How Racial Profiling in America Became the Law of the Land: *United States v. Brignoni-Ponce* and *Whren v. United States* and the Need for Truly Rebellious Lawyering

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INTRODUCTION

It may seem surprising to most readers, but the use of racial profiling by law enforcement authorities in the United States has long been permitted and encouraged, if not expressly authorized, by U.S. constitutional law. This is true despite the civil rights movement of the 1950s and 1960s and the generally positive trajectory of racial progress in the United States over the last 150 years. Indeed, in two major post-civil rights movement decisions—including one that has received relatively little scholarly attention—that are the subject of this Essay, the U.S. Supreme Court has affirmatively contributed to the predominance of racial profiling in law enforcement in modern America.

Persistent accusations of race-based criminal law enforcement, specifically in traffic stops, have long plagued the United States.[1] As recently as 1996, the Supreme Court declined to address the problem head-on when given the opportunity in the case of *Whren v. United States*, which effectively rendered the Fourth Amendment impotent in combating pretextual stops of automobiles based on the race of the occupants.[2] Indeed, as we shall see, the Court's decision in that case made legal challenges to profiling *more*, not *less*, difficult, thereby implicitly encouraging police officers to rely on racial profiles in law enforcement.

Although racial profiling in ordinary criminal law enforcement receives the bulk of public scrutiny and scholarly commentary, the practice has had a much broader and deeper reach into all of law enforcement. For example, border enforcement officers have long employed crude racial profiles—which almost invariably include undefined "Mexican appearance"—in making immigration (as well as drug) stops in attempts to ferret out undocumented immigrants. Such profiles are used not just at the United States–Mexico border region but are often tools that are utilized in immigration enforcement many miles away from any port of entry and indeed, as we shall see, within America's heartland.

As in the case of traffic stops, the U.S. Supreme Court has promoted racial profiling in immigration enforcement. Indeed, in 1975, more than two decades before *Whren*, the Court in *United States v. Brignoni-Ponce* expressly encouraged profiling, so long as the undefined "Mexican appearance" was only one of many factors relied upon by authorities in making an immigration stop.[3] Evidence unfortunately suggests that U.S. Immigration and Customs Enforcement officers, as well as state and local law enforcement officers assisting in federal immigration enforcement, today persistently rely unduly on race in targeting particular groups for immigration stops and in immigration enforcement more generally.[4]

Although decided more than two decades apart, the Court's 1975 decision in *United States v. Brignoni-Ponce* and its 1996 decision in *Whren v. United States* are cut from the same cloth. With little apparent concern for the consequences for minority communities, both decisions, in effect, allow racial profiling by law enforcement officers to go largely unchecked. As a result, both tacitly encouraged—and encourage to this day—racial profiling in law enforcement. This is true even though, over time, public opinion has generally come to condemn racial profiling in law enforcement.

To shed light on the emergence of the undue reliance on race in modern law enforcement, this Essay carefully situates *Brignoni-Ponce* and *Whren* in their

1. *See infra* Part II.
2. 517 U.S. 806 (1996).
3. 422 U.S. 873, 886–87 (1975).
4. *See generally* Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 688–716 (2000) (documenting prevalent claims of racial profiling in immigration enforcement).

proper historical contexts and dissects the litigation in those cases to show how and why the defense strategy failed to convince the Supreme Court to affirmatively root out race-conscious law enforcement. It further analyzes the legacies of those decisions to reveal how they operate together in practice to effectively contribute to the problem of racial profiling so prevalent in modern American social life.

Careful consideration reveals that *Brignoni-Ponce* and *Whren* aptly illustrate the difficult challenges facing lawyers seeking to bring about social change and racial justice. Gerald López conceptualized "rebellious lawyering" as a way of empowering poor clients through grassroots, community-based advocacy facilitated by lawyers.[5] Others have sought to import those teachings to immigration and related fields.[6] The fundamental idea is for lawyers to attempt to pursue meaningful social change while at the same time employing community activism to empower the subordinated who can serve as their own advocates in future struggles when the lawyers are long gone.[7] The important scholarship of the participants in this symposium—especially that of Anthony Alfieri—has offered much to this analysis, especially in considering the role of client identity in the strategies of poverty lawyers seeking to promote social change.[8]

The labor of the attorneys in the trenches in *Brignoni-Ponce* and *Whren* demonstrates the importance of litigation in seeking to confront racial subordination. The lawyering in those cases show the need to combine litigation with political strategies to bring about social change. In both cases, attorneys aggressively battled the government's reliance on race, only to be rebuffed in different—but both perfectly "legal"—ways. For the Supreme Court at least, the true stories of the law's impact on the lives of racial minorities in the United States

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5. *See* GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 37–38 (1992).

6. *See* Bill Ong Hing, *Coolies, James Yen, and Rebellious Advocacy*, 14 ASIAN AM. L.J. 1, 19–30 (2007); Bill Ong Hing, *Legal Services Support Centers and Rebellious Advocacy: A Case Study of the Immigrant Legal Resource Center*, 28 WASH. U. J.L. & POL'Y 265, 266–67, 353, 356–58 (2008); Michael A. Olivas, *"Breaking the Law" on Principle: An Essay on Lawyers' Dilemmas, Unpopular Causes, and Legal Regimes*, 52 U. PITT. L. REV. 815, 819–20, 833–42, 857 (1991).

7. *See generally* Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century*, 8 LA RAZA L.J. 42 (1995) (noting the importance of political activism in the Latino community as being perhaps more important than litigation in bringing about social change, especially because it allows Latina/os to exercise control over their lives); Kevin R. Johnson, *Lawyering for Social Change: What's a Lawyer To Do?*, 5 MICH. J. RACE & L. 201 (1999) (outlining the limits of litigation alone in achieving social change).

8. *See, e.g.*, Anthony V. Alfieri, *Faith in Community: Representing "Colored Town,"* 95 CAL. L. REV. 1829, 1830–32, 1852–57, 1867–70 (2007) (noting both the importance and potential pitfalls of race-conscious community lawyering); Anthony V. Alfieri, *Jim Crow Ethics and the Defense of the Jena Six*, 94 IOWA L. REV. 1651, 1683–89 (2009) (discussing the absence of dignity-related concerns in modern identity-affirming relations); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2146 (1991) (explaining how lawyer commitment to client narratives may improve advocacy); Anthony V. Alfieri, *(Un)Covering Identity in Civil Rights and Poverty Law*, 121 HARV. L. REV. 805 (2008) (evaluating the costs and benefits of invoking identities of affected client groups).

have been lost in the shuffle of legalities and legalisms.

Moreover, at times, the effort to win for a specific client—as in *United States v. Brignoni-Ponce*—comes at the expense of "bad law" negatively affecting the greater community. The potential solution to community-wide problems, although possible through the courts, in certain circumstances is more likely to be achieved at this historical moment through the political process, by relying on activism that brings public attention to the real life impacts of race-based law enforcement measures.

Part I of this Essay carefully scrutinizes *United States v. Brignoni-Ponce*, which, perhaps inadvertently, has encouraged the excessive and undue reliance on race in immigration enforcement by bestowing great discretion on immigration officers to make stops and specifically permitting them to consider a vague, and quite crude, identifier—"Mexican appearance"—in making an immigration stop.[9] Part II considers the better known case—and one that scholars almost universally love to hate—of *Whren v. United States*, which effectively immunized racial profiling by police on the streets and highways of the United States from legal sanction under the Fourth Amendment, and offered a toothless (futile in most cases) equal protection remedy in return.[10]

The Essay concludes by contending that to truly root out racial profiling from modern law enforcement, the law must impose limits on the consideration of race in law enforcement, restrict law enforcement discretion in making stops, and afford a meaningful remedy for impermissible stops and arrests. To maximize the potential for promoting social change, truly rebellious lawyers in all likelihood must advocate for racial justice in the political arena as well as in the courts. At the same time, attorneys must take great care in selecting litigation strategies and consider what a victory for the client under a particular strategy might mean for the greater community. Neither the clients nor the greater community should get lost in litigation.

I. *UNITED STATES V. BRIGNONI-PONCE*: "MEXICAN APPEARANCE [MAY BE] A RELEVANT FACTOR" IN MAKING AN IMMIGRATION STOP

United States v. Brignoni-Ponce is the Supreme Court's most significant immigration stop decision in the last fifty years. Its legacy, allowing law enforcement reliance on "Mexican appearance" in making immigration stops, remains central to modern enforcement of the U.S. immigration laws at the border and in the interior of the United States.

A. THE HISTORICAL BACKDROP

The 1970s and 1980s saw growing concern among the American public over undocumented immigration from Mexico. In 1975, the year the Supreme Court

9. *See infra* Part I.
10. *See infra* Part II.

decided *United States v. Brignoni-Ponce*, the nation was in the throes of a "severe recession";[11] reports in the press expressed deep concern with "[t]he flood of illegal aliens"[12] and "almost uncontrollable" immigration from Mexico.[13] In February 1975, *U.S. News and World Report*, consistent with the immigration tenor of the day, ran a story entitled "*Rising Flood of Illegal Aliens; How To Deal With It*."[14] Expressing similar sentiments in arguing for a dramatic overhaul of border enforcement a few years later in 1981, Attorney General William French Smith, a Californian appointed by President (and former California Governor) Ronald Reagan, boldly proclaimed that "we have lost control of our borders."[15] In response, Congress ultimately passed the Immigration Reform and Control Act of 1986 (IRCA),[16] which, among other things, included employer sanctions provisions that, for the first time in American law, prohibited the employment of undocumented immigrants.[17]

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11. COUNCIL OF ECON. ADVISERS, ECONOMIC REPORT OF THE PRESIDENT 3 (1975) ("The economy is in a severe recession. Unemployment is too high and will rise higher.").

12. *Illegal Aliens: What To Do?*, L.A. TIMES, Feb. 6, 1975, pt. 2, at 4. An article in *The Economist* highlighted similar sensationalistic themes:

> Most of them are Mexicans. They swarm across the Mexican border at an estimated rate of 2,000 a day. They are no longer just found working for subsistence-level wages in Californian fields but are employed in the big cities in factories and services. New York has an estimated 1.5m illegal aliens, Chicago has 500,000 and Los Angeles 100,000. *They used to be called "wetbacks"—as so many entered the country by swimming the Rio Grande—but today's wetbacks travel by car, bus or aeroplane across the border*.

Illegal Immigrants Flood In, THE ECONOMIST, Jan. 18, 1975, at 53, 53 (emphasis added).

13. James Reston, *Mexico's Hundred Million*, N.Y. TIMES, Aug. 29, 1975, at 27.

14. *Rising Flood of Illegal Aliens: How To Deal With It*, U.S. NEWS & WORLD REP., Feb. 3, 1975, at 27, 27 ("A swelling tide of illegal aliens coming into the United States is stirring alarm nationwide."); *see Latest Wave of Immigrants Brings New Problems to U.S.*, U.S. NEWS & WORLD REP., Apr. 5, 1976, at 25, 25 ("New waves of immigrants are flooding key sections of America *with a lively mixture of customs, languages, skin colors—and unprecedented social problems*." (emphasis added)).

15. *Immigration Reform and Control Act of 1983: Hearings on H.R. 1510 Before the Subcomm. on Immigration, Refugees, and International Law of the H. Comm. on the Judiciary*, 98th Cong. 1 (1983) (statement of U.S. Attorney General William French Smith).

16. Immigration Reform and Control Act of 1986, Pub L. No. 99-603, § 274A, 100 Stat. 3359, 3360–67 (1986).

17. For critical analysis of the nation's failed experience with employer sanctions as a means to deter the employment of undocumented immigrants, as well as the negative collateral consequences of such efforts, such as discrimination against U.S. citizens and lawful permanent residents of certain national origins, see generally Cecelia M. Espenoza, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986*, 8 GEO. IMMIGR. L.J. 343 (1994) (concluding that the elimination of employer sanctions is the most expedient way of remedying the increased racial discrimination caused by those sanctions); Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777, 780–82 (2008) (analyzing the ineffectiveness of employer sanctions and the resulting national origin discrimination against lawful workers); Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193 (arguing that employer sanctions regime has achieved neither of its goals of deterring illegal immigration and protecting U.S. labor markets).

IRCA also included a legalization program for certain undocumented immigrants, a temporary agricultural worker program, and related enforcement measures. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986). In many respects, the Act resembles an earlier

During this era, the Supreme Court's immigration enforcement decisions expressed sentiments similar to Attorney General Smith's. Justices frequently referred to the strong governmental interest at stake in controlling the seemingly uncontrollable undocumented immigration from Mexico, and often emphasized the great practical difficulties of enforcement of the southern border.[18] Both concepts were used to justify the great leeway often afforded immigration authorities by the Court's decisions. As we shall see, the Court consistently acted to ensure that law enforcement had plenty of tools so that the nation could seek to regain "control" of its border with Mexico and limit the number of undocumented Mexican immigrants entering the country.[19]

A string of Supreme Court opinions during this time period express this point of view. In *Plyler v. Doe*, Justice Powell asserted that undocumented immigration from Mexico was "virtually uncontrollable."[20] In *United States v. Cortez*, the Court upheld an immigration stop, observing that immigration enforcement poses "enormous difficulties."[21] In *INS v. Lopez-Mendoza*, the Court narrowly circumscribed the use of the exclusionary rule for unlawful searches and seizures in deportation proceedings, recognizing "the staggering dimension of the problem that the [Immigration & Naturalization Service] confronts."[22] In *INS v. Delgado*, Justice Powell emphasized the magnitude of the "immigration problem" as justification for the finding that an immigration sweep of a factory failed to constitute a "seizure" of persons under the Fourth Amendment.[23] In *United States v. Valenzuela-Bernal*, the Court perhaps put it most bluntly in stating that undocumented immigration from Mexico is nothing less than a "colossal problem."[24]

This era, marked by deep concern over migration from Mexico and fears

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version of the "comprehensive" immigration reform that failed in the U.S. Senate in 2007. *See generally* Asa Hutchinson, *Keynote Address: Holes in the Fence: Immigration Reform and Border Security in the United States Symposium*, 59 ADMIN. L. REV. 533 (2007) (providing a brief overview of current immigration reform and border security movements); Sheila Jackson Lee, *Why Immigration Reform Requires a Comprehensive Approach that Includes both Legalization Programs and Provisions To Secure the Border*, 43 HARV. J. ON LEGIS. 267, 279–80 (2006) (contrasting the Save America Comprehensive Immigration Act, which would have provided earned access to legalization on the part of undocumented workers, with the Bush Administration's proposed guest worker program); Doris Meissner, *Keynote Address: Immigration Reform and Policy in the Current Politically Polarized Climate*, 16 TEMP. POL. & CIV. RTS. L. REV. 309, 311, 313–15 (2007) (analyzing how the "comprehensive reform" approach allows for a steady flow of people coming into the country legally); Symposium, *A New Year and the Old Debate: Has Immigration Reform Reformed Anything?*, 13 NEXUS 1 (2008) (criticizing congressional immigration reform).

18. *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032, 1049 (1984); United States v. Valenzuela-Bernal, 458 U.S. 858, 864 n.5 (1982); United States v. Cortez, 449 U.S. 411, 418–19 (1981).

19. For a critical look at the efforts to secure numerical control over the numbers of immigrants to the United States, see John A. Scanlan, *Immigration Law and the Illusion of Numerical Control*, 36 U. MIAMI L. REV. 819, 835–36 (1982).

20. 457 U.S. 202, 237 (1982) (Powell, J., concurring).

21. 449 U.S. 411, 418, 421–22 (1981).

22. 468 U.S. 1032, 1049 (1984); *see infra* text accompanying section I.F.1.a.

23. 466 U.S. 210, 221–24 (1984) (Powell, J., concurring in judgment).

24. 458 U.S. 858, 864 n.5 (1982).

about the nation's abilities to secure its southern border, also produced the Supreme Court's decision in *Brignoni-Ponce v. United States*, which in turn has greatly influenced the nation's methods of immigration enforcement to this day. *Brignoni-Ponce* was one of four border enforcement cases—the number of cases itself reflecting the Court's deep concern with the general issue—that the Court grappled with in the October 1974 Term.[25]

B. THE STOP

On the evening of March 11, 1973, a fixed immigration checkpoint on Interstate Highway 5, a major north–south thoroughfare miles north of San Diego and the United States–Mexico border, was closed.[26] However, two Border Patrol officers parked at the checkpoint perpendicular to the Interstate watched northbound traffic. They ultimately pursued an automobile driven by Felix Humberto Brignoni-Ponce, a U.S. citizen of Puerto Rican ancestry, "saying later that their *only reason* for [the stop] was that [the automobile's] three occupants appeared to be of Mexican descent."[27]

The officers then learned that the two passengers, Elsa Marina Hernandez-Serabia, a native of Guatemala, and Jose Nunez-Ayala, a Mexican citizen, lacked proper U.S. immigration documentation.[28] All three were arrested. The driver, Brignoni-Ponce, was later charged with transporting undocumented immigrants in violation of federal law.[29]

C. THE DISTRICT COURT

On March 11, 1973, a grand jury in the Southern District of California charged the driver, Felix Humberto Brignoni-Ponce, with two counts of knowingly transporting an alien into the United States in violation of 8 U.S.C. § 1324(a)(2). Judge Howard B. Turrentine, Jr. was assigned the case.[30]

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25. *See* United States v. Peltier, 422 U.S. 531 (1975); Bowen v. United States, 422 U.S. 916 (1975); United States v. Ortiz, 422 U.S. 891 (1975).

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

27. *Id.* (emphasis added).

28. *See* Appendix at 7, *Brignoni-Ponce*, 422 U.S. 873 (No. 74-114); *infra* text accompanying notes 85–86.

29. *See Brignoni-Ponce*, 422 U.S. at 875; Appendix, *supra* note 28, at 3.

30. In June 1973, after the trial in the case, the Supreme Court decided *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), which held that roving patrols in the border region could not search automobiles without a warrant or probable cause. *Id.* at 273; *see infra* text accompanying notes 40–42 (discussing *Almeida-Sanchez*). The Southern District of California, which encompasses the U.S.–Mexico border region of California, ordered a hearing to evaluate the possible consequences of the decision "on the checkpoints operated by the Border Patrol within [the] District. All cases in [the] District raising [that] issue were consolidated on a voluntary basis." United States v. Baca, 368 F. Supp. 398, 401–02 (S.D. Cal. 1973). Just months after the trial in *Brignoni-Ponce*, Judge Turrentine issued an opinion in which he discussed "[t]he Illegal Alien Problem," *id.* at 402, and "[t]he Law Enforcement Problem," *id.* at 403, and upheld the constitutionality of the various checkpoints. *Id.* at 415–17. His opinion provides a distinctively negative view of the so-called illegal alien problem, concluding that "[t]he net effect of [the] *silent invasion* of illegal aliens from Mexico is suffering by the aliens who are frequently victims of . . . sharp practices, displacement of American citizens and legally residing aliens

Brignoni-Ponce moved to suppress the testimony of and about the passengers, claiming that the evidence was the fruit of a stop and seizure in violation of the Fourth Amendment.[31] By stipulation, the motion to suppress was heard on the day of trial.[32] After a brief hearing, Judge Turrentine denied the motion.[33]

Border Patrol Agent Terrance J. Brady testified that, in the early evening hours of March 11, he and Agent Harkins "observed a [1969] Chevrolet going through that [they] wished to inspect."[34] When they pulled the vehicle over, the passengers spoke Spanish.[35] Officer Brady then requested their immigration papers, but they did not have any. Prompted by the prosecutor, Brady identified the driver of the automobile as Felix Humberto Brignoni-Ponce, as he sat in the courtroom.[36]

On cross-examination, Agent Brady offered the following straightforward justification for the stop of Brignoni-Ponce's vehicle:

> Q. Did these people in the car appear to be of Mexican descent to you?
> A. Yes, sir.
> Q. And that, if there was any, appeared to be the reason that you stopped them?
> A. Yes, sir.[37]

After a one-day jury trial at which both passengers—whose deportation was apparently delayed so they could testify for the prosecution at trial—and Officer Brady testified, the jury found Brignoni-Ponce guilty on both counts of the

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from the labor market, and irritation between two neighboring countries." *Id.* at 403 (emphasis added). On "the law enforcement problem," Judge Turrentine concluded that, because of the difficulties of border enforcement in the United States–Mexico border region, there were no effective alternatives to the checkpoints used by the border patrol. *See id.* at 408. He then proceeded to look at the specific temporary and fixed checkpoints in the district "to determine whether searches conducted at those checkpoints are border searches for immigration purposes as required by *Almeida-Sanchez*." *Id.* at 409.

The analysis of the "problem" of Mexican immigration and immigration enforcement in *Baca* was quoted extensively in subsequent immigration decisions. *See, e.g.*, United States v. Ortiz, 422 U.S. 891, 892–93 (1975) (quoting *Baca*'s description of checkpoint at issue in that case); United States v. Franzenberg, 739 F. Supp. 1414, 1421 n.3 (S.D. Cal. 1990) (citing *Baca*'s estimate that eighty-five percent of undocumented immigrants are from Mexico); Alonso v. State, 123 Cal. Rptr. 536, 545–46 (Ct. App. 1975) (quoting *Baca* and then referring to "[t]he obvious catastrophic effect upon the economic well-being of California citizens by the tremendous influx of illegal aliens into California" if undocumented workers were eligible for unemployment insurance); People v. Cummings, 118 Cal. Rptr. 289, 296–98 (Ct. App. 1974) (quoting *Baca* and proclaiming that "[t]he Border Patrol is . . . engaged in *a silent war*, being our prime defense against unintended but very real economic and health aggression" (emphasis added)).

As it turns out, Judge Turrentine's opinion in *United States v. Baca* later played a most prominent role in the various opinions of the Supreme Court in *Brignoni-Ponce v. United States*. *See infra* notes 104, 116 and accompanying text.

31. *See* Appendix, *supra* note 28, at 10.
32. *Id.*
33. *Id.*
34. *Id.* at 6.
35. *Id.* at 7.
36. *Id.*
37. *Id.* at 9.

indictment.[38] Judge Turrentine subsequently sentenced the defendant to four years in prison.[39]

D. THE COURT OF APPEALS

Brignoni-Ponce's appeal to the U.S. Court of Appeals for the Ninth Circuit was pending when the Supreme Court decided *Almeida-Sanchez v. United States* in 1973.[40] That case held that it was a violation of the Fourth Amendment to use roving patrols to conduct warrantless searches without probable cause on vehicles that were in the greater border region, but not at the actual border.[41] In that case, the U.S. government had unsuccessfully argued that "the agents [were] acting within the Constitution when they stop[ped] and search[ed] automobiles without a warrant, without probable cause to believe the cars contain[ed] aliens, and even without probable cause to believe the cars [had] made a border crossing."[42]

The court of appeals, sitting en banc, applied *Almeida-Sanchez* to Brignoni-Ponce's appeal, and held that Mexican appearance, alone, was insufficient to justify a stop and that the district court should have granted the motion to suppress.[43] The court rejected the government's assertion that the case at hand was distinguishable from *Almeida-Sanchez* because it involved "merely a stop," not a full-blown search.[44] The court quoted language from the Supreme Court's 1925 decision in *Carroll v. United States* that "[i]t would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor."[45] Based on similar reasoning, the court declined to follow the Tenth Circuit's decision in *United States v. Bowman*,[46] which held that *Almeida-Sanchez* applied only to searches, but not to stops.[47]

Holding that the Border Patrol had violated the Fourth Amendment, the Ninth Circuit ruled that the stop was unconstitutional and that the fruits of the stop were inadmissible.[48] In the court's view,

> the border-patrol agents . . . did not possess facts which constituted a founded suspicion that [the driver] or his passengers were illegal aliens. *All that they knew was that Brignoni-Ponce and his companions appeared to be of Mexi-*

38. *See id.* at 11.
39. *Id*.
40. 413 U.S. 266 (1973).
41. *Id*. at 273.
42. *Id.* at 268. Justice White dissented, emphasizing his belief that roving patrols making random spot checks were essential to border enforcement activities designed to curb undocumented immigration from Mexico. *See id.* at 293–95 (White, J., dissenting).
43. United States v. Brignoni-Ponce, 499 F.2d 1109, 1111–12 (9th Cir. 1974) (en banc).
44. *See id*. at 1110.
45. *Id.* at 1111 (quoting Carroll v. United States, 267 U.S. 132, 153–54 (1925)).
46. *Id.* at 1110 (citing United States v. Bowman, 487 F.2d 1229 (10th Cir. 1973)).
47. *Bowman*, 487 F.2d at 1231.
48. *See Brignoni-Ponce*, 499 F.2d at 1112.

