIGRATION]. The Border Patrol remains con-

undocumented immigrants along the southwest border in 1997 and only 100,000 elsewhere in the nation.¹²⁰ Internal enforcement, now carried out by U.S. Immigration and Customs Enforcement (ICE),¹²¹ has increased its efforts, resulting in the record apprehension in 2007 of 276,912 undocumented immigrants¹²² while the Border Patrol apprehended about 1.1 million.¹²³ Department of Homeland Security Secretary Michael Chertoff attributes the drop in Border Patrol apprehensions partially to successful deterrence at the border through the deployment of National Guard and the infrastructure of 113 miles of fencing and 112 miles of vehicle barriers.¹²⁴

Perhaps enforcement of immigration laws intuitively should happen at the nation's border, but 45% of the undocumented population is actually already in the country when they become undocumented.¹²⁵ They entered *legally* through ports of entry and then overstayed their visas. An estimated 91% of undocumented immigrants not from Mexico or Central America are visa overstays.¹²⁶ In contrast, only about 16% of undocumented immigrants from Mexico and about 27% of undocumented immigrants from Central America overstayed their visas.¹²⁷ Thus, non-Latino undocumented immigrants (mostly visa overstays) are less likely to be apprehended by immigration enforcement authorities who focus their resources on border enforcement, and increasingly on worksite enforcement,¹²⁸ instead of visa overstay en-

centrated along the southwest border but to a slightly less degree. As of September 2006, 89% of Border Patrol officers were stationed in the southwest border region, and this percentage is projected to drop to 84% in December 2008. U.S. GEN. ACCOUNTING OFFICE, GAO-07-540R, TRAINING NEW BORDER PATROL AGENTS: AN OVERVIEW 6 (2007), available at <http://www.gao.gov/new.items/d07540r.pdf>.

120. GAO, ILLEGAL IMMIGRATION, *supra* note 119, at 7.

121. ICE was formed in 2003 by combining the law enforcement arms of the former Immigration and Naturalization Service (INS) and the former United States Customs Service. U.S. Immigration & Customs Enforcement, Dep't of Homeland Sec., About ICE, <http://www.ice.gov/about/index.htm> (last visited June 17, 2008).

122. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SECURITY, ICE FISCAL YEAR 2007 ANNUAL REPORT: PROTECTING NATIONAL SECURITY AND UPHOLDING PUBLIC SAFETY 4 (2008), available at http://www.ice.gov/doclib/about/ice07ar_final.pdf.

123. Spenser S. Hsu, *Immigration Arrests Down 8% for Year: DHS Credits Deterrent Effect of Enforcement Tactics, but Analysts Are Skeptical*, WASH. POST, Oct. 31, 2006, at A5.

124. *Accountability for Security Gaps Hearing*, *supra* note 84 (testimony of Michael Chertoff, Sec'y, Department of Homeland Security).

125. MODES OF ENTRY, *supra* note 77, at 1.

126. *Id.* at 4.

127. *Id.*

128. *Compare Accountability for Security Gaps Hearing*, *supra* note 84 (testimony of Michael Chertoff, Sec'y, Department of Homeland Security) (noting that, in 2007, ICE "made 3,942 administrative arrests and 790 criminal arrests in worksite enforce-

forcement.¹²⁹ This helps explain why, despite the fact that Latinos comprise approximately 80% of the undocumented immigrant population, they account for over 90% of deportations.¹³⁰ Rather than dividing federal resources between border enforcement and visa overstay enforcement in a manner that is proportional to the undocumented population, immigration enforcement favors non-Latino undocumented immigrants over Latino undocumented immigrants.¹³¹ This may serve efficiency concerns due to the awkwardness of finding immigrants who overstay their visas as opposed to those who illegally cross the border,¹³² but its discriminatory impact can hardly be denied.

The Border Patrol conducts three kinds of inland traffic-checking operations: permanent checkpoints, temporary checkpoints, and roving

ment cases”) with *Lack of Worksite Enforcement & Employer Sanctions: Hearing before the H. Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law*, 109th Cong. (2005) (testimony of Congressman John N. Hostetler) (“ICE has pursued almost no worksite enforcement at all ever since its creation.”).

129. See U.S. GEN. ACCOUNTING OFFICE, GAO-03-660T, HOMELAND SECURITY: CHALLENGES TO IMPLEMENTING THE INTERIOR IMMIGRATION ENFORCEMENT STRATEGY 1 (“Historically, Congress and INS have devoted over five times more resources in terms of staff and budget on border enforcement than on interior enforcement.”). US-VISIT, a biometric entry and exit program that began in 2004 to track visa overstay, has had an annual budget of between \$330 million and \$362 million. See *US-VISIT: Challenges and Strategies for Securing the U.S. Border: Hearing before S. Subcomm. on Terrorism, Technology, and Homeland Security*, 110th Cong. (2007) (testimony of C. Stewart Verdery, Jr., Partner and Founder, Monument Policy Group, LLC, and Adjunct Fellow, Center for Strategic and International Studies), <http://judiciary.senate.gov/hearing.cfm?id=2474>. Since its inception and until December 2006, US-VISIT helped ICE officials make about 290 arrests. *Id.* (testimony of Richard Barth, Asst. Sec’y for Policy Development, and Robert Mocny, Acting Director, US-VISIT Program Department of Homeland Security), available at <http://judiciary.senate.gov/hearing.cfm?id=2474>. That is only a small fraction of the people who overstay their visas. See *MODES OF ENTRY*, *supra* note 77, at 1 (estimating that 4.5 to 6 million of the unauthorized immigrant population entered the United States legally). In contrast, the Border Patrol apprehended about 1.1 million undocumented immigrants on a budget of less than \$2 billion in fiscal year 2007, amounting to less than \$2000 per arrest as opposed to roughly \$4.5 million per arrest. See Hsu, *supra* note 123; Tyche Hendricks, *On the Border; More Patrols, Stronger Fences May Keep Some Immigrants from Illegally Entering the U.S.*, SAN FRANCISCO CHRON., Mar. 12, 2007, at A1.

130. UNDOCUMENTED IMMIGRANTS: FACTS AND FIGURES, *supra* note 107; Johnson, *Against Racial Profiling in Immigration Enforcement*, *supra* note 108, at 678.

131. See, e.g., Hernández-Truyol, *supra* note 82, at 265–66 (making argument with regard to the non-inclusion in Proposition 187 of immigrants who have illegally overstayed their visas, saying this “reveals its true racist and mean-spirited nature”).

132. Some argue that immigration enforcement efforts at the border are more cost effective than an internal visa overstay operations would be. See David A. Martin, *Eight Myths of Immigration Enforcement*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 525, 544 (2007); *supra* note 129.

ing patrols.¹³³ At permanent and temporary checkpoints, a vehicle must stop, a Border Patrol officer may ask questions about the occupants' citizenship and immigration status, and the officer will then either wave them through or pull them over to a secondary checkpoint for more thorough questioning.¹³⁴ Up to that point, the officer need not justify his or her actions. To search a vehicle, the officer must establish probable cause to believe that someone in the vehicle is violating a federal law.¹³⁵ A roving patrol consists of a Border Patrol officer pulling a vehicle over because he or she has a reasonable suspicion that someone in the vehicle is an undocumented immigrant.¹³⁶ The officer can ask questions and conduct a visual search, but to do more, the officer must establish probable cause. Often, officers will conduct roving patrols when they have been tipped off that some immigrants may be illegally crossing the border in a certain area, but they can patrol an area, as opposed to actually stopping individuals, for any reason at all.¹³⁷

B. Attempting to Overrule Brignoni-Ponce: The Thrice-Introduced But Never-Passed "End Racial Profiling Act"

By the end of the 1990s, racial profiling had been largely discredited for criminal law enforcement purposes.¹³⁸ Prior to the terrorist attacks on September 11, 2001, President Bill Clinton called racial

133. *United States v. Martinez-Fuerte*, 428 U.S. 543, 552 (1976).

134. *Id.* at 552, 558–60. See generally U.S. GEN. ACCOUNTING OFFICE, GAO-05-435, BORDER PATROL: AVAILABLE DATA ON INTERIOR CHECKPOINTS SUGGEST DIFFERENCES IN SECTOR PERFORMANCE 10–14 (2005) [hereinafter GAO, INTERIOR CHECKPOINT DATA] (referring to temporary checkpoints as "tactical checkpoints").

135. *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973). Probable cause requires that "facts available to the officer would warrant a man of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false." *United States v. Dunn*, 946 F.2d 615, 619 (9th Cir. 1991) (internal quotations and citations omitted). For example, probable cause was established when an officer noticed a balloon in a car stopped at a routine driver's license checkpoint that was tied to conceal drugs, vials, and loose white. *Texas v. Brown*, 460 U.S. 730, 742–43 (1983).

136. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975).

137. See generally GAO, INTERIOR CHECKPOINT DATA, *supra* note 134, at 14 n.15 (defining roving patrol as "a stop by an agent who patrols in a vehicle but who is not assigned to a particular location"); Eleanor Barbour, Consensual Encounter: The Border Patrol Resumes an Old Policy of Random Sweeps in Search of Illegal Immigrants Far from the Border, L.A. CITY BEAT, July 8, 2004, available at <http://69.94.104.186/article.php?IssueNum=57&id=1042>. Since deciding where to conduct roving patrols is a matter of discretion, it would be very difficult to maintain an equal protection claim against Border Patrol officers for targeting certain neighborhoods.

138. See Bali, *supra* note 64, at 164; Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 163 (2002).

profiling “morally indefensible” and “deeply corrosive,”¹³⁹ President George W. Bush pledged to end it,¹⁴⁰ and former Attorney General John Ashcroft described it as “an unconstitutional deprivation of equal protection under the Constitution.”¹⁴¹ Yet, the most the U.S. Senate has done with the End Racial Profiling Act (ERPA or “the Act”), which Senator Russell Feingold has introduced four times since 2001,¹⁴² is to hold a subcommittee hearing.¹⁴³

The Act defines racial profiling as “the practice of a law enforcement agent or agency relying, *to any degree*, on race, ethnicity, national origin, or religion in selecting which individual to subject to routine or spontaneous investigatory activities.”¹⁴⁴ Under the Act, a law enforcement agent can only consider race when “trustworthy information, relevant to the locality and timeframe, . . . links a person of a particular race, ethnicity, national origin, or religion to an identified criminal incident or scheme.”¹⁴⁵ This Note adopts the definition used by the ERPA. Racial profiling can be defined more narrowly to mean using race as a key factor, rather than just a factor relied upon to any degree, in making investigatory stops.¹⁴⁶ Racial profiling can also be defined more broadly to include the use of race in descriptions of particular suspects.¹⁴⁷ This broader definition would include, for example, reliance on a racial characteristic of a particular suspect from a witness description. The definition of racial profiling in ERPA and in

139. Randall Kennedy, *Suspect Policy*, NEW REPUBLIC, Sept. 13–20, 1999, at 30, 31 [herein after Kennedy, *Suspect Policy*].

140. President’s Address Before a Joint Session of Congress on Administration Goals, 1 PUB. PAPERS 140, 143 (Feb. 27, 2001).

141. Thomas B. Edsall, *Black Caucus, Ashcroft Have Tense Meeting: Attorney General Cites “Candid Exchange” and Stresses Agreement on Profiling*, WASH. POST, Mar. 1, 2001, at A6.

142. See End Racial Profiling Act (ERPA) of 2007, S. 2481, 110th Cong. (2007); ERPA of 2005, S. 2138, 109th Cong. (2005); ERPA of 2004, S. 2132, 108th Cong. (2004); ERPA of 2001, S. 989, 107th Cong. (2001).

