BORDER EXCEPTIONALISM IN THE ERA OF MOVING BORDERS

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ABSTRACT

Historically, the courts have indicated that the tasks of enacting and enforcing immigration laws are federal functions. The federal agents who police the nation's borders have exceptionally broad policing authority—an authority that the courts have justified based on the special need to secure the nation's borders from a variety of threats. Part I of this essay will summarize the Supreme Court jurisprudence that has endorsed exceptionally broad policing powers not only at international borders, but also in a much wider swath of immigration enforcement contexts. Over the past decade, as a consequence of the expansion in the number of immigration enforcement agents at the federal level and the rapidly increasing number of sub-federal agents involved in immigration control efforts, immigration enforcement has become a part of the everyday fabric of policing in the United States. Therefore, after summarizing the broad powers granted to police in the immigration enforcement context as a result of the Court's jurisprudence of border exceptionalism, Part II of this essay will consider the implications of this jurisprudence in light of the recent trends that have transformed the nature and scope of immigration policing. This Part concludes that existing law is insufficient to protect against racial profiling and unreasonable police arrests and detentions, and that the implications of these recent developments extend well beyond the sphere of immigration enforcement.

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INTRODUCTION

Immigration law and policy have entered a period of radical upheaval. Different people have different perspectives as to what constitutes the "watershed" moment for immigration law in recent history, but scholars have tended to focus on several key transformative events, including: (1) The criminalization of hiring unauthorized workers, which was the product Immigration Reform and Control Act of 1986;[1] (2) The increasing militarization of the U.S.-Mexico border region, which spiked in the early 1990s and has continued through to the present;[2] (3) The radical Congressional overhaul of immigration law in 1996, which, among other things, led to a vast increase in the grounds for the removal of lawful permanent residents and the scope of mandatory administrative detention for noncitizens in removal proceedings, while simultaneously stripping courts of jurisdiction to hear many related legal claims;[3] (4) The reorganization and expansion of the immigration enforcement bureaucracy following the terrorist attacks of

1. Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324(a) (2006). For recent calls to eliminate these criminal sanctions, see Bill Ong Hing, *NAFTA, Globalization, and Mexican Migrants*, 5 J.L. ECON. & POL'Y 87, 126 (2009) (explaining the inefficacy of employer sanctions); Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193 (arguing for the repeal of employer sanctions).

2. *See* PETER ANDREAS, BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE (2001); *see also* Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 221-22, 243 (2003); Wayne Cornelius, *Evaluating Enhanced US Border Enforcement*, MIGRATION INFORMATION SOURCE (May 2004), http://www.migrationinformation.org/Feature/display.cfm?ID=223.

3. *See* Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of U.S.C.); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of U.S.C.). For a detailed discussion of these changes to the law, see Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 85 (2005). *See also* Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1891 (2000). *See generally* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000).

September 11, 2001;[4] (5) The rise in the use of criminal prosecutions in an effort to "manage migration through crime;"[5] and (6) The rise of sub-federal law enforcement participation in immigration enforcement.[6]

But there are other factors that have contributed to the current policy failures in the immigration sphere. These are not events, but rather critical failures to enact changes in law and policy, including: (1) A failure to expand and improve the Executive Office of Immigration Review (EOIR) and the Board of Immigration Appeals to deal with the growing administrative caseload generated by the increase in removals and the expansion of immigration detention;[7] (2) A failure to enact comprehensive immigration reform, or even piecemeal legislation, such as the Development, Relief and Education for Alien Minors Act (DREAM Act), to address the legal status of (at least some of) the more than ten million unauthorized migrants living and working in the United States;[8] (3) A failure to systematically address

4. For the reorganization, see the Homeland Security Act of 2002, Pub. L. No. 17-296, 116 Stat. 2135 (codified as amended in scattered sections of U.S.C.). For a discussion of the expansion of resources for border enforcement, see Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1565-66 (2010).

5. *See, e.g.*, Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009), *available at* http://www.columbialawreview.org/Sidebar/volume/109/135_Chacon.pdf; *see also* Ingrid Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. (forthcoming 2010) (discussing the effects of the merger of criminal and immigration enforcement systems on criminal processes).

6. *See* Chacón, *supra* note 4, at 1579-97 (discussing the rise of state and local participation in immigration enforcement through formal collaboration with the federal government and, increasingly, though informal "cooperation"); Karla Mari McKanders, *The Constitutionality of State and Local Laws Targeting Immigrants*, 31 U. ARK. LITTLE ROCK L. REV. 579, 580-81 (2009) (noting the rise of, and arguing against the constitutionality of, state and local ordinances enacted to regulate migration); Huyen Pham, *The Inherent Flaws in the Inherent Authority Position*, 31 FLA. ST. U. L. REV. 965 (2004) (discussing and criticizing the increasingly popular argument that state actors have the "inherent authority" to enforce federal immigration law); Cristina M. Rodríguez, *The Significance of the Local in Federal Immigration Regulation*, 106 MICH. L. REV. 567, 582-90 (2008) (noting the increase in state and local regulation of immigration); Juliet Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557 (2008) (noting increased sub-federal, immigration-related enactments passed under the rubric of the traditional police and welfare powers of states and localities); Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1622-24 (2008) (noting the increase in state and local regulation of immigration); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Law*, 6 U. PA. J. CONST. L. 1084, 1086-87 (2004).

7. *See* Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1651-64 (2010) (detailing the "underresourcing" of the EOIR and the "procedural shortcutting" of the BIA).

8. *See* Brandon E. Davis, *America's Immigration Crisis: Examining the Necessity of Comprehensive Immigration Reform*, 54 LOY. L. REV. 353 (2008); Kevin R. Johnson, *Protecting National Security Through More Liberal Admission of Immigrants*, 2007 U. CHI. LEGAL F. 157, 173; Michael A. Olivas, *Lawmakers Gone Wild? College Residency and the Re-*

the United States' economic and social policies that have spurred emigration from Mexico;[9] (4) A failure to reexamine policies on racial profiling in immigration enforcement even as the number of actors involved increases and their overall expertise in immigration law decreases;[10] and (5) A failure to revise quotas for legal immigration and to revisit the allocation of non-immigrant visas to take into account the realities of the modern economy.[11]

The *Fordham Urban Law Journal* asked each of the contributors to describe a specific element of the U.S. Immigration system that needs to be fixed, or a specific change to the system that needs to be made. The foregoing list of policy decisions and policy failures—which is not nearly complete—hints at how much needs to be done to create a rational, workable, economically sensible, and humane immigration policy. Numerous scholars and think-tanks have stepped into the fray, devising various comprehensive reform proposals aimed at achieving these goals. The notion of settling on one "fix" for the immigration system is truly daunting in the face of the many policy errors and failures that have brought us to the present situation. Fortunately, there are many authors addressing many different facets of the problem in this publication. Therefore, this essay does not purport, nor could it hope, to be a roadmap to comprehensive reform.

Instead, this essay will focus on the growing crisis in policing that is emerging as a result of the above-mentioned policies and policy failures. Historically, the courts have indicated that the tasks of enacting[12] and enforcing[13] immigration laws are federal functions. The federal agents who

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sponse to Professor Kobach, 61 SMU L. REV. 99, 130 (2008); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 91 (2007).

9. *See* Hing, *supra* note 1, at 93; Kevin R. Johnson, *An Essay on Immigration, Citizenship, and U.S./Mexico Relations: The Tale of Two Treaties*, 5 SW. J.L. & TRADE AM. 121, 140 (1998); *see also* Gabriela A. Gallegos, *Border Matters: Redefining the National Interest in U.S.-Mexico Immigration and Trade Policy*, 92 CALIF. L. REV. 1729 (2004).

10. *See* Chacón, *supra* note 4, at 1615-19. *See generally* Kevin R. Johnson, *How Racial Profiling in America Became the 'Law of the Land':* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010).

