2002

U.S. Border Enforcement: Drugs, Migrants, and the Rule of Law

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OVER the last few decades, law enforcement efforts to control the U.S. borders have focused on drugs and illegal immigrants. While the North American Free Trade Agreement encouraged the free flow of capital and goods across American borders, the United States almost simultaneously with the trade pact's approval took aggressive steps in the name of reducing the flow of undocumented labor and drugs from its southern neighbor, Mexico. These measures, however, have proven to be more symbolic than real in accomplishing their stated goals. Undocumented

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2. For a description of the potential impact of the North American Free Trade Agreement (NAFTA) on drug trafficking and undocumented migration, see Laurie L. Levenson, NAFTA: A Criminal Justice Impact, 27 U.C. Davis L. Rev. 843, 852-60 (1994). In analyzing the U.S. government's response to undocumented immigrants and drugs, this Article does not mean to suggest that the two are equal social problems. Some commentators and the public consider "the problem of illegals [to be] almost synonymous with drug trafficking." Sara S. Chapman & Ursula S. Colby, One Nation... Indivisible? 185-86 (2001); see also United States v. Ortiz, 422 U.S. 891, 899 (1975) (Burger, C.J., concurring) (stating that United States government "is powerless to stop the tide of illegal aliens—and dangerous drugs—that daily and freely cross[ ] our 2,000-mile southern boundary"). Criminal elements have engaged in organized efforts to smuggle drugs and humans across international boundaries. See Manuel Castells, The End of the Millennium 168-211 (2d ed. 2000). See generally Diane Marie Amann, Harmonic Convergence? Constitutional Criminal Procedure in an International Context, 75 Ind. L.J. 809 (2000) (analyzing how globalization of crime has affected international criminal law enforcement); Edgardo Rotman, The Globalization of Criminal Violence, 10 Cornell J.L. & Pub. Pol'y 1 (2000) (scrutinizing impact of globalization of crime). The benefits of undocumented immigrants (although subject to debate, see Stephen H. Legomsky, Immigration and Refugee Law and Policy 953-59 (2d ed. 1997) (summarizing debate over costs and benefits of undocumented immigration to United States)) to the U.S. economy are, however, in no way comparable to the scourge of drugs on this society. In that important way, the issues associated with undocumented immigrants and drugs are not equivalent.

3. See generally Andreas, supra note 1 (analyzing political and symbolic impacts of border enforcement, along with its lack of overall effectiveness); John A. Scanlan, Immigration Law and the Illusion of Numerical Control, 36 U. Miami L. Rev. 819 (1982) (analyzing "illusory" nature of U.S. government's efforts to control levels of migration).
immigrants and drugs regularly flow across the border, in no small part in response to market forces. Nonetheless, border enforcement has had perhaps unintended consequences, including the loss of lives (almost exclusively of Mexican citizens) in the southern border region and the stopping and questioning of large numbers of innocent persons, many of Mexican ancestry, throughout the United States.

Both at U.S. borders and in our cities, drug and immigration enforcement are inextricably linked. On one hand, domestic efforts to remove undocumented immigrants are designed to enforce the immigration laws regulating entry into the country. On the other hand, law enforcement efforts to interdict illegal drugs at the border seek to reduce the supply of drugs in the United States.

Importantly, in both drug and immigration enforcement, law enforcement authorities frequently resort to race as a tool for uncovering violations of the law. The racial impacts of the war on drugs are well-documented, as are those resulting from U.S. immigration enforcement. Specifically, police allegedly employ racial profiles in traffic stops as a pretext to search for drugs, just as U.S. Border Patrol officers employ "illegal


6. See infra notes 52-64 and accompanying text.


8. See infra notes 52-64 and accompanying text.
alien" and drug courier profiles with race as their touchstone. Moreover, after the horrible destruction of September 11, 2001, federal law enforcement authorities have focused on Arabs and Muslims in the ongoing criminal investigation. With border security tightened, drug seizures have risen dramatically.

Part I of this Article summarizes the law concerning race-based law enforcement in the United States. Part II considers the use of race at the U.S. borders in the massive effort to stem the flow of drugs and migrants into the country and analyzes U.S. Customs Service reforms that have reduced reliance on race by limiting line officer discretion while improving the effectiveness of border searches and seizures. Part III considers the disparate racial impacts resulting from the placement of undue discretion in the hands of law enforcement officers, which invites excessive reliance on race. It suggests the need for increased limits on law enforcement discretion, perhaps through the promulgation of internal rules and regulations, to reduce the centrality of race to domestic and international law enforcement. Somewhat counter-intuitively, such limits hold the potential of improving law enforcement, as well as reducing invidious discrimination.

I. RACE AND LAW ENFORCEMENT

Over the last few years, Americans have increasingly recognized the racial skew to criminal law enforcement in the United States. A prominent example is the public furor over racial profiling of African Americans. Reliance on racial stereotypes in U.S. immigration enforcement also has long plagued Latina/os, Asian Americans, and other groups, including persons of Arab ancestry. Unfortunately, stereotypes may result in law enforcement’s excessive and misplaced reliance on physical appearance as an indicator of legal wrongdoing.

9. See Tovah Rennee Calderón, Race-Based Policing from Terry to Wardlow: Steps Down the Totalitarian Path, 44 How. L.J. 73, 91-93 (2000); Jack B. Weinstein & Mae C. Quinn, Terry, Race, and Judicial Integrity: The Court and Suppression During the War on Drugs, 72 St. John’s L. Rev. 1323, 1332 (1998).

