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Car Stops, Borders, and Profiling: The Hunt for Undocumented (Illegal?) Immigrants in Border Towns

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I. INTRODUCTION

Days before his death, southern Arizona rancher Robert Krentz found large quantities of illegal drugs on his 35,000-acre farm and reported it to the police.[1] On March 27, 2010, Krentz was shot and killed by an unknown assailant while he worked on an isolated corner

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1. Philip S. Moore, *Border Fight: Murdered Rancher Who Helped Immigrants Spurred on Arizona Law*, NAT'L CATH. REG., May 9, 2010, http://www.ncregister.com/register_exclusives/border_fight/ (reporting the size of his ranch); Linda Chavez, *Arizona Mythbusting*, PARAGOULD DAILY PRESS, May 4, 2010, http://www.paragoulddailypress.com/articles/2010/05/04/opinion/doc4be06f86c406843694175 2.txt (reporting that Krentz contacted the authorities).

of the ranch.[2] Many speculated that the assailant who killed Krentz was in the country illegally, and,[3] for many, Krentz's death justified associating the immigration issue with danger.[4]

Three weeks later, the Governor of Arizona had the Support Our Law Enforcement and Safe Neighborhoods Act (the Act or the Arizona Act) on her desk.[5] Otherwise known as SB 1070, the patchwork set of laws makes it a misdemeanor to lack proper immigration paperwork in Arizona.[6] More controversially, the Act also enables officers who develop a "reasonable suspicion" to believe that someone is undocumented to stop that individual and determine the person's immigration status.[7] An individual's inability to provide government-issued identification proving legal residency, such as a driver's license, subjects that individual to twenty days in jail for the first violation (thirty for subsequent violations) and a fine of up to $100 plus jail costs.[8] In an effort to soften the Act's obvious ethnic and racial implications, it expressly states that "[a] law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not solely consider race, color or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution."[9]

Public response to the Act has been extreme and appeared from unlikely sources. Arizona's professional basketball team, the Phoenix Suns, wore their orange "Los Suns" jerseys on May 5, 2010, in the second game of their playoff series against the San Antonio Spurs in

2. Moore, *supra* note 1.

3. Specifically, law enforcement believes that an illegal immigrant who was headed to Mexico and worked as a scout for drug smugglers may have killed Krentz. Jacques Billeaud, *Official: Suspect in AZ Ranch Death Recently in US*, LAKE WYLIE PILOT, May 3, 2010, http://www.lakewyliepilot.com/2010/05/03/714474/official-suspect-in-az-ranch-death.html.

4. *See* Michael J. O'Neal, *The Arizona Immigration Law: Some Things You Probably Didn't Know About Arizona Politics*, HUFFINGTON POST (May 3, 2010, 8:41 PM), http://www.huffingtonpost.com/michael-j-o/the-arizona-immigration-l_b_561924.html ("While it is likely that the perpetrator was involved in drugs or smuggling (groups who are known to carry weapons) rather than manual workers who comprise the vast majority of illegal immigration (and who are not known to carry weapons), this distinction could easily be lost in the wave of public sympathy and outrage at a senseless murder."); *see also* Dennis Wagner, *Arizona Rancher's Slaying Sparks Debate Over Illegal Immigration*, AZ CENTRAL.COM (Mar. 29, 2010, 6:52 PM), http://www.azcentral.com/news/articles/2010/03/29/20100329rancher-killed-at-arizona-ranch.html ("The unsolved murder Saturday of a soft-spoken rancher in southern Arizona has become a new flashpoint in the debate over illegal immigration . . . .").

5. O'Neal, *supra* note 4.

6. ARIZ. REV. STAT. ANN. § 13-1509(H) (2010).

7. *Id.* § 11-1051(B).

8. *Id.* § 13-1509(H).

9. *Id.* § 11-1051(B).

part to express opposition to the new Arizona immigration law.[10] In a press release issued before the game, the Suns' owner, Robert Sarver, suggested that "frustration with the federal government's failure to deal with the issue of illegal immigration resulted in passage of a flawed state law."[11]

Major League Baseball has also protested the law. Approximately 27% of Major League Baseball players are Latino, and nearly half of the teams hold their spring training camps in Arizona.[12] Protestors turned out to Wrigley Field in Chicago to rally against the Act just before the Chicago Cubs were set to take on the Arizona Diamondbacks.[13] Given the Major League Baseball Players Association's opposition to the Act, there is growing speculation that fans will boycott the MLB's 2011 All-Star game—currently scheduled in Phoenix.[14]

Of course, the athletic community is hardly alone in voicing displeasure with the Act. Rallies nationwide—including in New York, Los Angeles, Chicago, Dallas, and Denver—have unified thousands in favor of federal immigration reform and to protest the passage of the Arizona Act.[15] University of Arizona students have pressed the university's president, Robert N. Shelton, to publicly denounce the Act and, in doing so, have noted that "[t]he families of a number of out-of-state students (to date all of them honors students) have told us that they are changing their plans and will be sending their children to universities in other states."[16] Moreover, city councils in Oakland and

10. Dan Bickley, *Phoenix Suns Owner's Bold Statement on Immigration Changes Focus of Game 2*, AZ CENTRAL.COM (May 4, 2010, 6:50 PM), http://www.azcentral.com/sports/suns/articles/2010/05/04/20100504phoenix-suns-immigration-law-bickley.html#ixzz0n4FIxxXD.

11. J.A. Adande, *Suns Using Jerseys to Send Message*, ESPN.COM (May 7, 2010, 9:48 AM) http://sports.espn.go.com/nba/playoffs/2010/columns/story?columnist=adande_ja&page=sarver-100504.

12. Akito Yoshikane, *Baseball Union and Players Speak Out Against SB1070*, IN THESE TIMES (May 5, 2010, 12:59 PM), http://inthesetimes.com/working/entry/5943/baseball_union_and_players_speak_out_against_sb1070/.

13. Kevin Baxter, *Consequences Could Follow Illegal Immigration Law: New York Congressman Calls For Major League Baseball to Put 2011 All-Star Game From Arizona*, CHI. TRIB., Apr. 29, 2010, http://articles.chicagotribune.com/2010-04-29/sports/ct-spt-0430-arizona-baseball—20100429_1_immigration-law-major-league-baseball-arizona-gov.

14. *Id*.

15. *Rallies Across U.S. Protest Arizona Law*, CBSNEWS (May 3, 2010, 12:50 PM), http://www.cbsnews.com/stories/2010/05/01/national/main6450616.shtml

16. Lauren Burgoyne, *University of Arizona Students Hosting Rally at U of A Mall*, KOLD NEWS13 (May 12, 2010, 4:04 AM), http://www.kold.com/Global/story.asp?S=12429950.

San Francisco have voted to economically boycott Arizona.[17] Other cities are actively contemplating doing the same.[18]

Perhaps most importantly, however, the federal judiciary recently weighed in by enjoining enforcement of most of the Act.[19] United States District Court Judge Susan R. Bolton found that "preserving the status quo through a preliminary injunction is less harmful than allowing state laws that are likely preempted by federal law to be enforced."[20] By enjoining enforcement of the Act on preemption grounds, the accompanying Fourth Amendment issue remains unresolved.

Preemption aside, the Act seems to suggest that "driving while black"[21] is out with the 2000s, and in Arizona "driving (or breathing?) while brown" is now "in."[22] Are citizens therefore no longer concerned with law enforcement profiling African-Americans? Of course not.[23]

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17. Stephanie Condon, *More City Councils Move Toward Arizona Boycotts Over Immigration Law*, CBS NEWS (Apr, 29, 2010, 4:40 PM), http://www.cbsnews.com/8301-503544_162-20003803-503544.html.
18. *Id*.
19. United States v. Arizona, No. CV 10-1413-PHX-SRB (D. Ariz. July 28, 2010), *available at* http://graphics8.nytimes.com/packages/pdf/national/20100729_ARIZONA_DOC.pdf.
20. *Id.* at 35. The court enjoined the following sections: (1) requiring officers to make a reasonable attempt to determine the immigration status of a detained person if there is a reasonable suspicion that the person unlawfully present in the U.S., *id.* at 4, 36 (enjoining section 2(B), creating A.R.S. § 11-1051 (B)); (2) creating a crime for the failure to apply for or carry registration papers, *id.* (enjoining section 3, creating A.R.S. § 13-1509); (3) creating a crime for unauthorized aliens to solicit, apply for, or perform work, *id.* (enjoining the portion of section 5, creating A.R.S. § 13-2928 (C)); and (4) authorizing the warrantless arrest of a person when there is probable cause to believe that person has committed a public offense that makes the person removable from the United States, *id.* (enjoining section 6, creating A.R.S. § 13-3883(A)(5)).
21. *See generally* David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997).
22. Conservative lawmakers in Oklahoma say they will introduce a bill similar to the Arizona Act in their state. One Republican state representative even told the Associated Press that Oklahoma may take Arizona's example further by including asset seizure provisions and harsher penalties. Ethan Sacks, *Battle Over Arizona's SB 1070: Oklahoma Eyes Similar Immigration Law; City Councils Eye Boycotts*, NY DAILY NEWS, Apr. 30, 2010, http://www.nydailynews.com/news/national/2010/04/30/2010-04-30_battle_over_arizonas_sb_1070_oklahoma_eyes_similar_immigration_law_city_councils.html. Oklahoma is not alone in possibly following Arizona. *See* Ryan Takeo, *Mich Fruit Pickers Oppose AZ-style law: 'Take Our Jobs' Challenge Set for July 24*, WOOD TV8 (July 12, 2010, 11:05 AM), http://www.woodtv.com/dpp/news/local/grand_rapids/Mich-fruit-pickers-oppose-AZ-style-law ("[Michigan] House Bill 6526 allows police officers to arrest and detain people with sufficient reasonable suspicion they are in the country illegally.").
23. Kevin R. Johnson, *The Legacy of Jim Crow: The Enduring Taboo of Black–White Romance*, 84 TEX. L. REV. 739, 761 (2006) (book review) (commenting that "racial

The Arizona Act merely serves to continue an effort—this time at the legislative level—to broaden the discretionary power of law enforcement. Yet, a fascinating question lies at the base of the public's pervasive criticism of the Act: where have all of you people been? Numerous Supreme Court cases already allow for law enforcement to engage in the very practice—racial and ethnic profiling premised on "reasonable suspicion"[24]—that has incited the emotions of so many

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profiling remains a problem in the United States today"); *see* Al Baker, *New York Minorities More Likely to Be Frisked*, N.Y. TIMES, May 12, 2010, at A1 (reporting that an analysis of the 2009 raw data by the Center for Constitutional Rights revealed that nearly 490,000 blacks and Latinos were stopped by the police on the streets last year, compared with 53,000 whites).