11. Cristina M. Rodríguez, *Constraint Through Delegation: The Case of Executive Control Over Immigration Policy*, 59 DUKE L.J. 1787, 1796-803 (2010).

12. *See, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581, 603-04 (1889) ("That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.").

13. *See, e.g.*, Nishimura Ekiu v. United States, 142 U.S. 651 (1892) (stating that the powers to enforce and adjudicate immigration law can be delegated by Congress to the executive branch).

police the nation's border[14] have exceptionally broad policing authority—an authority that the courts have justified based on the special need to secure the nation's borders from a variety of threats.[15] Part I of this essay summarizes the Supreme Court jurisprudence that has endorsed broad policing powers, not only at international borders, but also in a much wider swath of immigration enforcement contexts.

Over the past decade, as a consequence of the increase in the number of immigration enforcement agents at the federal level and the rapidly expanding number of sub-federal agents involved in immigration control efforts, immigration enforcement has become a part of the everyday fabric of policing in the United States. Therefore, after summarizing the broad powers granted to government officials engaged in immigration enforcement as a result of the Court's jurisprudence of border exceptionalism, Part II of this essay considers the implications of this jurisprudence in light of recent trends that have transformed the nature and scope of immigration policing.[16] Part II concludes that existing law is insufficient to protect against racial profiling and unreasonable police arrests and detentions. This has law enforcement implications that extend well beyond the sphere immigration enforcement.

The systematic and significant changes in migration policing have been largely ignored in the public policy debate over immigration. Plenty of pundits and commentators have been willing to disparage Arizona's recently enacted, and even more recently partially enjoined,[17] S.B. 1070[18] as a law that effectively requires anyone who might look like an immigrant to carry papers to avoid hassle and even criminal charges.[19] What most of these critics fail to acknowledge is that, with or without the Arizona law, we have become a nation that routinely relies on policing practices that require certain populations to be ready to document their belonging. We

14. I use the term "border" metaphorically here to include all policing of migration. Of course, as this essay makes clear, the scope of federal authority traditionally has varied in accordance with the proximity of the federal agent to the physical border (or its functional equivalent). *See infra* notes 33-39 and accompanying text.

15. See *infra* Part I.

16. See *infra* Part II.

17. United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010) (order on motion for preliminary injunction).

18. S.B. 1070, 49th Leg., 2d Sess., 2010 Ariz. Sess. Laws, ch. 113, as amended by H.B. 2162, 49th Leg., 2d Sess., 2010 Ariz. Sess. Laws, ch. 211.

19. *See, e.g.*, *The Rachel Maddow Show: Beheadings in Ariz?!?!? Gov. Brewer's Cringeworthy Debate* (MSNBC television broadcast Sept. 2, 2010) (referring to S.B. 1070 as a "papers, please" law); *The Rachel Maddow Show: Racist Roots of Arizona Law* (MSNBC television broadcast Apr. 26, 2010), *available at* http://www.msnbc.msn.com/id/26315908//vp/36791568#36791568 (same).

have not reached this point through the systematic development of laws and policies that would ensure the fair and efficient administration and enforcement of the law. Instead, we have reached this state of affairs in an ad hoc fashion that has bypassed broad public debate. In concluding, I offer some thoughts on how to address the growing rights deficit attributable to border exceptionalism.

I. A BRIEF HISTORY OF THE SUPREME COURT'S BORDER EXCEPTIONALISM

The Fourth Amendment to the Constitution places limits on the government's power to search and seize, specifying that,

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[20]

These Fourth Amendment limitations on government investigations apply to government officials operating everywhere within the boundaries of the United States,[21] including at the border.[22] Subsection A explores how the Supreme Court has applied the Fourth Amendment when evaluating searches and seizures that occur at and near the international border. Subsection B focuses on how the Court's understanding of the government's "strong" interest in controlling the border has migrated away from the border and into all aspects of immigration policing.

A. Searches At—And Near—The Border

While the Fourth Amendment governs interactions between government officials and civilians at the border, as a practical matter, the constraints on official actors at the border are less stringent than would be the case in many other contexts. This is because the test for Fourth Amendment "reasonableness" turns on the balance between the government's interest and the individual's right to privacy. In the context of border policing, which the courts have linked to the protection of sovereignty and the sanctity of the nation's boundaries,[23] the courts have treated the government's interest

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20. U.S. CONST. amend. IV.

21. The extraterritorial application of these limitations is more contested. *See e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 261-62 (1990) (declining to apply Fourth Amendment protections to an extraterritorial search and seizure of a noncitizen). *See generally* Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501 (2005).

22. United States v. Ramsey, 431 U.S. 606, 620 (1977).

23. Carroll v. United States, 267 U.S. 132, 154-55 (1925).

as extraordinarily strong.[24] Thus, courts have a more permissive standard for what constitutes a reasonable action on the part of a government actor in the context of policing the international border than in many other policing contexts.[25]

The Supreme Court has often treated the international border as a physical sphere in which the strong interests of the government in controlling the flow of goods (particularly illegal drugs) and people into the country completely eclipse individual privacy interests. Several criminal procedure cases decided between 1970 and 2005 illustrate the point.

In the case of *Almeida-Sanchez v. United States*, the Supreme Court invalidated a warrantless stop of an automobile by a roving border patrol agent.[26] The majority opinion, authored by Justice Stewart, rejected the agency's argument that its authority to conduct searches was granted by statute. The government had argued that the license to conduct routine, roving automobile searches was granted to the agency by Congress through the enactment of section 287(a)(3) of the Immigration and Nationality Act.[27] The statute provides for warrantless searches of automobiles and other vehicles "within a reasonable distance from any external boundary of the United States," as authorized by regulations to be promulgated by the Attorney General.[28] The Attorney General's regulation defined (and continues to define) a "reasonable distance" as "within 100 air miles from any external boundary of the United States."[29] The government thus argued that the regulation allowed for random, warrantless searches of automobiles within 100 miles of the border.

The Court declined to interpret the statute and regulation as allowing for such an "extravagant license to search,"[30] because it concluded that such authority was inconsistent with the Fourth Amendment.[31] Although the point where the agent stopped Almeida-Sanchez' vehicle was only about

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24. *See, e.g.*, United States v. Montoya de Hernandez, 473 U.S. 531, 537-38 (1985) (noting that Congress' "power to protect the Nation" justifies its grant to the Executive of "plenary authority to conduct routine searches and seizures at the border"); *Ramsey*, 431 U.S. at 616; United States v. Glasser, 750 F.2d 1197, 1201 (3d Cir. 1984). The courts have also deemed plenary Congress' power to legislate the exclusion of noncitizens from within the nation's borders. Chae Chan Ping v. United States, 130 U.S. 581, 603-04 (1889).

25. *See, e.g.*, United States v. 12,200-Ft. Reels of Super 8mm. Film, 413 U.S. 123, 125 (1973).

26. 413 U.S. 266, 267 (1973).

27. *Id.* at 268.

28. 8 U.S.C. § 1357(a)(3) (2006).

29. 8 C.F.R. § 287.1(a)(2) (2010).

30. *Almeida-Sanchez*, 413 U.S. at 268.

31. *Id.* at 274.

twenty-five miles from the border,[32] the Court declined to treat this stretch of road as the "functional equivalent" of the border, where virtually unlimited authority for searches exists.[33] The "functional equivalent" of border searches would include those taking place at "an established station near the border, at a point marking the confluence of two or more roads extending from the border" or "a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City,"[34] but not a search of a car on a road near the border by a roving patrol.[35] Thus, in cases involving roving patrols—even within twenty-five miles of the border—the Court determined that stops could not be made where agents "stop and search automobiles without a warrant, without probable cause to believe the cars contain aliens, and even without probable cause to believe the cars have made a border crossing."[36]

While the decision created some limitations on the powers of border police, it also simultaneously reaffirmed the broad powers of executive agents acting at the international border. The Court distinguished the roving search at issue in *Almeida-Sanchez* from two other kinds of border searches, those that take place at the border itself or its "functional equivalent," and those that take place at permanent checkpoints "maintained at certain nodal intersections."[37] In the latter two cases, border patrol agents are entitled to conduct routine searches in the complete absence of the rea-

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32. *Id.* at 268.