10. See infra notes 64, 79-85 and accompanying text.


12. See infra text accompanying notes 14-43.

A. Criminal Law Enforcement

Many commentators claim that police routinely stop African Americans for “driving while Black”\(^\text{14}\) and Latina/os for “driving while brown.”\(^\text{15}\) This practice represents the proverbial tip of the iceberg of the racial disparities in the nation’s criminal justice system.\(^\text{16}\) Studies show that police are stopping “blacks, Latinos and Asians approximately eight to ten times as often as they are stopping whites.”\(^\text{17}\)

To comply with the U.S. Constitution, police officers ordinarily must have individualized reasonable suspicion of criminal conduct before conducting an investigatory stop.\(^\text{18}\) Racial profiles based on alleged group propensities rather than individualized suspicion, generally violate the law.\(^\text{19}\) The Supreme Court, however, has done little to enforce the legal prohibition or, more generally, to remove the taint of race and racism from criminal law enforcement.\(^\text{20}\) Indeed, one commentator has gone so


18. See, e.g., United States v. Sokolow, 490 U.S. 1, 7 (1989); Terry v. Ohio, 392 U.S. 1, 27 (1968). For a criticism of the racial impacts of Terry, the famous decision allowing police officers the legal authority to conduct an investigatory stop with less than probable cause, see Tracey Maclin, Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police Discretion, 72 ST. JOHN’S L. REV. 1271, 1279 (1998).

19. See, e.g., United States v. Sigmund-Ballesteros, 2002 U.S. App. LEXIS 6778, at *6, (9th Cir. Apr. 12, 2002) (stating that reasonable suspicion necessary for traffic stop cannot be “based on broad profiles which cast suspicion on entire categories of people without any individualized suspicion of the particular person to be stopped”) (citation omitted); United States v. Laymon, 730 F. Supp. 392, 342 (D. Colo. 1990) (granting motion to suppress evidence in case in which evidence showed that drug task force focused enforcement efforts on African Americans and Latina/os).

far as to contend that the discretion afforded police in investigatory stops by the Court has contributed to the prevalence of racial profiling in law enforcement.\(^{21}\)

In *Whren v. United States*,\(^{22}\) for example, the Court held that, even if police offered pretextual reasons for a traffic stop and the stop in fact was based on the race of the driver, the Fourth Amendment was satisfied so long as the officers had probable cause to conclude that the driver had committed a traffic infraction. According to the Court, the pretextual basis for the stop did not invalidate the stop under the Fourth Amendment, although it might serve as a basis for an Equal Protection claim.\(^{23}\) Equal Protection violations, however, are notoriously difficult to prove because of the need to establish that the police possessed a "discriminatory intent."\(^{24}\) Police rarely admit such an intent and statistical data alone has been found to be insufficient to prove an invidious motive.\(^{25}\)

Because no ready and reliable legal remedy exists,\(^{26}\) state legislatures have considered the problem of racial profiling,\(^{27}\) with some requiring the collection of data on traffic stops and the adoption of policies prohibiting racial profiling.\(^{28}\) The jury is out on whether such reforms will remedy, or ameliorate in any way, the problem. However, at this time, state and local policy initiatives appear to hold promise for addressing racial profiling.\(^{29}\)

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\(^{21}\) See Harris, *supra* note 14, at 310-19. For an argument that the Supreme Court's reasoning in decisions finding that criminal laws bestowing undue discretion are unconstitutionally vague applies equally to Fourth Amendment doctrine, see Tracey Maclin, *What Can Fourth Amendment Doctrine Learn from Vagueness Doctrine?*, 3 U. PA. J. CONST'L L. 398 (2001).


\(^{23}\) See *Whren*, 517 U.S. at 813.


\(^{25}\) See, e.g., McCleskey, 481 U.S. at 319.


\(^{28}\) See infra note 138 and accompanying text.

\(^{29}\) See infra notes 114-41 and accompanying text.
Traffic stops are central to the war on drugs. Currently, “drug crimes . . . are what the great majority of pretext traffic stops are about.” Not coincidentally, racial profiling as a formal law enforcement technique arose in efforts to combat drug trafficking.

Despite sustained scholarly criticism, courts have tolerated drug profiles. For example, the Supreme Court has held that, although the Fourth Amendment requires individualized suspicion, an investigatory stop was valid if law enforcement considered the person’s behavior to be consistent with a drug profile; rather, “the agent [must] articulate the factors leading to [the existence of reasonable suspicion], but the fact that these factors may be set forth in a ‘profile’ does not somehow detract from their evidentiary significance . . . .”

While the Supreme Court has neither condemned nor endorsed the use of drug courier profiles, the lower federal courts have effectively sanctioned their use, even if race was a component of the profile in question. In United States v. Weaver, the U.S. Court of Appeals for the Eighth Circuit allowed law enforcement to rely on a drug courier profile that included race in deciding to stop and question an African American man at an airport. Similarly, in United States v. Malone, the Eighth Circuit affirmed a conviction in a case in which Drug Enforcement Administration agents stopped a person because he fit the “L.A. gang member” profile, which included the fact that he was African American.

The use of race in drug profiles by its nature disparately impacts minority communities. More generally, commentators have roundly criticized the disparate impact of the entire war on drugs on the African American and Latina/o communities. In Professor Dorothy Roberts’ words, the drug war “facilitates the incarceration of large numbers of inner-city blacks” well out of proportion to their drug use.

34. 966 F.2d 391 (8th Cir. 1992).
35. 886 F.2d 1162 (8th Cir. 1989).
36. See supra note 7 and accompanying text (citing authorities).
Efforts to challenge a pattern and practice of race-based traffic stops in drug enforcement efforts prove inherently difficult. In *Chavez v. Illinois State Police,* for example, the court affirmed summary judgment for the Illinois State Police in a case alleging racial profiling in a drug interdiction operation. In *Chavez,* experts reviewing the available statistical data found that African Americans and Hispanics were greatly over-represented in police stops. Strong individual evidence was presented as well. Specifically, in *Chavez,* the police stopped a Latino, Peso Chavez (the named plaintiff), for an illegal lane change, subjected him to an unsuccessful drug search, and ticketed him for a traffic infraction. In contrast to Chavez’s treatment by police, a white woman following Chavez’s automobile, who was driving a similar vehicle in a similar manner, was not stopped. Nevertheless, such evidence was insufficient to convince the court that an Equal Protection violation had been established.

