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## ***Brignoni-Ponce and the Establishment of Race-Based Immigration Enforcement***

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# **BRIGNONI-PONCE AND THE ESTABLISHMENT OF RACE-BASED IMMIGRATION ENFORCEMENT**

Isabel M. Skilton

*Abstract:* *United States v. Brignoni-Ponce* solidified the racist enforcement of United States immigration laws by allowing “Mexican appearance” to be a factor forming reasonable suspicion in a roving patrol. The United States Supreme Court rationalized race-based immigration enforcement by relying on erroneous immigration demographics and a misconstrued notion of serving the public interest. This comment demonstrates that the rationales provided by the Supreme Court are illogical, discriminatory, and harmful to communities of color. This comment analyzes the impacts of race-based discrimination and provides alternatives which may cabin the impact of *Brignoni-Ponce*. Aside from overruling *Brignoni-Ponce* in its entirety, a probable cause or warrant requirement could be added, either through legislative or judicial action, so as to bolster the Fourth Amendment rights of citizens and noncitizens alike.

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## INTRODUCTION

Immigration law is selectively enforced and adjudicated on the basis of race—focusing on who is perceived to be a danger to the community based on the color of their skin and their country of origin. In the United States, Latin Americans,<sup>1</sup> particularly those of Mexican descent,<sup>2</sup> have frequently been targeted and profiled by immigration enforcement. In 1975, the United States Supreme Court legitimized race-based immigration enforcement in *United States v. Brignoni-Ponce*. The Court held that “Mexican appearance” could be a factor, though not the sole factor, to consider when determining whether it was appropriate to stop and search a vehicle within the 100-mile United States border.<sup>3</sup> Through *Brignoni-Ponce*, the Supreme Court labeled those who did not fit the white mold as “foreign,” condoned disparate policing standards, and ultimately weakened the Fourth Amendment right to be free from unreasonable search and seizure for all individuals of “Mexican appearance.”<sup>4</sup> When *Brignoni-Ponce* was decided, only four percent of the United States population was Latin American.<sup>5</sup> Today, the demographics of the United States have dramatically diversified. White Americans make up sixty-two percent of those living in the United States<sup>6</sup> and Latin Americans

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<sup>1</sup> The courts and United States governmental bodies frequently use the term Hispanic or Latino to describe individuals from Mexico and Central and South America. These terms fail to accurately describe such populations. The term “Hispanic” describes individuals who speak Spanish, including those who live in Spain. It also fails to capture individuals in Latin America who do not speak Spanish, such as those who speak Portuguese, French, and Indigenous languages, such as Quechua, Guarani, and Aymara. The term “Latino,” on the other hand, like much of the Spanish vocabulary, is a gendered word in the masculine form and therefore excludes women and nonbinary individuals. “Latinx” has been used as a gender-neutral term. See ED MORALES, *LATINX: THE NEW FORCE IN AMERICAN POLITICS AND CULTURE* (2018). For this comment, I will use the term “Latin American” to describe individuals from Latin America. Latin America includes American countries south of the United States. See Latin America, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/Latin-American> (last visited May 2, 2022).

<sup>2</sup> For the purposes of this comment, those of Mexican descent include those who were born in Mexico or those whose parents or grandparents were born in Mexico. Note that while “Mexican” is a nationality, it has been racialized in the United States and many stereotypes have been established and perpetrated as a result.

<sup>3</sup> *Modern Immigration Wave Brings 59 Million to U.S., Driving Population Growth and Change Through 2065*, PEW RSCH. CTR. (Sept. 28, 2015), <https://www.pewresearch.org/hispanic/2015/09/28/modern-immigration-wave-brings-59-million-to-u-s-driving-population-growth-and-change-through-2065/>.

<sup>4</sup> See *United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975).

<sup>5</sup> PEW RSCH. CTR., *supra* note 3. In its ruling, the Supreme Court accepted incorrect data provided by the Immigration and Naturalization Service (INS). The INS had estimated, without empirical data, that 6.8 to 10.2 million undocumented Mexicans were present in the United States at the time. However, demographers later agreed that this number was closer to 1.7 to 2.3 million. *Brignoni-Ponce*, 422 U.S. at 879, n.5; Jorge Durand et al., *The Demographic Foundations of the Latino Population*, in *HISPANIC AND THE FUTURE OF AMERICA* (Marta Tienda & Faith Mitchell eds., 2006).

<sup>6</sup> PEW RSCH. CTR., *supra* note 3.

make up eighteen percent of the United States population—both authorized and unauthorized.<sup>7</sup> Any rationale for immigration enforcement that boils down to an ethnic or race-based appearance is unrealistic, unworkable, and illogical. Most importantly, it is discriminatory and harmful to those who are forced to bear the weight of heightened surveillance and policing.

*Brignoni-Ponce* remains a stronghold of the racist United States immigration system, arming immigration enforcement and the courts with a rationale and legal basis to continue perpetuating disparate and unconstitutional treatment of immigrant communities. The legitimization of disparate enforcement is evident in deportation rates for Black immigrants and immigrants of color in the United States. Today seventy-six percent of Black immigrants are deported on criminal grounds, compared to the average of forty-five percent of immigrants as a whole.<sup>8</sup> For a searingly horrific example one need look no further than the 2021 wholesale deportation of Haitian refugees by immigration enforcement on horseback—echoing scenes from our nation’s gruesome and shameful history of extrajudicial lynching and murder of Black communities.<sup>9</sup>

This comment analyzes the impacts of race-based discrimination and provides alternatives which may cabin the impact of *Brignoni-Ponce*. Section I briefly explores the history of Latin Americans, particularly Mexicans, within the United States and how these populations have been impacted by United States immigration policies and race-based immigration enforcement mechanisms. Section II assesses how the holdings in *Terry v. Ohio* and *Brignoni-Ponce* permit immigrant enforcement to stop individuals on the basis of race and how those rulings have been interpreted by lower courts. Finally, Section III analyzes the flaws of *Brignoni-Ponce* and explores alternatives to alleviate the harm the Supreme Court has condoned. Ultimately, this comment proposes heightened standards to authorize the stop and visual search of a car through a roving patrol through the requirement of probable cause instead of reasonable suspicion.

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<sup>7</sup> Luis Noe-Bustamante et al., *U.S. Hispanic population surpassed 60 million in 2019, but growth has slowed*, PEW RSCH. CTR. (July 7, 2020), <https://www.pewresearch.org/fact-tank/2020/07/07/u-s-hispanic-population-surpassed-60-million-in-2019-but-growth-has-slowed/>.

<sup>8</sup> Renée Feltz, *Black Immigrants Much More Likely to Be Deported Over Criminal Offenses, Data Shows*, THE GUARDIAN (Oct. 3, 2016, 10:06 PM), <https://www.theguardian.com/us-news/2016/oct/03/black-immigrants-us-deportation-rates-criminal-convictions>.

<sup>9</sup> *Migrants in Texas: US Probes Horseback Charge on Haiti Migrants*, BBC NEWS (Sept. 21, 2021), <https://www.bbc.com/news/world-us-canada-58637116>.