33. *Id.* at 273; *see also* Carroll v. United States, 267 U.S. 132, 154 (1925) ("Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in."); Boyd v. United States, 116 U.S. 616, 623 (1886) (theorizing the existence of a "border search exception" to the Fourth Amendment). For a repudiation of the argument in *Boyd*, see Martin Grayson, *The Warrant Clause in Historical Context*, 14 AM. J. CRIM. L. 107 (1987); Gregory L. Waples, Note, *From Bags to Body Cavities: The Law of Border Searches*, 74 COLUM. L. REV. 53 (1974); Harris J. Yale, Note, *Beyond the Border of Reasonableness: Exports, Imports and the Border Search Exception*, 11 HOFSTRA L. REV. 733, 745-52 (1983).

34. *Almeida-Sanchez*, 413 U.S. at 273.

35. Justice Powell's concurrence took a more expansive view of the scope of permissible government intrusions near the border. While he agreed that warrantless, suspicionless searches were impermissible, he argued that border patrol agents could carry out such searches under the auspices of an "area warrant." *Id.* at 283-85 (Powell, J., concurring). For a discussion of the broader significance of and problems created by the Powell concurrence, see Note, *Area Search Warrants in Border Zones:* Almeida-Sanchez *and* Camara, 84 YALE L.J. 355, 367 (1974) ("Instead of helping to define where the border ends and where Fourth Amendment rights attach, the *Almeida-Sanchez* concurrence will confuse the inquiry by creating a quasi-border lying entirely within the bounds of the nation.").

36. *Almeida-Sanchez*, 413 U.S. at 268.

37. *Id.*

sonable suspicion or probable cause that are generally required to conduct stops and arrests.[38]

Almeida-Sanchez therefore be can be read as an affirmation of the breadth of border search authority and a limitation on the geographic scope of this border exceptionalism.[39] While the case law has permitted broad searches absent probable cause (or even reasonable suspicion) to occur at the border and its functional equivalent, *Almeida-Sanchez* clarified that the "border" is a narrow zone—much narrower, indeed, than the 100 mile zone carved out by statute and regulation for the search and arrest powers of border agents.

Nevertheless, the protections offered by *Almeida-Sanchez* have proven somewhat illusory, particularly when examined in the broader context of the Supreme Court's border jurisprudence. First, the Court has given roving border agents broad latitude to conduct stops premised largely on the basis of the target's race. This has been enshrined in American law since 1975, and has not been reexamined by the high Court despite significant shifts in the demographics of the nation—shifts that severely undermine the notion that individuals of "Mexican appearance" are likely to be present without legal authorization.[40]

United States v. Brignoni-Ponce[41] involved a "roving border patrol" stop near a fixed highway border checkpoint. The officers pulled over the defendant's car, "saying later that their only reason for doing so was that its three occupants appeared to be of Mexican descent."[42] As with other cases

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38. *Id.* at 272-73; *see also* United States v. Flores-Montano, 541 U.S. 149 (2004) (upholding the constitutionality of "routine" suspicionless border searches); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (upholding the constitutionality of routine, suspicionless searches at fixed immigration checkpoints).

39. These limits did not really exist prior to the decision. As Justice Powell notes in his concurrence, this was the first time the Supreme Court addressed this question, but the circuit courts had determined that searches near the border should be treated the same way as other border searches. *Almeida-Sanchez*, 413 U.S. at 268 (citing United States v. Miranda, 426 F.2d 283 (9th Cir. 1970), and Roa-Rodriguez v. United States, 410 F.2d 1206 (10th Cir. 1969)).

40. *See, e.g.*, Rogelio Saenz, *Latinos, Whites and the Shifting Demography of Arizona*, POPULATION REFERENCE BUREAU (Sept. 2010), http://www.prb.org/Articles/2010/usarizona latinos.aspx (noting that "the Latino population more than quadrupled from nearly 441,000 in 1980 to almost 2 million in 2008" and now constitutes almost thirty percent of the state's population); *see also* United States v. Montero-Camargo, 208 F.3d 1122, 1133 (9th Cir. 2000) (en banc) (noting that that the "Hispanic population of this nation, and of the Southwest and Far West in particular, has grown enormously—at least five-fold in the four states referred to in the Supreme Court's [*Brignoni-Ponce*] decision" and concluding that this demographic shift, along with changing legal norms concerning racial profiling, invalidated reliance on race as a factor in an immigration stop).

41. 422 U.S. 873 (1975).

42. *Id.* at 875.

involving immigration policing, the Court held that the government has a "strong" interest in implementing effective measures to stop unauthorized migration.[43] As evidence of the problem, the Court cited the high and growing number of unauthorized migrants in the country.[44] The Court also elaborated that unauthorized migrants "create significant economic and social problems, competing with citizens and legal resident aliens for jobs and generating extra demand for social services."[45]

In spite of the purportedly strong governmental interest involved, the Court nevertheless declined to uphold searches of vehicles near the border in the absence of reasonable suspicion.[46] But it largely undercut the protective scope of this holding by concluding that "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor,"[47] which, in connection with factors like "proximity to the border,"[48] can be enough to justify the stop.[49] This conclusion does not provide much protection for the "[l]arge number of native-born and naturalized citizens [that] have the physical characteristics identified with Mexican ancestry."[50] While one might be tempted to conclude that *Brignoni-Ponce*—a 1975 case that preceded a vigorous national conversation on racial profiling[51]—is dead letter, even the present administration frequently and successfully cites it in litigating immigration enforcement actions.[52] Department of Justice guidelines on racial profiling also

43. *Id.* at 881.

44. *Id.* at 878-79; *see also* United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985) (noting the "crisis" of migrants smugglers of narcotics at the border); United States v. Martinez-Fuerte, 428 U.S. 543, 551-52 (1976) (recognizing that the high number of illegal immigrants from Mexico poses formidable law enforcement problems); *cf.* United States v. Flores-Montano, 541 U.S. 149, 152-53 (2004) (relying instead on the simple reiteration of the maxim that the government's interest in preventing unauthorized migration and entry of illegal contraband is strong).

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

46. *Id.* at 882.

47. *Id.* at 886-87.

48. *Id.* at 885.

49. *Id.* at 884-86.

50. *Id.* at 886.

51. *See, e.g.*, Samuel L. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1413 (2002) (noting that the September 11, 2001 terrorist attacks sparked a debate on the merits of racial profiling); Erik Luna, *Foreword: The New Face of Racial Profiling*, 2004 UTAH L. REV. 905, 905-06 (discussing the political consensus in opposition to racial profiling before the September 11, 2001 terrorist attacks).

52. *See, e.g.*, Gabriel J. Chin et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, GEO. IMMIGR. L.J. (forthcoming 2010) (manuscript at 19 & nn.102-05), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1617440.

sanction reliance on race in immigration enforcement.[53] In short, race, with very little else, can still form the basis for a valid roving border patrol stop.[54]

Moreover, having distinguished the border and its functional equivalent from interior areas in cases like *Brignoni-Ponce* and *Almeida-Sanchez*, the Court has given virtually free reign to agents at the border itself, effectively creating a zone nearly devoid of any Fourth Amendment protections. *United States v. Flores-Montano*[55] illustrates how far such searches can go. There, border agents referred the defendant's car to a secondary inspection station.[56] This was a "routine" search not premised on any individualized suspicion.[57] Nevertheless, the defendant was required to wait twenty to thirty minutes for a mechanic. When the mechanic finally arrived, "[h]e raised the car on a hydraulic lift, loosened the straps and unscrewed the bolts holding the gas tank to the undercarriage of the vehicle, and then disconnected some hoses and electrical connections."[58] In a process that ultimately took another fifteen to twenty-five minutes, the mechanic discovered a significant load of marijuana under the gas tank.[59] While it might not be "unreasonable" to suggest that agents with "reasonable suspicion" of a crime might engage in this sort of stop and search, it is important to stress

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53. CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (June 2003), *available at* http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm. For a discussion of the guidelines, see Kevin R. Johnson, *Racial Profiling After September 11: The Department of Justice's 2003 Guidelines*, 50 LOY. L. REV. 67 (2004).

