Washington University Law Review

Volume 78 | Issue 3

January 2000

The Case Against Race Profiling in Immigration Enforcement

Kevin R. Johnson
University of California, Davis

Washington University
Law Quarterly

VOLUME 78 NUMBER 3 2000

THE CASE AGAINST RACE PROFILING IN IMMIGRATION ENFORCEMENT

KEVIN R. JOHNSON*

Table of Contents

* Associate Dean for Academic Affairs of the School of Law and Professor of Law and Chicana/o Studies; Director, Chicana/o Studies Program, University of California at Davis. J.D., Harvard University (1983); A.B. (Economics), University of California at Berkeley (1980). I presented drafts of this paper at the Harvard Law School conference entitled "U.S. Immigration Policy at the Millennium: With Liberty and Justice for All?" in December 1999; at the Latin American Studies Association 2000 International Congress in Miami in March 2000; at the Immigration Law Teachers Workshop 2000 in San Antonio, Texas in May 2000; at the "NAFTA Impact on the Boarder" conference at the University of Texas at El Paso in October 2000; at law school faculty colloquia at Loyola (Los Angeles) Law School in March 2000 and Marquette Law School in April 2000; and to Chicana/o Studies faculty and students at the California State University at Chico in March 2000. Richard Delgado went above and beyond the call of duty in commenting, editing, and advising me on this paper. Diane Amann, Lenni Benson, Linda Bosniak, Janet Calvo, Christopher David Ruiz Cameron, Angela Davis, Nora Demleitner, Cecelia Espenoza, Ed Fallone, Joan Fitzpatrick, Susan Green, Anne Greer, Barbara Hines, Bill Ong Hing, Joan Howarth, Dan Kesselbrenner, Sylvia Lazos, Steve Legomsky, David Leonard, Frank Rene López, Guadalupe T. Luna, George A. Martínez, Nancy Morawetz, Hiroshi Motomura, Yxta Maya Murray, Karen Musalo, Lori Nessel, Michael A. Olivas, Mary Romero, Victor Romero, Lory Rosenberg, Michael Scaperlanda, Phil Schrag, Ted Seto, Gloria Valencia Weber, Leti Volpp, and various members of the Loyola (Los Angeles) and Marquette law school faculties graciously provided critical comments on a draft. Law students Marlon Cobar, University of California at Davis, class of 2000, and Rogelio Villagrana, class of 2002, offered extremely helpful research assistance. Dean Rex Perschbacher provides significant support for all my projects.

I. INTRODUCTION

> "You know, Anne," he said quietly, "when I am with a Hmong or a French or an American person, I am always the one who laughs last at a joke. I am the chameleon animal. You can place me anyplace, and I will survive, but I will not *belong*. I must tell you that I do not really belong anywhere."
>
> –Jonas Vangay, Hmong refugee and longtime U.S. resident.[1]

The public and the courts have begun a long overdue reconsideration of race profiling—the formal and informal targeting of African Americans, Latinos, and other racial minorities for investigation on account of their race—in criminal law enforcement.[2] Race, however, remains central to the enforcement of the United States immigration law, particularly in the southwestern part of the country.[3] In fact, the Supreme Court proclaimed in 1975 that "Mexican appearance" constitutes a legitimate consideration under the Fourth Amendment for making an immigration stop.[4]

---

1. ANNE FADIMAN, THE SPIRIT CATCHES YOU AND YOU FALL DOWN 249 (1997) (quoting Jonas Vangay). Thanks goes to Margaret Taylor for bringing this book, which documents the tragic experiences of a Hmong refugee family in the Central Valley of California with Western medicine, to my attention.

2. *See infra* Part II. *See also* Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409, 1411 (2000) (defining race profiling by police in traffic stops).

3. *See infra* Parts III.A-B.2, IV.

4. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 886-87 (1975); U.S. CONST. amend. IV. *See also infra* Part III.A-B.2 (analyzing *Brignoni-Ponce* and its progeny).

At first blush, reliance on "Mexican appearance" in immigration enforcement might not appear problematic given the widespread belief that the overwhelming majority of undocumented persons in the United States come from Mexico.[5] In fact, however, only about one-half of the undocumented persons in this country are Mexican nationals.[6] Unfortunately, the popular misperception adversely impacts U.S. citizens or lawful permanent residents of Latin American ancestry[7] who are subject to immigration stops in the hunt for undocumented persons.[8] U.S. citizens or lawful permanent residents bear the brunt of race-based immigration enforcement, which cuts to the core of their belonging to the national community.[9]

Although the Supreme Court has not revisited this area of law in recent years, at least one court of appeals has questioned the continued lawfulness of reliance on race in immigration enforcement.[10] The need for re-evaluation has become readily apparent. Indeed, the armed seizure of Elian Gonzalez in Miami at the break of dawn by the Immigration & Naturalization Service (INS) for a fleeting moment focused public attention on the question of whether the agency's enforcement methods comport with the Fourth Amendment.[11] Race-based enforcement deserves special scrutiny because it disproportionately burdens persons of Latin American ancestry in the United States,[12] the vast majority of whom are

---

5. *See infra* text accompanying notes 88-107 (discussing Supreme Court's reliance on inflated estimates of the percentage of the undocumented population that was of Mexican origin).

6. *See infra* Parts III.C- IV.A.1.

7. Latin America, as generally understood, includes countries south of the United States. *See* WEBSTER'S UNABRIDGED DICTIONARY 1087 (2d ed. 1997).

8. *See infra* Parts II.A., II.B.1, III.C.1-2, IV.

9. *See infra* Part III.C.2, IV.

10. *See* United States v. Montero-Camargo, 208 F.3d 1122 (9th Cir. 2000) (en banc) (disregarding language in *Brignoni-Ponce* and holding that Border Patrol cannot lawfully rely on "Hispanic appearance" when deciding to make an immigration stop).

11. *See, e.g.*, Jack Kemp, *Show of Force vs. Law*, WASH. TIMES, May 8, 2000, at A17; Laurence H. Tribe, *Justice Taken Too Far*, N.Y. TIMES, Apr. 25, 2000, at A23. *See also* Gonzalez v. Reno, 212 F.3d 1338 (11th Cir. 2000) (affirming dismissal of suit in which family members sought to apply for asylum on behalf of Gonzalez despite the fact that his father wanted his son to return to Cuba with him).

12. This Article equates "Latin American ancestry" with "race," which the growing weight of scholarly authority considers to be a social, as opposed to a biological, construction. *See generally* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S (2d ed. 1994) (analyzing social formation of various "races"). In the United States, persons of Mexican ancestry historically have been treated as a distinct and inferior "race." *See* JOAN W. MOORE, MEXICAN AMERICANS 1 (1970) ("Racial myths about Mexicans appeared as soon as Mexicans began to meet Anglo American settlers in the early nineteenth century. The differences in attitudes, temperament, and behavior were supposed to be genetic. It is hard now to imagine the normal Mexican mixture of Spanish and Indian[] as constituting a distinct 'race,' but the Anglo Americans of the Southwest defined it as such."). *See also infra* note 124 (citing authority on

U.S. citizens or lawful immigrants. Generally speaking, whether they are U.S. citizens, lawful immigrants, or undocumented aliens, persons of Latin American ancestry or appearance are more likely than other persons in the United States to be stopped and interrogated about their immigration status.[13] A popular stereotype characterizes Latinos as "foreigners" potentially subject to removal from the country.[14] Because ninety percent of the persons deported from the country are Latin American when closer to half of the undocumented population is Latino, race profiling in immigration enforcement helps reinforce and legitimate this inaccurate stereotype of Latinos as perpetual "foreigners."[15]

The public and legal endorsement of race-based immigration stops conflict with the deep suspicion of racial classifications in virtually every other body of public law.[16] Under modern Equal Protection doctrine, the Supreme Court has held that racial classifications are constitutionally suspect and subject to strict scrutiny.[17] The Court has prohibited states from using classifications based on overbroad gender stereotypes,[18] remarkably similar to the generalizations used daily in race-based

racialization of persons of Mexican ancestry in United States). For analysis of how the law shapes social meaning, see Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995).

13. *See infra* Part III.B.1-2.

14. *See* Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV. 101, 117-29 (1997). *See also* K. Anthony Appiah, *Stereotypes and the Shaping of Identity*, 88 CAL. L. REV. 41, 47-48 (2000) (analyzing stereotypes based on statistical correlations and their harms).

15. *See infra* text accompanying notes 198-200; *see also infra* text accompanying notes 42-43 (analyzing similar impacts resulting from race profiling in criminal law enforcement).

16. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends to seriously curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for correspondingly more searching judicial inquiry.") (citations omitted).

17. *See, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) (holding that all racial classifications are subject to strict scrutiny, including those in federal programs meant to increase government contracting with minority businesses); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (holding to the same effect); *see also* U.S. CONST. amend. XIV § 1 (providing that no state shall "deny to any person within its jurisdiction the equal protection of the laws"). Because color-blindness now dominates U.S. constitutional law, any deviation requires correction to ensure consistency and coherency in the law. *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986) (articulating jurisprudential theory requiring consistency and integrity in law).

Reliance in this Article on the Court's color-blindness principle should not be interpreted as endorsing its use in areas other than race profiling in immigration enforcement, specifically in the evaluation of affirmative action programs. *See* Victor C. Romero, *Racial Profiling: "Driving While Mexican" and Affirmative Action*, 6 MICH. J. RACE & L. (forthcoming 2000) (contrasting legal implications of the use of race in race profiling and affirmative action). For authorities discussing objections to the color-blindness approach to invalidating affirmative action programs, see *infra* note 242.

18. *See infra* text accompanying notes 245-46.

immigration enforcement. Nevertheless, not until recently has any arm of the U.S. government seriously questioned this practice.[19]

Race-based immigration enforcement, while in some ways unique in its express use of racial classifications, also constitutes part of a body of immigration law replete with disparate racial impacts cloaked in facial neutrality. As the prevailing wisdom would have it, Congress has removed the last vestiges of invidious discrimination from the immigration laws.[20] Certainly the predominant civil rights consciousness helped move immigration law in this direction. However, the hypertechnical immigration laws[21] still discriminate on the basis of race in ways that frequently are hidden or obscured. For example, the laws establish per-country ceilings on the number of immigrants eligible for admission each year that create long waits for potential immigrants from certain developing countries populated by people of color;[22] a diversity visa system that, through a complicated formula, masks a strong preference for immigrants from northern Europe;[23] a public charge exclusion that disparately impacts poor and working people from developing nations;[24] and a variety of removal grounds that adversely affect discrete immigrant communities of color.[25] All of the foregoing inhibit immigration from

19. *See* United States v. Montero-Camargo, 208 F.3d 1122 (9th Cir. 2000) (en banc).

20. *See, e.g.*, Peter H. Schuck, *Alien Rumination*, 105 YALE L.J. 1963, 1966 (1996) (reviewing PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER (1995)) ("[R]acism as such no longer plays a crucial role in immigration law; certainly it plays a less significant role than it did before 1965.") (footnotes omitted). *See also* Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273 (1996) (analyzing the 1965 law abolishing the national origins quota system as a product of the "civil rights revolution").

21. *See* Castro-O'Ryan v. INS, 847 F.2d 1307, 1312 (9th Cir. 1987) ("With only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity.'") (quoting E. HULL, WITHOUT JUSTICE FOR ALL 107 (1985)); Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977) (noting that some immigration laws resemble "King Minos's labyrinth in ancient Crete").

22. *See* Immigration & Nationality Act (INA) § 202(a), 8 U.S.C. § 1152(a) (1994 & Supp. III 1997).

23. *See* INA § 203(c), 8 U.S.C. § 1153(c).

24. *See* INA § 212(a)(4), 8 U.S.C. § 1182(a)(4). *See also* Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1519-23 (1995) (analyzing history of public charge exclusion in U.S. immigration laws).

25. *See, e.g.*, INA § 237(a), 8 U.S.C. § 1227(a) (listing removal grounds). For general analysis of discrimination in modern immigration law, see Howard F. Chang, *Immigration Policy, Liberal Principles, and the Republican Tradition*, 85 GEO. L.J. 2105 (1997) (contending that various aspects of U.S. immigration laws conflict with liberal philosophy); Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 COLUM. J. TRANSNAT'L L. 319 (1993) (analyzing disparate racial impacts of modern immigration laws). *See also* Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 U. PA. L. REV. 1147, 1210-21 (1997) (offering arguments about why concern with maintaining ethnic status quo in United States should not

Latin America.[26] The operation of the immigration laws generally deserve careful scholarly investigation.

Although focusing on race profiling in immigration enforcement, this Article analyzes issues that implicate civil rights concerns cutting to the core of equal citizenship and full membership for Latinos, and other minority groups, in the national community. Part II of this Article summarizes criticisms of race profiling in criminal law enforcement and analyzes the law that, although offering somewhat flawed remedies, prohibits exclusively race-based criminal law investigatory stops. Part III analyzes the impact on immigration law enforcement of the Supreme Court decisions permitting consideration of race to justify stopping an individual. Part IV sketches the civil rights implications of racially discriminatory immigration enforcement.

This Article contends that the Supreme Court should prohibit the INS from using race profiling in immigration enforcement. National origin minorities stereotyped as "foreign," especially Latinos and Asians, stand to benefit immensely from this reform in the law, while the costs to immigration enforcement would likely be minimal. Although the nation as a whole endorses controlling undocumented immigration, race-based immigration enforcement fails to achieve that goal. 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.[27] The removal of race from the litany of factors used by the INS to identify undocumented persons would represent a step forward in ensuring full membership and equal citizenship for Latinos and other national origin minorities in the United States.

II. RACE PROFILING IN CRIMINAL LAW ENFORCEMENT

Scholars and policymakers have been increasingly attentive to the issues of race implicated by criminal law enforcement,[28] especially since

---

be considered in immigration law and policy making); Stephen H. Legomsky, *E Pluribus Unum: Immigration, Race, and Other Deep Divides*, 21 S. ILL. U. L.J. 101, 108 (1996) ("[R]acism is a substantial part of today's anti-immigrant sentiment.").

26. *See infra* text accompanying notes 290-98.

27. *See infra* Introduction in Part II and text accompnaying notes 59-67.

28. *See, e.g.*, JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 35-60 (1997); DAVID COLE, NO EQUAL JUSTICE: RACE AND

the May 1992 violence in Los Angeles sparked by the acquittal of the white police officers involved in a videotaped beating of an African American man named Rodney King[29] and the O.J. Simpson murder trial.[30] Commentators argue that consideration of race impermissibly taints investigation, prosecution, and sentencing of criminal conduct and has particularly onerous impacts on young African American males.[31] African Americans have long contended that black men are routinely stopped by police for nothing other than "driving while black."[32] Moreover, "[r]ecent studies support [the fact that] . . . police target people of color, particularly

---

CLASS IN THE AMERICAN JUSTICE SYSTEM (1999); RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997); KATHERYN K. RUSSELL, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASMENT, AND OTHER MACROAGGRESSIONS (1998); Colloquy, *Prosecuting Violence: A Colloquy on Race, Community, and Justice*, 52 STAN. L. REV. 751 (2000). *See also* Kenneth B. Nunn, *The "Darden Dilemma": Should African Americans Prosecute Crimes*, 68 FORDHAM L. REV. 1473, 1479-91 (2000) (summarizing powerfully the endemic racism in the U.S. criminal justice system). Concern about the high incarceration rates of young African American males has prompted one influential scholar to make the controversial call for jury nullification in certain instances. *See* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

29. *See, eg.*, CHARLES J. OGLETREE ET AL., BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE CONDUCT IN MINORITY COMMUNITIES (1995); *see also* Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and the Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 63, 63-67 (1993) (analyzing racial implications of the beating of Rodney King, including how the incident grew out of and reinforced stereotypes of the "Black criminal.").

30. *See* Jeffrey Rosen, *The Bloods and the Crits: O.J. Simpson, Critical Race Theory, the Law, and the Triumph of Color in America*, NEW REP., Dec. 9, 1996, at 27. *See generally* JEFFREY TOOBIN, THE RUN OF HIS LIFE: THE PEOPLE V. O.J. SIMPSON (1996) (documenting Simpson trial and its national impact).

31. *See, e.g.*, Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998) (prosecution); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659 (1994) (traffic stops); Andrew D. Leipold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in Criminal Law*, 73 CHI.-KENT L. REV. 559, 565-72 (1998) (various aspects of criminal justice system); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271 (traffic stops). *See also* Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994) (analyzing legal responses to the perceived threat to society from African American criminality).

32. *See, e.g.*, Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 431-32 (1997); David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 275-88 (1999); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 342-62 (1998); Katheryn K. Russell, *"Driving While Black": Corollary Phenomena and Collateral Consequences*, 40 B.C. L. REV. 717, 718-19 (1999). *See also* Randall Kennedy, *Suspect Policy*, NEW REP., Sept. 13, 1999, at 30 (discussing controversy over race profiling by law enforcement); Harvey A. Silverglate, *Synergy of 'Race Profiling' and Federal Guidelines*, NAT'L L.J., Feb. 15, 1999, at A21 ("It is widely reported and, among people in the criminal justice system, well-known . . . , that young black and Hispanic males are statistically far more likely than whites to be stopped by police cruisers for suspected traffic offenses, or for no apparent reason at all."). Race profiling is such common knowledge that one scholar blandly states that "many police departments use racial profiles as the basis for whom to arrest." Gregory Alexander, *A Cognitive Theory of Fiduciary Relationships*, 85 CORNELL L. REV. 767, 771 (2000) (footnote omitted).

African Americans, for stops and frisks."[33]

Similarly, the criminal justice system unfairly focuses on minority groups other than African Americans.[34] For example, police employ race profiling to the detriment of Latinos, which is popularly known as being stopped for "driving while brown."[35]

The acknowledgement of the prevalence of race profiling, however belated, has provoked a public outcry. In a 1999 speech to the nation, President Bill Clinton criticized race profiling and called for the collection of data on race-based stops by federal law enforcement agencies.[36] Numerous state and local law enforcement agencies are currently under

33. Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 957 (1999). *See* Washington v. Lambert, 98 F.3d 1181, 1182-83 n.1 (9th Cir. 1996) (offering examples of prominent African Americans subject to unlawful stops on account of their race); Md. State Conference of NAACP Branches v. Md. Dep't of State Police, 72 F. Supp. 2d 560 (D. Md. 1999) (addressing motions in class action alleging constitutional violations in pattern of racially discriminatory stops, detentions, and searches of minority motorists); United States v. Leviner, 31 F. Supp. 2d 23, 33-34 (D. Mass. 1998) ("Studies from a number of scholars, and articles in the popular literature have focused on the fact that African American motorists are stopped and prosecuted for traffic stops, more than other citizens.") (footnote omitted); New Jersey v. Soto, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996) (reviewing evidence of race profiling by New Jersey State Police and suppressing evidence gathered as the result of race-based stop).

34. *See* Viet D. Dinh, *Races, Crime, and the Law*, 111 HARV. L. REV. 1289 (1998) (reviewing RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997)); Margaret E. Montoya, *Of "Subtle Prejudices," White Supremacy, and Affirmative Action: A Reply to Professor Butler*, 68 U. COLO. L. REV. 891, 924-29 (1998). *See also* Mary Romero, *State Violence, and the Social and Legal Construction of Latino Criminality: From El Bandido to Gang Members* (Aug. 24, 2000) (unpublished manuscript, on file with author) (offering analysis through case study of society's perceptions of Latino criminality). *See generally* CORAMAE RICHEY MANN, UNEQUAL JUSTICE: A QUESTION OF COLOR (1993) (examining criminal justice system from perspectives of various minority groups).

35. *See* Russell, *supra* note 32, at 717 n.2. *See, e.g.*, Martinez v. Mount Prospect, 92 F. Supp. 2d 780, 781 (N.D. Ill. 2000) (approving settlement of employment discrimination action in which evidence showed that commanding officers of local police department instructed officers "to target Hispanic drivers for traffic stops" and in which federal judge sent letter to Justice Department requesting investigation of race profiling); Rodriguez v. Cal. Highway Patrol, 89 F. Supp. 2d 1131, 1134 (N.D. Cal. 2000) (addressing motions in case alleging that law enforcement authorities "maintain a policy, pattern and practice of targeting African Americans and Latinos in conducting stops, detentions, interrogations and searches of motorists"); Nat'l Cong. of P.R. Rights v. New York, 191 F.R.D. 52 (S.D.N.Y. 1999) (contending that Latino and black plaintiffs stated a constitutional claim challenging race-based stops); Chavez v. Ill. State Police, 27 F. Supp. 2d 1053 (N.D. Ill. 1998) (addressing case in which plaintiffs claim that state police stop, detain, and search African American and Hispanic motorists solely on the basis of their race).

36. *See Memorandum on Fairness in Law Enforcement*, 35 WEEKLY COMP. OF PRES. DOC. 1067 (June 9, 1999) ("Stopping or searching individuals on the basis of race . . . is not consistent with our democratic ideals, especially our commitment to equal protection under the law for all persons."). *See also Hearing of the Senate Judiciary Comm.*, FED. NEWS SERV., May 5, 1999 (testimony of Attorney General Janet Reno) ("Racial profiling focused on conduct based on race or ethnic background [in law enforcement] is just plain wrong."). Whether the Clinton administration might have done more to eradicate race profiling is open to debate. *See* Richard L. Berke, *Gore and Bradley Duel, Briefly, on Racial Issue*, N.Y. TIMES, Jan. 18, 2000, at A20 (reporting that Democratic presidential hopefuls both promised, if elected, to issue an executive order prohibiting race profiling).

investigation for their race profiling practices.[37] Legislators have made many proposals designed to end the practice.[38] Acknowledging the growing public awareness of race profiling, Justice Stevens argued in his dissent in *Illinois v. Wardlow* that an African American man's flight from police may be caused by a legitimate fear of profiling by, as well as imminent violence at the hands of, law enforcement authorities; thus, such flight, he argued, should not necessarily lead to the reasonable suspicion of criminal conduct necessary to justify a stop.[39]

As a nation, we appear to be moving toward a consensus on the illegitimacy of exclusive reliance on a person's race in determining whether he or she is a criminal suspect. Should we allow, for example, consideration of the fact that someone is African American or Latino to justify an ordinary criminal stop because law enforcement authorities believe that African Americans or Latinos, as a matter of statistical probability, are more likely to break the law than whites?[40] Such stereotyping, with its onerous consequences,[41] is deeply problematic.

---

37. *See* Harris, *supra* note 32, at 275-78; Thompson, *supra* note 33, at 959. *See also* Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 815-17, 816 n.4 (1999) (stating that U.S. Department of Justice is reportedly investigating a number of local police agencies for engaging in pattern or practice of civil rights violations). The United States Department of Justice and the State of New Jersey entered into a consent decree prohibiting race profiling. *See New Jersey Enters Into Consent Decree Regarding Highway Stop Racial Profiling*, 68 U.S.L.W. 2390 (Jan. 11, 2000).