## I. CIRCULAR MISTREATMENT: RACE-BASED IMMIGRATION ENFORCEMENT

In *Brignoni-Ponce*, the United States Supreme Court held that a trained law enforcement officer deciding whether to conduct an investigatory immigration stop may, “in light of his experience,” rely upon a person’s racial appearance.<sup>10</sup> The Court largely justified its ruling on the demographics of the United States in the 1970s, particularly the size of Mexican communities. Underlying the decision was the prevailing belief that most unlawful residents of the United States were Mexican. But the increase of unauthorized Mexicans in the United States at the time was not due to rising immigration numbers—it was a consequence of policies that dramatically reduced the number of authorized immigrants. Such policies arbitrarily criminalized Mexican immigrants. Coupled with these immigration policies, *Brignoni-Ponce* legitimized race-based practices that harm immigrant communities and any community perceived by law enforcement as foreign. To better understand the rise of these race-based practices, it is important to understand a key policy underlying them—the Hart-Celler Act, passed in 1965.

### A. *The Hart-Celler Act Criminalized Mexican Immigrants*

The perception that a majority of Mexicans in the United States were unauthorized residents stems in part from the passage of the Hart-Celler Act in 1965, which severely limited the number of immigrants authorized to enter the United States every year.

In the midst of the Civil Rights Revolution of the 1960s and 1970s, the Hart-Celler Act amended the Immigration and Nationality Act (INA) to eliminate the national origins quota system and allow each nation to send up to 20,000 people to the United States every year.<sup>11</sup> While the Hart-Celler Act was passed with the goal of reducing the racist foundations that define United States immigration enforcement, it crippled pre-existing migration patterns into the United States.

The Hart-Celler Act had particularly devastating consequences for Mexican laborers in the United States. Following the Hart-Celler Act, the

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<sup>10</sup> *Brignoni-Ponce*, 422 U.S. at 885–87.

<sup>11</sup> See CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON, AMERICA’S OBSESSION WITH LOCKING UP IMMIGRANTS* 45 (2019); Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273 (1996); César Cuauhtémoc García Hernández, *Unseen Exclusions in Voting and Immigration Law*, 17 BERKELEY J. AFR. AM. L. & POL’Y 168 (2015).

demand for Mexican labor did not diminish and the migration patterns of Mexican nationals did not change.<sup>12</sup> This can be seen through the Hart-Celler Act not accounting for the former Bracero Program, which allowed temporary workers to legally work in the United States.<sup>13</sup> Congress' failure to "bring these temporary workers into the legal permanent migration stream" resulted in the "transformation, beginning in 1965, of the Mexican worker from legal and temporary to permanent and undocumented."<sup>14</sup> The Hart-Celler Act made the continuation of these migration patterns unlawful.<sup>15</sup> The Act severely limits authorized entry into the United States and is credited in large part with the increase in unauthorized Mexican immigration.<sup>16</sup> Prior to 1965, 200,000 Mexican immigrants had been legally entering the United States on a yearly basis.<sup>17</sup> In 1968, the year the Act went into effect, 151,000 Mexicans were deported.<sup>18</sup> When the law was further amended in 1976 to reduce Mexican quotas to 20,000 per year, 781,000 Mexicans were deported.<sup>19</sup> By the end of the 1970s immigration enforcement was apprehending nearly one million unauthorized immigrants along the United States-Mexico border.<sup>20</sup>

The unauthorized or undocumented<sup>21</sup> Mexican immigrant has taken on the stereotype of a criminal.<sup>22</sup> This stereotype is not only factually incorrect, but it also stems from policies—such as the Hart-Celler Act—that arbitrarily criminalized patterns of migration that communities had relied on for years.<sup>23</sup> The abrupt restrictions on migration created by the Hart-Celler Act failed to accommodate pre-existing migration patterns. Mexican migrants continued to travel to supply the United States demand for labor and were criminalized for doing so.

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<sup>12</sup> GARCÍA HERNÁNDEZ, *supra* note 11, at 44–45

<sup>13</sup> Leticia M. Saucedo, *The Impact of 1965 Immigration and Nationality Act on the Evolution of Temporary Guest Worker Programs, or How the 1965 Act Punted on Creating a Rightful Place for Mexican Worker Migration*, in *THE IMMIGRATION AND NATIONALITY ACT OF 1965*, 292, 292 (Gabriel J. Chin & Rose Cuison Villazor, eds., 2015).

<sup>14</sup> *Id.*

<sup>15</sup> GARCÍA HERNÁNDEZ, *supra* note 11, at 45.

<sup>16</sup> Jeffrey S. Passel & D'Vera Cohn, *Mexicans decline to less than half the U.S. unauthorized immigrant population for the first time*, PEW RSCH. CTR. (June 12, 2019), <https://www.pewresearch.org/fact-tank/2019/06/12/us-unauthorized-immigrant-population-2017/>.

<sup>17</sup> GARCÍA HERNÁNDEZ, *supra* note 11, at 45.

<sup>18</sup> TIMOTHY J. HENDERSON, *BEYOND BORDERS: A HISTORY OF MEXICAN MIGRATION TO THE UNITED STATES* 99 (2011).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 102.

<sup>21</sup> The word "unauthorized" is used here to describe individuals who have entered or remained in the United States in a manner that is prohibited by United States immigration laws.

<sup>22</sup> 'Drug dealers, criminals, rapists': What Trump thinks of Mexicans, BBC NEWS (Aug. 31, 2016) <https://www.bbc.com/news/av/world-us-canada-37230916>.

<sup>23</sup> FRANCISCO E. BALDERRAMA & RAYMOND RODRIGUEZ, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S*, 8 (Univ. of New Mexico Press, rev. ed. 2006).

*B. Profiling Latin Americans Harms Communities of Color*

As the Hart-Celler Act contributed to the increase in unauthorized immigrants in the United States, the federal government also amplified race-based policing of communities of color through the expansion of immigration enforcement.

Immigration enforcement grew through increased presence at the border and through cooperation with local law enforcement. After the passage of the Hart-Celler Act, the federal government “allocated more money and employed more Border Patrol agents,” who in turn spent more time attempting to apprehend individuals who were entering the United States without authorization.<sup>24</sup> The United States Customs and Border Patrol (CBP) conducts three kinds of inland traffic-checking operations: (1) permanent checkpoints; (2) temporary checkpoints; and (3) roving patrols.<sup>25</sup> In permanent and temporary checkpoints, the vehicle must stop and CBP officers may question the occupants regarding their citizenship and immigration status. In a roving patrol, an officer may pull over a vehicle based on reasonable suspicion that someone in the vehicle is an unauthorized immigrant.<sup>26</sup> Here, the officer may ask questions and conduct a visual search of the car.