> *can descent* and were in a sedan traveling north on Interstate 5, approximately 65 miles north of the Mexican border. That is not enough. As we said in *United States v. Mallides*:
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> "There is nothing suspicious about six persons riding in a sedan. *The conduct does not become suspicious simply because the skins of the occupants are nonwhite*."[49]

E. THE SUPREME COURT

The Solicitor General, Robert Bork,[50] filed a petition for a writ of certiorari in *United States v. Brignoni-Ponce* on behalf of the United States. The petition contended:

> This case presents an important issue concerning the Border Patrol's authority, consistent with the Fourth Amendment, to employ a law enforcement method that has a significant role in the Border Patrol's program of deterring and detecting the unlawful entry and transportation of aliens in this country.[51]

The United States further argued that there was a conflict in the circuits, with the Ninth Circuit's decision being inconsistent with the Tenth Circuit's ruling in *United States v. Bowman* on the breadth of the Supreme Court's decision in *Almeida-Sanchez v. United States*.[52] On the merits, the United States reiterated that *Almeida-Sanchez* was distinguishable because a search was at issue there, not a "brief stop" as in the case before the Court.[53]

The Supreme Court granted certiorari[54] and set the case for oral argument with *United States v. Ortiz*[55] and *Bowen v. United States*.[56]

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49. *Id.* (quoting United States v. Mallides, 473 F.2d 859, 861 (9th Cir. 1973) (emphasis added)). Interestingly, the defendant in *Mallides* driving an automobile was "not of Mexican origin. He [was] a naturalized citizen, born in Iraq." *Mallides*, 473 F.2d at 860 n.1. The *Mallides* court emphasized that "[i]t is impossible to determine from looking at a person of Mexican descent whether he is an American citizen, a Mexican national with proper entry papers, or a Mexican alien without papers." *Id*. at 860. Or, apparently, an Iraqi-American. *See also* United States v. Franzenberg, 739 F. Supp. 1414, 1417 n.1, 1419 (S.D. Cal. 1990) (analyzing lawfulness of immigration stop of Native American who "look[ed] Hispanic").

50. More than a decade later, President George H.W. Bush nominated Bork to serve as an Associate Justice on the U.S. Supreme Court only to be controversially rebuffed by the U.S. Senate. *See generally* MARK GITENSTEIN, MATTERS OF PRINCIPLE: AN INSIDER'S ACCOUNT OF AMERICA'S REJECTION OF ROBERT BORK'S NOMINATION TO THE SUPREME COURT (1992) (offering account of unsuccessful nomination).

51. Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at 7, United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (No. 74-114).

52. *See id*. at 8–9.

53. *See id.* at 11.

54. United States v. Brignoni-Ponce, 419 U.S. 824 (1974).

55. *Id.*; *see infra* text accompanying notes 106–07 (analyzing *Ortiz* decision).

56. 419 U.S. 824 (1974); *see infra* note 107 (discussing *Bowen*).

1. The Briefs

The government's brief made an expansive argument on the scope of law enforcement's authority in the United States–Mexico border region: "There exists an area-wide equivalent of probable cause that justifies a brief stop of a vehicle in the Mexican border area to inquire about the citizenship of its occupants."[57] The U.S. government admitted that, in the case before the Court, "[t]he officers pursued and stopped the car for a 'routine immigration inspection,' because they observed that its three occupants appeared to be of Mexican descent."[58]

Importantly, *Brignoni-Ponce* involved immigration enforcement operations away from a port of entry at the United States–Mexico border. The Supreme Court has consistently held that the U.S. government has significantly greater leeway—some might say wholly free reign—with respect to searches and seizures at the border than in the country's interior.[59] The U.S. government in *Brignoni-Ponce*, in effect, was arguing for the same broad power to stop, seize, and search in the entire border region that it had at a port of entry at the border. It is worth noting that evidence supports the claim that race influences immigration and customs inspections at ports of entry,[60] as well as in the interior of the United States.[61]

The bulk of Brignoni-Ponce's argument focused on the requirements of the Fourth Amendment for an immigration stop and contended that, without a warrant, Border Patrol officers must have probable cause to stop a motor vehicle on a highway outside the immediate vicinity of a port of entry.[62] The brief continuously repeated the core of respondent's argument that "[t]he sole basis for the stop [in this case], according to the agents, was that the occupants [of the

57. Brief for the United States at 10, *Brignoni-Ponce*, 422 U.S. 873 (No. 74-114).

58. *Id.* at 4.

59. *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." (emphasis added)). For analysis of the law of border searches, see Robert M. Bloom, *Border Searches in the Age of Terrorism*, 78 MISS. L.J. 295 (2008).

The "plenary" authority of the U.S. government at the border mirrors Congress's and the Executive Branch's "plenary power" over the criteria for the admission of immigrants into, as well as their treatment by the federal government in, the United States. *See, e.g.*, Demore v. Kim, 538 U.S. 510, 522 (2003); Fiallo v. Bell, 430 U.S. 787, 792 (1977); Mathews v. Diaz, 426 U.S. 67, 80–82 (1976).

60. *See, e.g.*, United States v. Ojebode, 957 F.2d 1218, 1223 (5th Cir. 1992) (upholding the constitutionality of border searches based on ethnicity).

61. *See* U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/GGD-00-38, 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").

62. Brief for Respondent at 10–46, *Brignoni-Ponce*, 422 U.S. 873 (No. 74-114).

automobile] appeared to be of Mexican descent."[63]

Brignoni-Ponce's secondary argument was that

> [t]he forcible stop and interrogation of persons travelling on a highway who appear to be of Mexican descent was an unlawful seizure that constituted invidious discrimination based on race, ancestry, or national origin which requires the suppression of the resultant evidence or dismissal of the criminal action under the Fourth and Fifth Amendments.[64]

The brief powerfully compared the use of "racially oriented controls over Mexican and Mexican-Americans" with the internment of persons of Japanese ancestry—U.S. citizens and noncitizens alike—during World War II: "[I]t was a wartime emergency which ostensibly justified the action taken [internment]. The Border Patrol, which has many other procedures or methods to control illegal alien traffic, should be affirmatively denied the racially discriminatory technique."[65] The brief also rebutted the U.S. government's claim that the Mexican border region should be a zone in which stops of persons without probable cause are constitutional.[66]

The Reply Brief for the United States almost exclusively addressed Brignoni-Ponce's invidious discrimination argument. It curiously—curious because the U.S. Constitution generally protects individual, and not group rights—contended:

> There is nothing in the record to suggest that it was the agent's practice to stop all cars containing persons who appeared to be of Mexican descent or to stop only such cars. All that can be said is that the agent determined to stop *this* car to inquire as to the citizenship of the three occupants who appeared to be of Mexican descent.[67]

The United States argued that the reasonableness of the stop "should be viewed in light of the surrounding circumstances," including the fact that Brignoni-Ponce and his passengers were at a checkpoint north of San Diego "where more

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63. *Id.* at 3; *see, e.g.*, *id.* at 9 ("The only articulated basis for this vehicle stop was that the occupants appeared to be of Mexican descent."); *id.* at 28–29 ("The Border Patrol officers had less than a hunch, a racial or ethnic bias, to support their stop of respondent's vehicle.").

64. *Id.* at 46. Among other cases relied on by Brignoni-Ponce in making this discrimination argument was *Hernandez v. Texas*, 347 U.S. 475 (1954), which was decided within weeks of the decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), and was the first Supreme Court decision to hold that Mexican-Americans enjoyed the full protections of the Equal Protection Clause of the Fourteenth Amendment and could not be precluded from jury service. *See* Brief for Respondent, *supra* note 62, at 49–51. *See generally* "COLORED MEN" AND "HOMBRES AQUÍ": *HERNANDEZ V. TEXAS* AND THE EMERGENCE OF MEXICAN-AMERICAN LAWYERING (Michael A. Olivas ed., 2006) (compiling essays analyzing *Hernandez v. Texas*).

65. Brief for Respondent, *supra* note 62, at 55.

66. *Id*. at 30–40.

67. Reply Brief for the United States at 3, *Brignoni-Ponce*, 422 U.S. 873 (No. 74-114).

than 12,000 deportable aliens were apprehended in fiscal year 1973."[68] Under the circumstances, the U.S. government claimed, it was understandable that "a northbound vehicle carrying three persons of apparent Mexican descent might arouse the suspicions of the agents. Those suspicions in this case were borne out . . . ."[69]

The U.S. government further claimed that the consideration of apparent national origin was not invidious discrimination, but was directly relevant to immigration enforcement along the United States–Mexico border:

> [W]e are dealing here with an immigration law enforcement problem of immense proportions, and nearly all the violators in the Mexican border area are illegal entrants from Mexico. Since the class of violators is composed of persons who are likely to appear to be of Mexican descent, it is not impermissible for law enforcement officers to take that fact into account in determining which persons should be asked about their citizenship. The situation here is analogous to that in which law enforcement officers are given descriptions of robbery suspects that include the suspects' race. Surely it would not be impermissible for the officers to limit their investigation to persons who fit the descriptions.[70]

The Mexican American Legal Defense & Educational Fund (MALDEF), a leading Latina/o civil rights organization that has focused a significant portion of its advocacy efforts on immigration matters, submitted an amicus curiae brief[71] addressing *United States v. Peltier*,[72] *United States v. Ortiz*,[73] *Bowen v. United States*,[74] and *United States v. Brignoni-Ponce*.[75] The brief supported Brignoni-Ponce's argument that the Fourth Amendment applied to stops, searches, and seizures inside and outside the border region. With respect to the stop in question, the brief emphasized:

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68. *Id.*

69. *Id.* at 4.

70. *Id.*; *see also infra* text accompanying notes 390–94 (discussing the possible abusive reliance on race when alleged crime perpetrator is identified as being of a particular race).

71. *See* Brief of the Mexican Am. Legal Def. & Educ. Fund, Amicus Curiae, United States v. Peltier, 422 U.S. 531 (No. 73-2000), Bowen v. United States, 422 U.S. 916 (1975) (No. 73-6848), United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (No. 74-114), and United States v. Ortiz, 422 U.S. 891 (1975) (No. 73-2050). For an analysis of MALDEF's amicus briefs in cases implicating the employment rights of Latina/os and immigrants, see Leticia M. Saucedo, *National Origin, Immigrants, and the Workplace: The Employment Cases in Latinos and the Law and the Advocates' Perspective*, 12 HARV. LATINO L. REV. 53, 58–70 (2009).

72. 422 U.S. 531, 542 (1975) (ruling that the holding in *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973), did not apply retroactively).

73. 422 U.S. 891, 896–97 (1975) (holding that the Fourth Amendment requires probable cause or consent to search private vehicles at non-border traffic checkpoints).

74. 422 U.S. 916, 918–19 (1975) (ruling that the holding in *Almeida-Sanchez*, 413 U.S. at 273, did not apply retroactively).

75. 422 U.S. 873, 885–86 (1975) (holding that apparent Mexican ancestry of a vehicle's occupants was insufficient to furnish reasonable grounds for roving border patrol unit to believe occupants were aliens).

> It is not a crime to be of Mexican descent, nor is a person's Mexican appearance a proper basis for arousing an officer's suspicions. Those broad descriptions literally fit millions of law abiding American citizens and lawfully resident aliens. . . .
>
> A person's racial or ethnic background or appearance is a neutral factor in appraising probable cause or reasonable suspicion, and to permit law enforcement officers to base their decision to stop or search an automobile on the racial or ethnic appearance of the occupants would be to sanction the very same discriminatory law enforcement condemned in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) as violative of the Equal Protection Clause of the Fourteenth Amendment. . . . This discrimination is inevitable if Border Patrol agents enjoy unfettered discretion to search whatever vehicles they chose, since they will naturally continue to focus on drivers of Mexican descent or who are of Mexican appearance, or whose passengers meet these criteria, as the most likely targets for routine or random vehicle searches.[76]

MALDEF further contended:

> There is simply no rational basis for believing that a person of Mexican appearance traveling in an automobile on an Interstate Highway in Southern California is an alien, much less for believing that he is an alien whose presence in this country is illegal. Settlers and immigrants have come to this country from all corners of the globe, and most United States citizens today bear to a greater or lesser extent the physical characteristics of persons dwelling in country or countries of origin.[77]

2. Oral Argument

The oral argument in *United States v. Brignoni-Ponce* was on February 18, 1975. Deputy Solicitor General Andrew L. Frey first argued the case on behalf of the United States. Early in the argument, Frey emphasized that the immigration stop occurred near the United States–Mexico border as opposed to "the road between Omaha and Des Moines."[78] He further focused on the exigency of immigration enforcement in the United States–Mexico border region:

> [W]e are saying that in this case, in this group of cases, the constitutional justification is that there are special problems in the area of the Mexican border; that these problems are enormous; that the traffic check operations are vital to our system of stopping the inflow of illegal entrants from Mexico into the interior labor markets.[79]

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76. Brief of the Mexican Am. Legal Def. and Educ. Fund, *supra* note 71, at 30–31 (citations omitted).

77. *Id.* at 46–47.

78. Transcript of Oral Argument at 9, *Brignoni-Ponce*, 422 U.S. 873 (No. 74-114).

79. *Id*. at 19. In the past, immigration officers had relied on race in making stops hundreds of miles from the border. *See e.g.,* United States v. Saldana, 453 F.2d 352, 353 (10th Cir. 1972) (upholding stop

As its brief did,[80] the U.S. government argued that the immigration enforcement powers in the border region should be as expansive as those that extended to searches at ports of entry at the border.[81] Frey further contended that it was "completely irrelevant"[82] that the officers stopped the automobile because of the appearance of the passengers: "*[W]e have a right to stop anybody*."[83] Earlier during his argument, he also stated that the Border Patrol had carte blanche to stop the automobile and once they had done so, he noted: "I don't think there's any serious challenge that once [the occupants] shrug[ged] their shoulders and didn't speak English, we had, in effect, probable cause for the ensuing arrest."[84] Interestingly, the U.S. government expressed the belief that physical appearance, immigration status, and language were all intertwined in the suspiciousness of one's immigration status, with the Border Patrol relying on many of these characteristics in determining who was suspected of violating the immigration laws.

Brignoni-Ponce's counsel emphasized that "the hunch of the officer can be used and abused. In this case we make note of that because here the *only* articulable basis given in cross-examination was that the person appeared to be of Mexican descent."[85] He emphasized throughout his argument that one of the most serious issues raised by the case "was that this defendant . . . was stopped because the three occupants appeared of Mexican descent" and then contrasted that belief with the true facts of the case:

> No. 1, the driver is a Spanish-speaking Puerto Rican-American citizen.
>
> No. 2, one is a Mexican from Guadalajara.
>
> But, No. 3, the third one, is a woman from Guatemala.[86]

In a critical part of the argument, counsel foreshadowed the Court's ultimate decision in the case:

> [T]he government, in five places in its brief, raises "Mexican appearing" as the basis of giving them something, maybe less than reasonable suspicion, but a justification for the stop.
>
> *It's our contention that you can't use race alone. Possibly as one of many factors, it can be used. It might be used in many other things.*

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as constitutional when it occurred in Oklahoma); United States v. Montez-Hernandez, 291 F. Supp. 712, 713, 716 (E.D. Cal. 1968) (finding stop near Sacramento, California to be constitutional).

80. *See supra* text accompanying notes 57–61.

81. *See* Transcript of Oral Argument, *supra* note 78, at 9–11.

82. Transcript of Oral Argument, *supra* note 78, at 14.

83. *Id.* at 22 (emphasis added).

84. *Id.* at 18.

85. *Id.* at 36–37 (emphasis added).

86. *Id.* at 47.

> "Spanish speaking", we have a problem, because I think we have a substantial portion of the citizen population that speaks Spanish and Spanish only.[87]

Brignoni-Ponce's counsel proceeded to suggest a number of other factors that might justify an immigration stop, such as those based on the observations of the person by the officers.[88] Nevertheless, counsel concluded: "I am hard-pressed to give you any facts that would suit this case, where an officer, at whim or caprice, some 66 miles from the border, could stop a car on the basis of appearance."[89] This part of the argument, focusing on multiple factors providing justification for a stop, appears to have hit a chord with the Justices; similar reasoning ultimately found its way into the Court's opinion in the case.[90]

Brignoni-Ponce's counsel rejected the argument that a stop based solely on race near the United States–Mexico border was somehow different. If that rule were adopted, he argued, "constitutional rights will vary by where [someone] happens to live. I think that people should not be so discriminated against."[91] The rule of law sought by the U.S. government, he persisted, would afford "carte blanche power, exercised in, say, the area of the Mexican border, [which] could be done arbitrarily if done purely on the basis of race. A *Yick Wo* concept."[92]

3. The Supreme Court Opinion

On June 30, 1975, the last day of the Term—often reserved for the announcement of opinions in the most difficult cases—Justice Powell delivered the Supreme Court's decision in *United States v. Brignoni-Ponce*.[93] According to the Court, "[t]he only issue presented for decision [was] whether a roving patrol may stop a vehicle in an area near the border and question its occupants when *the only ground* for suspicion is that the occupants appear to be of Mexican ancestry."[94] As is often the case, the Court's articulation of the question

87. *Id.* at 48 (emphasis added).

88. *See id.* at 49–50.

89. *Id.* at 51. Counsel for Brignoni-Ponce highlighted the varying facts that Border Patrol could rely on in making an immigration stop. "I can't say old cars or new cars. In fact, what shocks me is the government, in their reply brief in *Ortiz*, say that *you can tell a Mexican resident because they're thin*." *Id.* (emphasis added).

90. *See infra* text accompanying notes 108–09.

91. Transcript of Oral Argument, *supra* note 78, at 42.

92. *Id.* at 47. This last point is a reference to the famous case of *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886), which held that selective enforcement of a local laundry ordinance against persons of Chinese ancestry violated the Equal Protection Clause of the Fourteenth Amendment.

93. 422 U.S. 873 (1975). Justice Powell also authored the famous opinion just a few years later in *Regents of the University of California v. Bakke*, 438 U.S. 265, 314 (1978), which emphasized that race constitutionally could be one factor in a public university's admissions criteria in pursuit of a diverse student body. *See also* Grutter v. Bollinger, 539 U.S. 306, 343–44 (2003) (reaffirming *Bakke* and upholding law school's race-conscious admissions program).

94. United States v. Brignoni-Ponce, 422 U.S. 873, 876 (1975) (emphasis added).

presented strongly suggested its ultimate disposition of the case.

In considering the issue before it, the Court rejected both the broad powers advocated by the U.S. government in the border region and the probable cause requirement for an immigration stop sought by Brignoni-Ponce. It instead borrowed the Fourth Amendment reasonable suspicion standard used in police investigatory stops adopted in *Terry v. Ohio*[95] 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."[96] In so doing, the Court found that the stop in question had violated the Fourth Amendment because Border Patrol officers relied *exclusively* on "the apparent Mexican ancestry" of the Puerto Rican (and U.S. citizen) driver and Mexican and Guatemalan passengers of the 1969 Chevrolet.[97]

The Court reasoned that "Mexican appearance" failed to furnish "reasonable grounds to believe that the three occupants were aliens."[98] Echoing MALDEF's argument,[99] the Court observed 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."[100]

Although the Court found that "Mexican appearance" by itself does not constitute the reasonable suspicion necessary for an immigration stop, the Court elaborated that "Mexican appearance" can still be one relevant factor considered by a Border Patrol officer in making a stop: "The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens."[101]

In a concurrence, Justice Rehnquist attempted to cabin the finding of a Fourth Amendment violation to the somewhat extreme facts of the case before the Court.[102] Concurring in the judgment, Justice Douglas characterized the stop as a "patent violation of the Fourth Amendment" but disagreed with the Court that a reasonable suspicion, as opposed to a probable cause, test should apply in evaluating the constitutionality of the stop.[103] Chief Justice Burger also con-

95. 392 U.S. 1, 30 (1968).

96. *Brignoni-Ponce*, 422 U.S. at 884 (footnote omitted). The Court reserved the question of whether the Border Patrol "may stop persons reasonably believed to be aliens when there is no reason to believe they are illegally in the country." *Id.* at 884 n.9.

97. *Id.* at 885–86.

98. *Id*. at 886.

99. *See supra* text accompanying notes 71–77.

100. *Brignoni-Ponce*, 422 U.S. at 886.

101. *Id.* at 886–87.

102. *Id.* (Rehnquist, J., concurring).

103. *Id.* at 888 (Douglas, J., concurring in the judgment). Justice Douglas was particularly concerned with the extension of the reasonable suspicion test of *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968), to an automobile stop. *See Brignoni-Ponce*, 422 U.S. at 888–89 (Douglas, J., concurring in the judgment).

curred in the judgment but, in a telling passage, lamented:

> As the Fourth Amendment now has been interpreted by the Court it seems that the Immigration and Naturalization Service is powerless to stop the tide of illegal aliens—and dangerous drugs—that daily and freely crosses our 2,000-mile southern boundary. Perhaps these decisions will be seen in perspective as but another example of a society seemingly impotent to deal with massive lawlessness. In that sense history may view us as prisoners of our own traditional and appropriate concern for individual rights, unable—or unwilling—to apply the concept of reasonableness explicit in the Fourth Amendment in order to develop a rational accommodation between those rights and the literal safety of the country.[104]

Agreeing in important respects with Chief Justice Burger, Justice White issued an opinion concurring in the judgement in *Brignoni-Ponce*, criticizing *Almeida-Sanchez* and later cases for "dismantl[ing] major parts of the apparatus by which the Nation has attempted to intercept millions of aliens who enter and remain illegally in this country."[105]

In *United States v. Ortiz*, a companion case decided the same day as *Brignoni-Ponce*, Justice Powell, again writing for the Court, affirmed a Ninth Circuit ruling that the search of a vehicle at traffic checkpoints away from a port of entry at the border must be based on probable cause in order to be consistent with the Fourth Amendment.[106] Extending its holding in *Almeida-Sanchez* from roving patrols to checkpoints, the Court held that at traffic "checkpoints removed from the border and its functional equivalents, officers may not search private vehicles without consent or probable cause."[107] Thus, in two border enforcement cases decided the same day, the Court ruled that the Border Patrol had, in fact, violated the Fourth Amendment.

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104. United States v. Brignoni-Ponce & United States v. Ortiz, 422 U.S. 899, 899 (1975) (mem.) (Burger, C.J., concurring in the judgment) (footnote omitted). Chief Justice Burger's concurrence in *Ortiz* also applied to *Brignoni-Ponce*. It had an extraordinary twist. Chief Justice Burger noted that "[i]n the *Baca* case [United States v. Baca, 368 F. Supp. 398, 402–03 (S.D. Cal. 1973)] Judge Turrentine conducted a thorough review of the entire problem and the present Government response. Appended to this opinion is an excerpt from Judge Turrentine's *Baca* opinion describing the illegal alien problem and the law enforcement response." *Id.* at 899 n.1. The Appendix was composed of a lengthy quote from *Baca* on "The Illegal Alien Problem" and "The Law Enforcement Problem." *Id.* at 900–14; *see supra* note 30 (discussing Judge Turrentine's opinion in *Baca*).

One commentator contends that *Brignoni-Ponce*, *Ortiz*, and other border enforcement decisions create a "Mexican Exception" to the Fourth Amendment. *See* Alfredo Mirandé, *Is There a "Mexican Exception" to the Fourth Amendment?*, 55 FLA. L. REV. 365, 375–81 (2003); *see also* M. Isabel Medina, *Exploring the Use of the Word "Citizen" in Writings on the Fourth Amendment*, 83 IND. L.J. 1557 (2008) (critically analyzing judicial efforts to limit Fourth Amendment protections to citizens, rather than all persons in the United States).

105. *Brignoni-Ponce* & *Ortiz*, 422 U.S. at 915 (White, J., concurring in judgment).

106. United States v. Ortiz, 422 U.S. 891, 896–97 (1975).

107. *Id.* In *Bowen v. United States*, 422 U.S. 916, 918–19 (1975), the Court held that its decision in *Almeida-Sanchez* did not apply retroactively.

4. A Defeat in Disguise

At first glance, *United States v. Brignoni-Ponce* might be seen as a victory for immigrants and a loss for the U.S. government. Technically, that is the case; the Court found that the immigration stop violated the Fourth Amendment and Brignoni-Ponce's criminal conviction was reversed. However, the Court also rejected the probable cause requirement for immigration stops advocated by Brignoni-Ponce and emphasized that "[a]ny number of factors may be taken into account [by immigration officers] in deciding whether there is reasonable suspicion to stop a car in the border area."[108] Making it clear that immigration officers enjoy wide discretion in making stops, the Court offered its own laundry list of factors, including:

- the "characteristics of the area in which they encounter a vehicle";
- the"proximity to the border";
- the "usual patterns of traffic on the particular road";
- "previous experience with alien traffic";
- "information about recent illegal border crossings in the area";
- the "driver's behavior," such as "erratic driving" or "obvious attempts to evade officers";
- "[a]spects of the vehicle," such as "certain station wagons, with large compartments for fold-down seats or spare tires," a "heavily loaded" appearance, "an extraordinary number of passengers," or "observ[ations of] persons trying to hide";
- the "characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut"; and
- the "facts in light of [the officer's] experience in detecting illegal entry and smuggling."[109]

In affording broad discretion to the Border Patrol to consider a totality of the circumstances in making an immigration stop, the Court in *Brignoni-Ponce* appeared to be swayed by the U.S. government's alleged need for flexibility in border enforcement based on the assumption that undocumented immigrants impose great social, economic, and other costs on U.S. society.[110] The Court emphasized:

> The Government makes a convincing demonstration that the public interest demands effective measures to prevent the illegal entry of aliens at the Mexican border. Estimates of the number of illegal immigrants in the United States vary widely. A conservative estimate in 1972 produced a figure of about one million, but the INS now suggests there may be as many as 10 or 12

108. *Brignoni-Ponce*, 422 U.S. at 884.
109. *Id.* at 884–86 (citations omitted).
110. *See id.* at 878–79.