24. Given the focus in this Article on reasonable suspicion, it does not consider other powerful judicial doctrines that expand law enforcement discretion—most notably, the Court's "special needs" jurisprudence." The "special needs" rule allows for suspicionless searches when "'special needs, beyond the normal need for law enforcement, make the warrant and[/or] probable-cause requirement[s] impracticable.'" Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)). To determine the validity of policy or law allowing for a suspicionless search, the Supreme Court applies a "general Fourth Amendment approach" to determine reasonableness "by assessing, on the one hand, the degree to which [a search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." Samson v. California, 547 U.S. 843, 848 (2006). Relying on this analysis, the Court has upheld, inter alia, the following suspicionless Fourth Amendment intrusions as constitutional: (1) highway checkpoint stops during which officers ask citizens about a recent crime, Illinois v. Lidster, 540 U.S. 419, 428 (2004); (2) sobriety checkpoints, Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990); (3) brief seizures of motorists at border patrol checkpoints, United States v. Martinez-Fuerte, 428 U.S. 543, 562 (1976); (4) certain work-related searches by government employers of employees' desks and offices, O'Connor v. Ortega, 480 U.S. 709, 717 (1987); (5) school officials searching some student property, New Jersey v. T.L.O., 469 U.S. 325, 340 (1985); and (6) some governmental searches conducted pursuant to a regulatory scheme, *see, e.g.*, New York v. Burger, 482 U.S. 691, 702–03 (1987) (upholding a New York law requiring junkyard owners to maintain records for routine spontaneous inspections by police officers and state agents); Donovan v. Dewey, 452 U.S. 594, 602 (1981) (upholding a statute that enabled federal mine inspectors to inspect mining company's quarries without a search warrant); United States v. Biswell, 406 U.S. 311, 315–16 (1972) (upholding gun-control law allowing for warrantless "compliance checks" of individuals who were federally licensed to deal in sporting weapons); Camara v. Mun. Court, 387 U.S. 523, 539–40 (1967) (finding unconstitutional a city ordinance that gave city building inspectors the right to enter any building at reasonable times in furtherance of their code-enforcement duties). Given that government's "general interest in crime control" will not justify a suspicionless search, City of Indianapolis v. Edmond, 531 U.S. 32, 41–42 (2000), the Supreme Court upholds certain laws pursuant to the special-needs doctrine when there exists "no law enforcement purpose behind the searches" and "there [is] little, if any, entanglement with law enforcement," Ferguson v. City of Charleston, 532 U.S. 67, 79 n.15 (2001).

Perhaps most importantly for purposes of this footnote, the Court has also upheld routine investigatory searches of cars and personal effects of arrestees, Colordo v. Bertine, 479 U.S. 367, 371–72 (1987), and routine suspicionless

citizens nationwide. Thus, regardless of whether the Act is preempted, the very conduct codified by the Act and objectionable to so many is already condoned by a series of Supreme Court cases.

This Article therefore argues that the Arizona Act, while notable for the public response to it, is merely emblematic of a much larger and systemic problem that exists because of the collective core holdings from several Supreme Court Fourth Amendment cases. Indeed, law enforcement stops of persons lawfully present in the United States using an "illegal immigrant" profile existed before the Act and will remain permissible regardless of the Act's ultimate fate. Part I of this Article compiles and synthesizes varied Supreme Court cases that bestow upon local law enforcement an inordinate amount of discretionary law enforcement power both on the street and in an automobile. Part II offers a primer on immigration law in order to thereafter explain what exactly is illegal about being an "illegal immigrant." It also considers the available law enforcement agencies—both federal and state—charged with enforcing immigration law. Part III contends that the combination of law enforcement tools and immigration consequences provides law enforcement with a level of power and discretion comparable to that bestowed by the Arizona Act. That power, Part III asserts, allows for the pervasive de facto or express creation of an "illegal immigrant" profile and a corresponding propensity by law enforcement to stop individuals or cars using that profile.

II. THE SUPREME COURT AND OFFICER DISCRETION

This Part seeks to non-exhaustively synthesize several Supreme Court cases that, when applied at the border, equal or exceed the level of discretion bestowed upon officers by the Arizona Act. In doing so, section II.A first considers notable Supreme Court cases that apply nationwide—without regard to a suspect's relationship to the border. Then, section II.B briefly reviews a handful of border-specific Supreme Court cases.

A. Cases of Nationwide Applicability

To be clear at the outset, the Fourth Amendment to the United States Constitution serves as *the* limitation on the government's ability to impede or otherwise limit citizens' freedom of movement.[25] Within the context of stopping a vehicle or detaining a citizen on the street, the first question is whether, during that stop or detention, officers have "seized" the individual within the meaning of the Fourth Amendment. The importance of that question cannot be overstated;

searches at the border of persons and their effects, United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985).

25. *See generally* Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

indeed, if the police activity is not a "seizure," then the Fourth Amendment simply does not apply to the governmental conduct.[26]

Unlike the word "search," which has only one constitutional definition,[27] the word "seizure" has two: one that relates to property and the other that relates to the seizure of persons.[28] In the case of persons, law enforcement must have adequate cause to seize an individual, and, in the specific case of an in-home arrest, officers must ordinarily possess an arrest warrant.[29] Regardless of whether an arrest warrant is required, however, an arrest or its functional equivalent must be supported by probable cause.[30]

The Court has, however, also held that circumstances short of an arrest may constitute a less intrusive seizure, subject to a less stringent level of Fourth Amendment review. In the context of officer–citizen encounters, a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all the circumstances, a reasonable person would have believed that he was not free to leave.[31] Assuming a person has been seized within the meaning of that definition, the question ordinarily shifts to determining whether law enforcement had a sufficient justification—i.e., probable cause—for detaining the citizen.

Yet, in 1968, the Supreme Court's decision in *Terry v. Ohio*[32] made constitutional certain limited intrusions on a person's liberty based on something *less* than probable cause.[33] Specifically, under *Terry*, an officer may stop an individual based on "reasonable suspicion" to believe that criminal activity is afoot.[34] In defining reasonable suspicion, the Court held the officer "need not be absolutely certain the individual is armed; the issue is whether a reasonable prudent man in

26. *E.g.*, United States v. Karo, 468 U.S. 705, 713 (1984).
27. Katz v. United States, 389 U.S. 347, 362 (1967) (Harlan, J., concurring) (defining a "search" as police conduct that invades a person's subjective expectation of privacy, which expectation society is prepared to recognize as "reasonable").
28. *Compare Karo*, 468 U.S. at 712 ("A seizure of *property* occurs when 'there is some meaningful interference with an individuals' possessory interests in that property.'" (internal citation omitted) (emphasis added)), *with* United States v. Mendenhall, 446 U.S. 544, 553 (1980) ("[A] *person* is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained." (emphasis added)).
29. Payton v. New York, 445 U.S. 573, 588–89 (1980).
30. *See* Dunaway v. New York, 442 U.S. 200, 212 (1979).
31. Florida v. Bostick, 501 U.S. 429, 436 (1991); *Mendenhall*, 446 U.S. at 554. Although to some extent outside the scope of this Article, an uncomplied with request to stop is not a seizure. California v. Hodari D., 499 U.S. 621, 626 (1991). A suspect who continues to flee after an officer yells "stop" has therefore not been "seized" for Fourth Amendment purposes. *Id.* On the other hand, a submission to that show of force is a seizure. *Id.*
32. 392 U.S. 1 (1968).
33. *Id.* at 7.
34. *Id.* at 30.

the circumstances would be warranted in the belief that his safety or that of others was in danger."[35] If nothing during that stop dispels the officer's suspicion, then he may likewise engage in a limited pat down of the suspect's outer clothing.[36]

Notably, *Terry* provided the impetus, as well as the framework, for a stronger move by the Supreme Court away from the proposition that warrantless searches are per se unreasonable[37] and toward the competing view that the Fourth Amendment requires evaluating "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security."[38] In other words, warrant-

35. *Id*. at 27.

36. *Id*. (noting that a frisk is permissible if there exists "the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him").

37. The Supreme Court's early Fourth Amendment jurisprudence resoundingly suggested that searches conducted without a warrant were presumptively "unreasonable." *See* Stoner v. California, 376 U.S. 483, 486–87 (1964); Rios v. United States, 364 U.S. 253, 261 (1960); *see also* Chapman v. United States, 365 U.S. 610, 614 (1961) ("[The Fourth Amendment's] protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."); Jones v. United States, 357 U.S. 493, 498 (1958) ("The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy."). That position was forcefully reaffirmed by the Court's 1967 decision in *Katz v. United States*, 389 U.S. 347 (1967), wherein it observed that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Id*. at 357. Although the Court in the following two decades approved more exceptions to the warrant "requirement," *see, e.g.*, New York v. Belton, 453 U.S. 454, 460 (1981) (allowing for warrantless searches of an arrestee's car post-arrest); Schneckloth v. Bustamonte, 412 U.S. 218, 242–43 (1973) (allowing for warrantless searches premised on an individual's consent); Chimel v. California, 395 U.S. 752, 762–63 (1969) (allowing for warrantless searches incident to arrest), it continued to periodically highlight the Fourth Amendment's Warrant Clause as the predominant clause, *see, e.g.*, *Belton*, 453 U.S. at 457 ("It is a first principle of the Fourth Amendment jurisprudence that the police may not conduct a search unless they first convince a neutral magistrate that there is probable cause to do so."); *Schneckloth*, 412 U.S. at 219 ("It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is 'per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.'") (quoting *Katz*, 389 U.S. at 357); *Chimel*, 395 U.S. at 762 (observing "the general requirement that a search warrant be obtained is not lightly to be dispensed with") (citation omitted).