143. See *ERPA Hearing*, *supra* note 94, at 6 (testimony of Sen. Charles E. Schumer). Representative Conyers introduced companion bills in the House in 2001, 2004, and 2007. See ERPA of 2007, H.R. 4611, 110th Cong. (2007); ERPA of 2004, H.R. 3847, 108th Cong. (2004); ERPA of 2001, H.R. 2074, 107th Cong. (2001).

144. ERPA of 2007, S. 2481 § 3(6) (emphasis added).

145. *Id.*

146. See, e.g., U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-00-41, RACIAL PROFILING: LIMITED DATA AVAILABLE ON MOTORIST STOPS 1 (2000).

147. Strong arguments can be made that even in these particularized circumstances the use of race is discriminatory due to the unconscious biases of the person providing the description of the criminal. See, e.g., Deborah Ramirez, Jennifer Hoopes & Tara Lai Quinlan, *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195, 1205 (2003). The ERPA specifically rejects this definition. ERPA of 2005, S. 2138 § 3(6).

this Note does not include instances of such particularized description, but it does include general reliance on race to any degree.

Other than increased congressional findings supporting the need for such a bill, the ERPA has changed very little over the years.¹⁴⁸ According to the findings, statistical evidence suggests that racial profiling is a national problem in need of a federal response.¹⁴⁹ While the focus of the 2001 subcommittee hearings was on the racial profiling of African Americans, Latinos, and Asians,¹⁵⁰ the post-2001 versions of the ERPA mention that “many Arabs, Muslims, Central and South Asians, and Sikhs” have been subject to searches and seizures based only on generalized, not specific, suspicion.¹⁵¹ The ERPA also declares the 2003 Department of Justice guidelines on racial profiling to be insufficient, particularly with regard to federal law enforcement officers charged with protecting national security or the country’s borders.¹⁵² These officers are instructed that they may consider race or ethnicity when making investigatory stops.¹⁵³

The ERPA requires federal, state, and local law enforcement to take steps to eliminate racial profiling.¹⁵⁴ This includes federal law enforcement agencies involved in the enforcement of immigration and customs laws,¹⁵⁵ such as ICE agents and Border Patrol officers.¹⁵⁶ In doing this, the ERPA implicitly overrules the Supreme Court’s decision in *Brignoni-Ponce* that Mexican appearance is a relevant factor

148. Compare ERPA of 2007, S. 2481 § 2, with ERPA of 2005, S. 2138 § 2, and ERPA of 2004, S. 2132 § 2, and ERPA of 2001, S. 989 § 2.

149. ERPA of 2007, S. 2481 § 2(a)(6)–(7). For example, a 2001 Department of Justice report found that “although Blacks and Hispanics were more likely to be stopped and searched, they were less likely to be in possession of contraband” than Whites. *Id.* § 2(a)(10).

150. See *ERPA Hearing*, *supra* note 94.

151. ERPA of 2007, S. 2481 § 2(16); ERPA of 2005, S. 2138 § 2(16); ERPA of 2004, S. 2132 § 2(15). Generalized suspicion does not link a specific individual to criminal conduct.

152. ERPA of 2007, S. 2481 § 2(a)(4)–(5); ERPA of 2005, S. 2138 § 2(a)(4)–(5); ERPA of 2004, S. 2132 § 2(a)(4)–(5). See generally DOJ RACE GUIDANCE, *supra* note 30.

153. DOJ RACE GUIDANCE, *supra* note 30, at 9 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975)).

154. Such steps include prohibiting racial profiling, training on issues of racial profiling in law enforcement, collecting data, and establishing meaningful procedures for investigating allegations of racial profiling. ERPA of 2007, S. 2481 §§ 201, 301.

155. ERPA of 2007, S. 2481 § 3(4)–(5).

156. See generally U.S. Immigration & Customs Enforcement, Dep’t of Homeland Sec., About ICE, <http://www.ice.gov/about/index.htm> (last visited June 17, 2008); U.S. Customs & Border Patrol, Dep’t of Homeland Sec., This is CBP, http://www.cbp.gov/xp/cgov/about/mission/cbp_is.xml (last visited June 17, 2008).

for Border Patrol officers to consider when determining whether to conduct an investigatory traffic stop.¹⁵⁷

Senator Feingold insists that September 11th “cannot be an excuse for continued delay in dealing with the problem of racial profiling.”¹⁵⁸ However, the federal response to the attacks of September 11th was to systematically profile men of Middle Eastern or South Asian origin.¹⁵⁹ This set back the achievements of those opposed to racial profiling and indirectly encouraged private discrimination against these targeted communities.¹⁶⁰ Under the heightened threat of terrorism, many scholars and advocates fear that the public considers freedom from racial profiling to be a civil liberty it can live without.¹⁶¹

The ERPA, however, has not lost its popularity with human rights and civil liberties organizations.¹⁶² This is undoubtedly because studies confirm that African Americans are routinely stopped for

157. None of the versions of the ERPA or the subcommittee hearing mentions an allowance for consideration of racial appearance in decisions whether to make a stop. See ERPA of 2007, S. 2481; ERPA of 2005, S. 2138; ERPA of 2004, S. 2132; ERPA of 2001, S. 989; *ERPA Hearing*, *supra* note 94. See generally *Brignoni-Ponce*, 422 U.S. at 886–87.

158. Russell Feingold, Op-Ed., *Congress Must Devote More Energy to Civil Rights*, ATLANTA J.-CONST., Dec. 24, 2002, at A15 (“We need improved intelligence and law enforcement, not racial stereotypes, to protect our nation from future terrorist attacks.”).

159. See Akram & Johnson, *supra* note 102, at 295–96; Bali, *supra* note 64, at 164. For example, in 2002, Attorney John Ashcroft implemented “special registration” requirements for non-immigrant aliens (such as people in the United States on a student, business, or tourist visa) from certain designated countries. Registration and Fingerprinting, 8 C.F.R. 264.1(f) (2008). Citizens of the following countries were required to register: Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Libya, Lebanon, Morocco, North Korea, Oman, Pakistan, Qatar, Somalia, Saudi Arabia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen. Immigration and Customs Enforcement, Dep’t of Homeland Sec., Changes to National Security Entry/Exit Registration System (NSEERS), <http://www.ice.gov/pi/news/factsheets/nseersFS120103.htm>, last visited (June 17, 2008).

160. Akram & Johnson, *supra* note 102, at 296 (“Immediately after September 11, hate crimes against Arabs, Muslims, and others rose precipitously.”); Bali, *supra* note 64, at 164.

161. See Bali, *supra* note 64, at 164; Johnson, *Challenging Racial Profiling*, *supra* note 29, at 351 n.56.

162. See AM. CIVIL LIBERTIES UNION, DIMMING THE BEACON OF FREEDOM: U.S. VIOLATIONS OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 17, 109 (2006) [hereinafter ACLU ICCPR REPORT]; *ERPA Hearing*, *supra* note 94, at 80 (statement of Laura W. Murphy, Director, American Civil Liberties Union, Washington, D.C.); *id.* at 118 (statement of National Council of La Raza); Amnesty International USA: Race Profiling, http://www.amnestyusa.org/Domestic_Human_Rights/Racial_Profiling/page.do?id=1106650&n1=3&n2=850&n3=1298 (last visited May 10, 2007).

“driving while Black” and Latinos/as for “driving while Brown.”¹⁶³ As Senator Chuck Schumer explained, “Latino Americans face a double whammy, first, of being profiled as law-breakers and, if that doesn’t hold up, as illegal immigrants.”¹⁶⁴ As previously mentioned, a survey of over 300 families in Arizona border communities revealed that a majority of residents felt that Border Patrol agents stopped people for simply having brown skin.¹⁶⁵ Some organizations have even appealed to international bodies asserting that the United States is not following international law prohibiting discriminatory policies.¹⁶⁶ Such discrimination in immigration law, unfortunately, is not unusual and is not necessarily unconstitutional, as the previous sections discussed.

C. *How Brignoni-Ponce Has Been Updated By Courts: Montero-Camargo, Manzo-Jurado, and Habeeb*

While *Brignoni-Ponce* remains good law, lower courts have tweaked its reasoning and application in the face of shifting demographic statistics, social consciousness, and political atmosphere. As early as 1981, the Fifth Circuit noted that the presence of someone appearing to be of Latin origin was not suspicious in places where that characteristic describes a large portion of the population.¹⁶⁷ Even when the Border Patrol officer relies in part on a person’s Latino appearance, the Fifth Circuit accords it very little weight.¹⁶⁸ Rather, the

163. Johnson, *Challenging Racial Profiling*, *supra* note 29, at 343–43; see ERPA of 2005, S. 2138 § 2(a)(10)–(12); David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 276–88 (1999); Thompson, *supra* note 22, at 957.

164. *ERPA Hearing*, *supra* note 94, at 6 (statement of Sen. Charles Schumer, Member, S. Subcomm. on the Constitution, Federalism and Property Rights). Latinos are often profiled as drug traffickers or dealers. See *United States v. Rodriguez*, 976 F.2d 592, 595–96 (9th Cir. 1992) (describing profile Border Patrol officers use for drug dealers as including Hispanic appearance). This Note addresses only the enforcement of immigration laws. The racial profiling law enforcement officers engage in when enforcing drug laws is outside this article’s scope.

165. JUSTICE ON THE LINE, *supra* note 92, at 3.

166. See ACLU ICCPR REPORT, *supra* note 162, at 99, 103 (arguing before the UN that ICCPR Article 26 is being violated by continuing racial profiling); BNHR REPORT TO UNHRC, *supra* note 83, at 14; Sergio Bustos, *Frustration Over Illegal Immigration Mounts*, GANNETT NEWS SERVICE, April 21, 2005, at 3A; *Human Rights Abuses on Border are Alleged to OAS Panel*, ST. LOUIS POST-DISPATCH, Aug. 13, 1992, at 1C.

167. *United States v. Orona-Sanchez*, 648 F.2d 1039, 1042 (5th Cir. 1981) (“Nor is there anything vaguely suspicious about the presence of persons who appear to be of Latin origin in New Mexico where over one-third of the population is Hispanic.”).

168. See *United States v. Chavez-Villarreal*, 3 F.3d 124, 127 (5th Cir. 1993) (noting that Chavez-Villarreal’s Arizona license plate indicated that he was from a state with

Fifth Circuit primarily focuses on whether the agent had reason to believe that the vehicle came from the border, although a combination of other factors can compensate for a lack of this showing.¹⁶⁹ Still, the government argues that a person's "Hispanic appearance" gives a Border Patrol agent "reasonable suspicion that the driver was involved in illegal activity" since most undocumented immigrants are Hispanic.¹⁷⁰

The Tenth Circuit has reiterated the validity of Border Patrol officers' consideration of a person's racial appearance when determining whether to make a stop.¹⁷¹ But even when a Border Patrol agent testified that the occupants of the vehicle appeared to be Hispanic, the court responded that "many citizens of the United States 'appear to be Hispanic,'" that this is not unusual, and that it "certainly is not indicia of criminal conduct."¹⁷² Thus, like the Fifth Circuit, the Tenth Circuit seems to give little weight to an immigration officer's consideration of a person's racial appearance in deciding whether to perform a roving immigration stop.¹⁷³

The Ninth Circuit has explicitly rejected the consideration of profiles that are "very likely to sweep many ordinary citizens into a

a "substantial Hispanic population"); *United States v. Zertuche-Tobias*, 953 F. Supp. 803, 821 n.54 (S.D. Tex. 1996); *United States v. Rubio-Hernandez*, 39 F. Supp. 2d 808, 836 (W.D. Tex. 1998). *But see* Renata Ann Gowie, *Driving While Mexican: Why the Supreme Court Must Reexamine United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), 23 Hous. J. INT'L. L. 233, 248 (2001) (arguing that "the Fifth Circuit's rulings encourage stops merely based on race").