38. *See, e.g.*, Traffic Stops Statistics Act of 1999, H.R. 1443, 106th Cong. (1999) (providing for collection of data on race of drivers involved in traffic stops); Traffic Stops Statistics Act of 1998, H.R. 118, 105th Cong. (1998) (same); S. 1389, 2000 Leg. (Cal. 2000) (same); A.B. 1264, 1998 Leg. (Cal. 1998) (same) (vetoed by Governor); S. 76, 1999-2000 Gen. Assem. (N.C. 1999) (same). *See also* Jeffrey Ghannam, *Trafficking in Color*, ABA J., May 2000, at 18 (discussing evidence of race profiling in law enforcement); Hope Viner Samborn, *Profiled and Pulled Over*, ABA J., Oct. 1999, at 18 (discussing legislative proposals and growing public concern with race profiling).

39. 528 U.S. 119, 120 S. Ct. 673, 680-82 (2000).

40. *See* KENNEDY, *supra* note 28, at 138-63. However, in certain limited circumstances, courts have provoked controversy by permitting race to enter into the law enforcement decision to make an investigatory stop. *See* United States v. Harvey, 16 F.3d 109, 112-15 (6th Cir. 1994) (Keith, J., dissenting) (objecting to upholding of stop despite fact that police officer admitted to considering race as a factor); United States v. Weaver, 966 F.2d 391, 392 (8th Cir. 1992) (refusing to invalidate stop and search even though Drug Enforcement Administration agent stopped defendant at airport because he "was aware that a number of young roughly dressed black males from street gangs in Los Angeles frequently brought cocaine into the . . . area"). *See also* Margaret M. Russell, *Entering Great America: Reflections on Race and the Convergence of Progressive Legal Theory and Practice*, 43 HASTINGS L.J. 749 (1992) (analyzing use of race in "gang profiles" by law enforcement); *Police and Racial Profiling*, N.Y. TIMES UPFRONT, Sept. 6, 1999, at 36 (quoting Los Angeles police chief defending the consideration of race in constructing criminal profiles); *infra* notes 60-61 and accompanying text (noting court decisions allowing race to be considered when victim alleges that perpetrator of crime is racial minority).

41. *See infra* Part II.A.

A. Harms

As the ongoing legal and public criticism suggests, race profiling in criminal law enforcement implicates an array of evils. When criminal investigations focus on African Americans, more African Americans necessarily will be arrested and convicted of crimes, thereby creating a self-fulfilling prophesy.[42] By so doing, race profiling reinforces deep-rooted negative stereotypes about African American criminality.[43]

Race profiling also punishes innocent African Americans who are stopped for no other reason than the color of their skin.[44] Law-abiding African Americans regularly suffer the emotional turmoil, embarrassment, and humiliation that result from race-based stops.[45] Discriminatory law enforcement artificially shapes the daily conduct of many African Americans seeking to minimize their risk of interaction with police.[46] Race profiling fits into a pattern of discriminatory law enforcement that has created an enduring cynicism among African Americans about the criminal justice system, thereby increasing the difficulty of law enforcement in minority communities.[47]

---

42. *See* Harris, *supra* note 32, at 267-68, 301-02; Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 818 (1999); *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1507-08 (1988).

43. *See* FLOYD D. WEATHERSPOON, AFRICAN AMERICAN MALES AND THE LAW 1-30 (1998). *See also* Joan W. Howarth, *Representing Black Male Innocence*, 1 J. GENDER, RACE & JUST. 97, 106 (1997) ("[T]he deeply imbedded idea of a frightening Black man has some influence on every person in America, including every person in the criminal justice system. Each stage of our criminal justice process reflects and reinforces the 'knowledge' that Black male means criminal.") (footnote omitted).

44. *Cf.* Craig v. Boren, 429 U.S. 190, 204 (1976) ("[P]roving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with . . . the Equal Protection Clause."). For a discussion of Equal Protection doctrine forbidding reliance on overbroad stereotypes, see *infra* text accompanying notes 239-47.

45. *See* Harris, *supra* note 32, at 265-75. *See also* Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989) (analyzing impact of subtle attacks, known as microaggressions, on African Americans); Charles A. Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161, 1164-65 (1966) (expressing concern that discriminatory police questioning based on probabilities may injure innocent African American youth); Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127 (1987) (analyzing severe damage to human spirit caused by racism).

46. *See* Davis, *supra* note 32, at 425 (noting that some prominent African American men drive bland family automobiles to avoid being stopped by police); Harris, *supra* note 32, at 273-74, 305-07 (stating that to avoid pretextual stops, African American men may drive drab automobiles, dress in conventional ways, and avoid predominantly white areas). *See also* Tammerlin Drummond, *Coping With Cops*, TIME, Apr. 3, 2000, at 72 (discussing how parents of African American and Latino youth teach children about ways to deal with police to avoid violence).

47. *See* Harris, *supra* note 32, at 298-300. *See also* Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 SO. CAL. L. REV. 1219 (2000) (analyzing survey data on African American perceptions of criminal law

Finally, one must seriously contemplate whether race profiling is causally linked to police brutality toward minority communities.[48] The same communities victimized by race profiling also suffer the brunt of police brutality, at times resulting in death.[49] This correlation cannot be mere coincidence; rather, it illustrates how police target African Americans in law enforcement.

B. Legal Remedies

A body of well-developed Fourth Amendment law requires individualized reasonable suspicion to justify an investigatory police stop.[50] Race profiles, based on alleged group affinities, generally violate

---

enforcement); Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1118-19 (2000) (stating that minority distrust of police contributes to refusal to cooperate with law enforcement); William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1797 n.6 (1998) (summarizing survey data showing that African Americans have deeply negative views of the criminal justice system); Ronald Weitzer, *Racialized Policing: Residents' Perceptions in Three Neighborhoods*, 34 LAW & SOC'Y REV. 129 (2000) (concluding from study that attitudes among African Americans toward police vary by class).

48. *See* DERRICK BELL, RACE, RACISM AND AMERICAN LAW § 9.6, at 478 (4th ed. 2000) ("[B]lacks and Hispanics are more likely to be stopped by the police and are, therefore, more likely to experience excessive force."). *See also* JOHN L. BURRIS ET AL., BLUE VS. BLACK: LET'S END THE CONFLICT BETWEEN COPS AND MINORITIES (1999) (recounting incidents of race profiling and excessive use of force by police against African Americans). In perhaps the most widespread recent scandal of this type, Los Angeles Police Department officers framed minority men and imprisoned them for crimes that they did not commit. *See* Ann W. O'Neill, *The Rampart Verdicts: 3 Rampart Officers Convicted of Corruption*, L.A. TIMES, Nov. 16, 2000, at A1 (reporting that jury found police officers guilty of conspiring to obstruct justice by fabricating evidence and framing alleged gang members).

49. *See, e.g.*, Alan Feuer, *Three Are Guilty of Cover-Up Plot in Louima Attack*, N.Y. TIMES, Mar. 7, 2000, at A1 (discussing verdict in case of New York City police cover-up of brutal torture of Abner Louima, a Haitian man); Jane Fritsch, *4 Officers in Diallo Shooting Are Acquitted of All Charges*, N.Y. TIMES, Feb. 26, 2000, at A1 (reporting on acquittal of police officers who killed unarmed black man, Amadou Diallo, with forty-one shots in front of his apartment building). *See also* Charles J. Ogletree Jr. & Henry Louis Gates Jr., *Would a European Diallo Be Dead?*, L.A. TIMES, Mar. 26, 2000, at M5 (calling for federal investigation of Diallo killing and questioning whether police would have killed him if he were white).

50. *See* U.S. CONST. amend. IV ("The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated . . . ."). *See, e.g.*, United States v. Sokolow, 490 U.S. 1, 7 (1989) (stating that reasonable suspicion requires particularized suspicion and "'some minimal level of objective justification' for making the stop") (citation omitted); Terry v. Ohio, 392 U.S. 1, 27 (1968) (emphasizing that reasonable suspicion for investigatory stop calls for more than a mere "inchoate and unparticularized suspicion or 'hunch'"). *See generally* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 3.8, at 202-16 (2d ed. 1992) (summarizing law governing investigatory stops). Some contend, however, that both the vagueness of the "reasonable suspicion" standard and the discretion that it leaves to police officers contribute to race profiling. *See, e.g.*, Tracey Maclin, Terry v. Ohio*'s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271 (1998).

the law,[51] even with the Supreme Court's constriction of Fourth Amendment protections over the last several decades.[52]

Unfortunately, courts have not been particularly sensitive to the possibility that race influences criminal law enforcement.[53] In *Whren v. United States*, for example, the Supreme Court refused to consider whether race motivated a stop as long as police had probable cause that the person stopped had committed a traffic violation.[54] Although the Court made it clear that selective enforcement of the laws based on race may be challenged under the Equal Protection Clause,[55] a heavy burden of proof

---

51. *See* United States v. Cortez, 449 U.S. 411, 417-18 (1981) (holding that law enforcement officers "must have a particularized and objective basis for suspecting the particular person . . . of criminal activity" to make an investigatory stop); United States v. Rodriguez-Sanchez, 23 F.3d 1488, 1492 (9th Cir. 1994) (holding that reasonable suspicion cannot be "based on broad profiles which cast suspicion on entire categories of people without any individualized suspicion of the particular person to be stopped"); Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99, 105 (1999) ("Something more than a purely probabilistic inference of suspicion based on statistical likelihoods must be present to justify a stop."). However, some factors relied on by officers in formulating reasonable suspicion may correlate with race. *See* David A. Harris, *Frisking Every Suspect: The Withering of* Terry, 28 U.C. DAVIS L. REV. 1, 44 (1994).

52. *See, e.g.*, Illinois v. Wardlow, 528 U.S. 119 (2000) (holding that unprovoked flight in high crime area constitutes reasonable suspicion necessary to conduct an investigatory stop); Florida v. White, 526 U.S. 559 (1999) (holding that police did not need warrant before seizing automobile from public place when police had probable cause to believe that automobile was forfeitable contraband); Wyoming v. Houghton, 526 U.S. 295 (1999) (upholding search of purse after finding of contraband on passenger in automobile); Minnesota v. Carter, 525 U.S. 83 (1998) (holding that persons in apartment for brief period lack reasonable expectation of privacy against searches and seizures); Ohio v. Robinette, 519 U.S. 33, 35 (1996) (finding that Fourth Amendment does not require a police officer to inform "lawfully seized defendant . . . that he is 'free to go' before his consent to search will be recognized as voluntary"); Whren v. United States, 517 U.S. 806, 811-13 (1996) (holding that Fourth Amendment requirements are satisfied even if police traffic stop was race-based). *But cf.* Dickerson v. United States, 120 S. Ct. 2326 (2000) (refusing to overrule Miranda v. Arizona, 384 U.S. 436 (1966)).

53. *See, e.g.*, Illinois v. Wardlow, 528 U.S. 119 (2000) (refusing to disturb conviction in which police-based stop of defendant on fact that individual fled upon seeing police patrol in area known for heavy narcotics trafficking, despite fact that innocent persons, particularly racial minorities, might flee police out of fear for personal safety); McCleskey v. Kemp, 481 U.S. 279 (1987) (refusing to disturb death penalty sentence of African American man in face of statistical evidence that imposition of death penalty in Georgia appeared to correlate with race). *But cf.* City of Chicago v. Morales, 527 U.S. 41 (1999) (invalidating "gang congregation" ordinance that arguably had disparate impact on minority youth).

54. 517 U.S. 806 (1996). For criticism of the Court's refusal in *Whren* to consider the influence of race on police conduct in its Fourth Amendment analysis, see David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997); Davis, *supra* note 32, at 432-42; Maclin, *supra* note 32; Thompson, *supra* note 33, at 978-83. *See also* Lisa Walter, Comment, *Eradicating Racial Stereotyping from* Terry *Stops: The Case for an Equal Protection Exclusionary Rule*, 71 U. COLO. L. REV. 255 (2000) (contending that exclusionary rule under Equal Protection Clause was necessary to address racial targeting in stops).

55. *See Whren*, 517 U.S. at 813. *See also* Price v. Kramer, 200 F.3d 1237 (9th Cir. 2000) (affirming award of damages in civil rights action alleging racial bias in stop and search by police);

attaches to such claims.[56]

Legally speaking, race profiling in law enforcement implicates complex and interrelated Fourth Amendment and Equal Protection values. Significantly, Fourth Amendment law, with its focus on reasonable suspicion to justify a stop, often remains blind to the influence of race on law enforcement.[57] At the same time, the Supreme Court's reliance on the Equal Protection Clause as the vindicator of the nondiscrimination principle fails to acknowledge how the rigorous evidentiary burden of proving such a claim greatly limits the number of claims that are brought.[58]

Despite legal prohibition, stops based on race still result from express policy, such as drug courier profiles that incorporate race, informal policy, or individual officers' conscious or unconscious biases.[59] Such unlawful race profiling differs factually and legally from investigatory stops of African Americans after a victim has identified a black person as the perpetrator of a crime. For example, in *Brown v. City of Oneonta*, the court of appeals dismissed a civil rights action against police for stopping African American men because a crime victim had identified the assailant

---

State v. Russell, 477 N.W.2d 886 (Minn. 1991) (invalidating state sentencing scheme under Minnesota Constitution because of racial disparities); City of St. Paul v. Uber, 450 N.W.2d 623, 628 (Minn. Ct. App. 1990) (invalidating stop based in part on the fact that white person was in a racially mixed neighborhood); *see also* U.S. CONST. amend. XIV § 1 (providing that state cannot deny persons within its jurisdiction equal protection of the law).

56. *See* Washington v. Davis, 426 U.S. 229, 238-39 (1976) (announcing requirement that to prevail on Equal Protection claim plaintiff must establish that State actor had a "discriminatory purpose"). *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 465-71 (1996) (finding that intent necessary for selective enforcement claim had not been proven even though over ninety percent of persons convicted of crack cocaine trafficking were African American). *See also* Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151 (1991) (presenting results of empirical study showing negative impacts on plaintiffs seeking to prove Equal Protection claims); Debra Livingston, *Gang Loitering, the Court, and Some Realism About Police Patrol*, 1999 S. CT. REV. 141, 176 n.157 (observing limitations on proving selective enforcement claim mentioned in *Whren*). The intent requirement for proving an Equal Protection claim has been the subject of sustained scholarly criticism. *See, e.g.*, Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 4-5 (1976); Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000). Plaintiffs in some cases, however, have been able to establish such a discriminatory intent. *See, e.g.*, Hunter v. Underwood, 471 U.S. 222 (1985) (invalidating Alabama constitutional provision disenfranchising certain convicted criminals because the provision was motivated by racial animus); Rogers v. Lodge, 458 U.S. 613 (1982) (finding that at-large electoral scheme was maintained for discriminatory purpose).

57. *See supra* notes 53-56 and accompanying text.

58. *See supra* text accompanying notes 55-56.

59. *See* Russell, *supra* note 32, at 717-18 n.2.

as black.[60] In so doing, the court emphasized that no allegations existed that "the police used an established profile of violent criminals to determine that the suspect must have been black" or that the police had "a regular policy based upon racial stereotypes that all black . . . residents be questioned whenever a violent crime is reported."[61]

Although perhaps more theoretical than practical, remedies exist to punish and deter racial discrimination in the criminal justice system.[62] The law establishes that African Americans and other racial minorities cannot lawfully be stopped for criminal investigation solely because of their alleged propensity for criminal conduct.[63] Individualized suspicion is necessary to justify an investigatory stop.[64] To the extent that law enforcement remains discriminatory, scholars, activists, and policymakers search for solutions.[65] Our society faces the age-old problem of bringing the "law in action" into line with the "law in books."[66] Even with the divergence, the law's aspirations have helped fuel efforts to end race profiling in criminal law enforcement and its enduring injury to African American dignity.[67] Immigration law enforcement for Latinos, however, differs dramatically.

III. RACE PROFILING IN IMMIGRATION LAW ENFORCEMENT

Part II of this Article outlined the phenomenon of race profiling in criminal law enforcement, its harms, and its legal remedies.[68] Race profiling also remains part and parcel of the enforcement of a body of immigration law that has evolved under the influence, if not the command,

60. 195 F.3d 111 (2d Cir. 1999). *See, e.g.*, United States v. Williams, 714 F.2d 777 (8th Cir. 1983); United States v. Collins, 532 F.2d 79 (8th Cir. 1976). Factual aspects of the *Oneonta* case raise troubling Equal Protection questions. *See* Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945, 1947-48 & n.8 (1993) (contending that incident was part of pattern of police harassment of African American students in college town); Bob Herbert, *Breathing While Black*, N.Y. TIMES, Nov. 4, 1999, at A29 (criticizing fact that police in *Oneonta* made efforts to stop and question every young African American male in small, predominantly white community). The court's rejection of the Equal Protection claim suggests the difficulty facing plaintiffs seeking to establish the requisite discriminatory intent for an Equal Protection violation. *See Oneonta*, 195 F.3d at 118-20; *supra* text accompanying notes 55-56.

61. *Oneonta*, 195 F.3d at 119.

62. *See supra* text accompanying notes 52-61.

63. *See supra* notes 50-52 and accompanying text.

64. *See supra* note 50 and accompanying text.

65. *See supra* Introduction in Part II.

66. *See* Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

67. *See supra* text accompanying notes 36-39 (discussing efforts to end race profiling).

68. *See supra* Part II.

of the plenary power doctrine.[69]

The judiciary historically has taken a hands-off approach toward immigration law and its enforcement because of the plenary power doctrine. This doctrine, originally enunciated by the Supreme Court in *The Chinese Exclusion Case*,[70] effectively immunizes from judicial review the substantive provisions of the immigration laws governing the admission of immigrants into the United States on the ground that Congress has plenary power to decide such matters.[71] Under this doctrine, the Court refused to disturb the Chinese exclusion laws of the late 1800s, which severely restricted Chinese immigration to the United States.[72] In 1924, with the plenary power doctrine as a shield, Congress sought to reclaim the nation's racial and ethnic balance and enacted the national origins quota system, which favored northern European immigration at the expense of that from southern and eastern Europe and Asia.[73] Justice Frankfurter's

69. For analysis of the centrality of race to the U.S. immigration laws, see Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525.

70. *See* Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581 (1889).

71. *See* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-18, at 967-77 (3d ed. 2000) (summarizing Supreme Court jurisprudence on Congressional power over immigration and naturalization). Consistent with the discretion afforded the United States government with respect to noncitizens entering the United States, the Supreme Court also affords the federal government much leeway in its conduct outside the United States. *See, e.g.*, United States v. Alvarez-Machain, 504 U.S. 655 (1992) (holding that forcible abduction by U.S. government of foreign national in Mexico did not provide a defense to criminal prosecution in U.S. courts); United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (holding that Fourth Amendment protections do not apply to search and seizure by U.S. agents of "property owned by a nonrespondent alien and located in foreign country"). *See also* United States v. Balsys, 524 U.S. 666 (1998) (holding that fear of foreign prosecution was beyond the scope of the Fifth Amendment's privilege against self-incrimination); Diane Marie Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 UCLA L. REV. 1201 (1998) (contending that witness should be able to invoke Fifth Amendment privilege based on fear of foreign prosecution). These cases illustrate the continuing importance of territoriality to U.S. law, which is especially true in the realm of immigration. *See* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993) (holding that putative refugees did not have any legal right to apply for relief when interdicted outside United States); Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 1412, 1424-26 (11th Cir. 1995) (same). *See generally* Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909 (1991) (analyzing territorial, geographical, and alienage limitations on scope of constitutional protections).

72. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698 (1893) (refusing to disturb deportation law discriminating against Chinese immigrants); *The Chinese Exclusion Case*, 130 U.S. at 581 (upholding Chinese exclusion law in face of constitutional challenge). *See generally* BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1990, at 19-36 (1993) (summarizing history of anti-Chinese immigration laws); LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995) (reviewing genesis and enforcement of Chinese exclusion laws).

73. *See* Immigration Act of 1924, ch. 190, § 11(a), 43 Stat. 153, 159 (repealed 1952). *See also* SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: STAFF REPORT OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE

words capture the essence of the plenary power doctrine: "whether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress."[74] Thus, under traditional immigration law, racial exclusions are not necessarily suspect and are subject to limited judicial review.[75]

Prominent commentators have forcefully challenged the plenary power doctrine's logic, which over time has become increasingly anamolous with the civil rights revolution in constitutional law during the twentieth century.[76] The Supreme Court, however, has not disturbed the doctrine and sporadically invokes it.[77] Significantly, the Court decided cases permitting reliance on race in immigration enforcement years *after* the equal

---

POLICY 183-99 (1981) (summarizing events culminating in passage of quota system). *See generally* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925 (2d ed. 1988) (analyzing nativism in United States, including that culminating in congressional passage of national origins quota system); MATTHEW FRYE JACOBSON, WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE (1998) (recounting history of nativism directed toward white ethnic immigrants); DESMOND KING, MAKING AMERICANS: IMMIGRATION, RACE, AND THE ORIGINS OF THE DIVERSE DEMOCRACY (2000) (discussing social and political forces leading to enactment of quota system). For analysis of how the administrative law developed under the Chinese exclusion laws affected the evolution of administrative law generally, see Gabriel J. Chin, Regulating Race: Asian Exclusion and the Administrative State (May 2000) (unpublished manuscript, on file with author).

74. Harisiades v. Shaughnessy, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring) (refusing to disturb deportation of lawful permanent residents on grounds of political ideology). Aliens who have entered the country and who are in removal proceedings, however, enjoy procedural due process protections. *See* Yamataya v. Fisher (*The Japanese Immigrant Case*), 189 U.S. 86 (1903). The harshness of the plenary power doctrine has encouraged the development of due process safeguards, as well as liberal interpretation of the immigration laws favoring aliens. *See* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

75. *See* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 5–34 (1984). *See also* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1839 (1993) ("[I]mmigration law has included anomalies, and even barbarities, that would be tolerated in no other field of regulation.") (citation omitted).

76. *See* Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 122-31 (1998) (summarizing themes common to scholarly criticism of plenary power doctrine). *See, e.g.*, GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998); Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853 (1987); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255.

77. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787 (1977); Kleindienst v. Mandel, 408 U.S. 753 (1972). For the latest on the doctrine in light of the Supreme Court's splintered decision in Miller v. Albright, 523 U.S. 420 (1998), see Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller v. Albright, 1998 S. CT. REV. 1.

protection watershed of *Brown v. Board of Education*.[78] The existing legal anomaly thus remains: racial classifications are suspect under current Equal Protection doctrine except for those in immigration laws.[79]

Although technically limited to review of the law governing the admission of immigrants, the judicial deference embraced by the plenary power doctrine at times surreptitiously influences the rights afforded aliens present in the United States.[80] Courts, for example, have upheld indefinite detention of Cuban migrants that the Cuban government would not allow to return, when immigration courts ordered them removed from the United States.[81] Indefinite confinement of U.S. citizens under such circumstances

78. 347 U.S. 483 (1954); *see* David A. Strauss, *Affirmative Action and the Public Interest*, 1995 SUP. CT. REV. 1, 9 n.38 ("The one clear instance of the Supreme Court's allowing race (or national origin) to be used as a basis for classifying people (since *Brown [v. Board of Education*]) is *United States v. Brignoni-Ponce* . . . .").