38. *Terry*, 392 U.S. at 19. Perhaps the truest precursor to the Court's "reasonableness" jurisprudence came in *United States v. Rabinowitz*, 339 U.S. 56 (1950), wherein the Court held that warrantless searches incident to arrest are constitutional. *Id*. at 65–66. In doing so, the Court noted that the appropriate test of police conduct "is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *Id*. at 66.

less police conduct became much easier to justify after *Terry*. The bottom line is hopefully reasonably clear: the Court no longer treats all searches and all seizures alike. Further, as a result of *Terry*, many on-the-street encounters between police and citizens that do not involve arrests or full-blown searches come within the scope of the Fourth Amendment and are lawful notwithstanding the absence of a warrant or probable cause.

The question then becomes whether *Terry's* reach extends to scenarios *other* than citizen–police encounters on the street. In 1990, the Court made clear in *Alabama v. White*[39] that the concept of "reasonable suspicion" applies to car stops. In *White*, police received an anonymous tip indicating that a woman would leave a particular apartment building at a particular time and would drive to a particular motel.[40] After corroborating the place and time of the woman's departure, officers stopped her car as she drove in the hotel's direction.[41] The Court held that the combination of the anonymous tip and the police corroboration established sufficient indicia of reliability to constitute a reasonable suspicion and thus permit an investigative stop.[42]

Knowing now that reasonable suspicion reaches both street encounters and car stops, the question turns to how officers can *generate* "reasonable suspicion." We know that a suspect's flight,[43] a suspect's avoidance of a checkpoint,[44] a suspect's presence in a "high crime" neighborhood,[45] or an informant's tip,[46] are all factors that could provide an officer with reasonable suspicion to believe that criminal activity is afoot. Yet, asked differently (and more dramatically), could racist officers lawfully initiate a race-based stop predicated on probable cause—*or reasonable suspicion*—to believe that the driver committed a non-criminal traffic violation? The answer is yes. Whichever standard governs—whether probable cause or reasonable suspicion—the Court has specifically stated that the subjective intentions of the police officer do not alter Fourth Amendment analysis.[47]

In *United States v. Whren*,[48] plainclothes vice-squad officers were patrolling a "high drug area" of Washington, D.C., in an unmarked

39. 496 U.S. 325 (1990).

40. *Id*. at 327.

41. *Id*.

42. *Id.* at 332.

43. Illinois v. Wardlow, 528 U.S. 119, 124–25 (2000); Sibron v. New York, 392 U.S. 40, 66–67 (1968).

44. *See* United States v. Arvizu, 534 U.S. 266, 271 (2002).

45. Adams v. Williams, 407 U.S. 143, 147–48 (1972).

46. Alabama v. White, 496 U.S. 325, 332 (1990).

47. United States v. Whren, 517 U.S. 806, 813 (1996).

48. 517 U.S. 806 (1996).

car.[49] They watched the petitioners' vehicle sit at an intersection for what seemed to the officers to be an unusually long time.[50] When the officers turned their car around toward the petitioners, the vehicle suddenly turned right without signaling and sped off.[51] Officers stopped the vehicle and seized two large bags of crack cocaine.[52]

The petitioners subsequently challenged the legality of their car stop, arguing that it was not justified by probable cause, or even reasonable suspicion, to believe that the petitioners were engaged in illegal drug activity.[53] Moreover, they contended allowing officers to rely on suspected traffic violations as a basis to stop a motorist could create "the temptation to use traffic stops as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists," and would allow officers to base stops on impermissible factors, like race.[54] Accordingly, they argued that in the context of traffic stops the Fourth Amendment test should be whether a police officer, acting reasonably, would have made the stop for the specific reason given, rather than simply whether probable cause existed generally.[55] The Court rejected the petitioners' argument and stated, in part, the following:

> We think [cases cited by the Court] foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officer involved. We of course agree with the petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of the law is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.[56]

How far does that language extend? Although the Court phrased the last sentence narrowly in terms of probable cause, the first sentence demonstrates its true breadth: actual motivations of the individual officer are not a factor in the reasonableness of *all* traffic stops—re-

49. *Id.* at 808. Notably, a few years after *Whren*, a cover story in the *Washington City Paper* detailed the many transgressions of Officer Soto—one of the arresting officers in *Whren*—including excessive force, incredible preliminary hearing testimony, falsified police reports, and witness coaching. *See generally* Jason Cherkis, *Rough Justice: How Four Vice Officers Served as Judge and Jury on the Streets of MPD's 6th District*, WASH. CITY PAPER, Jan. 7–13, 2000, *available at* http://www.washingtoncitypaper.com/articles/18752/rough-justice.

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

51. *Id.*

52. *Id.* at 809.

53. *Id.*

54. *Id.* at 810.

55. *Id.*

56. *Id.* at 813.

gardless of whether those stops were based on probable cause or reasonable suspicion.[57]

B. A Few Border-Specific Cases

With *Terry*, *White*, and *Whren* firmly in mind, let's now direct our attention more specifically to how those cases operate on the border. To begin with, and let's be crystal clear, the functional equivalent of the Arizona Act has been around *nationwide* since 1975. In *United States v. Brigoni-Ponce*,[58] the Court held that officers on roving patrol may constitutionally stop a vehicle if they have "reasonable suspicion" to believe "that the vehicles contain aliens who may be illegally in the country."[59] Most importantly, though, *Brigoni-Ponce* provided a list of possible factors that, if present, would support a finding of reasonable suspicion (and look an awful lot like an "illegal immigrant" profile). Those factors include: (1) the area of the stop and its relation to the border; (2) aspects of the vehicle itself (like those with large compartments); (3) whether the vehicle appears to be heavily loaded; and (4) "*the characteristic appearance of persons who live in Mexico*, relying on such factors as the mode of dress and haircut."[60]

With that digression complete, we return to post-*Whren* doctrine and the Court's 2002 decision in *United States v. Arvizu*.[61] In *Arvizu*, a border patrol agent stopped the respondent as he drove on an unpaved road in a desolate area of southeastern Arizona.[62] A subse-

57. United States v. Knights, 534 U.S. 112, 122 (2001) (ignoring an officer's subjective motivations in the context of reasonable suspicion analysis); *see* United States v. Callaraman, 273 F.3d 1284, 1286 (10th Cir. 2001) ("When determining whether an officer possessed a reasonable articulable suspicion, the subjective motivations of an arresting officer are irrelevant." (citations omitted)). The ability of law enforcement to make pretextual stops is particularly powerful given their corresponding abilities to conduct a search incident to arrest for minor traffic offenses (even where the state law does not require an arrest for such an offense), Gustafson v. Florida, 414 U.S. 260, 265 (1973), and arrest persons for misdemeanors punishable by only a fine, Atwater v. City of Largo Vista, 532 U.S. 318, 354 (2001).

58. 422 U.S. 873 (1975).

59. *Id.* at 884. Prior to *Brigoni-Ponce,* the Court had held in *Almeida-Sanchez v. United States* that roving patrols required a warrant or probable cause to search vehicles at points removed from the border or its functional equivalent. 413 U.S. 266, 272–73 (1973). The Court in *Brigoni-Ponce* did not overrule *Almeida-Sanchez*; instead it electing to distinguish *Almeida-Sanchez* on the basis that *Brigoni-Ponce* dealt only with the Border Patrol's authority to question vehicle occupants about their immigration status but not their authority to search vehicles. 422 U.S. at 874.

60. *Brigoni-Ponce*, 422 U.S. at 885–87 (noting "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor") (emphasis added).

61. 534 U.S. 266 (2002).

62. *Id*. at 268.

quent search of his vehicle revealed more than 100 pounds of marijuana.[63] Several factors supported the border patrol agent's decision to stop the vehicle, including that: (1) it triggered a sensor along a roadway often traveled by individuals seeking to avoid checkpoints; (2) respondent was driving a minivan; (3) it slowed dramatically when the agent neared; (4) it contained five occupants; (5) the driver appeared stiff and did not look at the agent; (6) the knees of the two children sitting in the very back seat were unusually high; (7) the children in the vehicle simultaneously waved at the agent; and (8) the vehicle was registered in an area notorious for alien and narcotics smuggling.[64]

Following the district court's denial of the respondent's motion to suppress the marijuana, the Court of Appeals for the Ninth Circuit reversed after concluding that several factors relied upon by the agent to justify stopping respondent were impermissible.[65] In particular, the Ninth Circuit reasoned that a majority of the factors were not suggestive of criminal activity and therefore carried little or no weight in the reasonable suspicion calculus.[66] Although the Supreme Court agreed that several factors were "susceptible to innocent explanation,"[67] it nevertheless reversed by deferring to the agent's observations, his registration check of respondent's vehicle, and his experience as a border patrol agent.[68]

Taken together, it seems fair to conclude that the Court in *Brigoni-Ponce* made constitutional an "illegal immigrant profile" and then expressed a willingness to defer to a border patrol agent's use of that profile in *Arvizu*. That conclusion is surely bolstered by the Court's past willingness to condone profiling generally[69] and its correspond-

63. *Id*. at 272.

64. *Id*. at 269–72.

65. *Id*. at 272.

66. *Id*.

67. *Id.* at 277.

68. *Id*.