169. *United States v. Garcia*, 732 F.2d 1221, 1223 (5th Cir. 1984) (citing *United States v. Lamas*, 608 F.2d 547, 549 (5th Cir. 1979)). These factors, based on the *Brignoni-Ponce*, include "characteristics of the area in which the vehicle is encountered, . . . type and appearance of the vehicle, . . . and number, appearance, and behavior of the passengers." *Id.*

170. *United States v. Rubio-Hernandez*, 39 F. Supp. 2d 808, 835-36 (W.D. Tex. 1998) (noting that the agent did not rely upon haircut or dress as permitted by *Brignoni-Ponce*). Border Patrol agents have also testified that, in their experience, "a lone Hispanic driver" on a certain highway early in the morning "was either smuggling illegal aliens or drugs." *United States v. Samaguey*, 180 F.3d 195, 196-97 (5th Cir. 1999) (holding that agents had a reasonable suspicion for stopping the car under totality of the circumstances because "Samaguey's journey originated at the border, . . . [he] was traveling alone, in an out-of-state car, registered to a female, at an unusual hour, on a road known for illegal activity").

171. *See United States v. Abdon-Limas*, 780 F. Supp. 773, 775 (D.N.M. 1991); *United States v. Pollack*, 895 F.2d 686, 690 (10th Cir. 1990); *United States v. Sperow*, 551 F.2d 808, 810 (10th Cir. 1977); *United States v. Monsisvais*, 907 F.2d 987, 990 (10th Cir. 1990).

172. *Abdon-Limas*, 780 F. Supp. at 778.

173. While race-based immigration stops have resulted in decisions by courts from circuits other than the Fifth, Ninth, and Tenth, none of those decisions have addressed the reliance on appearing to be a certain race or nationality.

generality of suspicious appearance.”¹⁷⁴ Thus, where a majority or substantial number of people share a specific characteristic, then that characteristic has little or no probative value in contributing toward the particularized and objective basis necessary to support reasonable suspicion.¹⁷⁵

In 2000, the Ninth Circuit applied this reasoning in *Montero-Camargo* to racial appearance when it held that the traffic stop in question was justified under the reasonable suspicion standard but that the officers should not have considered the plaintiff’s Hispanic appearance.¹⁷⁶ This decision in effect rejects, under certain circumstances, the holding of *Brignoni-Ponce* that Hispanic appearance is a permissible factor to consider. The court justified this rejection in part by noting that *Brignoni-Ponce* relied on outdated statistics and that the Hispanic population of the four states referred to by the Court had increased by at least five-fold during the intervening twenty-five years.¹⁷⁷ The stop in question occurred in El Centro, an area where Hispanics are heavily in the majority.¹⁷⁸ The court found that “Hispanic appearance is of little or no use in determining which particular individuals among the vast Hispanic populace should be stopped by law enforcement officials on the lookout for illegal aliens.”¹⁷⁹ The use of race for these purposes does not meet the narrow tailoring requirements that are necessitated by Supreme Court cases invalidating the use of racial classifications.¹⁸⁰

174. *United States v. Rodriguez*, 976 F.2d 592, 595–96 (9th Cir. 1992) (noting that the profile of “a Hispanic man cautiously and attentively driving a 16 year-old Ford [Ranchero] with a worn suspension, who glanced in his rear view mirror while being followed by agents in a marked Border Patrol car” could fit thousands of law abiding daily users of Southern California highways); *see also* *United States v. Montero-Camargo*, 208 F.3d 1122, 1129–30 (9th Cir. 2000); *United States v. Franco-Munoz*, 952 F.2d 1055, 1057 (9th Cir. 1991) (providing similar profile).

175. *Montero-Camargo*, 208 F.3d at 1131.

176. *Id.* at 1139. The factors used by the Border Patrol that were considered by the district court were (1) a tip that two cars with Mexican license plates made a U-turn in the middle of the highway just before the checkpoint, (2) alleged driving in tandem and Mexicali license plates of plaintiffs’ cars, (3) the area in question was a “notorious spot where smugglers turn around” according to officers’ experience, (4) Hispanic appearance of occupants of both cars, and (5) the fact that a passenger picked up a newspaper as the Border Patrol car approached. *Id.* at 1128. The court rejected the last two factors. *Id.* at 1139–40.

177. *Id.* at 1133.

178. *Id.* Seventy-three percent of the population of Imperial County, in which El Centro is located, is Hispanic. *Id.*

179. *Id.* at 1134.

180. *See id.*; *see also* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

Montero-Camargo can be broadly read to say that a person's Latino appearance is "not an appropriate factor" to be relied upon when an immigration officer decides whether to perform an investigatory stop.¹⁸¹ Just six years later, the Ninth Circuit cabined *Montero-Camargo* as only applying to regions "heavily populated" by Latinos.¹⁸² The *Manzo-Jurado* decision permitted the consideration of a person's Latino appearance during an investigatory stop in Havre, Montana, a city sparsely populated by Latinos.¹⁸³

Lower courts have shifted toward accepting race considerations. A recent decision by a district court in Montana granted summary judgment to Border Patrol officers in a claim filed by Abdul Ameer Yousef Habeeb under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, which provides for a damages action in federal court against federal officers whose actions violated the Constitution.¹⁸⁴ After descending from a bus at its regularly scheduled stop in Havre, Montana, a Border Patrol officer approached Habeeb, who was on his way from Seattle to a new journalism job in Washington, D.C.,¹⁸⁵ began asking him questions about his immigration status, and discovered that Habeeb was an Iraqi who did not go through the "special registration" required of immigrants from certain countries pursuant to regulations promulgated by the Attorney General.¹⁸⁶ Seeming to rely solely on geographic location and deference

181. *Montero-Camargo*, 208 F.3d at 1135 ("[A]t this point in our nation's history, and given the continuing changes in our ethnic and racial composition, Hispanic appearance is, in general, of such little probative value that it may not be considered as a relevant factor where particularized or individualized suspicion is required. Moreover, we conclude . . . that it is also not an appropriate factor.").

182. *United States v. Manzo-Jurado*, 457 F.3d 928, 935 n.6 (9th Cir. 2006). The court did not define what constituted "heavily populated," but justified not applying *Montero-Camargo* because the Latinos constituted only 1.5% of the population in Havre. *Id.*

183. *Id.* The court, however, held that the stop in this case was not based on reasonable suspicion because certain factors, such as the fact that Manzo-Jurado stayed in the area despite knowing of the presence of the Border Patrol agent, weighed against suspicion and other factors, such as the fact that Manzo-Jurado and his friends were not cheering for a football team even though they were at the stadium, should not have been considered. *Id.* at 937, 939. The dissent argued that not cheering at a football game should create a presumption of violating immigration laws if that conclusion is based in the officer's experience. *Id.* at 941 (Gould, J., dissenting).

184. *Habeeb v. Castloo*, 434 F. Supp. 2d 899, 911-12 (D. Mont. 2006); see *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

185. David Bowermaster, *Feds Apologize for Iraqi Refugee's Detention*, SEATTLE TIMES, Aug. 24, 2007, at B1.

186. *Habeeb*, 434 F. Supp. 2d at 903. Under the National Security Entry-Exit Registration System, an immigrant must register if he: "(1) [i]s a male who was born on or before November 15, 1986; (2) [i]s a national or citizen of one of [several countries, including Iraq.] . . . and was last admitted to the United States as a nonimmigrant on

to the officers' experience, the court concluded that the officers had a reasonable suspicion to stop and question Habeeb.¹⁸⁷ The court did not offer or question the officers' reasons for making the stop.

With regard to Habeeb's equal protection claim, the court emphasized the ability of an officer making an investigatory stop to make use of a person's appearance.¹⁸⁸ The court found that Habeeb failed to show discriminatory purpose by simply asserting that the officer questioned him based solely on his race or ethnicity. For instance, Habeeb did not allege that the officer made any untoward comments or that he singled out Habeeb.¹⁸⁹ Thus, even though the court was determining a summary judgment motion where the pleading should be read in a light most favorable to the plaintiff,¹⁹⁰ the court claimed that it could not infer from the facts alleged that the officers questioned Habeeb solely based on race.¹⁹¹ The court defended immigration enforcement officers' reliance on appearance by arguing that, border protection officers would not otherwise be able to carry out the responsibilities assigned to them by law, which would result in a "chilling effect upon fundamentally-reasonable and appropriate law enforcement efforts."¹⁹²

The court's *Habeeb v. Castloo* opinion was withdrawn over a year later upon a joint motion to vacate judgment after the parties agreed to a settlement.¹⁹³ Habeeb received a written apology from the U.S. government and \$250,000 as part of the settlement.¹⁹⁴ The American Civil Liberties Union, who was representing Habeeb before the Ninth Circuit, characterized the settlement as "'a strong reminder that the government must not engage in ethnic profiling.'"¹⁹⁵ The government argued that the case and settlement had nothing to do with racial profiling, although it did admit that Habeeb should have never

or before [September 10, 2002]; and (3) [w]ill remain in the United States at least until December 16, 2002.'" *Id.* at 908 (quoting Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 67,766, 67,766 (Nov. 6, 2002)).

187. *Habeeb*, 434 F. Supp. 2d at 906. In addition, the court concluded that, since the train station was 45 miles south of the Canadian border, the officers could have boarded and searched the train for aliens under 8 U.S.C. § 1357(a)(3) and that Congress must have intended this grant of authority to include questioning passengers who descended at regularly scheduled stops. *Id.*

188. *Id.* at 910 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 885–87 (1975) and *United States v. Ortiz*, 422 U.S. 891, 897 (1975)).

189. *Id.* at 911.

190. *Id.* at 903 (citing Fed. R. Civ. P. 56(c)).

191. *See id.* at 911.

192. *Id.*

193. *Habeeb v. Castloo*, 2007 U.S. Dist. LEXIS 51268, at *1 (D. Mont. 2007).

194. Bowermaster, *supra* note 185, at B1.

195. *Id.* (quoting Jesse Wing, board president of the Washington ACLU).

been detained because, as an Iraqi refugee, he did not have to go through special registration.¹⁹⁶

Under *Manzo-Jurado*, the Ninth Circuit would permit border protection officers in this case to have relied in part on Habeeb's racial appearance so long as, under the totality of the circumstances, this race consideration was combined with other factors in order to create a reasonable suspicion. These cases reflect how the discomfort with the *Brignoni-Ponce* rule and with racial profiling that had been growing before September 11 was abandoned in the aftermath of September 11. Still, in light of the demographic, political, and social changes that the United States has experienced since 1975 and the proposal of the End Racial Profiling Act, the permissibility of considering race to perform an immigration investigatory stop is ripe for review.

III.

UPDATING *BRIGNONI-PONCE* AND INCORPORATING THE CONSIDERATION OF RACE INTO THE FOURTH AMENDMENT BALANCING TEST

Under *Brignoni-Ponce*, Border Patrol officers may detain or stop persons for questioning about their right to be in the United States without violating the Fourth Amendment as long as the officers have a reasonable suspicion that those detained may be immigrants.¹⁹⁷ In creating this standard, the Court first considered the balance of the public interest in allowing such stops against the burden on individual liberty such stops impose.¹⁹⁸ The Court then addressed how racial appearance may be relied upon, holding that officers may consider race but must supplement their consideration of race with at least one other suspicious factor.¹⁹⁹ The balancing test did not take into account the public interest and individual liberty concerns related to stigmatization and other harms that can be caused by such racially-based

196. *Id.* Habeeb was detained for seven days before being released after an attorney explained to CBP that Habeeb did not have to go through special registration. David Bowernmaster & Jennifer Sullivan, *U.S. Government Apologizes to Illegally Detained Iraqi Refugee*, SEATTLE TIMES, Aug. 23, 2007.