> million aliens illegally in the country. Whatever the number, these aliens create significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services. The aliens themselves are vulnerable to exploitation because they cannot complain of substandard working conditions without risking deportation.[111]

Despite the Court's unqualified pronouncement in this passage that undocumented "aliens create significant economic and societal problems," the question of whether the costs of undocumented immigration outweigh its benefits remains hotly disputed in the academic literature to this day.[112] Research studies, on balance, suggest that the aggregate economic benefits of immigration to the United States generally outweigh any costs.[113] Immigrants contribute labor, and their expenditures, as well as tax dollars to the U.S. economy, and the overall economic benefits generally outweigh their costs in public education, benefits, and services. To the extent that any persons in the United States are injured economically by competition in the labor market with immigrant workers, they are the least skilled—those without high school degrees—and those economic injuries appear to be relatively small.[114]

More significantly for our purposes, besides the lack of evidence supporting the claims of economic and social costs of undocumented immigrants, there is an unstated assumption in the Court's—as well as the U.S. government's briefs'—reference to "Mexican appearance." Namely, the reference assumes that there is such a thing. In fact, people from Mexico run the gamut in terms of phenotypes, with there being persons of both fair and dark complexions of Mexican ancestry.[115] Nevertheless, stereotypes of "Mexican appearance" persist, and the *Brignoni-Ponce* Court ultimately appears to have sanctioned reliance on such stereotypes by the Border Patrol.

To support its decision that "Mexican appearance" could be considered in an immigration stop, the Court, on flimsy evidence, noted that the government

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111. *See id.* at 878–79 (footnote omitted).

112. *See* Peter H. Schuck, *Alien Rumination*, 105 YALE L.J. 1963, 1978–90 (1996) (reviewing PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER (1995)) (concluding that the studies that have analyzed immigration's impact on the United States are inconclusive about the relative costs and benefits of immigration).

113. *See, e.g.*, NAT'L RESEARCH COUNCIL, THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION 135 (James P. Smith & Barry Edmonston eds., 1997) (discussing the research findings of the National Research Council in connection with their report to the U.S. Commission on Immigration Reform); *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).

114. *See generally* KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 131–67 (2007) (reviewing studies of economic costs and benefits of immigration to the United States).

115. *See* Kevin R. Johnson, *"Melting Pot" or "Ring of Fire"?: Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259, 1291–93 (1997).

"estimated that 85% of the aliens illegally in the country are from Mexico."[116] Even assuming that statistical probabilities might justify the stop of persons with a stereotypical "Mexican appearance," the allegedly high percentage of undocumented Mexicans in the total undocumented population does not comport with the best estimates available.[117] In 1975, the Commissioner of the Immigration and Naturalization Service reportedly stated that approximately one-half of undocumented immigrants were "non-Mexicans."[118] Importantly, the Court's authorization of Border Patrol consideration 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."[119] Border Patrol reliance on "Mexican appearance" in immigration stops almost inevitably contributes to the fact that today roughly ninety percent of all persons removed from the United States are natives of Mexico and other Latin American nations.[120]

F. SUBSEQUENT DEVELOPMENTS

This section briefly considers the expansion, contraction, and later expansion of the reliance on race in an immigration stop. Today, race dominates immigration enforcement, in no small part due to the Court's sanctioning of the reliance on "Mexican appearance" in *Brignoni-Ponce*. However, we have seen legal ebbs and flows in the courts' treatment of profiling, with an emergent concern over profiling that was stopped short by the tragic events of September 11, 2001. Today, there again is growing unease with profiling generally, with Latina/os especially concerned with racial profiling in immigration enforcement as undermining their claim to full membership in U.S. society.

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116. *Brignoni-Ponce*, 422 U.S. at 879. To support this dubious proposition, the Court cited *United States v. Baca*, 368 F. Supp. 398, 402 (S.D. Cal. 1973), *see supra* note 30 (discussing *Baca*), which relied on a 1974 Justice Department report and bootstrapped that data by stating that a high proportion of the deportable aliens came from Mexico. *See Brignoni-Ponce*, 422 U.S. at 879 n.5. As noted previously, Judge Turrentine, who presided over the trial below in *Brignoni-Ponce*, *see supra* text accompanying note 30, wrote the opinion in *Baca*.

117. *See infra* text accompanying notes 197–98.

118. Paul Houston, *Only 50% of Illegal Aliens Are Mexican, Official Says*, L.A. TIMES, Mar. 13, 1975, at A1. The best estimate today is that about 60% of the undocumented population is from Mexico. *See infra* note 197.

119. *Brignoni-Ponce*, 422 U.S. at 886. 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 statement that the class of persons of "Mexican appearance" includes a great many persons lawfully in the country is even truer in 2009 than it was in 1975. *See infra* text accompanying notes 158–71.

120. *See* U.S. DEP'T OF HOMELAND SECURITY, ANNUAL REPORT: IMMIGRATION ENFORCEMENT ACTIONS: 2007, at 4 tbl. 2 (2008), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_07.pdf.

1. The Evolution of *Brignoni-Ponce*

In a myriad of different ways, the Supreme Court's decision in *United States v. Brignoni-Ponce* has greatly shaped immigration enforcement in the United States over the past thirty-plus years. The Court authorized the Border Patrol to rely on "Mexican appearance" (whatever that might be), among other factors, even if the individual is not specifically identified as having violated the U.S. immigration laws.[121] Unfortunately, the Court has not revisited the use of race in immigration stops in the thirty years since it made the decision, although it continued to expand Border Patrol discretion in decisions following *Brignoni-Ponce*.

Building on *Brignoni-Ponce*, one year after the decision, the Supreme Court afforded even greater (and more troubling) leeway to Border Patrol officers. Classifying the intrusion as "sufficiently minimal," the Court in *United States v. Martinez-Fuerte* held that referrals to secondary inspection[122] at fixed checkpoints "made largely on the basis of apparent Mexican ancestry" do not violate the U.S. Constitution.[123] In so doing, the Court emphasized the Border Patrol's need for flexibility.[124] As it did in *Brignoni-Ponce*,[125] the Court repeated the government's grossly exaggerated assertion that 85 percent of the undocumented population in the United States is of Mexican origin when, in fact, the number was closer to 50 percent.[126] Dissenting in *Martinez-Fuerte*, Justice Brennan understood the case as authorizing the Border Patrol to "target motorists of Mexican appearance. . . . [, allowing inescapable discrimination] against

121. One commentator has suggested that *Brignoni-Ponce* is consistent with the caselaw permitting consideration of race when the victim of a crime identifies the perpetrator as a racial minority. *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, 280 (2000). That suggestion is misplaced because the Supreme Court in *Brignoni-Ponce* found race relevant based on statistical probability, not because any specific individual fit the description of a suspect identified as having committed a specific crime. *See* Sheri Lynn Johnson, *Race and the Decision To Detain a Suspect*, 93 YALE L.J. 214, 239 (1983).

122. At the border and fixed checkpoints away from the border, border and immigration officers generally engage in an initial screening of vehicles and the immigration status of their occupants. If the circumstances suggest the need for further inquiry, officers will direct the vehicle to an area for secondary inspection, which includes questioning the occupants and a possible search. *See* U.S. Immigration & Customs Enforcement, Arriving at a U.S. Port of Entry . . . What an Exchange Visitor Can Expect (Fact Sheet) (Oct. 1, 2004), http://www.ice.gov/sevis/factsheet/100104ent_exchng_fs.htm.

123. 428 U.S. 543, 563 (1976); *see* City of Indianapolis v. Edmond, 531 U.S. 32, 37–44 (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, 449–55 (1990) (rejecting constitutional challenge to fixed-sobriety checkpoint scheme).

124. *See Martinez-Fuerte*, 428 U.S. at 563–64; *see also* Arizona v. Hicks, 480 U.S. 321, 327 (1987) (citing *Brignoni-Ponce* for the 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).

125. *See supra* text accompanying notes 116–20.

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

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."[127]

In 1981, the Court relied on *Brignoni-Ponce* in *United States v. Cortez* to engage in a fact-intensive analysis upholding the validity of a stop under the Fourth Amendment and refusing to disturb criminal convictions for transporting undocumented immigrants.[128] Echoing the sentiments expressed in his concurrence in *Brignoni-Ponce*, Chief Justice Burger, writing for the Court, emphasized that "[t]his case portrays at once both the enormous difficulties of patrolling a 2,000-mile open border and the patient skills needed by those charged with halting illegal entry into this country."[129]

After the Court decided a flurry of immigration enforcement cases in the 1970s and 1980s,[130] it decided few cases of much consequence on the subject for a number of years. The next major decision confirmed the general approach of *United States v. Brignoni-Ponce* by affording great discretion to the Border Patrol.

In the 2002 case of *United States v. Arvizu*, the Supreme Court held that the Border Patrol had reasonable suspicion for a stop near the United States–Mexico border in southern Arizona.[131] The Ninth Circuit had held that most of the factors identified by the district court to justify the stop—the driver's slowing down, failure to acknowledge the officer, and the raised position of the children's knees—"carried little or no weight in the reasonable-suspicion calculus."[132] In a unanimous opinion written by Chief Justice William Rehnquist, the Court reversed, emphasizing that they had "said repeatedly that [courts] must look at the 'totality of the circumstances' of each case to see whether the detaining officer has 'a particularized and objective basis' for suspecting legal wrongdoing."[133] The Court held that the court of appeals' "rejection of seven of the listed factors in isolation from each other does not take into account the 'totality of the circumstances,' as our cases have understood that phrase."[134] The Court held that, in the case before it, the facts "[t]aken together . . . sufficed to form a particularized and objective basis for [the stop], making the stop reasonable within the meaning of the Fourth Amendment."[135]

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127. *Id.* at 572 (Brennan, J., dissenting).

128. 449 U.S. 411, 416–17, 420–22 (1981).

129. *Id.* at 418–19.

130. *See supra* text accompanying notes 20–24.

131. 534 U.S. 266, 277–78 (2002).

132. *Id.* at 272–73 (citing United States v. Arvizu, 232 F.3d 1241, 1251 (9th Cir. 2000)).

133. *Id.* at 273 (citing United States v. Cortez, 449 U.S. 411, 417–18 (1981)).

134. *Id.* at 274; *see, e.g.*, United States v. Manzo-Jurado, 457 F.3d 928, 935–40 (9th Cir. 2006); United States v. Diaz-Juarez, 299 F.3d 1138, 1142 (9th Cir. 2002); United States v. Sigmond-Ballesteros, 285 F.3d 1117, 1121 (9th Cir. 2002).

135. *Arvizu*, 534 U.S. at 277–78.

In *Muelhler v. Mena*, 544 U.S. 93, 95, 102 (2005), the Supreme Court held that the questioning of a person's immigration status without reasonable suspicion during the execution of a search warrant did

To this day, lower courts regularly rely on *Brignoni-Ponce* in determining whether a Border Patrol agent or an officer's investigatory stop was supported by reasonable suspicion. They often employ the laundry list of factors—sometimes referring to them as the "*Brignoni-Ponce* factors"—offered by the Supreme Court in determining whether there is reasonable suspicion to stop a motor vehicle for violation of the immigration laws.[136]

Unfortunately, less than a decade after the Supreme Court in *Brignoni-Ponce* and *Martinez-Fuerte* afforded great discretion to Border Patrol officers, a ground-level study of immigration enforcement concluded that "[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)."[137] Moreover, the study found that officers may believe that they can identify an undocumented person to a near certainty when they, in fact,

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not violate the Fourth Amendment. Under the circumstances, "the officers did not need reasonable suspicion to ask Mena for her name, date and place of birth, or immigration status." *Id.* at 101. The Court rejected the court of appeals' reliance on *Brignoni-Ponce* as barring the inquiry into immigration status exclusively based on physical appearance. *See id.* at 101 n.3.

Consistent with past precedent, *see supra* note 59 and accompanying text, in 2004, the Supreme Court held that a motorist crossing the border did not have an expectation of privacy in his fuel tank and, consequently, that it could be disassembled without reasonable suspicion. *See* United States v. Flores-Montano, 541 U.S. 149, 152–55 (2004). Writing for the Court, Chief Justice Rehnquist reiterated that "[t]he Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border," *id.* at 152, with the power to search at the border said to be nothing less than "'plenary.'" *Id.* at 153 (quoting United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985)).

136. *See, e.g.*, United States v. Berber-Tinoco, 510 F.3d 1083, 1087 (9th Cir. 2007); United States v. Hernandez, 477 F.3d 210, 213–14 (5th Cir. 2007); United States v. Cheromiah, 455 F.3d 1216, 1220 (10th Cir. 2006); United States v. Singh, 415 F.3d 288, 294–95 (2d Cir. 2005); United States v. Quintana-Garcia, 343 F.3d 1266, 1270–71 (10th Cir. 2003); United States v. Samaguey, 180 F.3d 195, 197–98 (5th Cir. 1999).

137. Edwin Harwood, *Arrests Without Warrant: The Legal and Organizational Environment of Immigration Law Enforcement*, 17 U.C. DAVIS L. REV. 505, 531 (1984); *see also* EDWIN HARWOOD, IN LIBERTY'S SHADOW: ILLEGAL ALIENS AND IMMIGRATION LAW ENFORCEMENT 59 (1986) ("[Immigration & Naturalization Service (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 the 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*" (emphasis added)); *see, e.g.*, United States v. Montero-Camargo, 208 F.3d 1122, 1140 (9th Cir. 2000) (en banc) (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). Racial profiling continues to plague immigration enforcement. *See, e.g.*, Mary Romero & Marwah Serag, *Violation of Latino Civil Rights Resulting from INS and Local Police's Use of Race, Culture and Class Profiling: The Case of the Chandler Roundup in Arizona*, 52 CLEV. ST. L. REV. 75 (2005) (analyzing a joint federal–local immigration enforcement operation in a suburb of Phoenix, Arizona that employed discriminatory techniques based on physical appearance, language, public places frequented, and similar characteristics).

err more often than not.[138]

The "totality of the circumstances" approach of *Brignoni-Ponce* thus appears to have been tailor-made for authorizing stops based in large part on "Mexican appearance," with the officers concocting a legally defensible rationale for the stop after the fact based on that "suspicious" appearance combined with a multitude of facts. *United States v. Dimas*[139] offers an example of such a case. In that case, a police officer stopped a van for traveling unusually slow and drifting in the lane.[140] He then detained the vehicle and its occupants upon observing the lack of luggage coupled with the fact that the van was filled to capacity, smelling an odor coming from the van that made him believe the occupants had been in the van for multiple days, and finding that the driver's license did not match the automobile registration.[141]

Taken together, *Brignoni-Ponce* and *Martinez-Fuerte*, as well as subsequent Supreme Court decisions, have had a pernicious impact on persons of "Mexican appearance," U.S. citizens and lawful immigrants, as well as undocumented immigrants. *Brignoni-Ponce* allows a person's appearance to be one factor in an immigration stop, while *Martinez-Fuerte* effectively permits a Border Patrol officer to direct any and all persons appearing to be of Mexican ancestry to secondary inspection for further inquiry and scrutiny.[142] More generally, they effectively sanction reliance on race in immigration enforcement at the nation's borders and in the interior of the United States.

a. Encouraging Racial Profiling: The Strict Limitation of the Exclusionary Rule in Deportation Proceedings. In addition to making physical appearance the touchstone of immigration enforcement, subsequent to *Brignoni-Ponce*, the Supreme Court decided cases that made it more difficult to challenge racial profiling in immigration enforcement. Importantly, a few years after deciding *Brignoni-Ponce*, the Court dramatically limited the applicability of the exclusionary rule for unlawful stops, searches, and seizures in deportation proceedings.

In *INS v. Lopez-Mendoza*, the Supreme Court held that the exclusionary rule applied to immigration stops only for "egregious" violations of the law.[143] Two decisions from the Ninth Circuit found race-based violations of the Fourth Amendment to be sufficiently egregious to invoke the exclusionary rule. The cases suggest growing judicial concern with the consideration of race in immigration enforcement. In *Gonzalez-Rivera v. INS*, the Ninth Circuit found that a stop based solely on Hispanic appearance was an egregious violation of the Fourth

138. *See* Harwood, *supra* note 137, at 532 n.105 (noting that immigration enforcement officers believe that they correctly identify undocumented persons over ninety percent of the time and that they have a "'sixth sense' for distinguishing an illegal alien" when in at least one case, the officer was only correct twenty to twenty-five percent of the time).

139. 418 F. Supp. 2d 737 (W.D. Pa. 2005).

140. *Id.* at 741.

141. *Id.* at 744.

142. *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 151 (1997).

143. 468 U.S. 1032, 1050–51 (1984).

Amendment.[144] In *Orhorhaghe v. INS*, the court held that a seizure of a person and a warrantless entry into a person's home based solely on his "Nigerian-sounding name" constitutes an egregious violation of the Fourth Amendment.[145] The trio of decisions warrants further scrutiny because they illustrate the problems of race-based immigration enforcement.

In *Lopez-Mendoza*, immigration officers arrested two undocumented immigrants upon searching the premises of their respective places of employment with the intention of arresting the occupants.[146] Both immigrants admitted unlawful entry into the United States. One of them objected to the submission of his admission offered at the deportation proceeding as evidence, contending that it should have been suppressed as the fruit of an unlawful arrest.[147] The Supreme Court held that the exclusionary rule should not ordinarily be applied in deportation hearings, which have long been classified as civil, rather than criminal, in nature:

> The costs of applying the exclusionary rule in the context of civil deportation hearings are high. In particular, application of the exclusionary rule in [removal] cases . . . would compel the courts to release from custody persons who would then immediately resume their commission of a crime through their continuing, unlawful presence in this country.[148]

The Court further stated that the exclusionary rule may have applied if (1) there was reason to believe that Fourth Amendment violations by INS officers were "widespread"; or (2) if there was an "egregious violation[] of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained."[149] The Court then found that this particular arrest, although unlawful, failed to consti-

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144. *See* 22 F.3d 1441, 1452 (9th Cir. 1994).

145. *See* 38 F.3d 488, 503 (9th Cir. 1994).

146. *See Lopez-Mendoza*, 468 U.S. at 1036–37.

147. *See id.* at 1037–38.

148. *Id.* at 1050. The distinction between the civil, as opposed to the criminal, nature of removal proceedings has been forcefully challenged. *See* Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1893–95 (2000).

149. *Lopez-Mendoza*, 468 U.S. at 1050–51. The Court further observed that the Border Patrol "has its own comprehensive scheme for deterring Fourth Amendment violations by its officers," thereby diminishing the need for the exclusionary rule. *Id.* at 1043. The effectiveness of those internal procedures has been roundly criticized. *See, e.g.*, Bill Ong Hing, *Border Patrol Abuse: Evaluating Complaint Procedures Available to Victims*, 9 GEO. IMMIGR. L.J. 757 (1995).

For the argument for revisiting the Court's narrowing of the exclusionary rule in removal proceedings, see generally Stella Burch Elias, Note, *"Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting* Lopez-Mendoza, 2008 WIS. L. REV. 1109 (arguing for the reintroduction of the exclusionary rule in the immigration context based on widespread constitutional violations and recent changes in immigration law and enforcement); Matthew S. Mulqueen, Note, *Rethinking the Role of the Exclusionary Rule in Removal Proceedings*, 82 ST. JOHN'S L. REV. 1157 (2008) (arguing that the exclusionary rule should be readopted in removal proceedings based on post-1984 immigration law reform).

tute an "egregious violation[]" of the Fourth Amendment.[150]

Two important Ninth Circuit decisions after *Lopez-Mendoza* began to place in question the consideration of race in immigration enforcement sanctioned by *Brignoni-Ponce*. In *Gonzalez-Rivera v. INS*, the court of appeals determined that a stop based on "Hispanic appearance" alone constitutes an egregious violation of the Fourth Amendment.[151] Border Patrol officers claimed that the stop was based on five factors: "(1) Gonzalez and his father appeared to be Hispanic; (2) both of them sat-up straight, looked straight ahead and did not turn their heads to acknowledge the Border Patrol car; (3) Gonzalez' mouth appeared to be 'dry'; (4) Gonzalez was blinking; and (5) both men appeared to be nervous."[152] In critically assessing these factors, the court ultimately agreed with the immigration judge that the stop in fact was based solely on race.[153] The court justified its holding of an "egregious" constitutional violation in part because:

> [R]acial oppression [is] one of the most serious threats to our notion of fundamental fairness and [courts generally] consider reliance on the use of race or ethnicity as a shorthand for likely illegal conduct to be "repugnant under any circumstances."
>
> . . . [A]s we have recognized in prior cases, racial stereotypes often infect our decision-making processes only subconsciously.[154]

The court, therefore, applied the exclusionary rule.[155]

In *Orhorhaghe v. INS*, immigration officers seized Orhorhaghe outside of his apartment and entered his residence on the basis of his surname.[156] The Ninth Circuit held that "[o]n the facts of [that] case, [they had] little difficulty in determining that the immigration agents committed egregious Fourth Amendment violations. *The agents targeted Orhorhaghe for investigation simply because he had a 'Nigerian-sounding name.'*"[157]

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150. *Lopez-Mendoza*, 458 U.S. at 1050–51.

151. Gonzalez-Rivera v. INS, 22 F.3d 1441, 1452 (9th Cir. 1994).

152. *Id*. at 1443.

153. *See id*. at 1447. Query whether this holding would survive the Supreme Court's decision in *Arvizu*. *See supra* text accompanying notes 131–35.

154. *Gonzalez-Rivera*, 22 F.3d at 1449–50.

155. *Id*. at 1452. In contrast to the Ninth Circuit's decisions, the Board of Immigration Appeals in *In re Toro* refused to exclude evidence obtained when Toro was unlawfully stopped solely because of her "Latin appearance." 17 I. & N. Dec. 340, 343 (B.I.A. 1980).

156. 38 F.3d 488, 492 (9th Cir. 1994).

157. *Id.* at 503 (emphasis added). Similarly, in *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012 (9th Cir. 2008), the Ninth Circuit found an "egregious" violation of the Fourth Amendment in a case in which INS agents received a tip that a female named Fabiola was fraudulently using a birth certificate to secure employment. *See id*. at 1013. Based on the tip, the agents began investigation and visited a residence that the tipper provided. *See id.* at 1014. Without an arrest or search warrant, the agents entered the home and began questioning Fabiola Gastelum-Lopez and Luz Lopez-Rodriguez. The court found that the agents' actions were egregious because "reasonable INS agents should have known that

b. Pushback Against Racial Profiling: United States v. Montero-Camargo. As the law evolved over the years, strictly scrutinizing (and often invalidating) the consideration of race in many circumstances,[158] some courts began to recognize the issues raised by racial profiling in immigration enforcement. The invocation of the exclusionary rule by the Ninth Circuit in finding unconstitutional several race-based immigration stops, which arguably are exceptions to the general rule, suggests a certain degree of judicial concern with the overreliance on race in immigration enforcement. Courts on a number of other occasions have also questioned the reliance on race in immigration stops.[159]

The judicial concern with racial profiling came to a head in *United States v. Montero-Camargo*.[160] In that case, the Ninth Circuit, sitting en banc, evaluated the constitutionality of an immigration stop that uncovered drugs. The officers relied on the following factors in stopping a vehicle: "apparent avoidance of a checkpoint, tandem driving, Mexicali license plates, *the Hispanic appearance of the vehicles' occupants*, the behavior of [a passenger], the agent's prior experience during stops after similar turnarounds, and the pattern of criminal activity at the remote spot where the two cars stopped."[161] The district court and the initial panel that decided the case relied in part on the Hispanic appearance of the three defendants to uphold the stop. Despite language to the contrary in *Brignoni-Ponce*, the Ninth Circuit disagreed on that reliance and held:

> The likelihood that in an area in which the majority—or even a substantial part—of the population is Hispanic, any given person of Hispanic ancestry is in fact an alien, let alone an illegal alien, is not high enough to make Hispanic

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they were violating the Fourth Amendment when they entered Gastelum's and Lopez's residence." *Id.* at 1019.