Immigration enforcement is also pursued through cooperation with local law enforcement through 287(g) agreements, which are named for Section 287(g) of the Immigration and Nationality Act.<sup>27</sup> Under 287(g) agreements, state and local police are deputized to act as federal immigration officers.<sup>28</sup> In early 2018, seventy-eight agencies in twenty-seven states had formal agreements with Immigration and Customs Enforcement (ICE)<sup>29</sup> in effect.<sup>30</sup> A study of the 287(g) program in Nashville, Tennessee, demonstrated that after the implementation of 287(g), officers were more likely to use explicit statements that mentioned countries of origin, language ability, and

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<sup>24</sup> GARCÍA HERNÁNDEZ, *supra* note 11, at 65.

<sup>25</sup> Kristin Connor, *Updating Brignoni-Ponce: A Critical Analysis of Race-Based Immigration Enforcement*, 11 N.Y.U J. LEGIS. & PUB. POL’Y 567, 688–89 (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 552 (1976)).

<sup>26</sup> *Brignoni-Ponce*, 422 U.S. at 886–87.

<sup>27</sup> The 287(g) program is named for Section 287(g) of the Immigration and Nationality Act. 8 U.S.C. § 1357(g). It became law as a part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Pub. L. 104-208, 110 Stat. 3009-546.

<sup>28</sup> GARCÍA HERNÁNDEZ, *supra* note 11, at 68.

<sup>29</sup> While CBP is responsible for enforcing immigration laws at and near the borders, ICE is responsible for enforcing immigration laws within the remaining areas of the United States. *See Border Patrol Overview*, U.S. CUSTOMS AND BORDER PROTECTIONS, <https://www.cbp.gov/border-security/along-us-borders/overview> (last visited May 2, 2022); *Homeland Security Investigations*, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, <https://www.ice.gov/about-ice/homeland-security-investigations> (last visited May 2, 2022).

<sup>30</sup> GARCÍA HERNÁNDEZ, *supra* note 11, at 67.

legal status.<sup>31</sup> These statements suggest that the implementation of local immigration enforcement “brings characteristics of foreignness to the forefront of policing duties, resulting in an unintended shift in policing behaviors.”<sup>32</sup> Other studies similarly show that Latin Americans, and anyone associated with “Latinidad by accent or perception of foreignness in spite of whiteness are treated as a deportable population.”<sup>33</sup> Policing on the basis of race is pervasive even outside the context of immigration enforcement. Studies show that racial minorities experience disproportionately higher rate of stops by law enforcement for minor infractions.<sup>34</sup> One study showed that Black and Hispanic drivers were stopped fifty percent more often than white drivers.<sup>35</sup> Such enforcement practices harm communities who experience heightened policing. The tactics used by law enforcement often produce “distress, vulnerability, and anxiety in the lives of young immigrants and their families, often resulting in legitimate fears of detention and deportation since enforcement measures disproportionately affect Latin Americans and other racialized immigration groups” in the United States.<sup>36</sup>

Increased policing by immigration officials and enforcement tactics like 287(g) agreements amplify the extent to which race-based rationales may be utilized as justification for stops and searches for individuals who appear “foreign” in the eyes of immigration enforcement. Not only do race-based policies harm Latin American communities, they are also ineffective. Increased border enforcement following the Hart-Celler Act did not impact the likelihood that migrants would cross the border.<sup>37</sup> The journey north became more difficult and more expensive, but the outcome did not change.<sup>38</sup>

Combined, the Hart-Celler Act, increased immigration enforcement at the southern border, and 287(g) agreements expanded the methods by which law enforcement could conduct discriminatory race-based policing. The Supreme Court provided these officials with the legal basis to execute race-

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<sup>31</sup> See generally Katharine M. Donato & Leslie Ann Rodriguez, *Police Arrests in a Time of Uncertainty: The Impact of 287(g) on Arrests in a New Immigrant Gateway*, 58(13) AM. BEHAV. SCIENTIST 1696 (2014).

<sup>32</sup> *Id.* at 1717–18.

<sup>33</sup> Elizabeth Aranda & Elizabeth Vaquera, *Racism, the Immigration Enforcement Regime, and the Implications for Racial Inequality in the Lives of Undocumented Young Adults*, 1 SOCIO. RACE & EQUAL. 88, 98 (2015).

<sup>34</sup> See Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1996); 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).

<sup>35</sup> See Katherine Y. Barnes, *Assessing the Counterfactual: The Efficacy of Drug Interdiction Absences Racial Profiling*, 54 DUKE L.G. 1089 (2005).

<sup>36</sup> Aranda & Vaquera, *supra* note 31, at 88.

<sup>37</sup> GARCÍA HERNÁNDEZ, *supra* note 11, at 65–66.

<sup>38</sup> *Id.* at 66.



based immigration enforcement within the context of roving patrols. Hand-in-hand, these mechanisms continue to erode the constitutional rights of all, inflicting the most harm on communities of color.

## II. ESTABLISHING THE RACE-BASED LEGAL STANDARD TO SEARCH A VEHICLE OR PERSON

### A. *Taking a Hatchet to the Fourth Amendment*

The Supreme Court lowered the protections provided by the Fourth Amendment through the establishment of the reasonable suspicion standard in *Terry v. Ohio*.<sup>39</sup> Reasonable suspicion requires less than probable cause, thereby prioritizing law enforcement's ability to search and seize over an individual's constitutional right to be free from surveillance and policing. In *Brignoni-Ponce*, the Supreme Court subsequently allowed race and ethnicity to be a factor in determining whether reasonable suspicion was established in the context of a roving patrol conducted by CBP. These two cases set up the legal basis for race-based immigration enforcement, which has been only marginally cabined by lower courts and remains a pillar of the racist U.S. immigration system.

#### 1. *Terry v. Ohio lowered the standard required to conduct a constitutional search*

Before condoning race and ethnic appearance as a factor for suspecting an individual as undocumented, the Supreme Court lowered the standard for a search to "reasonable suspicion" with its ruling in *Terry v. Ohio*.<sup>40</sup> In this case, a police officer perceived two men outside a store to be contemplating a robbery of the store.<sup>41</sup> At trial, the police officer testified to his belief that the men may have been armed at the time.<sup>42</sup> The officer approached the men, identified himself, and questioned them.<sup>43</sup> Receiving mumbled answers, the police officer patted down the outer clothing of one of the men and discovered

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<sup>39</sup> *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

<sup>40</sup> *Id.* at 30–31 (1968).

<sup>41</sup> *Id.* at 1–9.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

a gun in the coat pocket.<sup>44</sup> The Supreme Court upheld the search as constitutional.

This decision reduced the constitutional protection against searches and seizures. The Fourth Amendment mandates that people be “secure in their persons, houses, papers, and effects against unreasonable searches and seizures.”<sup>45</sup> It further requires that no warrants be issued without “probable cause,<sup>46</sup> supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”<sup>47</sup> In *Terry v. Ohio*, the Supreme Court lowered the legal standard required to conduct a constitutional search and thereby sacrificed protections offered by the Fourth Amendment. The Court held that weapons found by a police officer while conducting an inventory search without probable cause were admissible.<sup>48</sup> The police officer in *Terry* was only required to point to “specific and articulable facts which taken together” reasonably warranted a belief that his safety or that of others was in danger.<sup>49</sup> As such, the Court prioritized the perceived safety of the officer over the Fourth Amendment right of individuals subject to being stopped and searched.