197. *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975). The Court attempts to limit the exercise of authority granted by §§ 287(a)(1) and (3) by permitting officers on roving patrol, except at the border and its functional equivalents, to stop vehicles "only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." *Id.*

198. *Id.* at 879–80.

199. *Id.* at 886–87.

stops.²⁰⁰ In the following analysis, I incorporate the race-based aspect of the stop into the Fourth Amendment balancing test.

Given the Court's decision in *Brignoni-Ponce* and the application of its holding in subsequent cases, this Part explores how subsequent arguments outlined by the courts and various scholars might change how *Brignoni-Ponce* would be decided today. Additional factors to consider include current demographic statistics and factors on both the public interest and individual interest sides of the test. I conclude that, while the efficiency gained by relying in part on race imposes a racial tax upon people appearing to belong to any of the targeted groups, permitting the consideration of race as a factor in deciding whether to make a stop is better than encouraging immigration law enforcement to mask any reliance they place on racial appearance. Nationality and often race are intrinsic parts of being an immigrant, and permitting them to be considered along with other factors at least acknowledges how officers may make their decisions and brings discussion of racial profiling in immigration enforcement out into the open.

A. *Race as a Relevant Factor: Battling Statistics*

Brignoni-Ponce used statistics to justify the Court's decision to permit the consideration of race but disallow the sole reliance on race. The Court reasoned that there were too many persons of Mexican descent to allow the Border Patrol to stop all of them randomly, but that enough persons appearing to be of Mexican descent were undocumented immigrants to make appearance a relevant factor.²⁰¹ The Court ignored the impact of this practice on Latinos who are documented immigrants or citizens and, as of 1996, account for 90% of Latinos in the United States.²⁰²

A preliminary question is whether the Court was correct in reasoning that race should be considered at all, independent of racial statistics about the undocumented population or the surrounding community. In criminal law enforcement, the use of race for generic stops is largely discredited if officers are not operating on a specific description of a suspect.²⁰³ Race is not an element of any crime, thus

200. See *id.* at 879–80 (conducting a balancing analysis without considering harms of racially-based stops); *infra* note 253 and accompanying text.

201. *United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975).

202. Johnson, *Against Racial Profiling in Immigration Enforcement*, *supra* note 108, at 709.

203. Johnson, *Challenging Racial Profiling*, *supra* note 29, at 344–47 (explaining that racial profiling in criminal law enforcement is based on supposed propensities of certain groups to commit crimes). See generally Alschuler, *supra* note 138 (evaluating the constitutionality of using racial classifications in police investigations).

using race as a factor in determining whether to stop someone amounts to asserting that certain racial groups have the propensity to commit certain crimes.²⁰⁴ In contrast, for many immigration law enforcement stops, the person must be an immigrant in order to have violated the law.²⁰⁵ The officer must thus have a reasonable suspicion that the person is an immigrant violating immigration laws in order to stop him or her.²⁰⁶ Given that an undocumented immigrant must be foreign and that often foreigners are not white,²⁰⁷ considering race is rational.²⁰⁸

The Court accepted that race could be considered, but its decision depended on the supposed high percentage of Mexicans that were undocumented.²⁰⁹ The use of such statistics presents the question of where to draw the line on the appropriateness of considering race.²¹⁰

204. Johnson, *Challenging Racial Profiling*, *supra* note 29, at 344–47.

205. The Border Patrol also enforces narcotics and smuggling laws that do not depend on the national origin of the suspected violator. *See* CBP Border Patrol Overview, *supra* note 113 (describing the Border Patrol's operations to apprehend undocumented immigrants and to interdict narcotics smuggling); *see, e.g.*, United States v. Montero-Camargo, 208 F.3d 1122, 1127 (9th Cir. 2000) (noting that the Border Patrol officers stop vehicles for both immigration and narcotics violations).

206. *Brignoni-Ponce*, 422 U.S. at 884.

207. Of the undocumented population, only an estimated 5% are from Europe and Canada; others are from countries where the substantial majority of the population is not white. UNDOCUMENTED IMMIGRANTS: FACTS AND FIGURES, *supra* note 107.

208. Even those who oppose race-based immigration enforcement do so by emphasizing the negative consequences for those who appear to be Latino, Asian, or Middle Eastern—not by arguing that considering that person's appearance is irrational. *See* Johnson, *Challenging Racial Profiling*, *supra* note 29, at 350–52 (emphasizing negative consequences); Johnson, *Against Racial Profiling in Immigration Enforcement*, *supra* note 108, at 680 (noting that virtually every other body of public law has a deep suspicion of the racial classifications permitted in race-based immigration stops); *see also* Susan Sachs, *Files Suggest Profiling of Latinos Led to Immigration Raids*, N.Y. TIMES, May 1, 2001, at B1 (“Nationality is clearly an element to be considered when looking for illegal immigrants: all illegal immigrants, by definition, are foreigners. But simply looking or sounding foreign, civil rights groups have argued, is not a sufficient basis for suspicion in a country where illegal immigrants may not differ in race, ethnicity or national origin from everyone else around them.”).

209. The Court accepts the government's estimates that 85% of undocumented immigrants are of Mexican origin. *Brignoni-Ponce*, 422 U.S. at 879. The Court acknowledges estimates of the undocumented population in the United States as ranging from 1 million to 12 million. *Id.* at 878. The Court also lists the percentages of the Mexican-American population in Texas, New Mexico, Arizona, and California who are registered as aliens, which all range between 8.5% and 20.4%. *Id.* at 886 n.12. However, the Court recognizes that these figures likely do not include undocumented immigrants or people who are not Mexican-American but have a similar physical appearance to those who are. *Id.*

210. Statistics are also highly manipulable and, particularly in the case of undocumented immigrants, are difficult to come by. One example of this is how the Court supports government estimates of undocumented immigrants by referring to the INS deportation statistics. *Brignoni-Ponce*, 422 U.S. at 879 n.5. This deportation number

The Ninth Circuit held that it is not appropriate to consider Latino appearance in an area with a high Latino population, and the Fifth and Tenth Circuits have followed similar reasoning.²¹¹ It is not clear, however, how such an area should be defined or what the cutoff for a high Latino population should be. The court in *Montero-Camargo* indicated that a county which was 73% Latino was beyond the cutoff;²¹² the Fifth and Tenth Circuits have further indicated that states with Latino populations slightly over 18% constituted an area with a high Latino population.²¹³ This rule, while reducing the impact of race-based immigration enforcement for certain Latino populations, does not fit perfectly with the logic of enforcing immigration laws. Officers would be allowed to consider a person's Latino appearance in areas with a small Latino population, even though these areas may have a lower percentage of undocumented workers as part of the foreign-born population than areas with a high Latino population.²¹⁴

Professor Albert Alschuler argues that race is relevant so long as it has the power to exclude people from being targeted.²¹⁵ He thus tries to draw the line of appropriate race-based immigration enforcement where it no longer justifiably excludes people who do not appear to belong to that targeted group.²¹⁶ The resulting "efficiency gain,"²¹⁷

was undoubtedly influenced by Border Patrol efforts focused on the border. See *supra* Part II.A.4.

211. See *supra* Part II.C.

212. *United States v. Montero-Camargo*, 208 F.3d 1122, 1133 (9th Cir. 2000).

213. See *United States v. Chavez-Villarreal*, 3 F.3d 124, 127 (5th Cir. 1993) (noting that Chavez-Villarreal's Arizona license plate indicated that he was from a state with a "substantial Hispanic population"); U.S. CENSUS BUREAU, HISPANIC POPULATION, *supra* note 110, at 4 (noting the Latino population of Arizona in 1990 as 18.8%).

214. For example, considering Latino appearance would not be allowed in Arizona, Colorado, New Mexico, or Texas, even though in those states an estimated 40–49% of the foreign-born population is undocumented. See U.S. CENSUS BUREAU, HISPANIC POPULATION, *supra* note 110, at 4; UNDOCUMENTED IMMIGRANTS: FACTS AND FIGURES, *supra* note 107. The strange result of this policy is that Latino appearance could be considered in areas where such a presumption would add to the marginalization that Latinos—including citizens and documented immigrants—may already feel for being such a minority in the community. See, e.g., *ERPA Hearing*, *supra* note 94, at 6 (statement of Sen. Charles Schumer, Member, S. Subcomm. on the Constitution, Federalism and Property Rights) (describing how a black Harvard University law professor was regularly stopped in suburbs of Lexington, Massachusetts, because there were so few black people living there).

215. Alschuler, *supra* note 138, at 239–40.

216. *Id.* at 239.

217. This efficiency refers to both the use of Border Patrol resources and the number of people who have to be stopped for every stop of undocumented immigrants. See *id.* at 265 ("This efficiency gain depends on both the predictive accuracy of the classification employed by the police and the seriousness of the harm they seek to prevent.").

Alschuler argues, is enough to justify the resulting “ethnic tax.”²¹⁸ He reasons that the situation presented in *Brignoni-Ponce* was a justifiable use of race because supposedly 85% of undocumented immigrants were from Mexico.²¹⁹ He recognizes there is a tradeoff between distributive justice and efficiency when race is considered, but he concludes that this is acceptable when an “agent’s focus on Latinos taxes the members of this group at a rate only slightly higher than their rate of offending.”²²⁰ However, he poses a hypothetical in which Latinos only constitute half of the undocumented immigrant population and concludes that, since this classification has limited power to exclude, concentrating enforcement on Latinos would be unjust.²²¹ Alschuler offers little guidance of where the line can be drawn other than somewhere between 50% (not just) and 85% (just).²²² Under Alschuler’s logic, which considers the undocumented immigrant population on a national level, only Latino appearance can be used in immigration enforcement, since approximately 80% of undocumented immigrants are from Latin America.²²³

In essence, Alschuler is saying that the proportion of non-Latinos that are undocumented immigrants—20%²²⁴—is too small to justify expending immigration enforcement efforts on non-Latinos. This argument is particularly unfair to Latinos because the percentage of Latinos who are undocumented is similar to that of Asians and Middle Easterners. According to rough figures, about 10% of Latinos in the United States are undocumented immigrants.²²⁵ Approximately 8% of

218. Alschuler, *supra* note 138, at 241. Although Alschuler never defines the term, Randall Kennedy referred to the harms an innocent minority experiences in being stopped by law enforcement as a “tax” imposed on persons because of their ancestry. RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 159 (1997) [hereinafter KENNEDY, RACE]. Kevin Johnson criticized this term as smoothing “over the emotional turmoil, humiliation, and embarrassment caused by the actual experience of a race-based stop” and failing “to appreciate how race profiling undermines full and equal citizenship and stigmatizes Latino U.S. citizens and lawful immigrants in the United States.” Johnson, *Against Racial Profiling in Immigration Enforcement*, *supra* note 108, at 713; see also *infra* notes 276–277 and accompanying text.

219. Alschuler, *supra* note 138, at 239.

220. *Id.* at 241.

221. *Id.* at 239–40.

222. *Id.*

223. UNDOCUMENTED IMMIGRANTS: FACTS AND FIGURES, *supra* note 107.

224. About 10% of undocumented immigrants are from Asia, 5% are from Canada and Europe, and 5% are from the rest of the world. UNDOCUMENTED IMMIGRANTS: FACTS AND FIGURES, *supra* note 107.

