
NOTES

THE REASONABLENESS OF A RACE-BASED SUSPICION: THE FOURTH AMENDMENT AND THE COSTS AND BENEFITS OF RACIAL PROFILING IN IMMIGRATION ENFORCEMENT

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I. INTRODUCTION

Claudia, a Mexican American with family roots in the United States since the mid-1800s, walked out of a grocery store, happily chatting with her three young children in Spanish as they walked toward her car.¹ Before arriving at her car, she was stopped by government officials and asked for proof of citizenship.² Speaking to the officers in accent-free English, she explained that she is in fact a United States citizen, offering her driver's license as proof.³ After rejecting her driver's license, the officers requested another form of identification as proof that she was in the United States legally.⁴ Eventually, Claudia gave the officers something that satisfied them, and they allowed her to continue with her children to her car.⁵ After

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1. 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, 91–92 (2005).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

the event, Claudia wondered what she might do in the future to avoid being stereotyped as an “undocumented Mexican.”⁶

In a similar event in 2012, officers from the Maricopa County Sheriff’s Office (“MCSO”) in Arizona were trained by Immigration and Customs Enforcement (“ICE”) to use “Mexican ancestry”⁷ as a factor in determining whether any given individual may be undocumented.⁸ As a result, MCSO officers targeted individuals on the sole basis of their Mexican appearance, in violation of the Fourth Amendment.⁹ Around the same time, officers from the Alamance County Sheriff’s Office (“ASCO”) in North Carolina were told by their sheriff to “go out there and get me some of those taco eaters.”¹⁰ Several years later, the Department of Justice (“DOJ”) found that the ASCO had engaged in “an egregious pattern of racial profiling” against Latinos.¹¹

Stories like these illustrate why a discussion of racial profiling in immigration enforcement is particularly important in 2015. For one, data suggests that racial profiling of Latinos has increased¹² as the role of local and state police has been expanded to include enforcing federal immigration law.¹³

6. *Id.* This anecdote is based on “F’s” account of her experience during the Chandler Round-Up. *Id.* The Chandler Round-Up was an immigration operation conducted by the Chandler Police Department and Tucson Border Patrol Sector in 1997. *Id.* at 71–72.

7. Throughout this Note, I intentionally use terms such as “Mexican ancestry,” “Mexican appearance,” and “Latino appearance” in the context in which they are generally used throughout racial profiling literature. I only place the words in quotation marks when they are used in the cited materials.

8. *Melendres v. Arpaio*, 989 F. Supp. 2d 822, 846 (D. Ariz. 2009).

9. *Ortega Melendres v. Arpaio*, 598 F. Supp. 2d 1025, 1034–36 (D. Ariz. 2009).

10. Jason A. Cade, *Policing the Immigration Police: ICE Prosecutorial Discretion and the Fourth Amendment*, 113 COLUM. L. REV. SIDEBAR 180, 181 (2013), available at http://www.columbialawreview.org/Policing-the-Immigration-Police_Cade.

11. *Justice Department Releases Investigative Findings on the Alamance County, N.C., Sheriff’s Office*, U.S. DEP’T JUST. (Sept. 18, 2012), <http://www.justice.gov/opa/pr/2012/September/12-crt-1125.html>.

12. According to one study, more than 93 percent of people arrested under the Secure Communities program are Latino, even though Latinos make up only 77 percent of the undocumented population in the United States. AARTI KOHLI, PETER L. MARKOWITZ & LISA CHAVEZ, CHIEF JUSTICE EARL WARREN INST. ON LAW & SOC. POLICY, *SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 1, 2* (2011) [hereinafter WARREN INSTITUTE REPORT], available at http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf. See also Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 134 (2013) (finding that the correlation between the Secure Communities program, see *infra* note 64, and the Hispanic population is “extremely persistent”).

13. Local and state police involvement in enforcing immigration law is a fairly recent occurrence, but it has been criticized since the outset because it has led to additional claims of racial profiling against Latinos. *E.g.*, Carrie L. Arnold, Note, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113, 117 (2007);

Because a person is not visibly identifiable as being undocumented, the basic problem with local police enforcing immigration law is that police officers who are often not adequately trained, and in some cases not trained at all, in federal immigration enforcement will improperly rely on race or ethnicity as a proxy for undocumented status [S]tate or local police with minimal training in immigration law are put on the street with a mandate to arrest “illegal aliens.” The predictable and inevitable result is that *any* person who looks or sounds “foreign” is more likely to be stopped by police, and more likely to be arrested (rather than warned or cited or simply let go) when stopped.¹⁴

Furthermore, an examination of racial profiling in immigration enforcement is especially timely because it can inform agency guidelines and pending legislation.

In December 2014, the DOJ released updated guidelines on racial profiling that include not only race and ethnicity, but also national origin and religion as protected categories.¹⁵ While the new guidelines improve upon the oft-criticized¹⁶ 2003 guidelines¹⁷ by including national origin and religion as protected categories, and by covering interior immigration enforcement,¹⁸ they have several holes. First, they provide little direction for how the new guidelines should be enforced.¹⁹ Second, it is unclear how the guidelines should apply to local and state police officers who routinely

Anna C. Erwin, Note, *Arizona Senate Bill 1070, Brignoni, and the Convention on the Elimination of All Forms of Racial Discrimination: Has the United States Complied with Its Treaty Obligations, and Should It in the Future?*, 11 WASH. U. GLOBAL STUD. L. REV. 193, 208–09 (2012).

14. *Written Statement for a Joint Hearing on the Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws*, ACLU (Apr. 2, 2009), https://www.aclu.org/files/images/asset_upload_file968_39242.pdf. See also Cox & Miles, *supra* note 12, at 135 (“Our findings . . . reveal[] a troubling correlation between ethnicity and the [Secure Communities] program deployment.”).

15. U.S. DEP’T OF JUSTICE, GUIDANCE FOR FEDERAL LAW ENFORCEMENT AGENCIES REGARDING THE USE OF RACE, ETHNICITY, GENDER, NATIONAL ORIGIN, RELIGION, SEXUAL ORIENTATION, OR GENDER IDENTITY (2014) [hereinafter 2014 DOJ GUIDANCE], available at <http://www.justice.gov/sites/default/files/ag/pages/attachments/2014/12/08/use-of-race-policy.pdf>

16. Immigrants’ rights groups opposed the guidelines’ failure to prohibit national origin profiling, since that is the main type of profiling used in immigration enforcement. *E.g.*, Coalition Letter to Att’y Gen. Eric Holder (May 7, 2012), available at http://www.civilrights.org/press/2014/DOJ-Letter-1_2014.pdf. See also Kevin R. Johnson, *Racial Profiling After September 11: The Department of Justice’s 2003 Guidelines*, 50 LOY. L. REV. 67, 81–87 (2004) (delineating the criticisms of the DOJ’s 2003 guidelines).

17. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (2003) [hereinafter 2003 DOJ GUIDANCE], available at http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf.

18. Margo Schlanger, *When Is It Okay to Racially Profile?*, POLITICO (Dec. 18, 2014), <http://www.politico.com/magazine/story/2014/12/government-racially-profile-113676.html>.

19. *Id.*

enforce federal immigration law. Third, the guidelines' requirement that federal agencies train enforcement officers and collect data is vague and unclear.²⁰

Significantly, Congress's 2014 attempt at comprehensive immigration reform—the Border Security, Economic Opportunity, and Immigration Modernization Act (the “Act”)—also attempted to address racial profiling.²¹ In fact, the Act's provisions on racial profiling mirrored the 2003 DOJ guidelines²² that Attorney General Eric Holder replaced, prohibiting race and ethnicity-based profiling, but declining to prohibit profiling on the basis of national origin and religion.²³ While reports suggest that the 2014 attempt at comprehensive immigration reform may never be passed,²⁴ a discussion of the complex issues surrounding race and immigration enforcement can help assure that fair and effective legislation is passed in the future.

Thus, given that current events, agency action, and pending legislation put racial profiling in the limelight, this Note will explore how racial profiling in immigration enforcement should be examined and what policy changes can be made to ensure fair enforcement. Part II examines the current state of racial profiling jurisprudence and explains the methodology with which the “reasonableness” of racial profiling in immigration enforcement should be considered under the Fourth Amendment. Part III balances the government interests and individual rights that are implicated when race is used as a factor in immigration enforcement to determine whether using race in immigration enforcement is “reasonable.” Finally, Part IV sets forth recommendations for addressing the individual rights and governmental interests implicated in immigration enforcement. Part V concludes.

II. FOURTH AMENDMENT JURISPRUDENCE IN THE IMMIGRATION CONTEXT

Because noncitizens are entitled to Fourth Amendment protections,

20. 2014 DOJ GUIDANCE, *supra* note 15. *See also infra* Part IV.C.

21. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 3305 (2013), available at <https://www.govtrack.us/congress/bills/113/s744/text>; Border Security, Economic Opportunity, and Immigration Modernization Act, H.R. 15, 113th Cong. § 3305 (2013), available at <https://www.govtrack.us/congress/bills/113/hr15/text>.

22. 2003 DOJ GUIDANCE, *supra* note 17.

23. Compare *id.*, with S. 744 § 3305(a), and with H.R. 15 § 3305(a).

24. Adam Edelman, *Republicans Won't Commit to Immigration Reform This Year, but White House Still Optimistic*, N.Y. DAILY NEWS (Feb. 2, 2014, 4:19 PM), <http://www.nydailynews.com/news/politics/republicans-won-commit-immigration-reform-year-white-house-optimistic-article-1.1599683>.

racial profiling in immigration enforcement implicates the Fourth Amendment and its protections.²⁵ The Fourth Amendment protects the right to liberty and freedom from unlawful searches and seizures.²⁶ Thus, while a police officer may stop and question noncitizens without seizing them, any stop that “by means of physical force or show of authority” restrains the liberty of a person is considered a seizure.²⁷ For a seizure to be constitutional, it must be justified by a reasonable suspicion.²⁸ In other words, the officer must have a “particularized” and objective suspicion, based on the totality of the circumstances, that the person being stopped is doing something criminal.²⁹

Determining whether an officer’s suspicion is reasonable is a fact-intensive inquiry and is “not ‘readily, or even usefully, reduced to a neat set of legal rules.’”³⁰ Thus, the Supreme Court has described the analysis as a “balance between the public interest and the individual’s right to personal security free from arbitrary interference by law officers.”³¹ Stated differently, “the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.”³² While the majority of Fourth Amendment cases involve police officers stopping citizens, several cases involving noncitizens are instructive.