## 2. *Brignoni-Ponce opened the door to explicit race-based immigration enforcement*

In 1975, the United States Supreme Court, in *United States v. Brignoni-Ponce*, accepted “Mexican appearance” as a basis for reasonable suspicion that an individual is an unauthorized immigrant.<sup>50</sup> In this case a roving patrol stopped a vehicle near the U.S.-Mexico border.<sup>51</sup> The two immigration officers questioned its occupants about their immigration status and citizenship.<sup>52</sup> The opinion states that the only reason the officers stopped the vehicle and questioned the occupants was because of their “apparent Mexican ancestry.”<sup>53</sup> The Supreme Court held that this was a violation of their Fourth

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<sup>44</sup> *Id.*

<sup>45</sup> U.S. CONT. AMEND. IV.

<sup>46</sup> Probable cause to conduct a search exists when “the facts available to [the police officer] would warrant a person of reasonable caution in the belief that contraband or evidence of crime is present.” *Florida v. Harris*, 568 U.S. 237, 243 (2013) (citing *Texas v. Brown*, 460 U.S. 730, 742 (1983) (quotations omitted)).

<sup>47</sup> U.S. CONT. AMEND. IV.

<sup>48</sup> *Terry*, 392 U.S. at 30–31.

<sup>49</sup> *Id.* at 24.

<sup>50</sup> *Brignoni-Ponce*, 422 U.S. at 886–87.

<sup>51</sup> *Id.* at 875–77.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 874–75, 877.

Amendment rights because the only rationale used here was appearance.<sup>54</sup> However, the Supreme Court held that in a roving patrol a CBP officer may consider “Mexican” appearance as a basis, though not sole basis, for reasonable suspicion justifying the stop of a vehicle.<sup>55</sup>

The Court cited to data from the INS indicating that between ten to twelve million unauthorized immigrants were “illegally in the country” in 1972 and that a vast majority of “deportable [immigrants] arrested each year” were Mexican.<sup>56</sup> The Court provided the following factors to consider in the analysis of reasonable suspicion: (1) characteristics of the area, (2) proximity to the border, (3) usual patterns of traffic, (4) previous experience with “unauthorized immigration” traffic, (5) information about recent illegal border crossings in the area, (6) the driver’s behavior, (7) aspects of the vehicle, and (8) characteristic appearance of persons who live in Mexico, relying on factors such as mode of dress and haircut.<sup>57</sup>

By requiring reasonable suspicion, the Court constrained the unfettered power provided to CBP officers by statute and regulation<sup>58</sup> to search for “[unauthorized immigrants] in any vehicle” within 100 miles of the border.<sup>59</sup> The Court further held that race could not be the only rationale for reasonable suspicion.<sup>60</sup> There were enough United States citizens who shared appearances associated with Mexicans or who themselves identified with Mexican heritage to bar officers from stopping individuals solely on their appearance.<sup>61</sup> The Court further supported this statement by citing the small percentage of persons of Mexican origin registered as “unauthorized immigrants” even in states with large Mexican populations.<sup>62</sup>

The Court also, however, held that “the likelihood that any given person of Mexican ancestry is an [unauthorized immigrant] is high enough to make Mexican appearance a relevant factor.”<sup>63</sup> The Court failed to qualify the

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<sup>54</sup> *Id.* at 886.

<sup>55</sup> *Id.* at 886–87.

<sup>56</sup> *Id.* at 879, n.5 (“In 1970, for example, 80% of the deportable immigrants arrested were from Mexico... In 1974 the figure was 92%”).

<sup>57</sup> *Id.* at 884–85.

<sup>58</sup> 8 C.F.R. § 287.1(a) (1975), 8 U.S.C. 1357(a)(1), and 8 U.S.C. 1357(a)(3).

<sup>59</sup> 8 C.F.R. § 287.1(a).

<sup>60</sup> *Brignoni-Ponce*, 422 U.S. at 886–87.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* The Court cited the following: 12.4% of persons of Mexican origin in Texas were registered unauthorized immigrants from Mexico; 8.5% of persons of Mexican origin in New Mexico were registered unauthorized immigrants from Mexico; 14.2% of persons of Mexican origin in Arizona were registered unauthorized immigrants from Mexico; 20.4% of persons of Mexican origin in California were registered unauthorized immigrants from Mexico. *Id.* at n.12.

<sup>63</sup> *Id.* at 886–87.

likelihood justifying the use of race as a factor for reasonable suspicion.<sup>64</sup> Ultimately, by allowing race or ethnicity as a basis for reasonable suspicion, the Court paved the way for criminalization based on appearance.<sup>65</sup> When reviewing an officer's reasonable suspicion, the Supreme Court held that adjudicators look at the "totality of the circumstances."<sup>66</sup> Explaining that "this process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person."<sup>67</sup> In this way, it is clear that the Court believed that officers had training and tools from their experience to make fair and just decisions in their enforcement of the law and that their biases were not racist perceptions, but instead a reflection of the reality at the border.

Even if officers were prohibited from using race as a factor, they have the freedom to use other rationales to construe reasonable articulable suspicion as a pretext for a racially or ethnically motivated stop.<sup>68</sup> The Supreme Court held in *Whren v. United States* that an officer's subjective motivation is not relevant to the inquiry of reasonable suspicion.<sup>69</sup> Consequently, the Fourth Amendment's preclusion of unreasonable searches and seizures or requirement of probable cause is not an avenue to consider disproportionate and discriminatory application of the law.<sup>70</sup> Instead, the Court concluded that the Equal Protection Clause of the Fourteenth Amendment is the only avenue of relief.<sup>71</sup> To demonstrate that law enforcement operations are discriminatory, a court must find discriminatory intent.<sup>72</sup> Thus, racially disparate results of an otherwise race-neutral policy do not violate the Equal Protection Clause.<sup>73</sup> Even if the legitimization of race-based law enforcement in *Brignoni-Ponce* is denounced or overruled, the issue of profiling and over-surveillance of communities of color, including immigrant communities, is far from resolved.

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<sup>64</sup> *See id.*

<sup>65</sup> Immigration infractions have continually been used as rationales to pursue criminal charges. *See generally* César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 B.Y.U. L. REV. 1457, 1468 (2014).

<sup>66</sup> *United States v. Arvisu*, 534 U.S. 266, 273 (2000)

<sup>67</sup> *Id.*

<sup>68</sup> *See Whren v. United States*, 517 U.S. 806, 813 (1996).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977)

<sup>73</sup> *Personnel Adm'r of Massachusetts v. Feeney*, 42 U.S. 256, 272 (1979).