69. *See, e.g*., United States v. Sokolow, 490 U.S. 1, 10 (1989) ("A court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that conclusion, but the fact that these factors may be set forth in a 'profile' does not somehow detract from their evidentiary significance as seen by a trained agent."); Illinois v. Gates, 462 U.S. 213, 243 (1983) (stating that defendant's flight into Palm Beach, overnight stay in a motel, and apparent immediate return to Chicago, with the family car awaiting him, was "as suggestive of a pre-arranged drug run, as it [was] of an ordinary vacation trip"); United States v. Mendenhall, 446 U.S. 544, 548 n.1 (1980) (noting that the suspect's behavior fit "the so-called 'drug-courier profile'—an informally compiled abstract of characteristics though typical of persons carrying illicit drugs").

ing willingness to show deference to reasonable suspicion decisions made by officers in the field.[70]

III. IMMIGRATION LAW AND CAR STOPS

This Part explores the possible immigration consequences of a fruitful stop—i.e., a stop in which an officer discovers an individual's undocumented status. To do so, this Part offers, in section III.A, a brief primer on immigration law and thereafter, in section III.B, considers whether there is anything illegal—i.e., criminally punishable—about being a so-called illegal immigrant. Section III.C concludes by explaining the relationship between federal immigration agents and local law enforcement.

A. Immigration Law: The Basics

Immigration law is based on a complex and interwoven set of statutes found in the Immigration and Nationality Act and Title 8 of the United States Code.[71] Speaking broadly, these statutes codify (1) the means of obtaining immigration status in the United States, (2) the reasons why an alien can either be ineligible for entry into the United States—often termed "inadmissible"[72]—or deportable from the United States,[73] and (3) the process by which removal is accomplished.[74] Although the majority of the immigration code describes civil proceedings and penalties, it also includes criminal provisions for certain immigration violations.

The immigration code categorizes immigrants according to varied "types of status," and two main categories of aliens present in the United States are most relevant to this Article: documented immi-

70. *E.g.*, United States v. Cortez, 449 U.S. 411, 418 (1981) ("[T]he evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.").

71. Immigration laws are codified in Title 8 of the United States Code with parallel citations in the Immigration and Nationality Act. This Article will cite to the United States Code sections throughout.

72. Aliens are inadmissible if they fit within the categories provided in 8 U.S.C. § 1182 (2006). Section 1182 contains ten main categories of inadmissibility, including health-related grounds, criminal grounds, and immigration offense related grounds. *See infra* note 83 and accompanying text.

73. Deportability grounds appear in 8 U.S.C. § 1227 (Supp. 2008). There are seven main categories within this section, many similar to those listed in § 1182.

74. Prior to the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, immigration laws referred to "deporting" an alien. Pub. L. 104-208, 110 Stat. 3009-546. The current version of the INA calls aliens who are ineligible for admission "inadmissible." It also terms those who have been admitted but are no longer eligible to stay "deportable." Finally, any alien who is either inadmissible or deportable is, by consequence, "removable."

grants and undocumented immigrants.[75] Documented immigrants are generally either temporary nonimmigrants present for a specific purpose—e.g., an ambassador, student, or tourist[76]—or lawful permanent residents (LPRs).[77] LPRs are present in the United States on a more permanent basis, and they have the ability to naturalize after a period of stay ranging between three and five years.[78] Both nonimmigrants and LPRs are inspected at the border.[79] During inspection, border agents must assess whether the alien is inadmissible pursuant to certain categories of inadmissibility.[80] Importantly, there are also two types of undocumented aliens: those who were initially inspected and admitted but overstayed their legal stay[81] and those who were never legally admitted.

Regardless of their status, *all* aliens in the United States are subject to inadmissibility and deportability standards at some point during their time in the United States.[82] The standards for inadmissibility and deportability are generally similar and exclude in-

75. Other types of status exist. For example, the alien may possess "temporary protected status," 8 U.S.C. § 1254a (2006), be eligible for relief pursuant to section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, 111 Stat. 2160, 2196-2200 (1997) (codified as amended in scattered sections of 8 U.S.C.), obtain asylum, 8 U.S.C. § 1158 (2006), or acquire withholding of removal, 8 U.S.C. § 1231(b)(3) (2006). A small group of individuals might enter the United States without a visa pursuant to the Visa Waiver Program, which enables individuals from countries with low immigration rates and high temporary travel rates to visit the United States for fewer than ninety days for tourism or business. *See* 8 U.S.C. § 1187 (2006); Bureau of Consular Affairs, U.S. Dep't of State, *Visa Waiver Program (VWP)*, TRAVEL.STATE.GOV., http://travel.state.gov/visa/temp/without/without_1990.html (last visited May 9, 2011).

76. The United States Code lists twenty-two temporary visas, alongside so-called "derivatives" for the spouse and children of primary visa holders. 8 U.S.C. § 1101(a)(15) (Supp. 2010).

77. Lawful permanent residents are colloquially known as "green card" holders, though the card they receive is no longer green and looks more like a driver's license. *Profiles on Legal Permanent Residents*, DEP'T OF HOMELAND SEC., http://www.dhs.gov/files/statistics/data/dslpr.shtm (last visited Feb. 4, 2011).

78. Naturalization requires a specific period of residence in the United States, good moral character, comprehension of the English language, adherence to the principles of the Constitution, and knowledge of American history. 8 U.S.C §§ 1423, 1427 (2006).

79. *See generally* 8 U.S.C. §§ 1182 (a)(7)(A), 1181(b) (Supp. 2010) (discussing documents for readmission of returning resident immigrants and nonimmigrants).

80. 8 U.S.C. § 1182 (Supp. 2010).

81. For instance, students are usually admitted to the United States for "duration of status," meaning they are eligible to stay in the United States so long as they maintain their status as a student. They must leave the United States upon graduation. Individuals who overstay their student visa are deportable. 8 U.S.C. § 1227(a)(1) (Supp. 2008).

82. An Immigration and Customs Enforcement agent can issue a Notice to Appear, thereby placing the alien in removal proceedings, if the agent suspects that the alien is either inadmissible or deportable. 8 U.S.C. § 1229a (2006).

dividuals on the basis of health-related, criminal, security, public charge, and immigration violation grounds, though the statutes do treat the relevance of prior criminal conduct differently.[83] Taking each concept in turn, the inadmissible alien is one who is not eligible to enter the United States. Stated more specifically, any alien who enters the United States through the inspection and admission process is subject to inadmissibility standards; if the alien is deemed inadmissible pursuant to those standards, she will not be admitted into the country.[84]

Once an alien is admitted into the country, deportation standards replace those governing admissibility. Regardless of whether the alien is temporary or permanent, she must abide by those standards during the totality of her stay in the United States.[85] Thus, for example, the alien who commits certain crimes while in the United States immediately becomes deportable and subject to removal from the country.[86] Aliens who overstay their lawful period of admission become "undocumented" and are likewise subject to deportation.[87] Of course, because aliens not legally admitted to the country have not properly entered the country and are by definition "undocumented," they remain continuously subject to inadmissibility standards.[88] In sum, documented aliens and undocumented aliens previously admitted are subject to removal if they fall under any categories listed in the

83. For instance, § 1227(a)(2)(B), the deportability statutes, and §§ 1182(a)(2)(A)(i)(II) and 1182(a)(2)(C), the inadmissibility statute, address aliens who were previously convicted for any offense related to a controlled substance. The deportability statute, however, exempts simple possession of thirty or fewer grams of marijuana, § 1227(a)(2)(B)(i), and it includes waivers not present in the inadmissibility statute—e.g. § 1227(a)(2)(B)(i) (possession of marijuana of thirty or fewer grams) and §1227(a)(2)(A)(vi) (waiver for certain criminal offenses where alien, subsequent to conviction, has been granted full and unconditional pardon by the President or a governor). This interplay between the two statutes is pervasive, though the admissibility statute is thematically broader in its coverage. That statute, for example, includes more categories than does the deportability statute and omits exceptions to various criminal grounds present in the deportability statute. *Compare* § 1182(a)(2), *with* § 1227(a)(2). Moreover, some criminal grounds of inadmissibility do not require an actual conviction, whereas all criminal deportability grounds do. *Compare* § 1182(a)(2)(C)–(I), *with* § 1227(a)(2)(A)–(H).

84. 8 U.S.C. § 1225(a)(3) (Supp. 2009). Although nonimmigrants are subject to admissibility standards each time they enter the United States, LPRs generally need only satisfy those requirements at their first entry. 8 U.S.C. § 1101(a)(13)(C) (Supp. 2010).

85. 8 U.S.C. § 1227(a) (Supp. 2008) (providing the standards governing deportation).

86. *Id*. § 1227(a)(2) (listing, for example, qualifying crimes involving moral turpitude, aggravated felonies, and controlled substance violations).

87. *Id*. § 1227(a)(1).

88. One of the grounds of inadmissibility is presence without admission, making all unlawful entry aliens subject to removal. 8 U.S.C. § 1182(a)(6)(A)(i) (Supp. 2010).

deportation statute; undocumented aliens not previously admitted are subject to removal if they fall under a category listed by the inadmissibility statute.

To briefly illustrate how these statutes work in practice, assume a hypothetical alien is suspected of being either inadmissible or deportable (and therefore removable). When our hypothetically removable alien comes to the attention of Immigration and Customs Enforcement (ICE),[89] ICE will issue to the alien a Notice to Appear in Immigration Court. The Notice lists factual allegations related to entry and activity in the United States, as well as any corresponding charges of removability.[90] The alien thereafter enters civil removal proceedings within the jurisdiction of the Executive Office for Immigration Review, a civil court system within the Department of Justice.[91] Once in the immigration court, an immigration judge, assistant chief counsel, and the alien—referred to as the respondent—participate in a bench trial to determine if the alien is inadmissible or deportable.[92] If the judge determines, or the alien admits, removability, the proceeding moves to

89. ICE is one of three components of the Department of Homeland Security (DHS), created through the Homeland Security Act of 2002, Pub. L. 107-296, § 446, 116 Stat. 2135, 2195 (codified in scattered titles of U.S.C.). All components of the former Immigration and Naturalization Service were transferred to DHS and divided into ICE, Customs and Border Protection (CBP), and Citizenship and Immigration Services (CIS). 6 U.S.C. § 291 (2006); 8 U.S.C. § 1551 (2006). A reorganization plan pursuant to the Homeland Security Act changed the Bureau of Border Security to ICE and the Customs Service to the CBP. 6 U.S.C. § 542 (2006). These three agencies perform specific duties related to immigration. 8 U.S.C. § 1551 (2006). CBP is responsible for the admission of aliens and border initiatives. 6 U.S.C. § 2152 (2006). CIS is responsible for applications for immigration status. 6 U.S.C. § 271 (2006). ICE is responsible for apprehending and removing aliens within the United States. 6 U.S.C. §§ 251, 255 (2006).