A. *UNITED STATES V. BRIGNONI-PONCE*

The Supreme Court articulated the governing standard for Fourth Amendment questions in the context of immigration enforcement in *United States v. Brignoni-Ponce*.³³ There, a stop by two Border Patrol officers violated the Fourth Amendment because the officers relied exclusively on the “Mexican appearance” of the passengers in the car that they stopped.³⁴ While the Court held that *exclusive* reliance on “Mexican appearance” was not reasonable, in dicta, it addressed the balancing test of the reasonable suspicion analysis and noted that “[t]he likelihood that any given person of

25. *Cotzojay v. Holder*, 725 F.3d 172, 181 (2d Cir. 2013) (“[I]t is uncontroversial that the Fourth Amendment applies to aliens and citizens alike.”).

26. U.S. CONST. amend. IV.

27. *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968).

28. *Id.* at 27.

29. *United States v. Cortez*, 449 U.S. 411, 417–18 (1981).

30. *United States v. Sokolow*, 490 U.S. 1, 7–8 (1989) (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)).

31. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) (citing *Terry*, 392 U.S. at 20–21).

32. *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

33. *Brignoni-Ponce*, 422 U.S. at 873.

34. *Id.* at 886–87.

Mexican ancestry is an alien is high enough to make Mexican appearance a *relevant factor*” in forming a reasonable suspicion for an immigration stop.³⁵

The Court also considered the individual rights and government interests implicated in immigration enforcement, concluding that the burden of stereotypes and stigma placed on those with a “Mexican appearance” was “modest” and justified in light of the social and economic costs of illegal immigration:³⁶

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 INS³⁷ now suggests there may be as many as 10 or 12 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.³⁸

Although both conclusions reached by the Court were made using information that is now out of date,³⁹ lower courts still frequently cite *Brignoni-Ponce* for the proposition that race can be used as a factor in police enforcement.⁴⁰ The Court has never revisited its holding and dicta from *Brignoni-Ponce*.

B. NINTH CIRCUIT DECISIONS

1. *United States v. Montero-Camargo*

In 2000, the Ninth Circuit considered in part whether Border Patrol officers could permissibly use Mexican appearance as a factor generating reasonable suspicion for an immigration stop.⁴¹ Disagreeing with the reasoning from *Brignoni-Ponce*, the court pointed out that using race as a

35. *Id.* (emphasis added).

36. *Id.* at 880.

37. INS is now known as ICE.

38. *Brignoni-Ponce*, 422 U.S. at 878–79 (footnote omitted).

39. See Kevin R. Johnson, *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*, 98 GEO. L.J. 1005, 1024–25 (2010) (pointing out many of the false assumptions and myths about the social and economic costs imposed by undocumented immigrants).

40. 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, 1220–21 (10th Cir. 2006); *United States v. Singh*, 415 F.3d 288, 294–95 (2d Cir. 2005).

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

proxy for undocumented status is not only irrelevant to immigration policing, but also inappropriate.⁴²

First, the court noted that because the Latino population in the United States had increased five fold since the decision in *Brignoni-Ponce*, the Mexican appearance of any given person was no longer relevant to establishing a reasonable suspicion for an immigration stop, especially in areas densely populated with Latinos.⁴³ Second, it noted that race-based stops are also inappropriate, given the costs and benefits:

Stops based on race and 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.⁴⁴

Thus, the *Montero-Camargo* court explicitly distanced itself from the Supreme Court's decision in *Brignoni-Ponce*. Twenty-five years after the *Brignoni-Ponce* decision, it seemed as though courts would begin to recognize that using race as a factor in immigration policing was both irrelevant and inappropriate.⁴⁵

2. *United States v. Manzo-Jurado*

Six years later, however, in *United States v. Manzo-Jurado*, the Ninth Circuit noted that Mexican appearance was a relevant factor in forming a reasonable suspicion for an immigration stop in an area sparsely populated with Latinos.⁴⁶ There, a Border Patrol officer stopped a group of Latinos near the Canadian border.⁴⁷ Although the officer's stop was ultimately held to be unconstitutional, the court cited *Brignoni-Ponce* for the proposition that race is a permissible factor in forming a reasonable suspicion, despite the Ninth Circuit's *Montero-Camargo* decision six years earlier.⁴⁸ Thus, the Ninth Circuit retreated from its holding in *Montero-Camargo*, noting that race-based stops in the immigration context constitute a small infringement on the rights of Latinos, at least in an area in which fewer Latinos live.⁴⁹

42. *Id.*

43. *Id.* at 1133.

44. *Id.* at 1135.

45. See *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 237 (2d Cir. 2006) (“[W]ere there evidence that the stop was based on race, the violation would be egregious . . .”).

46. *United States v. Manzo-Jurado*, 457 F.3d 928, 935 n.6 (9th Cir. 2006).

47. *Id.* at 936.

48. *Id.* at 935.

49. *Id.*

C. TERRORISM CONTEXT

In *Farag v. United States*, two Arab men were stopped in a New York airport by at least ten armed SWAT team members with dogs and shotguns.⁵⁰ In the ensuing *Bivens* action, the defendants claimed that “Arab ethnicity” should be a permissible factor in a reasonable suspicion calculus because Arabs have a much greater propensity for terrorism than other ethnic groups.⁵¹ In rejecting the defendants’ argument, the U.S. District Court for the Eastern District of New York noted that *Brignoni-Ponce* is the only decision known to have used statistics to conclude that racial characteristics are in any way suggestive of immigration status or criminality.⁵² Furthermore, it pointed out that “the likelihood that any given airline passenger of Arab ethnicity is a terrorist is so negligible that Arab ethnicity has no probative value in a particularized reasonable suspicion . . . determination.”⁵³

The court concluded by citing several federal cases that rejected race as relevant or appropriate to a reasonable suspicion calculus⁵⁴ and noting that even a fear of terrorism does not justify the erosion of bedrock constitutional principles like the Fourth Amendment.⁵⁵

D. METHODOLOGY

As demonstrated above, when engaging in a cost-benefit analysis to determine whether any given factor can permissibly contribute to reasonable suspicion for making a stop, courts recently have asked two questions. First, courts query whether the factor used by police is in any way indicative of the type of behavior being policed.⁵⁶ In the context of immigration enforcement, the question thus becomes whether Mexican appearance is related to one’s likelihood of being undocumented and

50. *Farag v. United States*, 587 F. Supp. 2d 436, 442 (E.D.N.Y. 2008).

51. *Id.* at 463.

52. *Id.* at 464.

53. *Id.*

54. *See, e.g., Almeida-Amaral v. Gonzales*, 461 F.3d 231, 237 (2d Cir. 2006) (“[W]ere there evidence that the stop was based on race, the violation would be egregious”); *United States v. Swindle*, 407 F.3d 562, 570 (2d Cir. 2005); *United States v. Clay*, 640 F.2d 157, 159 (8th Cir. 1981) (“[T]his court has consistently rejected the use of race in combination with other factors to justify investigative searches and seizures.”); *United States v. Ruiz*, 961 F. Supp. 1524, 1532 (D. Utah 1997) (“[G]eneral circumstances of a person’s race or ethnicity are not a proper factor in determining reasonable suspicion”); *United States v. Hayden*, 740 F. Supp. 650, 653 (S.D. Iowa 1990) (“[D]efendants’ race would provide no basis for a reasonable suspicion, and it would be fundamentally wrong for an officer to act, even in small part, on the basis of a motorist’s race.”).

55. *Farag*, 587 F. Supp. 2d at 465–68.

56. *See supra* Part II.A–C.

whether the use of race in immigration enforcement is effective in promoting the goal of removing more undocumented immigrants.

Second, courts weigh the government interest in preventing the activity against the individual rights infringed by using that factor. Thus, in the immigration context, the inquiry is whether the government interest in preventing illegal immigration and its associated costs outweighs the consequences of using race as a proxy for undocumented status. If both of these questions cannot be answered in the affirmative, immigration stops based on Mexican appearance should not be considered “reasonable.”

III. THE REASONABLENESS OF A RACE-BASED SUSPICION

A. IS THE USE OF RACE AS A PROXY FOR UNDOCUMENTED STATUS RELEVANT TO IMMIGRATION ENFORCEMENT?

“By definition, race cannot affect probable cause or reasonable suspicion calculations unless it is statistically related to the suspected criminal activity.”⁵⁷ Thus, the inquiry here involves determining whether there is a strong statistical correlation between all Latinos in the United States and undocumented status. Absent such a correlation, race is irrelevant to immigration policing, except when used as a suspect descriptor.

While Latinos made up approximately 6 percent of the population in 1975 when the Supreme Court decided *Brignoni-Ponce*,⁵⁸ Latinos now make up 17.1 percent of the United States population.⁵⁹ There are 54 million Latinos in the United States⁶⁰ and Latinos make up approximately 77 percent of the 12 million undocumented immigrants in the United States.⁶¹ Thus, at least hypothetically, approximately one in six Latinos is

57. Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 237 (1983).

58. Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Division, and States*, U.S. CENSUS BUREAU (Sept. 2002), <http://www.census.gov/population/www/documentation/twps0056/twps0056.html> (calculating the percentage based on 1980 data).

59. *State & County QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last updated Dec. 3, 2014) (2013 estimates). Census Bureau statistics include, to the extent they can, undocumented immigrants. *Immigrants and the Census*, LEADERSHIP CONF. ON CIV. & HUM. RTS., <http://www.civilrights.org/census/messaging/immigrants.html> (last visited Jan. 7, 2015).

60. *State & County QuickFacts*, *supra* note 59 (17.1 percent of 316 million).

61. JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES i (2009), available at <http://www.pewhispanic.org/files/reports/107.pdf>.

undocumented. If a police chief tells his officers that most undocumented immigrants will have a Mexican appearance, but only one in six of those with a Mexican appearance will be undocumented, he is setting up his officers for failure. Indeed, the officers, using Mexican appearance as a predictor, will be wrong five out of six times. In being wrong, the officers will also intrude on the Fourth Amendment rights of U.S. citizens and undocumented immigrants alike.

Because of statistics like this, any police practice relying on race as a proxy for undocumented status is not likely to yield any benefit. In fact, such police practices may even come at significant cost.⁶² Overbroad ethnic generalizations about who might be undocumented may actually undermine effectiveness, as police officers focus in on one specific type of appearance, while ignoring the rest.⁶³ Unfortunately, data suggests that immigration enforcement officers may already be zeroing in almost exclusively on those with a Latino appearance. Ninety-three percent of people identified by the Secure Communities program⁶⁴ have been Latino, even though Latinos only make up 77 percent of the undocumented population.⁶⁵

While it is not uncommon for police to stereotype, the fact that racial profiling and stereotyping generally decrease the effectiveness of policing is fairly well established.⁶⁶ As Professor David Harris has noted:

[W]hen race or ethnic appearance became a factor in assessing suspicion—not the only factor but one factor among many—police officers did not get the higher returns on their enforcement efforts that

62. David Cole, *Enemy Aliens*, 54 STAN L. REV. 953, 976–77 (2002).

63. *Id.*

64. The Secure Communities program is an information-sharing initiative between ICE and the Federal Bureau of Investigation, designed to “identify criminal aliens without imposing new and additional requirements on state and local law enforcement.” *Secure Communities FactSheet*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities (last visited Oct. 3, 2013). Under the Secure Communities program, local and state officials receive little to no training on how to enforce immigration laws or avoid racial profiling, but are tasked with enforcing the laws. Katarina Ramos, Note, *Criminalizing Race in the Name of Secure Communities*, 48 CAL. W. L. REV. 317, 326–27 (2012). The Secure Communities program has been criticized often for leading to racial profiling. *Id.* at 335. See also Steven Papazian, Note, *Secure Communities, Sanctuary Laws, and Local Enforcement of Immigration Law: The Story of Los Angeles*, 21 S. CAL. REV. L. & SOC. JUST. 283, 306 (2012) (“[I]ncreased availability of immigration records and enforcement by local police could lead to, rather than discourage, racial profiling.”).

65. WARREN INSTITUTE REPORT, *supra* note 12, at 2; Cox & Miles, *supra* note 12, at 135 (“[H]it rates’ under the [Secure Communities] program do not appear to correlate meaningfully with a county’s Hispanic population. Yet if the proportion of a county that was Hispanic were truly correlated with the proportion of the county that was in violation of immigration law, then all else equal one would expect hit rates to correlate with ethnicity.”).

66. David A. Harris, *Using Race or Ethnicity as a Factor in Assessing the Reasonableness of Fourth Amendment Activity: Description, Yes; Prediction, No*, 73 MISS. L.J. 423, 457 (2003).

they were expecting. Instead, they did not do as well; their use of nonracial cues (i.e., observation of suspicious behavior) against whites did a better job than racial profiling, and did not sweep such a high number of innocent people into law enforcement's net.⁶⁷

According to one study, when police officers used only behavioral cues to form a reasonable suspicion for a criminal stop, their rate of success in assessing criminality with whites was two times greater than it was with blacks and five times greater than it was with Latinos.⁶⁸ “In other words, the police were stopping a disproportionately large share of minorities . . . yet their rate of success was much lower.”⁶⁹

The ineffectiveness of racial profiling in immigration enforcement specifically is exacerbated by the fact that it is both over- and under-inclusive. On the one hand, its reliance on Latino appearance as an indicator for immigration status is under-inclusive, since it ignores that “Hispanics have varying skin tones, assorted eye and hair colors, and radically different facial features.”⁷⁰ Light-skinned Latinos, who are just as likely—according to statistical generalizations—to be undocumented, are passed over by police enforcing immigration laws.⁷¹ On the other hand, racial profiling in immigration enforcement also over-inclusively focuses almost exclusively on Latinos as undocumented, even though they comprise only 77 percent of the undocumented population.⁷²

In essence, racial profiling offers a “low rate of return” and in many cases leads to police ineffectiveness.⁷³ Race may work as a “descriptor,” but it serves poorly as a “predictor” of criminality or undocumented status.⁷⁴ Thus, it is not relevant to establishing a reasonable suspicion for an immigration stop.⁷⁵

67. *Id.*

68. *Id.*

69. *Id.*

70. Anthony E. Mucchetti, *Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities*, 8 HARV. LATINO L. REV. 1, 19 (2005).

71. *See id.* (“Even if targeting Hispanics disproportionately . . . were a sound policing practice, this approach would fail to accomplish this goal since not all Latinos fit the ‘dark haired, brown skinned’ profile.”).

72. WARREN INSTITUTE REPORT, *supra* note 12.

73. Harris, *supra* note 66, at 457–59. *See also* 2014 DOJ GUIDANCE, *supra* note 15, at 2 (“Biased practices, as the Federal government has long recognized, are unfair . . . and perpetuate negative and harmful stereotypes. Moreover—and vitally important—biased practices are ineffective. As Attorney General Eric Holder has stated, such practices are ‘simply not good law enforcement.’”).

74. Harris, *supra* note 66, at 457–59.

75. *See, e.g., id.* (discussing the ineffectiveness of “profile-based law enforcement”).

B. IS THE USE OF RACE IN IMMIGRATION ENFORCEMENT APPROPRIATE
GIVEN THE COSTS AND BENEFITS?

1. Costs of Using Race as a Proxy for Undocumented Status in
Immigration Enforcement

a. Stigma

In 2013, a Mexican-American classmate of mine, who was born in the United States, went to the U.S. Citizenship and Immigration Services (“USCIS”) office in Los Angeles to submit documents on behalf of an undocumented immigrant she was representing in immigration proceedings. When she appeared at the window to drop off the documents, the employee with whom she spoke immediately asked, “Is this application for you?”, assuming that because of her appearance, she must be undocumented. As she reflected upon this experience with me, she noted that this was not the first, nor would it be the last time someone assumed she was not a member of American society because of her appearance.

While my classmate was not stopped by the police, her story illustrates two distinct harms faced by Latinos who are subjected to race-based stops in immigration enforcement, whether by ICE officers or local and state police officials. First, when their status in this country is questioned, Latinos are marginalized as they are subjected to stigma, embarrassment, and humiliation to which other groups are not exposed.⁷⁶ Second, when government officials make a concerted effort to remove individuals of a particular ethnicity from the United States, the status of all persons of that ethnicity is affected and the status of those who are lawfully in this country is subsequently diminished.⁷⁷ One commentator has referred to Latino U.S. citizens as enjoying “diluted membership rights” as a result of such treatment.⁷⁸

Importantly, the stigma imposed on Latinos is especially burdensome in the immigration context because policing is completely proactive.⁷⁹ Because police are seeking out those who they think may be undocumented within the general population rather than attempting to find a suspect on the basis of a suspect description, there is an incentive for them to investigate those who may lead to a greater “payoff.”⁸⁰ Since Latinos represent, in the

76. Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 722–23 (2000).

77. *Id.*

78. *Id.* at 724.

79. Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 216.

80. *Id.*

eyes of many, a goldmine of undocumented immigrants, police attention is largely devoted to them, thereby increasing the burden exponentially.⁸¹ As such, the burden of stigma falls not only on undocumented immigrants, but also on citizens, meaning that approximately 17.1 percent of the United States population is burdened by race-based immigration enforcement because of the color of their skin.⁸²

b. Impairment of Police-Community Relations

The use of race as a factor in immigration enforcement may also draw a further divide between police officers and the communities they serve,⁸³ increasing Latinos' distrust of police officers exponentially.⁸⁴ Since local law enforcement relies so heavily on community-based policing, the relationship of trust that exists between the community and law enforcement is of the utmost importance.⁸⁵ When the relationship of trust is violated, not only will victims of crimes be less likely to come forward, but witnesses of crimes could also be less likely to come forward to the police or to testify in court.⁸⁶ Such a consequence could occur even amongst Latinos with legal status, given that even they could be questioned about their immigration status.⁸⁷

Many Latinos live in very tight-knit communities, in which news about the use of race in immigration enforcement could spread quickly.⁸⁸ "Police officers and executive officials have recognized that disparate treatment creates mistrust of the government by non-white citizens,"⁸⁹ and distrust of police officers inevitably leads to a decrease in public safety in any given community.⁹⁰

81. *Id.* at 214–16.

82. Latinos make up approximately 17.1 percent of the United States population. *State and County QuickFacts*, *supra* note 59.

83. Johnson, *supra* note 76, at 716.

84. Kristin Connor, Note, *Updating Brignoni-Ponce: A Critical Analysis of Race-Based Immigration Enforcement*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 567, 610–11 (2008). The story of Michael Brown, a young, black male who was gunned down by a Ferguson, Mo. police officer in August of 2014, illustrates this point very well. While the situation did not involve immigration or Latinos, the St. Louis community's well documented, violent reaction to Brown's death was prompted largely by the fact that many believed Brown was killed because of the color of his skin. Rachel Clarke & Christopher Lett, *What Happened When Michael Brown Met Officer Darren Wilson*, CNN, <http://www.cnn.com/interactive/2014/08/us/ferguson-brown-timeline> (last updated Nov. 11, 2014).

85. Connor, *supra* note 84, at 611–12.

86. Mucchetti, *supra* note 70, at 21–22.

87. Reports show that 3,600 U.S. citizens were apprehended as a result of Secure Communities. WARREN INSTITUTE REPORT, *supra* note 12, at 4.

88. Mucchetti, *supra* note 70, at 21.

89. Connor, *supra* note 84, at 610–11.

90. Mucchetti, *supra* note 70, at 21.

c. Reinforcement of Stereotypes and Animus Toward Latinos

While animus toward Latinos is certainly not a direct product of racial profiling in immigration enforcement, it is bred by the same sentiment that favors the use of race in immigration enforcement. When government officials discriminate on the basis of race in an effort to enforce federal immigration law, such behavior may breed animus toward Latinos and encourage other citizens to take the law into their own hands to expel “foreigners.”⁹¹ Indeed, “[n]egative stereotypes and unfavorable attitudes toward [Latinos] can cause individuals to treat them differently than nonstereotyped group members.”⁹² As has already been discussed,⁹³ racially discriminatory immigration enforcement has a way of tagging Latinos “as perpetual foreigners in their own land,”⁹⁴ and gives citizens a reason to treat all Latinos as outsiders.