B. *Judicial Application of Brignoni-Ponce in the Fifth, Ninth, and Tenth Circuits*

*Brignoni-Ponce* has been applied largely in cases in the southern regions of the Ninth Circuit<sup>74</sup> and the Fifth<sup>75</sup> and Tenth Circuits,<sup>76</sup> because of the large Latin American populations in those regions and the stationing of border patrol agents along the United States-Mexico border.<sup>77</sup> The Ninth Circuit has expressly limited officials' discretion to use race or ethnicity as a factor for reasonable suspicion where Latin American appearance does not have probative worth. The Fifth and Tenth Circuits have failed to expressly denounce the race-based immigration enforcement allowed by *Brignoni-Ponce* but have indicated that in areas with significant Latin American populations, reasonable suspicion cannot be based on "Mexican appearance."<sup>78</sup>

1. *The Ninth Circuit Has Cabined Brignoni-Ponce*

The Ninth Circuit explicitly cabined *Brignoni-Ponce* through its ruling in *United States v. Montero-Camargo*, in which it held that "Mexican" appearance is not a proper factor to consider in determining whether Border Patrol agents had reasonable suspicion to stop individuals in locations where a large portion of the legal resident population is Latin American.<sup>79</sup>

In *Montero-Camargo*, two immigration enforcement officers in separate cars observed two drivers travelling together in an area "used to drop off and pick up undocumented aliens and illegal drugs, while evading inspection."<sup>80</sup> The agents followed the cars, pulled them over, searched the cars finding marijuana in one and a pistol and ammunition in the other, and arrested the drivers.<sup>81</sup> Charged violation of federal statutes regulating possession and distribution of marijuana and the possession of a firearm and ammunition, the three defendants filed a pretrial motion to suppress on the ground that the vehicle stop was not based on reasonable suspicion.<sup>82</sup> The

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<sup>74</sup> The Ninth Circuit includes Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington.

<sup>75</sup> The Fifth Circuit includes Louisiana, Mississippi, and Texas.

<sup>76</sup> The Tenth Circuit includes Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.

<sup>77</sup> Connor, *supra* note 25, at 585–86.

<sup>78</sup> See *United States v. Orona-Sanchez*, 648 F.2d 1039, 1042 (5th Cir. 1981); *United States v. Monsisvais*, 907 F.2d 987, 990 (10th Cir. 1990).

<sup>79</sup> *United States v. Montero-Camargo*, 208 F.3d 1122, 1131–32 (9th Cir. 2000).

<sup>80</sup> *Id.* at 1127.

<sup>81</sup> *Id.* at 1127–28.

<sup>82</sup> *Id.* at 1128.

district court however denied the motion stating that there was “sufficient founded suspicion to make an investigatory stop” because of four factors including “the fact that the occupants of both cars appeared to be of Hispanic descent.”<sup>83</sup> The defendants appealed arguing that the district court erroneously denied their motion to suppress.<sup>84</sup>

The Ninth Circuit held that factors such as Latin American ancestry or appearance “have such a low probative value that no reasonable officer would have relied on them to make an investigative stop and must therefore be disregarded as a matter of law.”<sup>85</sup> As the Supreme Court did in *Brignoni-Ponce*, the Ninth Circuit based its rationale on the number of Latin Americans in the area where the stop and seizure occurred.<sup>86</sup> The court explained that “reasonable suspicion requires *particularized* suspicion, and in an area in which a large number of people share a specific characteristic, that characteristic casts too wide a net to play any part in a particularized reasonable suspicion determination.”<sup>87</sup>

However, the key holding from *Brignoni-Ponce* is still governing case law in the Ninth Circuit, even in areas where there are few Latin Americans. For example, the Ninth Circuit declined to extend its holding in *Montero-Camargo* to *United States v. Manzo-Jurado*, which addressed a stop that took place in Havre, Montana, where Latin Americans comprised 1.5 percent of the population.<sup>88</sup>

In areas with large Latin American populations, like Maricopa County, Arizona, the Ninth Circuit has continued to prohibit CBP officials and local law enforcement from forming reasonable suspicion based on race or ethnicity.<sup>89</sup> In 2000, almost twenty-five percent of Maricopa County residents self-identified as being of “Hispanic” or “Latino” origin.<sup>90</sup> In *Melendres v. Arpaio*, U.S. Immigration and Customs Enforcement (ICE) had instructed the Maricopa County Sheriff’s Office (MCSO), which had been enforcing immigration laws through a 287(g) agreement, that apparent Mexican ancestry could be used in forming a reasonable suspicion that a person is

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 1132.

<sup>86</sup> *Id.* at 1133–34.

<sup>87</sup> *Id.* at 1131.

<sup>88</sup> *United States v. Manzo-Jurado*, 457 F.3d 928, 935–36, n.6 (9th Cir. 2006).

<sup>89</sup> *Melendres v. Arpaio*, 989 F. Supp. 2d 822 (D. Ariz. 2013).

<sup>90</sup> *Census data shows Arizona’s population is bigger, more diverse*, 12 NEWS (Aug. 13, 2021, 8:17 AM), <https://www.12news.com/article/news/local/arizona/census-data-shows-arizonas-population-is-bigger-more-diverse/75-e1da7b74-e695-41a1-9e97-9a43de8a0c43> (referencing 2000 U.S. Census data from Maricopa County, Arizona).

unlawfully in the United States.<sup>91</sup> The district court, however, held that ICE agents' training and the MCSO's subsequent enforcement tactics ignored the Ninth Circuit's prior holding that in locations where a "significant portion of the legal resident population is of Hispanic ancestry, Hispanic decent is not a permissible factor to consider, either alone or in conjunction with other factors, in forming reasonable suspicion."<sup>92</sup> The district court in Arizona further found that the MCSO's express racial classifications in the policies, practices, and procedures "established that the MCSO had sufficient intent to discriminate against Latino occupants of a motor vehicle."<sup>93</sup> The court also found the policy of considering Latin American appearance "probative of whether a person is legally present in the country" to be facially discriminatory and in violation of the Equal Protection Clause.<sup>94</sup>

Ultimately, the Ninth Circuit disallowed Latin American appearance to be used as a factor in areas with large Latin American populations. However, the Ninth Circuit simultaneously did not address the probative worth of other races as a factor for reasonable suspicion in a roving patrol, and expressly allowed the use of racial and/or ethnic appearance in geographic areas where individuals of a specific race or ethnicity were not prevalent enough to remove "probative value."<sup>95</sup>

## 2. *The Fifth and Tenth Circuits*

The Fifth Circuit has declined to establish reasonable suspicion for stops based on "Mexican appearance" in areas with significant Latin American populations, however, it has not explicitly cabined *Brignoni-Ponce*.<sup>96</sup> In *United States v. Orona-Sanchez*, the court held there is nothing "vaguely suspicious about the presence of persons who appear to be of Latin origin in New Mexico where over one-third of the population is Hispanic."<sup>97</sup> The court also, however, reiterated the same factors to be considered in

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<sup>91</sup> *Melendres*, 989 F. Supp. 2d at 870.

<sup>92</sup> *Id.* at 896–97.

<sup>93</sup> *Id.* at 905.

<sup>94</sup> *Id.* at 905.

<sup>95</sup> *Montero-Camargo*, 208 F.3d at 1131–32.