79. For a different view, see Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (2000). *See also* PETER H. SCHUCK, CITIZENS, STRANGERS, AND IN-BETWEENS 139 (2000) (dismissing claim that U.S. immigration law was influenced by nativism and restrictionist fervor in the 1990s).

80. *See* Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1127-53 (1995). *See, e.g.*, Reno v. Flores, 507 U.S. 292, 305-06 (1993) (relying on plenary power doctrine and upholding INS policy of detaining juvenile aliens in face of due process challenge); Mathews v. Diaz, 426 U.S. 67, 79-80 (1976) (rejecting constitutional challenge to exclusion of lawful permanent residents from certain federal medical benefits and emphasizing that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens"). John Hart Ely has forcefully contended that because aliens are a discrete and insular minority, alienage classifications deserve heightened judicial scrutiny. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 161-62 (1980). *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-23, at 1545-46 (2d ed. 1988) ("[I]t is clear that aliens historically suffered from prejudice and bias and, as 'an identifiable class of persons . . . , are already subject to disadvantages not shared by the remainder of the community.'") (quoting Hampton v. Mow Sun Wong, 426 U.S. 88, 102 (1976) (footnotes omitted)).

81. *See, e.g.*, Barrera-Echavarria v. Rison, 44 F.3d 1441 (9th Cir. 1995); Guzman v. Tippy, 130 F.3d 64, 66 (2d Cir. 1997); Gisbert v. United States Attorney Gen., 988 F.2d 1437, 1447-48 (5th Cir. 1993), *amended*, 997 F.2d 1122 (5th Cir. 1993). *See also* Ho v. Greene, 204 F.3d 1045 (10th Cir. 2000) (holding that continued detention of Vietnamese refugee subject to removal from country was authorized by law), *cert. granted*, 121 S. Ct. 297 (2000). *But see* Ma v. Reno, 208 F.3d 815, 824-25, 827-28 (9th Cir. 2000) (distinguishing *Barrera-Echaverria* on ground that unlike case before court, it involved an excludable, not deportable, alien and finding that indefinite detention of deportable alien was not permitted under statute), *cert. granted*, 121 S. Ct. 297 (2000). For criticism of *Barrera-Echaverria* and similar cases, see Joan Fitzpatrick & William McKay Bennett, *A Lion in the Path? The Influence of International Law on the Immigration Policy of the United States*, 70 WASH. L. REV. 589, 625-27 (1995); Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons From the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 935-36, 997-1000 (1995). Indefinite incarceration resulted in the December 1999 crisis in a Louisiana prison in which Cuban inmates took hostages to secure their return to Cuba. *See* Marc Lacey with David Firestone, *In Rare Deal, U.S. and Cuba Halt Standoff*, N.Y. TIMES, Dec. 20, 1999, at A1.

would be plainly unconstitutional.[82] This deviation from ordinary public law is consistent with the general perception that immigration law, broadly defined, is not subject to the constraints of the Constitution.[83] From a doctrinal standpoint, however, race-based immigration enforcement that affects the rights of persons present in the country cannot be shielded from judicial review by the plenary power doctrine, which governs Congress's power to establish criteria for *admission* of immigrants into the country.

This section summarizes the current state of immigration law enforcement and how it operates in practice. It then analyzes the propriety of the Border Patrol's reliance on race in immigration enforcement. The conventional wisdom holds that controlling undocumented migration is a legitimate legal and policy goal. However, the over-inclusiveness of targeting people of "Hispanic appearance" renders the classification a weak tool for detecting undocumented immigrants. Because the current classification is so broad, race-based immigration enforcement injures all U.S. citizens and lawful permanent residents of Latin American ancestry by subjecting them to unwarranted stops and diminishing their membership status in the United States. It unfortunately is part of a long history of U.S. immigration enforcement focused on citizens of Mexico.[84]

A. Law in Books

The Immigration & Nationality Act (INA) provides that INS officers "shall have power without warrant . . . to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States . . . ."[85] The Fourth Amendment,[86] which the Supreme Court has applied to Border Patrol searches and seizures of all persons in the United

82. *See* United States v. Salerno, 481 U.S. 739, 755 (1987) (upholding detention before trial of person shown to pose danger to community, although recognizing that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception"); Gerstein v. Pugh, 420 U.S. 103 (1975) (holding that state pretrial detention procedures violated Constitution).

83. For the argument that constitutional protections should apply to foreign citizens in the United States, see *supra* text accompanying notes 76-79; *infra* text accompanying notes 256-58.

84. *See* Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615 (1981); *see also* KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION AND THE I.N.S. (1992) (studying program designed to bring temporary Mexican labor to United States). *See generally* ALFREDO MIRANDÉ, GRINGO JUSTICE (1987) (documenting long history of Border Patrol abuse of persons of Mexican ancestry); MARK REISLER, BY THE SWEAT OF THEIR BROW: MEXICAN IMMIGRANT LABOR IN THE UNITED STATES, 1900-1940 (1976) (analyzing history of regulation of Mexican immigrant labor in United States in first half of twentieth century).

85. INA § 287(a)(1), 8 U.S.C. § 1357(a)(1).

86. *See* U.S. CONST. amend. IV ("The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated . . . .").

States, circumscribes this power.[87]

In *United States v. Brignoni-Ponce*,[88] the Supreme Court applied the Fourth Amendment reasonable suspicion standard used in police investigatory stops[89] and held that Border Patrol officers on roving patrols may stop persons "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."[90] In so doing, the Court found that the stop in question violated the Fourth Amendment because Border Patrol officers relied *exclusively* on "the apparent Mexican ancestry" of the occupants in the automobile.[91] The Court further stated, however, that *"[t]he 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."[92]

---

87. *See, e.g.*, Bond v. United States, 529 U.S. 334 (2000) (holding that Border Patrol officer conducting search violated the Fourth Amendment). In one much-publicized case, a district court initially held, only to reverse itself later after a public outcry, that undocumented immigrants lacked standing to challenge a search on Fourth Amendment grounds. *See* United States v. Guitterez, 983 F. Supp. 905 (N.D. Cal. 1998), *rev'd without opinion*, 203 F.3d 833 (9th Cir. 1999). *See also* Victor C. Romero, *The Domestic Fourth Amendment Rights of Undocumented Immigrants: On* Guitterez *and the Tort Law/Immigration Law Parallel*, 35 HARV. C.R.-C.L. L. REV. 57 (2000) (analyzing *Guitterez* decision); Michael Scaperlanda, *The Domestic Fourth Amendment Rights of Aliens: To What Extent Do They Survive* United States v. Verdugo-Urquidez?, 56 MO. L. REV. 213 (1991) (analyzing Fourth Amendment rights of aliens).

88. 422 U.S. 873 (1975). The following analysis focuses on enforcement operations away from ports of entry into the country. Government has significantly greater leeway with respect to searches and seizures at the border than in the country's interior. *See* United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985) ("Since the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country.") (citations omitted).

Evidence supports the claim that race influences immigration and customs inspections at ports of entry, as well as in the interior. *See* U.S. GENERAL ACCOUNTING OFFICE, U.S. CUSTOMS SERVICE: BETTER TARGETING OF AIRLINE PASSENGERS FOR PERSONAL SEARCHES COULD PRODUCE BETTER RESULTS 2 (2000) (summarizing results of study showing that black women citizens "were 9 times more likely than White women . . . to be x-rayed after being frisked or patted down" even though they "were less than half as likely to be found carrying contraband as White women who were U.S. citizens"). *See also* United States v. Ojebode, 957 F.2d 1218, 1223 (5th Cir. 1992) (holding that border searches based on ethnicity are constitutional).

89. *See supra* text accompanying notes 50-52 (discussing law requiring reasonable suspicion for investigatory stop).

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

91. *Id.* at 885-86.

92. *Id.* at 886-87 (emphasis added). Justice Powell, who wrote the opinion for the Court, also authored the famous opinion in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), emphasizing that in the pursuit of a diverse student body, race could be one factor in a university's admissions criteria. *See also supra* note 17 and accompanying text (acknowledging possible distinctions between consideration of race in race profiling and affirmative action).

The last sentence from *Brignoni-Ponce* has greatly shaped immigration enforcement in the United States over the past twenty-five years. Yet consider how the same sentence from *Brignoni-Ponce* would read as applied to African Americans in the criminal law enforcement context. Could we imagine the Supreme Court stating that "[t]he 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. Nevertheless, the use of race in immigration stops to this point has not been carefully scrutinized.[93]

In an important deviation from ordinary Fourth Amendment doctrine, the Court in *Brignoni-Ponce* authorized the Border Patrol to rely on "Mexican appearance" even if no individual, much less one who "appears Mexican," has been specifically identified as having violated the immigration laws.[94] To support its decision, the Court noted that the government "estimated that 85% of the aliens illegally in the country are from Mexico."[95] The Court's authorization of Border Patrol consideration

93. For analysis of why race-based immigration enforcement has been virtually ignored, see *infra* Part IV and text accompanying note 237. The prevailing stereotypes of Latinos as "foreigners," which ties into U.S. national identity, minimizes the likelihood of a public outcry about abuses in immigration law enforcement, such as that generated by race profiling of African Americans in criminal law enforcement. *See infra* Parts IV.A.1, IV.B.

94. For discussion of cases holding that African American appearance may be considered in criminal law enforcement when the victim identifies the perpetrator as black, see *supra* text accompanying notes 60-61. One commentator suggests that *Brignoni-Ponce* is consistent with the cases permitting consideration of race when the victim of a crime identifies the perpetrator as a racial minority. *See* Chin, *supra* note 79, at 280. The Supreme Court in *Brignoni-Ponce*, however, found race relevant based on raw statistical probability, not because any specific individual had been accused of committing a specific crime. *See supra* text accompanying notes 88-92; *see also* Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 239 (1983) (recognizing this fact).

95. *Brignoni-Ponce*, 422 U.S. at 879 (footnote omitted). This estimate almost certainly was inaccurate when the Court made the assertion in 1975. *See infra* Part III.C.1. To support this proposition, the Court cited United States v. Baca, 368 F. Supp. 398, 402 (S.D. Cal. 1973), which relied on a 1974 Justice Department report, and bootstrapped its reasoning by stating that a high proportion of the deportable aliens came from Mexico. *See Brignoni-Ponce*, 422 U.S. at 879 n.5. *See also infra* text accompanying notes 198-200. Border Patrol consideration of "Hispanic appearance" in stopping persons inevitably contributes to the fact that roughly ninety percent of persons removed from U.S. are Latin American. *See infra* text accompanying notes 198-200.

In authorizing great leeway to the INS, Supreme Court Justices have frequently invoked the strong governmental interest at stake in controlling undocumented immigration from Mexico and often have emphasized the difficulty of enforcement of the southern border. *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032, 1049 (1984) (rejecting general use of exclusionary rule in deportation proceedings and recognizing "the staggering dimension of the problem that the INS confronts"); INS v. Delgado, 466 U.S. 210, 221–24 (1984) (Powell, J., concurring in judgment) (emphasizing magnitude of "immigration problem" as justifying finding that INS sweep of factory did not constitute a "seizure" of persons under the Fourth Amendment); United States v. Valenzuela-Bernal, 458 U.S. 858, 864 n.5 (1982) (stating that undocumented immigration from Mexico is a "colossal problem"); Plyler v. Doe,

of "Mexican appearance" in *Brignoni-Ponce* conflicts with its recognition that "[l]arge numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens."[96] The Court thus acknowledged, but failed to register concern with, the over-inclusiveness of the Border Patrol's racial classification.[97] It failed to afford sufficient weight to the acknowledged fact that a relatively small percentage of the Mexican ancestry population in the United States is undocumented.[98] Even assuming that statistical probabilities could justify the stop of persons of "Mexican appearance," the allegedly high percentage of undocumented Mexicans in the total undocumented population that the Court relied on does not comport with the best estimates currently available.[99]

In addition, the Court in *Brignoni-Ponce* appeared to be swayed by the government's claimed need for flexibility in border enforcement because undocumented immigrants allegedly impose great social, economic, and other costs on U.S. society.[100] Despite the Court's unqualified pronouncement that undocumented aliens incur great societal costs, the question whether the costs of undocumented immigration outweigh its benefits remains hotly disputed in the academic literature.[101] Prominent research studies suggest that the benefits outweigh the costs.[102]

---

457 U.S. 202, 237 (1982) (Powell, J., concurring) (asserting that undocumented immigration from Mexico was "virtually uncontrollable"); United States v. Cortez, 449 U.S. 411, 418 (1981) (observing that immigration enforcement poses "enormous difficulties"); United States v. Ortiz, 422 U.S. 891, 899 (1975) (Burger, C.J., concurring in judgment) (expressing concern that INS "is powerless to stop the tide of illegal aliens—and dangerous drugs—that daily and freely crosses" the border with Mexico).

96. *Brignoni-Ponce*, 422 U.S. at 886 (footnote omitted). In making this statement, the Court cited demographic data from the 1970 Census showing that many citizens of Mexican ancestry lived in Arizona, California, New Mexico, and Texas. *See id*. at 886 n.12. Due to the great increase of Latinos in these states since 1970, the Court's argument that the class of persons of "Mexican appearance" includes a great many persons lawfully in the country is even more true today than it was then. *See infra* Part III.C.1.

97. *See infra* Part III.C.1.

98. *See id*.

99. *See id*.

100. *See Brignoni-Ponce*, 422 U.S. at 878-79.

101. *See* Schuck, *supra* note 20, at 1978-90 (summarizing studies on impacts of immigration on United States and concluding that they are inconclusive about the relative costs and benefits of immigration).

102. *See, e.g.*, NAT'L RESEARCH COUNCIL, THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION (James P. Smith & Barry Edmonston eds., 1997). *See also* Michael A. Olivas, *Immigration Law Teaching and Scholarship in the Ivory Tower: A Response to* Race Matters, 2000 U. ILL. L. REV. 613, 632-35 (reviewing various studies on the economic costs and benefits of immigration).

Building on *Brignoni-Ponce*, the Supreme Court subsequently afforded even greater leeway to Border Patrol officers who stop drivers at permanent checkpoints located many miles from the international border with Mexico. Classifying the intrusion as "sufficiently minimal," the Court in *United States v. Martinez-Fuerte* held that referrals to secondary inspection at permanent checkpoints "made largely on the basis of apparent Mexican ancestry" do not run afoul of the Constitution.[103] The Court emphasized the Border Patrol's need for flexibility[104] and, as it did in *Brignoni-Ponce*,[105] repeated the government's assertion that eighty-five percent of the undocumented population in the United States is of Mexican origin.[106] *Martinez-Fuerte* effectively permits a racist Border Patrol officer to stop all persons of Mexican ancestry.[107]

B. Law in Action

Current INS practice differs little from those facts before the Court in *Brignoni-Ponce*.[108] By emphasizing that race may properly contribute to the decision to stop a person, the Court opened the door for relying on race combined with little more than a Border Patrol officer's hunch.[109] Concern for racial discrimination in immigration law enforcement practices is heightened by the fact that "Border Patrol officers may use racial

---

103. 428 U.S. 543, 563 (1976). *See also* City of Indianapolis v. Edmond, No. 99-1030, 2000 U.S. LEXIS 8084, at **11-13 (Nov. 28, 2000) (discussing *Martinez-Fuerte* as a border enforcement case with minimally intrusive procedure); Mich. Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (rejecting constitutional challenge to fixed-sobriety checkpoint scheme).

104. *See Martinez-Fuerte*, 428 U.S. at 563-64. *See also* Arizona v. Hicks, 480 U.S. 321, 327 (1987) (citing *Brignoni-Ponce* for proposition that minimally intrusive seizure can be justified on less than probable cause to combat transportation of undocumented immigrants); Michigan v. Summers, 452 U.S. 692, 708 (1981) (Stewart, J., dissenting) (stating that *Martinez-Fuerte* upheld "brief stops and inquiries at permanent checkpoints [because of] the unique difficulty of patrolling" the U.S.-Mexico border).

105. *See supra* text accompanying note 95.

106. *See Martinez-Fuerte*, 428 U.S. at 551.

107. *See* KENNEDY, *supra* note 28, at 151. In his dissent in *Martinez-Fuerte*, Justice Brennan observed that the case authorized the Border Patrol to "target motorists of Mexican appearance. The process will then inescapably discriminate against citizens of Mexican ancestry and Mexican aliens lawfully in this country for no other reason than that they unavoidably possess the same 'suspicious' physical and grooming characteristics of illegal Mexican aliens." *Martinez-Fuerte*, 428 U.S. at 572 (Brennan, J., dissenting).

108. For analysis of cases scrutinizing use of race by Border Patrol, see *infra* Part III.B.1. State courts have looked to *Brignoni-Ponce* in criminal cases with mixed results. *Compare* Arizona v. Gonzalez-Gutierrez, 927 P.2d 776 (Ariz. 1996) (holding that Border Patrol officer relied excessively on race in stopping person), *with* Missouri v. Villa-Perez, 835 S.W.2d 897 (Mo. 1992) (upholding stop based in part on race).

109. *See* Maclin, *supra* note 32, at 366 ("Although *Brignoni-Ponce* invalidated the specific seizure at issue, much in the Court's opinion weakened Fourth Amendment protections.").

stereotypes as a proxy for illegal conduct without being subjectively aware of doing so."[110] Unconscious reliance on stereotypes, combined with express consideration of "Mexican appearance," greatly increases the potential for abuse.

One important change since *Brignoni-Ponce* is that Border Patrol officers have expanded the Court's endorsement of the use of "Mexican appearance" to the broader category of "Hispanic appearance,"[111] to accommodate the significant increase in Central American immigration to the United States through Mexico that began in the 1980s.[112]

1. On the Roads

The INS admittedly employs crude undocumented immigrant profiles with race as the touchstone. Border Patrol officers expressly rely on a person's "Hispanic appearance" as one factor in making immigration stops.[113] For example, the *New York Times* reported that two Mexican American judges were stopped and questioned by the Border Patrol in south Texas.[114] Border Patrol agents once pulled over the conservative

110. Gonzalez-Rivera v. INS, 22 F.3d 1441, 1450 (9th Cir. 1994) (citing Lawrence, *supra* note 56). *See* United States v. Garcia-Camacho, 53 F.3d 244, 248 n.7 (9th Cir. 1995) (quoting *Gonzalez-Rivera*).

111. *See infra* Part III.B.1.

112. *See* Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990) (upholding permanent injunction barring Immigration & Naturalization Service (INS) from engaging in pattern and practice of encouraging asylum-seekers from El Salvador to forego their claims and accept return to their native country); Am. Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991) (approving settlement of class action in which Central American asylum-seekers accused U.S. government of discriminating against them in processing asylum claims); SUSAN BIBLER COUTIN, LEGALIZING MOVES: SALVADORAN IMMIGRANTS' STRUGGLE FOR U.S. RESIDENCY (2000) (documenting Salvadoran immigrants' efforts to regularize their immigration status in United States). The classification of Mexican and Central American nationals as being of "Hispanic appearance" is consistent with the prevailing stereotype of Latinos as a homogeneous group when, in fact, they are diverse in many different respects, including physical appearance. *See* Johnson, *supra* note 14, at 129-38. For a discussion of the range of physical appearances among Latinos in United States, see *infra* text accompanying notes 211-15.

113. *See, e.g.*, United States v. Cruz-Hernandez, 62 F.3d 1353, 1355-56 (11th Cir. 1995); United States v. Rodriguez, 976 F.2d 592, 594 (9th Cir. 1992), *amended*, 997 F.2d 1306 (9th Cir. 1993); United States v. Franco-Munoz, 952 F.2d 1055, 1056 (9th Cir. 1991); United States v. Magana, 797 F.2d 777, 781 (9th Cir. 1986); United States v. Pulido-Santoyo, 580 F.2d 352, 354 (9th Cir. 1978). *See also* United States v. Lopez-Martinez, 25 F.3d 1481, 1487 (10th Cir. 1994) (emphasizing that "*Brignoni-Ponce* explained that 'Mexican appearance [is] a relevant factor' when the stop occurs near the United States-Mexico border") (citations omitted).

114. *See* Jim Yardley, *Some Texans Say Border Patrol Singles Out Too Many Blameless Hispanics*, N.Y. TIMES, Jan. 26, 2000, at A17; *see also* James Pinkerton, *Border Patrol Twice Stops U.S. Judge on Way to Court*, HOUSTON CHRON., Oct. 1, 2000, at 1 (reporting that federal judge, Filemon Vela, was stopped twice by Border Patrol, once for having "too many" passengers and once for having tinted windows); Leonel Sanchez, *Latinos Protest Ethnic Profiling*, SAN DIEGO UNION-

law-and-order mayor of a California city, a third generation Mexican American driving a pick-up truck, to verify his citizenship status. The agents told him that he fit an undocumented immigrant "profile"; the mayor's explanation cut to the core: "'you get stopped if you are Mexican. Period.'"[115]

Contending that the U.S. government regularly violates the wide latitude afforded it by the Supreme Court, plaintiffs in many lawsuits allege that the Border Patrol relies almost exclusively on race in making immigration stops.[116] In one case in which the plaintiffs alleged that the INS engaged in a pattern and practice of exclusively race-based stops, INS officials testified that an officer might properly rely, along with Hispanic appearance, on a "hungry look" and the fact that a person was "dirty, unkempt," or "wears work clothing."[117] In other cases, the INS defense effectively amounts to the claim that because most alleged "illegal aliens" are Hispanic, statistical probabilities justify the stop.[118]

In 1992, citizens of "Hispanic descent," including the students, graduates, faculty, and staff of a high school in El Paso, Texas, claimed that Border Patrol officers engaged in a pattern and practice of interrogating Mexican American citizens about their immigration status

---

TRIB., July 24, 2000, at A1 (reporting incident in which Border Patrol officer told Latina lawyer that she was stopped over because "'You look Mexican . . . .'").

115. Lee Romney, *Over the Line?: Citing Questioning of Mayor, Activists Say Border Patrol Targets All Latinos*, L.A. TIMES, Sept. 2, 1993, at J1. *See* David Jackson & Paul de la Garza, *Rep. Gutierrez Uncommon Target of a Too Common Slur*, CHI. TRIB., Apr. 18, 1996, at 1 (reporting that police officer in Capitol told Luis Gutierrez, a member of Congress of Puerto Rican descent, "'[w]hy don't you and your people just go back to the country you came from?'").

116. *See, e.g.*, Hodgers-Durgin v. de la Vina, 199 F.3d 1037 (9th Cir. 1999) (en banc); Nicacio v. INS, 797 F.2d 700 (9th Cir. 1985); LaDuke v. Nelson, 762 F.2d 1318 (9th Cir. 1985), *modified*, 796 F.2d 309 (9th Cir. 1986).