There is some evidence that the prolonged debate over immigration reform and the government’s use of race in enforcing immigration laws have an impact on animus toward Latinos and may even lead to hate crimes.⁹⁵ A 2010 hate crime statistics report published by the Federal Bureau of Investigation (“FBI”) noted that 66.6 percent of victims of ethnically motivated hate crimes in 2010 were attacked because of “anti-Hispanic bias.”⁹⁶ Indeed, when local, state, or federal government officials permit the use of race in order to expel “alien immigrants,” such dialogue may “lend legitimacy to a range of anti-immigration activities conducted by civilians.”⁹⁷ Thus, race-based immigration enforcement “implicitly encourages race-based discrimination by private individuals against Latina/os and immigrants in American social life. Private citizens thus often support governmental reliance on race and, as a corollary, believe it permissible to rely on racial cues in private and social life.”⁹⁸ As such, negative rhetoric about immigrants and the view that Latinos are all undocumented immigrants may be correlated with an upward trend in

91. Johnson, *supra* note 76, at 733–34.

92. L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2048–49 (2011).

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

94. Mucchetti, *supra* note 70, at 16.

95. *Hate Crime Statistics 2010*, FBI (Nov. 2011), <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010>.

96. *Id.*; Kevin R. Johnson & Joanna E. Cuevas Ingram, *Anatomy of a Modern Day Lynching: The Relationship Between Hate Crimes Against Latinas/os and the Debate over Immigration Reform*, 91 N.C. L. REV. 1613, 1625 (2013).

97. Mary Romero, *Are Your Papers in Order?: Racial Profiling, Vigilantes, and “America’s Toughest Sheriff”*, 14 HARV. LATINO L. REV. 337, 349 (2011).

98. Johnson & Ingram, *supra* note 96, at 1628.

violence against Latinos.⁹⁹

One example of how such anti-immigrant animus can lead to violence is found in the story of Luis Ramirez.¹⁰⁰ Ramirez was attacked by four white teens in Shenandoah, Pennsylvania after he spoke to them in Spanish.¹⁰¹ During the ensuing altercation that eventually led to his death, one of the teens yelled “This is Shenandoah. This is America. Go back to Mexico,” while another yelled “Go home, you Mexican motherfucker.”¹⁰² In the years leading up to Ramirez’s death, there had been heated debate about local immigration enforcement and an influx of Latinos in the area.¹⁰³

2. Possible Government Interests in Using Race as a Proxy for Undocumented Status

In *Brignoni-Ponce*, the Supreme Court noted that the costs of immigration—which included economic costs, social costs, and a drain on public services—provided the justification for using “Mexican appearance” as proxy for undocumented status.¹⁰⁴ Thus, determining if and how government interests are affected by illegal immigration helps determine whether racial profiling is appropriate. Hypothetically, if the government interest in a strong economy were heavily impacted by illegal immigration, one might conclude that racial profiling to remove additional Latinos was justified, even if the harm of racially profiling Latinos were enormous. This type of justification is often set forth by proponents of racially profiling those with an “Arab appearance” in airports: because the harm done by a terrorist attack is so great, racial profiling is justified, irrespective of the harm done to those with an “Arab appearance,” they say.¹⁰⁵ In the context of Latinos and immigration enforcement, most of the government interests that could justify race-based immigration enforcement are macroeconomic.

a. The Impact of Illegal Immigration on Jobs and the Economy

One economic cost commonly used to justify the use of “Mexican

99. Christina Iturralde, *Rhetoric and Violence: Understanding Incidents of Hate Against Latinos*, 12 N.Y. CITY L. REV. 417, 424–25 (2009).

100. Johnson & Ingram, *supra* note 96, at 1630.

101. *Id.* at 1630–31.

102. *Id.*

103. *Id.* at 1628–29.

104. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 886–87 (1975).

105. *E.g.*, Deborah A. Ramirez, Jennifer Hoopes & Tara Lai Quinlan, *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195, 1195 (2003); Thomas M. McDonnell, *Targeting the Foreign Born by Race and Nationality: Counter-Productive in the “War on Terrorism”?*, 16 PACE INT’L L. REV. 19, 21–22 (2004).

appearance” as a factor in forming a reasonable suspicion is the idea that undocumented immigrants are “competing with citizens and legal resident aliens for jobs.”¹⁰⁶ While available data is hardly conclusive, most data suggests that such a belief is largely unfounded, at least today.¹⁰⁷ In reality, immigrants’ different skills complement the skills of domestic workers and thus “immigration increases the average wages of all native-born workers, except those who do not have a high-school diploma.”¹⁰⁸

To be sure, illegal immigration can have tangible impacts on low-skilled, domestic workers in discrete, urban areas where many undocumented immigrants tend to live.¹⁰⁹ In some areas, an influx of immigrants may compete with other low-wage workers for jobs and subsequently force some of those low-wage workers to other areas, creating a ripple effect throughout the country, an effect known as wage depression.¹¹⁰ However, a 2010 study found that the wage for the lowest-skilled workers in the United States likely decreased only 0.1 percent from 1996 to 2006 as a result of immigration.¹¹¹

Besides not meaningfully harming the job market or the economy, immigration actually contributes to the U.S. economy on a more macroeconomic level as well. One economist estimated that undocumented “immigrants contributed \$428 billion dollars to [America’s] \$13.6 trillion gross domestic product in 2006.”¹¹² Moreover, low-cost immigrant labor

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

107. KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 133 (2007).

108. Giovanni Peri, *Immigrants, Skills, and Wages: Reassessing the Economic Gains from Immigration*, IMMIGR. POL’Y IN FOCUS, Mar. 2006, at 2–3, available at <http://www.immigrationpolicy.org/special-reports/immigrants-skills-and-wages-measuring-economic-gains-immigration>. See also GIOVANNI PERI, FED. RESERVE BANK OF S.F., ECONOMIC LETTER: THE EFFECT OF IMMIGRANTS ON U.S. EMPLOYMENT AND PRODUCTIVITY 2–3, (Aug. 30, 2010), available at <http://www.frbsf.org/economic-research/publications/economic-letter/2010/august/effect-immigrants-us-employment-productivity/el2010-26.pdf> (“[T]he total gains accruing to some U.S.-born workers are larger than the total losses suffered by others.”).

109. JOHNSON, *supra* note 107, at 145.

110. *Id.*

111. Gianmarco I.P. Ottaviano & Giovanni Peri, *Rethinking the Effect of Immigration on Wages* 10 J. EUR. ECON. ASS’N (2012), available at <http://economics.ucdavis.edu/people/gperi/site/papers/rethinking-the-effect-of-immigration-on-wages>. See also Howard F. Chang, *Migration as International Trade: The Economic Gains from the Liberalized Movement of Labor*, 3 UCLA J. INT’L L. & FOREIGN AFF. 371, 384 (1998) (concluding that the effect of illegal immigration on the economy is marginal). But see George J. Borjas & Lawrence F. Katz, *The Evolution of the Mexican-Born Workforce in the United States* 38 (Nat’l Bureau of Econ. Research, Working Paper No. 11281, 2005) (attributing wage reductions for low-skilled workers to undocumented immigrants).

112. Travis Loller, *Many Illegal Immigrants Pay Up at Tax Time*, USA TODAY (Apr. 11, 2008), http://usatoday30.usatoday.com/money/perfi/taxes/2008-04-10-immigrantstaxes_N.htm.

actually increases the ability of U.S. businesses to compete in the global marketplace, by helping lower prices for commodities and by contributing money to the economy.¹¹³ Furthermore, since an expanding labor force is necessary to achieve economic growth ahead of inflation, immigration—both illegal and legal—may actually help the United States economy continue to grow.¹¹⁴ According to Heidi Shierholz of the Economic Policy Institute, “there is a consensus that, on average, the incomes of families in this country are increased by a small, but clearly positive amount, because of immigration.”¹¹⁵ Thus, as Alan Greenspan said, “immigrants contribute[] more than their fair share to the economy.”¹¹⁶

However, while the overall net effect of immigration on the economy is positive, the billions of dollars spent on immigration enforcement may outweigh this net gain.¹¹⁷ The United States spent \$18 billion on immigration enforcement in 2012 alone, while spending 24 percent less—\$14.4 billion—on all other criminal federal law enforcement agencies, including the FBI, Drug Enforcement Administration, Secret Service, U.S. Marshals Service, and Bureau of Alcohol, Tobacco, Firearms, and Explosives.¹¹⁸ Federal spending on immigration enforcement has continuously increased since 9/11, despite the fact that apprehensions as a result of immigration policing have dropped 53 percent since 2008.¹¹⁹ It is unclear, of course, to what extent undocumented immigrants, whose choice to illegally enter the country partially contributes to federal spending, should be blamed for the federal government’s bloated immigration budget.¹²⁰

113. JOHNSON, *supra* note 107, at 134.

114. *Id.*

115. Adam Davidson, *Do Illegal Immigrants Actually Hurt the U.S. Economy?*, N.Y. TIMES (Feb. 12, 2013), <http://www.nytimes.com/2013/02/17/magazine/do-illegal-immigrants-actually-hurt-the-us-economy.html>.

116. JOHNSON, *supra* note 107, at 133. For a discussion of the economic models used to determine the effect of immigration on the economy, see David Frum, *Does Immigration Harm Working Americans?*, THE ATLANTIC (Jan. 5, 2015), <http://www.theatlantic.com/business/archive/2015/01/does-immigration-harm-working-americans/384060>.

117. *Id.* at 135.

118. DORIS MEISSNER ET AL., MIGRATION POL’Y INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 18 (2013), available at <http://www.migrationpolicy.org/pubs/pillars-reportinbrief.pdf>.

119. *Id.* at 13.