<sup>96</sup> See generally *Orona-Sanchez*, 648 F.2d 1039; see also *United States v. Rubio-Hernandez*, 39 F. Supp. 2d 808, 836 (W.D. Tex. 1999) (stating that "given the percentage of Hispanic people that make up the population of [West Texas]," Latin American origin alone was not enough to demonstrate an individual was undocumented or concealing unauthorized immigrants); *United States v. Zertuche-Tobias*, 952 F. Supp. 803, 821, n. 54 (S.D. Tex. 1996) (declining to rely on Latino ethnicity in a stop).

<sup>97</sup> *Orona-Sanchez*, 648 F.2d at 1042; see also *United States v. Chavez-Villareal*, 3 F.3d 124, 127 (5th Cir. 1993) ("[W]e accord no weight to Chavez-Villareal's failure to look at the patrol cars and very little his Hispanic appearance; his license plates indicate that he was from a state with a substantial Hispanic population...the stop herein violated the Fourth Amendment.").

establishing reasonable suspicion as those listed by the Supreme Court in *Brignoni Ponce*, including “number and appearance of the passengers” and giving credence to the “experience of the agents.”<sup>98</sup>

The Tenth Circuit has also continued to rely on *Brignoni-Ponce* to determine whether a stop was supported by reasonable suspicion.<sup>99</sup> However, the Tenth Circuit has rephrased the eight relevant factors from *Brignoni-Ponce* for assessing reasonable suspicion in order to exclude “Mexican appearance” as a factor.<sup>100</sup> Instead, in *United States v. Monsisvais*, the Tenth Circuit listed the *Brignoni-Ponce* factors as follows:

- (1) characteristics of the area in which the vehicle is encountered;
- (2) the proximity of the area to the border;
- (3) the usual patterns of traffic on the particular road;
- (4) the previous experience of the agent with alien traffic;
- (5) information about recent illegal border crossings in the area;
- (6) the driver's behavior, including any obvious attempts to evade officers;
- (7) aspects of the vehicle, such as a station wagon with concealed compartments; and
- (8) the appearance that the vehicle is heavily loaded.<sup>101</sup>

As such, the Tenth Circuit seems to have silently erased the racial appearance of the driver or passengers as a factor to be considered in the analysis of reasonable suspicion without directly confronting or contradicting *Brignoni-Ponce*.<sup>102</sup>

Neither the Fifth nor the Tenth Circuit have expressly cabined *Brignoni-Ponce* like the Ninth Circuit. Instead, it appears both circuits have simply declined to use ethnicity as a factor rationalizing a stop in a roving patrol without addressing head-on the disparate legal standard established by *Brignoni-Ponce*.

### III. LOOKING FORWARD: *BRIGNONI-PONCE* MUST GO

As seen through U.S. case law and immigration enforcement mechanisms, *Brignoni-Ponce* allows for heightened discrimination that violates the Equal Protection Clause of the Fourteenth Amendment and the

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<sup>98</sup> *Orona-Sanchez*, 648 F.2d at 1040 n. 1 (citing *Brignoni-Ponce*, 422 U.S. at 884–85).

<sup>99</sup> *Monsisvais*, 907 F.2d at 990; *United States v. Gandara-Salinas*, 327 F.3d 1127, 1130 (10th Cir. 2003); *United States v. Quintana-Garcia*, 343 F.3d 1266, 1270 (10th Cir. 2003).

<sup>100</sup> *Monsisvais*, 907 F.2d at 990 (citing *Brignoni-Ponce*, 422 U.S. at 884).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*



Due Process Clause of the Fifth Amendment. Additionally, *Brignoni-Ponce* violates international laws such as the International Convention of the Elimination of Racial Discrimination and the International Convention of Civil and Political Rights. *Brignoni-Ponce* should be overruled due its overt allowance of disparate treatment and discrimination based on perceived race or ethnicity and its violation of international treaties signed and ratified by the United States. However, given the high standard of proof required for Equal Protection claims and the lack of any enforcement mechanism in the international realm, *Brignoni-Ponce* could alternatively be cabined by repealing legislation that authorizes immigration enforcement to circumvent the requirements of the Fourth Amendment at the border. The discrimination established in *Brignoni-Ponce* could also be avoided by requiring a warrant establishing probable cause before executing roving patrols in certain geographic areas.

*A. Rationales for Using Race or Ethnicity as a Basis for Reasonable Suspicion Are Not Applicable*

In *Brignoni-Ponce*, the Supreme Court rationalized the use of “Mexican appearance” as a basis for reasonable suspicion because (1) evidence indicated that there were large numbers of Mexicans living in the United States without authorization, (2) immigrants, particularly unauthorized immigrants, strain social services and the economy, (3) the public interest requires enforcement of the nation’s immigration laws, and (4) the interference with the immigrant’s individual liberty through race-based roving patrols is modest. These rationales from the Supreme Court are not applicable and are discriminatory.

*1. It is illogical to base reasonable suspicion of unauthorized presence in the United States on racial or ethnic appearance.*

It is illogical to base suspicion of unauthorized presence on racial or ethnic appearance. In the context of “Mexican appearance,” there is no singular appearance that equates to an individual’s Mexican nationality. Furthermore, courts have tended to discuss Latin Americans as a monolithic group without accounting for the racial and ethnic diversity of a geographic

area consisting of thirty-three countries.<sup>103</sup> Due to the diverse ethnic heritage of this vast region, Latin Americans may visually present as indigenous, white, Black, Asian, and as members of other racial groups. The concept of Mexican appearance or “Latinidad” is a product of the United States’s consistent attempt to place every group of people into a racialized box that distinguishes the “other” from white.<sup>104</sup>

The Supreme Court’s reasoning in *Brignoni-Ponce* also lacks logic because the demographic data it relied upon was inaccurate.<sup>105</sup> The Court stated that of the ten to twelve million unauthorized immigrants, the government estimated that eighty-five percent were Mexican.<sup>106</sup> This would mean that there were anywhere between 8.5 to 10.2 million unauthorized Mexicans in the United States. However, in 1980—just five years after *Brignoni-Ponce* was decided—demographers reached consensus that the unauthorized Mexican population was instead between 1.7 and 2.3 million.<sup>107</sup>

Today, Mexicans do not constitute the majority of unauthorized immigrants in the United States. Instead, unauthorized immigration has recently increased from Asia and Central America.<sup>108</sup> In 2007, 1,300,000 unauthorized immigrants from Asia entered in the United States.<sup>109</sup> Ten years later, that number grew by 130,000.<sup>110</sup> In the same time period, the number of unauthorized Mexicans entering the United States decreased by 2,000,000.<sup>111</sup> Furthermore, it is predicted that by 2065 Asians will be the largest immigrant group in the United States.<sup>112</sup> These trends should not be used, however, to alter which ethnicities and races should be profiled and targeted. Instead, these numbers demonstrate that even if it were not discriminatory, it is counterintuitive to base suspicion of unauthorized presence on appearance. The perception of who is undocumented and who belongs in the United States is tied not to actual migration data or statistics but instead to rhetoric and policies that build the concept of foreignness.<sup>113</sup> Race-based policing does not serve as a rational mechanism in enforcing immigration laws.