54. Of course, law enforcement officers can circumvent even the very minimal protections provided by *Brignoni-Ponce* by pointing to other, legally acceptable factors justifying the stop; the fact that race was the motivating factor for the stop will not invalidate an otherwise lawful stop. *See* Whren v. United States, 517 U.S. 806 (1996); *see also* Johnson, *supra* note 10. *But see* United States v. Montero-Camargo, 208 F.3d 1122, 1131 (9th Cir. 2000) (concluding that reliance on race alone in making such stops did not give rise to reasonable suspicion given the increasing percentage of individuals of Mexican ancestry lawfully present in the country).

In *United States v. Montero-Camargo*, 208 F.3d 1122, 1131 (9th Cir. 2000), the Ninth Circuit concluded that Hispanic appearance alone did not give rise to reasonable suspicion in an immigration stop given the increasing percentage of individuals of Mexican ancestry lawfully present in the country. But this ruling does not always prevent an officer's reliance on race as the basis for immigration stops in the Ninth Circuit. *See, e.g.*, United States v. Manzo-Jurado, 457 F.3d 928, 935 n.6 (9th Cir. 2006) ("In *Montero-Camargo*, we held that, in regions heavily populated by Hispanics, an individual's apparent Hispanic ethnicity is not a relevant factor in the reasonable suspicion calculus. Such holding is inapplicable here because Havre, Montana is sparsely populated with Hispanics." (internal citation omitted)).

55. 541 U.S. 149 (2004).

56. *Id.* at 150.

57. *Id.* at 150-51.

58. *Id.* at 151.

59. *Id.*

that this stop—which took between thirty-five and fifty-five minutes and involved the partial disassembly of a vehicle—was approved unanimously by the Supreme Court in the absence of any individualized suspicion whatsoever.[60] In other words, anyone can "routinely" be asked to wait an hour while their car is temporarily dismantled at the border, and agents need not give any reason for authorizing this delay. The reasoning of *Flores-Montano* subsequently has been used by lower courts to uphold even more intrusive border searches in the complete absence of reasonable suspicion—let alone probable cause—which is generally required to conduct such searches.[61]

As *Flores-Montano* and subsequent lower court cases have illustrated, courts rarely find border stops—even when lengthy and intrusive—to be nonroutine.[62] *United States v. Montoya de Hernandez*[63] was one of the rare exceptions, but rather than establishing upper limits on border searches, the case provides further illustration of how little is required to vest border agents with tremendous powers of search and seizure. In that case, Montoya-Hernandez was referred to secondary inspection at Los Angeles International Airport because her travel history raised questions in the mind of a border agent.[64] During secondary inspection, agents discovered that she was carrying $5000 in cash, had no family or friends in the United States, had packed very little clothing, and spoke little English.[65] Based on these facts, and that she had travelled from Bogota, Colombia (considered a source destination for narcotics), inspecting agents developed suspicion that she was a "balloon swallower" carrying narcotics in her alimentary canal.[66] On the basis of this suspicion—and in the absence of probable cause—they detained Montoya-Hernandez for sixteen hours, told her she

60. *Id.* at 150.

61. *See, e.g.*, United States v. Arnold, 523 F.3d 941 (9th Cir. 2008) (authorizing the search of defendant's laptop computer, separate hard drive, computer memory stick, and six compact disks at airport customs); *see also* United States v. Ickes, 393 F.3d 501 (4th Cir. 2005) (upholding ICE agents' review of a video in a video camera at the international border).

62. *See* Jon Adams, *Rights at the United States Borders*, 19 BYU J. PUB. L. 353, 356 & n.17 (2005) (noting that "[c]ourts rarely find a sufficient level of intrusiveness to render a general border search nonroutine").

63. 473 U.S. 531 (1985).

64. *See id.* at 533.

65. *Id.* at 533-34. The Court does not suggest that the agent's suspicion at this point rose to the level of reasonable suspicion. Indeed, the government appears to have argued that such suspicion arose only after Montoya de Hernandez' discussion with Agent Talamentes, which occurred after this referral. *See id.* at 534 ("*At this point* Talamentes and the other inspector suspected that respondent was a 'balloon swallower' . . . ." (emphasis added)).

66. *Id.*

could only go to the bathroom in a wastebasket, and when she refused to be x-rayed on the grounds of pregnancy, transported her to the hospital for a pregnancy test and rectal examination.[67] The Court concluded that such a stop was constitutional under the Fourth Amendment.[68]

B. Border Exceptionalism Migrates to the Interior

The reasoning of *Flores-Montano*, *Montoya de Hernandez*, and other cases approving routine border searches is applicable at the border and its functional equivalent, but because of the growing presence of fixed immigration checkpoints, such border searches are increasingly common in the interior of the country. In *United States v. Martinez-Fuerte*, the Court approved the routine stop of vehicles at fixed border checkpoints in the interior of the United States as well.[69] In the consolidated cases at issue in *Martinez-Fuerte*, one of the defendants, Martinez-Fuerte, had been referred to "secondary" inspection after passing through the initial checkpoint.[70] The agents offered no basis for particularized suspicion as a justification for the reference to secondary inspection or for the search that occurred there, nor does the Court find that such referrals were made on a systematic, random basis.[71] The Supreme Court nevertheless concluded that, even in the interior of the country,[72] a referral to an intrusive secondary immigration search with no justification is consistent with the demands of the Fourth Amendment.[73] Even if one accepts the notion that operating random checkpoints under certain conditions may actually protect Fourth Amendment values[74]—one would want to see a justification for the use of

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67. *Id.* at 535-36.

68. *Id.* at 541 ("We hold that the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal."). It might have been of some importance to the majority that the defendant had been offered less intrusive means to end her ordeal, although it is unclear how much weight the Court afforded that fact. *See id.* at 544.

69. 428 U.S. 543, 545 (1976).

70. *See id.* at 547.

71. *Id.* at 547.

72. In *Martinez-Fuerte*, one checkpoint was located sixty-six miles from the Mexican border on the "principal highway between San Diego and Los Angeles" and was conducted with an official warrant, and one was located sixty-five to ninety miles from the nearest point of the Mexican border in south Texas. *Id.* at 545, 547, 549-50.

73. *Id.* at 556-57.

74. *See, e.g.*, Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment* (Univ. of Chi. L. & Econ., Olin Working Paper No. 530, 2010), *available at* http://ssrn.com/abstract=1665562 (arguing that randomized checkpoints, when properly implemented, provide benefits of privacy protection and fairness in enforcement).

random checkpoints and would also want to see some evidence of the methods by which the "random" nature of the search was guaranteed.[75]

Indeed, in cases involving DUI and other non-immigration checkpoints approved in the Court's Fourth Amendment jurisprudence, while random checks are allowed for primary inspections, agents must justify referrals to more intrusive, secondary inspections.[76] But the Court oddly declined to require any such additional justification in the immigration checkpoint context.[77] The Court also failed to require the government to justify the placement of these interior border checkpoints, which raises unanswered constitutional questions about whether there are any limitations on the use of such checkpoints in the interior.