117. Nicacio v. INS, 797 F.2d 700, 704 (9th Cir. 1985). Courts encounter great difficulty in reviewing the lawfulness of a stop based on such subjective factors, and therefore tend to defer to the Border Patrol on the assumption that "officers can recognize the characteristic appearance of persons who live in Mexico." *Brignoni-Ponce*, 422 U.S. at 885 (citation omitted). Deference, of course, is the touchstone of modern administrative law. *See, e.g.*, Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc., 467 U.S. 837 (1984). *See, e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511; Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071 (1990). The courts have been particularly deferential to the Executive Branch in immigration matters. *See, e.g.*, INS v. Aguirre-Aguirre, 526 U.S. 415, 424-33 (1999); Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 188 (1993); INS v. Elias-Zacarias, 502 U.S. 478, 481, 483-84 (1992). *See generally* Kevin R. Johnson, *Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy Over Immigration*, 71 N.C. L. REV. 413 (1993) (analyzing judicial deference to immigration decisions of Executive Branch). No theory of deference to an administrative agency, however, can justify the consideration of invidious factors such as race in the treatment of noncitizens in the United States. *See infra* text accompanying notes 238-61.

118. *See* United States v. Jones, 149 F.3d 364, 369 (5th Cir. 1998); United States v. Rubio-Hernandez, 39 F. Supp. 2d 808, 835 (W.D. Tex. 1999).

and further claimed that officers on occasion physically assaulted those who asserted their legal rights.[119] Similarly, in *Hodgers-Durgin v. de la Vina*,[120] Arizona motorists of Latino descent accused the INS of stopping them without the reasonable suspicion required by law. Although courts occasionally find that stops fail to satisfy the Supreme Court's minimal Fourth Amendment requirements,[121] race-based discriminatory enforcement generally continues unabated, unreported, and unremedied.

As this discussion reveals, the Border Patrol's undocumented immigrant profile contains class-based as well as race-based elements.[122] Generally speaking, immigration laws have historically limited admission of poor and working people into the United States and continue to do so.[123]

---

119. *See* Murillo v. Musegades, 809 F. Supp. 487, 492-94 (W.D. Tex. 1992). After a court enjoined such conduct, the parties settled the lawsuit. *See* ARIZONA, CALIFORNIA, NEW MEXICO, AND TEXAS ADVISORY COMMITTEES TO THE UNITED STATES COMM'N ON CIVIL RIGHTS, FEDERAL IMMIGRATION LAW ENFORCEMENT IN THE SOUTHWEST: CIVIL RIGHTS IMPACTS ON BORDER COMMUNITY 15-20 (1997).

120. 199 F.3d 1037 (9th Cir. 1999) (en banc) (affirming dismissal on justicability grounds).

121. *See, e.g.*, United States v. Garcia-Camacho, 53 F.3d 244, 247-48 (9th Cir. 1995); United States v. Rodriguez, 976 F.2d 592, 595-96 (9th Cir. 1992); United States v. Ortega-Serrano, 788 F.2d 299, 302 (5th Cir. 1986).

122. *See Magana*, 797 F.2d at 781 (stating that Border Patrol officers, among other factors, observed that automobile passengers "appeared to be farm workers, one of whom wore a hat which the officers emphasized was indicative of someone who came from the Mexican state of Jalisco"); United States v. Garcia, 732 F.2d 1221, 1228 (5th Cir. 1984) (Tate, J., dissenting) (contending "that, stripped to its essence, the stop was based upon no more than the border patrolmen's speculation that poor and dirty Hispanic appearing persons might possibly be Mexican aliens"); United States v. Hernandez-Lopez, 538 F.2d 284, 285-86 (9th Cir. 1976) (stating that Border Patrol officers observed that person stopped "did not look like he had lived in the United States, but rather looked like a 'Mexican cowboy'") (footnote omitted). *Cf.* United States v. Ramon, 86 F. Supp. 2d 665 (W.D. Tex. 2000) (holding that Border Patrol reliance on display of religious symbols on automobile could not give rise to reasonable suspicion justifying a stop). Class also influences ordinary criminal law enforcement. *See* Harris, *supra* note 31 (discussing how appearing "poor" as well as black enhances the likelihood of being subject to *Terry* stop).

123. *See* Johnson, *supra* note 24, at 1519-28 (summarizing this history). *See also infra* text accompanying notes 290-91 (discussing impacts of "public charge" exclusion under immigration laws). In deciding whether to grant visa applications, for example, State Department consular officers rely on race and class profiles. *See* T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 462 (4th ed. 1998) (describing case in which former consular officer claimed that he was terminated for not following racial and class stereotypes called for by office policy); Olsen v. Albright, 990 F. Supp. 31 (D.D.C. 1997) (same). Congress in 1996 amended the immigration laws in a way that arguably permitted greater consideration of race and nationality in visa decisions. *See* Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) § 633, 8 U.S.C. §1152(a)(1)(B) (Supp. IV 1994) (adding the following sentence to nondiscrimination requirement: "Nothing in this paragraph shall be construed to limit the authority of the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed"). *See also* William L. Pham, Comment, *Section 633 of IIRIRA: Immunizing Discrimination in Immigrant Visa Processing*, 45 UCLA L. REV. 1461 (1998) (analyzing discriminatory potential of the amendment). Notably, consular visa decisions are wholly immune from judicial review. *See, e.g.*, Pena v. Kissinger, 409 F. Supp. 1182 (S.D.N.Y. 1976);

In addition, race and class have been central to the historical subordination of persons of Mexican ancestry in the United States.[124] Currently, persons of Mexican ancestry as well as those who fit the "Hispanic appearance" stereotype, particularly working class and poor people, commonly find themselves subject to immigration enforcement procedures more than other persons in the United States.[125]

Contrary to popular belief, race-based immigration enforcement extends far from the U.S. borders and into every region of the United States.[126] Heightened immigration enforcement and civil rights complaints in the South and Pacific Northwest accompanied increased Mexican and Central American migration to those regions.[127] Latinos have long leveled legal challenges at alleged immigration enforcement excesses in the Midwest,[128] which corresponds with the history of Mexican migration to the region.[129] In 1997, for example, a district court enjoined Ohio law

---

Hermina Sague v. United States, 416 F. Supp. 217 (D.P.R. 1976).

124. For an analysis of the interaction of race and class in the subordination of Chicanos in the United States of recent class in the subordination of Chicanos in the United States, see RODOLFO ACUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS (4th ed. 1999); TOMÁS ALMAGUER, RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA (1994); MARIO BARRERA, RACE AND CLASS IN THE SOUTHWEST (1979); NEIL FOLEY, THE WHITE SCOURGE: MEXICANS, BLACKS, AND POOR WHITES IN TEXAS COTTON CULTURE (1997); DAVID MONTEJANO, ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836-1936 (1987).

125. *See supra* notes 116-18 and accompanying text.

126. *See* United States v. Orozco, 191 F.3d 578, 582 n.3 (5th Cir. 1999) (collecting authority concluding that INS officers may consider *Brignoni-Ponce* factors in immigration stop in areas well beyond the border region).

127. *See, e.g.*, Nicacio v. INS, 797 F.2d 700 (9th Cir. 1985); LaDuke v. Nelson, 762 F.2d 1318 (9th Cir. 1985), *modified*, 796 F.2d 309 (9th Cir. 1986); Cervantes-Cuevas v. INS, 797 F.2d 707 (9th Cir. 1985); United States v. Gonzalez-Vargas, 496 F. Supp. 1296 (N.D. Ga. 1980). *See also* Deborah M. Weissman, *Between Principles and Practice: The Need for Certified Court Reporters in North Carolina*, 78 N.C. L. REV. 1899, 1907-22 (2000) (describing increase in Latino population in North Carolina and state's reaction to various changes); Sue Anne Pressley, *Hispanic Immigration Boom Rattles South*, WASH. POST, Mar. 6, 2000, at A3 (reporting on increasing immigration from Mexico to the South and great increase in Hispanic population in southern states from 1990-98).

128. *See, e.g.*, Ill. Migrant Council v. Pilliod, 540 F.2d 1062 (7th Cir. 1976) (affirming issuance of injunction in case where complaint alleged INS pattern and practice of harassment of persons of Mexican ancestry, including director and deputy director of Illinois Migrant Council), *modified*, 548 F.2d 715 (7th Cir. 1977) (en banc); Ramirez v. Webb, 787 F.2d 592 (6th Cir. 1986) (per curiam) (affirming grant of preliminary injunction in case brought by class of persons of "Hispanic origin or appearance" within the Western District of Michigan subject to unlawful stops by INS). A 1999 enforcement operation, known as "Operation Vanguard," in Nebraska provoked criticism from Mexican American and immigrant organizations. *See* David LaGesse, *Social Security Officials Halt INS Program in Meatpacking Industry*, DALLAS MORNING NEWS, Aug. 13, 1999, at 5A; Mike Sherry, *Panel to Review INS Initiative Operation Vanguard Advisory Panel*, OMAHA WORLD-HERALD, Sept. 10, 1999, at 23.

129. *See, e.g.*, DENNIS NODÍN VALDÉS, BARRIOS NORTEÑOS: ST. PAUL AND MIDWESTERN MEXICAN COMMUNITIES IN THE TWENTIETH CENTURY (2000); DENNIS NODÍN VALDÉS, AL NORTE: AGRICULTURAL WORKERS IN THE GREAT LAKES REGION, 1917-1970 (1991).

enforcement officers from stopping and detaining Hispanic motorists based on race or national origin and interrogating them about their immigration status.[130] Ohio law enforcement officers admitted that the vast majority of the motorists asked for immigration documentation were Hispanic and that officers asked for a green card if a driver spoke little, or poor, English. One officer testified that "he became suspicious that a motorist was an illegal alien if the motorist was going to pick crops, was coming from Florida or Texas, had little money, was driving an older vehicle, and/or was wearing work clothes."[131]

As the Ohio case reveals, state and local governments, sometimes with federal encouragement, have engaged in egregious race-based immigration enforcement.[132] During and after the violence in May 1992 following acquittal of white police officers charged with the brutal beating of Rodney King, an African American man, in Los Angeles,[133] local law enforcement officers with the cooperation of the INS engaged in a concerted effort to arrest and deport undocumented Latino immigrants.[134] In July 1997, police in Chandler, a suburb of Phoenix, Arizona, with the cooperation of the Border Patrol began an operation in the name of community redevelopment and stopped cars with drivers or passengers of "Mexican appearance" to check their immigration status.[135] At stores

130. *See* Farm Labor Org. Comm. v. Ohio State Highway Patrol, 991 F. Supp. 895 (N.D. Ohio 1997).

131. Farm Labor Org. Comm. v. Ohio State Highway Patrol, 95 F. Supp. 2d 723, 736 (N.D. Ohio 2000). For discussing of Border Patrol's reliance on indicia of class in undocumented immigrant profiles, see *supra* text accompanying notes 122-25.

132. *See* Anne-Marie O'Connor, *Rampart Set Up Latinos to Be Deported, INS Says*, L.A. TIMES, Feb. 24, 2000, at A1 (reporting that Los Angeles Police Department gang task force indiscriminately rounded up Latinos and turned over those with questionable immigration status to the INS); *see also* UNITED STATES GEN. ACCOUNTING OFFICE, ILLEGAL ALIENS: INS PARTICIPATION IN ANTIGANG TASK FORCES IN LOS ANGELES (Oct. 2000) (reporting on INS cooperation with Los Angeles Police Department). *See generally* FRANCISCO E. BALDERRAMA & RAYMOND RODRIGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S (1995) (analyzing efforts of state and local governments to send persons of Mexican ancestry to Mexico). Recent changes to the immigration laws have increased the role of state and local governments in the enforcement of the federal immigration laws. *See* Jay T. Jorgensen, Comment, *The Practical Power of State and Local Governments to Enforce Federal Immigration Laws*, 1997 B.Y.U. L. REV. 899.

133. *See supra* note 29 (citing authorities analyzing King incident).

134. *See* MANUEL PASTOR, JR. ET AL., LATINOS AND THE LOS ANGELES UPRISING: THE ECONOMIC CONTEXT 11-13 (1993). *See also* Cruz Reynoso, *Hispanics and the Criminal Justice System*, *in* HISPANICS IN THE UNITED STATES 277, 284-85 (Pastora San Juan Cafferty & David W. Engstrom eds., 2000) (analyzing cooperation between law enforcement and INS).

135. *See* Kathy Khoury, *Who Gets Swept in Immigration Sweep?*, CHR. SCI. MON., Feb. 2, 1999, at 1; Hector Tobar, *An Ugly Stain on a City's Bright and Shining Plan*, L.A. TIMES, Dec. 28, 1998, at A1. *See also* Michael A. Fletcher, *Latinos See Bias in Elgin's Fight Against Blight*, WASH. POST, May 29, 2000, at A1 (reporting that Latinos in Chicago suburb contend that housing regulations are being enforced in discriminatory manner).

frequented by undocumented persons, police officers questioned patrons about their immigration status. Police officers also entered homes of suspected undocumented immigrants without warrants or probable cause and stopped "[n]umerous American citizens and legal residents . . . on multiple occasions . . . for no other reason than their skin color or Mexican appearance or use of the Spanish language."[136]

That claims of discriminatory enforcement of immigration laws continue should not be surprising.[137] By granting vast discretion to the Border Patrol, the Supreme Court invites race to dominate immigration enforcement. A ground level study of immigration enforcement concludes that Border Patrol "[o]fficers can easily strengthen their reasonable suspicion for an interrogation *after* they have begun talking to an individual . . . . *It is easy to come up with the necessary articulable facts after the fact* . . . . [This practice] is referred to as '*canned p.c.*' (probable cause)."[138] Moreover, officers may believe that they can identify an undocumented person to a near certainty when, in fact, they err more often than not.[139] This formula is tailor-made for a pattern of stops based exclusively on "Hispanic appearance," with the officers concocting a legally-defensible rationale after the fact.[140]

---

136. OFFICE OF THE ATTORNEY GENERAL OF ARIZONA, RESULTS OF THE CHANDLER SURVEY 31 (1997). The INS Office of Internal Audit criticized the Border Patrol's role in the operation. *See* Memorandum from Office of Executive Associate Commissioner, U.S. Dep't of Justice, I.N.S., to the Commissioner, U.S. Dep't of Justice, I.N.S. (statement on the I.N.S. Chandler Report) (on file with the author) (Aug. 4, 1999).

137. Courts generally have found it difficult to ensure compliance with the law by the federal immigration agencies. *See* Peter H. Schuck & Theodore Hsien Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979-1990*, 45 STAN. L. REV. 115 (1992) (finding from an empirical study that courts reversed decisions of immigration agencies at high rates, thereby suggesting structural flaws in immigration bureaucracy).

138. Edwin Harwood, *Arrests Without Warrant: The Legal and Organizational Environment of Immigration Law Enforcement*, 17 U.C. DAVIS L. REV. 505, 531 (1984) (emphasis added). *See* EDWIN HARWOOD, IN LIBERTY'S SHADOW 59 (1986) ("INS officers can easily circumvent the constitutional requirements. To justify a stop, officers can easily claim that they thought the individual was wearing Mexican clothing, behaved furtively, or closely resembled a person they had processed before."); *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1374 (1983) (stating that Supreme Court has "grant[ed] INS agents the freedom to select individuals for interrogation on the basis of ethnicity, as long as the agents can meet the minimal burden of devising plausible post hoc rationalizations for their actions") (footnote omitted). *Cf. Montero-Camargo*, 208 F.3d at 1140 (Kozinski, J., concurring) (stating that Border Patrol officers alleged reasoning for a stop of Latino driver was "window dressing, designed to get around" Ninth Circuit precedent).

139. *See* Harwood, *supra* note 138, at 532 n.105 (noting that officer he observed believed that he correctly identified undocumented persons over ninety percent of time and that he had a "'sixth sense' for distinguishing an illegal alien" when officer's accuracy in fact was in the 20-25% range).

140. One federal judge went so far as to contend that the law has evolved to a point where the courts have in effect created an exception to the Fourth Amendment for the Border Patrol. *See* United States v. Zapata-Ibarra, 223 F.3d 281, 282 (5th Cir. 2000) (Wiener, J., dissenting) ("[H]istory is likely

2. In the Workplace

The Supreme Court's authorization of the use of race in *Brignoni-Ponce* has influenced immigration enforcement in the workplace as well as on the roads. No doubt encouraged by the Court's reasoning, the INS relies on "Hispanic appearance" in selecting workplaces to search for undocumented workers.[141] During workplace raids, which the Supreme Court refused to classify as "seizures" subject to the constraints of the Fourth Amendment,[142] the INS has targeted persons of apparent Latin American ancestry for interrogation.[143] Critics object to worksite raids, although the role of race in the sweeps has not been challenged as strongly as one might expect.[144] Due to the criticism, particularly the objections of employers, the INS in recent years has focused on border enforcement

---

to judge the judiciary's evisceration of the Fourth Amendment in the vicinity of the Mexican border as yet another jurisprudential nadir, joining Korematsu [v. United States, 323 U.S. 214 (1944)], Dred Scott [v. Sandford, 60 U.S. 393 (1856)], and even Plessy [v. Ferguson, 163 U.S. 537 (1896)] on the list of our most shameful failures to discharge our duty of defending constitutional civil liberties against the popular hue and cry that would have us abridge them.") (footnotes omitted).

141. *See, e.g.*, Pearl Meadows Mushroom Farm, Inc. v. Nelson, 723 F. Supp. 432, 442 (N.D. Cal. 1989) (recounting testimony of INS agents that "when questioned as to the justification for entering [a workplace] without a warrant, [the agents] answered that they did not need one 'if they could see Mexicans in plain view of the street'") (footnote omitted); Int'l Ladies' Garment Workers' Union v. Sureck, 681 F.2d 624, 627 n.5 (9th Cir. 1982) (stating that INS acknowledged that it considered "'apparent Latin decent' [sic]" of workers in deciding to raid factory), *rev'd sub nom*, INS v. Delgado, 466 U.S. 210 (1984); Blackie's House of Beef, Inc. v. Castillo, 659 F.2d 1211, 1226 n.17 (D.C. Cir. 1981) (condoning INS consideration of "'foreign appearances'" of employees in deciding to embark on enforcement operation). As with other aspects of immigration enforcement, race profiling in workplace enforcement tends to have class-specific impacts. *See supra* text accompanying notes 122-25; *see also infra* text accompanying notes 311-13.

142. *See* INS v. Delgado, 466 U.S. 210 (1984). For criticism of the Court's reasoning in *Delgado*, see Note, *Reexamining the Constitutionality of the INS Workplace Raids After the Immigration Reform and Control Act of 1986*, 100 HARV. L. REV. 1979 (1987).

143. *See* Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson, 674 F. Supp. 294, 295 (N.D. Cal. 1987) (discussing legal challenges to INS raids and stating that plaintiffs "allege[d] that in a typical raid, the INS would block the exits from the work area and systematically question primarily hispanic [sic] workers about their immigration status").

144. *See, e.g.*, Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 973-76, 987-98 (reviewing litigation surrounding INS workplace enforcement and the various objections to INS raids); NATIONAL INS RAIDS TASK FORCE, PORTRAIT OF INJUSTICE: THE IMPACT OF IMMIGRATION RAIDS ON FAMILIES, WORKERS, AND COMMUNITIES (1998) (documenting negative consequences of INS raids); *INS Distributes New Guidelines for Worksite Raids*, 75 INTERPRETER RELEASES 979 (July 17, 1998) (announcing new INS procedures in response to "a raid . . . in Miami where armed INS agents stormed into a warehouse, and allegedly were abusive to the workers. One woman reported that an agent grabbed her by the hair, threw her on the floor and kicked her. A pregnant woman reportedly fainted after being shoved.") (footnotes omitted). *See also* Lenni B. Benson, *By Hook or By Crook: Exploring the Legality of an INS Sting Operation*, 31 SAN DIEGO L. REV. 813 (1994) (examining operation in which INS lured deportable aliens to report to INS for arrest by false promises of amnesty).

rather than workplace raids in the country's interior.[145]

Race-based workplace enforcement conflicts with the nondiscrimination rules that the immigration laws impose on employers. In the Immigration Reform and Control Act of 1986 (IRCA)[146] as part of a compromise that allowed for the imposition of sanctions on employers of undocumented immigrants,[147] Congress prohibited discrimination on the basis of national origin or immigration status by employers against immigrants authorized to work.[148] If employers relied on race in their hiring practices in the same way that the INS does in immigration stops and workplace raids, they would necessarily violate IRCA's nondiscrimination provisions.[149] In any event, discrimination against national origin minorities does not appear to be a high priority. Despite findings of a pattern and practice of discrimination by employers in violation of the law, Congress has not toughened the anti-discrimination provisions. Indeed, the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) increased the difficulty of establishing a discrimination claim by requiring proof of a "purpose" or "intent of

145. *See* Ricardo Alonso-Zaldivar, *INS to Cut Workplace Raids, Target Employers*, L.A. TIMES, Mar. 16, 1999, at A1.

146. Pub. L. No. 99-603, 100 Stat. 3359.

147. *See* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 963-64 (2d ed. 1997). For an analysis of the complex politics culminating in the passage of the Act, see Peter H. Schuck, *The Politics of Rapid Legal Change: Immigration Policy in the 1980s*, 6 AM. POL. DEV. 37 (1992).

148. *See* INA § 274B(a), 8 U.S.C. § 1324b(a).

149. Strong evidence exists that employers discriminate against Latino, Asian Americans, and other perceived "foreigners" living lawfully in the country. As stated by the Commission on Immigration Reform, IRCA's anti-discrimination provisions have largely failed, as demonstrated by "the documentation of government and private studies of discriminatory practices against foreign-sounding and foreign-looking applicants for employment." U.S. COMM'N ON IMMIGRATION REFORM, U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY 52 (1994) [hereinafter U.S. COMM'N ON IMMIGRATION REFORM, RESTORING CREDIBILITY]. *See* U.S. GEN. ACCOUNTING OFFICE, IMMIGRATION REFORM—EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 3-8 (1990); Cecelia M. Espenoza, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986*, 8 GEO. IMMIGR. L.J. 343, 347-48, 364-69, 381-83 (1994). *See also* Michael A. Scaperlanda, *The Paradox of a Title: Discrimination Within the Anti-Discrimination Provisions of the Immigration Reform and Control Act of 1986*, 1988 WIS. L. REV. 1043 (examining anti-discrimination provisions of Immigration Reform and Control Act of 1986). The Commission stated that:

> [T]he pattern of subjecting foreign-appearing workers to different or additional requirements appears most prevalent: employers selectively verify employment authorization for some, but not other, employees, refusing to accept valid documents, requiring specific documents from certain workers (such as a green card from everyone they believe to be an immigrant), and accepting only a limited number of documents, such as a driver's license and social security card.

U.S. COMM'N ON IMMIGRATION REFORM, RESTORING CREDIBILITY, *supra*, at 80.

discriminating against an individual."[150]

Race profiling in immigration enforcement facilitates the exploitation of undocumented Latin Americans by their employers.[151] Playing on fears of apprehension due to race-based immigration enforcement in the workplace and on the roads, employers have considerable leverage in dealing with undocumented workers.[152] Employers remain confident that the undocumented workers, psychologically conditioned that their appearance automatically places their immigration status into question, will be unlikely to report workplace violations to the authorities due to their fear of removal from the country.[153]

3. The Lack of Effective Remedies

No existing device effectively deters excessive reliance on race by the INS in the enforcement of immigration laws. Legal challenges to misconduct, such as class actions, run into formidable procedural[154] and

150. IIRIRA § 421 (amending INA § 274B(a)(6), 8 U.S.C. § 1324b(a)(6)). *See* Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 693-95 (1997).