2. Race and Criminal Investigation

Race also comes into play in law enforcement in a more routine, seemingly innocent, way. If the perpetrator of a crime has been identified as being of a particular racial group, police can lawfully rely on race in stopping a person. Unlike racial profiling, this use of race does not focus exclusively on statistical probabilities based on group membership. Nonetheless, even though race may be a logical factor to consider under these circumstances, police may rely *excessively* on race in criminal investigation and emphasize it over all else.

Consider *Brown v. City of Oneonta.* In this case, the victim identified a young African American man as the perpetrator of a burglary and assault.

38. 251 F.3d 612 (7th Cir. 2001).
39. See Chavez, 251 F.3d at 625-26.
40. See id. at 623-24.
42. See Chavez, 251 F.3d at 624-25.
43. See id. at 645-48; see also supra notes 23-25 and accompanying text (mentioning difficulties in establishing Equal Protection violation).
44. See, e.g., United States v. Morrison, 254 F.3d 679, 682 (7th Cir. 2001) (holding that officers could consider race in stop when “a bank robber [was] described as a black male”).
46. 221 F.3d 329 (2d Cir. 1999), cert. denied, 122 S. Ct. 44 (2001).
who, while committing the crime, cut himself with a knife. As a result of this identification:

The police immediately contacted [the university in Oneonta, a small, predominantly white town in upstate New York] and requested a list of its black male students. An official . . . supplied the list, and the police attempted to locate and question every black male student . . . . This endeavor produced no suspects. Then, over the next several days, the police conducted a “sweep” of Oneonta, stopping and questioning non-white persons on the streets and inspecting their hands for cuts. More than two hundred persons were questioned during that period, but no suspect was apprehended.

Emphasizing that police did not rely on statistical probabilities based on race in making the stops, but on the victim’s identification of the perpetrator, the Second Circuit held that the police sweep of hundreds of African American males in a town did not violate the Equal Protection guarantee.

The result in Brown is troubling. The police employed an old-fashioned dragnet focused on all African American men, not unlike police techniques long condemned as overbroad and over-inclusive. Although one might allow race to be a factor in a decision to stop a suspected perpetrator, among others such as height, weight, clothing, and other characteristics, that cannot justify the questioning of every African American man in town. The police conduct in Brown therefore suggests that police overrelied on race in the investigation of a crime.

B. Immigration Enforcement

As we have seen, race often influences criminal law enforcement. Even though this influence violates the law in certain circumstances, enforcement has proven difficult. In contrast, judicially sanctioned racial profiling is central to the U.S. government's enforcement of the immigra-

47. See Brown, 221 F.3d at 335.
48. Id. at 334.
49. See id. at 337 (“Plaintiffs do not allege that upon hearing that a violent crime had been committed, the police used an established profile of violent criminals to determine that the suspect must have been black. Nor do they allege that the defendant law enforcement agencies have a regular policy based upon racial stereotypes that all black . . . residents be questioned whenever a violent crime is reported.”).
51. See, e.g., Banks, supra note 45, at 1090-92; Roberts, supra note 37, at 1947-48 & n.8. The effort by the U.S. government to question large numbers of Muslim immigrants in the United States in the investigation of the devastation of September 11, 2001 shares similar characteristics with the dragnet in Brown. See infra notes 64, 79-85 and accompanying text.
52. See supra notes 14-51 and accompanying text.
RACE AND BORDER ENFORCEMENT

In United States v. Brignoni-Ponce, the Supreme Court invalidated a Border Patrol stop made exclusively on Mexican appearance. However, in doing so the Court stated 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 making an immigration stop. Unlike in the criminal context, this rule applies whether or not a person of “Mexican appearance” has been identified as entering the country unlawfully or violating the law in any way.

A striking anomaly from the color-blindness generally required by the Supreme Court, this explicit consideration of race has dramatically influenced immigration enforcement. For example, Border Patrol officers routinely rely on one’s “Hispanic appearance” in deciding to question a person. Evidence supports the claim that the Border Patrol over-relies on physical appearance, as has arguably been the case in criminal law enforcement in those cases where race is lawfully considered in an investigatory stop. Plaintiffs regularly bring actions claiming that the Border Patrol focuses almost exclusively on race in immigration stops. One case revealed that the Immigration and Naturalization Service (INS) employs an “illegal alien” profile; INS officials testified that an officer might properly rely, along with Hispanic appearance, on a “hungry look” and the fact that a person was “dirty, unkempt,” or “wears work clothing.”

54. 422 U.S. 873 (1975).
55. Brignoni-Ponce, 422 U.S. at 886-87 (emphasis added). But see United States v. Montero-Camargo, 208 F.3d 1122, 1130-35 (9th Cir. 2000) (en banc) (disregarding language in Brignoni-Ponce and holding that Border Patrol cannot lawfully consider “Hispanic appearance” in deciding to make immigration stop).
56. See supra notes 14-51 and accompanying text (analyzing use of race in criminal law enforcement).
57. See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that all racial classifications, including those in federal program to increase government contracting with minority businesses, are subject to strict scrutiny); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989) (same).
59. See supra notes 34-35, 44-51 and accompanying text.
60. See, e.g., Hodgers-Durgin v. de la Vina, 199 F.3d 1037, 1038 (9th Cir. 1999) (en banc); Nicacio v. INS, 797 F.2d 700, 701 (9th Cir. 1985); LaDuke v. Nelson, 762 F.2d 1318, 1321 (9th Cir. 1985), modified, 796 F.2d 309 (9th Cir. 1986); Ill. Migrant Council v. Pilliod, 540 F.2d 1062, 1065 (7th Cir. 1976), modified, 548 F.2d 715 (7th Cir. 1977) (en banc); Murillo v. Musegades, 809 F. Supp. 487, 497 (W.D. Tex. 1992).
61. Nicacio, 797 F.2d at 704.
Other racial groups suffer similar profiling in the enforcement of immigration laws. INS questioning of Asian Americans about their immigration status often is based on the presumption that they are foreigners. Along similar lines, persons of African ancestry who arrive at airports have found themselves presumed to be entering the country unlawfully. Moreover, after the horrible loss of life on September 11, 2001, many "Arab" or "Muslim" appearing people have been subject to special scrutiny by immigration and other law enforcement officers; the U.S. government, for example, endeavors to question five thousand Arabs and Muslims in the country—none suspected of a crime—for leads about terrorist networks.