225. Johnson, *Against Racial Profiling in Immigration Enforcement*, *supra* note 108, at 709.

Asians living in the United States are undocumented,²²⁶ and an estimated 10% of Middle Easterners living in the United States are undocumented immigrants.²²⁷ The Court in *Brignoni-Ponce* would say that the likelihood that anyone appearing to be of these origins is high enough to make his or her appearance a relevant factor;²²⁸ Alschuler says that immigration enforcement officers may only justifiably consider Latino appearance.

Alschuler endorses an immigration law enforcement presumption against people who appear to be Latino so long as they comprise a majority of the population of undocumented immigrants. Yet, the Ninth Circuit disallowed the consideration of “Hispanic appearance” in *Montero-Camargo* because the appearance of the plaintiff did not create a significant likelihood that he would be an undocumented immigrant.²²⁹ These competing logics raise the question of whether it is rational or appropriate at all to presume that Latinos are violating immigration laws if 90% of them are not. Another question these arguments raise is whether racial profiling is unjustifiable even if it enhances the accuracy of law enforcement.²³⁰ These questions will be addressed in the following sections.

B. Public Interest

In *Brignoni-Ponce*, the Court decided that public interest demanded effective immigration enforcement measures primarily because of the economic and social impact of undocumented immigrants.²³¹ The Court then focused on the modes of entry to the United States by undocumented immigrants.²³² In updating the Court’s analysis on this issue, this Note introduces national security concerns, critiques the Court’s understanding of undocumented immigrants’ economic and social impact, and provides current statistics on modes of entry. While this analysis reveals bias in the *Brignoni-*

226. ASIAN AM. JUSTICE CTR., ASIAN AMERICANS AND COMPREHENSIVE IMMIGRATION REFORM, <http://www.naaap-nc.org/doc/AAFactSheetCIR.pdf> (last visited May 14, 2007).

227. CTR. FOR IMMIGRATION STUDIES, STUDY ON IMMIGRATION FROM THE MIDDLE EAST, <http://www.cis.org/articles/2002/mideastcoverage.html> (last visited May 14, 2007).

228. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975).

229. *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 (9th Cir. 2000).

230. See Hiroshi Motomura, *Immigration Policy: Immigration and We the People*, 66 ALB. L. REV. 413, 414–15 (2003) (asking “if there might be a nondiscrimination principle weighty enough to counsel against profiling even if profiling enhances truthseeking”).

231. *Brignoni-Ponce*, 422 U.S. at 878–79.

232. *Id.* at 879.

Ponce decision, a future court will likely continue to find a very strong public interest in enforcing the immigration laws and regulations that were adopted by Congress or promulgated by the Executive.

1. *Enforcing Immigration Laws and the Intersection with National Security*

Brignoni-Ponce is cited for stating that the public has an interest in the proper enforcement of immigration laws.²³³ However, the decision did not discuss national security in the context of terrorism. The current perception is that immigration is linked directly to national security concerns.²³⁴ This stems in large part from the September 11th terrorist attacks, which signaled that immigration policy could be an “important tool in stopping or monitoring terrorists and criminals.”²³⁵ Indeed, the Administration has used its position of power over immigration matters to implement measures that target immigrants based on nationality.²³⁶ This suggests that in the post-September 11th climate, the public interest in enforcing immigration laws is higher than it was in 1975, when the Court decided *Brignoni-Ponce*.

2. *Economic and Social Impact of Immigration*

Unlike national security concerns, the Court in *Brignoni-Ponce* did consider the economic and social impact of immigrants:

[T]he public interest demands effective measures to prevent the illegal entry of aliens at the Mexican border. Estimates of the number of illegal immigrants in the United States vary widely Whatever the number, these aliens create significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services.²³⁷

That undocumented immigrants drain government resources continues to be popular rhetoric,²³⁸ even though undocumented immi-

233. See *Blackie’s House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1221 (D.C. App. 1981).

234. For example, immigration enforcement is now handled by the Department of Homeland Security instead of the Department of Justice. Also, the Border Patrol is charged with protecting the nation’s borders both from terrorists and immigrants. CBP Border Patrol Overview, *supra* note 113.

235. DORIS MEISSNER ET AL., INDEPENDENT TASK FORCE ON IMMIGRATION AND AMERICA’S FUTURE, IMMIGRATION AND AMERICA’S FUTURE: A NEW CHAPTER 15 (2006) [hereinafter IMMIGRATION AND AMERICA’S FUTURE].

236. See *supra* notes 159–60 and accompanying text. The Court’s decision in *Korematsu v. United States* is still good law. 323 U.S. 214 (1944) (sanctioning the Executive’s use of internment camps for Japanese Americans during World War II).

237. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878–79 (1975).

238. See Huntington, *supra* note 69, at 30.

grants are not eligible for federal public benefits such as income supplements, health care, and food stamps.²³⁹ Most immigrants come to the United States because there is demand for their services, and they do not displace American citizen workers.²⁴⁰ Immigrants often fill low-skilled, low-cost jobs that many American citizens will not even consider taking.²⁴¹ Since immigration laws make obtaining the correct documents extremely difficult, the result is that most immigrants who want to come to the United States must enter illegally and live in the shadows of society since they lack proper documentation.²⁴²

Seeing undocumented immigrants only as creating significant economic and social problems ignores U.S. policy that has encouraged immigration to the United States while limiting the access to legal status.²⁴³ This also ignores the benefits that the United States receives

239. NAT'L IMMIGRATION LAW CTR., FACTS ABOUT IMMIGRANTS' LOW USE OF HEALTH SERVICES AND PUBLIC BENEFITS 3 (2006), available at http://www.nilc.org/immspbs/research/imms&publicservices_2006-9-12.pdf. The claim that immigrants are responsible for high rates of emergency room usage is contradicted by research showing that communities with high rates tend to have relatively small percentages of noncitizen residents. *Id.* at 1.

240. For example, between 2000 and 2020 the United States will not have a net increase in native-born workers aged 25 to 54, and immigrant workers will need to fill this "worker gap." See IMMIGRATION AND AMERICA'S FUTURE, *supra* note 235, at 3.

241. *Plyler v. Doe*, 457 U.S. 202, 228 (1981) (noting no credible evidence supporting argument that children are burden on economy and recognizing that immigrants are attracted to the United States by the availability of employment which results in labor for the local economy and tax money for the state); Hernández-Truyol, *supra* note 82, at 264; Perea, *supra* note 61, at 2 ("For a chance at a better life, the undocumented are willing to work hard for much less than they deserve.").

242. One example of this difficulty is the caps that limit each country to no more than 7%, approximately 25,600, of the total number of annual worldwide visas. IMMIGRATION AND AMERICA'S FUTURE, *supra* note 235, at 22; *supra* notes 125–26 and accompanying text. Because of these caps, a U.S. citizen sponsoring an unmarried child from Mexico is likely to wait fourteen years for unification, and a legal permanent resident sponsoring a spouse can expect to wait six years regardless of country of origin. IMMIGRATION AND AMERICA'S FUTURE, *supra* note 235, at 22.

243. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 878–79 (1975). One such policy was the government-sponsored Bracero Program of the 1940s–60s, which facilitated the migration of Mexican workers to the United States. Tallman, *supra* note 38, at 884. These economic issues are complicated and out of the scope of this paper. Suffice it to note that focusing on a particular immigrant's decision to immigrate to the U.S. puts all the responsibility for immigration on the immigrants. See SASKIA SASSEN, LOSING CONTROL?: SOVEREIGNTY IN AN AGE OF GLOBALIZATION 84 (1996). This allows commentators to speak about the United States passively receiving an "influx" or "invasion" of immigrants without considering the activities of the U.S. government or American corporations that may have contributed to the formation of economic links with emigration countries and invited the movement of people and capital. *Id.*; see Rebecca Smith & Catherine Ruckelshaus, *Solutions, Not Scapegoats: Abating Sweatshop Conditions for All Low-Wage Workers as a Centerpiece of Immi-*

from undocumented immigrant labor, including the estimated \$220 billion that undocumented Mexican immigrants contribute annually to the GDP.²⁴⁴ As discussed earlier, *Brignoni-Ponce* based its assessment of the public interest on an overstated fear of the impact of undocumented immigration on the economy. To the contrary, undocumented labor keeps certain products cheap and to some extent depends on immigration enforcement not being too effective.²⁴⁵

Despite *Brignoni-Ponce*'s flawed understanding of immigrants' contribution to the economy and social fabric of the country, the end result is the same: Congress continues to choose to limit access to legal immigration, and the Court lacks competence to question Congress's reasons for doing so.²⁴⁶

3. *Modes of Entry*

In *Brignoni-Ponce*, the Court focuses on the need for effective measures to prevent illegal entry at the border, assuming that 85% of undocumented immigrants are from Mexican descent and that they either cross illegally or with valid temporary border-crossing permits that they then violate.²⁴⁷ While this may have been true in 1975, it is not now. Undocumented immigrants of Mexican descent only comprise 57% of the undocumented population.²⁴⁸ Approximately 55% (6–7 million) of undocumented immigrants currently in the country entered illegally.²⁴⁹ Of the approximately 45% (4.5–6 million) who

gration Reform, 10 N.Y.U. J. Legis. & Pub. Pol'y 555, 571 (2006–2007) (advocating sanctions for employers who “seek out and hire undocumented workers, expecting them to work for lower wages and working conditions and to remain silent about violations of workplace rights out of fear of losing their job or being reported to immigration authorities”).

244. R. HINOJOSA OJEDA, *COMPREHENSIVE IMMIGRATION POLICY REFORM IN NORTH AMERICA: THE KEY TO SUSTAINABLE AND EQUITABLE ECONOMIC INTEGRATION* 5 (2001), available at http://naid.spsr.ucla.edu/pubs&news/public/wp_012_01/migrationpolicyreport.pdf (calculating that low-end estimates of 3 million undocumented Mexican workers contributed \$154 billion to the GDP and that high-end estimates of 4.5 million undocumented Mexican workers would result in a \$220 billion contribution to GDP). See also Tallman, *supra* note 38, at 881–82 (noting that often undocumented workers are barred from the public benefits for which their work helps pay); April McKenzie, *A Nation of Immigrants or a Nation of Suspects? State and Local Enforcement of Federal Immigration Laws Since 9/11*, 55 ALA. L. REV. 1149, 1163 (2004) (noting that undocumented workers comprise about 4% of the workforce and are concentrated in particular industries).

245. See McKenzie, *supra* note 244, at 1163–64.

246. See *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 606 (1889); *supra* Part II.A.I.

247. *Brignoni-Ponce*, 422 U.S. at 878–79.

248. UNDOCUMENTED IMMIGRANTS: FACTS AND FIGURES, *supra* note 107.

249. MODES OF ENTRY, *supra* note 77, at 1.

entered legally, less than 500,000 were border crossing card violators.²⁵⁰ Since the public is interested in seeing immigration laws enforced despite undocumented immigrants' mode of entry, these corrected statistics may not change the Fourth Amendment analysis.

C. Individuals' Right to Personal Security Free from Arbitrary Interference by Law Enforcement Officers

The Court in *Brignoni-Ponce* described the intrusion of the investigatory immigration stop in people's individual liberty as "modest."²⁵¹ The stop typically lasts for less than a minute, and officers can only inspect those parts of the vehicle that can be seen by anyone standing alongside the vehicle.²⁵² The Court did not consider whether the fact that the Border Patrol could consider race as a factor in making this decision would cause any additional harm. The Court has made Fourth Amendment balancing decisions in the past either by dismissing any of the indirect and stigmatic harm caused to the individual or to the public as insignificant or by not referring to such harm at all.²⁵³ However, scholarship and advocacy organizations, as will be seen, have argued that the effect of these one-minute stops is actually quite significant. This section will consider the impact of race-based stops with regard to stigma, tension between the targeted community and law enforcement officers, and private discrimination.