151. *See* U.S. COMM'N ON IMMIGRATION REFORM, RESTORING CREDIBILITY, *supra* note 149, at 53 ("Because they have few avenues of redress if their rights to fair wages and working conditions are denied, illegal aliens are particularly vulnerable to abuse."). A wealth of literature exists on how a person's uncertain immigration status facilitates their exploitation. *See, e.g.*, Gerald P. López, *The Work We Know So Little About*, 42 STAN L. REV. 1 (1989) (describing struggle of undocumented Mexican immigrant struggling at low wage job); Maria L. Ontiveros, *To Help Those Most in Need: Undocumented Workers' Rights and Remedies Under Title VII*, 20 N.Y.U. REV. L. & SOC. CHANGE 607, 617-23 (1994) (discussing exploitation of undocumented women in the workplace).

152. An extreme example is the immigrant garment workers who were held in involuntary servitude in an apartment complex in southern California, which the authorities uncovered in 1995. *See* Laura Ho, Catherine Powell & Leti Volpp, *(Dis)Assembling Rights of Women Workers Along the Global Assembly Line: Human Rights and the Garment Industry*, 31 HARV. C.R.-C.L. L. REV. 383, 383-84 (1996).

153. *See* Bosniak, *supra* note 144, at 986-87. *See also* Hoffman Plastic Compounds, Inc. v. NLRB, 208 F.3d 229, 238 (D.C. Cir. 2000) (discussing split in circuits over whether undocumented workers may obtain reinstatement and backpay as remedy for employer's violation of National Labor Relations Act); Montero v. INS, 124 F.3d 381 (2d Cir. 1997) (holding that undocumented Latina could be removed from the country even though tip by her employer to INS resulting in her apprehension violated federal labor law); Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. (forthcoming 2001) (analyzing *Montero* decision).

154. *See, e.g.*, Hodgers-Durgin v. de la Vina, 199 F.3d 1037 (9th Cir. 1999) (en banc) (dismissing action claiming pattern and practice of INS discrimination against Latino motorists on justicability grounds). *See also* Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1454-55 (1997) (stating that Congress amended INA § 242(f) in 1996 "to prevent class-wide injunctions" against INS); Leti Volpp, *Court-Stripping and Class-Wide Relief: A Response to Judicial Review in Immigration Cases After AADC*, 14 GEO. IMMIGR. L.J. 463 (2000) (analyzing negative impacts of 1996 amendments to immigration laws limiting injunctive relief available in class actions that challenge INS patterns and practices). *Cf.*

substantive[155] barriers. Commentators routinely criticize internal INS complaint procedures as ineffective.[156] The Supreme Court has held that the Fourth Amendment's exclusionary rule generally does not cover civil removal proceedings, so that the fruits of an unlawful stop ordinarily remain admissible.[157] Although the Court emphasized that it was not dealing "with egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained,"[158] establishing such extreme conduct to invoke the exclusionary rule has proven difficult.[159] Because race is a legally proper factor to consider in an immigration stop, establishing that race was the *exclusive* factor for the stop, which the law currently requires, is far from easy.[160]

In 1985, one observer summarized the status of border enforcement in words that continue to ring true today:

Brandon Garrett, *Standing While Black: Distinguishing* Lyons *in Racial Profiling Cases*, 100 COLUM L. REV. 1815 (2000) (discussing justiciability barriers to race profiling claims due to decision in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1993)).

155. *See infra* text accompanying notes 248-55 (discussing difficulties in proving Equal Protection violations).

156. *See* Bill Ong Hing, *Border Patrol Abuse: Evaluating Complaint Procedures Available to Victims*, 9 GEO. IMMIGR. L.J. 757 (1995); Stephen A. Rosenbaum, *Keeping an Eye on the I.N.S.: A Case for Civilian Review of Uncivil Conduct*, 7 LA RAZA L.J. 1 (1994); Jesus A. TreviZo, Comment, *Border Violence Against Illegal Immigrants and the Need to Change the Border Patrol's Current Complaint Review Process*, 21 HOUS. J. INT'L L. 85 (1998).

157. *See* INS v. Lopez-Mendoza, 468 U.S. 1032 (1984). In reaching this conclusion, the Court analogized undocumented persons to hazardous waste. *See id*. at 1046 ("Presumably no one would argue that the exclusionary rule should be invoked to prevent an agency from ordering corrective action at *a leaking hazardous waste dump* if the evidence underlying the order had been improperly obtained . . . .") (emphasis added). *See also* Peter L. Reich, *Environmental Metaphor in the Alien Benefits Debate*, 42 UCLA L. REV. 1577 (1995) (analyzing use of environmental metaphors in immigration debate, specifically immigrant receipt of public benefits).

For arguments on why certain criminal procedure protections, such as the exclusionary rule, should apply to removal proceedings, see Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305 (2000). *See also* Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890 (2000) (calling for constitutional protections for noncitizens in removal proceedings because of their nature and impact).

158. *Lopez-Mendoza*, 468 U.S. at 1050-51 (citation omitted). *But see Montero*, 124 F.3d at 386 (refusing to exclude evidence from removal proceeding obtained in violation of the First Amendment).

159. *See, e.g.*, Gonzalez-Rivera v. INS, 22 F.3d 1441, 1448-52 (9th Cir. 1994) (finding that the Border Patrol's conduct in making a race-based stop was "egregious," thereby justifying application of the exclusionary rule); Orhorhaghe v. INS, 38 F.3d 488, 497 (9th Cir. 1994) (finding that a person's possession of a "Nigerian-sounding name," which the court reasoned might serve as a proxy for race, was insufficient to justify an INS stop). *But see* Matter of Toro, 17 I. & N. Dec. 340, 343 (BIA 1980) (concluding that INS stopped alien exclusively because of "Latin appearance" in violation of Fourth Amendment but refusing to bar evidence obtained as a result of stop from removal proceedings).

160. *See supra* text accompanying notes 88-92.

> [I]mmigration authorities can still effectively stop and interrogate anyone they meet . . . providing only that the [person] looks foreign. While they cannot in theory question people on the basis of racial or ethnic appearance alone, they in fact do so consistently, and no one familiar with the realities of immigration enforcement would suggest the contrary.[161]

C. The Need for Change

The deficiencies in the existing law authorizing the Border Patrol to consider race in immigration stops demand change. The "Hispanic appearance" classification is dramatically overbroad and unnecessarily includes many U.S. citizens and lawful immigrants.[162] In addition to the weak correlation between the "Hispanic appearance" classification and undocumented status, the dignitary harms suffered by Latinos living lawfully in the United States call for legal reform.[163] These shortcomings fail to differ significantly from those that have provoked the public outcry against race profiling in criminal law enforcement.[164]

1. Over-Inclusiveness

The stereotype that all Latinos are "foreigners" of suspicious immigration status influences immigration enforcement law.[165] The facts, however, belie the stereotype and show that cases like *Brignoni-Ponce* and *Martinez-Fuerte* rest, at best, on shaky factual foundations.

In vesting the Border Patrol with the discretion to consider "Mexican appearance" in immigration stops, the Supreme Court relied on the government's assertion that eighty-five percent of the undocumented population in the United States was of Mexican ancestry.[166] Assuming that it is relevant to the inquiry, this figure bears no resemblance to the best available evidence today and in all likelihood was inaccurate in 1975.[167] In

---

161. ELIZABETH HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS 100 (1985).

162. *See infra* Part III.C.1.

163. *See infra* Part III.C.2.

164. *See supra* Part II.

165. *See supra* text accompanying notes 88-153; *see also infra* Part IV.

166. *See supra* text accompanying notes 95, 106.

167. *See* Arthur F. Corwin, *The Numbers Game: Estimates of Illegal Aliens in the United States, 1970-1981*, 45 LAW & CONTEMP. PROBS. 223, 246, 259 (1982) (reviewing various estimates of undocumented immigrants in United States and concluding that best estimate at time was that only fifty to sixty percent of undocumented population was of Mexican origin).

1981, the final report of the U.S. Select Commission on Immigration and Refugee Policy summarizing U.S. Bureau of the Census data reported that "Mexican nationals probably account *for less than half* of the undocumented/illegal population."[168] According to the latest INS estimates, Mexican citizens comprise roughly one-half of the undocumented population,[169] a far cry from the unsubstantiated estimate that the government provided the Supreme Court in 1975.[170]

In any event, rather than considering the percentage of undocumented persons of Mexican ancestry in the country, the Supreme Court should have considered the percentage of the total Hispanic population in the United States with lawful immigration statuses. This represents the group of individuals subject to the injuries inflicted by race profiling in immigration enforcement, harms never considered seriously by the Court in *Brignoni-Ponce*. The population of persons of "Hispanic appearance" residing *lawfully* in the United States and subject to race-based immigration stops is extensive, having grown substantially since 1975.[171] In 1997, nearly thirty million people of Hispanic ancestry—over eleven percent of the total U.S. population—lived in the United States,[172] an

168. U.S. SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, FINAL REPORT AND RECOMMENDATIONS: U.S. POLICY AND THE NATIONAL INTEREST 36 (1981) (emphasis added).

169. *See* U.S. DEP'T OF JUSTICE, 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 200 tbl.N (1999) [hereinafter 1997 INS STATISTICAL YEARBOOK]. Some other estimates are considerably lower. *See* Frank Sharry, *Myths, Realities and Solutions: Facts About Illegal Immigrants*, 67 SPECTRUM: THE JOURNAL OF STATE GOVERNMENT 20 (1994) (contending that data shows that Mexican nationals comprise only thirty percent of undocumented immigrant population in United States). There is evidence that Mexicans as a percentage of the overall undocumented population declined after the implementation of the legalization program created by the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359. *See* Karen A. Woodrow & Jeffrey S. Passel, *Post-IRCA Undocumented Immigration to the United States: An Assessment Based on the June 1988 CPS*, *in* UNDOCUMENTED MIGRATION TO THE UNITED STATES: IRCA AND THE EXPERIENCE OF THE 1980S 48, 66-67 (Frank D. Bean et al. eds., 1990)

170. *See supra* note 95 and accompanying text. This would not be the first time that erroneous data provided by the U.S. government resulted in the making of law adverse to immigrants. *See* LEGOMSKY, *supra* note 147, at 148-49 (describing how INS Commissioner's testimony before congressional committee presented erroneous estimates of marriage fraud that helped ensure passage of Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537, which imposed strict new requirements on persons seeking to have spouses obtain immigrant visas).

171. In declining to follow the Court's 1975 statement in *Brignoni-Ponce* that race could be considered as one factor in a stop, the Court of Appeals for the Ninth Circuit emphasized the fact that the Latino population had grown dramatically since the 1970s. *See* United States v. Montero-Camargo, 208 F.3d 1122, 1132-34 (9th Cir. 2000) (en banc). *See also* United States v. Lopez-Martinez, 25 F.3d 1481, 1490 (10th Cir. 1994) (McKay, J., dissenting) (contending that "Hispanic appearance" should not factor into Border Patrol officer's decision to stop person because Hispanics constitute nearly 40 percent of the population of New Mexico).

172. *See* U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS: THE HISPANIC POPULATION IN THE UNITED STATES: MARCH 1997 (UPDATE) (1998).

increase from 14.6 million people or 6.5 percent of the population in 1980.[173] In contrast, as of October 1996, barely over three million undocumented Mexican and Central American immigrants lived in the United States.[174] A crude estimate from these figures reveals that the vast majority (about ninety percent) of Hispanics in the United States are lawful immigrants or citizens.[175]

Much-publicized population projections also show a growing Hispanic population in this country. The Bureau of the Census estimates that by 2050, Hispanics will constitute nearly twenty-five percent of the U.S. population.[176] Each year, hundreds of thousands of persons of Latin American ancestry are lawfully admitted to this country. In fiscal year 1997 alone, the United States admitted over 146,000 lawful permanent residents from Mexico.[177] Over 640,000 in 1971-80, about 1.7 million in 1981-90, and over 1.8 million Mexican immigrants in 1991-97, lawfully immigrated to the United States.[178] In fiscal years 1988-97, nearly 600,000 Mexican immigrants naturalized and became U.S. citizens.[179]

In California, whose southern border is one of the focal points of U.S. immigration enforcement, Hispanics comprised *over one-quarter* of the state's population in 1990.[180] Hispanics constitute a large percentage, sometimes even a majority, of the population in many localities on or near California's Mexican border.[181] For example, in Imperial County, a hot bed of border enforcement in the state, Hispanics constitute over seventy

---

173. *See* U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 19 tbl.19 (119th ed. 1999).

174. *See* 1997 INS STATISTICAL YEARBOOK, *supra* note 169, at 200 tbl.N.

175. This rough estimate was computed by dividing the Bureau of the Census report projection that roughly thirty million Latinos live in the United States, by the INS estimate that about three million are undocumented. *See supra* notes 171-74 and accompanying text.

176. *See* U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS: POPULATION PROJECTIONS OF THE UNITED STATES BY AGE, SEX, RACE, AND HISPANIC ORIGIN: 1995 TO 2050, at 13 tbl.J (1996). As at least one member of the Equal Employment Opportunity Commission has observed that these demographics will likely make national origin discrimination a greater problem in the future. *See Undocumented Workers, National Origin Discrimination Prove Tricky for Employers*, 68 U.S.L.W. 2611, 2612 (Apr. 18, 2000).

177. *See* 1997 INS STATISTICAL YEARBOOK, *supra* note 169, at 21 tbl.C.

178. *See id*. at 26 tbl.2.

179. *See id*. at 148 tbl.47.

180. *See* JON STILES ET AL., CALIFORNIA LATINO DEMOGRAPHIC DATABOOK 2-5 tbl.2.1 (1998).

181. *See id*. at 2-32, 2-34 (Maps 2.22, 2.24); *see also* David G. Gutiérrez, *Migration, Emergent Ethnicity, and the "Third Space": The Shifting Politics of Nationalism in Greater Mexico*, 86 J. AM. HIST. 481, 505-06 (1999) ("By 1990 . . . , ethnic Mexicans constituted more than 40 percent of the population of . . . Los Angeles . . . , nearly 30 percent of . . . Tucson, 52 percent of San Antonio's population, 66 percent of El Paso's, and nearly 78 percent of the sprawling Brownsville-Harlingen-San Benito metropolitan area.").

percent of the population.[182]

Because of the dramatic growth of the Latino community, which is projected to continue for an indefinite future, both the number of persons subject to and the percentage of the total population potentially injured by race-based immigration stops have increased significantly since the Supreme Court's 1975 *Brignoni-Ponce* decision.[183] Given the millions of Latinos residing lawfully in the United States, "Hispanic appearance" holds little probative value in determining whether a person lacks proper immigration documentation. In Equal Protection terms, the classification is over-inclusive with respect to the ostensible goal of identifying undocumented persons. Like the proverbial "dragnet," it punishes "the innocent bystander, the hapless victim of circumstance or association. . . . [S]uch classifications fly squarely in the face of our traditional antipathy to assertions of mass guilt and guilt by association."[184] As Tussman and tenBroek observed in their famous Equal Protection article, "Herod, ordering the death of all male children born on a particular day because one of them would some day bring about his downfall, employed [an overinclusive] classification[,]" as did the United States government in interning persons of Japanese ancestry on the west coast during World War II.[185] Although the "Hispanic appearance" category is not as overbroad as these examples, its expansiveness should nevertheless trouble scholars committed to equality under the law.

Endorsing the use of statistical probabilities in immigration enforcement, one commentator contends that Border Patrol officers properly consider race because of the "correlation between apparent Mexican ancestry and the law enforcement objective of" controlling undocumented immigration, and because "acknowledging its use and limited relevance may encourage an officer to acknowledge her reliance on racial factors."[186] Reliance on such racial correlations, however, is generally forbidden in domestic criminal law enforcement because of the resulting dignitary harms and injustices.[187] Race profiling in immigration enforcement similarly injures persons of Latin American ancestry residing

182. *See* U.S. DEP'T OF COMMERCE, POPULATION ESTIMATES FOR COUNTIES BY RACE AND HISPANIC ORIGIN: JULY 1, 1999 (1999).

183. *See supra* text accompanying notes 169-79.

184. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 351-52 (1949).

185. *Id*. at 351. *See* Korematsu v. United States, 323 U.S. 214 (1944) (upholding internment of a U.S. citizen of Japanese ancestry during World War II).

186. Thompson, *supra* note 33, at 1007.

187. *See supra* Part II.A.

lawfully in the United States.[188] In addition, as the cases reveal, Border Patrol officers readily admit the use of race as a factor in immigration stops; encouraging the acknowledgement of such reliance serves no legitimate purpose.[189]

Whatever the raw probabilities might suggest, race profiling in immigration enforcement may not even make sense from a utilitarian perspective. Current U.S. border enforcement policy often professes to be directed toward apprehending commercial smugglers.[190] As smugglers realize that the Border Patrol tends to stop persons of "Hispanic appearance," one would expect them to employ drivers who do not fit the profile and are therefore less likely to be stopped.[191]

Perhaps more importantly, reliance on group probabilities to justify individual stops violates fundamental principles of human dignity at the core of the Equal Protection Clause.[192] Some might contend that even if eighty-five, ninety, or ninety-five percent of the undocumented population were of Latin American ancestry, race should still not be considered in the decision whether to stop an individual. An analysis of the dignitary harms resulting from race profiling in immigration enforcement supports these arguments.

2. The Dignitary Harms

Although stops and interrogations about citizenship may appear to be minimal intrusions to people unlikely to be stopped and interrogated, such enforcement practices affect the sense of belonging to U.S. society of Latino citizens and immigrants.[193] Especially in the Southwest, immigration enforcement regularly imposes indignities on citizens and

188. For further discussion of the dignitary harms to Latinos, see *infra* Parts III.C.2, IV.

189. *See supra* Part III.B.1.

190. *See* Alan D. Bersin & Judith S. Feigin, *The Rule of Law at the Margin: Reinventing Prosecution Policy in the Southern District of California*, 12 GEO. IMMIGR. L.J. 285, 303-04 (1998). *See also* U.S. GEN. ACCOUNTING OFFICE, ALIEN SMUGGLING: MANAGEMENT AND OPERATIONAL IMPROVEMENTS NEEDED TO ADDRESS GROWING PROBLEM 12-13 (2000) (describing INS anti-smuggling strategy and reporting on its deficiencies).

191. *See* Robert L. Bach, Address at the "U.S. Immigration Policy at the Millennium: With Liberty and Justice for All?" conference, Harvard Law School (Dec. 4, 1999).

192. *See infra* Part IV.A.

193. *See infra* Part IV.B. Race-based immigration enforcement also may result in convictions of nonimmigration related crimes that may subject an immigrant to removal from the country. *See, e.g.*, United States v. Arvizu, 217 F.3d 1224 (9th Cir. 2000) (invalidating seizure of evidence used in drug prosecution based on immigration stop by Border Patrol officer). In this circumstance, race-based border enforcement effectively evades the prescription of race profiling in criminal law enforcement. *See supra* Part II.

lawful immigrants of Mexican ancestry that are not imposed on Anglos.[194] The net is cast so wide that large numbers of Latinos in some regions are under constant suspicion and are subject to stops and interrogations by Border Patrol officers. For example, in the small border town of El Cenizo, Texas, which has an eighty percent Spanish-speaking population, increased border enforcement has been accompanied by allegations of Border Patrol harassment of U.S. citizens and lawful immigrants of Mexican ancestry.[195] As the case law illustrates,[196] "Border Patrol officers who stop cars based in substantial part on whether the occupants 'look Mexican' infringe on the freedom of movement of Latinos who are permanent resident aliens and citizens as well as those who are undocumented."[197]

That the Border Patrol targets persons of "Hispanic appearance" almost invariably contributes to the fact that *close to ninety percent* of the removals involve Mexican and Central American citizens, even though they only constitute slightly more than one-half of the total undocumented population in the United States.[198] This, of course, closely resembles the self-fulfilling prophesy caused by the race profiling of African Americans in criminal law enforcement.[199] Similarly, race-based enforcement reportedly has led to the unlawful arrest, and sometimes even wrongful deportation of U.S. citizens of Mexican ancestry.[200]

---

194. *See supra* Part III.C.1-2.

195. *See* Guillermo X. Garcia, *Border Battle Centers on 'Spanish-Only' Town*, USA TODAY, Dec. 17, 1999, at 21A; Claudia Kolker, *Town Speaks the Language of Its People*, L.A. TIMES, Aug. 13, 1999, at A1. *See also* Norma Ortiz, Comment, *The Dangers of Unguarded Discretion: The Unconstitutional Stops of Buses by Roving Patrols*, 2 SCHOLAR 289 (2000) (analyzing critically Border Patrol seizure of public buses in El Cenizo in search of undocumented immigrants).

196. *See supra* Part III.B.1.

197. Rachel F. Moran, *Neither Black or White*, 2 HARV. LATINO L. REV. 61, 96 (1997) (citation omitted). As observed by a federal judge dissenting in a case upholding a Border Patrol stop, "How is this practice distinguishable from the former practice of Southern peace officers who randomly stopped black pedestrians to inquire, 'Hey, boy, what are you doin' in this neighborhood?'" United States v. Zapata-Ibarra, 223 F.3d 281, 285 (5th Cir. 2000) (Wiener, J., dissenting).

198. *See* News Release, U.S. Dep't of Justice, Immigration & Naturalization Serv., INS Sets New Removals Record (Nov. 12, 1999) (on file with author); *supra* text accompanying notes 167-70. There are limits to this comparison because aliens may be removed from the country on many other grounds besides entering without inspection or violating the terms of a visa. *See* INA § 237, 8 U.S.C. § 1227 (listing many different grounds for removal). The gross disparity at a minimum, however, suggests the *possibility* of racially disparate enforcement and warrants further inquiry. The best way to evaluate the impact of race on immigration enforcement would be to consider the percentage of all removable aliens who are Latino with the percentage of Latinos in fact removed from the country.

199. *See supra* text accompanying notes 42-43.