90. 8 U.S.C. § 1229(a)(1) (2006).

91. Although immigration law is a subset of administrative law, the immigration court system is not governed by typical administrative law court rules. *See* Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 598, 611–27 (2009) (describing the more limited judicial review in immigration adjudication as compared to administrative adjudication). Notably, however, scholars are currently advocating for reform to the system. *See, e.g.,* Michelel Benedetto, *Crisis On The Immigration Bench: An Ethical Perspective*, 73 BROOK. L. REV. 467, 485–88 (2008) (advocating judicial ethics reform for immigration adjudication); Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L.J. 1501, 1553–60 (2010) (analyzing possible judicial specialization in immigration adjudication); Stephen H. Legomsky, *Restructuring Immigration Adjudication,* 59 DUKE L.J. 1635, 1636 (2010).

92. The alien is entitled to an attorney, but not at the government's expense. 8 U.S.C. § 1229(a)(1)(E) (2006). In cases charging inadmissibility, the burden is on the alien to prove that they are admissible. *Id*. § 1229a(c)(2). For cases alleging deportability, the government must prove that the alien has lost her status. *Id*. § 1229a(c)(3). The assistant chief counsel, from the ICE Litigation Unit, represents the government at the hearing. 8 C.F.R. § 1240.2 (2010).

evaluating whether the alien is eligible for relief from removability.[93] Should the alien not be entitled to relief, the judge enters an order of removal directing the alien to return to her home country.[94] If she is eligible for a form of relief, the result is often a grant of lawful permanent residence.[95] Should our hypothetical alien be ineligible for relief, she may appeal to the Board of Immigration Appeals and thereafter, if necessary, to the appropriate United States circuit court.[96]

B. What Is Illegal about Being an Illegal?

What could officers on roving patrol near the border be hunting for? Stated more pointedly, what makes an illegal, illegal? The question is an important one given that the immigration code distinguishes criminal from civil violations.[97] The criminal violations range from misdemeanors to felonies, whereas the civil violations are punished through fines and the prospect of removal proceedings in immigration court.[98] Multiple sections address more serious immigration-related criminal activity, such as aiding the unlawful entry of a felon or trafficking for "immoral purposes."[99] More relevant to this Article, however, are two criminal provisions that may apply to undocumented aliens with no other criminal or immigration related past—sections 1302 and 1325.[100]

The first of these two criminal provisions penalizes an unlawful entry into the United States as a misdemeanor punishable by up to six months imprisonment and/or a fine.[101] Accordingly, any alien who

93. As with immigration "status," there are multiple forms of relief from removal. Cancellation of removal and asylum are just two examples of relief. For a better understanding of the types of relief and the requirements for it, see EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FACT SHEET: FORMS OF RELIEF FROM REMOVAL (2004), *available at* http://www.justice.gov/eoir/press/04/ReliefFromRemoval.pdf.

94. 8 U.S.C. § 1229a(c)(1)(A) (2006).

95. *See id*. § 1229b.

96. 8 C.F.R. §§ 1240.15, 1252(b)(2) (2010).

97. *Compare* 8 U.S.C. § 1324c (2006) (describing both civil and criminal penalties for document fraud), *with id*. § 1324d (providing civil penalties for failure to depart pursuant to a final order of removal).

98. For example, the Code punishes, as a first offense, eluding inspection at a port of entry with a fine and/or up to six months in prison. 8 U.S.C. § 1325(a)(2) (2006). For the second offense of eluding inspection, an alien will be subject to a fine and up to two years imprisonment. *Id*. The Code also provides for civil penalties for eluding: $50–250 for the first offense and $100–500 for the second offense. *Id*. § 1325(b). Commission of eluding triggers removal proceedings. *Id*. § 1182(a)(6)(A)(i).

99. *See* 8 U.S.C. §§ 1322, 1323, 1324, 1326, 1327, 1328 (2006). An immoral purpose is generally defined as importation of individuals for prostitution. *See* United States v. Sabatino, 943 F.2d 94, 103 (1st Cir. 1991).

100. 8 U.S.C. §§ 1302, 1305 (2006).

101. 8 U.S.C. § 1325 (2006).

enters at an undesignated time or place, by eluding inspection or through fraudulent means, may be criminally punished.[102] By way of limitation, however, the criminal penalties associated with unlawful entry apply only to undocumented aliens who enter the country without permission (but not to those undocumented aliens who overstay a visa).[103]

Undocumented aliens might also violate registration requirements by failing to register upon entering the United States.[104] Indeed, the Code requires any alien present in the United States for longer than thirty days to apply for registration and be fingerprinted.[105] Following registration, aliens must notify the Attorney General of an address change within ten days of such change.[106] Importantly, an alien's willful failure to register is punishable as a misdemeanor, and a willful failure to provide notification of an address change is punishable as a misdemeanor *and* the initiation of removal proceedings.[107]

At this point, it is worth recalling that there exists more than one type of "undocumented alien" in the United States—those who enter the country unlawfully and those who overstay their visas are both "undocumented."[108] Aliens who have overstayed their visas initially registered to obtain the visa and are therefore exempt from the registration requirements governing those who enter the country unlaw-

102. *Id.* The Supreme Court has specifically declined to determine whether unlawful entry in violation of § 1302(a) constitutes a continuing offense, reasoning even a single violation suffices as a basis for removal regardless of whether it is continuing in nature. INS v. Lopez-Mendoza, 468 U.S. 1032, 1047 n.3 (1984).

103. 8 U.S.C. § 1325(a) (2006) (criminally punishing only entering or attempting to enter).

104. *Id.* § 1302. Requiring an alien who has not registered pursuant to a visa application but has been present in the United States for longer than thirty days to apply for registration would seem simple enough. Yet, the Department of Justice does not clarify how an undocumented alien can comply with the requirement, despite clear Code language requiring the Attorney General to create registration forms and procedures. 8 U.S.C. § 1304 (2006). The absence of an established procedure for compliance suggests that it is, in fact, impossible for an alien to actually register properly (though it may also suggest that it would likewise be impossible for an alien to willfully fail to register).

105. *Id.* § 1302(a) (requiring aliens who are fourteen or older to register); *see id.* § 1302(b) (requiring the parents or legal guardians of aliens under the age of fourteen to register them and transfer the duty to register and be fingerprinted to the alien upon attaining fourteen years of age).

106. *Id.* § 1305(a).

107. *Id.* § 1306.

108. Statistics compiled and provided by the government fail to clarify what percentage of the current undocumented population falls under either of these categories. Although the percentage of undocumented aliens who overstay their legal entry—as opposed to those who entered unlawfully—is difficult to discern, some estimates suggest that 25% to 40% of the population are visa overstays. PEW HISPANIC CTR., MODES OF ENTRY FOR THE UNAUTHORIZED MIGRANT POPULATION 2–3 (2006), *available at* http://pewhispanic.org/files/factsheets/19.pdf.

fully.[109] That same exemption extends to any undocumented alien who previously applied for any immigration benefit, like temporary protected status or asylum.[110] Accordingly, this particular registration requirement applies only to those undocumented aliens who have never before applied for an immigration benefit.[111]

C. Local Law Enforcement and Immigration

As noted above, there are two separate consequences to being undocumented: civil penalties in the form of removal from the country if they are removable and criminal penalties if the alien has violated certain sections of the Code. Still, who is charged with identifying *which* immigrants are subject to these penalties? Customs and Border Protection agents by far apprehend the highest numbers of undocumented aliens at or near the border.[112] Yet, ICE also has a significant apprehension role by using internal initiatives to apprehend aliens within the United States, like workplace raids.[113] More relevant to this Article, however, is the relationship ICE has with local law enforcement, which enables local authorities to help enforce both the civil and criminal aspects of immigration law.[114]

Although federal law permits federal and state collaboration on immigration law enforcement,[115] local and state policy or legislation ultimately determines the actual involvement of local law enforcement. Some local policies may, for example, require local authorities to work

109. 8 U.S.C. §§ 1201(b), 1301, 1302 (2006).

110. *Id.*

111. *Cf.* INS v. Lopez-Mendoza, 468 U.S. 1032, 1047 n.3 (1984) (noting that the failure to properly register as an alien upon entering the United States is a crime).

112. Press Release, U.S. Customs & Border Prot., Securing America's Borders: CBP Fiscal Year 2009 in Review Fact Sheet (Nov. 24, 2009), *available at* http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/2009_news_releases/nov_09/11242009_5.xml. Aliens apprehended at the border generally go through an expedited removal process in lieu of the removal process described above. *See* 8 U.S.C. § 1225 (2006).

113. In 2008, ICE removed over 350,000 "illegal" aliens from the United States. U.S. Immigr. & Customs Enforcement, ICE Fiscal Year 2008 Annual Report iii (2008), *available at* http://www.ice.gov/doclib/news/library/reports/annual-report/2008annual-report.pdf. Perhaps one of the most infamous recent raids took place in Postville, Iowa, in May 2008, during which 389 immigrants were arrested at a meat-processing plant—the largest employer in northeast Iowa. Spencer S. Hsu, *Immigration Raid Jars a Small Town*, Wash. Post, May 18, 2008, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/05/17/AR2008051702474.html.

114. Lisa M. Seghetti et al., Cong. Research Serv., RL 32270, Enforcing Immigration Law: The Role of State and Local Law Enforcement (2009), *available at* http://www.au.af.mil/au/awc/awcgate/crs/rl32270.pdf (reviewing the recent trends in relationships between local law enforcement and federal agencies).