In sum, the law permits race to be considered in border stops. However, it appears that, once that concession is made, race dominates the enforcement process. The delegation of discretion to the lowest levels of law enforcement makes this possible. As we shall see, such discretion has reached its zenith at the U.S./Mexican border.

II. THE WAR ON DRUGS AND "LAW" AT THE BORDER

As discussed in Part I, race often influences criminal and immigration law enforcement. At the border, the law permits race-based searches of a type that go well beyond those permitted elsewhere. As then-Justice Rehnquist explained:

62. See, e.g., Chueng Tin Wong v. INS, 468 F.2d 1123, 1128 (D.C. Cir. 1972) (holding that appearance of Asian ancestry combined with other factors justified INS stop); see also Neil Gotanda, Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee, 47 UCLA L. Rev. 1689, 1689 (2000) (contending that stereotypes about Asians contributed to federal government's trumped up espionage charges against Wen Ho Lee).

63. See, e.g., Orhorhaghe v. INS, 38 F.3d 488, 497-98 (9th Cir. 1994) (finding that INS improperly investigated person's immigration status based on his "Nigerian-sounding name," which court reasoned might serve as proxy for race); Toni Locy, Lawsuit Spotlights Alleged INS Abuses at Airports, USA TODAY, Oct. 18, 2000, at 1A (reporting that INS accused Black college student, with lawful immigration status, of being in United States on false documents, and strip searched, shackled, and detained him).

64. See Elizabeth Bumiller & David Johnston, Bush Sets Military Trials in Terrorism Cases, N.Y. TIMES, Nov. 14, 2001, at A1; Ken Ellingwood & Nicholas Riccardi, Arab Americans Enduring Hard Stares of Other Fliers, L.A. TIMES, Sept. 20, 2001, at A1; see also Laurie Goodstein & Tamar Lewin, Victims of Mistaken Identity, Sikhs Pay a Price for Turbans, N.Y. TIMES, Sept. 19, 2001, at A1 (recounting violence against Sikh community after events of September 11, including killing of Sikh gas station owner in Arizona). Even before that date, Arabs and Muslims were subject to special treatment under the law, including procedures allowing deportation based on secret evidence not disclosed to them, in the name of fighting terrorism. See, e.g., Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 492 (1999) (refusing to intervene in action in which Muslim noncitizens claimed that efforts to deport them from country were based on impermissible ideological grounds); Kiareldeen v. Reno, 71 F. Supp. 2d 402, 404 (D.N.J. 1999) (granting writ of habeas corpus in case of Palestinian man detained for over one year based on secret evidence of alleged terrorist activity).
[S]earches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable . . . . Border searches . . . from before the adoption of the Fourth Amendment, have been considered to be "reasonable" by the single fact that the person or item in question has entered into our country from outside. There has never been any additional requirement that the reasonableness of a border search depended on the existence of probable cause. This longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless "reasonable" has a history as old as the Fourth Amendment.65

In United States v. Montoya de Hernandez,66 the Supreme Court upheld a detention at the border and emphasized that "[s]ince the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country."67 In re-affirming the "border exception" to the Fourth Amendment, the Court in Montoya de Hernandez upheld the search of a suspect who, upon arrival on a flight from Bogota, Colombia, was stopped by U.S. Customs Service officers. The suspect was then "detained . . . because she fit the profile of an 'alimentary canal smuggler,'" was strip searched, and, when she refused an x-ray, was held until she had a bowel movement, without being allowed to contact her husband or an attorney.68 After almost a full day had passed, the Customs Service contacted a magistrate to request a court-ordered x-ray and body cavity search before a rectal examination produced contraband.69

The fact that Montoya de Hernandez arrived in this country from Bogota, Colombia contributed to the decision to detain her.70 The Court in Montoya de Hernandez noted that race, which often coincides with national origin, was a proper consideration in border enforcement: "[a]utomotive travelers may be stopped at fixed checkpoints near the border without indi-
individualized suspicion even if the stop is based largely on ethnicity."71 As one court of appeals later understood the “border exception” cases, the contention that a border search is not routine, and thus subject to more rigorous legal requirements, “if motivated by [the] ethnicity of a person searched,” is groundless.72

The “border exception” to the Fourth Amendment, as it has come to be known, is well-established.73 As is so often the case with the exceptions, this exception has proven difficult to cabin. In upholding a warrantless search over twenty miles away from the Mexican border, the Supreme Court expanded the exception to apply not just to the border, but to “its functional equivalents.”74

One federal court of appeals judge contends that a further expansion has silently occurred; he proclaims that the U.S. “government’s so-called War on Drugs and its efforts to interdict illegal immigration”75 have eviscerated Fourth Amendment protections in the entire border region:

I find inescapable the conclusion that the [Border Patrol] agent in this case was adjudged to have acted reasonably for Fourth Amendment purposes only because we of the federal judiciary have accepted the proposition that the mission of interdicting illegal aliens (or drugs) in proximity to the Mexican border justifies riding roughshod over the Fourth Amendment’s guarantees. [This] encourages agents on roving patrol to conduct warrantless searches, devoid of reasonable suspicion, much less probable cause. How

71. Id. at 538 (citing United States v. Martinez-Fuerte, 428 U.S. 543, 562-63 (1976)) (emphasis added). In Martinez-Fuerte, the Court found that the Border Patrol’s consideration of “apparent Mexican ancestry” in deciding to direct automobiles to secondary inspection at fixed checkpoints miles from the border, did not violate the Fourth Amendment. 428 U.S. at 563-64.


74. See Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973). The Court offered examples of a “functional equivalent” of border searches: [S]earches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, might be functional equivalents of border searches. For another example, a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search.


is this practice distinguishable from the former practice of Southern peace officers who randomly stopped black pedestrians to inquire, “Hey, boy, what are you doin’ in this neighborhood?”