200. *See, e.g.*, Diaz v. Reno, 40 F. Supp. 2d 984 (N.D. Ill. 1999) (addressing case in which INS was accused of wrongfully deporting U.S. citizen); Suzanne Espinosa, *Snafu Underscores Civil Rights Issues*, S.F. CHRON., Oct. 22, 1993, at A1 (recounting story of U.S. citizen arrested by Border Patrol while repairing his parents' roof near Santa Barbara, California, a city hundreds of miles from the

Ultimately, the injuries suffered by Latino U.S. citizens and lawful immigrants are not palpably different from those sustained by innocent African Americans whom police officers stop on account of their race.[201] Stops in both circumstances are based on group probabilities, not individualized suspicion.[202] Resulting harms fall almost exclusively on innocent racial minorities.[203] According to one prominent commentator, such injuries amount to a "tax" imposed on persons of Latin American ancestry not assessed on other groups.[204] This characterization, although acknowledging that race profiling imposes costs on a discrete and insular minority, smooths over the emotional turmoil, humiliation, and embarrassment caused by the actual experience of a race-based stop.[205] It also fails to appreciate how race profiling undermines full and equal citizenship and stigmatizes Latino U.S. citizens and lawful immigrants in the United States.[206]

Although frequently overlooked, race-based immigration enforcement imposes injustices on undocumented immigrants.[207] Even if they are in the

---

border, and sent to Mexico). *See also* CENTER FOR HUMAN RIGHTS AND INTERNATIONAL JUSTICE, EXPEDITED REMOVAL STUDY: REPORT ON THE FIRST THREE YEARS OF EXPEDITED REMOVAL 82-86 (2000) (describing case of U.S. citizen of Mexican ancestry wrongfully detained for 45 days by INS because of belief that he was a Mexican citizen using fraudulent documents); Lisa J. LaPlante, *Expedited Removal at U.S. Borders: A World Without a Constitution*, 25 N.Y.U. REV. L. & SOC. CHANGE 213, 213-14 (1999) (discussing case in which U.S. citizen of Mexican ancestry was wrongfully deported and contending that such error is more likely to occur with expedited removal added by 1996 amendments to immigration laws); Jody A. Benjamin, *INS Mistake Gets Citizen Deported*, SUN-SENTINEL (Fort Lauderdale, Florida), Dec. 6, 2000, at 1B (reporting on wrongful deportation of U.S. citizen); Bob Egelko, *INS Settles Two Suits Alleging Mistreatment of Citizens*, S.F. EXAMINER, Nov. 21, 2000, at A4 (reporting settlement of case of INS harassment of U.S. citizen (a doctor) of African ancestry, including shackling and five hours of interrogation, seeking re-entry into country from Nigeria); John Moreno Gonzales, *McKnight Comes Home, INS Officials Apologize for Blunder*, NEWSDAY, June 19, 2000, at A7 (discussing U.S. citizen who was wrongfully deported to Jamaica); Toni Heinzl, *Lost Identity: INS Deports a Man to Mexico Who Might Be an American Citizen*, FORT WORTH STAR-TELEGRAM, Nov. 13, 2000, Metro, at 1 (reporting that INS may have deported a U.S. citizen to Mexico); Toni Locy, *Lawsuit Spotlights Alleged INS Abuses at Airports*, USA TODAY, Oct. 18, 2000, at 11A (reporting that INS officers subjected student returning from Jamaica to racial slurs, strip search, and shackles).

201. *See supra* Part II.A.

202. *See supra* text accompanying notes 50-52, 94-99.

203. *See supra* Parts II.A, III.C.

204. *See* KENNEDY, *supra* note 28, at 159-61.

205. *See supra* Parts II.A, III.C.2.

206. *See infra* Part IV.

207. *See* Lamar Smith & Edward R. Grant, *Immigration Reform: Seeking the Right Reasons*, 28 ST. MARY'S L.J. 883, 893 (1997) ("[An immigration] policy that disregards the basic human dignity of any person, especially one whose violation of the law was motivated by an attraction to the great opportunities this country has to offer, is offensive to American ideals and utterly inconsistent with a system of ordered immigration."). *See also* Elvia R. Arriola, *LatCrit Theory, International Human Rights, Popular Culture, and the Faces of Despair in INS Raids*, 28 U. MIAMI INTER-AM. L. REV. 245

United States in violation of the law, undocumented persons have constitutional and human rights. Although the Supreme Court has held that they are not a suspect class,[208] undocumented immigrants are entitled to Fourth Amendment and Equal Protection safeguards that cannot be trampled upon by the INS in the name of border enforcement.[209] For precisely this reason, the Supreme Court prohibited exclusive reliance on race as the justification for an immigration stop.[210]

Border Patrol reliance on race also reinforces negative, ill-conceived stereotypes about "Hispanic appearance." References to "Hispanic appearance" is problematic given the fact that the phenotype varies widely among persons of Latin American ancestry.[211] For example, "[m]ost [persons of Mexican ancestry] are of dark complexion with black hair . . . .

(1996-97) (analyzing impacts of INS border enforcement on Mexican immigrants and U.S. citizens of Mexican descent). For an analysis of the failure of progressive scholars and activists to articulate justice-based arguments in the context of California's Proposition 187 that would have stripped illegal immigrants of certain public benefits, see Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555 (1996); *see also infra* text accompanying notes 320-23 (discussing Proposition 187).

208. *See* Plyler v. Doe, 457 U.S. 202, 223 (1982). Despite concluding that undocumented persons do not constitute a suspect class, the Court in *Plyler* held that a Texas law barring undocumented children from an elementary and secondary education violated the Equal Protection Clause. *See id.* at 224-30. A principal concern of the Court in reaching this conclusion was that denying a public education to undocumented children "raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents." *Id.* at 218-19 (footnote omitted). *See also* Rachel F. Moran, *Foreword—Demography and Distrust: The Latino Challenge to Civil Rights and Immigration Policy in the 1990s and Beyond*, 8 LA RAZA L.J. 1, 13-16 (1995) (analyzing impacts of *Plyler v. Doe* on Latino community). Commentators have questioned the reasoning of the Court's decision. *See* TRIBE, *supra* note 80, § 16-23, at 1553 (stating that some commentators "will quite properly wish that the Court's head had proven equal to its heart and that a sturdier analytic foundation had been provided for the result reached").

209. *See supra* Part III.A; *supra* text accompanying notes 85-87. Besides being inconsistent with domestic constitutional norms, race profiling might also violate international law, such as the International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969). *See* Berta Esperanza Hernández-Truyol & Kimberly A. Johns, *Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare "Reform,"* 71 SO. CAL. L. REV. 547, 568-72 (1998) (contending that various provisions of U.S. immigration laws violate the Convention on the Elimination of All Forms of Racial Discrimination and other international law). *See also* Chin, *supra* note 76, at 60-61 (arguing that Convention on the Elimination of All Forms of Racial Discrimination bars racial discrimination in immigration laws).

210. *See supra* text accompanying notes 88-107.

211. *See* Kevin R. Johnson, *"Melting Pot" or "Ring of Fire"?: Assimilation and the Mexican American Experience*, 85 CAL. L. REV. 1259, 1291-93 (1997). *See also* Kenneth L. Karst, *The Bonds of American Nationhood*, 21 CARDOZO L. REV. 1141, 1165-67 (2000) (summarizing great diversity among Latinos). Consequently, it is important not to treat persons of Mexican ancestry as homogeneous or to essentialize their experiences. *See* Elizabeth M. Iglesias & Francisco Valdes, *Religion, Gender, Sexuality, Race and Class in Coalitional Theory: A Critical and Self-Critical Analysis of LatCrit Social Justice Agendas*, 19 CHICANO-LATINO L. REV. 503, 513-15 (1998).

[b]ut many are blond, blue-eyed and 'white,' while others have red hair and hazel eyes."[212] The stereotype of the dark haired, brown skinned (often linked to "dirty")[213] "Mexican" ignores the rich diversity of physical appearances among Latinos. Racially discriminatory immigration enforcement may encourage Latinos to, among other things, attempt to change their physical appearance and seek to "pass" as Spanish or white, with damaging personal consequences.[214] The diversity among Latinos also suggests that room for error exists when Border Patrol officers seek to detect undocumented persons by focusing on the stereotypical "Hispanic appearance." In this respect, the classification is under-inclusive as well as over-inclusive.[215]

To further complicate matters, "[n]early 1 in 10 U.S. families with children is a mixed-status family, that is to say, a family in which one or more parents is a noncitizen and one or more children is a citizen."[216] Thus, a nuclear family with "Hispanic appearances" may have members with different immigration statuses, thereby making enforcement efforts based on physical appearance more problematic. Moreover, due to family ties, some undocumented persons in these families are eligible to become lawful permanent residents.[217]

---

212. JULIAN SAMORA & PATRICIA VANDEL SIMON, A HISTORY OF THE MEXICAN AMERICAN PEOPLE 8 (rev. ed. 1993) (emphasis added).

213. *See* Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 GEO. L.J. 179, 225 (1995) ("[A] persistent expression of anti-Mexican prejudice in Texas has been the belief that the skin and bodies of Mexicans are dirty, and by extension so too are their habits and morals.") (footnote omitted). *See also* John O. Calmore, *Exploring Michael Omi's "Messy" Real World of Race: An Essay for "Naked People Longing to Swim Free"*, 15 LAW & INEQ. 25, 72 (1997) (referring to the "powerful social construction of the 'dirty Mexican'") (footnote omitted); Guadalupe T. Luna, *"Agricultural Underdogs" and International Agreements: The Legal Context of Agricultural Workers Within the Rural Economy*, 26 N.M. L. REV. 9, 9 (1996) ("The Mexican 'peon' (Indian or mixed-breed) is a poverty-stricken, ignorant, primitive creature, with strong muscles and just enough brains to obey orders and produce profits under competent direction.") (quoting LOTHROP STODDARD, RE-FORGING AMERICA: THE STORY OF OUR NATIONHOOD 214 (1927)); United States v. Galindo-Gonzales, 142 F.3d 1217, 1223 (10th Cir. 1998) (stating that law enforcement suspected an immigration violation in part because of automobile "passengers' dark hair and dark complexions and the fact that they were speaking Spanish") (citation omitted).

214. *See* Johnson, *supra* note 211, at 1269-79, 1305-09. *See also* Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994) (analyzing voluntary construction of racial identity by individuals). *See generally* KEVIN R. JOHNSON, HOW DID YOU GET TO BE MEXICAN? A WHITE/BROWN MAN'S SEARCH FOR IDENTITY (1999) (analyzing Latino efforts at assimilation).

215. For an analysis of the over-inclusiveness of "Hispanic appearance" in determining undocumented status, see *supra* Part III.C.1.

216. Michael Fix & Wendy Zimmerman, *All Under One Roof: Mixed-Status Families in an Era of Reform* 1 (June 1999), *available at* http://www.urban.org/immig/all_under.htm (last visited Nov. 22, 2000).

217. *See* INA § 245(i), 8 U.S.C. §1255(i) (adjustment of status); *id*. § 240A, § 1229b

As race-based law enforcement breeds cynicism about the criminal justice system in minority communities,[218] race profiling in immigration enforcement also foments distrust of government and discourages lawful permanent residents from Mexico from fully embracing an American national identity.[219] Such distrust may well contribute to the historically low naturalization rates of Mexican immigrants.[220] Similarly, by placing a cloud over the citizenship status of virtually all Latinos, race-based enforcement also serves to limit Latino social integration into mainstream society. Although some commentators claim that immigration from Latin America should be curtailed because of Latinos' alleged failure to assimilate, race-based immigration enforcement constitutes an important impediment to Latino integration.[221]

In light of its substantial injuries, race profiling in immigration law enforcement is a serious problem that deserves careful scrutiny. Until this problem is recognized, the evils of race profiling will fall disproportionately on persons of Latin American ancestry and others who appear "foreign." The time is ripe for the Supreme Court to revisit *Brignoni-Ponce* and bring it into line with modern constitutional sensibilities.[222]

IV. BORDER ENFORCEMENT AND THE DEFINITION OF UNEQUAL CITIZENSHIP FOR LATINOS IN THE UNITED STATES

Historically, domestic civil rights law and immigration law have been closely linked in the United States.[223] For example, the prohibition on

(cancellation of removal).

218. *See supra* text accompanying note 47.

219. *See* Gutiérrez, *supra* note 181 (analyzing formation of national identity by Mexican immigrants to United States and general distrust of government resulting from experiences with the INS).

220. *See* 1997 INS STATISTICAL YEARBOOK, *supra* note 169, at 140 tbl.K (showing that for immigrants admitted in fiscal year 1997, 32.2% of Mexican immigrants naturalized compared to 52.8% of immigrants from all countries). *See also supra* text accompanying note 47 (noting that race profiling breeds contempt and cynicism in minority communities toward law enforcement). In response to political setbacks for immigrants in the 1990s, *see generally* IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan F. Perea ed., 1997), naturalization rates among Mexican immigrants have been on the rise, which has generated claims of naturalization abuse and calls for reform. *See infra* text accompanying note 303.

221. For an analysis of these issues, see Johnson, *supra* note 211; George A. Martínez, *Latinos, Assimilation and the Law: A Philosophical Perspective*, 20 CHICANO-LATINO L. REV. 1 (1999); Sylvia R. Lazos Vargas, *Deconstructing Homo[geneous] Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect*, 72 TUL. L. REV. 1493 (1998).

222. *See infra* text accompanying notes 242-46.

223. *See generally* Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations:*

Chinese immigration in the 1800s coincided with repressive anti-Chinese legislation aimed at the Chinese population in the country.[224] In the early twentieth century, the "alien land" laws, which restricted alien ownership of real property, paved the way for Japanese internment during World War II and followed successful efforts to greatly restrict Japanese immigration.[225] Enacted in an era when nativism ran amok in the United States, the 1924 national origins quota system limited immigration from eastern and southern Europe.[226] Various legal restrictions on immigration from Africa, as well as the U.S. government's refusal to offer a safe haven to refugees fleeing Haiti in the 1980s and 1990s, mirrors the disfavored status of African Americans in this country.[227]

The treatment of persons of Latin American ancestry under the immigration laws offers further evidence of the connection between immigration and civil rights. Race profiling in immigration enforcement confirms that Latinos, whether citizens or lawful immigrants, enjoy fewer membership rights than Anglos.[228] Raced-based immigration enforcement is simply only one of many aspects of immigration law that creates "partial membership"[229] or more colloquially, second-class citizenship, for Latinos in the United States. In invalidating a law that discriminated on the basis of sexual orientation, the Supreme Court emphasized that "laws singling out a certain class of citizens for disfavored legal status or general

---

A "Magic Mirror" into the Heart of Darkness, 73 IND. L.J. 1111 (1998) (analyzing historical relationship between racial discrimination in immigration laws and domestic civil rights).

224. *See generally* CHARLES J. MCCLAIN, IN SEARCH FOR EQUALITY (1994) (documenting resistance of Chinese community to discriminatory laws and practices in nineteenth century).

225. *See* Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37 (1998) (analyzing "alien land" laws as part of anti-Japanese history in California culminating in internment of persons of Japanese ancestry during World War II).

226. *See supra* text accompanying note 73.

227. *See* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993) (upholding interdiction and repatriation of Haitians fleeing political violence and economic turmoil in their homeland); Bill Ong Hing, *Immigration Policies: Messages of Exclusion to African Americans*, 37 HOW. L.J. 237 (1994) (discussing how immigration laws discriminate against African immigrants); Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391 (1994) (criticizing U.S. government's policy toward Haitian refugees). Class, cultural, and foreign policy concerns influenced the United States harsh policies directed at Haitian migrants. *See* Kevin R. Johnson, *Judicial Acquiescence to the Executive Branch's Pursuit of Foreign Policy and Domestic Agendas in Immigration Matters: The Case of the Haitian Asylum-Seekers*, 7 GEO. IMMIGR. L.J. 1 (1993); *see also* John A. Scanlan, *Call and Response: The Particular and the General*, 2000 U. ILL. L. REV. 639, 660-70 (discussing personal experiences with studying U.S. policy toward Haitians).

228. *See generally* STEPHANIE WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (1996) (studying invisible privilege attached to whiteness in United States); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993) (analyzing whiteness as a valuable property right in U.S. society).

229. *See* Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707 (1996).

hardships are rare."[230] Judicially condoned race profiling in immigration enforcement, however, singles out Latino citizens for a "disfavored legal status" and "general hardships."[231]

Although scholars and policymakers have directed much attention to immigration reform in recent years, precious little attention has been paid to the civil rights implications of immigration enforcement. For example, the blue-ribbon U.S. Commission on Immigration Reform prepared a series of reports on immigration reform in the 1990s, including one offering detailed recommendations on curbing undocumented migration to the United States.[232] A product of a time when public opinion considered undocumented migration to be out of control,[233] the report endorsed heightened border enforcement strategies with significantly increased resources, with precious little consideration for the potential loss of life.[234] Border Patrol abuses received scant attention; race-based immigration enforcement evaded study.[235] Indeed, three years after issuing its initial recommendations calling for bolstered border enforcement, the Commission reiterated its commitment to the expansion of enforcement operations, despite recognizing the "human toll," including "increased violence along the border, as well as deaths resulting from exposure to extreme weather in mountain and desert areas."[236]

One can only wonder why the civil and human rights consequences of race profiling in immigration enforcement, and border enforcement generally, are ignored. Factors contributing to this ignorance no doubt include the stereotype of Latinos as foreigners and the perception that

---

230. Romer v. Evans, 517 U.S. 620, 633 (1996) (invalidating Colorado law, which effectively repealed state and local laws barring discrimination on the basis of sexual orientation).

231. *Id*. at 633.

232. *See* U.S. COMM'N ON IMMIGRATION REFORM, RESTORING CREDIBILITY, *supra* note 149.

233. *See* Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1050 (1994) (stating that, at that time, "[p]ublic officials and citizens groups [had] begun to promote a series of legal initiatives designed to respond to the perceived 'immigration crisis'") (citation omitted).

234. *See* U.S. COMM'N ON IMMIGRATION REFORM, RESTORING CREDIBILITY, *supra* note 149, at 11-19. *See also* David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 VA. J. INT'L L. 673, 684-86 (2000) (discussing enforcement operations without accounting for loss of life).

235. *See* U.S. COMM'N ON IMMIGRATION REFORM, RESTORING CREDIBILITY, *supra* note 149, at 19-21 (advocating improved complaint procedures for abuses and like-minded measures). To be fair, the Commission made recommendations on ways to reduce discrimination by employers against national origin minorities in the workplace. *See id*. at 76-88.

236. U.S. COMM'N ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 107 (1997). *See infra* Part IV.A.1-2, B (describing human costs of increased border enforcement).

undocumented immigrants are criminals who deserve harsh treatment.[237] Whatever the cause of the past failure to address the issue, race profiling in immigration enforcement now warrants our full attention.

A. Race Profiling Constitutes a Civil Rights Violation

In allowing the consideration of race in immigration stops, the Supreme Court interpreted the Fourth Amendment's prohibition of unreasonable searches and seizures.[238] This ruling, however, implicates core Equal Protection values in providing individuals with full membership and equal citizenship.[239] In *United States v. Montero-Camargo*,[240] the Court of Appeals for the Ninth Circuit relied on Equal Protection precedent endorsing color blindness in governmental action, and held that the Border Patrol could not consider "Hispanic appearance" in making immigration stops.[241]

The Ninth Circuit's reasoning finds plentiful support in modern Equal Protection doctrine, which emphasizes the need for racial neutrality in the law.[242] As Justice Scalia enthusiastically proclaimed, "'Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.'"[243]

---

237. *See supra* Part III.

238. *See supra* Part III.A.

239. *See supra* Part III.C.

240. 208 F.3d 1122 (9th Cir. 2000) (en banc).

241. The court cited, *inter alia*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) and City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). *See Montero-Camargo*, 208 F.3d at 1135. *See also* Victor C. Romero, *The Congruence Principle Applied: Rethinking Equal Protection Review of Federal Alienage Classifications After* Adarand Constructors, Inc. v. Peña, 76 OR. L. REV. 425 (1997) (stating that *Adarand* suggested that federal, like state, alienage classifications should be subject to strict scrutiny).

242. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) (invalidating federal program designed to promote diversity of federal contractors); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (holding similar program adopted by a city to be unconstitutional). *See also* Rice v. Cayetano, 120 S. Ct. 1044 (2000) (invalidating state law permitting only native Hawaiians to vote for trustees of state agency under Fifteenth Amendment); Bush v. Vera, 517 U.S. 952 (1996) (invalidating legislative districts as impermissibly relying on race under Fourteenth Amendment); Shaw v. Reno, 509 U.S. 630 (1993) (holding that plaintiffs stated claim of impermissible consideration of race in legislative redistricting); Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (finding the affirmative action program of the University of Texas School of Law unconstitutional). Commentators have criticized the use of a color-blindness rationale to prohibit affirmative action and related programs aimed at remedying past discrimination. *See, e.g.*, PATRICIA J. WILLIAMS, SEEING A COLOR-BLIND FUTURE: THE PARADOX OF RACE (1998); Neil Gotanda, *A Critique of "Our Constitution is Color Blind"*, 44 STAN. L. REV. 1 (1991); Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77 (2000).

243. *Richmond*, 488 U.S. at 521 (Scalia, J., dissenting) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

During the past twenty years, the Supreme Court has unequivocally held that all racial classifications, even those in federal and state affirmative action programs designed to remedy past discrimination or promote diversity, warrant strict scrutiny. As a result, a number of affirmative action and related government programs have been invalidated.[244] Along similar lines, the Court has employed heightened scrutiny to invalidate gender classifications based on outdated stereotypes about women.[245] In so doing, the Court emphasized that "gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, *even when some statistical support can be conjured up for the generalization*."[246] Overbroad generalizations about the immigration status of Latinos, however, still serve as the principal underpinning for race profiling in immigration enforcement.[247]

The Supreme Court's statement in *Brignoni-Ponce* that the Border Patrol may lawfully consider race as a factor justifying an immigration stop stands woefully out of line with today's Equal Protection doctrine.[248] Race, although arguably ignored by the courts as influencing law enforcement in their Fourth Amendment analysis of criminal law,[249] is an approved factor for consideration in immigration enforcement. Conventional Equal Protection jurisprudence would condemn the use of "Hispanic appearance" as a factor in an immigration stop,[250] at least so long as a witness did not identify a person of "Hispanic appearance" as

244. For case citations, see *supra* note 242.

245. *See* United States v. Virginia, 518 U.S. 515, 516 (1996) (holding that male-only admission policy of Virginia Military Institute violated Equal Protection Clause and emphasizing that gender classifications "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females") (citation omitted); J.E.B. v. Alabama, 511 U.S. 127, 135 (1994) (holding that the exercise of peremptory challenges based on gender in jury selection violated the Fourteenth Amendment, and emphasizing that heightened scrutiny applies to gender-based classifications because of the risk that they may reflect "'archaic and overbroad' generalizations about gender . . . based on 'outdated misconceptions concerning the role of females in the home'") (citations omitted). *See also* Miller v. Albright, 523 U.S. 420, 469-70 (1998) (Ginsburg, J., dissenting) (collecting authorities on impermissibility of relying on gender stereotypes in law).

246. *J.E.B.*, 511 U.S. at 139 n.11 (citing *inter alia*, Craig v. Boren, 429 U.S. 190, 201 (1976) (invalidating Oklahoma law that adopted different drinking ages for men and women even though evidence in support of differentiation was "not trivial in a statistical sense") (emphasis added).

247. *See supra* Parts III.A., C.1.

248. *See* 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 (1986) (arguing that INS consideration of race implicates Equal Protection concerns); Note, *supra* note 142, at 1997-2000 (contending that INS reliance on race in enforcement violates Equal Protection Clause).