1. Stigmatic Harm

Under *Brignoni-Ponce*, persons appearing to be of Latin American ancestry are more likely than other persons to be stopped and questioned about their immigration status.²⁵⁴ Considering that only approximately 10% of Latinos are undocumented, this racial profiling has a high probability of error.²⁵⁵ Injuries from dignitary harms can

250. *Id.* at 1.

251. *Brignoni-Ponce*, 422 U.S. at 879–80.

252. *Id.* at 880.

253. *See* *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976) (accusing defendants of overstating the stigma and consequences associated with a secondary referral at a standing checkpoint); *Brignoni-Ponce*, 422 U.S. 873, 880 (referring only to the minimal intrusion caused by a stop that lasts less than a minute); *Terry v. Ohio*, 392 U.S. 1 (1968) (omitting any mention of defendants' race and possible stigmatic harm).

254. Johnson, *Against Racial Profiling in Immigration Enforcement*, *supra* note 108, at 707.

255. Johnson, *Challenging Racial Profiling*, *supra* note 29, at 345; Motomura, *supra* note 230, at 415 (discussing Professor Lund's position that racial profiling is "often inaccurate and irrational"); *see* Johnson, *Against Racial Profiling in Immigration Enforcement*, *supra* note 108, at 709.

amount to a “tax” imposed on a particular racial group,²⁵⁶ and they may encourage Latinos to attempt to “pass” as Spanish or white.²⁵⁷ Even if profiling is rational to the extent that undocumented immigrants must inherently be foreign and many of them do not appear to be white, it still sends a message of exclusion to the affected groups and can “punish, embarrass, and humiliate innocent people, whose skin color is used as a proxy for criminal conduct.”²⁵⁸

Like the Court in *Plessy v. Ferguson*,²⁵⁹ the Court in *Brignoni-Ponce* and *Martinez-Fuerte* ignores that the stigmatization of being stopped by immigration law enforcement could be a significant harm.²⁶⁰ This error skews the balancing test on both sides because it is in both the public interest and an individual’s liberty interest that citizens are protected from discrimination and stigmatization.²⁶¹ The Ninth Circuit recognized that “[s]tops based on race or ethnic appearance send the underlying message to all our citizens that those who are not white are judged by the color of their skin alone.”²⁶² Even the Department of Justice guidelines on the use of race by federal law enforcement agencies recognize that racial profiling in law enforcement “perpetuate[s] negative racial stereotypes that are harmful to our

256. See KENNEDY, RACE, *supra* note 218, at 157–59; Johnson, *Against Racial Profiling in Immigration Enforcement*, *supra* note 108, at 710–11 (comparing the harms to those sustained by innocent African Americans who are stopped by police officers on account of their race); *supra* note 218.

257. Johnson, *Against Racial Profiling in Immigration Enforcement*, *supra* note 108, at 714–15. Passing is the “ability of individuals to change race.” Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 47 (1994). If a certain race is taxed by dignitary harms, then members of that race may be encouraged to pass as members of another race. For example, if someone of Mexican ancestry thought being Mexican was looked upon unfavorably, that person may claim to be of Spanish ancestry to pass as white. See Kevin R. Johnson, “*Melting Pot*” or “*Ring of Fire*”? *Assimilation and the Mexican American Experience*, 85 CAL. L. REV. 1259, 1272–74 (1997).

258. Johnson, *Challenging Racial Profiling*, *supra* note 29, at 344; see ERPA Hearing, *supra* note 94 (statement of Sen. Charles Schumer, Member, S. Subcomm. on the Constitution, Federalism and Property Rights) (describing emotions resulting from being profiled as rage, helplessness, and total marginalization); Motomura, *supra* note 230, at 415.

259. 163 U.S. 537, 543 (1896) (ignoring the stigmatization caused by segregated carriages because a “statute which implies merely a legal distinction between the white and colored races . . . has no tendency to destroy the legal equality of the two races”).

260. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976).

261. *Cf. Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (“To separate [African American children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”).

262. *United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000).

rich and diverse democracy, and materially impair our efforts to maintain a fair and just society.”²⁶³

When the Court finally recognized the impact of stigmatization stemming from segregated schools in *Brown v. Board of Education*, it did so based on social science research.²⁶⁴ No specific study has been completed yet on the impact of race-based immigration law enforcement on targeted groups. However, many scholars and advocates describe how race-based immigration enforcement perpetuates the idea that people of Latino appearance are “others.”²⁶⁵ This otherness contributes to the sense among Latinos and other targeted populations that they do not “belong” and that even the many who are citizens do not have full-fledged citizenship recognition.²⁶⁶ This is similar to the impact of racial profiling in criminal law that perpetuates the perception of African Americans as a crime-prone group.²⁶⁷ As a result, innocent individuals suffer “fear, anxiety, humiliation, anger, resentment, and cynicism” about being stopped²⁶⁸ and shape their daily activities so as to avoid contact with the police.²⁶⁹ The recognition on behalf of the Department of Justice and extensive scholarship support at least a more serious consideration of stigmatization than the Supreme Court’s cursory dismissal in *Brignoni-Ponce*. Preventing such stigmatic harm is in the interest of both the public and the targeted individuals.²⁷⁰

Despite these concerns, not all scholars recognize such stigmatization as weighty enough to discourage the use of race in immigration enforcement, even if its parallel would discourage racial profiling in the criminal law context. Alschuler acknowledges that a discriminatory purpose for an equal protection claim should not be necessary to prove discrimination when a police practice “stigmatizes a race in the

263. DOJ RACE GUIDANCE, *supra* note 30, at 1 (citing *Montero-Camargo*, 208 F.3d at 1135).

264. *Brown*, 347 U.S. at 494–95 & n.11.

265. See Perea, *supra* note 61, at 2; BNHR REPORT TO UNHRC, *supra* note 83, at 14; Johnson, *Against Racial Profiling in Immigration Enforcement*, *supra* note 108, at 717.

266. See Rodríguez, *supra* note 68, at 230–32; Johnson, *Against Racial Profiling in Immigration Enforcement*, *supra* note 108, at 717.

267. Johnson, *Challenging Racial Profiling*, *supra* note 29, at 353.

268. End Racial Profiling Act of 2005, S. 2138 § 2(a)(14) (listing congressional findings).

269. Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989) (analyzing impact of subtle attacks, known as microaggressions, on African Americans).

270. Cf. *Brown*, 347 U.S. at 494 (“To separate [African American children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”).

eyes of objective observers.”²⁷¹ He also recognizes that a police practice that “systematically subjects the members of a race to searches or seizures at a higher rate of offending” violates the Fourth Amendment unless it is appropriately tailored to advance a compelling state interest.²⁷² Alschuler fails, however, to extend these conclusions to the immigration context. In doing so, he ignores that people appearing to be Latino are subjected to deportation at a rate disproportionate to their composition of the undocumented population.²⁷³ While he states that associating Latino appearance with illegal immigration is a “harmful stereotype,” he thinks “it probably does less harm than when profiling suggests that either blacks or Latinos are more likely than others to have committed serious crimes.”²⁷⁴ Perhaps Alschuler is attempting to take issue with the analogy that, if the use of race in immigration were to be cast in terms of criminal law, such use of race would not be permitted.²⁷⁵ Still, it is unfair to conclude that the stigma of being labeled an outsider and unwelcome in a person’s country of residence is less harmful than the stigma of being labeled a drug dealer.

2. *Tension Between Law Enforcement and the Targeted Community*

An additional harm of race-based immigration enforcement is that the targeted groups may harbor deep cynicism about the judicial system and be less likely to cooperate in the reporting and investigation of criminal activity.²⁷⁶ Local law enforcement relies on community-based policing as a valuable tool to fight crime, but its efficacy depends on law enforcement having a relationship of trust with the community.²⁷⁷ Police officers and executive officials have recognized that disparate treatment creates mistrust of the government by non-

271. Alschuler, *supra* note 138, at 268.

272. *Id.*

273. Even though Latinos comprise just about 80% of the undocumented immigrant population, they account for 90% of those removed from the United States. UNDOCUMENTED IMMIGRANTS: FACTS AND FIGURES, *supra* note 107; Johnson, *Against Racial Profiling in Immigration Enforcement*, *supra* note 108, at 678.

274. Alschuler, *supra* note 138, at 244.

275. See Johnson, *Against Racial Profiling in Immigration Enforcement*, *supra* note 108, at 694 (“Could we imagine the Supreme Court stating that ‘the likelihood that any given person of [African American] ancestry is [a criminal] is high enough to make [African American] appearance a relevant factor’ in a criminal stop? Such a clearly discriminatory statement would provoke justified outrage.”).

276. Johnson, *Challenging Racial Profiling*, *supra* note 29, at 344–45.

277. See McKenzie, *supra* note 244, at 1160.

white citizens.²⁷⁸ This actually alienates minority communities who would otherwise be most helpful to law enforcement and discourages minority communities from reporting crimes,²⁷⁹ including Border Patrol abuses.²⁸⁰

Even though local law enforcement officials are not empowered to conduct investigatory immigration stops,²⁸¹ this line is unclear in light of governmental comments indicating acceptance of state and local law enforcement of civil immigration laws.²⁸² Former Attorney General John Ashcroft went as far as to say that state and local police have inherent authority to enforce immigration laws despite the fact that immigration historically has been a uniquely federal issue.²⁸³ This has confused local law enforcement officers. For example, after a federal judge in Ohio ordered the Border Patrol to stop making discriminatory stops,²⁸⁴ the Ohio Highway Patrol began conducting them instead until a federal court ordered them to stop illegally confiscating green cards from *legal* migrant workers.²⁸⁵ In May 2003, local police

278. See End Racial Profiling Act (ERPA) of 2007, S. 2481 § 2(a)(15) (“Racial profiling damages law enforcement and the criminal justice system as a whole by undermining public confidence and trust in the police, the courts, and the criminal law.”); Peter Verniero, Attorney Gen. of N.J., Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling 4, 7 (1999).

279. McKenzie, *supra* note 244, at 1163; Akram & Johnson, *supra* note 102, at 340–41 (noting that those of Middle Eastern origin would be the most helpful to law enforcement in investigating certain terrorist events but that they are discouraged from cooperating for fear of being deported).

280. The Tucson Office of Inspector General told a reporter in 2000 that they receive one criminal complaint per day against Border Patrol agents. AM. FRIENDS SERV. COMM., *Situational Analysis: A Policy of Impunity*, in ABUSE REPORT 2000: COMPLAINTS OF ABUSE ON THE U.S. MEXICO BORDER AND IN THE SAN DIEGO REGION BY LOCAL AND FEDERAL LAW ENFORCEMENT AGENCIES, <http://webarchive.afsc.org/sandiego/brdr0104.htm> (last visited March 29, 2008); see also *Human Rights Abuses on Border are Alleged to OAS Panel*, ST. LOUIS POST-DISPATCH, Aug. 13, 1992, at 1C (quoting American Friends Committee representative as claiming that many Border Patrol abuses go “‘unreported, since many of the victims fear retaliation, deportation or have no faith in the system’”).