Judge Wiener further commented that:

I sense that history is likely to judge the judiciary’s evisceration of the Fourth Amendment in the vicinity of the Mexican border as yet another jurisprudential nadir, joining Korematsu, Dred Scott, and even Plessy on the list of our most shameful failures to discharge our duty of defending constitutional civil liberties against the popular hue and cry that would have us abridge them.

Other federal judges have expressed agreement with the thrust of this analysis.

After the tragic events of September 11, 2001, it seems unlikely that the courts, including the Supreme Court, will limit the Fourth Amendment’s “border exception.” Indeed, the indications are to the contrary. Increased searches at airports and ports of entry and detention of noncitizens were part of the increased security measures. The U.S. government arrested over 1000 persons—almost all of them Arab or Muslim—as either material witnesses or because of routine immigration violations. The U.S. government also endeavored to interview thousands of Arab and Muslim noncitizens in the country, although there was no evidence that they had knowledge directly relevant to the crimes. Within weeks of the violence, Congress passed the USA PATRIOT Act, which allows the Attorney General to detain a suspected terrorist for seven days before being required to institute removal proceedings or charge the noncitizen with a

76. Id. at 285 (emphasis added).
77. Id. at 282 (footnote citing, inter alia, Korematsu v. United States, 323 U.S. 214 (1944); Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856); Plessy v. Ferguson, 163 U.S. 537 (1896)).
78. See United States v. Jacquinot, 258 F.3d 423, 432 (5th Cir. 2001) (Parker, J., specially concurring) (criticizing finding that Border Patrol had reasonable suspicion for stop and stating that “I remain hopeful that at some point in time, the hysteria regarding the ill-fated war on drugs and its impact on the Fourth Amendment will subside and the rule of reason will again prevail”); United States v. Guerrero-Barajas, 240 F.3d 428, 436 (5th Cir. 2001) (Dennis, J., dissenting) (endorsing view that “border exception” will be condemned in annals of history as constitutional anomaly).
79. See supra note 64 and accompanying text.
80. See id.
82. See Bumiller & Johnston, supra note 64.
Finally, President Bush issued a military order permitting noncitizens accused of terrorist attacks in the United States to be tried in military courts. Such drastic measures, with obvious civil rights implications, in the name of national security, suggest that courts are unlikely to narrow the "border exception" in the foreseeable future.

Moreover, the "border exception" to the Fourth Amendment finds support in the foundational principles of U.S. immigration law. The Supreme Court created the "plenary power" doctrine to immunize congressional immigration judgments from constitutional scrutiny, which at times has shielded racial and national origin exclusions in the immigration laws, and has allowed Congress free reign in determining which categories of immigrants to admit into the country. Although much-maligned, the doctrine remains the law of the land. Both the "border exception" and the plenary power doctrine show how courts have held that the Constitution simply does not apply to government conduct with respect to people and things entering the country.

A. Migrants, Drugs, and the Border Exception

The border exception to the Fourth Amendment has an impact well beyond searches at the border. In the southern border region, many Border Patrol stops involve suspected migrant or drug smugglers. At times, a race-based stop designed to investigate citizenship, which may be


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


89. Cf. Margaret H. Taylor, Detained Aliens Challenging Conditions of Confinement and the Porous Borders of the Plenary Power Doctrine, 22 HASTINGS CONST. L.Q. 1087, 1133 (1995) (contending that immigration law's plenary power doctrine, which technically only immunizes Congress' substantive judgments over which groups of immigrants to admit into United States, also impacts the decisions about treatment of noncitizens in United States).
lawful, results in the discovery of illicit drugs. Express reliance on race thus may influence drug arrests and convictions in a way beyond that ordinarily permitted in criminal law enforcement.

A case recently decided by the Supreme Court illustrates how an immigration stop can result in a drug conviction. In United States v. Arvizu, a Border Patrol officer stopped a minivan with two adults and three children in a national forest located near the border, inquired about their citizenship, and uncovered drugs in a search of the vehicle. The Ninth Circuit had held that certain factors relied on by the officers in making the initial stop—such as that the minivan slowed as the Border Patrol approached, and that the adults failed to wave to, or otherwise acknowledge the officer, but did not expressly include the race of the occupants in the minivan—could not lawfully justify the stop. The court reiterated its previous holding that “factors that have such a low probative value that no reasonable officer would have relied on them to make an investigative stop must be disregarded as a matter of law.” The court further concluded that the legitimate factors considered by the Border Patrol—such as that the road was commonly used by smugglers—could not legally justify the stop.

90. See supra notes 52-64 and accompanying text.
91. See, e.g., Bond v. United States, 529 U.S. 334, 335 (2000) (discussing case in which Border Patrol officer boarded bus near border to check immigration status of passengers and later engaged in unlawful search of luggage for drugs); United States v. Montero-Camargo, 208 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (addressing criminal case in which Border Patrol stop was based on Hispanic appearance, which at the time was legally relevant to immigration stop, but search produced drugs that resulted in criminal indictment and conviction); United States v. Rodriguez-Sanchez, 23 F.3d 1488, 1490 (9th Cir. 1994) (same). One court has questioned the Border Patrol’s authority to search for drugs, rather than undocumented immigrants. See United States v. Perkins, 166 F. Supp. 1116, 1122 (W.D. Tex. 2001). Race also plays a role in conviction of criminal immigration offenses, which often arise from arrests in the border region. A disproportionate number of Latina/os, for example, have been prosecuted under a federal law prohibiting illegal re-entry into the country after being deported. See Pamela A. MacLean, Study Suggests Hispanic Men Face Excessive Prosecution, DAILY RECORDER (Sacramento), Oct. 11, 2001, at 1; see, e.g., Almendarez-Torres v. United States, 523 U.S. 224 (1998); United States v. Mendoza-Lopez, 481 U.S. 828 (1987); see also 8 U.S.C. § 1326(a) (providing that illegal re-entry into country after deportation is criminal offense).
92. See supra notes 14-51 and accompanying text.
93. 232 F.3d 1241 (9th Cir. 2000), rev’d, 122 S. Ct. 744 (2002).
94. See id. at 1248-49.
95. Id. at 1249 (quoting Montero-Camargo, 208 F.3d at 1132 (citation omitted)).
96. See id. at 1251. Concern with allowing Border Patrol officers the necessary discretion to ensure proper security in the wake of the events of September 11, 2001 led Justice O’Connor to question the court of appeals’ approach in Arvizu at oral argument in the case. See Tony Mauro, Safety Trumps Justice, Says Justice, RECORDER, Nov. 28, 2001, at 1. Nevertheless, as discussed here, there is little evidence that increased discretion of this nature improves law enforcement. See infra notes
The Ninth Circuit in *Arvizu* attempted to limit the factors that the Border Patrol may consider in making a stop. Judge Kozinski had previously outlined the rationale for this effort:

> What factors law enforcement officers may consider in deciding to stop and question citizens minding their own business should, if possible, be carefully circumscribed and clearly articulated. When courts invoke multi-factor tests, balancing of interests or fact-specific weighing of circumstances, this introduces a troubling degree of uncertainty and unpredictability into the process; no one can be sure whether a particular combination of factors will justify a stop until a court has ruled on it.97

Other lower court decisions also reflect an effort to limit Border Patrol discretion by finding that certain factors cannot be relied upon in deciding to make a stop. Indeed, despite the Supreme Court’s pronouncement that race can be considered in an immigration stop,98 the Ninth Circuit held in 2000 that “Hispanic appearance” could not legitimately be relied upon by the Border Patrol in stopping a vehicle, thereby limiting the discretion of immigration officers.99

The Supreme Court rebuked the Ninth Circuit’s approach in *Arvizu*. It reversed the Ninth Circuit’s decision on the grounds that it was inconsistent with well-established precedent that the “totality of the circumstances” could supply the reasonable suspicion necessary for an investigatory stop.100 Acknowledging the Ninth Circuit’s desire to limit law enforcement discretion and promote consistency in law enforcement, the Court believed that de novo appellate review would promote these goals.101

B. The U.S. Customs Experience

The “border exception” to the Fourth Amendment and the power to use race in immigration enforcement have encouraged, rather than discouraged, race-based border enforcement. For example, until recently,

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97. *Montero-Camargo*, 208 F.3d at 1142 (Kozinski, J., concurring); see also United States v. Sigmoid-Ballesteros, 247 F.3d 943, 947 (9th Cir. 2001) (reaching similar conclusion as court in *Montero-Camargo*); United States v. Chavez-Valenzuela, 268 F.3d 719, 725-26 (9th Cir. 2001) (holding that nervousness could not justify prolonged detention and search for drugs).

98. See supra notes 52-56 and accompanying text (discussing *Brignoni-Ponce*).

99. See *Montero-Camargo*, 208 F.3d at 1135. In *Arvizu*, the Solicitor General resisted this attempt and argued (although the issue was not squarely raised in the case) that law enforcement should have the discretion to consider race in some instances in deciding whether to make a stop. See Brief for the United States at *29 & n.16, United States v. Arvizu, 122 S. Ct. 744 (2001) (No. 00-1519), available at 2001 WL 826745.


101. See id. at 751 (citing Ornelas v. United States, 517 U.S. 690, 691 (1996)).
the U.S. Customs Service was regularly reported to be conducting discriminatory searches.\textsuperscript{102} A U.S. General Accounting Office study found that, during fiscal years 1997 and 1998, U.S. Customs Service officers were more likely to subject Black women entering the country to intrusive searches than any other group. In fact,

Black women who were U.S. citizens . . . were 9 times more likely than White women who were U.S. citizens to be x-rayed after being frisked or patted down . . . . But on the basis of x-ray results, Black women who were U.S. citizens were less than half as likely to be found carrying contraband as White women who were U.S. citizens.\textsuperscript{103}

In one lawsuit, after she complained about how customs inspectors treated a Nigerian citizen, an African American U.S. citizen returning from Nigeria was subjected to a full pat down and strip search, and many other intrusive procedures, including examination of her rectal and vaginal cavities, in an unsuccessful hunt for drugs.\textsuperscript{104}

Along with drug courier profiles,\textsuperscript{105} stereotypes of Black women may consciously or unconsciously result in this pattern of intrusive searches.\textsuperscript{106} Intense scrutiny of travelers from drug producing countries also may have racial impacts,\textsuperscript{107} just as police reliance on the fact that a suspect was in a

\begin{footnotesize}
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\item[102.] See, e.g., Daria MonDesire, Stripped of More Than My Clothes, USA TODAY, Apr. 7, 1999, at 15A (offering personal account of strip search by U.S. Customs of only African American woman on flight); Matt O'Connor, Jury Hears Details of Strip-Search, X-Rays Also Taken of Woman by Customs Agents, Chi. TRIB., Aug. 14, 2001, at 1Metro (reporting on trial in which African American woman returning from Jamaica was subject to strip search by U.S. Customs Service officers); David Stout, Customs Service Will Review Drug-Search Process for Bias, N.Y. TIMES, Apr. 9, 1999, at A18 (reporting claims of racial discrimination by U.S. Customs Service officers in searches). As was the case with Customs Service searches, evidence suggests that African Americans and Latina/os are subject to more intrusive traffic stops than other groups, while no more likely to be discovered with contraband. See Howard P. Greenwald, Final Report: Police Vehicle Stops in Sacramento, California 35-36 (2001).


\item[104.] See Brent v. United States, 66 F. Supp. 2d 1287, 1290 (S.D. Fla. 1999), aff'd sub nomin., Brent v. Ashley, 247 F.3d 1294 (11th Cir. 2001).

\item[105.] See supra notes 34-35 and accompanying text.