158. *See, e.g.*, Adarand Constructors Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

159. *See, e.g.*, United States v. Chavez-Villarreal, 3 F.3d 124, 127 (5th Cir. 1993) (offering "very little [weight]" to defendant's "Hispanic appearance" because "he was from a state [(Arizona)] with a substantial Hispanic population"); United States v. Rodriguez, 976 F.2d 592, 596 (9th Cir. 1992) ("[T]he agents in this case saw a Hispanic man cautiously and attentively driving a 16-year-old Ford with a worn suspension, who glanced in his rear view mirror while being followed by agents in a marked Border Patrol car. This profile could certainly fit hundreds or thousands of law abiding daily users of the highways of Southern California."); United States v. Orona-Sanchez, 648 F.2d 1039, 1042 (5th Cir. 1981) ("Nor is there anything vaguely suspicious about the presence of persons who appear to be of Latin origin in New Mexico where over one-third of the population is Hispanic."); United States v. Rubio-Hernandez, 39 F. Supp. 2d 808, 836 (W.D. Tex. 1999) (stating that Hispanic origin alone was not a reliable indicia of being undocumented or concealing undocumented immigrants "given the percentage of Hispanic people that make up the population of [West Texas]," and deciding that the factor held no significant weight); United States v. Zertuche-Tobias, 953 F. Supp. 803, 821 n.54 (S.D. Tex. 1996) (declining to rely on "Hispanic ethnicity" in stop).

160. 208 F.3d 1122 (9th Cir. 2000) (en banc); *see* Elisabeth R. Calcaterra & Natalie G. Mitchell, Casenote, *Subtracting Race from the "Reasonable Calculus": An End to Racial Profiling?* United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000)* Cert. Denied Sub Nom, 6 MICH J. RACE & L. 339, 339 (2001); Ian H. Hlawati, Casenote, United States v. Montero-Camargo*: Elimination of the Race Factor Develops Piecemeal: The Ninth Circuit Approach*, 23 U. HAW. L. REV. 703, 703 (2001).

161. *Montero-Camargo*, 208 F.3d at 1128–29 (emphasis added).

> appearance a relevant factor in the reasonable suspicion calculus. As we have previously held, factors that have such a low probative value that no reasonable officer would have relied on them to make an investigative stop must be disregarded as a matter of law.[162]

Addressing the "dictum" in *Brignoni-Ponce* about the consideration of "Mexican appearance," the court noted that the Supreme Court had "relied heavily on now-outdated demographic information,"[163] and acknowledged that "[t]he Hispanic population of this nation, and of the Southwest and Far West in particular, has grown enormously—at least five-fold in the four states referred to in the Supreme Court's decision [(Arizona, California, New Mexico, and Texas)]."[164] The en banc court further acknowledged that there had been "significant changes in the law restricting the use of race as a criterion in government decision-making. The use of race and ethnicity has been severely limited."[165]

Moreover, the court in *Montero-Camargo* emphasized the concrete harms of racial profiling in immigration enforcement:

> Stops based on race or ethnic appearance send the underlying message to all our citizens that those who are not white are judged by the color of their skin alone. Such stops also send a clear message that those who are not white enjoy a lesser degree of constitutional protection—that they are in effect assumed to be potential criminals first and individuals second.[166]

Despite finding that race could not be considered in an immigration stop, the court found that other facts justified the initial stop and that it did not violate the Fourth Amendment.[167]

In 2006, the Ninth Circuit retreated from its holding in *Montero-Camargo* in a case involving a stop near the U.S.–Canada border in Montana.[168] In making the stop, officers considered "the group's proximity to the Canadian border, the group members' conversing with each other in Spanish, the group's conduct at the game, the group's appearance as a work crew, and Manzo-Jurado's evasive

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162. *Id.*

163. *Id.* at 1132.

164. *Id.* at 1133. The court recognized that race "may be considered when the suspected perpetrator of a specific offense has been identified as having such an appearance." *Id.* at 1134 n.22; *see infra* text accompanying notes 390–94 (analyzing critically this use of race in law enforcement).

165. *Montero-Camargo*, 208 F.3d at 1134 (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)).

166. *Id.* at 1135 (footnote omitted). For an analysis of *Brignoni-Ponce* in conjunction with *Montero-Camargo*, see Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 236–45; Renata Ann Gowie, *Driving While Mexican: Why the Supreme Court Must Reexamine* United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)*, 23 HOUS. J. INT'L L. 233, 248–49 (2001); Kristin Connor, Note, *Updating* Brignoni-Ponce*: A Critical Analysis of Race-Based Immigration Enforcement*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 567, 595–96 (2008).

167. *See Montero-Camargo*, 208 F.3d at 1139–40.

168. United States v. Manzo-Juardo, 457 F.3d 928 (9th Cir. 2006).

behavior."[169] The court explained that *Montero-Camargo* is "inapplicable here because Havre, Montana is sparsely populated with Hispanics,"[170] in contrast to the demographics of southern California in that case. Still, the court found that the totality of the circumstances failed to justify the stop, emphasizing that "the agents here lacked information beyond factors forming a broad profile that would cover many lawful, newly-arrived immigrants."[171]

c. The Resurgence of Racial Profiling in the "War on Terror." After years of criticism of racial profiling,[172] and the Ninth Circuit's decision in *Montero-Camargo*,[173] the tragic events of September 11, 2001, reinvigorated governmental reliance on statistical probabilities at the core of racial profiling. Arabs and Muslims, including some U.S. citizens, were removed from airplanes, arrested, detained, interrogated, and sometimes physically as well as psychologically abused, often while also denied access to counsel and family.[174] The U.S. government even imposed special immigration procedures, including compulsory registration with federal authorities, on certain groups of noncitizens from Arab and Muslim nations.[175] The various measures in the new "war on terror" smacked of racial profiling.

Courts have grappled with the reliance on race in law enforcement stops in the so-called war on terror, but generally have not interfered with various security measures adopted by the Executive Branch.[176] In *United States v. Ramos*, for example, one factor on which the officers based the initial stop was

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169. *Id*. at 936.

170. *Id.* at 936 n.6.

171. *Id.* at 939–40.

172. *See infra* text accompanying notes 402–22.

173. *See supra* text accompanying notes 158–67.

174. *See, e.g.*, Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 ANN. SURVEY AM. L. 295, 352–55 (2002); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 960–77 (2002); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576–86 (2002). The profiling of Arabs and Muslims continued long after the immediate months following September 11, 2001. A 2009 report outlines the racial profiling of Arabs and Muslims and other abuses in U.S. government national security policies. *See* ASIAN LAW CAUCUS & STANFORD LAW SCH. IMMIGRANTS' RIGHTS CLINIC, RETURNING HOME: HOW U.S. GOVERNMENT PRACTICES UNDERMINE CIVIL RIGHTS AT OUR NATION'S DOORSTEP (2009), http://www.asianlawcaucus.org/wp-content/uploads/2009/04/Returning%20Home.pdf.

175. *See, e.g.*, Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52,584, 52,585 (Aug. 12, 2002) (to be codified at 8 C.F.R. pts. 214, 264) (rationalizing registration of certain noncitizens from nations populated predominantly by Arabs and Muslims by emphasizing that "[t]he political branches of the government have plenary authority in the immigration area") (citing Fiallo v. Bell, 430 U.S. 787, 792 (1977); Mathews v. Diaz, 426 U.S. 67, 80–82 (1976)).

176. *See infra* text accompanying notes 177–87. For example, all of the courts that considered the issue refused to disturb the so-called special registration program. *See, e.g.*, Kandamar v. Gonzales, 464 F.3d 65, 74 (1st Cir. 2006) (rejecting argument that evidence obtained through passport examination should be suppressed based on constitutional violations); Ali v. Gonzales, 440 F.3d 678, 681–82 & n.4 (5th Cir. 2006) (holding that special registration did not warrant remedy under the Equal Protection Clause); Roundnahal v. Ridge, 310 F. Supp. 2d 884, 892 (N.D. Ohio 2003) (refusing to disturb special registration program).

their mistaken belief that the defendants were of Middle Eastern descent.[177] In fact, defendants were Hispanic.[178] In defendants' trial for unlawful transportation of undocumented immigrants, the U.S. government asserted that *Brignoni-Ponce* allowed the officers to focus on Middle Eastern-appearing men in determining reasonable suspicion.[179] The court found that stops based on mistakes of fact are permissible so long as the mistake is objectively reasonable.[180] The court further reasoned that the proper constitutional basis for challenging discrimination was the Equal Protection Clause of the Fourteenth Amendment, not the Fourth Amendment.[181] Relying on *Whren v. United States*,[182] the court held that the officer's subjective intent alone does not render a stop violative of the Fourth Amendment.[183]

In *Farag v. United States*, however, a district court examined *Brignoni-Ponce* and *Montero-Camargo* in evaluating the constitutionality of law enforcement seizure, detention, and interrogation of two airline passengers who appeared to be Arab.[184] The court held that officers could not rely on Arab appearance alone as cause to question airline passengers, emphasizing that race was not indicative of criminal propensity.[185] The court criticized reliance on *Brignoni-Ponce* in this instance: "To the Court's knowledge, no court has ever marshaled statistics to conclude that racial or ethnic appearance is correlated with, and thus probative of, any type of criminal conduct *other than* immigration violations."[186] The court emphasized that "[e]ven granting that all of the participants in the 9/11 attacks were Arabs . . . the likelihood that *any given airplane passenger* of Arab ethnicity is a terrorist is so negligible that Arab ethnicity has *no* probative value in a particularized reasonable-suspicion or probable-cause determination."[187]

2. Subsequent Political Developments

While the courts, as a whole, have permitted racial profiling in immigration enforcement, Latina/os have challenged it, as well as the many tough-on-immigration policies.[188] Many Latino/as in the United States today firmly believe that race is determinative to immigration officers investigating alleged

177. 591 F. Supp. 2d 93, 96 (D. Mass. 2008).
178. *Id.*
179. *See id*. at 104–05.
180. *See id*. at 106.
181. *Id.* at 107 (citing Whren v. United States, 517 U.S. 806, 813 (1996)); *see infra* Part II (analyzing Whren v. United States).
182. *See infra* Part II.
183. *See Ramos*, 591 F. Supp. 2d at 106–07.
184. 587 F. Supp. 2d 436 (E.D.N.Y. 2008).
185. *See id.* at 463–65.
186. *Id* at 464.
187. *Id*. (second emphasis added).
188. *See* Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99 (2007) (analyzing implications of mass marches of Latina/os, immigrants, and others protesting proposed punitive immigration legislation and demanding justice for all immigrants).

violations of the U.S. immigration laws.[189] Evidence supports this assertion. In many cases challenging the constitutionality of stops by the Border Patrol, one of the factors that the officers often admit to relying upon is "Hispanic appearance,"[190] an expansion from the "Mexican appearance" that the Supreme Court authorized in *Brignoni-Ponce*. Ultimately, "[d]espite the favorability of its holding to the individuals in the case at hand, the *Brignoni-Ponce* Court opened the floodgates for immigration agents to rely on race in their enforcement efforts in a manner that would be impermissible for standard law enforcement officers."[191]

Part of the deep dissatisfaction among many Latina/os with the U.S. immigration laws almost inevitably results from the profiling endemic in its enforcement by the U.S. government. Unfortunately, the Supreme Court in *Brignoni-Ponce* arguably increased reliance on race in immigration stops by allowing immigration officers great discretion in making stops and deferentially reviewing the "totality of the circumstances" offered by the officers for justifying the stop.[192]

The government's rationale for race-based immigration stops, although infrequently stated in such blunt terms, is simple:

> The government urges the fact that the driver was Hispanic tends to give the agent reasonable suspicion that the driver was involved in illegal activity. The government reasons that most illegal immigrants in Texas [(the location of the stop in the case before the court)] are Hispanic and jumps to the conclusion that *this makes it more likely that this driver was also an illegal immigrant, or was involved in the trafficking of aliens*.[193]

As this explanation suggests, "Border Patrol officers may use racial stereotypes as a proxy for illegal conduct without being subjectively aware of doing

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189. *See generally* MARK HUGO LOPEZ & SUSAN MINUSHKIN, PEW HISPANIC CTR., 2008 NAT'L SURVEY OF LATINOS: HISPANICS SEE THEIR SITUATION IN U.S. DETERIORATING; OPPOSE KEY IMMIGRATION REFORM MEASURES, http://pewhispanic.org/reports/report.php?ReportID=93 (discussing unpopularity among Latina/os of workplace raids, criminal prosecution of undocumented immigrants, and criminal prosecution of employers hiring undocumented immigrants).

190. *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, 595 (9th Cir. 1992), *amended*, 997 F.2d 1306 (9th Cir. 1993); United States v. Franco-Munoz, 952 F.2d 1055, 1056 (9th Cir. 1991), *overruled by* United States v. Montero-Camargo, 208 F.3d 1122, 1134 n.22 (9th Cir. 2000). The expansion of the category presumably results from the increase in the migration of asylum-seekers from Central America to the United States that peaked in the 1980s, caused by political violence in El Salvador and Guatemala. *See* BILL ONG HING, DEFINING AMERICA THROUGH IMMIGRATION POLICY 247–51 (2004).

191. Abby Sullivan, Note, *On Thin ICE: Cracking Down on the Racial Profiling of Immigrants and Implementing a Compassionate Enforcement Policy*, 6 HASTINGS RACE & POVERTY L.J. 101, 109 (2009); *see* César Cuauhtémoc García Hernández, *La Migra in the Mirror: Immigration Enforcement and Racial Profiling on the Texas Border*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 167, 179–89 (2009).

192. *See supra* text accompanying notes 108–09.

193. United States v. Rubio-Hernandez, 39 F. Supp. 2d 808, 835 (W.D. Tex. 1999) (emphasis added); *see also* United States v. Jones, 149 F.3d 364, 369 (5th Cir. 1998) (noting that Mexican origin, without more, is not enough for reasonable suspicion).

so."[194] Immigration officers today often rely on crude undocumented immigrant profiles with race at their core. In one case, an Immigration & Naturalization Service (INS) supervisor testified that "an officer could rely, along with Hispanic appearance, on a 'hungry look,'" and whether a person was "dirty, unkempt," or "wear[ing] work clothing."[195]

"Illegal alien" profiles usually rest at least in part on the stereotype that Latino/as are "foreigners" of suspect immigration status and are therefore presumptively subject to an immigration stop.[196] The stereotype flies in the face of the current estimates that roughly forty percent of the undocumented immigrants in the United States are *not* from Mexico,[197] and that a majority of Latina/os are in fact U.S. citizens and lawful immigrants.[198]

One federal judge observed critically that the U.S. government had articulated "virtually anything and everything" as justifying a stop in the border region, which suggests that something else, such as race, is primarily at work:

> The vehicle was suspiciously dirty and muddy, *or* the vehicle was suspiciously squeaky-clean; the driver was suspiciously dirty, shabbily dressed and unkept, *or* the driver was too clean; the vehicle was suspiciously traveling fast, *or* was traveling suspiciously slow (*or* even was traveling suspiciously at precisely the legal speed limit); the [old car, new car, big car, station wagon, camper, oilfield service truck, SUV, van] is the kind of vehicle typically used for smuggling aliens or drugs; the driver would not make eye contact with the agent, *or* the driver made eye contact too readily; the driver appeared nervous (*or* the driver even appeared too cool, calm, and collected); the time of day

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194. Gonzalez-Rivera v. INS, 22 F.3d 1441, 1450 (9th Cir. 1994); *see* United States v. Garcia-Camacho, 53 F.3d 244, 248 n.7 (9th Cir. 1995) (quoting *Gonzalez-Rivera*, 22 F.3d at 1450).

195. Nicacio v. INS, 797 F.2d 700, 704 (9th Cir. 1986), *amending* 768 F.2d 1133 (9th Cir. 1985), *overruled in part by* Hodgers-Durgin v. De La Vina, 199 F.3d 1037, 1045 (9th Cir. 1999).

196. *See* Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV. 101, 117–29 (1997). Groups other than Latino/as are designated for some reason as being "foreign." Asian-Americans, at various times in U.S. history, have been subject to similar treatment. *See* Keith Aoki, *"Foreign-ness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 ASIAN PAC. AM. L.J. 1, 9–13 (1996) (analyzing legal significance of treatment of persons of Asian ancestry as "foreigners"); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 295–315 (1997) (same); *see also* Orhorhaghe v. INS, 38 F.3d 488, 492 (9th Cir. 1994) (ruling that a "Nigerian-sounding name" was insufficient to justify an immigration stop); *supra* text accompanying notes 156–57 (describing *Orhorhaghe*).

197. *See* JEFFREY S. PASSEL, PEW HISPANIC CTR., ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION 2 (2005), http://pewhispanic.org/files/reports/44.pdf.

198. *See* Kevin R. Johnson, *A Handicapped, Not "Sleeping" Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CAL. L. REV. 1259, 1266 (2008) ("According to the U.S. Census Bureau, Latina/os are the largest minority group in the United States, comprising approximately 44.3 million people or roughly 14.8% of the total U.S. population. The best available estimate is that between 11.5 and 12 million undocumented immigrants reside in the United States; more than half are of Mexican origin. The Pew Hispanic Center estimated that, in 2005, approximately 40% of the Hispanic population was foreign born. The Census estimates that about a quarter of all Latina/os in this country are not U.S. citizens. In 2003, 33.5 million foreign-born people lived in the United States, with more than one-half born in Latin America." (citations omitted)).

> [early morning, mid-morning, late afternoon, early evening, late evening, middle of the night] is when "they" tend to smuggle contraband or aliens; the vehicle was riding suspiciously low (overloaded), *or* suspiciously high (equipped with heavy duty shocks and springs); the passengers were slumped suspiciously in their seats, presumably to avoid detection, *or* the passengers were sitting suspiciously ramrod-erect; the vehicle suspiciously slowed when being overtaken by the patrol car traveling at a high rate of speed with its high-beam lights on, *or* the vehicle suspiciously maintained its same speed and direction despite being overtaken by a patrol car traveling at a high speed with its high-beam lights on; and on and on *ad nauseam*.[199]

Even though there is great discretion in ordinary criminal policing, the law does not permit the express reliance on race as an indicator of criminal activity; in contrast, the immigration enforcement law does permit race to serve as one indicator of potential undocumented immigration status. The authorization to rely on race, combined with much discretion, has resulted in even greater abuses of racial minorities in immigration enforcement than ordinary law enforcement.[200]

Judge Weiner went so far as to contend that the law had evolved to a point where the courts have, in effect, created an exception to the Fourth Amendment for the Border Patrol:

> [H]istory is likely 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.[201]

As discussed previously, the Supreme Court has consistently considered undocumented immigration from Mexico to be a serious problem that justifies aggressive enforcement. The perception remains to this day. As Congress debated comprehensive immigration reform in the early years of the twenty-first century, the focus remained almost myopically on Mexican migration.[202]

A long history of discrimination against persons of Mexican ancestry, particu-

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199. United States v. Zapata-Ibarra, 223 F.3d 281, 282–83 (5th Cir. 2000) (Weiner, J., dissenting) (footnotes omitted) (involving a stop of four undocumented immigrants by Border Patrol officers on roving patrol).

200. *See infra* Part II.

201. *Zapata-Ibarra*, 223 F.3d at 282 (footnotes omitted).

202. *See* Johnson & Hing, *supra* note 188 (analyzing implications of March 2006 immigrant rights marches in response to harsh immigration reform bill passed by the U.S. House of Representatives that would have had dramatic negative impacts on Latina/os); *see also* Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 MINN. L. REV. 1369, 1396–1404 (2007) (contending that "war on terror" focused

larly in the United States–Mexico border region,[203] may help explain why the public and policymakers have undervalued, if not ignored outright, the impacts of considering "Mexican appearance" on Mexican-Americans in immigration enforcement. From the days of the U.S.-Mexican war that ended in 1848 to more recent times, with the "repatriation" of persons of Mexican ancestry, including U.S. citizens, during the Great Depression,[204] Operation Wetback in 1954,[205] and Proposition 187 in 1994,[206] there long has been an anti-Mexican undercurrent to the debate about immigration law and its enforcement, as well as immigrants, in the United States. This undercurrent continues to this day, with some recent examples being the anti-immigrant, anti-Mexican agitation seen in local cities and municipalities culminating in the recent passage of a plethora of anti-immigrant measures.[207]

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attention of immigration reform on security measures and, in public debate over immigration reform, transformed border enforcement with Mexico into a national security issue).

203. *See generally* RODOLFO F. ACUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS (6th ed. 2007) (chronicling long history of discrimination against persons of Mexican ancestry in U.S. social life); NEIL FOLEY, THE WHITE SCOURGE: MEXICANS, BLACKS, AND POOR WHITES IN TEXAS COTTON CULTURE (1997) (studying the complex history of race and class relations in Texas); ALFREDO MIRANDE, GRINGO JUSTICE (1987) (documenting U.S. immigration officer abuses of persons of Mexican ancestry); DAVID MONTEJANO, ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836–1986 (1987) (reconstructing the history of Mexican-Anglo relations along the United States–Mexico border).

In addition, the treatment of African-Americans often dominates the dialogue about civil rights and contributes to the minimization of the impact of race-based immigration enforcement on persons of Mexican ancestry. *See* Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181 (1997) (reviewing LOUISE ANN FISCH, ALL RISE: REYNALDO G. GARZA, THE FIRST MEXICAN AMERICAN FEDERAL JUDGE (1996)); *see also* Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213, 1257 (1997) (arguing that "much relevant legal history and information concerning Latinos/as and other racialized groups is simply omitted from books on race and constitutional law" because of race scholarship's exclusive "inquiry into the relationship between Blacks and Whites").

204. *See* Kevin R. Johnson, *The Forgotten "Repatriation" of Persons of Mexican Ancestry and Lessons for the "War On Terror,"* 26 PACE L. REV. 1, 4–13 (2005) (describing the forced removal of Mexicans (U.S. citizens and noncitizens) in the United States during the Great Depression). *See generally* FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S (rev. ed. 2006) (discussing the consequences of Mexican repatriation in the 1930s).

205. *See generally* JUAN RAMON GARCÍA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954 (1980) (describing the mass deportation of persons of Mexican ancestry in the 1940s and 1950s in the program known as "Operation Wetback").

206. *See generally* Ruben J. Garcia, Comment, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118 (1995) (describing Proposition 187 using critical race theory); 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 (1995) (analyzing role of race in the passage of Proposition 187). Ultimately blocked for implementation by a court, Proposition 187 was an initiative passed overwhelmingly by the California voters in a campaign tinged by anti-Mexican, anti-immigrant sentiment. It would have barred undocumented immigrants from most public benefits. *See* Garcia, *supra*, at 119–20.

207. *See* Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. (forthcoming) (manuscript at 37–45), *available at* http://ssrn.com/abstracts=1319795 (describing recent immigration enforcement measures in three U.S. cities). Expressions of such sentiment also arguably have contributed to the spike in hate crimes—at times

Modes of immigration enforcement other than in the roving patrols in the United States–Mexico border region also indicate the disparate impacts on Latina/os. At various times in U.S. history, the U.S. government has employed raids at workplaces, as well as at homes and in public places, as a means to enforce the immigration laws.[208] In its waning years, for example, the Bush Administration increasingly employed immigration raids in the interior of the United States as part of an effort to demonstrate the federal government's commitment to aggressive immigration enforcement.[209]

Recently, the U.S. government has specifically conducted immigration raids with increased rigor at worksites across the United States.[210] For example, the May 2008 raid at a kosher meat processing plant in Postville, Iowa constituted one of the largest raids on undocumented workers at a single site in U.S. history.[211] According to news reports, almost all those arrested in the raids were

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homicide—directed at Latina/os. *See* Brentin Mock, *Immigration Backlash: Hate Crimes Against Latinos Flourish*, INTELLIGENCE REP., Winter 2007, http://www.splcenter.org/intel/intelreport/article.jsp?aid=845 (reporting "egregious examples of physical and psychological violence waged against Latinos").

208. *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032, 1035 (1984); INS v. Delgado, 466 U.S. 210, 211–12 (1984); Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson, 799 F.2d 547, 550 (9th Cir. 1986); *see also* David K. Chan, Note, *INS Factory Raids as Nondetentive Seizures*, 95 YALE L.J. 767 (1986) (discussing constitutional implications of workplace raids).

209. *See, e.g.*, Raquel Aldana, *Of* Katz *and "Aliens": Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081, 1092–96 (2008) (discussing raids of Swift Company meatpacking plants in December 2006); Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137 (2008) (analyzing legal impacts of immigration raids and other forms of interior immigration enforcement); Sandra Guerra Thompson, *Immigration Law and Long-Term Residents: A Missing Chapter in American Criminal Law*, 5 OHIO ST. J. CRIM. L. 645, 655–58 (2008) (arguing that aggressive use of workplace raids contributes, in part, to increasing number of Latino detainees); David B. Thronson, *Creating Crisis: Immigration Raids and the Destabilization of Immigrant Families*, 43 WAKE FOREST L. REV. 391 (2008) (identifying negative impacts of immigration raids on families, including U.S. citizen children of undocumented immigrants); Shoba Sivaprasad Wadhia, *Under Arrest: Immigrants' Rights and the Rule of Law*, 38 U. MEM. L. REV. 853, 862–88 (2008) (discussing immigration enforcement policies following debate on comprehensive immigration reform); *see also* Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777 (2008) (discussing various modes of private enforcement of the U.S. immigration laws).