One could justify the use of random, "suspicionless" border searches on the ground that such searches have high "hit rates."[78] In *Martinez-Fuerte*, the Court documented the fact that unauthorized noncitizens were found in 171 of the 820 vehicles referred to secondary inspection in San Clemente during an eight day period in 1974.[79] Notably, however, the Court does not actually rely on the twenty percent hit rate to justify its conclusions. Indeed, troublingly, the Court conceded that in the consolidated case for the Sarita checkpoint in Texas—where *every* car was stopped for questioning—the data needed to ascertain a hit rate was not available at all.[80]

Nevertheless, relying again on San Clemente's twenty percent hit rate from secondary inspections during an eight day period, and making no effort to ascertain whether these numbers are universal or exceptional at the fixed border checkpoints to which the ruling would apply, the Court concluded that "even if it be assumed that such referrals [to secondary inspection] are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation."[81] Therefore, legal *carte blanche* is given for racial profiling at fixed border checkpoints without any meaningful statistical justification for this outcome.

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75. *See* Harcourt & Meares, *supra* note 74, at 38.

76. *See, e.g.*, Mich. Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (approving DUI checkpoints that include referrals to secondary inspection "[i]n cases where a checkpoint officer detected signs of intoxication").

77. *See Martinez-Fuerte*, 428 U.S. at 547 (noting that no basis for suspicion was provided for the referral to secondary inspection).

78. This general approach is endorsed by Harcourt and Meares, *supra* note 74, at 38, but it is unlikely that those authors would condone the Court's methodology (or lack thereof) in *Martinez-Fuerte*.

79. United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976).

80. *Id.* One wonders whether that number would be closer to the less than .17% hit rate based on vehicles flowing through primary inspection at San Clemente. *See id.*

81. *Id.* at 563.

Finally, in *INS v. Delgado*, the Court created another avenue for aggressive immigration policing—the consensual encounter.[82] Consensual encounters between law enforcement and civilians are common, and such encounters are not subject to the restrictions of the Fourth Amendment.[83] Un-Unfortunately, in recent years the Court has developed a notion of consent that is, to put it mildly, somewhat detached from its lay meaning.[84] Perhaps unsurprisingly, some of the Court's most unrealistic notions of consent have their roots in the Supreme Court's immigration enforcement jurisprudence—in particular, the *Delgado* case.[85]

The *Delgado* case involved an Immigration and Naturalization Service (INS) "survey" of a factory in California, in which armed agents entered the workplace seeking to ascertain whether the workers possessed legal authorization to work.[86] Between twenty and thirty INS agents participated in this workplace survey,[87] blocking the exits to the building and moving among the workers, questioning them about their status.[88] "If the employee gave an unsatisfactory response or admitted that he was an alien, the em-

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82. 466 U.S. 210, 212 (1984).

83. *See, e.g.*, United States v. Mendenhall, 446 U.S. 544 (1980) (drawing the line between a consensual encounter and "stop" at the point where a reasonable person would believe she was not free to leave).

84. *See, e.g.*, Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27, 27 (2008) (noting a "surreal quality" to the Supreme Court's "consent" decisions); Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 774 (2005) (arguing that the consent requirement is "absurd, meaningless, and irrelevant"); Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 211 (2001) (positing that the Supreme Court's consent requirement "means very little"). For a discussion of other such manipulations of the Fourth Amendment test, see Aya Gruber, *Garbage Pails and Puppy Dog Tails: Is That What* Katz *is Made of?*, 41 U.C. DAVIS L. REV. 781 (2008).

85. *See, e.g.*, Devon Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946, 991 (2002) (arguing that *Delgado* paved the way for the problematic holding in *Florida v. Bostick*, 501 U.S. 429 (1991), and later expansions of the consent doctrine).

86. 466 U.S. at 212. These "surveys" are now more typically characterized as workplace raids. *See, e.g.*, Cindy Carcamo, *Fullerton Business Accused of Immigrant Exploitation*, ORANGE CNTY. REGISTER, Sept. 1, 2010 (discussing the "ICE workplace enforcement raid" of a Fullerton company); Susan Carroll, *Audits: ICE Isn't Cracking Down on Illegal Immigrant Employees*, HOUS. CHRON., Aug. 31, 2010 (mentioning "the 2008 raid of a Houston rag factory" and "a 2007 Ohio chicken factory raid").

87. Brief for Respondents at 10, INS v. Delgado, 466 U.S. 210 (1984) (No. 82-1271); Yvonne Abraham, *As Immigration Raids Rise, Human Toll Decried*, BOS. GLOBE, Mar. 20, 2007, http://www.boston.com/news/nation/articles/2007/03/20/as_immigration_raids_rise_human_toll_decried; Julia Preston, *Immigration Crackdown With Firings, Not Raids*, N.Y. TIMES, Sept. 29, 2009, at A1 ("The firings at the company, American Apparel, have become a showcase for the Obama administration's effort to reduce illegal immigration by forcing employers to dismiss unauthorized workers rather than by using workplace raids.").

88. 466 U.S. at 212-13. The majority stresses that the guns were never drawn and that "employees were free to walk around within the factory." *Id.*

ployee was asked to produce his immigration papers."[89] The four respondents in *Delgado*, who had been working in the factory on the day of the incident, argued that the conduct of the INS officers violated their Fourth Amendment right because the officers seized them in the absence of reasonable suspicion.[90]

The Supreme Court disagreed. In an opinion authored by Justice Rehnquist, the Court concluded that these interactions were "consensual" interactions not governed by the Fourth Amendment.[91] According to Justice Rehnquist, "[o]rdinarily, when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers."[92] In this framework, if workers did not feel free to leave, it was because of their workplace obligations, and not because of the armed immigration agents surrounding and infiltrating the building.[93] As Justice Powell points out in his concurrence, the Court could have upheld the seizures in this case by concluding that there was indeed a stop, but that the government's strong interest justified the intrusion.[94] Instead, the Court rested its holding on a notion of "consent" that defies common sense and prior legal understandings of the term.[95] This expansive notion of "consent" has affected immigration policing both at the border and away from it.

II. THE EXPANSION OF BORDER EXCEPTIONALISM (AND WHAT TO DO ABOUT IT)

Taken together, the border cases described in Part I mean an agent needs no suspicion to conduct a fairly intrusive search at the border or its functional equivalent. Such searches are constitutional if they rest on no rea-

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89. *Id.*

90. *Id.* at 213.

91. *Id.* at 221.

92. *Id.* at 218.

93. *See* Carbado, *supra* note 85 (arguing that the Court concluded that it was "their workplace responsibilities, and not the INS, [that] restricted their freedom of movement"). Carbado criticizes this problematic analysis, also evident in Justice O'Connor's opinion in *Bostick*, as ignoring the relevant social context of the policing involved and evincing a willingness to allow people of certain races—in this case Latinas/os—to bear the burden of justifying their belonging. *Id.* at 991, 998.

94. 466 U.S. at 221-24 (Powell, J., concurring); *see also* Carbado, *supra* note 85, at 997-98.

95. *See, e.g.*, 466 U.S. at 225-26 (Brennan, J., concurring in part and dissenting in part) ("I am convinced that a fair application of our prior decisions to the facts of this case compels the conclusion that respondents were unreasonably seized by INS agents in the course of these factory surveys.").

sonable suspicion or probable cause, even when they entail a "stop" of over an hour while one's car is temporarily dismantled. Not only are Customs and Border Protection (CBP) officers entitled to search the luggage of entering passengers regardless of whether there is any suspicion of wrongdoing, but recent cases have suggested that they are entitled to review the entire content of laptop computers of entering passengers.[96] Indeed, organizations that advocate for civil liberties have filed lawsuits seeking information about the CBP practice of copying and retaining large amounts of data stored on travelers' laptops.[97]

For other highly intrusive stops and searches, such as those involving both physical searches of the alimentary canal and detentions in excess of sixteen hours, the Court appears to require reasonable suspicion, but certainly has not required probable cause of criminal activity for these extreme measures. Nor is it clear that individuals can walk away to avoid these sorts of intrusions at the border.[98] In short, very few meaningful Fourth Amendment protections remain at the border and its functional equivalent.[99]

The Court has also given the green light to stops at fixed border checkpoints that are more intrusive than the stops allowed at other checkpoints authorized under the Fourth Amendment.[100] This means that the sweeping powers of the government at the border extend, in modified fashion, far into the interior of the country.