120. The federal government spends money on immigration enforcement in myriad ways, but most nonpartisan groups have criticized the United States’ bloated immigration budget. *E.g.*, *Obama Administration Spent \$18B on Immigration Enforcement*, USA TODAY (Jan. 7, 2013), <http://www.usatoday.com/story/news/nation/2013/01/07/obama-immigration-enforcement/1815667> (noting that, according to a policy expert, “[n]o nation anywhere in the world has been as determined, has made as deep and expensive a commitment to, or has had as deep a reach in its enforcement efforts as the U.S.

b. The Impact of Illegal Immigration on Social Services and Taxes

Those in favor of strict immigration enforcement commonly point to the undocumented immigrants' consumption of social services as one justification for using "Mexican appearance" as a factor in immigration enforcement.¹²¹ In reality, undocumented immigrants are not eligible for the supplemental nutrition assistance program (i.e., food stamps),¹²² old-age assistance, aid to families with dependent children, aid to the blind, aid to the permanently disabled, supplemental security income,¹²³ Medicare hospital insurance,¹²⁴ or Medicaid hospital insurance for the aged.¹²⁵ Most states, including those with high immigrant populations, have similar restrictions on eligibility for state-funded social services.¹²⁶ Thus, undocumented immigrants are only eligible for some of the least costly government programs, like Women, Infants, and Children ("WIC").¹²⁷

Despite this, several states have passed laws seeking to bar undocumented immigrants from receiving any social services at all. Proposition 187, passed in California in 1994 and subsequently struck down, attempted to bar undocumented immigrants from receiving any public benefits.¹²⁸ Arizona's SB 1070 had similar provisions.¹²⁹ Such laws ignore the fact that undocumented immigrants have never had the ability to receive any of the major government benefits programs.¹³⁰ Moreover, even if they were eligible, many would avoid any contact with the government due to a fear that such contact could affect their immigration status.¹³¹

has"). While the United States spends billions on immigration enforcement, it could in fact reap benefits from a more liberal immigration system. JOHNSON, *supra* note 107, at 145–48.

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

122. 7 U.S.C. § 2015(f) (2012); 7 C.F.R. § 273.4 (2014).

123. 45 C.F.R. § 233.50 (2014).

124. 42 U.S.C. § 1395i-2 (2012).

125. 42 U.S.C. § 1395o (2012).

126. *E.g.*, CAL. WELF. & INST. CODE § 14011.2(d) (West 2006).

127. *See* 42 U.S.C. § 1786(d) (2012) (listing eligibility requirements that do not explicitly state that the benefits are only for citizens or legal permanent residents).

128. JOHNSON, *supra* note 107, at 150.

129. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), available at <http://www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf>.

130. JOHNSON, *supra* note 107, at 151. *See also* Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 6 (2006) ("Generally, the only benefits federally required for undocumented immigrants are emergency medical care . . . and elementary and secondary public education.").

131. JOHNSON, *supra* note 107, at 151. *See also* Stephen H. Legomsky, *Immigration, Federalism, and the Welfare State*, 42 UCLA L. REV. 1453, 1459–60 (1995) ("Any alien who becomes a public charge within five years after entry can be deported unless he or she affirmatively proves that the causes of the dependency arose after entry."); Peter L. Reich, *Jurisprudential Tradition and Undocumented Alien Entitlements*, 6 GEO. IMMIGR. L.J. 1, 4 (1992) ("Unauthorized aliens often forego both necessary

In addition, although undocumented immigrants cannot receive costly public benefits, they still contribute “payroll taxes, including Social Security, Medicare, and unemployment taxes.”¹³² Because the IRS is prohibited from sharing taxpayer information with other agencies¹³³ like the Department of Homeland Security, undocumented immigrants have little incentive not to file taxes, especially since many of them are told that paying their taxes will help them gain legal status at a later date.¹³⁴ As such, most undocumented immigrants pay taxes with Taxpayer Identification Numbers or with false Social Security numbers, never collecting any benefits from such payments.¹³⁵ Some have estimated that the federal government gained \$90 billion in revenue for Medicare, Social Security, and tax liability between the years 1996 and 2003 due to tax payments by undocumented immigrants.¹³⁶

Even if undocumented immigrants did not pay taxes with false identification information, most pay sales and property taxes, which go to states and municipalities.¹³⁷ A study by the Institute for Taxation and Economic Policy, for example, found that households headed by undocumented immigrants paid \$11.2 billion dollars in state and local taxes in 2010.¹³⁸ California, the state with the largest undocumented population,¹³⁹ was estimated to have received \$2.7 billion in tax revenue from undocumented immigrants that same year.¹⁴⁰ Thus, state and local governments also benefit from taxes paid by undocumented immigrants.

State and local governments, however, are faced with paying for education¹⁴¹ and emergency healthcare¹⁴² for undocumented immigrants.¹⁴³ States with large populations of undocumented immigrants, like California and Arizona, bear the brunt of the costs imposed by illegal immigration, without much help from the large tax revenues received by the federal

medical care and other public assistance because they fear INS detection . . .”).

132. JOHNSON, *supra* note 107, at 151–52.

133. I.R.C. § 6103 (2012).

134. JOHNSON, *supra* note 107, at 152.

135. *Id.*

136. Loller, *supra* note 112.

137. Lipman, *supra* note 130, at 6.

138. *Unauthorized Immigrants Pay Taxes, Too*, IMMIG. POL’Y CTR. (April 18, 2011), <http://www.immigrationpolicy.org/just-facts/unauthorized-immigrants-pay-taxes-too>.

139. Passel & Cohn, *supra* note 61, at ii.

140. *Id.*

141. *See infra* Part III.B.2.c.

142. *See infra* Part III.B.2.d.

143. JOHNSON, *supra* note 107, at 152–53.

government.¹⁴⁴ As such, there is a sharp divide between who bears the fiscal costs and who receives the tax benefits of illegal immigration, which has often led to tension between states and the federal government.¹⁴⁵

c. The Impact of Undocumented Immigrants and Their Children on Secondary Education

Because the Supreme Court held in *Plyer v. Doe* that a Texas statute denying undocumented children access to public education violated the Equal Protection Clause of the Fourteenth Amendment, all children in this country, irrespective of their parents' legal status, are entitled to a secondary education.¹⁴⁶ Thus, since some undocumented parents may not be paying taxes to account for the cost of their child's education, the cost of educating some undocumented children is borne by state governments and taxpayers. Studies suggest that children of undocumented parents—whether the child is a U.S. citizen or not—make up approximately 6.8 percent of children in elementary schools around the country.¹⁴⁷ Thus, the cost of educating children whose undocumented parents do not pay some types of taxes can be fairly substantial.

There are, however, several economic reasons for educating undocumented children. For one, many undocumented immigrants pay taxes.¹⁴⁸ As such, they are in fact contributing to state revenue used to finance public education.¹⁴⁹ Secondly, educating children provides them with skills they can then use to work, contribute to the economy, and pay taxes themselves. Finally, preventing undocumented children, who were brought to the United States by their parents, the opportunity to gain an education would create “a permanent caste of undocumented resident aliens,”¹⁵⁰ depriving a large percentage of the population of the chance to work and positively contribute to the economy.¹⁵¹

144. *Id.* at 153.

145. One of the main reasons immigration enforcement has become such a hot button issue, besides 9/11, is because of the substantial economic costs of illegal immigration borne by state and local governments. *Id.* at 152–53. Arizona, California, Florida, New Jersey, New York, and Texas have all sued the federal government to receive additional help to pay costs associated with illegal immigration. *Id.* at 153. Because the states only receive a small percentage of taxes paid by undocumented immigrants, states bear most of the burdens of illegal immigration. *Id.*

146. *Plyer v. Doe*, 457 U.S. 202, 230 (1982).

147. Passel & Cohn, *supra* note 61, at 9.

148. *See supra* Part III.B.2.b.

149. *Id.*

150. *Plyer*, 457 U.S. at 218–19.

151. *Id.* at 223. Given the Supreme Court's ruling that the cost of educating undocumented children should be borne by the nation and its states, for constitutional reasons, the overall costs of education should probably not be considered a government interest in this context. *Id.* at 229. Not

d. The Impact of Illegal Immigration on Healthcare

The Emergency Medical Treatment and Active Labor Act requires doctors to provide emergency treatment to any person who enters their hospital,¹⁵² including undocumented immigrants.¹⁵³ The state of Arizona, for example, typically pays approximately \$90 million a year to provide such services,¹⁵⁴ while the federal government provides only approximately \$650,000 to offset those costs.¹⁵⁵ Providing emergency services to undocumented immigrants thus amounts to a significant cost.¹⁵⁶ Because of costs like this, some states have taken to deporting undocumented immigrants directly from hospitals.¹⁵⁷

However, despite the stereotype that undocumented immigrants are depleting healthcare resources by making multiple emergency visits, most studies suggest that undocumented immigrants visit the hospital much less than other groups.¹⁵⁸ In fact, undocumented immigrants may spend less on health care than legal immigrants and U.S. natives, because they “tend to be cheaper and healthier than the general population.”¹⁵⁹ “There’s a selection effect because people really have to have a lot of gumption and motivation to come here without authorization, and they’re often coming here for manual labor jobs.”¹⁶⁰ Thus, even though undocumented immigrants certainly do use healthcare resources, their impact on the healthcare system is likely exaggerated.

Outside of visits for childbirth, the rate of doctor’s and ambulatory visits among the undocumented population is comparable to or lower than the rate in the general population,¹⁶¹ and undocumented Latinos are 50

educating undocumented children would violate the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 230.

152. 42 U.S.C. § 1395dd(a) (2012).

153. Madeleine Pelner Cosman, *Illegal Aliens and American Medicine*, 10 J. AM. PHYSICIANS & SURGEONS 6, 6 (2005).

154. JOHNSON, *supra* note 107, at 152–53.

155. Nathanael J. Scheer, Comment, *Keeping the Promise: Financing EMTALA’s Guarantee of Emergency Medical Care for Undocumented Aliens in Arizona*, 35 ARIZ. ST. L.J. 1413, 1414 (2003).