\item[107.] See, e.g., United States v. Ogberaha, 771 F.2d 655, 658 (2d Cir. 1985) (stating that one factor that Customs Service officers in conducting intrusive search relied on was that defendant "traveled from a country that is a drug source (Nigeria)").
\end{enumerate}
\end{footnotesize}
"high crime" neighborhood may have.\textsuperscript{108}

The broad discretion afforded Customs Service officers no doubt played a role in racially disparate search patterns. One U.S. Congressman analyzed the problem as follows:

[O]ne of my greatest concerns has been the almost complete discretion that Customs inspectors have when deciding which travelers to stop and search. It appears that Customs criteria for stopping passengers is so broad that an inspector can justify stopping just about anybody. I fear that, when given this discretion, an inspector's racial biases, either conscious or subconscious, influence who is stopped and searched.\textsuperscript{109}

After public attention focused on its race-based search practices, the U.S. Customs Service, to its credit, promptly responded. The Customs Service Commissioner appointed a commission, which issued a report on personal searches by the Customs Service.\textsuperscript{110} A new personal search handbook required supervisor approval for all pat down personal searches, records kept of all negative personal searches, port director approval of searches that require medical assistance, and that, when conducting a personal search or taking a person to a medical facility, officers must explain the process and timelines to the person.\textsuperscript{111}

After remedial steps were in place, the Customs Service reported seventy-five percent fewer personal searches and a dramatic "226% improvement in the rate of 'positive'" searches—namely, those that produced contraband.\textsuperscript{112} Limited discretion thus resulted in fewer but, from a law


\textsuperscript{109} Allegations of Racial Profiling by U.S. Customs, 1999 WL 321644 (May 20, 1999) (opening statement of John Lewis, Member, House Comm. on Ways and Means) (emphasis added).


enforcement standpoint, more efficient, searches. This suggests that
tighter limits on officer discretion, including those that limit the consider-
ation of race, may in fact improve, not hinder, law enforcement.113

III. IMPACT OF DISCRETION ON THE ROLE OF RACE IN LAW ENFORCEMENT

Parts I and II of this Article analyzed the discretionary consideration
of race in law enforcement and how this plays out in the border region. Reliance on profiles is possible in no small part because of the broad dis-
cretion afforded law enforcement officers. Use of profiles allows law en-
forcement to categorize and process vast amounts of information, thereby
simplifying a complex world.114 It is cognitively efficient, and necessary,
to rely on generalizations in daily life. Racial categorizations, however,
may be imbued with stereotypes and over-generalizations, and shaped by
unconscious racism.115 The expansive discretion afforded law enforce-
ment authorities allows for overbroad racial categorization to be employed
and to adversely affect minority communities.

Many modern criminal procedure doctrines are filled with grants of
discretion to law enforcement officers.116 Traffic stops are the epitome of
decision of police discretion:

Police officers exercise a tremendous amount of discretion in the
exercise of their official law enforcement duties. The decisions
to stop, detain or arrest an individual are all left to the discretion
of police officers .... The .... serious disadvantage of discretionary
police power lies in its potential for abuse. Pretextual traffic stops exem-
plify this abuse when race—either consciously or unconsciously—infuses
the decision to stop a motorist.117

Although rights of government have expanded under the Fourth
Amendment, the Supreme Court occasionally, such as in the creation of
the Miranda warnings, continues to make clear rules that bind police con-

113. See Harris, supra note 31, at 12 (offering reasons why eradication of racial
profiling will result in improved law enforcement).

114. See generally Linda Hamilton Krieger, The Content of Our Categories: A Cog-
nitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 STAN. L.
Rev. 1161, 1188 (1995) (analyzing racial discrimination caused by human need for
categorization).

115. See Lawrence, supra note 24, at 323 (studying unconscious nature of
much racism and discrimination in modern world).

(analyzing implications of discretion of law enforcement authorities in enforcing
crime); Maclin, supra note 22, at 386 (same); L. Darnell Weeden, It Is Not Right
Under the Constitution to Stop and Frisk Minority People Because They Don't Look Right, 21
U. ARK. LITTLE ROCK L. REV. 829, 836 (1999) (contending that stop-and-frisk au-
thority given to police under Terry v. Ohio, 392 U.S. 1 (1968), has resulted in dis-
criminatory law enforcement against African Americans).

117. Davis, supra note 14, at 427-28 (footnotes omitted) (emphasis added).
duct. At the same time, however, the Court has vacillated between the types of authority it is willing to afford police under the Fourth Amendment. It invalidated a traffic checkpoint program designed to uncover illegal narcotics, but allowed police the authority to arrest a person for a minor criminal offense, and has permitted police to consider the totality of the circumstances in deciding whether to conduct an investigatory stop.

There is little evidence that broad delegations of discretion enhance law enforcement efficiency. They have undermined the confidence of minority communities in the impartiality of the police. This lack of confidence stems from both perceived and actual racially disparate impacts in law enforcement. For example, a study of Terry stops concluded that only two to five percent resulted in an arrest, and suggested that law enforcement officers apply the Terry standard differently based on the suspect’s race. A study of Border Patrol stops in southern Arizona, many of which almost undoubtedly were based at least in part on race, found that only 14 of 534 vehicle stops—less than three percent—resulted in arrests. The strikingly low efficiency rates mean that many innocent persons are erroneously stopped. To the extent that race plays into the stops or, perhaps more importantly, that the person stopped perceives that race resulted in the stop, this undercuts their sense of full membership and equal citizenship in U.S. society.

At a time when Border Patrol officers are being hired in large numbers to bolster border enforcement, a reassessment of how they in fact enforce the law is in order. To limit undue reliance on race, more

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119. See City of Indianapolis v. Edmond, 531 U.S. 32, 47 (2000). The Supreme Court, however, in Edmond expressed greater willingness to afford discretion to the Border Patrol because of “the formidable law enforcement problems” posed by the northbound tide of illegal entrants into the United States.” Id. at 38 (quoting Martinez-Fuerte v. United States, 428 U.S. 543, 551 (1976)).
121. See, e.g., United States v. Arvizu, 122 S. Ct. 744 (2002) (holding that Border Patrol could consider totality of circumstances in immigration stop); Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (allowing police to consider fact that person fled upon seeing police in deciding to conduct stop); see also supra notes 93-101 and accompanying text (analyzing Arvizu).
122. See Harris, supra note 14, at 298-300.
124. See supra notes 52-64 and accompanying text.
125. Brief Amicus Curiae for the DKT Liberty Project for Support of Respondent at *8, Arvizu (No. 00-1519).
126. See generally Kenneth L. Karst, Belonging to America: Equal Citizenship and the Constitution (1989) (analyzing efforts by various minority groups to achieve full membership in U.S. society).
limited discretion might be required. Judicial efforts to narrow the factors that law enforcement may consider in justifying a stop can be viewed as part of such an effort. The U.S. Customs Service experience, however, also suggests that limits on discretion, even if self-imposed restrictions promulgated by the agency, may limit racial disparities and need not adversely impact law enforcement objectives.