Although *Almeida-Sanchez* purports to create additional protections against "roving" stops near, but not at, the international border, the nature of these protections is limited in two significant ways. First, Supreme Court jurisprudence still allows the use of race as a legitimate factor in generating the reasonable suspicion necessary to conduct stops of individuals

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96. *See, e.g.*, United States v. Arnold, 523 F.3d 941 (9th Cir. 2008) (discussing border search cases involving laptops and videos); United States v. Ickes, 393 F.3d 501 (4th Cir. 2005) (same).

97. Asian Law Caucus v. U.S. Dep't of Homeland Sec., No. C08-00842 CW, 2008 U.S. Dist. LEXIS 98344, at *1 (N.D. Cal. Nov. 24, 2008).

98. *See, e.g.*, Torbet v. United Airlines, 298 F.3d 1087 (9th Cir. 2002). For a discussion of this and related cases, see Arnold H. Loewy, *Rethinking Search and Seizure in a Post-9/11 World*, INT'L SOC'Y FOR THE REFORM OF CRIM. L. (2008), http://www.isrcl.org/Papers/2007/Loewy.pdf.

99. Some circuit courts also have adopted an extended border search doctrine, under which border searches that occur *near* the border are deemed constitutionally permissible if reasonable under the Fourth Amendment. *See, e.g.*, United States v. Yang, 286 F.3d 940, 949 (7th Cir. 2002); United States v. Ogbuehi, 18 F.3d 807, 813 (9th Cir. 1994) (treating secondary inspection as a routine border search although it occurred a few minutes after defendant had crossed the border and sixty feet away). Although these expansions of the border search doctrine are quite modest, they demonstrate the malleability of the concept.

100. *See supra* notes 21-25 and accompanying text.

(and vehicles) not only at the border and its functional equivalent, but everywhere. Although race cannot be the "only" factor used to justify the stop, the use of this factor along with another—like type of dress or car—is permissible, which means stops based solely on race and class are countenanced by the law of the land.[101] When viewed in connection with the Court's unwillingness to examine seemingly reasonable stops for impermissible racial motives,[102] this rule allows for virtually unbridled racial profiling, not only in roving border inspections, but in immigration enforcement more generally.

Second, interactions in which individuals are cowed into complying with official requests for information are quite likely to be deemed "consensual" interactions by courts, thus eliminating the need for reasonable suspicion or probable cause. The fictitious "consent" of the workers in *Delgado* creates an extremely low bar for government agents wishing to claim that their searches of homes and workplaces were consensual. The argument has become extremely common and successful in the context of workplace and home raids by ICE.[103] Consent is also used by the Border Patrol to justify

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101. *See* Johnson, *supra* note 10, at 1038.

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

103. *See, e.g.*, Rodriguez v. United States, 542 F.3d 704, 710-11 (9th Cir. 2008) (finding that consent to entry was established although the only evidence came from ICE agents' conflicting and inconsistent testimony); *see also* CARDOZO IMMIGR. JUST. CLINIC, CONSTITUTION ON ICE: A REPORT ON IMMIGRATION HOME RAID OPERATIONS 6-10, *available at* http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/IJC_ICE-Home-Raid-Report%20Updated.pdf (noting that because ICE conducted most home raids without judicial warrant, consent was required, but also noting a significant percentage of home raids in New Jersey and Long Island, New York where consent was not obtained); Marisa Antos-Fallon, Comment, *The Fourth Amendment and Immigration Enforcement in the Home: Can ICE Target the Utmost Sphere of Privacy?*, 35 FORDHAM URB. L.J. 999, 1006 (2008) (citing several complaints alleging ICE entry without warrants or meaningful consent).

The Obama administration has expressed an intention to reduce reliance on high-profile workplace raids, focusing efforts instead on noncitizens who have criminal records or pose other threats to the community. *See* Julia Preston, *U.S. Identifies 111,000 Immigrants With Criminal Records*, N.Y. TIMES, Nov. 12, 2010, at A13 ("At a news conference in Washington, John Morton, the top official at Immigration and Customs Enforcement, called the program 'the future of immigration enforcement,' because, he said, it 'focuses our resources on identifying and removing the most serious criminal offenders first and foremost.' . . . Obama administration officials have worked to distinguish their immigration enforcement strategy from the Bush administration's, which centered on high-profile factory raids and searches in communities for immigration fugitives."). Interestingly, these and other reform efforts have sparked resistance from career staff—the "agency middle managers and attorneys, and the union that represents immigration officers." Andrew Becker, *Tensions Over Obama Policies Within Immigration and Customs Enforcement*, WASH. POST, Aug. 27, 2010, at B3. The strong push-back is perhaps unsurprising in light of the fact that so many agents were hired so quickly into an extremely permissive enforcement milieu.

boarding domestic trains and asking passengers for identification.[104] The fictitious nature of the "consent" in many of these cases is clear,[105] but equally clear from the case law is the Court's willingness to accept the fiction.

Given these two significant limitations on Fourth Amendment protections, jurisprudential checks on improper police conduct in the context of immigration policing are minimal. These problems are compounded further by the fact that there is seldom a remedy for Fourth Amendment violations in cases that are referred to immigration courts rather than criminal courts because the exclusionary rule is generally inapplicable in removal proceedings, except in cases involving "egregious violations."[106] Ultimately, agents enforcing immigration laws can engage in racial profiling and conduct coercive searches without reasonable suspicion or probable cause under the auspices of legal "consent," and, in instances when their conduct is so improper that it nevertheless runs afoul of the Fourth Amendment, can likely rely on the fruits of their unlawful investigations in any ensuing immigration proceedings. And although some lower courts and immigration judges have occasionally intervened to suppress evidence in the face of egregious ICE illegality,[107] the Supreme Court has largely written itself out of any supervisory role in immigration enforcement, and has provided no guidance to lower courts as to when such interventions might be appropriate. As the number of agents engaged in immigration enforcement has grown exponentially, so has the problem of inadequate supervision over immigration policing.

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104. *See* Nina Bernstein, *Border Sweeps in North Reach Miles Into U.S.*, N.Y. TIMES, Aug. 29, 2010, at A1; *see also* Sasha Abramsky, *Terror on the Inner Border*, NATION, Sept. 26, 2005, http://www.thenation.com/article/terror-inner-border (discussing CBP practice of boarding domestic Amtrak trains to ask for identification in Havre, Montana).

105. *See* Nina Bernstein, *When the Border Patrol Comes Aboard*, CITY ROOM, N.Y. TIMES (Aug. 30, 2010, 10:04 AM), http://cityroom.blogs.nytimes.com/2010/08/30/when-the-border-patrol-comes-aboard/?scp=2&sq=trains%20immigration%20police&st=cse ("It's just like they're authority figures, so you answer.").

106. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984); *see also* Chacón, *supra* note 4, at 1611-15; Stella Burch Elias, *Good Reason to Believe: Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting* Lopez-Mendoza, 2008 WIS. L. REV. 1109, 1115.