115. 8 U.S.C. § 1357(g) (2006) (referred to as section 287(g) programs).

directly with ICE.[116] Alternatively, other local policies could create a so-called "sanctuary city" by prohibiting local contact with federal agencies about immigration enforcement.[117] When analyzing the propriety of a state policy, 18 U.S.C. § 1373(a) unavoidably takes center-stage because it *prevents* local and state authorities from prohibiting or restricting communication with ICE about the immigration status of any individual.[118] Although the statute does not *require* communication between localities and ICE, it no doubt influences how local governments set policy.[119]

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116. Although a more in-depth discussion follows, the main tool for involving local law enforcement is section 287(g) programs. These programs create an explicit connection between local law enforcement and DHS through a Memorandum of Agreement. *See infra* note 133 and accompanying text.

117. Traditionally, sanctuary cities essentially adopt "don't ask, don't tell" policies. Alex Koppelman, *Congress to New York (and Chicago and L.A.): Drop Dead*, SALON (Oct. 4, 2007, 7:45 AM), http://www.salon.com/news/feature/2007/10/04/sanctuary/index.html. Although the 1980s saw a large influx of such cities, the rising concerns with aliens committing serious criminal offenses and infiltrating certain areas have left few true sanctuary cities remaining. *See* SEGHETTI, *supra* note 114, at 18–19 (noting the increasingly "contentious" nature of sanctuary cities and the contrasting jurisdictional actions regarding sanctuary policies); Jennifer M. Hansen, Comment, *Sanctuary's Demise: The Unintended Effects of State and Local Law Enforcement*, 10 SCHOLAR 289, 306–08 (2008) (discussing the increasing popularity of sanctuary cities, but noting the federal and state laws designed to curtail their effectiveness); Laura Sullivan, Note, *Enforcing Nonenforcement: Countering the Threat Posed to Sanctuary Laws by the Inclusion of Immigration Records in the National Crime Information Center Database*, 97 CAL. L. REV. 567, 573–78 (2009) (same).

The City of San Francisco nicely illustrates this evolution. Once a "don't ask, don't tell" city, highly publicized violent offenses by undocumented youth caused San Francisco Mayor Gavin Newsom to require local authorities to begin reporting youths arrested on suspicion of felonies to ICE. Jessie McKinley, *San Francisco at Crossroads Over Immigration*, N.Y. TIMES, June 13, 2009, at A12. The Board of Supervisors later amended the Mayor's order to require reporting only those actually convicted of felonies. Rachel Gordon, *Standoff Over Sanctuary Law*, S.F. CHRON., Mar. 4, 2010, http://www.sfgate.com/cgi-bin/blogs/cityinsider/detail?entry_id=58481. The City is currently divided over whether to follow California's agreement with the federal Secure Communities program, which would require the city's local law enforcement to submit the fingerprints of any person booked through their criminal system. Rachel Gordon, *Tug-of-War Over IDing Illegals*, S.F. CHRON., May 26, 2010, at C1.

118. Section 1373(a) provides:

> Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

8 U.S.C. § 1373(a) (2006).

119. For example, the Texas Attorney General has opined that local policies preventing communication with federal agencies are likely a "nullity" and that "[t]he Texas Legislature is not prohibited from adopting some form of legislation designed to compel local governments to comply with any duties they have under

Of course, § 1373 more than suggests the impropriety of sanctuary cities. A true sanctuary city is one in which local officials have determined that no government employee will report undocumented aliens to federal immigration officials.[120] Pursuant to such a policy, members of law enforcement are not permitted to ask suspects questions about their immigration status during an arrest, a conviction, or even during the detention phase following their conviction.[121] Not surprisingly, few true sanctuary cities remain. Rather, a range of local policies now exist; on the one end, a locality might employ a "don't ask, don't tell" program, whereas, on the other, a locality might fully disclose all collected immigration information to DHS. Most cities exist between these two extremes, creating policies to address both the level of participation with ICE[122] as well as the stage during which individuals are reported to ICE.[123]

To be considered alongside local policies are certain federal programs that exist to promote joint state and federal cooperation. In 2007, for example, ICE created the Criminal Alien Program, now active in all 114 federal and state prisons and over 300 local jails, which is designed to help identify removable aliens by allowing federal ac-

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federal immigration laws, so long as such legislation is not inconsistent with federal law." Tex. Att'y Gen. Op. No. GA-0699 (2009). Several communities in Texas have since joined the Secure Communities federal program that, in short, allows for communication about detained individuals to DHS. Julian Aguilar, *More Detainers Placed on Immigrants*, TEX. TRIB., June 21, 2010, http://www.texastribune.org/immigration-in-texas/immigration/more-detainers-placed-on-immigrants/. Even Dallas, historically a sanctuary city, now participates in the Secure Communities program. Dianne Solis, *Dallas County is Part of Secure Communities Program that Raises Immigrant Profiling Concerns*, DALL. MORNING NEWS, July 31, 2010, http://www.dallasnews.com/sharedcontent/dws/news/city/dallas/stories/072510dnmetsecure.38cbe0d.html.

120. *See* SEGHETTI, *supra* note 114, at 26.

121. For example, Haines Borough, Alaska, prohibits the Borough, its officers, employees, and agents from enforcing immigration matters. HAINES BOROUGH, ALASKA, RESOLUTION 5-12-078 (2005), *available at* http://www.hainesborough.us/Resolutions/R511278.pdf. The National Immigration Law Center provides a list of all "sanctuary cities" in the country along with a comprehensive list of the types of laws in place. *See* NAT'L IMMIGRATION LAW CTR., LAWS, RESOLUTIONS AND POLICIES INSTITUTED ACROSS THE U.S. LIMITING ENFORCEMENT OF IMMIGRATION LAWS BY STATE AND LOCAL AUTHORITIES 1 (2008), *available at* http://www.nilc.org/immlawpolicy/LocalLaw/locallaw-limiting-tbl-2008-12-03.pdf.

122. For instance, some cities contact ICE only when a felony is involved, but do not check the immigration status of misdemeanants. CICERO, ILL., POLICE DEPARTMENT GENERAL ORDER 61-01-02 (1998), *available at* http://www.democracyinaction.org/dia/organizationsORG/NILC/images/CiceroPoliceDept.pdf; *see* NAT'L IMMIGRATION LAW CTR., *supra* note 121, at 6.

123. In promulgating a local policy to govern relations with the federal government, various cities make decisions on whether to cooperate based on *when* cooperation would be required—i.e., at the arrest stage, the charging stage, and the conviction stage. *See supra* notes 120 and 122 and accompanying text.

cess to local databases of incarcerated individuals.[124] Consider also the "Secure Communities" program, which began in 2008 after a congressional appropriation to ICE.[125] In brief, the program allows local law enforcement to transmit data to ICE about individuals it determines are foreign nationals.[126] Although the nominal purpose of the program is to focus on serious criminal offenders, the program's scope includes a range of criminal offenses and delegates to local ICE offices the discretion to set enforcement priorities.[127]

More informally, localities might also simply contact federal authorities following the arrest and booking of an individual in a local jail. If, for instance, a member of local law enforcement alerts federal authorities after stopping an undocumented alien who is suspected of a criminal offense, like unlawful entry or failure to depart after an order of removal, that alien can be placed in federal criminal proceedings.[128] Importantly, civil proceedings may also commence immediately, wholly apart from any criminal consequences, if federal authorities suspect the alien should be removed.[129]

Yet, most relevant to this Article is the extensive partnership between federal, state, and local law enforcement, known colloquially as "287(g) programs."[130] In short, 287(g) programs allow for the federal

124. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., FACT SHEET: CRIMINAL ALIEN PROGRAM 1 (2008) (on file with author); ANDREA GUTTIN, IMMIGRATION POL'Y CTR., SPECIAL REPORT: THE CRIMINAL ALIEN PROGRAM: IMMIGRATION ENFORCEMENT IN TRAVIS COUNTY, TEXAS 6 (2010), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/Criminal_Alien_Program_021710.pdf.

125. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., FACT SHEET: SECURE COMMUNITIES 1 (2009) (on file with author).

126. *Id.*

127. *Id.* Some 1265 local jurisdictions in forty-two states have already signed up for the Secure Communities program. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., ACTIVATED JURISDICTIONS (2010), *available at* http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf. Nationwide access to the program will be available by 2013. *Id*.

128. *See supra* note 99 and accompanying text.

129. 8 U.S.C. § 1229a (2006). Such a consequence is permissible given that federal courts have uniformly held that many of the constitutional protections afforded to those in criminal proceedings are not required in civil immigration proceedings. *See, e.g.,* INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) (holding that the exclusionary rule does not apply in deportation proceedings); Galvan v. Press, 347 U.S. 522, 529–31 (1954) (finding the ex post facto clause does not apply in deportation proceedings); Navia-Duran v. INS, 568 F.2d 803, 808 (1st Cir. 1977) (finding that Miranda rights are not applicable in deportation proceedings). *But see* Orhorhaghe v. INS, 38 F.3d 488, 493 (9th Cir. 1994) (holding that an egregious violation of Fourth Amendment rights can result in the exclusion of evidence).

130. Section 287(g) provides, in pertinent part, as follows:

> [The Attorney General may] enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attor-

deputization of local law enforcement.[131] The program permits local officers—pursuant to a written agreement with DHS—to carry out federal immigration functions like investigation, apprehension, and/or detention.[132] Although the deputized officers remain employed by the locality,[133] they operate under "the direction and supervision of the Attorney General."[134] As such, they are considered federal employees for purposes of determining individual or governmental liability and for determining their compensation following a work-related injury.[135] The programs also allow for unfettered federal access to local information; indeed, there is no requirement that an alien be in a specific stage of criminal proceeding (e.g., arrest, charge, or conviction) before the individual's information is made available to federal authorities.[136] Thus, although there are multiple ways in which local law enforcement agencies are connected to federal officials at ICE, the most extensive relationship exists through 287(g) programs.