249. *See supra* Introduction in Part II and text accompanying notes 53-67.

250. *See supra* Part III.C.

having violated the immigration laws.[251] As in the criminal context,[252] the Equal Protection Clause, rather than the Fourth Amendment, might serve as the more appropriate constitutional vehicle for challenging race-based border enforcement.[253] Although the federal government must honor the Equal Protection guarantee,[254] any potential plaintiff would face the same formidable barriers encountered by victims of race profiling in criminal law enforcement, namely the need to prove discriminatory intent.[255] To contemplate the possibility of providing an Equal Protection remedy for reliance on race in immigration enforcement, however, Congress or the judiciary must first remove race from the litany of lawful factors to consider by the INS in making an immigration stop. Absent that change, virtually no Equal Protection claim can prevail except in the most egregious of circumstances.

Race-based immigration enforcement cannot be legally defended on plenary power doctrine grounds. Immigration enforcement within the territorial jurisdiction of the United States is outside the purview of the plenary power doctrine.[256] Persons of Latin American ancestry in the country enjoy constitutional rights that cannot be infringed. Even in the heyday of Chinese exclusion, the Supreme Court held that discriminatory enforcement of local laws against persons of Chinese ancestry in the United States violated the Constitution.[257] Indeed, the Supreme Court in *Brignoni-Ponce* acknowledged that the plenary power doctrine did not immunize the U.S. government from the constraints of the Constitution in its encounters with undocumented persons inside our borders.[258]

---

251. For an analysis of the law on this issue in the criminal law enforcement context, see *supra* text accompanying notes 60-61.

252. *See supra* text accompanying notes 53-56.

253. For authorities, see *supra* note 245.

254. *See Adarand*, 515 U.S. at 212-37; Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

255. *See supra* note 56 and accompanying text.

256. *See supra* text accompanying notes 68-79 (discussing plenary power doctrine as a limit on judicial review of congressional judgments about which categories of immigrants to admit into the United States).

257. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886). *See generally* Thomas Wuil Joo, *New "Conspiracy Theory" of the Fourteenth Amendment: Nineteenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence*, 29 U.S.F. L. REV. 353 (1995) (analyzing *Yick Wo* as part of Supreme Court's evolving jurisprudence protecting economic rights).

258. *See Brignoni-Ponce*, 422 U.S. at 883-84. *See also* Plyler v. Doe, 457 U.S. 202 (1982) (holding that Texas law barring undocumented children in state from public elementary and secondary education violated Equal Protection Clause). In so stating, the Court in *Brignoni-Ponce* emphasized that:

> [a]lthough we may assume for purposes of this case that the broad congressional power over immigration . . . authorizes Congress to admit aliens on condition that they will submit to reasonable questioning about their right to be and remain in the country, *this power cannot*

Nor can "Hispanic appearance" constitute a valid nationality-based distinction similar to some valid classifications in the immigration laws. "Hispanic appearance," a trait shared by U.S. citizens, Latin American nationals, and citizens of other countries, is simply too broad to constitute a nationality-based classification.[259] Physical appearance is a weak proxy for nationality and cannot be employed by the INS to enforce the immigration laws.

In essence, the endorsement of race-based immigration enforcement under the Fourth Amendment conflicts with the Equal Protection guarantee of equal citizenship for all. In order to bring immigration law into line with modern Equal Protection doctrine, Congress removed racial prerequisites for immigration[260] and citizenship[261] from the Immigration and Nationality Act. By placing race at the forefront, race profiling in immigration enforcement bucks this trend and represents a stark anomaly in the law. The current law on immigration stops exacerbates racial discrimination in immigration enforcement and tangibly harms Latinos in the United States.

1. Latino Injuries

Part III of this Article reviewed the dignitary harms to persons subject to race-based interrogation of their citizenship status. Race profiling deeply harms the Latino community as a whole as well as the individuals

---

> *diminish the Fourth Amendment rights of citizens who may be mistaken for aliens. For the same reasons that the Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens.*

Brignoni-Ponce, 422 U.S. at 883-84 (citation omitted) (emphasis added).

259. *See, e.g.*, Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979) (upholding Presidential order for all Iranian students in U.S. to report to INS and demonstrate lawful presence in country); *see also* Bill Ong Hing, *No Place for Angels: In Reaction to Kevin Johnson*, 2000 U. ILL. L. REV. 559, 601 (noting "harassment of all Iranian students in the United States in response to the 1979 Tehran hostage crisis") (footnote omitted). Race and nationality among Latinos often are conflated; in fact, Latinos comprise many different national origin groups. *See generally* Berta Esperanza Hernández-Truyol, *Borders (En)Gendered: Normativities, Latinas, and a LatCrit Paradigm*, 72 N.Y.U. L. REV. 882 (1997) (analyzing conflation); Gloria Sandrino-Glasser, *Los Confundidos: De-Conflating Latinos/as' Race and Ethnicity*, 19 CHICANO-LATINO L. REV. 69 (1998) (same).

260. *See* Immigration Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.) (eliminating discriminatory national origin quotas systems in place since 1924 from U.S. immigration law).

261. *See generally* IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) (analyzing racial prerequisite for citizenship); ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY (1997) (summarizing history of limitations on citizenship in U.S. law).

stopped. By deviating from the race-neutral norm, race-based immigration enforcement stigmatizes persons of "Hispanic appearance" and undercuts their claim to membership and citizenship in U.S. society in at least two distinct ways.[262] First, race profiling marginalizes Latinos by subjecting them to concrete harms not suffered by persons of other groups.[263] Race profiling singles Latinos out as a group for immigration inquiries and reinforces their suspect and subordinated status in the United States.

Second, concerted efforts to remove persons of certain national origin groups from the country—in this instance, persons of Hispanic appearance—diminishes the status of persons who share that characteristic who are lawfully in the country.[264] By effectively telling Latinos that they are unwanted in the United States, the legally sanctioned use of race in immigration law enforcement runs afoul of the guarantee of equal citizenship to all citizens and undermines a person's right to "belong[] to America."[265] "Stops based on race or ethnic appearance send the underlying message to all . . . citizens that those who are not white are

---

262. *See Richmond*, 488 U.S. at 516-17 (Stevens, J., concurring in judgment) (stating that remedial programs that consider race impose "stigma on its supposed beneficiaries"); Johnson, *supra* note 223, at 1148-53 (analyzing stigma imposed on minority groups by racial exclusions in immigration law). *See also* Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENTARY 257 (1996) (contending that Equal Protection Clause should be invoked to invalidate classifications tending to make certain outgroups into pariahs); Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399, 522-25 (1999) (analyzing stigmatic harm caused by laws targeting minorities and how those laws undermine civic participation); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994) (arguing that Equal Protection Clause should strike down laws that facilitate creation of castes).

263. *See supra* Part III.B.

264. *See* Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 327 (contending that racial or national origin classification limiting admission of immigrants "would . . . require strict scrutiny, not because of the injury to the aliens denied admission, but rather because of the injury to American citizens of the same race or national origin who are stigmatized by the classification"). *See also* Hiroshi Motomura, *Whose Alien Nation?: Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1927, 1947 (1996) (reviewing PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER (1995)) ("[I]mmigration law that excludes members of a particular race or ethnicity may cast a stigma on that group. Unless the government can show a compelling interest, any such stigma violates the bedrock equal protection prohibition against treating any person as inferior to another by virtue of race or ethnicity.") (citations omitted).

265. I borrow this phrase from KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION (1989). *See also* Richard A. Reeves, *A Reporter at Large: Boyle Heights and Beyond*, NEW YORKER, Sept. 14, 1981, at 116, 130 ("It all gives you the feeling that you don't really belong here . . . . You're always ready to prove you're a citizen, that you're an American, that you belong.") (quoting third generation Mexican American on citizenship). As Professor Karst cogently observes, "The sense of belonging is a basic human need, vital to every individual's sense of self." Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303 (1986).

judged by the color of their skin alone. Such stops also send a clear message that those who are not white enjoy a lesser degree of constitutional protection . . . ."[266] One commentator goes so far as to suggest that the harms caused by race profiling in immigration enforcement exceed those caused by ordinary race profiling in criminal law enforcement:

> [C]onveying doubt about an individual's right to belong in the country . . . strikes at the heart of one's claim to actual equal membership in society. . . . Hispanics—specifically targeted by the INS—cannot take for granted the right to full participation in American society. . . . [Q]uestioning by INS agents that challenges one's right to be in the country . . .—much less one's claim to equal membership—is likely to be acutely disturbing and, therefore, enormously intrusive.[267]

Immigration scholarship analyzing the definition and meaning of membership in the national community and the rights accorded lawful immigrants reveals much about the impact of race profiling in immigration enforcement on Latinos.[268] Although the political climate at various times has resulted in the narrowing of rights afforded to lawful permanent residents,[269] the bundle of rights in the current era closely resembles those of citizens. Indeed, one influential observer disparages the rough equality of treatment of U.S. citizens and lawful immigrants as the "devaluation of American citizenship."[270] A membership objection to race profiling in criminal law enforcement might center on its harms to innocent persons of minority groups (for example, African Americans and Latinos),[271] who effectively enjoy diluted membership rights. Race profiling in immigration enforcement similarly dilutes the membership rights of lawful immigrants from Latin America and Latino citizens.

---

266. *Montero-Camargo*, 208 F.3d at 1135.

267. David K. Chan, Note, *INS Factory Raids as Nondetentive Seizures*, 95 YALE L.J. 767, 773 (1986) (citation omitted).

268. *See, e.g.*, T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENTARY 9 (1990); Bosniak, *supra* note 233; David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165 (1983); Scaperlanda, *supra* note 229.

269. *See* T. Alexander Aleinikoff, *The Tightening Circle of Membership*, 22 HASTINGS CONST. L.Q. 915 (1995) (analyzing how lawful immigrants were experiencing loss of rights as result of a "tightening circle of membership"). *See generally* IMMIGRANTS OUT!, *supra* note 220 (analyzing restrictionist measures of 1990s).

270. *See* Peter H. Schuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship*, 3 GEO. IMMIGR. L.J. 1 (1989).

271. *See supra* Parts II.A, III.C.

Ultimately, the Supreme Court's sanction of the use of race in immigration enforcement authorizes stark civil rights violations that limit Latino citizenship rights. These decisions make it clear that Latino citizens and lawful immigrants may be subject to immigration stops primarily due to their physical appearance.[272] Race profiling in immigration enforcement is therefore based on and further reinforces the perception that persons of Latin American ancestry, citizens and noncitizens alike, are "foreigners."[273] This erroneous perception ignores that a population of persons of Mexican ancestry lived in the West and Southwest long before those territories became part of the United States.[274] The prevailing myth of national identity allows Latinos to be classified and treated as "foreigners" and Anglos as native to this land.[275] In sum, Latinos enjoy less than full membership rights in the United States due to racially discriminatory immigration enforcement.[276]

2. Harms to Other "Foreigners"

Minority groups other than Latinos also suffer the dignitary harms of race-based immigration enforcement. These groups have specific histories and varying stereotypical characteristics attached to their "foreigner" status. For example, persons of Asian ancestry are often automatically questioned about their immigration status.[277] During World War II, the

---

272. *See supra* Part III.B.1.

273. *See supra* Part III.B-C. *Cf. J.E.B.*, 511 U.S. at 140 ("When state actors exercise peremptory challenges in reliance on gender stereotypes, *they ratify and reinforce prejudicial views of the relative abilities of men and women* . . . . [T]hese stereotypes have wreaked in justice in so many . . . spheres of our country's public life . . . .") (emphasis added).

274. *See generally* THE LEGACY OF THE MEXICAN AND SPANISH-AMERICAN WARS: LEGAL, LITERARY, AND HISTORICAL PERSPECTIVES (Gary D. Keller & Cordelia Cordelaria eds., 2000) (collecting essays analyzing Treaty of Guadalupe Hidalgo from different perspectives); RICHARD GRISWOLD DEL CASTILLO, THE TREATY OF GUADALUPE HIDALGO: A LEGACY OF CONFLICT (1990) (recounting history surrounding Treaty of Guadalupe Hidalgo, which ended the U.S.-Mexican War in 1848, ceded Mexican territory to the United States, and allowed Mexican citizens in territory to become U.S. citizens); Symposium, *Understanding the Treaty of Guadalupe Hidalgo on its 150th Anniversary*, 5 SW. J.L. & TRADE AM. 5 (1998) (studying legal history of enforcement of treaty).

275. *See* Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 268-81 (1997) (analyzing role of race in formation of national identity and citizenship rights).

276. *See generally* ACUÑA, *supra* note 124 (analyzing history of subordination of Mexican Americans in United States); ALMAGUER, *supra* note 124 (studying this history in California).

277. *See* Keith Aoki, *"Foreign-Ness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 UCLA ASIAN PAC. AM. L.J. 1 (1996); Neil Gotanda, *"Other Non-Whites" in American Legal History: A Review of* Justice at War, 85 COLUM. L. REV. 1186 (1985) (reviewing PETER IRONS, JUSTICE AT WAR (1983)); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 429-38 (1996); Saito, *supra* note 275; *see also* Kevin R. Johnson, *Racial Hierarchy, Asian Americans and*

United States government reacted to the long-standing perception of Asians as "foreign" and of suspect allegiance to the United States, by forcing persons of Japanese ancestry, citizens and noncitizens alike, on the west coast into internment camps because of their potential sympathy for the Japanese government.[278] Foreigner bias apparently contributed to the trumped up espionage charges against Dr. Wen Ho Lee, who was recently accused of turning over U.S. nuclear secrets to the Chinese government.[279] It also seems to have resulted in the questioning of certain Asian Americans about their citizenship status after allegations that President Clinton accepted illegal "foreign" campaign contributions from them.[280] More commonly, employers often suspect that Asian American job applicants are in the country unlawfully and presumptively not lawfully eligible for employment.[281] Not surprisingly, INS officers consider race in attempting to enforce the immigration laws against immigrants from Asia.[282] INS inspectors at ports of entry reportedly rely on "profiles" based on nationality and racial distinctions to inspect travelers from particular Asian countries.[283]

Latinos as "Foreigners," and Social Change: Is Law the Way to Go?, 76 OR. L. REV. 347, 352-58 (1997) (analyzing similarities in Latino and Asian American experiences in their characterization as "foreigners"). *See generally* ROBERT S. CHANG, DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE (1999) (analyzing position of Asian Americans in U.S. society).

278. *See* Korematsu v. United States, 323 U.S. 214 (1944). *See generally* Symposium, *The Long Shadow of* Korematsu, 40 B.C. L. REV. 1, 19 B.C. THIRD WORLD L.J. 1 (1998) (collecting essays analyzing *Korematsu* and its impact).

279. *See* William J. Broad, *Official Asserts Spy Case Suspect Was a Bias Victim*, N.Y. TIMES, Aug. 18, 1999, at A1. *See also* Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689 (2000) (analyzing racial profiling of Asian Americans in *Lee* case); *see also* James Glanz, *Fallout in Arms Research*, N.Y. TIMES, July 16, 2000, § 1, at 1 (reporting that Asian and Asian American scientists are avoiding employment at national weapons laboratories because of pattern and practice of racial discrimination). Eventually Lee, after nine months in custody, pleaded guilty to a single offense of mishandling nuclear secrets, and was released. *See* James Sterngold, *Nuclear Scientist Set Free After Plea in Secrets Case*, N.Y. TIMES, Sept. 14, 2000, at A1.

280. *See* Frank H. Wu, *The Campaign Contributions Fiasco and Racial Stereotyping: The Asian-American Connection*, LEG. TIMES, Feb. 10, 1997, at 24.

281. *See supra* note 149 (discussing reports on discrimination by employers against persons of Asian and Latin American ancestry).

282. *See, e.g.*, Cheung Tin Wong v. INS, 468 F.2d 1123 (D.C. Cir. 1972) (holding that Asian appearance combined with other factors justified INS stop); Matter of King and Yang, 16 I. & N. Dec. 502, 504-05 (BIA 1978) (stating that "Oriental appearance, combined with the past history of illegal alien employment at that particular restaurant, and the anonymous tip" justified INS questioning of waiter and dishwasher about citizenship status).

283. *See* Janet A. Gilboy, *Deciding Who Gets In: Decisionmaking By Immigration Inspectors*, 25 LAW & SOC'Y REV. 571, 584-90 (1991) (reporting results of study of INS inspection practices). *See also* Florangela Davila, *Hardline INS Under Fire in 'Deportland'*, SEATTLE TIMES, Sept. 11, 2000, at B5 (reporting that INS inspectors at Portland International Airport had a bad reputation in Asia for denying entry to citizens of Asian nations). *Cf. supra* note 123 (describing use of race and class

Similarly, the waning years of the twentieth century saw public and social stereotyping of Arab Americans as suspected "foreign" terrorists.[284] Persons of Arab ancestry in the United States have long suffered discrimination.[285] The erroneous claim that Middle Eastern terrorists were responsible for the 1995 bombing of a federal building in Oklahoma City, Oklahoma, spurred the passage of the Antiterrorism and Effective Death Penalty Act of 1996.[286] This Act dramatically changed the immigration laws by, *inter alia*, curtailing judicial review of many removal decisions, enhancing INS powers to detain aliens, and creating special proceedings with "secret evidence" not disclosed to the alien for the removal of "alien terrorists," which have been used almost exclusively against persons from the Middle East.[287]

Immigration enforcement also has focused on other racial groups. For example, in *Orhorhaghe v. INS*,[288] the Court of Appeals for the Ninth

---

profiles by State Department consular officers denying immigrant visa applications).

284. *See* Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L.J. 51, 108-13 (1999) (presenting evidence of bias against Arabs and Muslims in enforcement of immigration and anti-terrorism laws). The U.S. government's deep concern with Arab terrorism can be seen in a study of extradition cases showing that persons linked with the Irish Republican Army won two-thirds of their extradition cases while those even loosely affiliated with the Palestinian Liberation Organization failed to win a single case. *See* BARBARA M. YARNOLD, INTERNATIONAL FUGITIVES: A NEW ROLE FOR THE INTERNATIONAL COURT OF JUSTICE 36-37 (1991).

285. *See* Saint Francis College v. Al-Khazraji, 481 U.S. 604, 609-13 (1987) (holding that person of Arab ancestry was protected by law prohibiting racial discrimination).

286. Pub. L. No. 104-132, §§ 423, 502, 110 Stat. 1272, 1282. *See* Note, *Blown Away? The Bill of Rights After Oklahoma City*, 109 HARV. L. REV. 2074 (1996). *See, e.g.*, Kiareldeen v. Reno, 71 F. Supp. 2d 402 (D.N.J. 1999) (granting writ of habeas corpus in case of Palestinian man detained for over one year based on secret evidence of alleged terrorist activity that failed to convince immigration court); *Public Record Evidence Insufficient to Support Al Najjar's Detention*, 77 INTERPRETER RELEASES 1566 (Nov. 6, 2000) (reporting that immigration judge found no evidence supporting INS claim that Middle Eastern immigrant detained for three years in fact engaged in any terrorist activity). Similarly, an episode on the "60 Minutes" television show about a Muslim cleric later convicted of criminal involvement in the World Trade Center bombing led to congressional hearings and the subsequent amendment of immigration laws allowing expedited removal of certain aliens at ports of entry. *See* INA § 235, 8 U.S.C. § 1225 (Supp. III 1997); PHILIP G. SCHRAG, A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA 42-45 (2000) (recounting immediate congressional response on expedited removal to 60 Minutes segment); *60 Minutes: How Did He Get Here?* (CBS television broadcast, Mar. 14, 1993) (detailing how cleric had sought asylum in United States).

287. *See* Mary Abowd, *Arab-Americans Suffer Hatred After Bombing*, CHI. SUN-TIMES, May 13, 1995, The Forum, at 14; Youssef M. Ibrahim, *Terror in Oklahoma: Arab Reaction*, N.Y. TIMES, Apr. 24, 1995, at B10. U.S. citizens were later convicted for their role in the bombing. *See* United States v. Nichols, 169 F.3d 1255 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 336 (1999); United States v. McVeigh, 153 F.3d 1166 (10th Cir. 1998), *cert. denied*, 526 U.S. 1007 (1999); *see also* Andrew Cockburn, *The Radicalization of James Woolsey*, N.Y. TIMES, July 23, 2000, § 6, at 26 (discussing frustration of former director of Central Intelligence Agency in obtaining information about Iraqi citizen detained based on secret evidence).

288. 38 F.3d 488, 498 (9th Cir. 1994).

Circuit held that a person's possession of a "Nigerian-sounding name," which the court reasoned might serve as a proxy for race, was insufficient to justify an INS stop.[289] In short, the impact of race profiling in immigration enforcement adversely impacts many racial minorities.

B. Immigration Law Helps Define and Limit Latino Membership in U.S. Society

Unfortunately, core features of immigration law in addition to race profiling contribute to less than full membership in U.S. society for persons of Latin American ancestry. The public charge exclusion, which bars admission of immigrants "likely at any time to become a public charge,"[290] has a disparate impact on working class and low income citizens and lawful immigrants of Latin American ancestry who seek to bring family members to the United States.[291] The annual per-country ceilings impose a longer waiting period for potential Mexican immigrants, many of whom seek to join family members residing lawfully in the country, than that faced by similarly situated immigrants from other nations.[292] For the most part, the diversity visa system excludes Mexican immigrants and favors potential immigrants from Europe.[293] By diminishing the rights of Mexican American citizens and lawful immigrants seeking to bring family members to this country, these

289. *See* Orhorhaghe, 38 F.3d at 497; *see also* Brent v. United States, 66 F. Supp. 2d 1287 (S.D. Fla. 1999) (discusing allegations that U.S. customs inspector subjected African American women returning from Nigeria to inspections based on racial profile); *supra* note 88 (discussing race-based inspections by customs officers at ports of entry). The court held that the immigration officers' "egregious" conduct justified application of the exclusionary rule. *See Orhorhaghe*, 38 F.3d at 503. *See also supra* text accompanying notes 157-60 (discussing exclusionary rule in removal proceedings).

290. INA § 212(a)(4), 8 U.S.C. § 1182(a)(4).

291. For analysis of the 1996 amendments that toughened the public charge exclusion ground, see Juan P. Osuna, *The 1996 Immigration Act: Affidavits of Support and Public Benefits*, 74 INTERPRETER RELEASES 317 (1997); Charles Wheeler, *The New Affidavit of Support and Sponsorship Requirements*, 74 INTERPRETER RELEASES 1581 (1997).

292. *See* Bernard Trujillo, *Immigrant Visa Distribution: The Case of Mexico*, 2000 WIS. L. REV. 713. For example, prospective first preferences (unmarried sons and daughters of U.S. citizens) from Mexico who applied in October 1993 had visas available in November 1999, while similarly situated nationals from almost every other nation who applied in August 1998 had visas available in November 1999. *See* U.S. BUREAU OF CONSULAR AFFAIRS, IMMIGRANT NUMBERS FOR NOVEMBER 1999, at 2 (1999).