281. State and local governments can enforce *criminal* immigration regulations, but they cannot enforce *civil* immigration regulations. McKenzie, *supra* note 244, at 1153. This is due to the legislative history of the INA and the complexity of civil regulations. *Id.*

282. See Clear Law Enforcement for Alien Removal (CLEAR) Act of 2005, H.R. 3137 § 2 (declaring “law enforcement personnel of a State or a political subdivision of a State have the inherent authority of a sovereign entity to investigate, identify, apprehend, arrest, detain, or transfer to Federal custody aliens in the United States”).

283. Panel Discussion, *Immigration Post-September 11*, 9 HARV. LATINO L. REV. 91, 99 (2006) [hereinafter *Panel on Immigration Post-September 11*].

284. Ramirez v. Webb, 719 F. Supp. 610, 618–19 (W.D. Mich. 1989).

285. ERPA Hearing, *supra* note 94, at 117 (statement of National Council of La Raza) (citing Farm Labor Org. Comm. v. Ohio State Highway Patrol, 991 F. Supp. 895 (N.D. Ohio 1997)).

officers in Riverside, California, demanded to see the drivers' licenses of all Latinos working in an avocado grove and threatened to turn them over to the Border Patrol.²⁸⁶ In a publicized effort to rid the community of undocumented immigrants, local police in a suburb of Phoenix, Arizona, stopped citizens and lawful immigrants who appeared to be of Mexican ancestry and were speaking Spanish.²⁸⁷ While they were not stopped solely because of their Mexican appearance, simply speaking Spanish—something which over 28 million people in the United States do²⁸⁸—does not give rise to a reasonable suspicion that someone is an undocumented immigrant even if coupled with Mexican appearance.²⁸⁹ Such incidents show why the federal government should not commandeered local law enforcement officers into enforcing immigration laws,²⁹⁰ and also help explain why undocumented immigrants as well as citizens and legal residents may fear or resent local police officers.²⁹¹

3. *Public and Private Discrimination*

An additional harm a court could consider is the possibility that the permissible use of race in immigration enforcement is likely to encourage discrimination by law enforcement officers and throughout

286. *Panel on Immigration Post-September 11*, *supra* note 283, at 99.

287. Johnson, *Challenging Racial Profiling*, *supra* note 29, at 356.

288. According to the 2000 census, 28.1 million people spoke Spanish in their home. U.S. CENSUS BUREAU, CENSUS 2000 BRIEF: LANGUAGE USE AND SPEAKING ABILITY (2000), <http://www.census.gov/prod/2003pubs/c2kbr-29.pdf> (last visited July 24, 2008).

289. Compare this limited basis for reasonable suspicion to the seven factors enumerated by *Brignoni-Ponce* Court. *United States v. Brignoni-Ponce*, 422 U.S. 873, 884–85 (1975); *see supra* text accompanying note 48.

290. Arguments against local police departments enforcing immigration laws include that the department would drain their funds, lose trust with the community, and run the great risk of poorly enforcing the complicated federal immigration regulations. McKenzie, *supra* note 244, at 1160–62. There is also the fear that every traffic stop could be cast as an immigration stop and that the “zeal to enforce immigration laws could lead unwittingly to racial profiling.” *Id.* at 1163 (quoting Sylvia R. Lazos Vargas, *Missouri, the “War on Terrorism,” and Immigrants: Legal Challenges Post 9/11*, 67 MO. L. REV. 775, 821 (2002)).

291. *See, e.g.*, Press Release, Am. Civil Liberties Union, FAMILIES SUE OTERO COUNTY SHERIFFS OVER ILLEGAL IMMIGRATION RAIDS: *Civil Rights Groups Say Sheriffs “Broke Trust” with Community* (Oct. 17, 2007), http://www.aclu-nm.org/News_Events/news_10_17_07.html (describing suit brought against the Otero County, New Mexico, Sheriff’s Department for entering homes of Latino families and to interrogate about immigration status); *Panel on Immigration Post-September 11*, *supra* note 283, at 99 (describing that a survey by NOW Legal Defense found that fear of deportation is the most significant reason that battered immigrant women are much less likely than non-immigrant women to report abuse).

society.²⁹² Scholars argue that adopting practices that target specific groups of people based on race or nationality promotes the public perception that discriminating against people appearing to belong to those groups is acceptable.²⁹³ Many residents of South Texas and of Arizona border communities believe that Border Patrol agents systematically stop Latinos only based on the color of their skin.²⁹⁴ Latino judges have also been frustrated by the race-based nature of Border Patrol stops.²⁹⁵

From this public consideration of race, some private citizens may infer that discrimination is an acceptable and even necessary part of immigration enforcement. One example of this is the U.S. citizen in Arizona who, claiming vengeance for his country, killed an immigrant from India under the mistaken belief that he was Middle Eastern.²⁹⁶ Also, vigilante groups along the U.S.-Mexico border have harassed, detained, and physically harmed Latinos—citizens, legal residents, and undocumented immigrants.²⁹⁷ Both the public and individual

292. See Bali, *supra* note 64, at 164; Alschuler, *supra* note 138, at 211; Johnson, *Against Racial Profiling in Immigration Enforcement*, *supra* note 108, at 702 (arguing the discretion the Supreme Court grants the Border Patrol to consider race “invites race to dominate immigration enforcement”).

293. See Bali, *supra* note 64, at 164; Alschuler, *supra* note 138, at 211; Johnson, *Against Racial Profiling in Immigration Enforcement*, *supra* note 108, at 732 (“[R]acial discrimination by the U.S. government encourages private citizens and organizations to target Latinos in the name of immigration enforcement.”).

294. See *ERPA Hearing*, *supra* note 94, at 115 (statement of National Council of La Raza); JUSTICE ON THE LINE, *supra* note 92, at 3.

295. *ERPA Hearing*, *supra* note 94, at 115 (statement of National Council of La Raza) (referring to *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999)). One Latino judge driving with two Latino staff was stopped by the Border Patrol supposedly because there were too many people in his car. *Id.*

296. Akram & Johnson, *supra* note 102, at 296; Richard A. Serrano, *Assaults Against Muslims, Arabs Escalating*, L.A. TIMES, Sept. 28, 2001, at A19.

297. See generally AM. CIVIL LIBERTIES UNION, CREATING THE MINUTEMEN: A SMALL EXTREMIST GROUP’S CAMPAIGN FUELED BY MISINFORMATION (2006), <http://www.acluaz.org/News/PressReleases/PDFs/minutemen6view.pdf>; BORDER ACTION NETWORK, HATE OR HEROISM: VIGILANTES ON THE ARIZONA-MEXICO BORDER (2002), http://www.borderaction.org/PDFs/vigilante_report.pdf. In 2004, the Mexican-American Legal Defense Fund settled a case against Ranch Rescue where six immigrant plaintiffs claim that they were violently assaulted, falsely imprisoned, robbed at gunpoint and threatened with death. Andrew Pollack, *2 Illegal Immigrants Win Arizona Ranch in Court Fight*, N.Y. TIMES, Aug. 19, 2005, at A16. Cases have also been filed against Roger Barnett of Cochise County, Arizona, who is accused of harassing and unlawfully imprisoning people he has confronted on his ranch. In one incident, he pointed guns at sixteen undocumented immigrants he, his wife, and his brother intercepted, threatening them with dogs, and kicking one woman in the group. Randal C. Archibald, *A Border Watcher Finds Himself Under Scrutiny*, N.Y. TIMES, Nov. 24, 2006, at A1. Another lawsuit, accusing Mr. Barnett of threatening two Mexican-American hunters and three young children with an assault rifle and insulting them with racial epithets, ended in November 2006 with a jury awarding the hunters

members of targeted groups have an interest in the government not indirectly encouraging private discrimination or unconscious racism. However, given the weak causation link, the court would probably not give this factor much, if any, weight when reconsidering the Fourth Amendment standard for roving investigatory immigration stops.

D. Fourth Amendment Conclusion

Despite the analytical errors and dated statistics of *Brignoni-Ponce*, a court would likely come to the same conclusion today: Border Patrol officers may conduct a roving investigatory stop based on a reasonable suspicion that a vehicle occupant is an immigrant, and this suspicion can be partly, but not wholly, based on the occupant's racial appearance.²⁹⁸ However, the court should not base this conclusion on the idea that appearance of a certain race or nationality is correlated strongly enough with immigration status to be a relevant factor in investigatory immigration stops. Rather, the decision should carefully consider the various interests and harms at play in such a stop if race were to be a permissible factor.

The public interest side of the test is concerned with enforcing immigration laws, protecting the nation's border, and discouraging the discrimination and stigmatization of a particular racial group. On the individual liberty side of the test, traffic stops partly based on race perpetuate a sense of exclusion for members of those groups, create tense relations with law enforcement, and promote discrimination. Future studies that track the impact of race-based stops on communities and examine Border Patrol roving stop records could present a stronger case for elimination of race-based immigration enforcement.²⁹⁹ For now, particularly due to heightened national security concerns and the difficulty of quantifying the harm incurred by individuals and racial groups, a court would most likely find that an immigration law enforcement agent can consider race when deciding

\$98,750 in damages. Susy Buchanan, *Border Vigilante Ordered to Pay Damages in SPLC-Sponsored Suit*, SOUTHERN POVERTY LAW CENTER INTELLIGENCE REPORT, <http://www.splcenter.org/intel/news/item.jsp?aid=93>.

298. At least one Fifth Circuit judge, though, is ready to abandon the permissibility of race-based immigration enforcement. *United States v. Zapata-Ibarra*, 223 F.3d 281, 283–85 (5th Cir. 2000) (Weiner, J., dissenting). Judge Weiner is “[c]onvinced that the fabric of our society suffers significantly more harm by sacrificing the right of all the people—including those near the Mexican border—to the constitutional protections of the Fourth Amendment than it gains from the apprehension of a few more illegal immigrants or narcotic traffickers and their contraband” *Id.* at 281–82.

299. *Cf. Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (discussing studies tracking the impact of race-based segregation).

whether to stop a car and question its occupants about their right to be in the United States.

IV.

ELIMINATING THE PERMISSIBLE USE OF RACE IN IMMIGRATION ENFORCEMENT BY LEGISLATION: LIMITING JUDICIAL REVIEW WITHOUT CURBING DISCRIMINATION

What if the Court came to the opposite conclusion, and race could not be considered? Or what if Congress actually passed a version of the End Racial Profiling Act that prohibited the consideration of race in immigration enforcement? Some advocacy groups and scholars would likely view the removal of racial considerations from immigration enforcement as a victory.³⁰⁰ However, the question remains whether such a decision would improve the situation for Latinos in practice, since facially race-neutral laws do not necessarily result in race-neutral practices.³⁰¹

National origin is undeniably a relevant factor in immigration enforcement. Undocumented immigrants are by definition foreign, and approximately 95% of them come from countries with large nonwhite populations.³⁰² Instructing immigration enforcement officers not to consider a factor that is intrinsic to the legal violation they are investigating seems counterproductive.³⁰³ First, if officers were to follow such an instruction, law enforcement might suffer.³⁰⁴ Second, the more likely result is that officers would continue to consider race even

300. See, e.g., *ERPA Hearing*, *supra* note 94, at 80 (statement of Laura W. Murphy, Director, American Civil Liberties Union, Washington, D.C.); *id.* at 118 (statement of National Council of La Raza); KENNEDY, RACE, *supra* note 218, at 148; Johnson, *Against Racial Profiling in Immigration Enforcement*, *supra* note 108, at 680 (“Mere legal prohibition in all likelihood would not immediately end race profiling; barring the INS from using race profiling, however, would at least begin the difficult task of purging racial considerations from border enforcement. As is true in the realm of race-based criminal law enforcement, prohibition of the express use of race would shift our focus to efforts to enforce the legal norm.”); Gowie, *supra* note 168, at 254 (arguing the Court should “hold that Border Patrol agents cannot rely upon factors that readily occur in the law-abiding population, such as Hispanic ancestry . . .”).