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<sup>103</sup> See Dianisbeth M. Acquie, *Beyond the Binary: Deconstructing Latinidad and Ramifications for Latinx Civil Rights*, 24 HARV. LATINX L. REV. 13, 15–19 (2021).

<sup>104</sup> *Id.* at 20; see George A. Martinez, *Mexican Americans and Whiteness*, in THE LATINO/A CONDITION: A CRITICAL READER 175, 177 (Richard Delgado & Jean Stefancic eds., 1998).

<sup>105</sup> *Brignoni-Ponce*, 422 U.S. at 879; see generally Durand et al., *supra* note 5.

<sup>106</sup> *Brignoni-Ponce*, 422 U.S. at 879.

<sup>107</sup> Durand, et al., *supra* note 5, at 77.

<sup>108</sup> See generally Passel & Cohn, *supra* note 16.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> PEW RSCH. CTR., *supra* note 3.

<sup>113</sup> See *infra* Part I.

## 2. *Immigrants do not strain social services or the economy*

The Supreme Court's concern with the strain immigrants place on the social services and the economy of the United States is unfounded. Unauthorized immigrants, and even legal permanent residents, have long been excluded from federal public benefits programs such as the Supplemental Nutrition Assistance Program (SNAP), nonemergency Medicaid, Supplemental Security Income (SSI), and Temporary Assistance for Needy Families (TANF).<sup>114</sup> Additionally, studies show that immigrants, including unauthorized immigrants, are a "net positive for the economy and pay more into the system than they take out."<sup>115</sup> Legalizing unauthorized immigrants could add \$1.5 trillion to the U.S. gross domestic product (GDP) over a decade, largely due to the increased wages and purchasing power of this population.<sup>116</sup> Additionally, immigrants, even those who are unauthorized, pay a significant amount in taxes. Studies show that unauthorized immigrants paid \$11.2 billion in state and local taxes in 2010 alone.<sup>117</sup>

In fact, studies demonstrate that a policy of mass deportation would immediately reduce the "nation's GDP by 1.4 percent, and ultimately by 2.6 percent, and reduce cumulative GDP over 10 years by \$4.7 trillion."<sup>118</sup> This is largely due to the reduction in labor and the dramatic impact the U.S. economy would face with the reduction of seven million workers who currently do not have authorization to be in the United States.<sup>119</sup> Far from harming the nation's economy, undocumented immigrants contribute to it without benefiting from many social programs. Immigration policies, however, should not be based on how "useful" a person can be or the ways in which they can provide service to a nation, instead they should be squared on principles of decency, fairness, and equality. It can be dangerous and exclusionary to promote immigration only for the "good" immigrants and relegate those determined as less worthy to the margins.

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<sup>114</sup> Tanya Broder, et al., *Overview of Immigrant Eligibility for Federal Programs*, NAT'L IMMIGR. LAW CTR. (Oct. 2021), <https://www.nilc.org/issues/economic-support/overview-immeligfedprograms/>.

<sup>115</sup> Marshall Fitz et al., *Immigrants Are Makers, Not Takers*, CTR. FOR AM. PROGRESS (Feb. 8, 2013), <https://www.americanprogress.org/issues/immigration/news/2013/02/08/52377/immigrants-are-makers-not-takers/>.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Ryan Edwards & Fransesc Ortega, *The Economic Impacts of Removing Unauthorized Immigrant Workers*, CTR. FOR AM. PROGRESS (Sept. 21, 2016), <https://www.americanprogress.org/issues/immigration/reports/2016/09/21/144363/the-economic-impacts-of-removing-unauthorized-immigrant-workers/>.

<sup>119</sup> *Id.*

3. *The public interest is not served by reducing unauthorized immigration*

The Supreme Court presumed that the public is interested in reducing unauthorized immigration even if the mechanisms used to do so disproportionately target Latin American communities. Today, Latin Americans make up almost one-fifth of the United States population.<sup>120</sup> The depiction of Latin Americans as “foreign” and their exclusion from the concept of the public interest has always been reprehensible, but it has become even more inexcusable as the Latin American population in this country has grown. Furthermore, today, most Americans do not think undocumented immigrants “take jobs U.S. citizens want or are more likely to commit serious crimes.”<sup>121</sup> This perspective indicates that it is not in the public interest to demand “measures to prevent the illegal entry of [unauthorized immigrants] at the Mexican border” at such a high cost to ethnic and racial minorities.<sup>122</sup>

4. *The interference with individual liberty through race-based roving patrols is severe*

Lastly, the Supreme Court inaccurately described the interference with individual liberty to be modest.<sup>123</sup> Racially based enforcement strategies are harmful to Latin American communities. As described by Justice Reinhardt in the *Montero-Camargo* opinion,

[S]tops based on race or ethnic appearance send an underlying message to all our citizens that those who are not white are judged by the color of their skin alone. Such stops also send a clear message that those who are not white enjoy a lesser degree of Constitutional protection – that they are in effect assumed to be potential criminals first and individuals second.<sup>124</sup>

Here, the Ninth Circuit indicated, without deciding, that consideration of race in *Brignoni-Ponce* clashes with the Supreme Court’s holding in other contexts where it has held that race may not be considered to remedy past

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<sup>120</sup> Noe-Bustamante et. al, *supra* note 7.

<sup>121</sup> *Shifting Public Views on Legal Immigration Into the U.S.*, PEW RSCH. CTR. (June 28, 2018), <https://www.pewresearch.org/politics/2018/06/28/shifting-public-views-on-legal-immigration-into-the-u-s/>.

<sup>122</sup> *Brignoni-Ponce*, 422 U.S. at 879–80.

<sup>123</sup> *Id.*

<sup>124</sup> *Montero-Camargo*, 208 F.3d at 1135.

discrimination.<sup>125</sup> Furthermore, in *Melendres v. Arpaio*, the Ninth Circuit found the practice of targeting Latin Americans to be facially discriminatory and therefore a violation of the Fourteenth Amendment.<sup>126</sup> However, due to the high standard of proof required in Equal Protection claims, it is unlikely that courts will consistently find reasonable suspicion in part on the basis of race to be discriminatory.

*B. Brignoni-Ponce Is Discriminatory and Violates International Law*

United Nations treaties prohibit discrimination on the basis of race. The International Convention of the Elimination of Racial Discrimination (CERD) is the broadest expression of the antidiscrimination principle. “Racial discrimination” under CERD means “any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin” which impairs the recognition “of human rights and fundamental freedom in the political, economic, social, cultural or any other field of public life.”<sup>127</sup> Racial discrimination, as defined by the CERD treaty, is a violation of internationally recognized human rights.<sup>128</sup> Additionally, nations must prohibit and eliminate “racial discrimination in all forms,” notably including the “right to equal treatment before the tribunals and all other organs administering justice.”<sup>129</sup> The International Convention of Civil and Political Rights (ICCPR) also recognizes that the law within a nation “shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination” on the basis of race.<sup>130</sup>

*Brignoni-Ponce* explicitly allows and advocates for profiling, policing, and ultimately criminalization of individuals on the basis of their race, ethnicity, and nation of origin. As such, *Brignoni-Ponce* and the prevailing law of reasonable articulable suspicion within the United States violates these international treaties. Even the Ninth Circuit’s narrower approach is inconsistent with international law because it allows for race-based discrimination in areas where few Latin Americans live. International laws do

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<sup>125</sup> *Montero-Camargo*, 208 F.3d at 1134–35 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).