107. *See, e.g.*, Lopez-Rodriguez v. Mukasey, 536 F.3d 1012, 1016-17 (9th Cir. 2008) (upholding immigration judge's finding that entry was nonconsensual and ruling that "the government may not show consent to enter from the defendant's failure to object to the entry") (internal citations omitted); United States v. Gomez-Moreno, 479 F.3d 350, 357-58 (5th Cir. 2007) (finding that consent was not voluntary where it was obtained after ICE agents conducted an initial unconstitutional raid and search of the defendant's home); *In re* Perez Cruz, No. A 95-748-837 (L.A. Immigr. Ct. Feb. 10, 2009) (suppression order) (suppressing evidence illegally seized in workplace raid and granting Respondent's motion to terminate removal proceedings).

A. Increasing Immigration Enforcement and the Spread of Border Exceptionalism

The expansion of immigration policing over the past decade has taken two different forms. First, the number of federal agents and dollars devoted to immigration control has skyrocketed. This is true both in the interior and at the border.[108] On the federal level, the vast expansion in the number of agents dedicated to enforcement has resulted in an expansion of the kinds of policing practices evidenced in the border search cases outlined in Part I.

But a second, and perhaps more important, trend is that state and local law enforcement agents have become important players in immigration enforcement.[109] Sub-federal actors such as state and local police officers are now actively engaged in various forms of immigration policing. Some of these efforts involve cooperation and coordination with federal immigration agents, but other efforts are proceeding independently.

On the cooperative end of the spectrum are states and localities that have signed memoranda of agreement with the federal government that allow them to participate in immigration enforcement, subject to training and oversight by federal officials. These agreements, known as 287(g) agreements,[110] can authorize state or local officials to engage in enforcement efforts identical to those undertaken by federal immigration enforcement agents.[111] This translates to a significant expansion in the number of agents nationwide who are able to take advantage of the broad statutory and constitutional authority granted to officials engaged in immigration enforcement. Available data suggests that in at least some locations where local officials have authority to enforce immigration law pursuant to 287(g) agreements, law enforcement agents have changed their policing practices

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108. *See* Andreas, *supra* note 2; Cornelius, *supra* note 2. President Obama underscored the point in a July 2010 speech about immigration reform, noting:

> Today, we have more boots on the ground near the Southwest border than at any time in our history. Let me repeat that: We have more boots on the ground on the Southwest border than at any time in our history. We doubled the personnel assigned to Border Enforcement Security Task Forces. We tripled the number of intelligence analysts along the border.

President Barack Obama, Remarks on Comprehensive Immigration Reform at American University School of International Service (July 1, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-comprehensive-immigration-reform.

109. *See* Chacón, *supra* note 4, at 1579.

110. 287(g) is the section of the Immigration and Nationality Act that provides statutory authority for these agreements. 8 U.S.C. § 1357(g) (2006).

111. *Id.*

in ways that increasingly target Latina/o residents.[112] Critics argue that the rise in racial profiling in areas that have adopted 287(g) agreements signals the need for the elimination of the program.[113]

Far from moving to eliminate the program, however, the federal government has signaled its intent to preserve it.[114] More significantly, the government is effectively nationalizing aspects of the program through the national roll-out of the Secure Communities Initiative (S-Comm).[115] In jurisdictions where that program is in place, arrestees are screened through the FBI and DHS databases, which contain information on both criminal and civil immigration violations. Such screening occurs without regard for the reason for the arrest or whether the person is guilty or innocent of a crime.[116] It is essentially impossible for localities to opt out of the S-Comm program.[117] To the extent that 287(g) and other collaborative programs have spiked stops and arrests of Latinas/os, it seems likely that S-Comm will have the same effect. Although S-Comm theoretically should have no impact on policing since it involves post-arrest screenings, like the 287(g) program, S-Comm heightens the incentives (and reduces the costs) of making stops where a state or local official believes the stop might reveal an immigration violator. The problem is aggravated by the fact that state and local agents receive little to no formal training in immigration en-

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112. *See, e.g., New Study Finds Dramatic Problems with 287(g) Immigration Program*, AM. CIV. LIBERTIES UNION N.C. (Feb. 18, 2009), http://acluofnc.org/?q=new-study-finds-dramatic-problems-287g-immigration-program.

113. *Id.*

114. Press Release, Dep't of Homeland Sec., Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements (July 10, 2010), *available at* http://www.dhs.gov/ynews/releases/pr_1247246453625.shtm

115. Press Release, U.S. Immigration & Customs Enforcement, ICE Unveils Sweeping New Plan to Target Criminal Aliens in Jails Nationwide (Mar. 28, 2008), *available at* http://www.ice.gov/pi/news/newsreleases/articles/080414washington.htm.

116. *More Questions Than Answers About the Secure Communities Program*, NAT'L IMMIGR. L. CTR. (NILC, Washington D.C.), Mar. 2009, at 1-2, *available at* http:// www.nilc.org/immlawpolicy/LocalLaw/secure-communities-2009-03-23.pdf.

117. Shankar Vedantam, *No Opt-Out for Immigration Enforcement*, WASH. POST, Oct. 1, 2010, at B5 ("The Obama administration is making it virtually impossible for Arlington County, the District and other jurisdictions to refuse to participate in a controversial immigration enforcement program that uses fingerprints gathered by local enforcement agencies to identify illegal immigrants."); *see also* Tracy Seipel, *Santa Clara County Supervisors Vote to Opt Out of Secure Communities Program*, MERCURY NEWS (Sept. 28, 2010), http://www.mercurynews.com/ci_16199369?IADID=Search-www.mercurynews.com-www.mercurynews.com (reporting that Santa Clara County supervisors unanimously voted to pursue opting out of S-Comm, but that state and federal officials had to be notified in writing, and state officials had previously denied San Francisco's effort to opt out).

forcement.[118] Since the program is scheduled to be in effect nationally by 2013,[119] it would seem to be an opportune time for Congress or the Executive Branch to provide for some additional restrictions on the use of race in immigration enforcement. No such reevaluation appears to be underway, however.

The problem is further magnified by the fact that many state and local authorities are acting on their own initiative to enforce federal immigration law. The notion that states have the "inherent authority" to enforce federal immigration laws is a relatively new and legally controversial one. Prior to 2002, the federal government had taken the position that sub-federal actors were not authorized to enforce federal immigration laws independently, although they could conduct arrests in cases involving violations of federal criminal law.[120] In 2002, when announcing the launch of the National Security Entry-Exit Registration System (NSEERS) program, John Ashcroft noted that states would have the power to enforce federal immigration laws in support of the federal government's antiterrorism mission.[121]

This announcement, which "seemed like an afterthought"[122] actually upended decades of settled law and policy.[123] Over the past decade states and localities, prompted in no small part by the apparent powers granted to them by this policy reversal, have begun their own efforts to police immigration. In the absence of 287(g) agreements, some sub-federal law enforcement agents are enforcing immigration laws pursuant to their purported "inherent authority" to enforce federal immigration laws.[124]

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118. Even under the 287(g) program, where training was a formal part of the statutorily-authorized cooperation, government reports concluded that oversight and training was woefully insufficient. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-109, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF IMMIGRATION LAWS (2009), *available at* http://www.gao.gov/new.items/d09109.pdf. S-Comm participation requires no training in immigration enforcement.

119. Indeed, ICE recently announced that the program is now in place in every county in Texas, and the program is now operating in 659 jurisdictions in 32 states. Press Release, U.S. Immigration & Customs Enforcement, All Texas Counties Now Participating in Secure Communities Program (Sept. 29, 2010), *available at* http://www.ice.gov/pi/nr/1009/100929dallas.htm.

120. Pham, *supra* note 6, at 977 (noting that this position was "taken by the Ninth Circuit and, until recently, the Department of Justice); *see also* Gonzalez v. City of Peoria, 722 F.2d 468, 476 (9th Cir. 1983).

121. Att'y Gen. John Ashcroft, Prepared Remarks at the National Security Entry-Exit Registration Program (June 6, 2002), *available at* http://www.justice.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm.