210. *See, e.g.*, Pam Belluck, *Lawyers Say U.S. Acted in Bad Faith After Immigrant Raid in Massachusetts*, N.Y. TIMES, Mar. 22, 2007, at A22 (Massachusetts); Robbie Brown, *300 Detained in Immigration Raid at Plant*, N.Y. TIMES, Oct. 8, 2008, at A19 (South Carolina); Anna Gorman, *U.S.-Born Children Feel Effect of Raids; Immigration Agents Try To Act Humanely when a Parent Is Arrested, Officials Say. Critics Aren't Convinced*, L.A. TIMES, June 8, 2008, at B.1 (California); Adam Nossiter, *Nearly 600 Were Arrested in Factory Raid, Officials Say*, N.Y. TIMES, Aug. 27, 2008, at A16 (Mississippi); Julia Preston, *Immigration Raid Draws Protest from Labor Officials*, N.Y. TIMES, Jan. 26, 2007, at A17 (North Carolina); Libby Sander, *Immigration Raid Yields 62 Arrests in Illinois*, N.Y. TIMES, Apr. 5, 2007, at A12 (Illinois); William Wan, *Authorities Detain 45 in Immigration Raid of Painting Company*, WASH. POST, July 1, 2008, at B2 (Maryland).

211. *See* Erik Camayd-Freixas, *Interpreting After the Largest ICE Raid in US History: A Personal Account* at 1, N.Y. TIMES (July 14, 2008), *available at* http://graphics8.nytimes.com/images/2008/07/14/opinion/14ed-camayd.pdf.

Guatemalan and Mexican nationals.[212] The U.S. government not only sought to deport the undocumented workers but, in a change from past practice, pursued questionable criminal prosecutions of the workers on immigration and related crimes.[213]

As the Postville raid suggests, racial profiling in immigration enforcement may be expanding, not contracting, in scope. Although regulation of immigration is firmly in the hands of the federal government, state and local governments have increasingly participated in immigration enforcement in recent years.[214] State and local law enforcement authorities enforcing U.S. immigration laws today cooperate more with the federal government in immigration enforcement than in the past. Besides frightening immigrant communities from reporting crime and otherwise assisting local law enforcement, state and local involvement in law enforcement may worsen the existing problems with racial

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212. *See, e.g.*, Spencer S. Hsu, *Immigration Raid Jars a Small Town: Critics Say Employers Should Be Targeted*, WASH. POST, May 18, 2008, at A1. It has been reported that only five of the persons originally arrested by the authorities had criminal records. *See* Camayd-Freixas, *supra* note 211, at 30.

Recent immigration raids have had particularly negative impacts on Guatemalan immigrants. Before the Postville raid, another large raid occurred in March 2007 in New Bedford, Massachusetts, where authorities arrested more than 360 workers, the majority of whom were natives of Guatemala. *See* Yvonne Abraham & Brian R. Ballou, *350 Are Held in Immigration Raid: New Bedford Factory Employed Illegals, US Says*, BOSTON GLOBE, Mar. 7, 2007, at A1; Maria Sacchetti, *Commission Hears Testimony on US Immigration Raids*, BOSTON GLOBE, Apr. 8, 2008, at B1; Jack Spillane, *Immigrants Feel Singled Out for Labor Abuse*, NEW BEDFORD STANDARD TIMES, June 30, 2008, at A4. *See generally* Gregoire F. Sauter, *Case Study:* Aguilar v. ICE *Litigating Workplace Immigration Raids in the Twenty-First Century*, 14–7 BENDER'S IMMIGR. BULL. 9 (2009) (reviewing legal challenges to New Bedford raid).

213. *See* Hsu, *supra* note 212. For incisive criticism of the U.S. government's Postville strategy, see Peter R. Moyers, *Butchering Statutes: The Postville Raid and the Misinterpretation of Federal Criminal Law*, 32 SEATTLE U. L. REV. 651 (2009).

U.S. immigration authorities employed similar strategies in much-publicized raids at meatpacking plants in the Midwest in 2007. *See* Aldana, *supra* note 209, at 1092–94; Thronson, *supra* note 209, at 400–01.

214. For critical analysis of local attempts to regulate immigration and immigrants, see generally Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27 (providing survey of state immigration regulation to argue for more comprehensive federal approach to preempt disjointed state law); Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT'L L. 217 (1994) (arguing for adherence to a rule that state regulation of immigration is preempted by federal law); Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965 (2004) (contending that local governments cannot constitutionally enforce immigration laws). Some scholars have called for greater state and local involvement in immigration regulation. *See, e.g.*, Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 792 (2008) (contending that federal preemption of state and local immigration regulation is "contestable"); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 59 (arguing for "a more robust role for the states in certain areas of immigration policy); Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 123 (1994) (concluding that "state-level treatment of aliens could be more rationally measured and constrained by international norms relating to the treatment of aliens than by constitutional norms of uncertain application and legitimacy").

profiling in immigration enforcement.[215] The fears of abuse are even greater with state and local law enforcement officers, who cannot be expected to appreciate the nuances of U.S. immigration law, than federal officers whose sole function is enforcement of those laws. Nonetheless, such enforcement has been on the rise under a provision of the immigration laws that permits the federal government to enter into agreements with state and local law enforcement agencies to provide training and coordinate in the enforcement of the federal immigration laws.[216] State and local authorities exercising immigration enforcement power unfortunately engage in racial profiling and similar misconduct directed at minority communities.[217]

G. THE DIFFERENCE THAT REBELLIOUS LAWYERING COULD MAKE

By permitting racial profiling in immigration enforcement, the Supreme Court in *Brignoni-Ponce* permitted what at least a segment of the public now popularly condemns. The evolution of the law reflects an ebb-and-flow in judicial views about profiling. Nonetheless, the Court's ruling promoted a pattern and practice of governmental conduct that has injured Latina/os in all modes of immigration enforcement.

The damage done to the greater Latina/o community warrants consideration of the strategic choices made by the lawyers in *Brignoni-Ponce*. In that case, the defense attorneys did their job and secured reversal of a criminal conviction—the exact result that their client desired. However, while the Supreme Court affirmed reversal of the convictions, it created law that permitted racial profiling in immigration enforcement for decades. The result was widespread mistreatment of persons of "Mexican appearance," including U.S. citizens and lawful

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215. *See* Carrie L. Arnold, Note, *Racial Profiling in Immigration Enforcement: State and Local Agreements To Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113, 141 (2007) (exploring likelihood of racial profiling under federal training program for state officers on immigration enforcement and concluding that training program will not prevent racial profiling); *see also* Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1557 (2008) (discussing increasing "state and local efforts to address the criminalization of immigration law, or 'crimmigration law'").

216. *See* Immigration & Nationality Act § 287(g), 8 U.S.C. § 1357(g) (2006); *see also* Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 591–92 (2008) (analyzing place of local governments in immigration regulation). For criticism of these agreements, see, for example, Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004). *See also* Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid To Call the Police*, 91 IOWA L. REV. 1449 (2006) (analyzing federalism issues raised in immigration enforcement). *But see* Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police To Make Immigration Arrests*, 69 ALB. L. REV. 179, 182 (2005) (contending that local police departments possess "inherent" authority to enforce the U.S. immigration laws).

217. *See* AM. CIVIL LIBERTIES UNION OF N.C. FOUND. & IMMIGRATION & HUMAN RIGHTS POLICY CLINIC, UNIV. OF N.C. AT CHAPEL HILL, THE POLICIES AND POLITICS OF LOCAL IMMIGRATION ENFORCEMENT LAWS: 287(g) PROGRAM IN NORTH CAROLINA 43–50 (2009), *available at* http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf; TREVOR GARDNER II & AARTI KOHLI, THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM 1, 4–6 (2009), *available at* http://www.law.berkeley.edu/files/policybrief_irving_0909_v9.pdf.

immigrants, in immigration stops, as well as interior immigration enforcement throughout the United States. Undocumented immigrant profiles incorporating "Hispanic appearance" dominate immigration enforcement today. One wonders what the defense attorneys could have done to avoid the negative impacts of bad law on generations of Latina/os.

Rebellious lawyering focused on social change would suggest a strategy like the one advocated by the Mexican American Legal Defense & Educational Fund (MALDEF) in its amicus curiae brief submitted in *Brignoni-Ponce*, which would look to the long-term impact of the law that might be created by a litigation strategy in a specific case. Refusing to compromise on the issue like petitioners' counsel did, MALDEF contended that "Mexican appearance" was wholly and completely irrelevant to an immigration stop, not that it could be one factor among many in a stop.[218] A holding that "Mexican appearance" was irrelevant would have rendered the same result in *Brignoni-Ponce* and would have avoided the collateral damage to all Latina/os that resulted from the Supreme Court's "totality of the circumstances" approach, with "Mexican appearance" as the touchstone.

Counsel for Brignoni-Ponce had the facts at hand to argue most powerfully that "Mexican appearance" should be irrelevant to an immigration stop. Brignoni-Ponce, the defendant in the case, was a U.S. citizen of Puerto Rican ancestry while another vehicle occupant was a native of Guatemala. That the Border Patrol concluded that these occupants were of "Mexican appearance" strongly suggests the overinclusiveness and room for error in reliance on this so-called characteristic. The case, thus, had the facts available to attack head-on the border enforcement officers' now-common reliance on the vague and ambiguous "Mexican appearance" characteristic.

Thus, truly rebellious lawyering focused on long-term community impacts, as well as immediate client needs, would not have been willing to accept a compromise that might win the individual case but doom later community members. In that respect, MALDEF had the better argument, with its focus on the law's impact on the greater Latina/o community.

In later cases, such as *Montero-Camargo*, attorneys faced a distinctly uphill battle in light of *Brignoni-Ponce* in challenging reliance on physical appearance in immigration stops. In so doing, they emphasized the kinds of things that MALDEF did in its brief in *Brignoni-Ponce*—that to rely on "Mexican appearance" was racially discriminatory, injured lawful residents, and was contrary to fundamental equal protection principles. The law, after many years, ultimately moved in the direction toward greater protection for Latina/o citizens and lawful immigrants. However, the conventional—and overly narrow, client-centered—representation by Brignoni-Ponce's counsel has resulted in deep damage, with many thousands, if not millions, of Latina/os adversely affected.

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218. This was, of course, the position later taken by the court of appeals in *Montero-Camargo*. *See supra* section I.E.1.

This history demonstrates the challenges of truly rebellious lawyering by lawyers committed to social justice. Such creative lawyering requires a long-term view of litigation and the impacts of the law on communities of people, not just individual clients. A broad vision is what Thurgood Marshall and a team of civil rights attorneys pursued for a generation before realizing the milestone victory in *Brown v. Board of Education*.[219] Such a vision requires careful evaluation of compromises, strategies, long-term goals, and the human impacts of legal rules. In the end, the attorneys' short-term strategy in *Brignoni-Ponce*, although successful for the individual defendant, set back the rights of Latina/os for decades.

II. *WHREN V. UNITED STATES*: EVEN IF RACE WAS THE TRUE REASON FOR THE TRAFFIC STOP, "FOR THE RUN-OF-THE-MINE CASE, . . . PROBABLE CAUSE JUSTIFIES A SEARCH AND SEIZURE."[220]

Whren v. United States is the leading traffic stop case decided by the U.S. Supreme Court in at least the last twenty years. In that case, the Court encouraged racial profiling in ordinary traffic stops and abandoned solutions to profiling to the political process. Despite much rhetoric and many promises, political efforts to this point have failed to end race-conscious law enforcement in American life. As with racial profiling in immigration enforcement, the U.S. government's aggressive race-conscious response to the events of September 11, 2001, seriously set back those efforts.

A. THE HISTORICAL BACKGROUND

For all of recent memory, police across the United States have aggressively pursued the "war on drugs," which began many years before the so-called war on terror after September 11, 2001. For more than two decades, Congress and state legislatures stiffened criminal penalties for drug crimes and increased law enforcement budgets, as politicians from a diversity of political persuasions embraced "tough on crime" measures.[221] State and federal governments spent millions of dollars to build new prisons.[222] Not coincidentally, the U.S. prison population increased sixfold from 1972 to 2000, with about 1.3 million men incarcerated in state and federal prisons at the beginning of the new millenni-

219. *See generally* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1975) (describing litigation strategy culminating in *Brown*).

220. 517 U.S. 806, 819 (1996).

221. *See* Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court's Criminal Justice Jurisprudence*, 94 GEO. L.J. 1385, 1406–11 (2006).

222. *See, e.g.*, Walter L. Gordon III, *California's Three Strikes Law: Tyranny of the Majority*, 20 WHITTIER L. REV. 577, 605–06 (1999) (explaining expansion of prison system in California to accommodate federal law).

um.[223] As of 1997, a whopping 60% of federal prisoners and 20% of state prisoners had been convicted of drug crimes.[224]

In the early 1990s, the perception among the general public was that crime was out of control on the streets of urban America.[225] This parallels the perceived loss of control of the U.S. border with Mexico in the 1970s and 1980s. Legislators and law enforcement officers aggressively responded to this widespread public perception. In 1994, for example, President Bill Clinton, a "New" Democrat who supported a firm anti-crime platform, signed into law a comprehensive crime bill[226] that was filled with anti-drug measures[227] and authorized the imposition of the death penalty for certain federal criminal offenses.[228]

A critical fact often lost in the public debate over the propriety of the nation's "war on drugs" is that the available statistical data suggests that Whites, Latina/os, Blacks, and Asian-Americans have roughly similar rates of illicit drug use.[229] Nonetheless, the "war on drugs" as it has been enforced has had devastating impacts on minority communities across the United States.[230] One particularly egregious example occurred in the small rural town of Tulia, Texas, where an undercover narcotics officer framed more than twenty percent of the adult African-American population.[231] Some have labeled the drug war as the "new" Jim Crow,[232] tapping into memories of a long period in U.S. history when criminal laws buttressed racial segregation and served as a bulwark of white supremacy.

In fighting the drug war, federal, state, and local law enforcement agencies developed profiles to identify likely offenders. Police in their investigatory

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223. *See* Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151, 151 (2004).

224. *See id.* at 152.

225. *See* David S. Broder, *Clinton's Approval Rating Weakens: Poll Shows Rising Public Concern over Crime, Health Care Plan*, WASH. POST, Nov. 16, 1993, at A1 (reporting "sudden jump in the number of people naming crime as the biggest issue facing the country").

226. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

227. *See, e.g.*, *id.* §§ 90101–208, 108 Stat. at 1986–95.

228. *See id.* § 60003, 108 Stat. at 1968.

229. *See* NAT'L INSTS. OF HEALTH, NAT'L INST. ON DRUG ABUSE, U.S. DEP'T OF HEALTH & HUMAN SERVS., DRUG USE AMONG RACIAL/ETHNIC MINORITIES 34 fig.2 (rev. ed. 2003), *available at* http://www.drugabuse.gov/pdf/minorities03.pdf.

230. *See, e.g.*, MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA 81–123 (1995) (arguing that the war on drugs has negatively impacted the lives of young, disadvantaged African-Americans).

231. *See generally* NATE BLAKESLEE, TULIA: RACE, COCAINE, AND CORRUPTION IN A SMALL TEXAS TOWN (2005) (documenting the sting operation in Tulia, Texas in which corrupt narcotics officer framed scores of African-Americans for selling cocaine).

232. *See* Ira Glasser, *American Drug Laws: The New Jim Crow*, 63 ALB. L. REV. 703, 707 (2000); William H. Buckman & John Lamberth, *Challenging Racial Profiles: Attacking Jim Crow on the Interstate*, THE CHAMPION, Sept./Oct. 1999, at 14, 14.

activities commonly employed drug courier[233] and gang member profiles,[234] which almost invariably directed law enforcement attention toward African-American and Latino youth. Racial profiling of young African-American and Latino men in traffic stops on the American roads and highways emerged as a central law enforcement tool in the "war on drugs."[235] Police regularly stop and search Blacks and Latina/os in larger numbers than their percentage of the general population. A much-publicized study by the New Jersey Attorney General, for example, found that these minority groups represented the overwhelming majority of searches (77.2%).[236] In cities across the country, minorities persistently complain of being stopped for nothing more than driving while Black and driving while Brown.

Racially disparate policing has had dramatic and severe—and racially disparate—consequences. Blacks and Latina/os today are disproportionately represented among prison populations across the country—one of the few institutions in modern America in which these groups are over-represented as compared to their percentage of the general U.S. population. "By 2002, around 12 percent of black men in their twenties were in prison or jail."[237]

The impacts of the drug war were so racially disproportionate that one law professor, and former federal prosecutor, advocated that jurors, as a matter of principle, should acquit Black defendants on drug charges because of the harms imposed on the African-American community by their mass imprisonment.[238] As the radical call for jury nullification of the drug laws suggests, minority

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233. *See* Morgan Cloud, *Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 B.U. L. REV. 843, 844–45 (1985).

234. *See* Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and* Arvizu, 47 VILL. L. REV. 851, 869–76 (2002). *See generally* 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 gang profiles in context of race theory).

235. *See* Kevin R. Johnson, *U.S. Border Enforcement: Drugs, Migrants, and the Rule of Law*, 47 VILL. L. REV. 897, 902–03 (2002); Lisa Walter, Comment, *Eradicating Racial Stereotyping From* Terry *Stops: The Case for an Equal Protection Exclusionary Rule*, 71 U. COLO. L. REV. 255, 258–66 (2000). *See generally* Floyd D. Weatherspoon, *Racial Profiling of African-American Males: Stopped, Searched, and Stripped of Constitutional Protection*, 38 J. MARSHALL L. REV. 439 (2004) (analyzing prevalent use of racial profiling against African-Americans and courts' supposed sanction of treatment).

236. PETER VERNIERO & PAUL H. ZOUBEK, INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING 27 (1999) (reviewing racial profiling allegations in New Jersey, and providing empirical data and recommendations for New Jersey law enforcement).

237. Pettit & Western, *supra* note 223, at 151 (citation omitted).

238. *See* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679 (1995). Professor Butler became interested in jury nullification because of the African-American community's reaction to the 1990 sting operation that resulted in the indictment of District of Columbia Mayor Marion Barry, an African-American, on crack cocaine charges. *See infra* note 265 and accompanying text.

Importantly, many African-Americans hold different views of Black lawbreakers than members of other racial groups. *See* Regina Austin, "*The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1776–87 (1992).

communities deeply distrust the criminal justice system in the United States.[239] Profiling has contributed to this distrust by singling out Blacks and Latina/os, law-abiding citizens as well as lawbreakers, for the humiliation, distress, and danger of race-based traffic stops. Ironically, evidence suggests that profiling is not even an effective law enforcement tool.[240]

As previously alluded to, the "war on drugs" is not the first time that the criminal laws in the United States have had racial impacts. From the days of the slave codes, the criminal justice systems throughout the nation have had racially disparate impacts on African-Americans.[241] *Brown v. Board of Education*[242] and the civil rights movement helped begin the process of removing explicit racism from the law. The laws that comprise the "war on drugs," despite their disparate impacts, are facially neutral and do not expressly discriminate on the basis of race; their stated purpose is to eradicate the drug trade as well as illicit drug use in the United States, not to target and punish racial minorities.

Despite the official claims of neutrality, racial profiling in the enforcement of the law intuitively strikes many observers as contrary to the law. Law enforcement measures based on alleged group propensities for criminal conduct appear to run afoul of the U.S. Constitution, which is generally premised on the view that *individualized*, not *group*, suspicion of criminal wrongdoing is necessary for police action.[243] Racial profiling also runs counter to the Fourteenth Amendment's guarantee of equal protection of the law.

So far, the constitutional concerns described here do not appear to have played significant roles in the decisions of the U.S. Supreme Court. Since at least 1970, the Court has played a central role in the "war on drugs." With relatively few exceptions, it has consistently refused to interfere with aggressive police practices in fighting crime and has steadily expanded the discretion afforded police officers.[244] In 2005, for example, the Court ruled that the use of a dog to sniff for drugs during an ordinary traffic stop did not violate the Fourth

239. *See* Illinois v. Wardlow, 528 U.S. 119, 132–35 (2000) (Stevens, J., dissenting) (summarizing reasons why African-Americans might reasonably fear interacting with police officers in the United States).

240. *See* Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 661 (2002) (concluding, based on statistical data on traffic stops and costs and benefits of such stops, that "such programs are essentially useless").

241. *See* KENNEDY, *supra* note 142, at 76–135.

242. 347 U.S. 483 (1954).

243. *See, e.g.*, United States v. Sokolow, 490 U.S. 1, 7 (1989); Terry v. Ohio, 392 U.S. 1, 27 (1968).

244. *See, e.g.*, United States v. Flores-Montano, 541 U.S. 149, 150 (2004) (allowing fuel tank search at border to search for drugs absent reasonable suspicion); United States v. Arvizu, 534 U.S. 266, 277–78 (2002) (finding that stop of vehicle in search for drugs was permissible even though law enforcement officers relied on certain factors that, alone, were insufficient to justify stop); Illinois v. Wardlow, 528 U.S. 119, 124–25 (2000) (holding that flight from the police by African-Americans could be a factor justifying a stop); Ohio v. Robinette, 519 U.S. 33, 35 (1996) (ruling that police need not tell a person that he or she can leave before securing consent to a search); Florida v. Bostick, 501 U.S. 429, 439–40 (1991) (holding that police officers in drug interdiction effort could board buses and request searches of bags).

Amendment.[245]

Some commentators bitterly complain that the Supreme Court has developed a jurisprudence of drug exceptionalism in which the Bill of Rights gives way when the Court reviews the exercise of police power in the "war on drugs."[246] None other than Justice John Paul Stevens boldly observed that "[n]o impartial observer could criticize [the] Court for hindering the progress of the war on drugs. On the contrary, decisions like the one [in *California v. Acevedo*, which found that the search of a closed container in an automobile did not violate the Fourth Amendment,] will support the conclusion that *this Court has become a loyal foot soldier in the Executive's fight against crime*."[247]

Not long before the declaration of the "war on drugs," the Supreme Court made it more difficult to protect racial minorities from discrimination. In 1976, the *Washington v. Davis* Court held that discriminatory *impact*, alone, was not enough to establish a violation of the Equal Protection Clause of the Fourteenth Amendment when challenging a facially neutral governmental policy.[248] The Court held that discriminatory intent must also be proved.[249] Because it poses a formidable barrier to proving Equal Protection claims,[250] the discriminatory intent requirement has been the subject of sustained scholarly criticism.[251]

In certain respects, the link between criminal procedure and civil rights is rather obvious. Under the leadership of Chief Justice Earl Warren, the Supreme Court issued path-breaking decisions in both areas of the law, with the rulings informed, in no small part, by the quest for racial equality.[252] In contrast, the Burger Court adopted the discriminatory intent requirement for equal protection violations in 1976, making it difficult for criminal defendants to establish that police conduct violated the Fourteenth Amendment.[253] The Rehnquist Court enforced the intent requirement with enthusiasm.[254]

More generally, in *McCleskey v. Kemp*, the Supreme Court rejected a power-

245. *See* Illinois v. Caballes, 543 U.S. 405, 407–09 (2005).

246. *See* Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753, 755–56 (2002).

247. California v. Acevedo, 500 U.S. 565, 601 (1991) (Stevens, J., dissenting) (emphasis added).

248. 426 U.S. 229, 235–36, 248 (1976).

249. *Id.*

250. *See generally* Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151 (1991) (empirical study concluding that discriminatory intent standard has deterred filing of civil rights lawsuits).

251. *See, e.g.*, Linda Hamilton Krieger, *The Content of our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164–65 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319–21 (1987); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 808–09, 877–78 (2004); Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133 (2010).

252. *See* Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1, 6–8 (1995).

253. *See* Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 2011–12 (2000) (suggesting that the Supreme Court may have adopted the intent requirement to reduce the number of equal protection claims).

254. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 291–99 (1987).

ful equal protection claim alleging racial discrimination in the imposition of the death penalty.[255] Despite empirical evidence strongly supporting the claim of discrimination against African-Americans, the Court found that it had not been established that the state actors possessed the requisite racially discriminatory intent.[256] One influential commentator opined that "[i]t is nearly impossible to make [the] showing" required by the Court.[257]

Similarly, *United States v. Armstrong*,[258] decided the same year as *Whren v. United States*,[259] demonstrates the great difficulty in obtaining the evidence necessary to establish selective enforcement of the drug laws despite the Court's long-held precedent that such selective enforcement is unconstitutional.[260] According to the *Armstrong* Court, the Black defendants had failed to make the threshold showing that similarly situated Whites had not been prosecuted *despite the undisputed evidence that all of the cases with crack charges handled by local federal public defenders that year were brought against Black defendants*.[261] Based on the Court's ruling, the defendants could not obtain the necessary discovery from the U.S. government.[262]

Before 1996, many defendants unsuccessfully claimed that police made traffic stops based on race.[263] As we shall see, the Supreme Court arguably made the problem worse in *Whren v. United States* when it, in effect, sanctioned racial profiling in criminal law enforcement—especially in the "war on drugs."[264]

The *Whren* case came before the Supreme Court in 1996, which in many ways could not have been worse timing for criminal defendants. In the early 1990s, the District of Columbia, the nation's capital and the Court's home, had the reputation for being a high-crime city with a booming drug trade. Even its mayor, Marion Barry, had been arrested for crack cocaine use (albeit in a controversial sting operation).[265] In 1993, homicides—many drug-related—

255. *Id.*

256. *Id.* at 297.

257. DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 135 (1999).

258. 517 U.S. 456, 459, 470 (1996). The Court's decision in *Armstrong* has been roundly criticized. *See, e.g.*, Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of* Armstrong, 73 CHI.-KENT L. REV. 605, 606 (1998) (contending that standard established by the Court in *Armstrong* is nearly impossible for many defendants with meritorious claims to satisfy).

259. 517 U.S. 806 (1996).

260. *See* Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886).

261. *Armstrong*, 517 U.S. at 459, 470.

262. *Id.*

263. *See* COLE, *supra* note 257, at 40 (reporting that eighty percent of all stops in cases in which race could be identified involved minority drivers and further noting the failure of almost every defendant's argument that the stop was racially motivated, based on the results of a computer search of federal courts of appeals decisions from August 1993 to February 1996, and federal district court cases from February 1992 to January 1996).

264. *See infra* Part II.

265. United States v. Barry, 938 F.2d 1327, 1329 (D.C. Cir. 1991); *see also* Butler, *supra* note 238, at 681–84; *supra* note 238 and accompanying text.

were near an all-time high in the District.[266] The mayor even considered calling in the National Guard to patrol the streets, a drastic move ordinarily reserved for quelling mass civil unrest. Rejecting that extreme option, President Clinton instead increased federal support to local law enforcement authorities.

June 1993 was an especially crime-filled month in Washington. A rash of murders, with ten people killed in one thirty-six hour period, made the headlines of the *Washington Post*.[267] Metropolitan Police Department Chief Fred Thomas "outlined a short-term revival of Operation Clean Sweep, an expensive anti-crime initiative . . . . *He said the department's narcotics and special investigations division [would focus] more on arresting smaller-time drug dealers on the streets instead of larger, more sophisticated rings*."[268] Needless to say, in the summer of 1993, the D.C. police force must have felt pressure to put an end to crime on the streets and put the full-court press on small- as well as big-time drug dealers. Not surprisingly, arrests went up.[269]

At the same time, troubling reports surfaced that D.C. police officers had engaged in criminal conduct, possibly even the selling of drugs.[270] Minority citizens frequently complained of abuse at the hands of the local police. Such reports, of course, were not limited to the District of Columbia. Los Angeles had seen a violent eruption of rioting on the streets in 1992 following the acquittal of police officers for the beating of African-American Rodney King, which had been captured on videotape. In addition, the perjury of a racist Los Angeles Police Department officer tainted the prosecution of O.J. Simpson for murder.[271] A few years later, a public outcry followed the revelations that New York police officers, in the midst of a crackdown on crime in the city under the direction of Mayor (and former federal prosecutor) Rudy Giuliani, had tortured Abner Louima and shot Amadou Diallo forty-one times, killing the unarmed man.[272] Both men were Black immigrants.

Put simply, the case of *Whren v. United States* could have arisen in any large

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266. *See* Ruben Castaneda, *Year Ranks with D.C.'s Deadliest*, WASH. POST, Aug. 12, 1993, at A1; Yolanda Woodlee, *U.S. Police Agencies To Help District: Kelly Receives Commitment from Clinton Cabinet Members*, WASH. POST, Oct. 27, 1993, at A1.

267. *See* Keith A. Harriston, *Violent 36 Hours Leaves 10 Slain Across District*, WASH. POST, June 24, 1993, at D1.

268. Serge F. Kovaleski, *D.C. Moves To Stem Tide of Violence: More Police Planned for Affected Areas*, WASH. POST, June 26, 1993, at A10 (emphasis added).

269. *See* Ruben Castaneda, *Extra Officers, Neighbors' Aid Stave Off Violence in District*, WASH. POST, June 29, 1993, at B3.

270. *See* Mary McGrory, *The Thinnest Blue Line*, WASH. POST, Dec. 26, 1993, at C1; *Policing the D.C. Police*, WASH. POST, May 4, 1993, at A20.

271. *See* Devon W. Carbado, *The Construction of O.J. Simpson as a Racial Victim*, 32 HARV. C.R.-C.L. L. REV. 49, 70–71 (1997).

272. *See* Alan Feuer, *Three Are Guilty of Cover-Up Plot in Louima Attack: Obstruction of Justice—Jury Finds that Police Officers Made Up a Story About the Actions of One of Them*, N.Y. TIMES, Mar. 7, 2000, at A1 (describing brutal attack by New York police on Abner Louima, a Black Haitian immigrant); Jane Fritsch, *4 Officers in Diallo Shooting Are Acquitted of All Charges: 4-Week Trial Ends—But Litigation over the Racially Heated Case May Not Be Over*, N.Y. TIMES, Feb. 26, 2000, at A1 (reporting on acquittal of police officers in the killing of Black immigrant, Amadou Diallo).

urban center in the United States during this time in history. Events in the District of Columbia, however, increased the likelihood that young African-American men would be stopped on the streets at night in June 1993. In the end, two young Black men were arrested, convicted, and sentenced to years in prison. As the Supreme Court later characterized it, the prosecution was a "run-of-the-mine" case.[273] This certainly is one judicial perspective—from part of a system that churns out such cases on an almost daily basis. However, the arrest, prosecution, and conviction on federal drug charges resulted in extremely long prison sentences for the two young African-American men that forever changed their lives. The fact that the Court could label this case "ordinary" shows how far the nation had gone in the "war on drugs."

B. THE STOP

On the night of June 10, 1993, District of Columbia police officers Efrain Soto, Jr., Homer Littlejohn, and a group of nine or ten plain clothes vice officers were patrolling Southeast Washington in two unmarked cars.[274] The Supreme Court later described this as a "'high drug area' of the city."[275] Investigator Tony Howard drove and Officers Soto and Littlejohn were passengers.[276]

The vice officers were from the Metropolitan Police Department's Sixth District station, known locally as 6D.[277] Several years later, this precinct's vice squad was the subject of a scathing newspaper exposé reporting that the officers, including Littlejohn and Soto, had engaged in excessive use of force, planted evidence, and perjured themselves to secure drug convictions, something fitting of a television crime show drama.[278]

Importantly, these were vice officers, not traffic cops, on the lookout for drug deals on the D.C. streets.[279] Vice officers ordinarily would not concern themselves with mundane criminal infractions such as violations of the traffic laws. Indeed, District of Columbia police regulations permit plainclothes officers to make traffic stops "*only* in the case of a violation that is so grave as to pose an *immediate threat* to the safety of others."[280]

Officer Soto noticed a dark Nissan Pathfinder with temporary tags at a stop

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273. Whren v. United States, 517 U.S. 806, 819 (1996).

274. United States v. Whren, 53 F.3d 371, 372 (D.C. Cir. 1995).

275. *Whren*, 517 U.S. at 808.

276. *Whren*, 53 F.3d at 372.

277. *See* Jason Cherkis, *Rough Justice: How Four Vice Officers Served as Judge and Jury on the Streets of MPD's 6th District*, WASH. CITY PAPER, Jan. 7–13, 2000, *available at* http://www.washingtoncitypaper.com/display.php?id=18752.

278. *See id.*

Perjury by police officers to secure criminal convictions has been so common that law enforcement officers refer to the practice as "testilying." *See* I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 836 (2008); Christopher Slobogin, *Testilying: Police Perjury and What To Do About It*, 67 U. COLO. L. REV. 1037, 1040 (1996).

279. *Whren*, 53 F.3d at 372.

280. *Whren*, 517 U.S. at 815 (citing Metro. Police Dep't, Wash., D.C., General Order 303.1, pt.1(A)(2)(a)(4) (Apr. 30, 1992)) (first emphasis added).

sign.[281] Two young African-American men were in the vehicle. Soto observed the driver, later identified as James Brown, looking down into the lap of the passenger, Michael Whren. A car was stopped behind the vehicle at the stop sign. Soto watched the Pathfinder, which, he later testified, remained stopped at the intersection for more than twenty seconds. Investigator Howard, the driver, was making a U-turn to follow the vehicle when Brown turned without signaling and "sped off quickly," according to Soto.[282]

The officers followed the Nissan Pathfinder and pulled into the lane next to it.[283] Followed by Littlejohn, Soto exited his vehicle and approached the driver's side door of the Pathfinder, identifying himself as a police officer. The traffic stop was near an elementary school, a fact that later led to a separate and enhanced criminal charge against both Whren and Brown for possession of crack cocaine for sale near a school.[284]

After noticing that Brown could not pull over because of parked cars to the vehicle's right, Soto instructed Brown to put the Pathfinder in park.[285] Soto later testified that Whren was holding, in each hand, a large clear plastic bag of what the officer suspected to be crack cocaine. Soto yelled "C.S.A." to let the other officers know that he had observed a Controlled Substances Act violation. He later would testify that, as he reached for the driver's side door, he heard Whren yell "pull off, pull off," and observed him pull the cover off of a power window control panel in the passenger door and put one of the bags into a hidden compartment. Soto opened the door, dove across Brown, and grabbed the other bag from Whren's left hand. Littlejohn then pinned Brown to the driver's seat so that he could not move.

The officers then converged on the suspects, arrested them, and searched the Pathfinder.[286] The officers recovered two tinfoils containing marijuana laced with PCP, a bag of chunky white rocks, a large white rock of crack cocaine from the hidden compartment on the passenger side door, unused ziplock bags, a portable phone, and personal papers. What began as a seemingly routine stop for a minor violation of the traffic laws had turned into a drug bust.

C. THE DISTRICT COURT

On July 8, 1993, a federal grand jury returned an indictment against Michael Whren and James Brown charging them with possession with intent to distribute fifty grams or more of crack cocaine in violation of a variety of federal statutes.[287] Judge Norma Holloway Johnson, an African-American jurist appointed to the federal bench by President Jimmy Carter in 1980, was assigned

281. *Whren*, 53 F.3d at 372.
282. *Id.*
283. *Id.*
284. *Id.* at 376.
285. *Id.* at 373.
286. *Id.*
287. *Id.* at 372.

the case.[288]

Defense counsel brought a motion to suppress the drug evidence on the ground that the stop violated the Fourth Amendment's prohibition of unreasonable searches and seizures.[289] At the hearing on the suppression motions, defense counsel pressed the arresting officers to explain their reasons for making the traffic stop. Officer Efrain Soto testified that the driver of the vehicle, James Brown, was "'not paying full time and attention to his driving.'"[290] Soto admitted that he did not intend to issue a ticket to the driver for stopping too long at the stop sign; rather, he wanted to inquire about why Brown was obstructing traffic and why he had sped off without signaling in a school area. He denied that the decision to stop the Nissan Pathfinder was based on any sort of "racial profile."[291] Littlejohn's testimony for the most part confirmed Soto's.

Judge Johnson denied the motion to suppress. Although noting some minor discrepancies between the testimony of Soto and Littlejohn, she ruled:

> [t]he one thing that was not controverted . . . is the facts surrounding the stop. There may be different ways in which one can interpret it but, truly, the facts of the stop were not controverted. There was nothing to really demonstrate that the actions of the officers were contrary to a normal traffic stop. It may not be what some of us believe should be done, or when it should be done, or how it should be done, but the facts stand uncontroverted, and the court is going to accept the testimony of Officer Soto.
>
> I was indeed concerned primarily with the manner in which he responded to a question more so than his response to the question. But I do believe that the government has demonstrated through the evidence presented that the police conduct was appropriate and, therefore, there is no basis to suppress the evidence. And it is so ordered. The motions to suppress will be denied.[292]

As counsel for Whren and Brown later explained,

> The court had been concerned by the "lengthy pause" before Officer Soto answered "no" to the following question from Mr. Brown's counsel:

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288. As Chief Judge, Johnson later decided a number of matters involving Independent Counsel Kenneth Starr's investigation of President Bill Clinton. *See In re* Grand Jury Proceedings, Misc. No. 98-228, 1998 U.S. Dist. LEXIS 17290, at *1 (D.D.C. Sept. 24, 1998); *In re* Grand Jury Proceedings, 5 F. Supp. 2d 21, 24 (D.D.C. 1998); *In re* Grand Jury Proceedings, Misc. Action Nos. 98-095, 98-096, & 98-097(NHJ), 1998 U.S. Dist. LEXIS 7735, at *1 (D.D.C. May 26, 1998).

289. *Whren*, 53 F.3d at 372.

290. *Id.* at 373.

291. Brief for the Petitioners at 10 n.11, Whren v. United States, 517 U.S. 806 (1996) (No. 95-5841) (citations omitted).

292. Transcript of Motions and Trial Before the Honorable Norma Holloway Johnson United States District Judge, United States v. Whren, Crim. No. 93-0273 (Oct. 20, 1993) (footnote omitted) (on file with author).

> Q . . . [I]sn't it true that your decision to stop the Pathfinder was because you believed that two young black men in a Pathfinder with temporary tags were suspicious; isn't that true?
>
> When the court asked Officer Soto why he had "hesitate[d] a long time" before answering that "very straightforward question," Soto stated that he had "wanted to really think" and "analyze the question." He denied basing the stop on any "racial profile."[293]

After the district court denied the suppression motion, a trial was held. One of the defense attorneys recalls the case as one in which the deck was stacked against the defendants, with Judge Johnson antagonistic to the defendants at every turn.[294] A jury convicted Whren and Brown on all counts of the indictment. Judge Johnson sentenced Whren and Brown to fourteen years in prison, along with supervised release and fines.[295]

The defendants appealed their convictions to the U.S. Court of Appeals for the District of Columbia Circuit.

D. THE COURT OF APPEALS

The panel presiding over the case consisted of three appointees of Republican President Ronald Reagan: former Conservative Party (a short-lived offshoot of the Republican Party) U.S. Senator James Buckley, who is the brother of conservative pundit William F. Buckley, and former federal prosecutors Stephen Williams[296] and David Sentelle.

In the D.C. Circuit, Whren and Brown contended that the police officers obtained the evidence through an illegal search and seizure in violation of the Fourth Amendment.[297] They specifically argued that the police officers used traffic violations as a pretext for a search for drugs without probable cause and that the search was objectively unreasonable under the Fourth Amendment.[298] As the court of appeals summarized the argument in a published opinion written

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293. Brief for the Petitioners, *supra* note 291, at 10 n.11.

294. *See* Telephone Interview with Christian Camenisch, Attorney for Michael Whren (June 2005). Some of the other facts of the case mentioned in this Essay come from the author's interviews of attorneys involved in *Whren v. United States*.

295. *See Whren*, 53 F.3d at 373.

296. Williams is also a former law professor, most recently at the University of Colorado School of Law.

297. Whren and Brown also challenged their convictions and sentences for possession and intent to distribute cocaine base under 21 U.S.C. § 841, arguing that the crime was a lesser included offense of their separate convictions for possession with intent to distribute cocaine base within 1000 feet of a school under 21 U.S.C. § 860(a). *Whren*, 53 F.3d at 376. The government agreed with the appellants on this issue and the court of appeals remanded for entry of an amended judgment and resentencing. In a subsequent appeal of the sentencing in the case, the D.C. Circuit held that a defendant on remand generally cannot raise new challenges to sentencing. *See* United States v. Whren, 111 F.3d 956, 957 (D.C. Cir. 1997), *cert. denied*, 522 U.S. 1119 (1998).

298. *Whren*, 53 F.3d at 374.

by Judge Sentelle,

> Appellants argue that this court should borrow from the law of other circuits in determining whether "objective circumstances" warrant a search. While several circuits hold that an alleged pretextual stop is valid as long as an officer legally "could have" stopped the car in question because of a suspected traffic violation, appellants urge this court to adopt the test laid out by the Tenth and Eleventh Circuits, which have held that a stop is valid only if "under the same circumstances a reasonable officer *would have* made the stop in the absence of the invalid purpose." Appellants contend that the "would have" test is superior to the "could have" test because the latter fails to place any reasonable limitations on discretionary police conduct, thus "cut[ting] at the heart of the Fourth Amendment."[299]

The D.C. Circuit found that its previous decision in *United States v. Mitchell*[300] had "implicitly adopt[ed]" the "could have" test.[301] Judge Buckley, joined by Judge Williams (both on the appellate panel deciding *Whren*), authored the opinion in *Mitchell*, holding that a stop was reasonable so long as an officer had observed a traffic violation.[302] In *Mitchell*, a police stop for speeding and failing to signal led to a search that uncovered drugs and firearms.[303] According to the court of appeals in *Whren*, one virtue of the "could have" test is that it avoided inquiry into the officer's state of mind; in the court's view, the probable cause required for the traffic stop sufficiently limited police discretion.[304] Applying the test to the facts at hand, the D.C. Circuit found that Soto and Littlejohn had the necessary grounds to stop Whren and Brown consistent with the Fourth Amendment, and affirmed the denial of the motion to suppress the evidence and the convictions.[305]

E. THE SUPREME COURT

Whren and Brown next sought review of their convictions in the U.S. Supreme Court. They contended that the Court needed to reconcile a split in the lower courts about the appropriate Fourth Amendment test to apply when evaluating the lawfulness of traffic stops.[306] In urging the Court not to hear the case, the Solicitor General contended that the disagreement over the appropriate Fourth Amendment test was not significant because the "minority" view would not change the result in most cases; the Solicitor General's brief noted that, "to

299. *Id.* (internal citations omitted) (alteration in original).
300. 951 F.2d 1291 (D.C. Cir. 1991).
301. *See Whren*, 53 F.3d at 375.
302. *See Mitchell*, 951 F.2d at 1295–96.
303. *Id.* at 1293–94.
304. *Whren*, 53 F.3d at 375.
305. *See id.* at 376.
306. *See* Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 7–9, Whren v. United States, 517 U.S. 806 (1996) (No. 95-5841).

date, pretext claims have rarely succeeded in any circuit. Far more typical are cases finding that the stop was undertaken pursuant to routine police practice."[307]

In January 1996, the Supreme Court agreed to hear *Whren v. United States*.[308] Until then, the

> Court had not explicitly decided whether the police could use the legal justification of a minor crime as a pretext to stop a person in order to search or interrogate that person for an unrelated, more serious crime for which the police did not have reasonable suspicion—a so-called pretextual stop.[309]

1. The Briefs

Whren and Brown's initial Supreme Court brief emphasized the need for the "would have" test—that is, a stop is valid only if under the same circumstances a reasonable officer *would have* made the stop, absent an impermissible purpose—to circumscribe police discretion and attempt to curtail pretextual stops based on race.[310] The brief argued that any alternative would afford carte blanche to police to rely on hunches based on the race of the driver in stopping automobiles. As one court of appeals judge had forcefully put it:

> Given the "multitude of applicable traffic and equipment regulations" in any jurisdiction, upholding a stop on the basis of a regulation seldom enforced opens the door to the arbitrary exercise of police discretion . . . . The ["could have"] standard . . . allows virtually unfettered discretion by upholding a stop even if . . . motivated by an illegal purpose . . . .[311]

As this quotation suggests, the defendants' position found support in some precedent and leading authorities.[312]

The opening salvo of Whren and Brown's brief argued that police discretion must be limited. It also emphasized the critically important role of race in this particular traffic stop:

> *This case arose because the sight of two young black men in a Nissan Pathfinder with temporary tags, pausing at a stop sign in Southeast Washington, D.C., aroused the suspicion of plainclothes vice officers patrolling for*

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307. Brief for the United States in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals to the District of Columbia Circuit at 9, *Whren*, 517 U.S. 806 (No. 98-5841).

308. 516 U.S. 1036 (1996).

309. Christopher R. Dillon, Note, Whren v. United States *and Pretextual Traffic Stops: The Supreme Court Declines To Plumb Collective Conscience of Police*, 38 B.C. L. REV. 737, 753 (1997).

310. *See* Brief for the Petitioners, *supra* note 291, at 15–37.

311. United States v. Botero-Ospina, 71 F.3d 783, 790–91 (10th Cir. 1995) (en banc) (Seymour, C.J., dissenting) (citations omitted).

312. *See* WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE § 3.1, at 113–14 (4th ed. 2004); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 287 & n.73.

> *narcotics violations in an unmarked car*. The officers decided to stop the Pathfinder and "investigate" why the driver was stopped so long at the stop sign—ostensibly a violation of the District of Columbia Municipal Regulation requiring drivers to pay "full time and attention" to operating their vehicle. Turning around to make the stop, one of the officers claimed to see the Pathfinder commit two other minor traffic infractions. Without any intention of issuing a ticket, and in violation of police regulations, the officers then seized the Pathfinder at a stoplight a few blocks away and discovered illegal drugs in plain view.[313]

To bolster the argument that the stop was based on race, the brief summarized studies establishing the racially disparate impacts of traffic stops on African-Americans throughout the United States.[314]

In its brief, the U.S. government countered that the "could have" test—that is, a traffic stop is valid under the Fourth Amendment so long as an officer lawfully *could have* stopped the car in question because of a suspected traffic violation—offered the only workable standard for police officers.[315] According to the Solicitor General, that test did not afford unbridled discretion to police officers to rely on race to stop an automobile: "Any decision to single out a suspect or suspects on the basis of [race or ethnicity] . . . would be unlawful under the Equal Protection Clause."[316] This elaboration of the U.S. government's argument apparently was made for the first time in the Supreme Court. Importantly, the Solicitor General did not engage in any attempt to justify a race-based traffic stop by police officers; such an argument would have been difficult for the Court to reconcile with its consistently expressed view that the U.S. Constitution bans state action motivated by a racially discriminatory intent.[317]

In their reply brief, Whren and Brown countered that regardless of whether the police violated the Equal Protection Clause, the traffic stop was impermissible under the Fourth Amendment.[318] Their brief further argued that equal protection claims were inherently difficult to prove and failed to offer a full remedy to a criminal defendant for a race-based stop by police officers:

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313. Brief for the Petitioners, *supra* note 291, at 2–3 (emphasis added) (citation omitted).

314. *See id.* at 21–27.

315. *See* Brief for the United States at 13–38, *Whren*, 517 U.S. 806 (No. 95-5841).

316. *Id.* at 28 (citing Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886)). The brief quoted a concurring opinion of Chief Judge Newman in a Second Circuit decision adopting the "could have" test in which he emphasized that "the Equal Protection Clause has sufficient vitality to curb most of the abuses that the [defendant] apprehends. Police officers who misuse the authority we approve today may expect to be defendants in civil suits seeking substantial damages for discriminatory enforcement of the law." *Id.* (quoting United States v. Scopo, 19 F.3d 777, 786 (2d Cir. 1994) (Newman, C.J., concurring) (alteration in original)); *see* Brief of the Cal. Dist. Attorney's Ass'n as Amicus Curiae in Support of Respondent at 27–29, *Whren*, 517 U.S. 806 (No. 95-5841) (making similar argument).

317. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); J.A. Croson Co. v. City of Richmond, 488 U.S. 469 (1989).

318. *See* Reply Brief for the Petitioners at 8–9, *Whren*, 517 U.S. 806 (No. 95-8541).

> [T]he Equal Protection Clause cannot be relied upon to curb the systemic abuses petitioners have documented. An equal protection claim in the selective traffic enforcement setting would require determination of the very subjective intent of the officer that the government agrees is so difficult to establish. Any individual motorist . . . might have a "gut instinct" that his race played a role in his stop, but would be hard-pressed to gather even the minimal amount of information needed . . . to file a complaint. Even if the claim survived [a motion to dismiss], the kind of data required to prove intentional discrimination is not generally available.[319]

Amicus curiae briefs were filed in support of each side in the case. The American Civil Liberties Union and National Association of Criminal Defense Lawyers aligned themselves with the Petitioners, while various state attorneys general and the conservative Criminal Justice Legal Foundation sided with the U.S. government. The briefs in support of the Petitioners repeatedly expressed concern with the use of pretextual traffic stops to investigate other crimes.[320] In contrast, the briefs supporting the U.S. government's position emphasized the difficulty and impropriety of interrogating the intent of police officers who made a valid traffic stop.[321]

2. Oral Argument

In April 1996, the Supreme Court heard oral argument in *Whren v. United States*. As one would expect, the arguments centered on the contrasting tests offered by the parties for judging the validity of a traffic stop under the Fourth Amendment.[322] Racial profiling, however, also came up in the oral argument. At one point, the Court's questioning allowed the Assistant to the Solicitor General to reiterate the U.S. government's proposed remedy for police reliance on race in a traffic stop spelled out in its brief:

> QUESTION: . . . [Y]ou wouldn't say selective enforcement based on race or religion would be permissible.
> MR. FELDMAN: Our view would be that those would be unconstitutional—
> QUESTION: For a different reason.
> MR. FELDMAN: —but they would be unconstitutional under the Equal Protection Clause—

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319. *Id.* (citations omitted); *see also* Brief Amicus Curiae of the Am. Civil Liberties Union in Support of Petitioners at 10 n.4, *Whren*, 517 U.S. 806 (No. 95-5841) (making similar argument).