156. JOHNSON, *supra* note 107, at 152–53.

157. Janet L. Dolgin & Katherine R. Dieterich, *When Others Get Too Close: Immigrants, Class, and the Health Care Debate*, 19 CORNELL J.L. & PUB. POL’Y 283, 293–94 (2010).

158. Jim P. Stimpson, Fernando A. Wilson & Dejun Su, *Unauthorized Immigrants Spend Less than Other Immigrants and U.S. Natives on Health Care*, 32 HEALTH AFF. 1313, 1315 (2013).

159. Jennifer Medina, *California Pushes for Immigrant Health*, N.Y. TIMES (June 22, 2013), <http://www.nytimes.com/2013/06/22/us/in-california-a-push-for-immigrant-health.html> (quoting researcher Jim P. Stimpson).

160. *Id.* (internal quotation marks omitted).

161. Marc L. Berk et al., *Health Care Use Among Undocumented Latino Immigrants*, 19 HEALTH AFF. 51, 51–64 (July 2000), available at <http://content.healthaffairs.org/content/19/4/51.full.pdf>. For

percent less likely than other members of society to visit emergency rooms.¹⁶² One reason for such statistics may be that undocumented persons fear how a visit to the doctor might affect their immigration status.¹⁶³

In sum, providing emergency health care is certainly one cost of illegal immigration, but the cost is not as high as is stereotypically portrayed,¹⁶⁴ especially given that undocumented immigrants contribute to state economies by paying taxes.

e. The Impact of Illegal Immigration on Crime and Public Safety

If statistics showed that undocumented immigrants generated a substantial increase in crime or violence, such statistics could provide one justification for the use of Mexican appearance as a proxy for undocumented status in immigration enforcement.¹⁶⁵ Some politicians have already attempted to use such justifications. In 2010, Arizona Governor Jan Brewer claimed that undocumented immigrants were the culprits behind numerous beheaded bodies that were found in the Arizona desert, a claim that was later proved false.¹⁶⁶ Later, Brewer told the public that undocumented immigrants “are coming here and they’re bringing drugs, and they’re doing drop houses and they’re extorting people and they’re terrorizing the families. That is the truth.”¹⁶⁷

another study that found similar results, see Alexander N. Ortega et al., *Health Care Access, Use of Services, and Experiences Among Undocumented Mexicans and Other Latinos*, 167 ARCHIVES INTERNAL MED. 2354, 2357 (2007) (detailing health care access and use statistics of undocumented Latinos).

162. Ortega et al., *supra* note 161. See also Mary Engel, *Latinos’ Use of Health Services Studied*, L.A. TIMES (Nov. 27, 2007), <http://articles.latimes.com/2007/nov/27/local/me-immigrants27> (supporting the proposition that undocumented Latinos are 50 percent less likely to visit emergency rooms than other members of society).

163. Marc L. Berk & Claudia L. Schur, *The Effect of Fear on Access to Care Among Undocumented Latino Immigrants*, 3 J. IMMIGRANT & MINORITY HEALTH 151, 151–56 (2001).

164. *But see* Neal Asbury, *The Cost of Permanent Patients*, MONEYNEWS, (May 9, 2013), <http://www.moneynews.com/NealAsbury/Immigration-healthcare-illegal-emergency/2013/05/09/id/503579> (estimating that the cost of treating uninsured immigrants reaches \$4.3 billion per year).

165. Similar to arguments that safety concerns justify race-based immigration enforcement are justifications due to concerns over terrorism. Senator John Cornyn said that the debate over immigration reform “is . . . first and foremost about our Nation’s security. In a post-9/11 world, border security is national security.” KEVIN R. JOHNSON & BERNARD TRUJILLO, IMMIGRATION LAW AND THE US-MEXICO BORDER 217 (2011). While the government certainly has a compelling interest in preventing terrorism, “not one terrorist has entered the United States from Mexico,” suggesting that the government’s interest in preventing terrorism should not be given as much weight in the context of Latinos. Peter Beinart, *The Wrong Place to Stop Terrorists*, WASH. POST (May 4, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/03/AR2006050302199.html>.

166. Dana Milbank, Op-Ed., *Headless Bodies and Other Immigration Tall Tales in Arizona*, WASH. POST (July 11, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/09/AR2010070902342.html>.

167. *Id.*

Statistics suggest, however, that there is no correlation between undocumented immigrants and increasing crime.¹⁶⁸ A 2010 study done at the University of California, Berkeley, found that “there is no evidence that California is in the midst of a crime emergency as a result of substantial migration of persons born in other nations.”¹⁶⁹ The study actually found that crime in California has decreased as migration to California has increased.¹⁷⁰ In fact, the majority of current social science research indicates that immigration is positively correlated with decreasing crime.¹⁷¹ Thus, while taxpayers do pay the cost of incarcerating those undocumented immigrants who are convicted of crimes,¹⁷² the fear that immigration will significantly increase crime is probably unfounded.¹⁷³

C. INITIAL CONCLUSIONS

By “balanc[ing] between the public interest and the individual’s right to personal security free from arbitrary interference by law officers,”¹⁷⁴ it becomes evident that there is a significant “public interest” in enforcing immigration laws. Indeed, illegal immigration does impose significant macroeconomic costs on states and the federal government, even if the weightiness of the government interest in preventing illegal immigration is often exaggerated. However, the ineffectiveness of racial profiling¹⁷⁵ and the distinct harms faced by Latinos¹⁷⁶ suggest that racial profiling of

168. See, e.g., KRISTIN F. BUTCHER & ANNE MORRISON PIEHL, PUB. POLICY INST. OF CAL., CRIME, CORRECTIONS, AND CALIFORNIA: WHAT DOES IMMIGRATION HAVE TO DO WITH IT? 1, 12 (2008), available at http://www.ppic.org/content/pubs/cacounts/cc_208kbcc.pdf (stating that U.S. born institutionalization rates are ten times higher than those of non-citizens); Robert J. Sampson, *Rethinking Crime and Immigration*, CONTEXTS (Jan. 9, 2008), <http://contexts.org/articles/winter-2008/sampson> (arguing that immigration leads to lower crime rates). But see Steven A. Camarota & Jessica M. Vaughan, *Immigration and Crime: Assessing a Conflicted Issue*, CTR. FOR IMMIGR. STUD., (Nov. 2009), <http://www.cis.org/sites/cis.org/files/articles/2009/crime.pdf> (providing statistics suggesting that there is a high rate of criminality among immigrants).

169. BARRY KRISBERG, BERKELEY CTR. FOR CRIMINAL JUSTICE, WHERE IS THE FIRE? IMMIGRANTS AND CRIME IN CALIFORNIA 111 (2010), available at http://www.law.berkeley.edu/files/Where_is_the_fire.pdf.

170. *Id.* at 8.

171. RAMIRO MARTINEZ, JR., LATINO HOMICIDE: IMMIGRATION, VIOLENCE, AND COMMUNITY 27–28 (2002).

172. JOHNSON, *supra* note 107, at 155.

173. Indeed, a recent study found that, contrary to public opinion, immigration enforcement does not reduce crime. Adam B. Cox & Thomas J. Miles, *Does Immigration Enforcement Reduce Crime? Evidence from “Secure Communities”*, 57 J.L. & ECON. (forthcoming Nov. 2014) (manuscript at 38), available at http://www.law.uchicago.edu/files/file/does_immigration_enforcement_reduce_crime_082514.pdf.

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

175. See *supra* Part III.A.

176. See *supra* Part III.B.1.a.

Latinos does not advance that government interest. Thus, because it is not “reasonable” for Mexican appearance to be an inherently suspicious characteristic when immigration laws are being enforced, any stops that use race as a predictive factor should violate the Fourth Amendment.

Attorney General Holder’s announcement that the DOJ’s racial profiling guidelines will be updated to include all types of profiling represents a recognition, at least implicitly, that the DOJ agrees that appearance is not relevant to predicting one’s criminality or immigration status.¹⁷⁷ If the DOJ guidelines are applied to immigration enforcement officials, the announcement will also represent a realization that the government interests in strict immigration enforcement, which are almost exclusively economic, do not outweigh the harms caused by race-based immigration enforcement.¹⁷⁸

IV. RECOMMENDATIONS FOR AVOIDING FOURTH AMENDMENT VIOLATIONS

A. DOCTRINAL RECOMMENDATIONS

1. Remedies for Fourth Amendment Violations

One way in which racial profiling in immigration enforcement could be addressed—either through legislation, regulations, or the courts—is through the creation of additional remedies for those whose Fourth Amendment rights are violated during a race-based stop. Two remedies in particular would at least partially rectify the violation of noncitizens’ rights and incentivize police officers to abide by the DOJ’s 2014 racial profiling guidelines: (1) the expansion of the exclusionary rule to civil removal proceedings; and (2) the exercise of prosecutorial discretion by DHS for those whose rights are violated.

a. The Exclusionary Rule

The exclusionary rule is the primary way by which courts enforce the

177. See *supra* Part III.A.

178. It is worth noting that the preceding discussion is also relevant to an Equal Protection analysis of racial profiling in immigration enforcement. Racial profiling claims are often litigated as equal protection claims. Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275, 1278 (2004). Since racial classifications trigger strict scrutiny, the preceding discussion of the government’s interests in strict immigration enforcement are the interests that would need to be deemed compelling to justify race-based immigration enforcement. Furthermore, if race is not relevant to immigration policing, it is also not narrowly tailored, even if the above-discussed interests are deemed compelling.