293. *See* 1997 INS STATISTICAL YEARBOOK, *supra* note 169, at 46-47 tbl.9 (noting that eighteen Mexicans, as compared to nearly 3400 Poles received diversity immigrant visas in fiscal year 1997). *See also* Bernard P. Wolfsdorf & Naveen Rahman, *The Diversity Lottery: Asians and Latinos Need Not Apply!*, IMMIGRATION BRIEFINGS, Sept. 2000, at 14 (stating that diversity visa program "emerged from an ill-advised attempt to benefit primarily Caucasian immigrants at the expense of Asians and Latinos").

measures conflict with fundamental equality principles.[294]

Other immigration enforcement developments further undermine the Latino sense of belonging to the United States. For example, the U.S. government in the last few decades militarized the southern border in a concerted effort to halt undocumented migration from Mexico, while the nation's northern border with Canada remains relatively free from obstruction despite concerns with unlawful activity in this area.[295]

Moreover, heightened border enforcement focuses disproportionately on the undocumented Mexican population in the United States. As of October 1996, slightly over forty percent undocumented persons had entered the country legally with the requisite papers but overstayed or otherwise violated the terms of their visas.[296] Visa overstays are generally unaffected by heightened border security measures, which by their nature concentrate on unlawful entry.[297] Moreover, only "[a]bout 16 percent of the Mexican undocumented population are nonimmigrant overstays, compared to 26 percent of those from Central America, and 91 percent from all other countries."[298]

Monumental race-based immigration enforcement efforts came at a time when the best-selling book on immigration in the 1990s expressly stated that immigration from Latin America should be drastically curtailed because of race.[299] A prominent scholar also lamented the immigration of

---

294. *See supra* Parts III.C.2, IV.A.

295. *See* Memorandum from Acting Inspector General, to Commissioner, I.N.S., U.S. Dep't of Justice, Office of the Inspector General, Border Patrol Effects Along the Northern Border (Feb. 18, 2000) (on file with author) (concluding based on review of fiscal years 1993-98 that the Canadian "border sectors were 14 times as likely to encounter an alien involved with smuggling weapons and 9 times as likely to encounter an alien involved with smuggling drugs than sectors along the southwest [Mexican] border" and that smuggling of migrants from certain countries was on the rise on Canadian border). *See also Testimony of Mark P. Hall, President National Border Patrol Council, Before House Judiciary Comm.*, FED. NEWS SERV., Apr. 14, 1999 (testimony of Border Patrol agent on U.S.-Canada border) (noting that "[a]s of September 1998 approximately 7,357 Border Patrol Agents protect our 1,945 miles of southwest border with Mexico" compared to 289 to protect our 3,987 miles of northern border with Canada, such that "the southwest border has 25 times the manpower than the northern border"). Attention to the Canadian border increased with the arrest on the eve of the new millennium of an Algerian man allegedly seeking to smuggle bomb-making materials into the United States from Canada. *See* John Kifner, *Terrorists Said to Hide in Canada's Melting Pot*, N.Y. TIMES, Dec. 24, 1999, at A8. This incident unfortunately may result in increased suspicion of all Middle Eastern immigrants to the United States. *See supra* text accompanying notes 284-87.

296. *See* 1997 INS STATISTICAL YEARBOOK, *supra* note 169, at 199.

297. For a description of militarization of U.S.-Mexico border, see *supra* note 295 and accompanying text; *infra* notes 304-13 and accompanying text.

298. 1997 INS STATISTICAL YEARBOOK, *supra* note 169, at 199.

299. *See* PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER (1995). In making the argument, Brimelow ominously proclaimed that "the American nation has always had a specific ethnic core. *And that core has been white*." *Id.* at 10 (emphasis added). *See also* Richard Brookhiser, *AMERICA: Pluribus, and Unum*, NAT'L REV., Jan. 24, 2000

low-skilled immigrants from Mexico and other developing nations, people who, he claimed, were prone to welfare dependency,[300] a variant of the controversial "culture of poverty" thesis popularized in the 1960s as an explanation for African American poverty in the United States.[301] Some commentators consider proposals to limit birthright citizenship[302] and reform the naturalization process due to alleged abuses[303] as veiled efforts to discourage persons of Mexican ancestry from settling in the United States.

The human toll on Latin American citizens, expecially of Mexican ancestry, along the southern border sends similar messages of exclusion. For example, U.S. Marines patrolling the border mistakenly shot and killed a young goatherder, a U.S. citizen of Mexican ancestry.[304] Such

---

(making similar arguments); Patrick J. Buchanan, *Trouble in the Neighborhood*, *at* http://www.buchananreform.com/library (last visited Nov. 12, 2000) (speech of 2000 Presidential candidate Patrick Buchanan calling for increased border enforcement because increasing percentage of persons of Mexican ancestry in Southwest may lead to its reconquest by Mexico). For scrutiny of race and class subtexts to the modern immigration debate, see BILL ONG HING, TO BE AN AMERICAN: CULTURAL PLURALISM AND THE RHETORIC OF ASSIMILATION (1997). *See also* Richard Delgado, *Rodrigo's Bookbag: Brimelow, Bork, Herrnstein, Murray, and D'Souza—Recent Conservative Thought and the End of Equality*, 50 STAN. L. REV. 1929 (1998) (reviewing ROBERT H. BORK, SLOUCHING TOWARD GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE (1996); DINESH D'SOUZA, THE END OF RACISM: PRINCIPLES FOR A MULTICULTURAL SOCIETY (1995)); PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER (1995); RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1994)).

300. *See* GEORGE J. BORJAS, HEAVEN'S DOOR: IMMIGRATION POLICY AND THE AMERICAN ECONOMY (1999).

301. *See, e.g.*, Oscar Lewis, *The Culture of Poverty*, *in* ON UNDERSTANDING POVERTY: PERSPECTIVES FROM THE SOCIAL SCIENCES 187 (Daniel P. Moynihan ed., 1969); Daniel Patrick Moynihan, *The Negro Family: The Case for National Action*, *reprinted in* THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY (Lee Rainwater & William L. Yancey eds., 1967).

302. *See* Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54, 55-56 & nn.5-8 (1997) (describing proposals). *See, e.g.*, Charles Wood, *Losing Control of America's Future—The Census, Birthright Citizenship, and Illegal Aliens*, 22 HARV. J.L. & PUB. POL'Y 465 (1999) (contending that statutory changes need be made to eliminate birthright citizenship and to end counting of undocumented persons in U.S. Census). Such proposals find intellectual support in PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985).

303. *See* Linda Kelly, *Defying Membership: The Evolving Role of Immigration Jurisprudence*, 67 U. CIN. L. REV. 185, 197-209 (1998) (analyzing controversy over naturalization in 1990s).

304. *See* AMNESTY INT'L, UNITED STATES OF AMERICA: HUMAN RIGHTS CONCERNS IN THE BORDER REGION WITH MEXICO 44-47 (1998) (describing events surrounding killing of Esequiel Hernandez, a U.S. citizen of Mexican ancestry, by U.S. Marines patrolling U.S.-Mexico border). *See also* American Friends Service Comm., *Human and Civil Rights Violations on the U.S.-Mexico Border 1995-97* (documenting human rights abuses along border by Border Patrol and others), *available at* http://www.afsc.org/border.htm (last visited Nov. 22, 2000); Ken Ellingwood, *U.S. Agents Posed Suspect with Humiliating Sign, Lawyers Say*, L.A. TIMES, May 21, 2000, at A1 (reporting that Border Patrol forced Mexican national who was arrested to hold a sign stating "I Support Our Border Patrol" for photograph). *See generally* TIMOTHY J. DUNN, THE MILITARIZATION OF THE U.S.-MEXICO

violence, as is true with respect to claims of police brutality in general,[305] appears to be linked to race profiling in immigration enforcement. Well-publicized enforcement operations at major border crossings in Arizona, California, and Texas have forced undocumented Mexican and other minority migrants to embark on dangerous journeys through deserts and mountains.[306] By the beginning of the year 2000, about five hundred deaths had been directly attributed to the new enforcement operations.[307] The lack of significant public reaction suggests that this loss of life generates little public concern.[308] Despite the human casualties of the recent border enforcement measures, few legal actions have been brought.[309] As the death toll rises, the INS hastens to comply with the

---

BORDER, 1978-92 (1996) (chronicling increasing use of military force to limit immigration from Mexico).

305. *See supra* text accompanying notes 48-49.

306. *See supra* text accompanying notes 232-36.

307. *See* The California Rural Legal Assistance Foundation's Boarder Project, *Operation Gatekeeper Fact Sheet*, *at* http://www.stopgatekeeper.org/English/facts (last visited Nov. 12, 2000); *U.S. Policy on Mexico Border Irks Rights Aide*, SAN DIEGO UNION-TRIB., Nov. 28, 1999, at A30. *See also* Yxta Maya Murray, *The Latino-American Crisis of Citizenship*, 31 U.C. DAVIS L. REV. 503 (1998) (analyzing how bolstered border enforcement efforts and other changes in law has created a "crisis of citizenship" for Latinos); Valerie Alvord, *Toxic River Becomes Path to USA*, USA TODAY, May 11, 2000, at 1A (reporting that, to come to the United States, undocumented Mexican migrants cross river polluted with toxic waste that Border Patrol officers will not enter). The death toll may be much higher given that some bodies are never discovered and others who die on the Mexican side of the border may not be counted in the official statistics. *See* Karl Eschbach et al., *Death at the Border*, 33 INT'L MIGRATION REV. 430, 430 (1999) (estimating that over 1600 migrants died along Southwestern border from 1993 to 1997).

308. The human impacts of the operation of immigration law are obfuscated by the use of the terms "aliens" and "illegal aliens," which tends to de-humanize those who suffer as a result of increased border enforcement. *See* Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263 (1996-97). As Professor Lucie White observed, "If we face the ones that our policies exclude, then our practices of making policy judgments might improve. We might be drawn toward better ways to assess the human costs of guarding borders . . . ." Lucie White, *On the Guarding of Borders*, 33 HARV. C.R.-C.L. L. REV. 183, 186 (1998). *See, e.g.*, HING, *supra* note 299, at 32-43 (recounting story of immigrant client and friend Rodolfo Martinez Padilla); López, *supra* note 151 (relaying story of undocumented Latina). *See generally* Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU L. REV. 1139, 1227-38 (contending that human stories of immigrants must be circulated in attempt to prevent anti-immigrant measures and sentiment).

309. The federal government settled one action filed by environmental organizations, who complained that the environmental impacts of the federal government's border enforcement measures violated the Endangered Species Act. *See* Deborah Schoch, *Agency Agrees to Study Effects of Border Barriers*, L.A. TIMES, Sept. 2, 2000, at A1; *cf.* Richard Delgado & Noah Markewich, *Rodrigo's Remonstrance: Love and Despair in an Age of Indifference—Should Humans Have Standing?*, 88 GEO. L.J. 263, 283-96 (2000) (reviewing PAUL M. BARRETT, THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA (1999); WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998); LEE A. DANIELS, THE STATE OF BLACK AMERICA (1998); TERRY EASTLAND, ENDING AFFIRMATIVE

congressional mandate that the Attorney General hire increasing numbers of Border Patrol personnel and provide more arms and technology to enforce the border.[310]

Heightened border enforcement also results in a dramatic rise in the fees charged by smugglers to persons seeking undocumented entry into the United States.[311] This fee hike has contributed to the emergence of complex smuggling networks that require migrants to work off their debts to smugglers through unlawful employment, a modern form of indentured servitude.[312] Thus, heightened border enforcement also facilitates exploitation of undocumented persons by employers.[313]

Moreover, racial discrimination by the U.S. government encourages private citizens and organizations to target Latinos in the name of immigration enforcement. Emulating the Border Patrol's activities along the southern border, private citizens have on occasion taken the law into their own hands. In Douglas, Arizona, armed ranchers near the border use force to arrest undocumented persons crossing their land, which has provoked threats of legal action by the Mexican government.[314] Private citizens have shot, and sometimes killed, undocumented persons in the Rio Grande Valley.[315] A few years ago, private citizens calling themselves the

---

ACTION: THE CASE FOR COLORBLIND JUSTICE (1996)) (contending that racial minorities might enjoy more success in vindicating civil rights violations by resorting to laws protecting endangered species rather than those designed to protect their civil rights).

310. *See* IIRIRA §§ 101-12, 110 Stat. at 3009-553-59 (1996) (requiring Attorney General to increase by 1000 per year from fiscal years 1997 to 2000 the number of Border Patrol officers and authorizing increased use of barriers and technology for improved border enforcement). *See also* PETER ANDREAS, BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE 89-93 (2000) (summarizing the large increase (148%) in Border Patrol budget and doubling of Border Patrol officers in Southwest in 1990s during general downsizing of federal government); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1948-49 (2000) (observing that Congress "continues to place considerable pressure on the INS to increase deportations" and that as a result, INS has adopted stringent interpretation of 1996 amendments to immigration laws).

311. *See* Bersin & Feigin, *supra* note 190, at 303-04.

312. *See* Nora V. Demleitner, Anti-Trafficking Measures: Criminalizing Migration and Creating Organized Crime? (May 2000) (unpublished manuscript, on file with author).

313. *See supra* text accompanying notes 151-53 (discussing exploitation of undocumented persons in workplace).

314. *See* Michael Janofsky, *Immigrants Flood Border in Arizona, Angering Ranchers*, N.Y. TIMES, June 18, 2000, § 1, at 1; Smita P. Nordwall & Elliot Blair Smith, *Mexico Threatens to Sue Arizona Ranchers*, USA TODAY, May 3, 2000, at 19A. *See also* Peter Carlson, *Buchanan's Far Right Hand*, WASH. POST, Sept. 13, 2000, at C01 (quoting Ezola Foster, 2000 vice presidential candidate for Reform Party, on undocumented Mexican immigration in Arizona: "'The illegals come over [the border] into the ranches . . . . They kill their cattle. They rape their children. The children can't play in the yard anymore.'").

315. *See* Lisa Sandberg, *Shootings Inflaming Tensions Along Border*, SAN ANTONIO EXPRESS-NEWS, May 28, 2000, at 1A.

"Airport Posse" and wearing shirts emblazoned with the words "U.S. CITIZENS PATROL," searched for "illegal aliens" at the San Diego airport, mainly targeting persons of Hispanic appearance.[316] An anti-immigrant organization displayed a billboard near the interstate highway from Arizona to California, declaring California as the "Illegal Immigration State."[317] All of these citizen groups claimed they were enforcing the law against undocumented aliens.[318] At the same time, hate crimes against all persons of Mexican ancestry, often with an anti-immigrant twist, rose preciptiously.[319]

Immigration law historically has been a site of intense conflict between Latinos and Anglos with regard to status in the United States.[320] Persons of Latin American descent fully appreciate how anti-immigrant legislation can veil more general anti-Latino animus.[321] For example, in opposing the California initiative known as Proposition 187, which would have barred undocumented immigrants from receiving most public benefits including a public education, many Mexican American citizens viewed the measure as a broad political attack on all Mexican Americans, not just immigrants.[322] Under this measure, school teachers would be required to ask about the immigration status of their students. Critics feared such an inquiry would

316. *See* San Diego Unified Port Dist. v. U.S. Citizens Patrol, 74 Cal. Rptr. 2d 364 (Cal. Ct. App. 1998); William Claiborne, *'Airport Posse' Takes San Diego Border Control Into Its Own Hands*, WASH. POST, May 23, 1996, at A03.

317. *See* David Reyes & Robert Ourlian, *Immigration Sign Removed Amid Threats*, L.A. TIMES, June 24, 1998, at A1.

318. For analysis of the criminalization of undocumented immigrants, see Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, 9 HASTINGS WOMEN'S L.J. 79 (1998).

319. *See* CARMEN T. JOGE & SONIA M. PÉREZ, THE MAINSTREAMING OF HATE: A REPORT ON LATINOS AND HARASSMENT, THE VIOLENCE, AND LAW ENFORCEMENT ABUSE IN THE '90S (1999) (documenting reports of hate crimes and other violence and harassment directed at Latinos). *See, e.g.*, Charles LeDuff, *Immigrant Workers Tell of Being Lured and Beaten*, N.Y. TIMES, Sept. 20, 2000, at B1 (reporting beating of Mexican immigrants in New York); Elizabeth Wilberg & Leonel Sanchez, *Attack on Migrants Seen as Hate Crime*, SAN DIEGO UNION-TRIB., July 8, 2000, at B1 (reporting on attack on Mexican nationals in migrant camp near border in San Diego). *See generally* IMMIGRANTS OUT!, *supra* note 220 (analyzing growth of nativism in U.S.).

320. *See* Johnson, *supra* note 24, at 1536-37.

321. *See* DAVID G. GUTIÉRREZ, WALLS AND MIRRORS: MEXICAN AMERICANS, MEXICAN IMMIGRANTS, AND THE POLITICS OF ETHNICITY 212-16 (1995). At the same time, faultlines have developed among the established Latino community and recent Latin American immigrants on the issue of immigration. *See* Kevin R. Johnson, *Immigration and Latino Identity*, 19 CHICANO-LATINO L. REV. 197 (1998).

322. *See* Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 650-61 (1995). A court enjoined implementation of Proposition 187. *See* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755 (C.D. Cal. 1995). The parties ultimately settled the case under terms leaving the injunction largely intact. *See* Patrick J. McDonnell, *Davis Won't Appeal Prop. 187 Ruling, Ending Court Battles*, L.A. TIMES, July 29, 1999, at A1.

inevitably lead to a reliance on the stereotypical, and overbroad, "Mexican appearance" in attempts to identify undocumented children.[323]

Immigration law is not the exclusive site for conflict between Latino and Anglos in American social life. Other examples include the rise of English-only laws, language regulation in the workplace, and attacks on bilingual education.[324] Language often serves as a convenient proxy for race without invoking the obvious stigma of appearing to be racist.[325] Segregation of Latinos in housing and the public schools reveals the limited integration of Latinos into the mainstream.[326] According to a 1999 study, "the data shows continuously increasing segregation for Latino students, who are rapidly becoming our largest minority group and have been more segregated than African Americans for several years."[327] Stark income disparities also reflect the status of Latinos in this country and highlight particularly important class issues in the community.[328]

In some ways, the public attacks on undocumented immigrants may represent the displacement of more generalized social anxieties about all citizens and lawful immigrants of Latin American ancestry.[329] Although the law generally limits the ability to discriminate against citizens and to some extent, lawful permanent residents, legal race-based enforcement allows government and the public lawfully to lash out at undocumented immigrants of a similar ancestry as a sort of transference or displacement of animus for Latinos to Latin American immigrants. A displacement theory helps explain why society willingly accepts the harms imposed on Latinos when the current border enforcement regime has proven to be

---

323. *See* Johnson, *supra* note 24, at 1571-72.

324. *See* Christopher David Ruiz Cameron, *How the García Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347 (1997); Rachel F. Moran, *Bilingual Education as Status Conflict*, 75 CAL. L. REV. 321 (1987). *See also* Lazos, *supra* note 262, at 433-47 (analyzing motivations behind English-only measures enacted by voters in number of states).

325. *See* Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863, 874 (1993). *See also* Kevin R. Johnson & George A. Martínez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227 (2000) (analyzing case study of use of language as proxy for race).

326. *See* Larson, *supra* 213 (studying dilapidated housing conditions for persons of Mexican ancestry along U.S.-Mexico border in Texas).

327. Gary Orfield & John T. Yun, *Resegregation in American Schools* (June 1999), *available at* http://www.law.harvard.edu/groups/civilrights/publications/resegregation99.html (last visited Nov. 22, 2000).

328. *See* Rachel F. Moran, *Foreword—Demography and Distrust: The Latino Challenge to Civil Rights and Immigration Policy in the 1990s and Beyond*, 8 LA RAZA L.J. 1, 10-13 (1995).

329. *See* Johnson, *supra* note 223, at 1136-40, 1154-58 (analyzing phenomenon).

largely symbolic in nature; border enforcement does not appear to have actually reduced the number of undocumented immigrants in the United States.[330]

V. CONCLUSION

In 1975, the Supreme Court held that the Border Patrol could consider race as one factor to justify an immigration stop.[331] The dramatic growth of the Latino community, the vast majority composed of U.S. citizens and lawful immigrants,[332] and the Court's deep and growing commitment to color-blindness in its constitutional jurisprudence,[333] require reconsideration of that ruling. The enduring commitment of the Equal Protection Clause to equal treatment for all people justifies the preclusion of the consideration of race in immigration law enforcement, even if racial discrimination may in some loose way facilitate immigration enforcement.[334] Race-based immigration enforcement tangibly harms persons of Latin American ancestry residing lawfully in the country as U.S. citizens or lawful permanent residents, and stigmatizes all Latinos in the United States.[335]

The law prohibits race profiling in criminal law enforcement for precisely these reasons. The injuries caused by Border Patrol consideration of "Hispanic appearance" in the enforcement of immigration law do not differ substantially from those resulting from race-based criminal law enforcement. Race profiling in both criminal law and immigration law should be outlawed because of the harms it imposes on racial minorities.

Race profiling in immigration enforcement reveals an unpleasant truth about the status of Latinos in U.S. society.[336] As presumed foreigners, Latinos have often received diluted civil rights protections. The disparity between the civil rights protections afforded to Latinos and other U.S.

---

330. *See generally* ANDREAS, *supra* note 310.
331. *Brignoni-Ponce*, 422 U.S. at 884.
332. *See supra* Part III.C.1.
333. *See supra* text accompanying notes 242-46.
334. *See id*.
335. *See supra* Part IV.
336. For a collection of readings on this subject, see Symposium, *Comparative Latinas/os: Identity, Law and Policy*, 53 U. MIAMI L. REV. 575 (1999); THE LATINO/A CONDITION: A CRITICAL READER (Richard Delgado & Jean Stefancic eds., 1998); Symposium, *Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory*, 19 CHICANO-LATINO L. REV. 1 (1998); Symposium, *LatCrit: Latinas/os and the Law*, 85 CAL. L. REV. 1087 (1997); Symposium, *LatCrit Symposium—Rotating Centers, Expanding Frontiers: LatCrit Theory and Marginal Intersections*, 33 U.C. DAVIS L. REV. 751 (2000); Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 HARV. LATINO L. REV. 1 (1997).

citizens and lawful residents[337] is exemplified by the lawfulness of race profiling in immigration law enforcement and the unlawfulness of race profiling in criminal law enforcement.[338] The consideration of race, a suspect classification under the equal protection doctrine,[339] should also be suspect in immigration enforcement. The Supreme Court hopefully will repair the damage that it did to Latinos in *Brignoni-Ponce* and prevent race from justifying an immigration stop under the Fourth Amendment. Fundamental equality principles demand no less.

---

337. *See generally* George A. Martínez, *Legal Indeterminacy, Judicial Discretion and the Mexican American Litigation Experience: 1930-1980*, 27 U.C. DAVIS L. REV. 555 (1994) (documenting failure of litigation to protect civil rights of Mexican Americans).

338. *See supra* Part II.

339. *See supra* text accompanying notes 242-46.