The substance of the regulation—whether externally or internally imposed—affects the enforcement of the law. As many have observed, clear rules are more likely to provide notice and limit abuse than fact-specific standards. Scholars have engaged in a sustained debate over the efficacy of bright-line rules versus more flexible standards. Specifically, as Ninth Circuit Judge Kozinski has recognized, Fourth Amendment law may benefit from clear legal rules that constrain law enforcement. The Supreme Court and commentators long have grappled with this difficult issue.

northern boundary). In the 1990s, Congress had authorized large increases in Border Patrol personnel and expenditures. See generally Hing, supra note 5 (analyzing human impacts of increased border control).

128. See supra text accompanying notes 93-101.
129. See supra text accompanying notes 102-13.


132. See supra note 97 and accompanying text (quoting Judge Kozinski in Montero-Camargo).

133. See, e.g., Illinois v. Wardlow, 528 U.S. 119, 126-27 (2000) (Stevens, J., concurring in part, dissenting in part) (stating that both prosecution and defense argued for "bright-line rule" in their favor and that he agreed with Court's "totality of the circumstances" approach to whether police had reasonable suspicion required by Terry); see also Bruce A. Green & Daniel Richman, Of Laws and Men: An Essay on Justice Marshall's View of Criminal Procedure, 26 ARIZ. ST. L.J. 369, 375 (1994) (analyzing concerns expressed by Justice Marshall in his dissenting opinions about impact of police discretion on racial minorities). Compare Rochin v. California, 342 U.S. 165, 172 (1952) (holding that search that "shocked the conscience" violated due process), with id. at 175 (Black, J., concurring) (objecting to excessive subjectivity of majority's ruling).

Importantly, as alluded to previously, any procedures limiting officer discretion need not be judicially generated. As Professor Anthony Amsterdam advocated in an influential article published over twenty-five years ago, police departments would do well to promulgate regulations governing officer conduct, with the Fourth Amendment demanding adherence to them. Mere promulgation of regulations by the Customs Service in response to claims of racial profiling in searches resulted in great, perhaps monumental, improvements. Many state and local governments currently are in the process of requiring law enforcement agencies under their jurisdiction to issue racial profiling policies as a response to the furor over perceived abuse. The response to the claims of racial


137. See supra notes 102-13 and accompanying text.

138. See, e.g., COLO. REV. STATS. § 24-31-309(6) (2001) (requiring every state and local law enforcement agency to "establish and enforce a written antiracial profiling policy governing the conduct of peace officers engaged in stops of citizens"); KY. REV. STAT. ANN. § 15A.195(4)(a) (2001) (same); MO. REV. STAT. § 590.650(5) (2001) (same); OKLA. STAT. tit. 22 § 34.3(E) (2001) (same); 2001 Minn. Sent. Law Serv. 8, Article 7, § 626.8471 (West) (same); 2001 Neb. Laws 593 § 4; 2001 Tex. Sent. Law Serv. § 947 Art. 2.132 (Vernon) (same); see also Brown v. City of Oneonta, 235 F.3d 769, 786-87 (2d Cir. 2000) (Calabresi, J., dissenting from denial of rehearing en banc) (contending that courts should encourage legislatures to develop guidelines for use of race in criminal investigation); David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 576-79 (1997) (advocating increased police regulation of traffic stops); Harris, supra note 14, at 322-23 (same); Sean Hecker, Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review, 28 COLUM. HUM. RTS. L. REV. 551, 592-604 (1997) (contending civilian review boards should be employed to avoid racial profiling); Christopher Slobogin, An Empirically Based Comparison of American and European Regulatory Approaches to Police Investigation, 22 Mich. J. Int'l L. 423, 455-56 (2001) (advocating legislative efforts to regulate police investigation based on comparative analysis and concluding that "[t]he European codes of criminal procedure are far superior to the judi-

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profiling has been encouraging, although the ultimate impact on police conduct remains uncertain.

The possible reliance on internal regulations to constrain police reliance on race does not suggest that the courts should refrain from enforcing constitutional norms. The judicial role, of course, remains fully intact. Important efforts have been made in this area by the lower courts in recent years. Nevertheless, reforms within law enforcement agencies might improve matters and, for that reason, deserve serious consideration. As a purely practical matter, it is difficult to imagine the courts in the current political and social climate intervening in a law enforcement matter implicating border security.

IV. CONCLUSION

Race influences the war on drugs and the enforcement of the immigration laws. The two, both domestically and internationally, are inextricably intertwined. Excessive discretion bestowed on law enforcement officers has increased the chance for race to unduly influence the enforcement of the drug and immigration laws. Once race seeps into the enforcement calculus, it often comes to dominate the enforcement of both bodies of law. Reforms in the U.S. Customs Service limiting law enforcement discretion to conduct searches have increased law enforcement efficiency and inspired confidence in previously victimized communities. We would do well to consider similar reform efforts that address the issue of the discretion of law enforcement officers.


139. See Miranda v. Arizona, 384 U.S. 436, 490 (1966) (rejecting argument that Court should postpone decision on warnings to suspect until state and local legislative bodies had opportunity to pass constitutional laws).

140. See supra notes 95-101 and accompanying text (discussing Ninth Circuit’s analysis in Arvizu and other cases).

141. See supra notes 79-85 and accompanying text.