122. Pham, *supra* note 6, at 965-66.

123. *Id.*

124. The most important contemporary architect of the "inherent authority" argument is Kris Kobach, who was working in the Justice Department at the time Attorney General Ashcroft announced the policy shift, and who subsequently expanded on the argument in a

Moreover, state and local participation in immigration has taken the form of states and localities creating and enforcing independent, state-level restrictions on migration. Arizona's S.B. 1070 may be the best-known example, but it is not the only one.[125] These sub-federal criminal ordinances—which are more than likely unconstitutional efforts on the part of sub-federal actors to engage in federal criminal law enforcement[126]—have the effect of enshrining existing federal authorization for racial profiling in immigration enforcement into state law.[127] More generally, this trend means that the permissive approach to policing endorsed in the Court's border jurisprudence is increasingly becoming a policing norm in some parts of the country. Unchecked, that trend is likely to continue.

Some supporters of more restrictive immigration policies argue that they are happy to be stopped and asked for identification.[128] These views reflect a rational policy preference. The problem is that it is not a policy preference that reflects existing policy choices. Up to now, it has been impossible to create a national identity card; the closest thing the United States has are the requirements of the REAL ID Act, out of which a number of states

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full-length law review article. *See* Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2005). Sheriff Arpaio has relied on such authority to continue to police immigration offenses even after the cancellation of his 287(g) agreement. Miriam Jordan, *Arizona Sheriff, U.S. in Standoff Over Immigration Enforcement*, WALL ST. J., Feb. 10, 2010, http://online.wsj.com/article/SB10001424052748703455804575057650062572536.html (quoting Sheriff Arpaio arguing "[w]e have the inherent right to enforce federal immigration law," and "[i]f Washington doesn't like it, I recommend they change the laws"). For a refutation of Kobach's "inherent authority" argument, as embraced by Sheriff Arpaio and others, see Pham, *supra* note 6, at 965-68.

125. An ordinance enacted in Hazleton, Pennsylvania would have required an employer who hired unauthorized workers to fire those workers within three business days after receiving notice from the city or risk suspension of its business license. Hazleton, Pa., Ordinances 2006-18 (Sept. 18, 2006).

126. *See generally* Gabriel J. Chin & Marc L. Miller, *Cracked Mirror: SB1070 and Other State Regulation of Immigration Through Criminal Law* (Ariz. L. Studies, Discussion Paper No. 10-25, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1648685.

127. S.B. 1070, for example, allows racial profiling to the extent it is permitted by federal and state law. Clearly, federal law allows for fairly broad reliance on racial profiling in immigration enforcement. *See supra* notes 41-53 (discussing the *Brignoni-Ponce* case); *see also* Chin et al., *supra* note 52, at 16-20 (concluding that the law codifies well-established reliance on racial profiling in immigration enforcement).

128. *See, e.g.*, Bernstein, *supra* note 104 ("'It [being asked for identification on Amtrak by CBP officials] makes me feel safe,' volunteered Katie Miller, 34, who was riding Amtrak to New York from Ohio. 'I don't mind being monitored.'"). The European model, where requests for identification are common and where individuals are expected to carry identification at all times, is often cited as a potential model, although European nations also have more exacting privacy laws to protect personal data. *See, e.g.*, *Why Not a National ID?*, BOS. GLOBE, Jan. 20, 2008, at K8, *available at* http://www.boston.com/bostonglobe/editorial_opinion/editorials/articles/2008/01/20/why_not_a_national_id/.

have now opted.[129] The failure of the national legislature to enact a policy that requires all those lawfully present to carry a certain identifying document reflects a lack of consensus on the question of whether we should engage in widespread internal policing of identification and belonging.

But policing practices have evolved as if this consensus already exists—that is, as if citizens (and others lawfully present) are already aware that they are required to carry identification to prove their belonging and are aware of the consequences for failing to do so. These policing practices create de facto requirements that some populations—particularly those suspected of being "foreign"—be prepared to document their belonging.[130] This requirement exists without formal codification and thrives because the jurisprudence of border policing is very forgiving. Additionally, because it is not part of an overarching policy choice, its implementation is uneven and discriminatory.

B. What is to be Done About Border Exceptionalism?

In light of the changing landscape of immigration enforcement, it is time for legislatures and agencies to impose more meaningful restrictions on all forms of immigration policing, notwithstanding the permissive Fourth Amendment framework set in place by earlier Supreme Court cases. First, standards for inspection at the border and its functional equivalent should be tightened. ICE and CBP officials should be required to have "reasonable suspicion" of a violation prior to referring individuals to more intrusive secondary inspections. Highly intrusive searches, such as laptop searches and full body searches, should be prohibited in the absence of probable cause.

Second, ICE and CBP should cease to rely on "consent" as the basis for making home entries and for checking identification on mass transit far from the border. These searches may be "consensual" as defined in the Fourth Amendment jurisprudence, but in fact they rely on coercive uses of

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129. *See, e.g.*, *National ID and the REAL ID Act*, ELECTRONIC PRIVACY INFO. CTR., http://epic.org/privacy/id-cards/#state (last visited Nov. 4, 2010) (noting legislation in nineteen states opting out of the REAL ID Act).

130. Huyen Pham, *When Immigration Borders Move*, 61 FLA. L. REV. 1115, 1160 (2009) ("[T]hose who have a foreign accent or appearance or who were born in another country can expect to be asked to show documents when others are not, be asked to show more documents, or be denied restricted benefits altogether. And because there are so many moving border laws, enacted by all levels of government, we can expect that large numbers of people with legal status will experience this discrimination. Those singled out for this discrimination will feel the impact through everyday transactions, as they apply for jobs, housing, and other essential benefits. For them, moving border laws will become permanent borders of discrimination.").

power. Home entries would still be permissible with a warrant. Stops on trains would still be permissible in cases where officers had reasonable suspicion or probable cause to conduct such a stop. But searches in the absence of any articulable reason would be prohibited, and agents could not rely on fictional consent to justify unwarranted searches.

Third, the Department of Justice guidelines on racial profiling should be revised to bring the standards for immigration policing in line with those articulated for general law enforcement purposes. At this point, immigration policing is so inextricably intertwined with general law enforcement that allowing profiling in the immigration context effectively guarantees reliance on profiling in all law enforcement efforts. Once the federal government has articulated higher standards, state and local agents deputized through 287(g) will also be held to those higher standards, and this could help slow the rising tide of racial profiling that has been generated by increased state and local participation in immigration policing.

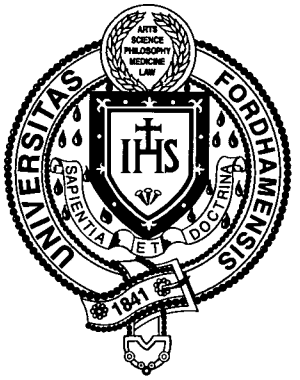
Fourth, remedies for Fourth Amendment violations in the context of immigration enforcement need to be strengthened. Pursuant to the Court's 1984 decision in *INS v. Lopez-Mendoza*,[131] the exclusion remedy is rarely available in civil removal proceedings—which is where many immigration enforcement actions lead. The Court's open hostility to the exclusionary rule makes a reversal of *Lopez-Mendoza* unlikely, but legislative imposition of exclusion in removal proceedings could achieve the same end.[132] Ideally, however, legislative change would address not only the need to extend the exclusionary rule to removal proceedings, but also would remove bars to the kind of class action civil suits by noncitizens that might help to deter Fourth Amendment violations by immigration agents.[133]

Ultimately, all of these changes to the law might be politically difficult to achieve. But any one of them would help to slow the erosion of Fourth Amendment protections in policing that began at the border, and have slowly extended throughout the interior of the country, affecting citizens and noncitizens alike.

131. 468 U.S. 1032 (1984).

132. Chacón, *supra* note 4, at 1624-27.

133. *Id.* at 1628-30.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