<sup>126</sup> *Melendres*, 989 F. Supp. 2d at 900–06.

<sup>127</sup> The International Convention on the Elimination of Racial Discrimination, Dec. 21, 1965, T.I.A.S. No 94–1120, 660 U.N.T.S. 195, art. 1 (1969).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* art. 5(a)

<sup>130</sup> *Id.* art. 26.

not suggest that a right to be free from discrimination varies depending on how much of a minority you are in the area where you live.

The United States ratified CERD in 1994 and ICCPR in 1992, and as such is obligated to comply with and implement the provisions of both CERD and ICCPR. In the event of a violation of either treaty, anyone claiming to be a victim of a violation can submit a complaint against a party to a treaty.<sup>131</sup> The applicant must provide sufficient evidence to demonstrate a violation of their rights by the United States, or the applicant is considered unfounded.<sup>132</sup> Considering that the individuals who are experiencing the discrimination are usually those who are new to the country and likely lack resources, creating such a complaint and establishing the evidence required would be extremely challenging.

Regardless of the challenges an individual may face in demonstrating racial discrimination at the hands of federal immigration enforcement, even if they establish a violation of either the CERD or ICCPR, they would still be required to exhaust all remedies available and effective domestically first.<sup>133</sup> In addition, there is no enforcement mechanism available to address the violation of UN treaties. The United States has not and will likely never be held accountable for violating these UN treaties. The solution to the discriminatory outcome derived from *Brignoni-Ponce* must be found domestically.

### C. *Requiring a Warrant for Roving Patrols Would Increase Fourth Amendment Protections*

An alternative to upholding *Brignoni-Ponce* or overruling *Brignoni-Ponce* entirely is to require a higher standard to authorize the stop and visual search of a car through a roving patrol. This can be accomplished through the requirement of a warrant, not simply reasonable suspicion. A warrant requires probable cause, a higher standard than reasonable articulable suspicion.<sup>134</sup> Two ways to require a warrant, and thereby probable cause, for a roving patrol are (1) through the elimination of the section of the Immigration and Nationality Act (INA) which allows for warrantless searches, or (2) by requiring warrants for geographic areas where CBP intends to conduct a roving patrol.

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<sup>131</sup> ILIAS BANTEKAS & LUTZ OETTE, INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE (3rd ed. 2002).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *See supra* Part II.

It is in Congress' power to pass legislation that revises or eliminates 8 U.S.C. §§ 1357(a)(1) and (3), which allow immigration enforcement to circumvent the requirements of the Fourth Amendment along the border.<sup>135</sup> CBP is permitted to board vehicles and vessels and search for individuals without immigration status without a warrant at the border.<sup>136</sup> The border zones extend 100 miles into the interior of the United States and include almost every major city in the United States.<sup>137</sup> Seventy-five percent of the United States population lives within this border zone.<sup>138</sup> Without this statute, CBP or local law enforcement cooperating with CBP would have little basis to search vehicles where unauthorized immigrants may be present without a warrant.

Instead of requiring a warrant at the border, CBP could be required to get a warrant to conduct roving patrols of specific geographic areas, as recommended by Justice Powell in his concurrence in *Almeida-Sanchez v. United States*.<sup>139</sup> Here, the Supreme Court held that the search of a Mexican citizen who held a valid work permit by a CBP roving patrol was not a permissible border search or its functional equivalent as therefore could not be conducted without a warrant, probable cause, or consent.<sup>140</sup> This case turns on the fact that the driver had provided proof of legal immigration status.<sup>141</sup> Justice Powell proposed in his concurrence that Fourth Amendment rights could be better protected by requirement of a warrant for the geographic area where roving patrols would be conducted, and as a result, the standard would require probable cause which cannot be based on race.<sup>142</sup> These warrants would provide CBP with the ability to stop vehicles within the specific geographic area outlined in the warrant without individual warrants for every vehicle CBP intends to stop and search through a roving patrol.<sup>143</sup> Thus, they would allow CBP to maintain some flexibility while eliminating discretion to use race as a factor in deciding whom to stop.

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<sup>135</sup> 8 U.S.C. §§ 1357(a)(1), (3).

<sup>136</sup> *Id.*

<sup>137</sup> *Know Your Rights: 100 Mile Border Zone*, ACLU, <https://www.aclu.org/know-your-rights/border-zone/> (last visited May 2, 2022).

<sup>138</sup> *Id.*

<sup>139</sup> *Almeida-Sanchez v. United States*, 413 U.S. 266, 284–85 (1973) (Powell, J., concurring).

<sup>140</sup> *Id.* at 273–75.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 283–85 (Powell, J. concurring).

<sup>143</sup> *Id.*

## CONCLUSION

In the beginning of this comment, I asked whether *United States v. Brignoni-Ponce* should be overruled. Throughout, I argued that the United States Supreme Court legitimized race-based immigration enforcement in *Brignoni-Ponce*. By legitimizing race-based immigration enforcement the Supreme Court drastically impacted race-based discrimination in two ways. First, the Supreme Court weakened the Fourth Amendment right to be free from unreasonable searches for those who are perceived by immigration officials to be of “Mexican appearance” by holding that “Mexican appearance” could be a factor, though not the sole factor, to consider when determining whether it is appropriate to stop and search a vehicle within the 100-mile United States border. Second, *Brignoni-Ponce*, armed immigration enforcement and the courts with a rationale and legal basis to continue perpetuating disparate and unconstitutional treatment of immigrant communities.

However, *Brignoni-Ponce* is not the sole force lowering the standard of search and seizure and thereby legitimizing a race-based immigration enforcement system. In *Terry v. Ohio*, the Supreme Court lowered the protections provided by the Fourth Amendment through the establishment of the reasonable suspicion standard. The reasonable suspicion standard requires less than probable cause, thereby prioritizing law enforcement’s ability to search and seize over an individual’s constitutional right to be free from surveillance and policing. Coupled with *Brignoni-Ponce*, which subsequently allowed race and ethnicity to be a factor in determining whether reasonable suspicion was established in the context of a roving patrol conducted by CBP, a legal basis for race-based immigration enforcement was created.

The elimination of the legal basis for race-based immigration enforcement will require the unlikely overruling of *Brignoni-Ponce*. As such, to limit the disparate treatment and discrimination those of “Mexican appearance” face, Fourth Amendment protections should be strengthened by requiring a warrant to stop and search vehicles during roving patrols. Warrants and the probable cause required to issue a warrant cannot be facially based on race or ethnicity. While race-based policing will not be eliminated through increased Fourth Amendment protections for those subject to roving patrols, or through the overruling of *Brignoni-Ponce* altogether, even a dilution of the Supreme Court’s ruling is a worthwhile move against discrimination on the basis of race, ethnicity, or the mythical concept of “Latinidad.”