IV. THE CONSTITUTIONALITY OF IMMIGRANT PROFILING

Synthesizing just a few of the Supreme Court's decisions in the context of that brief immigration discussion demonstrates how much discretion even local officers possess in ordinary street and car stop encounters. As one of our former criminal procedure professors was fond of saying, "in no other job does discretion *increase* the lower down on the hierarchical chain you go." Indeed, through its decisions in *Terry*, *White*, and *Whren*, the Court has provided local officers with nearly unfettered discretion. Moreover, when *Brigoni-Ponce*, *Arvizu*, and 287(g) programs are considered alongside *Terry*, *White*, and *Whren*, it becomes clear that no meaningful checks exist on the authority of deputized law enforcement at the border or its functional

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> ney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension or detention of aliens in the United States (including the transportation of such aliens across State line s to detention centers), may carry out such function at the expense of the State or political subdivision and to extent consistent with State and local law.

8 U.S.C. § 1357(g)(1) (2006). For a link to each Memorandum of Agreement (MOA) between ICE and a locality, see U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., DELEGATION OF IMMIGRATION AUTHORITY SECTION 287(g), http://www.ice.gov/news/library/factsheets/287g.htm (last visited Mar. 7, 2011).

131. 8 U.S.C. § 1357(g)(1) (2006).

132. *Id*.

133. *Id*. § 1357(g)(7).

134. *Id*. § 1357(g)(3).

135. *Id*. § 1357(g)(8), (g)(7).

136. *See id*. § 1357(g)(2) (providing for federal access to local information without requiring an alien to be in a particular stage of a criminal case).

equivalent.[137] Profiling, ethnic targeting, and outright racism supported by "reasonable suspicion" all seem constitutionally permissible at or near the border.[138] Remember, there are no constitutional protections awaiting the alien in immigration proceedings.[139]

From the standpoint of the Fourth Amendment, it also seems fairly clear at this point that the Arizona Act is constitutional.[140] After all,

137. To be clear, border patrol agents have no authority to stop a car on the basis of a suspected traffic violation. *See id.* § 1357 (empowering immigration officers to interrogate aliens or suspected aliens as to his right to be in the U.S.; to make certain arrests of aliens violating immigration laws, usually in the officer's presence or view; to board vessels in territorial water; to conduct warrantless searches of persons seeking admission when reasonable cause exists to suspect the person is not admissible; and to take custody of aliens arrested for violation of drug laws). *White* and *Whren* are nonetheless applicable because, as noted, the creation of 287(g) programs allow for federal deputization of local law enforcement.

138. That same reasonable suspicion may of course extend even to traffic offenses. *See supra* note 57 and accompanying citations. Despite the stated objective of 287(g) to target violent or serious criminals, many jurisdictions have seen a rise in traffic violations and subsequent removal proceedings. *See* Sarah Ovaska, *Data: Most Deportees Are Minor Offenders*, CHARLOTTE OBSERVER, Mar. 25, 2010, http://www.charlotteobserver.com/2010/03/25/1335099/data-most-deportees-are-minor.html. Some therefore claim that 287(g) programs impose too much of a burden on local police and shift their focus from localized law enforcement to federal immigration enforcement. *See* HANNAH GLADSTEIN ET AL., MIGRATION POL'Y INST, BLURRING THE LINES: A PROFILE OF STATE AND LOCAL POLICE ENFORCEMENT OF IMMIGRATION LAW USING THE NATIONAL CRIME INFORMATION CENTER DATABASE, 2002–2004, at 7 (2005), *available at* http://www.migrationpolicy.org/pubs/MPI_report_Blurring_the_Lines_120805.pdf.

139. INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("Consistent with the civil nature of the proceeding, various protections that apply in the context do not apply in a deportation hearing."). Addressing the inapplicability of, for example, the exclusionary rule in immigration proceedings, the Supreme Court has relied heavily on to the specific training and specialization of immigration officers. *Id.* at 1044–46. Yet, as the lines between criminal enforcement and immigration enforcement at the local level are blurred, "[n]onfederal actors who are using immigration enforcement powers to achieve their criminal law objectives are able to circumvent some of the constitutional baselines that apply to criminal policing without confronting the sanctions that would be available in the criminal system." Jennifer M. Chácon, *A Diversion of Attention: Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1570 (2010).

140. As foretold by Judge Bolton's recent opinion, the Arizona law may unconstitutionally violate the Supremacy Clause. *See supra* note 20 and accompanying text. At present, there is a split among federal circuit courts as to whether the federal Immigration Reform and Control Act preempts all state and local regulation of immigration. *Compare* Chicanos Por La Causa, Inc. v. Napolitano, 544 F.3d 976 (9th Cir. 2008) (concluding that Arizona's Legal Arizona Workers Act is facially constitutional), *opinion amended and superseded on denial of reh'g*, 558 F.3d 856 (9th Cir. 2009), *cert. granted sub nom.*, Chamber of Commerce v. Candelaria, 130 S. Ct. 3498 (2009), *with* Lozano v. City of Hazelton, 496 F. Supp. 2d 477, 517–29 (M.D. Pa. 2007) (holding that state-based immigration ordinances are expressly and impliedly preempted).

Arizona simply codified what the Supreme Court's holdings permit. Indeed, the Arizona Act is the product of its surrounding jurisprudential environment—an environment that over time has come to implicitly condone law enforcement conduct that, according to recent press, has finally crossed the threshold into conduct society is not prepared to accept as reasonable.

Apart from the public outcry surrounding the Arizona Act, applying the reasonable suspicion standard to assessing a citizen's immigration status seems to further eviscerate the Court's core holding in *Terry*. Given that the reasonable suspicion standard now applies to other non-criminal conduct, like traffic offenses,[141] it is easy to forget that *Terry* limited its reasonable suspicion standard to an officer's belief that "*criminal activity* may be afoot *and* that the persons with whom he is dealing may be armed and presently dangerous."[142] Yet, there is nothing necessarily criminal about an individual's status as "undocumented."[143] Further, unlike an officer's belief that a person committed a traffic offense, there's something far more normatively uncomfortable about allowing officers to generate the requisite reasonable suspicion to believe an individual is undocumented by relying in whole or in part on that individual's Mexican ethnicity. That same discomfort, albeit in the context of race, generated an overflow of scholarship skewering the Court for its decision in *Whren*.[144]

Moreover, even if the holding in *Whren* in particular is somehow faithful to *Terry's* requirement that officers believe *criminal activity* is

141. *See, e.g.,* Holeman v. City of New London, 425 F.3d 184, 189–90 (2d Cir. 2005) ("The Fourth Amendment requires that an officer making [a temporary detention during a traffic stop] have probable cause or reasonable suspicion that the person stopped has committed a traffic violation or is otherwise engaged in or about to be engaged in criminal activity." (internal citations omitted)); United States v. Mariscal, 285 F.3d 1127, 1130 (9th Cir. 2002) ("[T]he Fourth Amendment requires only reasonable suspicion in the context of investigative traffic stops." (internal citations and quotations omitted)); United States v. Botero-Ospina, 71 F.3d 783, 787 (10th Cir. 1995) ("Our sole inquiry is whether this particular officer had reasonable suspicion that this particular motorist violated any one of the multitude of applicable traffic and equipment regulations of the jurisdiction." (internal citation and quotation marks omitted)); *supra* note 57 and accompanying citations.

142. Terry v. Ohio, 392 U.S. 1, 30 (1968) (emphasis added).

143. *See supra* notes 98–99 and accompanying text.

144. *See, e.g.*, Phyllis W. Beck & Patricia A. Daly, *State Constitutional Analysis of Pretext Stops: Racial Profiling and Public Policy Concerns*, 72 TEMP. L. REV. 597, 597 (1999); Mark M. Dobson, *The Police, Pretextual Investigatory Activity, and the Fourth Amendment: What Hath* Whren *Wrought*?, 9 ST. THOMAS L. REV. 707, 763 (1997); Diana Roberto Donahoe, *"Could Have," "Would Have:" What the Supreme Court Should Have Decided in* Whren v. United States, 34 AM. CRIM. L. REV. 1193, 1194 (1997); David A. Harris, *Car Wars: The Fourth Amendment's Death on the Highway*, 66 GEO. WASH. L. REV. 556, 585 (1998); Illya Lichtenberg, *Police Discretion and Traffic Enforcement: A Government of Men?*, 50 CLEV. ST. L. REV. 425, 451 (2003).

afoot, lower court decisions interpreting the Supreme Court's jurisprudence suggest that the pendulum favoring police discretion has swung too far in the border context. Should, for example, border patrol agents stop a blue van traveling at a normal rate of speed at 9:30 PM about fifteen miles from the Del Rio border area on a road that lacks a checkpoint? Yes, says the Fifth Circuit.[145] In *United States v. Zapata-Ibarra*,[146] a veteran border patrol agent of ten years—armed with only the preceding facts—made a U-turn after passing the blue van and ultimately elected to stop the van after (1) it slowed down, (2) the officer saw several passengers, (3) the passengers appeared to slouch down, and (4) the van was driving on an indirect route based on its place of registration.[147] Relying on the *Brigoni-Ponce* factors, the court upheld the stop as constitutional by reasoning that the van was close to the Mexican border, the road was a known smuggling route, the agent was experienced, the van slowed down after witnessing the agent make a U-turn, and the van had several passengers.[148]

The court's holding in *Zapata-Ibarra* is neither unique nor surprising.[149] As detailed above, the Supreme Court has showered border agents with discretionary power, and it should therefore surprise no one that wholly innocent behavior may provide agents with "reasonable suspicion."

Another noteworthy but perhaps equally unsurprising result is the cost exacted from broader society by arming border patrol agents with inordinate discretion. In July of 2008, five individuals and Somos

145. In truth, the driver's proximity to the border in this hypothetical likely ends the inquiry. Border patrol agents may stop and interrogate "any alien or person believed to be an alien" who is "within a reasonable distance from any external boundary of the United States." 8 U.S.C. § 1357(1), (3) (2006). Federal regulations interpret the term "reasonable distance" to mean a distance "within 100 air miles from any external boundary of the United States." As one district court noted, "Title 8 U.S.C. § 1357 seems to give officers of the INS, including Border Patrol agents, complete discretion to stop vehicles without a warrant or probable cause within a reasonable distance of the border." United States v. Rubio-Hernandez, 39 F. Supp. 808, 831 (W.D. Tex. 1998).

146. 212 F.3d 877 (5th Cir. 2000).

147. *Id*. at 879–80.

