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LA MIGRA IN THE MIRROR:
IMMIGRATION ENFORCEMENT AND RACIAL PROFILING ON THE TEXAS BORDER

CÉSAR CUAUHTEMOC GARCÍA HERNÁNDEZ*

The first step in any Latino urban agenda must be to remove La Migra from the front yard.

—Mike Davis

Where would the United States be without its ilegales?

—Ilan Stavans

On an ordinary Saturday night in late July 2007 the traffic on a bridge linking the Mexican state of Tamaulipas with the Texas border cities of Hidalgo and McAllen was in its typical weekend crawl. My parents and I paid the toll and immediately found ourselves in downtown Reynosa, a gritty industrial city whose eighteenth century origins as a key outpost of México's expansive northern frontier suggest it has seen better days. Fifteen minutes later we reached our destination: a glittery new salón tucked behind an H-E-B grocery store, a Texas landmark, screaming in bright red and white neon lights of the strong bond that unites the communities located in the shadow of the Río Grande River.

We were in Reynosa to join longtime family friends in celebrating the marriage of their youngest son, a twenty-year-old Marine recently back from Iraq, to his high school sweetheart. Like many families along the border, including mine, Enrique and Katarina were born, raised, and live in Texas, but have many relatives in Reynosa and surrounding towns.

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4. The names of the couple and their family have been changed to protect their anonymity.
Though families have straddled the border for generations, it has not been until recent years that family gatherings required the permission of the federal government. On this night, thousands of miles away from the latest Washington beltway theatrics about immigration and national security, politicians' heated arguments were more vivid than at any well-staged press conference. The political became so personal because Enrique and Katarina chose to celebrate their marriage in México for no other reason than that some of their relatives cannot enter the United States of America (U.S.A.). The young couple had seen little choice in the matter. Despite having spent their lives in Texas, except for Enrique's travels as a Marine and family trips to México, the pair faced a difficult choice: a wedding in Texas, recognizing the place where they plan to settle and raise children but without some of their family, or a wedding in México. They chose México.

Nonetheless, the choice they made was still imperfect. The couple's plans were complicated by a variable unique to the borderlands: Enrique's older brother, José, is a seasoned Border Patrol agent.\(^5\) Fully bilingual, he is a prized employee of the agency charged with regulating entry into this country. Were he looking to sign up with the agency during that year, when his younger brother got married, José would even have been eligible for fast-track training that would put him in the field quicker than the standard training program allows as a direct result of his Mexican ancestry and corresponding Spanish-language ability.\(^6\)

The unpleasant reality that has arisen in the lives of many border residents was vividly displayed that Saturday night—the border has been


According to the Migration Policy Institute, CBP Border Patrol officers are responsible for enforcing 8,000 miles of US land and water boundaries between legal ports of entry (designated points where immigration officials can regulate entry). The goal of the Border Patrol is to maintain a presence along border areas in order to prevent individuals, such as criminals and unauthorized migrants, from entering US territory outside official ports.


increasingly transformed from a political designation into a real division with meaningful implications for border communities. On Enrique and Katarina’s wedding night, the border appeared in the form of fear. Since becoming a Border Patrol agent, José has not entered México. It is too dangerous for Border Patrol agents to venture into México, he has been told. As a result, José was afraid that he would not return alive from his brother’s wedding. Acting on this fear, he elected to miss Enrique and Katarina’s celebration.

And so the wedding went on. Despite their best efforts to accommodate the border’s rules, Enrique still celebrated his wedding without his older brother. His parents, who entered Texas without documents, worked under false names, and still remain far more comfortable in Spanish than English, saw their family fractured. All because the older brother works for la migra—the immigration police.

Meanwhile, the Border Patrol is in the midst of an enormous employment push. While José avoided his brother’s wedding, Border Patrol recruiters traveled the country looking for 6,000 more bodies to don the trademark green trousers and take to the hot banks of the Río Grande and the rest of the border, possibly forsaking their own family reunions in the process. Before the decade is out, the agency hopes to have more than 20,000 agents posted throughout the country.

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7. See Drug-Related Blasts in Mexico Put US Border Patrols on Maximum Alert, BBC, Sept. 21, 2008. According to the BBC, the Border Patrol has recommended that its agents avoid crossing over into Mexico until the violence in the border states is controlled by authorities. “We have been told not to cross over into Mexico because of the danger, but many of our colleagues have relatives on the other side. They have been asked not to travel in uniform and to take every possible precaution during their return,” the [unidentified Border Patrol] spokesman said.