Fourth Amendment.¹⁷⁹ The application of the exclusionary rule is simple: any evidence obtained in violation of the Fourth Amendment is to be excluded from trial,¹⁸⁰ unless the violation was done in objective good faith.¹⁸¹ The exclusionary rule does not apply in civil removal proceedings, however.¹⁸² In *I.N.S. v. Lopez Mendoza*, the Supreme Court held that the exclusionary rule would not apply in removal proceedings, absent a showing of a particularly “egregious” Fourth Amendment violation, mainly due to concerns over the efficiency of the immigration court system.¹⁸³ According to the Court, for a Fourth Amendment violation to be egregious and thus lead to the application of the exclusionary rule, it must “transgress notions of fundamental fairness and undermine the probative value of evidence obtained.”¹⁸⁴

For any racial profiling reform to be meaningful, however, remedies like the exclusionary rule should be available to noncitizens in civil removal proceedings. The Supreme Court in *Lopez-Mendoza* noted that a need for the exclusionary rule could eventually come to pass, “if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread.”¹⁸⁵ The Court’s decision, however, was partially motivated by the belief that the INS had “its own comprehensive scheme for deterring Fourth Amendment violations by its officers.”¹⁸⁶ ICE currently does not have such a scheme, and as noted previously, the increasing use of local and state police officers in immigration enforcement has led to greater concerns about Fourth Amendment violations.¹⁸⁷

Without the exclusionary rule, immigration enforcement officials have less incentive to avoid Fourth Amendment violations, since Fourth Amendment violations will have no impact on whether a noncitizen is removed.¹⁸⁸ Allowing for the exclusion of evidence obtained through an unlawful stop would provide added incentive for local and state police officers to adhere to constitutional principles while policing and would provide a meaningful remedy to noncitizens whose civil rights are violated.

179. Elizabeth A. Rossi, *Revisiting INS v. Lopez-Mendoza: Why the Fourth Amendment Exclusionary Rule Should Apply in Deportation Proceedings*, 44 COLUM. HUM. RTS. L. REV. 477, 484 (2013).

180. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

181. *United States v. Leon*, 468 U.S. 897, 922 (1984).

182. *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984).

183. *Id.* at 1050–51.

184. *Id.*

185. *Id.* at 1050.

186. *Id.* at 1044.

187. *See supra* Part I.

188. Cade, *supra* note 10, at 183.

To be sure, concerns about judicial economy and speedy trials still apply to the immigration court system. The question now is whether those concerns still outweigh noncitizens' Fourth Amendment interests, given recent reports of widespread racial profiling in immigration enforcement.¹⁸⁹ With current circuit splits on what constitutes an "egregious" violation of the Fourth Amendment, the Supreme Court could revisit the exclusionary rule's application in civil removal proceedings soon.¹⁹⁰

b. Prosecutorial Discretion

In addition, the exercise of prosecutorial discretion¹⁹¹ by ICE would provide an arguably less disruptive method of remedying racial profiling, give teeth to soon-to-be updated racial profiling guidelines, and indicate that the government is truly serious about preventing profiling.

In 2011, ICE Director John Morton issued a memorandum (the "Morton Memo") detailing how ICE personnel, particularly ICE trial attorneys, could use prosecutorial discretion to administratively close or decline to prosecute certain noncitizens.¹⁹² The stated rationale behind the Morton Memo was to efficiently use the limited resources of the agency by focusing attention on the agency's highest priorities, "namely the promotion of national security, border security, public safety, and the integrity of the immigration system."¹⁹³ ICE officials subsequently released other advisories, detailing other circumstances in which prosecutorial discretion should be exercised in order to conserve the agency's resources.¹⁹⁴

189. See *supra* Part I.

190. Rossi, *supra* note 179, at 504–25.

191. ICE officials, particularly ICE trial attorneys, exercise prosecutorial discretion by balancing the equities to determine whether a particular noncitizen is a person worth prosecuting. Shoba Sivaprasad Wadhi, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 244 (2010).

192. Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, U.S. Dep't of Homeland Sec., to All Field Office Directors, All Special Agents in Charge & All Chief Counsel, U.S. Immigration & Customs Enforcement, U.S. Dep't of Homeland Sec., Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

193. *Id.* at 2.

194. *E.g.*, Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, U.S. Dep't of Homeland Sec., to All Field Office Directors, et al., U.S. Immigration & Customs Enforcement, U.S. Dep't of Homeland Sec., Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011), available at <https://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>; Memorandum from Peter S. Vincent, Principal Legal Advisor, U.S. Immigration & Customs Enforcement, U.S. Dep't of Homeland Sec., to All Chief Counsel, Office of the Principal Legal Advisor, U.S. Immigration & Customs Enforcement, U.S. Dep't of Homeland Sec. (Nov. 17,

While none of the memos specifically mention Fourth Amendment violations as warranting an exercise of prosecutorial discretion,¹⁹⁵ ICE trial attorneys in Charlotte, North Carolina have reportedly exercised discretion in dozens of cases, after reports surfaced that the Alamance County Sheriff's Office was engaging in pervasive discriminatory policing against Latinos.¹⁹⁶ Not only have ICE trial attorneys exercised favorable discretion in cases they normally would have prosecuted, but they have also done so in cases in which the noncitizen was unrepresented and in which reopening the case to revoke the removal order was necessary.¹⁹⁷ Thus, although there is so far only one instance of the favorable exercise of discretion for Fourth Amendment violations, prosecutorial discretion is one way of remedying the violation of noncitizens' constitutional rights due to racial profiling.¹⁹⁸

2. Probable Cause Instead of Reasonable Suspicion

Some commentators have also suggested that replacing the reasonable suspicion standard with the probable cause standard would cause officers to act with more restraint before engaging in racial profiling.¹⁹⁹ "Probable cause is a tougher standard than reasonable suspicion" because it "require[s] officers to gather more information and to observe more unambiguous behavior before seizing individuals."²⁰⁰ Requiring probable cause of officers to justify a stop could also increase the accuracy of their stops, thus increasing overall efficiency.²⁰¹

In one sense, probable cause probably should be the governing standard in the context of immigration enforcement. The violation of federal immigration law by continuous, unlawful presence is an ongoing crime, and probable cause is the governing standard for "completed or ongoing crimes."²⁰² The reasonable suspicion standard, in contrast, typically encompasses "imminent criminal activity,"²⁰³ which does not include immigration violations.

2011), available at <http://www.aila.org/content/default.aspx?docid=37680>.

195. See sources cited *supra* notes 192, 194.

196. Cade, *supra* note 10, at 185.

197. *Id.*

198. *Id.*

199. Richardson, *supra* note 92, at 2075–77. See also David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U.C. DAVIS L. REV. 1, 3–6 (1994); Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1332–33 (1990).

200. Richardson, *supra* note 92, at 2075–76.

201. *Id.* at 2076.

202. Johnson, *supra* note 57, at 216.

203. *Id.*

Furthermore, the unique nature of immigration policing strengthens the argument that probable cause should be the governing standard. Immigration policing is distinct from policing in the criminal context, where officers may look for furtive movements, bulging clothing, or other behavior indicative of criminal activity.²⁰⁴ In the immigration context, there is little to suggest to enforcement officers that any given individual is undocumented, especially when the distance from the U.S. border is increased. Thus, because officers have fewer factors to rely upon when assessing the “undocumentedness” of any given individual, they may be more likely to rely on other, less reasonable factors, like race.

Requiring that officers have probable cause instead of reasonable suspicion, however, would not come without several problems. First, courts are probably unlikely to implement such an approach.²⁰⁵ In addition, courts could eventually dilute the probable cause standard, such that it would become, in essence, a reasonable suspicion standard.²⁰⁶ Finally, even if probable cause were the governing standard, such a change in doctrine would not guarantee the removal of racial stereotypes in immigration enforcement.²⁰⁷

B. TEXTUAL SUGGESTIONS FOR STATUTES AND GUIDELINES

The inclusion of national origin as a protected category in the DOJ’s 2014 racial profiling guidelines is a step in the right direction. As stated by Justice Brennan, “the line between discrimination based on ‘ancestry or ethnic characteristics’ and discrimination based on ‘place or nation of . . . origin is not a bright one Often . . . the two are identical as a factual matter”²⁰⁸

National origin profiling is especially relevant to Latinos, since “Mexican appearance”—not brown skin—is generally the reason articulated by police officers as the factor that generated at least some reasonable suspicion.²⁰⁹ Since the racial profiling provision in Congress’s 2014 attempt at comprehensive immigration reform mirrors the DOJ’s

204. *Id.* at 217.

205. Richardson, *supra* note 92, at 2076.

206. Maclin, *supra* note 199, at 1331–32.

207. Richardson, *supra* note 92, at 2075.

208. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 614 (1987) (Brennan J., concurring) (citations omitted). *See also* *United States v. Martinez-Fuerte*, 428 U.S. 543, 572 n.1 (1976) (Brennan, J., dissenting) (“That law in this country should tolerate use of one’s ancestry as probative of possible criminal conduct is repugnant under any circumstances.”).

209. *See* *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) (permitting the use of “Mexican appearance” as a factor in generating a reasonable suspicion for an immigration stop).

2003 guidelines, it stands to reason that any future attempts at immigration reform will employ the DOJ's 2014 guidelines, which include national origin. Without such an update, the unreasonable use of race as a factor in immigration enforcement will be allowed to continue.

Even more important than the inclusion of national origin as a protected category is the extent to which officers are permitted to use race as a factor in special circumstances. Under Congress's 2014 attempt at comprehensive immigration reform, officers were afforded an expansive exception to use race in "preventing threats to national security . . . or in enforcing laws protecting the integrity of the Nation's borders."²¹⁰ Officers are afforded similar discretion under the DOJ's 2014 guidelines.²¹¹ Thus, even with an extremely inclusive definition of racial profiling, using this language, race could still be permissibly used as a "predictor" of criminality or undocumented status.

Such an exception is problematic because national security is commonly defined as not only national defense, but also the economic interests of the United States.²¹² As such, without promulgating regulations that define the contexts in which the use of race—or national origin—in immigration enforcement would be permissible, Congress would vest ICE with immense discretion in deciding how, when, and where race would be relevant to protecting "national security."²¹³ One could envision a scenario in which simply removing undocumented immigrants would prevent threats to our nation's economic security, since undocumented immigrants are often seen as drain on the United States economy.²¹⁴

In sum, the DOJ's 2014 guidelines are a good first step. However, the exception allowing race to be used in the "national security" context suggests that some still believe race to be relevant to predicting undocumented status, a conclusion the statistics simply do not support.²¹⁵

210. S. 744, 113th Cong. § 3305 (2013); H.R. 15, 113th Cong. § 3305 (2013).

211. 2014 DOJ GUIDANCE, *supra* note 15.

212. 8 U.S.C. § 1189(d)(2) (2012).

213. 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, 103 (2009).

214. *See supra* Part III.B.

215. *See supra* Part III.A.