148. *Id*. at 881–84.

149. *See, e.g.,* United State v. Magana, 797 F.2d 777, 781–82 (9th Cir. 1986); United States v. Garcia, 732 F.2d 1221, 1225 (5th Cir. 1984); United States v. Gonzalez, No. 05-250, 2005 U.S. Dist. LEXIS 36728, at *23–31 (D.P.R. Nov. 1, 2005). *But see* United States v. Montero-Camargo, 208 F.3d 1122, 1132 (9th Cir. 2000) ("The likelihood that in an area in which the majority—or even a substantial part—of the population is Hispanic, any given person of Hispanic ancestry is in fact an alien, let alone an illegal alien, is not high enough to make Hispanic appearance a relevant factor in the reasonable suspicion calculus."); *Rubio-Hernandez*, 39 F. Supp. at 834–37 (finding no reasonable suspicion to support a stop despite the facts that the driver was Hispanic, he did not acknowledge agents as he passed them, swerved and looked into the rearview mirror nervously, and drove on a common route for smugglers).

America, a Latino community-based coalition, sued Maricopa County, Arizona, the Maricopa County Sheriff's Office, and Sheriff Joe Arpaio, charging that they or their members were unlawfully stopped and mistreated by law enforcement because they were Latino.[150] The class action suit alleged, inter alia, that Arpaio and the County (1) engaged in generalized "crime suppression sweeps" in Latino neighborhoods of day laborers; (2) made a public statement that physical appearance alone is sufficient to question an individual about their immigration status; and (3) used volunteers to assist in these crime sweeps who have known animosity towards Hispanics and immigrants.[151] Although defendants moved to dismiss the complaint, the United States District Court for the District of Arizona denied the motion via memorandum opinion in February 2009.[152] Although the litigation remains ongoing, it is perhaps worth noting that the defendants were recently sanctioned for destroying evidence.[153]

More attenuated consequences of the Supreme Court's discretion-granting jurisprudence have also surfaced outside Arizona. In New York, for example, Nassau County enacted what critics have dubbed the "waving while Latino" law, which was enacted to curb soliciting immigrant day laborers.[154] In Texas, the Northern District recently struck down legislation enacted by the City of Farmers Branch which conditions residence in rental housing within the City on lawful presence in the United States.[155] Finally, in Pennsylvania, a federal judge in 2007 struck down an ordinance in Hazelton designed to bar undocumented immigrants from working or renting homes there.[156] Of course, back in Arizona, constitutional challenges to SB 1070 have already surfaced.[157]

The next question is an obvious one—what now? First, consistent with *Terry*, roving border patrol stops should be made on the basis of

150. First Amended Complaint at 2–3, Melendres v. Arpaio, 598 F. Supp. 2d 1025 (D. Ariz. 2009) (No. CV 07-02513-PHX-MHM).

151. *Id*. at 11–16.

152. *Melendres*, 598 F. Supp. 2d at 1040.

153. Melendres v. Arpaio, No. CV-07-2513-PHX-GMS, 2010 U.S. Dist. LEXIS 20311, at *24 (D. Ariz. Feb. 11, 2010).

154. Robin Finn, *Town Divides Over Law Aimed at Day Laborers*, N.Y. TIMES, Dec. 24, 2009, at MB1.

155. Villas at Parkside Partners v. City of Farmers Branch, 701 F. Supp. 2d 835 (2010).

156. Julia Preston, *Judge Voids Ordinance on Illegal Immigrants*, N.Y. TIMES, July 27, 2007, http://www.nytimes.com/2007/07/27/us/27hazelton.html.

157. *See* Complaint for Declaratory, Injunctive and other Relief, Nat'l Coal. of Latino Clergy and Christian Leaders v. Arizona, No. CV-10-0943-PHX (D. Ariz. Apr. 29, 2010), *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/ClergyComplaint-4-29-10.pdf; Complaint, Escobar v. Brewer, No. CV-10-00249 (D. Ariz. Apr. 29, 2010), *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/EscobarComplaint-4-29-10.pdf.

reasonable suspicion to believe that the driver or the vehicle's occupants are engaged in *criminal* activity. A mere belief or unparticularized hunch that the driver or her occupants are undocumented is insufficient.

Second, as part of the reasonable suspicion calculus at the border, the factors provided by the Court in *Brigoni-Ponce* require revision. In 2010, can it be that "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor" in the reasonable suspicion calculation?[158] It is true that some 86.1% of those apprehended *at* the border between 2005 and 2008 for being undocumented in the United States were Mexican nationals.[159] That statistic undoubtedly suggests that nationality is a significant factor *at* the border. The constitutional problem, however, arises away from the border: although it is a crime to *enter* the country undocumented,[160] it is *not necessarily* criminally punishable to otherwise simply be *in* the country undocumented.[161] Given that Mexicans—and immigrants generally—are no more prone than any other ethnicity or race to committing crimes,[162] the color of one's skin

158. United States v. Brigoni-Ponce, 422 U.S. 873, 886–87 (1975).

159. NANCY RYTINA & JOHN SIMANSKI, DEP'T OF HOMELAND SEC., FACT SHEET, APPREHENSION BY THE U.S. BORDER PATROL: 2005–2008 (2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_apprehensions_fs_2005-2008.pdf.

160. 8 U.S.C. § 1325 (2006).

161. *See supra* notes 98–99 and accompanying citations.

162. Immigrants and immigrant communities maintain low crime rates despite often being faced with adverse social conditions more conducive to criminal behavior, such as low income and low education levels. *See* Ramiro Martinez, Jr. & Matthew T. Lee, *On Immigration and Crime*, in 1 CRIMINAL JUSTICE 2000: THE NATURE OF CRIME: CONTINUITY AND CHANGE 485, 501 (2000), *available at* http://www.ncjrs.org/criminal_justice2000/vol_1/02j.pdf ("In the small number of studies providing empirical evidence, immigrants are generally less involved in crime than similarly situated groups, despite the wealth of prominent criminological theories that provide good reasons why this should not be the case . . . ."); Dennis Wagner, *Violence is Not Up on Arizona Border Despite Mexican Drug War*, ARIZ. REPUBLIC, May 2, 2010, at A1; Kristine F. Butcher & Anne Morrison Piehl, *Why Are Immigrants' Incarceration Rates So Low? Evidence of Selective Immigration, Deterrence, and Deportation* (Nat'l Bureau of Econ. Research, Working Paper No. 13229, 2007), *available at* http://www.nber.org/papers/w13229 ("18-40 year-old male immigrants have lower institutionalized rates than are one-fifth of the native born.").

When it comes to Mexicans specifically, incarceration rates among young men are the lowest compared to other immigrant groups. RUBÉN G. RUMBAUT & WALTER A. EWING, IMMIGRATION POL'Y CTR, THE MYTH OF IMMIGRANT CRIMINALITY AND THE PARADOX OF ASSIMILIATION: INCARCERATION RATES AMONG NATIVE AND FOREIGN-BORN MEN 1 (2007), *available at* http://www.americanimmigrationcouncil.org/sites/default/files/docs/Imm%20Criminality%20%28IPC%29.pdf. In 2003, foreign-born Mexicans had an incarceration rate of only 0.7% compared to the 5.9% rate of native-born males of Mexican descent. *Id.* at 6; *see* Nicholas Riccardi, *Quiet Border Towns Don't Live Up to Their Notoriety*, L.A. TIMES, May

can play no role in assessing whether a *crime* has taken place or is ongoing. Accordingly, at least for agents seeking to establish reasonable suspicion outside the border or its functional equivalent, nationality should play no role.

Finally, wholly innocent conduct should not be the *sole* or *exclusive* basis upon which to allow border patrol agents to effectuate a stop. Admittedly, "[l]aw enforcement officers may perceive meaning in actions that appear innocuous to the untrained observer."[163] However, when so many of the lawful factors that comprise the reasonable suspicion calculus at the border—e.g., vehicle type, looking nervous, failing to acknowledge law enforcement, nationality, and number of passengers—are common to *so* many people, courts should require agents to articulate some basis to believe criminal activity is intertwined with this otherwise lawful conduct. As the Eighth Circuit has noted, "[g]eneral profiles that fit large numbers of innocent people do not establish reasonable suspicion."[164] If the Supreme Court—or even a modest handful of other circuits—felt similarly, perhaps states like Arizona would think twice before enacting legislation like SB 1070. As it stands now, however, that law does not violate the Fourth Amendment.

V. CONCLUSION

According to President Obama, the Arizona Act is "irresponsib[le]" and threatens "to undermine basic notions of fairness that we cherish as Americans, as well as the trust between police and our communities that is so crucial to keeping us safe."[165] This may be true, but blame does not reside exclusively with the Arizona Legislature. The Arizona Act is merely the foreseeable consequences of nearly three decades worth of Supreme Court decisions that have gradually increased the discretionary capabilities of law enforcement. Nowhere is that discretion higher than at the border.

The true fix is not at the legislative level. Sure, federal immigration reform may prove helpful. Yet, to avoid "irresponsible" legislation, the Supreme Court must rearticulate the reasonable suspicion standard to, consistent with *Terry*, make clear that officers must believe that the suspect is engaged in *criminal* activity. As part of the

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13, 2010, http://www.latimes.com/news/nationworld/nation/la-na-border-crime-20100514,0,7955325,full.story ("Despite the drug war that has claimed thousands of lives in Mexico, communities along the U.S. side of the 2,000-miles southern border have shown virtually no increase in crime for several years.").

163. United States v. Gutierrez-Daniez, 131 F.3d 939, 942 (10th Cir. 1997).

164. United States v. Yousif, 308 F.3d 820, 828 (8th Cir. 2002) (citing United States v. Eustaquio, 198 F.3d 1068, 1071 (8th Cir. 1999)).

165. Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 23, 2010, at A1.

reasonable suspicion calculus, border patrol agents must not be allowed to take the color of a suspect's skin into account. Finally, circuit and district courts should no longer permit wholly innocent conduct to constitute the *sole* or *exclusive* basis upon which to allow border patrol agents to effectuate a stop.