320. *See generally* Brief Amicus Curiae of the Am. Civil Liberties Union in Support of Petitioners, *supra* note 319 (arguing that pretextual stops are contradictory to Fourth Amendment values); Brief of Amicus Curiae National Ass'n of Criminal Defense Lawyers in Support of Petitioners, *Whren*, 517 U.S. 806 (No. 95-8541) (arguing that pretextual stops are so broad as to put everyone at risk of being arbitrarily stopped).

321. *See, e.g.*, Brief of the California District Attorney's Ass'n, as Amicus Curiae in Support of Respondent, *supra* note 316.

322. *See generally* Transcript of Oral Argument, *Whren*, 517 U.S. 806 (No. 95-5841), *available at* 1996 U.S. TRANS. LEXIS 20.

QUESTION: Right.
MR. FELDMAN: —and there would be different standards applied to them.[323]

Later, government counsel went on to emphasize that Whren and Brown's "arguments are primarily directed towards interests that are not protected by the Fourth Amendment. Insofar as there's an equal protection claim, that claim should be made under the Equal Protection Clause."[324]

3. The Supreme Court Opinion

Less than three months after oral argument—at the end of the Term, when the Court rushes to file many decisions—the Court handed down the opinion in *Whren v. United States*.[325] A unanimous Court affirmed the D.C. Circuit's decision in an opinion written by Justice Antonin Scalia, formerly a member of the D.C. Circuit himself.[326] The Justices framed the question before the Court as "whether the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment's prohibition against unreasonable seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws."[327]

As previously discussed, the problem of pretextual stops based on the race of the occupants of an automobile came up in the briefs and oral argument.[328] Nevertheless, in restating the facts of the case, the Court failed to mention that Whren and Brown were African-American, one of the central facts of the entire case and its briefing. The Court instead delayed mentioning this most salient fact until later in the opinion in introducing the legal analysis of the Fourth Amendment claim: "Petitioners [Whren and Brown], who are both black, . . . contend that police officers might decide which motorists to stop based on decidedly impermissible factors, such as the race of the car's occupants."[329]

The Court began its legal analysis by reciting standard Fourth Amendment law that an automobile stop must be "reasonable."[330] The Court next seized on the admission of Whren and Brown that the officers had probable cause to

323. *Id.* at *42.
324. *Id.* at *47; *see also id.* at *43.
325. 517 U.S. 806.
326. THE OYEZ PROJECT, ANTONIN SCALIA, http://www.oyez.com/justices/antonin_scalia (last visited Dec. 1, 2009).
327. *Whren*, 517 U.S. at 808.
328. *See supra* text accompanying notes 310–11, 323–24.
329. *Whren*, 517 U.S. at 810; *see* Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 978 (1999) (noting that "the [Supreme] Court in *Whren* presented the facts of the case without any mention of race" and explaining that the current Court's criminal decisions often seek to downplay the importance of the race of the defendants in police actions).
330. *See Whren*, 517 U.S. at 809–10 (citing Delaware v. Prouse, 440 U.S. 648, 653 (1979); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975)).

believe that Brown's driving of the Nissan Pathfinder violated the District of Columbia traffic code.[331] This all-important admission was the linchpin of the Court's ultimate disposition of the case.[332]

The Court directly addressed the argument that, because a police officer almost invariably can find a technical traffic code violation for virtually anyone driving on the roads, upholding Whren and Brown's stop would allow police to use pretextual grounds to investigate more serious crimes. The Court reviewed several cases in which it had questioned searches as unconstitutional pretexts under the Fourth Amendment.[333] Justice Scalia reasoned that those decisions were limited to searches in which officers lacked probable cause and were thus readily distinguishable from the stop at issue in this case.[334]

For example, in *Colorado v. Bannister*, the Court upheld a traffic stop that was followed by the plain view sighting of contraband and an arrest for charges unrelated to the stop.[335] The Court remarked in passing that "[t]here was no evidence whatsoever that the officer's presence to issue a traffic citation was a pretext to confirm any other previous suspicion about the occupants."[336] Rejecting this dictum as support for Whren and Brown's argument, the Court emphasized that it could not justify a reversal of prior law.[337] According to Justice Scalia, the Court had "repeatedly" found "that an officer's motive [could not] invalidate[] objectively justifiable behavior under the Fourth Amendment."[338]

The Court rejected the petitioners' proposed Fourth Amendment test that it characterized as calling for a determination of "whether the officer's conduct deviated materially from usual police practices, so that a reasonable officer in the same circumstances would not have made the stop for the reasons given."[339] It understood the proposed standard as requiring an inquiry into whether a police officer had the proper state of mind based on what a reasonable officer might believe given the same set of facts.[340] Snidely denigrating any such inquiry, Justice Scalia saw it as reducing a reviewing court "to speculating about the hypothetical reaction of a hypothetical constable—an exercise that might be called virtual subjectivity."[341] The Court offered no reason why it could not apply a reasonableness standard to the traffic stop at issue in *Whren*. Indeed, as the Court recognized a few years later in finding that drug checkpoints to

331. *See id.* at 810.
332. *See id.* at 813.
333. *See* Florida v. Wells, 495 U.S. 1 (1990); Colorado v. Bertine, 479 U.S. 367 (1987).
334. *See Whren*, 517 U.S. at 811–13.
335. 449 U.S. 1, 4 & n.4 (1980).
336. *Id.*
337. *Whren*, 517 U.S. at 812.
338. *Id.* For this proposition, the Court cited its decisions in *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983); *Scott v. United States*, 436 U.S. 128, 138 (1978); and *United States v. Robinson*, 414 U.S. 218 (1973). *See Whren*, 517 U.S. at 812–13.
339. *Whren*, 517 U.S. at 814.
340. *Id.* at 813–14.
341. *Id.* at 815.

interdict unlawful drugs violated the Constitution, the reasonableness of police conduct is the touchstone of the Fourth Amendment.[342]

Besides the problem of discerning the state of mind of a police officer, a standard the Justices were unwilling to import from the Equal Protection Clause,[343] the Court expressed concern about local variation in the Fourth Amendment standard.[344] In the case before it, Whren and Brown claimed that the officers' conduct was unreasonable because District of Columbia police regulations permit plainclothes officers to make traffic stops "'only in the case of a violation that is so grave as to pose an *immediate threat* to the safety of others.'"[345] Because different police departments are subject to different rules and regulations, incorporation of local standards into its Fourth Amendment analysis, in the Court's view, would lead to divergent interpretations of whether the same traffic stop was constitutional or not.[346] As a result, one of the most troubling facts in the case—that the officers had in fact deviated from the local regulations in making the stop—was deemed to be effectively irrelevant to the Court's disposition of the case. That fact failed to be incorporated into the Court's Fourth Amendment analysis, with any violation of local police department policy presumably left to be (or not to be) addressed by local authorities.

The Court also declined to balance competing interests in deciding whether plainclothes officers could lawfully make traffic stops in the circumstances before the Court. Generally opposed to multifactored balancing tests as a matter of jurisprudential principle,[347] Justice Scalia reasoned that the cases that balanced the interests at stake were inapplicable to the case at hand "because they involved seizures without probable cause."[348] The Court emphasized once again that, in contrast to its balancing cases, the police in this case had the requisite probable cause to justify the traffic stop.[349]

The Court rejected the petitioners' argument that, because traffic regulations are so comprehensive, police under the "could have" test can stop whomever

342. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000) ("The Fourth Amendment requires that searches and seizures be reasonable.").

343. *Cf.* Washington v. Davis, 426 U.S. 229, 239, 248 (1976). For criticism of the intent requirement created by the Court in *Washington v. Davis*, see *supra* notes 250–53 (citing authorities).

344. *See Whren*, 517 U.S. at 815.

345. *Id.* (quoting Metro. Police Dep't, Wash., D.C., General Order 303.1, pt. 1, (A)(2)(a)(4) (Apr. 30, 1992)). In a subsequent case, the Court relied on *Whren* in rejecting a claimed Fourth Amendment violation predicated on the violation of state law. *See* Virginia v. Moore, 553 U.S. 164, 128 S. Ct. 1598, 1604 (2008).

346. *Whren*, 517 U.S. at 807.

347. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); *see, e.g.*, Burnham v. Superior Court, 495 U.S. 604, 622–27 (1990) (Scalia, J., providing plurality opinion) (criticizing freewheeling fairness analysis in evaluating the constitutionality, under the Due Process Clause, of state courts exercising personal jurisdiction over nonresident defendants).

348. *Whren*, 517 U.S. at 817–18. In this regard, the Court referred to *Delaware v. Prouse*, 440 U.S. 648 (1979) (random traffic stop), *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (checkpoint stops), and *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (roving patrols).

349. *Whren*, 517 U.S. at 819.

they want for a technical violation of the law.[350] The Court could not identify a standard that it might apply to evaluate such conduct and emphasized that "*[f]or the run-of-the-mine case*, which this surely is, we think there is no realistic alternative to the traditional common law rule that probable cause justifies a search and seizure."[351]

In a brief, yet critical, passage of the opinion, the Court fully accepted the Solicitor General's argument about the proper remedy for race-based traffic stops: "We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."[352]

4. A Right Without a Remedy

In holding that the Equal Protection Clause was the exclusive remedy for a race-based pretextual stop based on probable cause for a violation of the traffic laws, *Whren v. United States* failed to persuasively justify that conclusion. Moreover, it left criminal defendants like Michael Whren and James Brown with a toothless equal protection remedy that, more often than not, will leave them with an unenforceable right.

The Court failed to cite any cases supporting its conclusion that the Equal Protection Clause offered the exclusive constitutional remedy (or, at least, that it offered a remedy where the Fourth Amendment did not). Nor did it acknowledge the formidable difficulties facing criminal defendants who attempt to prove an equal protection claim.

The Court must have been aware of the evidentiary burden in proving discriminatory intent, given that one month before deciding *Whren*, it decided *United States v. Armstrong*, which barred the discovery of evidence that African-American defendants claimed was necessary to prove the racially discriminatory enforcement of crack cocaine laws.[353] Applying "'ordinary equal protection standards,'"[354] the Court required a showing that the prosecution of the individual defendant was motivated by racial animus.[355] Such a state of mind, of course, is difficult, if not impossible, to establish without information about other criminal prosecutions—the same information defendants in *Armstrong* were denied when pursuing their selective prosecution claim. The Court denied defendants' discovery request in *Armstrong*, despite well-documented evidence of racial bias in enforcement of crack cocaine laws[356] and defendants' evidence

350. *Id.* at 818.
351. *Id.* at 819 (emphasis added).
352. *Id.* at 813.
353. 517 U.S. 456 (1996).
354. *Id*. at 465 (citing Wayte v. United States, 470 U.S. 598, 608 (1985)).
355. *Id.* at 465.
356. *See, e.g.*, David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1283 (1995) (noting that Black crack cocaine offenders are "sentenced under laws that treat crack

that *all* crack cocaine defendants arrested in the same prosecutorial district were Black.[357]

To pursue a claim under the Equal Protection Clause, Whren and Brown would have to file a civil action for damages based on the police officers' allegedly discriminatory conduct.[358] For criminal defendants, this remedy is far less appealing than the suppression of illegally obtained evidence in criminal cases. The Fourth Amendment's exclusionary rule bars the use of unlawfully seized evidence against a defendant;[359] there is no counterpart in the Equal Protection Clause of the Fourteenth Amendment. The inability to exclude the fruits of a stop based on impermissible factors under the Equal Protection Clause make any such claim of limited utility to criminal defendants like Whren and Brown, who wanted to avoid conviction and imprisonment, not to recover damages in a civil action for a violation of their constitutional rights.

F. SUBSEQUENT DEVELOPMENTS

Having lost their case in the Supreme Court, both Michael Whren and James Brown went to prison. Both were released after nearly a decade.[360] Nothing appears to have come of the fact that Metropolitan Police Department vice officers Efrain Soto and Homer Littlejohn stopped Brown and Whren in violation of departmental regulations. Both officers continued serving on the vice squad. However, their stories are perhaps more surprising than those of Whren and Brown.

For at least a decade, allegations of serious misconduct dogged the Metropolitan Police Department vice division. In 2000, an article in a local District of Columbia newspaper reported that, among other things, Littlejohn had been accused of planting evidence.[361] Both Littlejohn and Soto were the subjects of citizen complaints of alleged misconduct, although none were upheld.[362] Soto was sued for false arrest and beating a suspect in 1995, which ended in a settlement.[363]

In addition, local judges questioned whether Soto and Littlejohn testified truthfully in drug cases.[364] Moreover, according to the newspaper article, Soto and Littlejohn had their own personal legal problems. In 1996 and 1998, Soto's

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offenders more harshly than the predominately non-Black defendants caught with the more common, powder form of cocaine").

357. *See Armstrong*, 517 U.S. at 470. Despite the grossly disproportionate number of arrests, the drug usage rates of Whites and Blacks are almost equal. *See supra* note 229 and accompanying text.

358. *See* 42 U.S.C. § 1983 (2006).

359. *See* Weeks v. United States, 232 U.S. 383 (1914), *overruled on other grounds by* Mapp v. Ohio, 367 U.S. 643 (1961).

360. *See* Cherkis, *supra* note 277.

361. *See id.*

362. *Id.*

363. *Id.*

364. *Id.*

wife was granted temporary restraining orders after he beat her.[365] And in 1998, Littlejohn was twice charged with drunk driving.[366]

In a later traffic stop in May 1999, a judge heard testimony "from Littlejohn that he, along with Soto and [another officer], had stopped [a suspect] after they spotted him from a block away driving without a seat belt. After learning that [the suspect] didn't have a driver's license, they arrested and searched him and found drugs."[367] It sounds remarkably similar to the stop at issue in *Whren v. United States*.

In a 2004 criminal appeal, the D.C. Circuit reversed a drug and firearms conviction because the trial court had denied the defendant the opportunity to present witnesses willing to testify that Efrain Soto had a reputation within the local legal community as being untruthful.[368] The defendant, who claimed that Soto had planted a gun at the scene of the arrest, sought to introduce the testimony of a local defense counsel who believed that Soto had lied in other cases.[369] The defendant proffered another witness who would testify that Soto and other officers wrongly arrested him on a drug charge in 1995.

Although accused of excessive use of force, planting evidence, perjury, and, in effect, being part of a squad of lawless vice officers, Soto received a departmental award in December 2004.[370] In 2002, the Mayor of the District of Columbia honored Littlejohn for his police service.[371] The very next year, Littlejohn was indicted for perjury for allegedly lying to a grand jury about contacting another grand jury witness (a police officer).[372]

Through its decision in *Whren v. United States*, the Supreme Court left it to the political process—and growing minority political power—to address the problems of race-based policing on the streets in cities across the country. Although political action initially brought progress, the so-called war on terror that followed the tragic events of September 11, 2001, sidetracked efforts to end racial profiling by law enforcement.

From a legal perspective, Michael Whren and James Brown's efforts to curtail racial profiling through the Fourth Amendment failed in *Whren*. However, profiling emerged as an issue of great public concern in the United States

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365. *Id.*

366. *Id.*

367. *Id.*

368. *See* United States v. Whitmore, 359 F.3d 609, 613–14 (D.C. Cir. 2004) (discussing allegations of Officer Soto's misconduct).

369. *See id.* at 614.

370. *See* Program, Fifth Annual Metropolitan Police Department Annual Awards Ceremony 9 (Dec. 14, 2004), http://mpdc.dc.gov/mpdc/frames.asp?doc=/mpdc/LIB/mpdc/about/heroes/awards/awardsprog_04.pdf (listing Officer Efrain Soto, Jr. as recipient of Meritorious Service Medal).

371. *See* Karlyn Barker, *City, Chamber Honor Public-Safety Heroes*, WASH. POST, Mar. 21, 2002, at T6.

372. *See Crime & Justice: The District—Officer Indicted*, WASH. POST, Dec. 5, 2003, at B2.

as the twentieth century drew to a close.[373] Public opinion condemned racial profiling more quickly than the courts, thus suggesting that the public, not the courts, may in certain circumstances be a better place to initiate social change. The court of public opinion in certain instances can be more nimble in promoting change than the slow-moving legal machinery.

1. The Legal Evolution of *Whren*

Unquestionably, the Supreme Court's 1996 decisions in *Whren v. United States* and *United States v. Armstrong*, taken together, have made it exceedingly difficult to challenge police practices as constituting racial discrimination. In *Whren*, the Court foreclosed inquiry into the subjective intent of police officers in reviewing a traffic stop under the Fourth Amendment and allowed police officers to ground a stop for investigation of drug and other crimes on a violation of the traffic laws.[374] By effectively sanctioning pretextual traffic stops under the Fourth Amendment and relegating defendants to a toothless equal protection remedy, the Court increased the vast powers that police officers possess in the "war on drugs." Moreover, the *Armstrong* Court made it difficult to collect the basic evidence necessary to establish a claim of discriminatory enforcement of criminal laws.[375] Together, *Armstrong* and *Whren* effectively immunize police from any challenges for race-based law enforcement conduct; only the most egregious police misconduct will likely be subject to sanction, if at all.

Whren quickly emerged as the leading traffic stop case in the Supreme Court and the lower courts. The Court later relied on that decision in finding that the motivations of police officers were wholly irrelevant to Fourth Amendment analysis.[376] Lower courts fastidiously follow *Whren*, and prosecutors frequently invoke the holding as immunizing the conduct of police officers.[377] The decision quickly became the boilerplate citation for the proposition that subjective motives of the police in making a stop are irrelevant in evaluating its constitutionality under the Fourth Amendment.[378] Several state courts have adopted *Whren* in interpreting the Fourth Amendment and its counterparts in state constitu-

373. *See*, *e.g.*, Robert D. McFadden, *Police Singled Out Black Drivers in Drug Crackdown, Judge Says*, N.Y. TIMES, Mar. 10, 1996, at 33; Jon Nordheimer, *Troopers Are Accused of Stopping Drivers Based on Race*, N.Y. TIMES, Dec. 23, 1994, at B5.

374. *See supra* text accompanying section II.E.3.

375. *See supra* text accompanying notes 353–57.

376. *See, e.g.*, Brigham City v. Stuart, 547 U.S. 398, 404–05 (2006); Devenpeck v. Alford, 543 U.S. 146, 153–54 (2004); United States v. Knights, 534 U.S. 112, 122 (2001); Arkansas v. Sullivan, 532 U.S. 769, 771–72 (2001).

377. *See, e.g.*, United States v. Linkous, 285 F.3d 716, 719–20 (8th Cir. 2002); United States v. Escalante, 239 F.3d 678, 680–81 (5th Cir. 2001); United States v. Wellman, 185 F.3d 651, 655–56 (6th Cir. 1999).

378. *See, e.g.*, United States v. Brigham, 382 F.3d 500, 510 (5th Cir. 2004) (en banc); United States v. Jones, 377 F.3d 1313, 1314 (11th Cir. 2004) (per curiam); United States v. Gomez Serena, 368 F.3d 1037, 1041 (8th Cir. 2004); United States v. Ibarra, 345 F.3d 711, 714–16 (9th Cir. 2003); United States v. Bookhardt, 277 F.3d 558, 565 (D.C. Cir. 2002); United States v. Saucedo & United States v. Key, 226

tions.[379]

Some lower courts have also relied on *Whren* for the bolder proposition that, so long as there is an objectively reasonable basis for the stop, it is justified even when it is *admittedly* a pretext.[380] One court of appeals bluntly stated that "traffic stops, in practice, may be used as a pretext to investigate other crimes because courts will not usually inquire into the actual motives of the police."[381]

Although the Court unanimously decided *Whren v. United States*, a couple of Justices soon appeared to have second thoughts about the effects of the decision. A year after the Court decided *Whren*, Justice Anthony Kennedy dissented from the majority's holding in *Maryland v. Wilson* that police could order a passenger to exit a vehicle even though he was not suspected of any crime.[382] In Justice Kennedy's view,

> The practical effect of our holding in *Whren*, of course, is to allow the police to stop vehicles in almost countless circumstances. When *Whren* is coupled with today's holding, the Court puts tens of millions of passengers at risk of arbitrary control by the police. If the command to exit were to become commonplace, the Constitution would be diminished in a most public way.[383]

In the controversial 2001 *Atwater v. City of Lago Vista* decision, which found that the arrest of a driver for a minor traffic violation did not run afoul of the Fourth Amendment, the Court relied on *Whren v. United States* in rejecting a balancing test.[384] Justice Sandra Day O'Connor dissented, claiming that the *Whren* Court had not addressed the particular issue in *Atwater*[385] and that the "unbounded discretion" provided by the Court to police officers "carrie[d] with it grave potential for abuse."[386] She continued:

> The majority takes comfort in the lack of evidence of "an epidemic of unnecessary minor-offense arrests." But the relatively small number of published cases dealing with such arrests proves little and should provide little solace. *Indeed, as the recent debate over racial profiling demonstrates all too*

F.3d 782, 789 (6th Cir. 2000); United States v. Dhinsa, 171 F.3d 721, 724–25 (2d Cir. 1999); United States v. Williams, 106 F.3d 1362, 1365 (7th Cir. 1997).

379. *See, e.g.*, Gama v. State, 920 P.2d 1010, 1013–14 (Nev. 1996) (adopting the *Whren* test under the Nevada Constitution equivalent of the Fourth Amendment); Abraham Abramovsky & Jonathan I. Edelstein, *Pretext Stops and Racial Profiling After* Whren v. United States*: The New York and New Jersey Responses Compared*, 63 ALB. L. REV. 725 (2000). *But see, e.g.*, State v. Ladson, 979 P.2d 833, 842 (Wash. 1999) (en banc) (finding that Washington State Constitution prohibited pretextual stops).

380. *See, e.g.*, *Linkous*, 285 F.3d at 719–20; *Escalante*, 239 F.3d at 680–81; *Wellman*, 185 F.3d at 655–56.

381. United States v. Woodrum, 208 F.3d 8, 10 (1st Cir. 2000) (citing Whren v. United States, 517 U.S. 806, 813 (1996)).

382. 519 U.S. 408, 423 (1997) (Kennedy, J., dissenting).

383. *Id.*

384. 532 U.S. 318, 346–50, 354 (2001).

385. *See id.* at 363–64.

386. *Id.* at 372 (O'Connor, J., dissenting).

> *clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual.* After today, the arsenal available to any officer extends to a full arrest and the searches permissible concomitant to that arrest. An officer's subjective motivations for making a traffic stop are not relevant considerations in determining the reasonableness of the stop. But it is precisely because these motivations are beyond our purview that we must vigilantly ensure that officers' poststop actions—which are properly within our reach—comport with the Fourth Amendment's guarantee of reasonableness.[387]

Some lower court judges have expressed concerns about how *Whren* immunizes racial profiling. In one case, a court of appeals judge asserted unequivocally that, "[i]f there ever was a clear case of racial profiling, it is this case. By affirming these convictions, the majority gives support to police officers in this circuit who seize and search individuals because of their race."[388] In another, a dissenting court of appeals judge observed:

> In this case there is the unspoken issue of racial profiling. . . . [I]n my view, the obvious facts of this case, *i.e.*, four young African-Americans traveling in a vehicle with out-of-state license plates stopped on a public highway in East Texas by a white highway patrolman for "following too closely" and then interrogated for 20 minutes about matters unrelated to the reasons for that stop, are so suggestive of circumstances in which racial profiling typically occurs that the district court and our Court fail in our responsibility to the hundreds of our minority citizens who daily exercise their constitutional right to travel . . . without harassment when we close our eyes and minds to the reality of these circumstances.[389]

The Supreme Court emphasized in *Whren* that, even if the stop did not violate the Fourth Amendment, there was an equal protection remedy for a race-based traffic stop. As discussed previously,[390] such claims face formidable barriers. The problems with enforcing an equal protection claim based on a pretextual traffic stop can be seen vividly in the post-*Whren* case of *Brown v. City of Oneonta*.[391] In that infamous case, the U.S. Court of Appeals for the Second Circuit held that, despite the fact that the police questioned *every* young African-American man (and one Black woman) in a small college town after a

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387. *Id.* (citation omitted) (emphasis added) (citing *Whren*, 517 U.S. at 813).