C. STRUCTURAL RECOMMENDATIONS

1. Data Collection

That the DOJ's 2014 guidelines contain a provision that will require "[e]ach law enforcement agency . . . [to] begin tracking complaints made based on [the guidelines]"²¹⁶ suggests that the DOJ is well aware that a prohibition on racial profiling without concomitant data collection is largely meaningless. However, by not specifying data collection methods in its guidelines, the DOJ has failed to provide law enforcement agencies with any guidance as to what types of data it wants and how such data should be collected.²¹⁷

Although there is currently no single, accepted methodology for gathering data of racial profiling, most states voluntarily collect data on racial profiling or have been required to do so by legislation.²¹⁸ Thus, ICE can study states' methodologies for an example of what does and does not work. One simple methodology that should be incorporated into any data collection effort is a comparison of the characteristics of the population the police come into contact with and the characteristics of the population as a whole.²¹⁹

Data gathered using this approach would help pinpoint disproportionate enforcement early on, before police patterns are established. Simply tracking the race of those that are stopped, however, is not enough.²²⁰ Data collection need also focus on hit rates—in other words, how often the stop of an individual of any given race led to an immigration arrest.²²¹ This approach would provide needed data regarding the effectiveness of racial profiling in immigration enforcement.²²² Moreover, because local and state officers are increasingly involved in immigration enforcement, data could also be collected using officer-specific data.²²³ Using this approach, the government would compare data on stops and arrests of officers in similar situations—the same shift, the same

216. 2014 DOJ GUIDANCE, *supra* note 15.

217. *Id.*

218. JESSICA SAUNDERS, RAND CORP., LIMITING THE POTENTIAL FOR RACIAL PROFILING IN STATE AND LOCAL POLICE ENFORCEMENT OF IMMIGRATION LAWS 7 (2013), available at http://www.rand.org/content/dam/rand/pubs/perspectives/PE100/PE104/RAND_PE104.pdf.

219. *Id.* at 4.

220. Harcourt, *supra* note 178, at 1281.

221. *Id.* at 1317.

222. Many commentators, however, argue that focusing on hit rate alone is not enough for data collection. *Id.* at 1316–18. A statistical discussion of which data points should be measured is, however, outside the scope of this Note.

223. SAUNDERS, *supra* note 218, at 4.

neighborhood, or the same type of tasks.²²⁴ Any data gathered by ICE must be publically disclosed.²²⁵ Without disclosure, many of the benefits of gathering data will not be realized.²²⁶

Data collection is a complex and difficult task and officers are often resistant to reporting detailed information about every stop.²²⁷ Many officers see the additional data collection requirements as burdensome and distracting from their duties.²²⁸ Thus, much of the data may fail to be instructive due to piecemeal collection.²²⁹ At least one commentator has acknowledged that self-reported data from law enforcement agencies should not be seen as complete or as an “unbiased reflection of reality.”²³⁰ Law enforcement agencies know that any data that is gathered is used to assess their efforts, and are thus provided with an incentive to paint the rosier picture possible.²³¹ As such, police may fail to report cases that make them look bad, while over-reporting any cases that make them look good.²³² Despite these problems, the benefits of gathering data on racial profiling certainly outweigh the costs.²³³

There are many benefits to collecting data on racial profiling in immigration enforcement. For one, collected data would not only reveal discriminatory police practices, but would also help ascertain whether certain police activities are productive.²³⁴ Data collection also helps raise public consciousness about the issues, leading to increased public dialogue, potential changes, and accountability for officers.²³⁵ When the public is aware that instances of profiling are more than just anecdotal, but systemic, it is more likely to seek change.²³⁶ In addition, data collection builds trust between agencies and the communities they serve.²³⁷ Given that police-

224. *Id.* at 10. For additional ideas about data collection, see generally *id.*

225. Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 117 (2001).

226. *Id.*

227. Saren Stiegel, *Racial Profiling and Wisconsin's Mandatory Data Collection . . . Who's the Victim?*, 16 LOY. PUB. INT. L. REP. 89, 91 (2011).

228. Garrett, *supra* note 225, at 123.

229. *Id.* at 84.

230. Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 659 (2002).

231. *Id.*

232. *Id.*

233. *Id.* at 751.

234. RUSS LEACH, PUB. ENTITY RISK INST., RACIAL PROFILING: A POLICE MANAGER'S PERSPECTIVE 2–3 (2002), available at <http://www.riskinstitute.org/peri/images/file/RacialProfilingPERISymposiumPaper.pdf> (last visited Jan. 9, 2015).

235. Garrett, *supra* note 225, at 82.

236. *Id.*

237. See Michael Cohen et al., *An Evaluation of Racial Profiling Data Collection and Training*,

community relations have been strained by the increased role of state and local police officers in immigration enforcement,²³⁸ data collection could assuage some of those concerns. Moreover, data collection can help shape the training that law enforcement officers receive, providing points of emphasis for jurisdiction-specific training.²³⁹

2. Training of Federal, Local, and State Police Officers

Training of all officers involved in immigration enforcement is especially important because “Border Patrol officers may use racial stereotypes as a proxy for illegal conduct without being subjectively aware of doing so.”²⁴⁰ One of the difficulties regarding racial profiling is that much of it is motivated solely by stereotypes and biases.²⁴¹ Implicit biases can affect a police officer’s perception in several different ways. First, the biases can lead officers to focus on Latinos because of their appearance.²⁴² Biases can also have an impact on an officer’s evaluation of ambiguous behavior, “causing identical behavior to be interpreted different depending on the racial appearance of the person performing the act.”²⁴³

If the DOJ is truly serious about prohibiting racial profiling, any enforcement officials involved in immigration enforcement should receive training about implicit biases as part of an initial training.²⁴⁴ Trainings should teach officers about how implicit biases influence decision making “in ways that they are unaware of and largely unable to control.”²⁴⁵ After initial trainings, police department and government agencies should also provide for supplemental trainings, which could include special interest groups, community leaders, academics, and police officers.²⁴⁶ With the participation of these different groups, other training programs could be developed.²⁴⁷ These training programs could endeavor to explain to police

CAL. LEGIS. ANALYST’S OFF. (Aug. 27, 2002), www.lao.ca.gov/2002/racial_profiling/8-02_racial_profiling.html (stating that data can be used to determine if a problem exists and how to solve it).

238. See *supra* Part III.B.

239. Cohen et al., *supra* note 237.

240. *Gonzalez-Rivera v. I.N.S.*, 22 F.3d 1441, 1450 (9th Cir. 1994).

241. See 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, 748 (2004) (arguing that law enforcement officers should be trained regarding “stereotypical biases”).

242. *Id.*

243. Richardson, *supra* note 92, at 2044.

244. For a more in-depth discussion of how implicit biases affect policing and Fourth Amendment jurisprudence see *id.* (arguing for greater awareness of behavioral realism in Fourth Amendment jurisprudence and policing).

245. *Id.* at 2042.

246. LEACH, *supra* note 234, at 3.

247. *Id.*

officers the consequences of racial profiling in terms of costs to those who are profiled and possible civil litigation against local and state police departments.²⁴⁸ Many police departments appear to be attempting to implement similar types of training, although most have not extended them to the immigration context.²⁴⁹

Since the partial delegation of immigration enforcement to local and state governments, at least three county police departments have been investigated by the DOJ for discriminatory policing in the realm of immigration enforcement.²⁵⁰ In one case, the Sheriff of a county was quoted as having said, “go out there and get me some of those taco eaters” and “bring me some Mexicans.”²⁵¹ Such attitudes suggest that if the county did receive training, it either did not go into enough depth about permissive police practices or failed to provide officers with enough incentives to avoid discriminatory policing. With additional sensitivity and implicit bias training, awareness of issues like this could be significantly increased.

V. CONCLUSION

Although racial profiling does not occupy center stage in the debate over immigration reform, it is an increasingly common phenomenon.²⁵² Given that racial profiling in immigration enforcement is permitted under current Supreme Court case law,²⁵³ this should not come as much of a surprise. However, applying the Supreme Court’s dictated formula for determining whether a police officer’s suspicion is “reasonable” leads to the conclusion that using “Mexican appearance” as an indicator of undocumented status is no longer “reasonable.” It does appear that steps are being taken to address some of these issues. Without a true understanding of why the ruling in *Brignoni-Ponce* is no longer reasonable, however, all the necessary steps will probably not be taken.

There are several doctrinal and practical ways to incentivize those

248. *Id.* at 4.

249. Bob Audette, *Training Programs Help Police Reduce Racial Profiling*, BRATTLEBORO REFORMER (July 1, 2013), http://www.reformer.com/ci_23573134/doing-work-training-programs-help-police.

250. Cade, *supra* note 10, at 181–82.

251. *Id.* at 181.

252. See WARREN INSTITUTE REPORT, *supra* note 12, at 2 (summarizing statistical findings about the increase in racial profiling against Latinos since the inception of the Secure Communities program); Cox & Miles, *supra* note 12, at 135 (laying out statistical evidence suggestive of racial profiling in immigration enforcement).

253. Johnson, *supra* note 39, at 1077.

enforcing federal immigration law to avoid relying on race.²⁵⁴ Introducing new racial profiling guidelines and providing in-depth bias training for officers are good first steps, but they are actually the easy steps.²⁵⁵ Providing meaningful remedies for those whose Fourth Amendment rights are violated because of racial profiling or collecting data that could point to systemic problems are much more difficult steps.²⁵⁶

It is important to remember that the problems presented by racial profiling in immigration enforcement affect more than just noncitizens. Immigration officials may not detain many citizens more than momentarily, but this does not change the message sent when citizens' status in this country is questioned due to their apparent national origin. Such practices end up calling into question Latinos' membership rights in American society.²⁵⁷

One day in 2013, as I rode the Los Angeles Metro, I heard two Latino men speaking. One said to the other, in Spanish, "Get out of here. You're probably illegal." The other replied, "No, I've been a citizen since 1984." I could not help but think that peoples' appearance should not lead to any assumptions about their status or right to remain in this country.

254. *See supra* Part IV.

255. *See supra* Part IV.A–B.

256. *See supra* Part IV.A–B.

257. *See supra* Part III.B.