301. See, e.g., *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880) (permitting use of educational requirements to keep African Americans off juries).

302. See UNDOCUMENTED IMMIGRANTS: FACTS AND FIGURES, *supra* note 107; Thompson, *supra* note 22, at 1006–07 (“[T]here is a correlation between apparent Mexican ancestry and the law enforcement objective of preventing Mexicans from entering the country without documentation.”).

303. Thompson, *supra* note 22, at 1006–07.

304. *Id.* at 1007. For example, the reasons for stopping vehicles may become even more arbitrary—which would mean invading the individual liberty interest of even more people, although the discriminatory impact may not be as pronounced.

if they could not say they were doing so.³⁰⁵ Instructing officers not to consider race may be as fruitful an exercise as “instructing a child not to think about hippopotamuses”: the first thing the child would think of would be a giant hippo.³⁰⁶

Telling Border Patrol officers not to think about race does not actually prevent them from relying on racial appearance; it just requires that they provide a race-neutral explanation for their actions.³⁰⁷ As a result, officers may either consciously lie about such considerations or unconsciously replace racial appearance with permissible proxies for race, such as “the mode of dress and haircut.”³⁰⁸ Officers claim that Mexicans often share these characteristics,³⁰⁹ but this claim is suspect given the diversity of the Mexican population.³¹⁰ It is thus not clear whether excluding racial consideration would have any result other than encouraging officers to cover up a racially motivated stop with other factors. Perhaps if such cover-ups were difficult to achieve, then the number of stops lacking sufficient reasonable suspicion would drop. However, given the availability of race proxies, it is not hard to veil racial motivation.

Unfortunately, the use of proxies to perpetuate racial discrimination continues to this day. In the voting context, proxies used to prohibit African Americans from voting included poll taxes and literacy tests.³¹¹ Proxies such as educational achievement and the ability to speak Spanish have been used in jury selection cases with the result of a racially discriminatory impact.³¹² Language-based discrimination often serves as “an easy proxy for race discrimination,” particularly in the workplace and at school.³¹³ A qualified applicant may be rejected

305. *Id.* at 1006–07; see Alschuler, *supra* note 138, at 241.

306. See Alschuler, *supra* note 138, at 241.

307. Thompson, *supra* note 22, at 1007. Alschuler argues that Border Patrol agents should be allowed to consider race but not rely upon it. Alschuler, *supra* note 138, at 241. I do not find this distinction helpful, because laws cannot realistically control what officers merely think about or consider.

308. *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975); see Alschuler, *supra* note 138, at 241–42 (describing an officer’s claim that he could identify an undocumented immigrant by his or her footwear); Thompson, *supra* note 22, at 1001 (describing how any race-neutral explanation suffices for justifying a peremptory challenge).

309. See *Brignoni-Ponce*, 422 U.S. at 885.

310. See Hernández -Truyol, *Building Bridges*, *supra* note 5, at 383–96.

311. *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 45–46 (1959). Poll taxes were eventually struck down. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966).

312. See *supra* notes 73–75 and accompanying text (discussing *Hernandez v. New York* and *Strauder v. West Virginia*).

313. Edward M. Chen, Speech at the Asian Law Journal Symposium on Law and Labor, in 6 *ASIAN L.J.* 223, 223–24 (1999); see Mari J. Matsuda, *Voices of America:*

for a job because of an accent that the employer claims hinders communication.³¹⁴ In the Ninth Circuit, an employer need not provide any justification for adopting an English-only policy despite the plaintiffs' claim that this policy, although not necessarily difficult to comply with, "contributed to an atmosphere of isolation, inferiority, or intimidation."³¹⁵ *Yick Wo v. Hopkins* was a rare case in which the Court saw through the proxy—strict regulations for a type of laundry-washing technique used almost exclusively by Chinese businesses in San Francisco—and held that the regulations constituted illegal discrimination.³¹⁶

The next inquiry is to determine which is less harmful for people belonging to the targeted group: considering race explicitly or pretending not to consider it at all. Declaring race irrelevant may "begin the difficult task of purging racial considerations from border enforcement,"³¹⁷ but it also assumes unrealistically that race does not matter and that officers will automatically not consider race once they are told not to do so.³¹⁸ In the end, it may "encourage[] courts to assume nonracial motives," "demonize[] the use of race," and close off any discussion about race.³¹⁹ A prime example of these potential results is seen in *Terry v. Ohio*, the case discussed above, which is well known for establishing the reasonableness standard used in evaluating some Fourth Amendment events.³²⁰ The opinion does not mention the de-

Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction, 100 YALE L.J. 1329, 1397 (1991) ("The recent push for English-only laws, and the attack on bilingual education, may represent new outlets for racial anxiety now that many traditional outlets are denied. The angry insistence that 'they' should speak English serves as a proxy for a whole range of fears displaced by the social opprobrium directed at explicit racism.").

314. *See Fragante v. City and County of Honolulu*, 699 F. Supp. 1429, 1432 (D. Haw. 1987) (finding the plaintiff, who spoke perfect English but with a Filipino accent, was legitimately denied the job for business reasons); Matsuda, *supra* note 313, at 1333–40 (noting that Fragante's English grammar from the trial transcript was better than the lawyers' and the judge's).

315. *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1488–89 (9th Cir. 1993), *rehearing en banc denied*, 13 F.3d 296 (9th Cir. 1994) (internal quotations omitted) (holding plaintiffs failed at establishing prima facie case of discriminatory impact). Dissenting from the court's decision not to rehear the case en banc, Judge Reinhardt pointed out that "[l]anguage is intimately tied to national origin and cultural identity: its discriminatory suppression cannot be dismissed as an 'inconvenience' to the affected employees." *Spun Steak*, 13 F.3d at 298 (Reinhardt, J., dissenting).

316. *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).

317. Johnson, *Against Racial Profiling in Immigration Enforcement*, *supra* note 108, at 680.

318. *See supra* notes 305–307 and accompanying text.

319. Thompson, *supra* note 22, at 1008.

320. *Terry v. Ohio*, 392 U.S. 1 (1968). *See* discussion *supra* Part I.A. Another example is *Tennessee v. Garner*, 471 U.S. 1 (1985), in which the Court omitted any

endants' races, and the Court accepts that Detective McFadden was "unable to say precisely what first drew his eye to them" or why they "didn't look quite right."³²¹ The decision proceeds without any discussion of race, but it is clear in the trial transcript that McFadden's suspicion was aroused because two black men were standing in front of a store during the middle of the day and because a white man stopped twice to chat with them.³²² Because the Court erased racial references from its decision and constructed a narrative of "police officer as expert," the Court had no occasion to question the officer's reliance on race and stereotypes.³²³

The problem with this facially race-neutral approach is that it avoids asking whether the decision to stop and question someone had a legitimate basis and simply assumes that the officer knows best. An alternative would be to recognize race as a relevant factor but to scrutinize the officer's reliance on it.³²⁴ One disadvantage of this approach lies in its reliance on judges—who typically are reluctant to find that officers engaged in racist behavior—to scrutinize the actions and motivations of law enforcement officers.³²⁵ Additionally, the effectiveness of such scrutiny will vary per judge.

Thus, the choice is between opting for a prohibition that signals that considering race is impermissible though allows officers to easily circumvent it by providing neutral explanations and opting for an opportunity for a judge to examine the permissible use of race. Neither option presents a sure path to curbing the harms that race-based immigration enforcement causes Latinos and other minority groups. However, given the reality that national origin is a necessary factor in immigration law enforcement and that past decisions have analyzed the use of a person's apparent ancestry,³²⁶ allowing race to be a factor in establishing a reasonable suspicion provides for critical review of officers' discretion to make a stop.

mention of race, even though evidence had been presented that a black person fleeing the scene of a crime was more likely to be shot by police than a white one. Thompson, *supra* note 22, at 974–75.

321. See Thompson, *supra* note 22, at 966–67.

322. *Id.*

323. *Id.* at 971 (internal quotations omitted) ("The 'police officer as expert' narrative allowed the Court in *Terry* to present a coherent, raceless narrative about why McFadden acted as he did.").

324. See *id.* at 1007.

325. *Id.* at 1007–08; Kennedy, *Suspect Policy*, *supra* note 139, at 35.

326. See Part II.C (discussing *United States v. Manzo-Jurado*, 457 F.3d 928, 935 (9th Cir. 2006); *United States v. Montero-Camargo*, 208 F.3d 1122, 1130 (9th Cir. 2000); *United States v. Chavez-Villarreal*, 3 F.3d 124, 127 (5th Cir. 1993); and other cases that have scrutinized a Border Patrol officer's reliance on racial appearance).

This conclusion has the danger of being interpreted as a presumption that Latinos, Asians, and Middle Easterners are violating immigration laws, and such a presumption causes significant harm to those communities. However, immigration enforcement officers will most likely consider race whether the law allows it or not.³²⁷ Part of the officers' task is to determine whether a person is an immigrant. That determination necessarily involves drawing conclusions about the person's national origin. Racial appearance, while not determinative about a person's national origin, is closely intertwined with it. Officers may put forth a good faith effort to ignore racial appearance, but to completely ignore racial appearance would be difficult. At least under *Brignoni-Ponce* a judge can inquire into the Border Patrol officers' motivations, to ensure that their decision was not entirely based on race. Such an inquiry would be more difficult if the consideration of race was completely prohibited because officers would be conditioned to present race-neutral motivations.

CONCLUSION

Should a bill ending racial profiling apply to immigration enforcement? After analyzing the variety of factors that the Court considered in arriving at the *Brignoni-Ponce* decision and the updated statistics, present political conditions, and additional harms a modern-day court would have to take into account, this Note concludes that, under the Fourth Amendment, the consideration of racial appearance is appropriate. It cannot, however, serve as the sole reason for making the stop. Unlike the Court's decision in *Brignoni-Ponce*, this conclusion is not based on the likelihood that someone appearing to be Latino, Asian, or Middle Eastern will be an undocumented immigrant. In fact, this likelihood is quite small.

Rather, this Note concludes that the public interest in enforcing immigration laws, even if they were enacted to subordinate certain racial groups, is quite strong, since the laws were passed by elected branches of government. The harm caused by a perceived or real presumption that people appearing to be of a certain racial group do not belong in this country is also real, and it affects citizens, documented immigrants, and undocumented immigrants. However, it is not clear that eliminating the acceptable consideration of racial appearance by Border Patrol officers would redress that injury completely since na-

327. See Alschuler, *supra* note 138, at 241 (arguing that ordering officers enforcing immigration laws near the border not to consider racial appearance makes perjury by those officers almost inevitable); *supra* notes 305–307 and accompanying text.

tional origin is an intrinsic part of being an immigrant, and this often overlaps with racial appearance. Thus, officers would likely still consider racial appearance and simply produce a race-neutral reason for conducting the stop by relying on numerous proxies or constructing reasonable suspicion post hoc. Any victory implied by removing race-based immigration enforcement from the books would be diminished by the fact that race would likely still be considered but without judicial scrutiny.

If Congress were to ban immigration law enforcement officers' reliance on race by passing a bill like the End Racial Profiling Act—overturning *Brignoni-Ponce*—then the courts would have to enforce it. However, challenging courts to scrutinize an officer's reliance on race promotes a more honest conversation about stereotypes and racism. This inquiry, in addition to training Border Patrol officers about what totality of circumstances rises to the level of reasonable suspicion, will, in the long run, serve the public interest more than deceptive neutrality ever could.