388. United States v. Herrera Martinez, 354 F.3d 932, 935 (8th Cir. 2004) (Lay, J., dissenting), *vacated*, 549 U.S. 1164 (2007).

389. United States v. Brigham, 382 F.3d 500, 520 n.13 (5th Cir. 2004) (en banc) (DeMoss, J., dissenting).

390. *See supra* text accompanying notes 353–59.

391. 221 F.3d 329, 338–39 (2d Cir. 2000). For cogent criticism of the *Oneonta* decision, see R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075 (2001), and Bela August Walker, Note, *The Color of Crime: The Case Against Race-Based Suspect Descriptions*, 103 COLUM. L. REV. 662 (2003).

robbery victim told police that a Black man had committed the crime, the class action plaintiffs failed to demonstrate that the police had acted with the necessary discriminatory intent.[392] The court found that the police, rather than seeking to discriminate on the basis of race, only sought to solve a crime in which the victim claimed that the perpetrator was Black.[393]

The facts of *Brown* (like those in *Armstrong*) are extreme—the questioning of every African-American within the city limits—yet the plaintiffs still failed to prevail on their equal protection claim. It would therefore seem extremely difficult to succeed in proving discriminatory intent in a "run-of-the-mine" case like *Whren*. Not surprisingly, after *Whren*, there has been a long string of defeats for plaintiffs in lawsuits claiming that racial profiling led to a traffic stop in violation of the Equal Protection Clause.[394] Put simply, the Equal Protection Clause, with its difficult problems of proof, has not proven to be a viable method for criminal defendants to address systemic reliance on race by local police.

In contrast to the enthusiastic application of *Whren* to vindicate traffic stops and to shield police officers' motives from scrutiny by the courts, the academic criticism of the Supreme Court's decision has been harsh,[395] with defenders of the decision relatively few and far between.[396] Prominent criticisms range from the claim that the ruling blunted any efforts to eradicate racial profiling through the Fourth Amendment[397] to the argument that the equal protection remedy for racial discrimination suggested by the Court is not full and effective.[398]

Many observers find problematic the wide-ranging discretion that the Supreme Court's Fourth Amendment analysis has afforded police, which in turn has hindered efforts to end race-based law enforcement. Leading criminal

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392. *Brown*, 221 F.3d at 338–39.

393. *Id.* at 337.

394. *See, e.g.*, Flowers v. Fiore, 359 F.3d 24, 34–35 (1st Cir. 2004); Bingham v. City of Manhattan Beach, 341 F.3d 939, 948–49 (9th Cir. 2003); Chavez v. Ill. State Police, 251 F.3d 612, 648 (7th Cir. 2001); United States v. Avery, 137 F.3d 343, 358 (6th Cir. 1997); United States v. Duque-Nava, 315 F. Supp. 2d 1144 (D. Kan. 2004). However, a few racial profiling claims have been successful. *See, e.g.*, Marshall v. Columbia Lea Reg'l Hosp., 345 F.3d 1157, 1166–71 (10th Cir. 2003).

395. *See, e.g.*, Devon W. Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1032–34 (2002); Andrew D. Leipold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHI.-KENT L. REV. 559, 566–69 (1998); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 318–21 (2001); Eric F. Citron, Note, *Right and Responsibility in Fourth Amendment Jurisprudence: The Problem with Pretext*, 116 YALE L.J. 1072 (2007); *see also* Margaret M. Lawson, *The Road to* Whren *and Beyond: Does the "Would Have" Test Work?*, 57 DEPAUL L. REV. 917, 928–32 (2008) (summarizing various critiques of *Whren*).

396. *See, e.g.*, STEVE HOLBERT & LISA ROSE, THE COLOR OF GUILT & INNOCENCE: RACIAL PROFILING AND POLICE PRACTICES IN AMERICA 120 (2004) ("[P]retext stops [as permitted by *Whren*] can be a useful means of apprehending those who violate the law.").

397. *See, e.g.*, Alberto B. Lopez, *Racial Profiling and* Whren*: Searching for Objective Evidence of the Fourth Amendment on the Nation's Roads*, 90 KY. L.J. 75, 79, 87–93 (2002).

398. *See* Pamala S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2005–14 (1998).

procedure authority Wayne LaFave, for example, suggests that the decision in *Whren v. United States* encourages police to act on a "hunch."[399] In his view, the Court's Fourth Amendment ruling does not adequately limit police discretion, and a race-based equal protection challenge to a traffic stop is next to impossible to prove.[400] LaFave understands *Whren* as undermining well-settled search and seizure precedent that limits law enforcement officer discretion.[401]

In sum, the Supreme Court's decision in *Whren v. United States* authorized and encouraged police to employ pretextual traffic stops as a tool in the "war on drugs." The Court's refusal to consider the intent of police officers in its Fourth Amendment analysis created a safe haven for racial profiling by the police. Lower courts seized on the decision to justify pretextual traffic stops. And equal protection claims challenging racial profiling, the only legal avenue of relief that remained, have been notoriously difficult to prove.

2. Subsequent Political Developments

Not long after the Supreme Court's 1996 decision in *Whren v. United States*, racial profiling emerged as a hot issue of pressing public concern across the United States. A practice that was part and parcel of the facially neutral "war on drugs," but with starkly disparate racial impacts, finally came under sustained public scrutiny. Scholars and policymakers critically examined racial profiling in criminal law enforcement, which in its most extreme form bases police stops of African-Americans, Latina/os, and other racial minorities on their perceived group propensities for criminal conduct.[402] This scrutiny of racial profiling largely ignored the long-standing profiling of Latina/os in immigration enforcement.[403]

Prominent federal officials condemned the use of racial profiling directed at African-Americans on the nation's highways. In 1999, President Bill Clinton issued an Executive Order denouncing racial profiling and requiring federal law enforcement agencies to collect statistical data to determine whether abuses

399. LAFAVE ET AL., *supra* note 312, § 12.5, at 676. The same kind of problem arose in immigration enforcement after the Court bestowed great discretion on immigration officers in *United States v. Brignoni-Ponce*. *See supra* text accompanying notes 137–42.

400. *See* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.4(f), at 136–55 (4th ed. 2004); Wayne R. LaFave, *The "Routine Traffic Stop" From Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1853–61 (2004).

401. *See* 3 LAFAVE, *supra* note 400, §§ 6.7(d), 7.2(d), at 494, 569.

402. *See, e.g.*, Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 442–43 (1997); David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 267–68 (1999); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 342–62 (1998); Floyd Weatherspoon, *Ending Racial Profiling of African-Americans in the Selective Enforcement of Laws: In Search of Viable Remedies*, 65 U. PITT. L. REV. 721, 723–24 (2004).

403. *See supra* Part I. The failure to acknowledge the problems of profiling of Latina/os in immigration enforcement may have something to do with the fact that the Black–White paradigm has long dominated civil rights discourse. *See* Delgado, *supra* note 203 (discussing the "Black–White binary" as a method of understanding civil rights concerns in U.S. society); Perea, *supra* note 203 (using the Black–White binary in critiquing leading race and civil rights scholarship).

were occurring.[404] During the 2000 Democratic presidential primary campaign, candidates Bill Bradley and Al Gore each claimed to be tougher on racial profiling than the other in a debate held, ironically enough, at a famous African-American landmark—the Apollo Theater in Harlem.[405] As Professor Albert Alschuler summarized,

> Until September 11, 2001, almost everyone condemned racial profiling. President Bill Clinton called the practice "morally indefensible" and "deeply corrosive." President George W. Bush pledged, "[W]e will end it." A federal court observed, "Racial profiling of any kind is anathema to our criminal justice system." 81 percent of the respondents to a 1999 Gallup poll declared their opposition.[406]

One influential criminal procedure scholar went so far as to state that "profiling is the great issue of our time."[407]

Although the movement to end racial profiling had begun before 1996, public awareness of the problem grew significantly after *Whren v. United States*. The loss for criminal defendants in the Supreme Court effectively shifted efforts from the courts to the political arena to address the problem. African-American, Latina/o, and civil rights groups pressed to raise public awareness and make profiling a significant political issue.

Despite the formidable legal barriers to such claims, lawsuits continue to challenge racial profiling by state law enforcement agencies, including those in California, Nebraska, and New Jersey.[408] Several state legislatures passed laws requiring their state and local police departments to adopt policies designed to reduce profiling.[409] Some states enacted legislation to require the collection of demographic and other data on drivers stopped by police, with the hope of compiling statistical evidence of impermissible profiling.[410] Additionally, many states and localities conducted studies on traffic stops in their jurisdictions.[411]

If nothing else, political action shed light on racial profiling as a national problem that deserved the attention of politicians and policymakers. This

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404. *See* Memorandum on Fairness in Law Enforcement, 1 PUB. PAPERS 906 (June 9, 1999).

405. *See* Ceci Connolly & Mike Allen, *Gore and Bradley Woo Minorities, Attack Records in Harlem Debate,* WASH. POST, Feb. 22, 2000, at A1.

406. Alschuler, *supra* note 166, at 163 (footnotes omitted) (alteration in original). The court opinion quoted by Professor Alschuler was *Martinez v. Village of Mount Prospect*, 92 F. Supp. 2d 780, 782 (N.D. Ill. 2000).

407. William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2142 (2002).

408. *See* Ballard v. Heineman, 548 F.3d 1132 (8th Cir. 2008); Trice v. Modesto City Police Dep't, No. 1:08-cv-01891-AWI-SMS, 2009 WL 102712 (E.D. Cal. Jan. 14, 2009); Rodriguez v. Cal. Highway Patrol, 89 F. Supp. 2d 1131 (N.D. Cal. 2000); *New Jersey Enters into Consent Decree on Racial Issues in Highway Stops*, 66 CRIM. L. REP. 251, 251–52 (2000).

409. *See* Johnson, *supra* note 235, at 901, 918–19.

410. *See* MATTHEW J. HICKMAN, U.S. DEP'T OF JUSTICE, TRAFFIC STOP DATA COLLECTION POLICIES FOR STATE POLICE, 2004, at 1–2 (2005).

411. *See id.*

growing public awareness arguably influenced developments in related areas. For example, it may have helped move the Ninth Circuit to bar officer reliance on "Hispanic appearance" in making immigration stops near the Mexican border, finding that such reliance was of little probative value in evaluating the immigration status of a person.[412]

Many commentators proclaimed that the reconsideration of the use of race in law enforcement made perfect sense. However, after the September 11 attacks, public opinion began to favor racial profiling, which does not affect the vast majority of U.S. citizens, as a central tool in the "war on terror."[413]

> Shortly after [September 11, 2001], 58 percent of the respondents to a Gallup poll said that airlines should screen passengers who appeared to be Arabs more intensely than other passengers. Half of the respondents who voiced an opinion favored requiring people of Arab ethnicity, including U.S. citizens, to carry special identification cards.[414]

The federal government's policies were in line with, and tended to confirm the wisdom of, the newfound public support of aggressive profiling of Arabs and Muslims in the name of national security.[415]

The federal government's profiling of Arabs and Muslims in the dragnet after September 11, 2001, promoted the legitimacy of racial profiling.[416] It also undermined federal efforts to pressure state and local law enforcement agencies to end profiling in criminal law enforcement, which had been a priority of the federal government under President Clinton. Indeed, a few local law enforcement agencies went so far as to refuse then-Attorney General John Ashcroft's request to interview Arabs and Muslims as part of the war on terror because this tactic, they claimed, amounted to impermissible racial profiling.[417]

Once government embraces the use of race-based statistical probabilities as a law enforcement tool, the argument logically follows that the probabilities justify similar law enforcement techniques across the board—from combating terrorism to fighting crime on the streets to apprehending undocumented immigrants. As they were for many years, statistical probabilities also can be employed to justify law enforcement targeting African-Americans, Latina/os,

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412. *See* United States v. Montero-Camargo, 208 F.3d 1122, 1135 (9th Cir. 2000) (en banc) ("Hispanic appearance is, in general, of such little probative value that it may not be considered as a relevant factor where particularized or individualized suspicion is required."); *see also supra* section I.F.1.b (discussing *Montero-Camargo*).

413. *See* Alschuler, *supra* note 166, at 163; *see, e.g.*, Peter H. Schuck, *A Case for Profiling*, AM. LAW., Jan. 2002, at 59.

414. Alschuler, *supra* note 166, at 163 (footnotes omitted).

415. *See supra* section I.F.1.c.

416. *Id.*

417. *See* Jim Adams, *Twin Cities Police Undecided on Helping FBI: They Fear Interviewing Mideast Men Would Be Profiling*, STAR TRIB. (Minneapolis, Minn.), Nov. 22, 2001, at B7; Fox Butterfield, *Police Are Split on Questioning of Mideast Men: Some Chiefs Liken Plan to Racial Profiling*, N.Y. TIMES, Nov. 22, 2001, at A1.

and Asian-Americans in cities across the United States.[418]

Abuses are likely to result from the reliance on statistical probabilities in law enforcement, sometimes in famous fashion. The federal government, for example, relied on probabilities, rather than individualized suspicion to justify the internment of persons of Japanese ancestry—citizens and noncitizens alike—during World War II.[419] Ultimately, the faulty logic of profiling threatens all minority communities in all areas of law enforcement.

Indeed, despite similar rates of illicit drug use,[420] disparate results in traffic stops of racial minorities greatly contribute to the disparate rates of criminal convictions and imprisonment of racial minorities.[421] Similarly, the focus on Latina/o "appearing" people in immigration enforcement results in disparate deportation rates in which Latina/os are overrepresented compared to their relative proportion of the population of immigrants in the United States.[422]

Immediately after September 11, the political wherewithal for eradicating racial profiling in law enforcement waned. Although the federal government officially condemns profiling in ordinary criminal law enforcement,[423] the efforts to end racial profiling by state and local police have lost steam. Thus, the impact of the profiling adopted after September 11 was felt not only by Arabs and Muslims but also by African-Americans, Latina/os, and other racial minorities resisting race-based law enforcement.

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418. *See* AM. CIVIL LIBERTIES UNION & THE RIGHTS WORKING GROUP, THE PERSISTENCE OF RACIAL AND ETHNIC PROFILING IN THE UNITED STATES: A FOLLOW-UP REPORT TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION 12–13 (2009), *available at* http://www.aclu.org/pdfs/humanrights/cerd_finalreport.pdf ("The disproportionate rates at which minorities are stopped and searched, in addition to the often high concentrations of law enforcement in minority communities, continue to have a tremendous impact on the over-representation of minorities (and especially members of African-American, Latino, and Native American communities) in the American criminal justice system."). The arrest of Harvard Professor Henry Louis Gates by Cambridge police in July 2009 again brought national attention to the issue of racial profiling. *See* Bernard E. Harcourt, Henry Louis Gates and Racial Profiling: What's the Problem? (Sept. 2009) (unpublished manuscript, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474809) (discussing racial profiling in connection with the arrest of Professor Gates); Angela Onwuachi-Willig, An Officer and a Gentleman: A "Post Racial" Arrest (Sept. 15, 2009) (unpublished manuscript, on file with author) (same).

419. *See* Korematsu v. United States, 323 U.S. 214, 224 (1944) (rejecting constitutional challenge to the internment of persons of Japanese ancestry during World War II); *see also supra* text accompanying note 65 (noting that the respondent's brief in *United States v. Brignoni-Ponce* compared use of race in that case to the use of race in the internment of the Japanese during World War II). *See generally* ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT (2001) (analyzing the internment of Japanese-Americans during World War II and the reparations movement in the 1980s).

420. *See supra* text accompanying note 229.

421. *See supra* text accompanying notes 230–42.

422. *See supra* text accompanying note 120.

423. *See* Kevin R. Johnson, *Racial Profiling After September 11: The Department of Justice's 2003 Guidelines*, 50 LOY. L. REV. 67 (2004) (reviewing Department of Justice policy attempting to reconcile ban on racial profiling in criminal law enforcement with profiling in the war on terror).

G. THE DIFFERENCE THAT REBELLIOUS LAWYERING CAN MAKE

The Supreme Court created Fourth Amendment law in *Whren v. United States* that, in combination with existing equal protection doctrine, has made it extremely difficult for individuals aggrieved by racial profiling in traffic stops to secure any legal relief. The end result is that law enforcement has not been significantly deterred by the law from engaging in profiling as a mode of law enforcement.

Unlike the attorneys for the defense in *Brignoni-Ponce*, the counsel for the defendants in *Whren* did not seem to make any missteps that sacrificed the rights of minorities generally in order for the individual to prevail in the case at hand. Whren's counsel sought to provide relief to victims of pretextual stops and vigorously opposed the provision of an exclusive toothless equal protection remedy for minorities victimized through racial profiling by law enforcement.

Truly rebellious lawyering, however, envisions strategies beyond simply resorting to the courts for social justice. Lawyers played an important role in the political campaign to end racial profiling in law enforcement. After the Supreme Court's decision in *Whren v. United States*, political pressures, including those spearheaded by civil rights organizations, replaced litigation-oriented strategies. For a time, such efforts bore fruit. Racial profiling became a nationally recognized problem and political leaders looked for ways to solve the problem.[424] The condemnation of profiling became so popular that even conservative political leaders well known for being tough on crime, including President George W. Bush and his first Attorney General John Ashcroft, joined the chorus. Studies followed. Consistent with the growing public opinion against racial profiling, state and local governments took steps to remedy a perceived problem.

Unfortunately, the political pressure to eradicate profiling receded after the tragic events of September 11, 2001, with racial profiling making a comeback of sorts. Many measures in the war on terror targeted Arabs and Muslims. This type of political setback is not extraordinary, but is an ordinary feature of the ebb and flow of politics and reflects the limited political power of minorities. It reveals the limits of the political powers of racial minorities—known in equal protection parlance as "discrete and insular minorities"[425]—in American social life. As a result, political action must be on a different time frame than litigation. In addition, the political terrain regularly shifts on controversial issues. One must expect political support for social justice initiatives to wax and wane over the years.

As this suggests, timing is all-important in the selection of a change strategy. Given the fear of the ongoing "crime wave" in the 1990s, resorting to the

424. *See supra* text accompanying notes 402–11.

425. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for . . . more searching judicial inquiry.").

political process initially made little sense for defendants like Whren and civil rights organizations. After the setback in the Supreme Court, however, a lawyer committed to social justice would need to look more closely at the political process, rather than the courts, as the source of a possible solution. Through political action, a movement to challenge racial profiling on moral and related grounds stood more of a chance of prevailing than returning to the courts. As society's views on crime softened, efforts to eradicate profiling took root.

The bottom line is that lawyers seeking to promote social change must consider all of the tools at their disposal. There are limits to what the law can do. Political action is the most appropriate avenue for relief in some circumstances. The focus on litigation as a first strategy results, in part, from *Brown v. Board of Education*'s having famously ended de jure segregation in the public schools and helped spark political action through the civil rights movement.[426] However, a political strategy to end public school segregation was doomed to fail, so that resort to the courts in the first instance made sense. Different political times may call for different sequencing of the deployment of change strategies.

III. LESSONS FROM *BRIGNONI-PONCE* AND *WHREN*

This Essay has argued that, despite the advocacy of criminal defendants, the U.S. Supreme Court has effectively authorized racial profiling in law enforcement. The Court's decisions, thus, are in no small part responsible for the fact that race dominates much of modern U.S. law enforcement.

In *United States v. Brignoni-Ponce*, the Court permitted "Mexican appearance" to be one factor in an immigration stop.[427] Immigration authorities immediately seized the "totality of the circumstances" approach endorsed by the Court. Because of the great discretion afforded immigration officers by the Supreme Court over the last few decades, race continues to dominate immigration enforcement to this day. Not surprisingly, claims of racial profiling are regularly made today by immigrants and U.S. citizens of certain national origin ancestries and physical appearances.[428]

In supporting law enforcement efforts once again in the "war on drugs," the *Whren* Court made any challenge to a pretextual stop close to impossible under the Fourth Amendment when the stop was based primarily on race.[429] This left defendants with the sole option of pursuing an equal protection remedy, with an onerous evidentiary burden, when challenging racial discrimination. Following the Court's decision in *Whren*, political efforts to challenge racial profiling made the most sense and initially made headway. Consequently, advocacy to end racial profiling increasingly centered on political, not litigation-based,

426. *See supra* note 219 and accompanying text.
427. *See supra* Part I.
428. *See supra* section I.F.
429. *See supra* Part II.

solutions.

Unfortunately, the events of September 11, 2001, noticeably slowed the movement to end racial profiling. To the contrary, the U.S. government relied heavily on racial, national origin, and religious profiles in the newly proclaimed "war on terror." The comeback of racial profiling and its subsequent retrenchment reveals the difficulties of racial minorities relying on the political process in pursuit of social justice and suggests the need for different minority groups to work together politically in order to eliminate racial profiling.[430] Unfortunately, we currently see a criminal justice system that, in operation today, has disparate impacts on minority communities, much as in the days of Jim Crow, with that system in effect sanctioned by the U.S. Supreme Court.

The Supreme Court, in *Brignoni-Ponce* and *Whren*, afforded vast discretion to law enforcement, despite the arguments of the defendants that such discretion would lead to undue reliance on race in law enforcement. The Court, led by Chief Justices Burger, Rehnquist, and Roberts, has greatly expanded the authority and power of law enforcement officers, and that discretion has exacerbated problems with racial profiling in law enforcement. Today, we find ourselves in a situation in which African-Americans and Latina/os, as well as Arabs and Muslims, claim that racial profiling is endemic to modern criminal and immigration enforcement.

Unfortunately, nothing coming remotely close to a solution to race-based law enforcement appears on the immediate horizon. In fact, the events of September 11, 2001 have set back efforts for political action to remedy race-conscious law enforcement on our streets and near our borders. The struggle continues.

Political action faces even greater challenges in combating racial profiling in immigration enforcement than ordinary criminal law enforcement. In no small part, this is the result of a significant portion of the Latina/o community affected by immigration enforcement being disenfranchised due to their status as noncitizens.[431] However, the Latina/o population—including a number of U.S. citizens—continues to grow and has increasingly demanded fair treatment in immigration law and enforcement, as well as in law enforcement generally.[432]

What can we expect in the future? Over time, the race-based teachings of *Brignoni-Ponce* and *Whren* have become increasingly embedded in law enforcement and criminal procedure jurisprudence. Together, the two decisions virtually guarantee that, all other things being equal, racial profiling will continue to plague criminal and immigration law enforcement for the indefinite future. A change in Fourth Amendment law would do much to dampen the incentives for racial profiling by law enforcement. Based on the current ideological composition of the courts, however, political action would be more likely to provide the

430. *See* Kevin R. Johnson, *The Case for African American and Latina/o Cooperation in Challenging Racial Profiling in Law Enforcement*, 55 FLA. L. REV. 341 (2003) (advocating multiracial coalitions to combat racial profiling by law enforcement).

431. *See* Johnson, *supra* note 198, at 1264–71.

432. *See* Johnson & Hing, *supra* note 188.

much-needed assistance in limiting undue reliance on race by law enforcement officers. We can expect continued protest against racial profiling in immigration enforcement in the future, and for the voices of minorities to increasingly promote political action on more general matters, such as reform of the U.S. immigration laws and their enforcement.

Whether through the evolution of constitutional law or legislative mandate, legal restrictions on the consideration of race by law enforcement officers are necessary and proper. As a beginning, the Supreme Court should revisit the authorization of racial profiling provided in *Brignoni-Ponce* and *Whren* and the vast discretion afforded law enforcement by the Court generally. Given the current state of law enforcement, the discretion afforded law enforcement officers does not seem to have resulted in especially effective law enforcement and has had intolerable consequences on equal protection under the law for racial minorities in the United States.

This Essay has sought to highlight how lawyers who seek to promote social justice and racial change—truly rebellious lawyers—must consider the impacts of their legal strategies not just on their clients but also on the greater community. Winning a good case for a client but creating bad law for the cause of social justice, with *Brignoni-Ponce* as an example, can occur unless care is taken and a long-term strategy is conceptualized and followed.

Even when a prudent legal strategy is followed, however, the courts can still develop law that injures minorities. *Whren* stands as an example. Consequently, rebellious lawyers must be ready and willing to resort to the political process, if need be, to secure social change.

Lawyers zealously representing their clients must appreciate that advocacy on behalf of the targets of race-based policing cannot be restricted to the courts. Political solutions to the problems of race-based law enforcement may be just as effective as ones achieved in the courts. As we see with the fallout of *Brignoni-Ponce* and *Whren*, however, the political process has struggled with the solutions.

In the future, in the effort to achieve lasting racial justice, attorneys and community advocates cannot ignore the courts or the legislatures. At the same time, they must highlight the effects of race-based law enforcement on the lives of real people, such as Humberto Brignoni-Ponce, a U.S. citizen of Puerto Rican ancestry stopped solely because of his "Mexican appearance," and Michael Whren and James Brown, two young African-American men who were drug suspects simply because of their race and spent many years in prison as a result. Highlighting the human impacts of the law can be an effective tool for social change in the political process.