11. See id.; see also Hsu & Hedgpeth, supra note 9, at A4 (stating that the Department of Homeland Security expected to expand the number of Border Patrol agents to more than 18,000 by the end of 2008). A press release issued by Customs and Border Protection announcing a series of employment events in Georgia and South Carolina noted that the agency is in the midst of “the largest expansion of the Border Patrol in history.” Press Release, U.S. Customs & Border Protection (Sept. 15, 2008), reprinted in U.S. Fed. News Serv., Border Patrol Kicks Off Southern Hiring Blitz to Reach Presidential Mandate, Sept. 15, 2008 [hereinafter Border Patrol Hiring Blitz]. The agency has conducted similar employment events across the country. See, e.g., Press Release, U.S. Customs & Border Protection (Sept. 5, 2008), reprinted in U.S. Fed. News Serv., Border Patrol Launches Wisconsin Mission, Sept. 5, 2008 (announcing a recruitment event in
In a region of unrelenting double-digit unemployment, low wages, limited job security, and staggeringly low levels of educational achievement,\(^{12}\) federal government agencies offer some of the best jobs available to young people growing up in South Texas.\(^{13}\) Workers in the Rio Grande Valley’s two metropolitan areas, Brownsville and McAllen, earn thousands of dollars less than in the rest of the country. The mean annual wage in May 2007 was $27,750 in McAllen and $27,770 in Brownsville, while nationally the median wage was $40,690.\(^{14}\) In a scene more commonly associated with undocumented migrants, investigative journalist Héctor Tobar chronicled how many of the region’s homegrown workers are forced to venture north out of the border region in search of employment:

Frankie and Linda were recently married and the parents of an infant boy. For them, the journey began on the Texas side of the Rio Grande Valley, in the bus station in Eagle Pass, a slice of the United States that is more like Mexico. . . . Frankie and Linda are like me, American by birth but with a good chunk of their souls connected to a place that is, culturally speaking, in Latin America. Just a few years beyond high school, they too were drawn in by the pitch of the labor contractors and the promise of a new beginning.

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\(^{13}\) A 1998 report on the Texas borderlands issued by the Texas Comptroller of Public Accounts noted that government employment in the border region paid, on average, higher than any other large sector of the regional economy. TEX. COMPTROLLER OF PUB. ACCTS., BORDERING THE FUTURE: CHALLENGE AND OPPORTUNITY IN THE TEXAS BORDER REGION 19 tbl.2.2 (1998). In contrast, statewide, manufacturing employed a large percentage (12.9%) of the population and paid, on average, almost $10,000 more than government employment. Id. Ámérico Paredes fictionalized this phenomenon beautifully in his novel about a young Mexican boy who grows up in a poor family along the border, succeeds in school, and eventually becomes employed by the U.S. Army. See generally ÁMÉRICO PAREDES, GEORGE WASHINGTON GÓMEZ (1990).

\(^{14}\) U.S. DEP’T OF LABOR, BUREAU OF LABOR STATS., MAY 2007 NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES: UNITED STATES (2008), http://www.bls.gov/oes/current/oes_nat.htm#b00-0000 (providing the most recent available national data); U.S. DEP’T OF LABOR, BUREAU OF LABOR STATS., MAY 2007 METROPOLITAN AND NONMETROPOLITAN AREA OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES: BROWNSVILLE-HARLINGEN, TX (2008), http://www.bls.gov/oes/current/oes_15180.htm#b00-0000 (providing the most recent available data for the Brownsville-Harlingen metropolitan statistical area); U.S. DEP’T OF LABOR, BUREAU OF LABOR STATS., MAY 2007 METROPOLITAN AND NONMETROPOLITAN AREA OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES: McALLEN-EDINBURG-MISSION, TX (2008), http://www.bls.gov/oes/current/oes_32580.htm#b00-0000 (providing the most recent available data for the McAllen-Edinburg-Mission metropolitan statistical area).
in a secret corner of America. The pull is so strong, and the Rio Grande Valley so needy, that dozens of Frankie and Linda’s Eagle Pass friends [jump] into the stream along with the mexicanos, filling up trailers on a red patch of Alabama soil, hidden from the highway that runs past it by a strand of trees.

Frankie and Linda were pulled away from the only home they had ever known by the hope you hear on people’s lips when they speak of the jobs that await them, by the exclamation points on flyers attached to the walls of the bus stations in McAllen, Harlingen, and Brownsville, and that pass from one needy hand to another, back and forth across the border. In spite of the steadfast efforts of many border residents like Frankie and Linda, the Texas Comptroller of Public Accounts nonetheless predicted in a 1998 forecast of the region’s future labor conditions “that while real earnings per capita in the Border region will more than double by 2020, the region’s standing relative to the rest of the state will deteriorate during this same period.” In this bleak employment context, the Border Patrol’s starting salary of up to $46,000 and great benefits are a temptation few can financially afford to resist.

This article addresses the impact of immigration policing on the border region. In particular, the article focuses on the use of race-based immigration enforcement to construct and maintain a dichotomized population in the Texas borderlands. Due to the unique historical significance of the Border Patrol in enforcing immigration laws along the border, the article devotes greater attention to that agency than its cousin federal immigration enforcement agency, Immigration and Customs Enforcement. Part I presented an introduction to the human face of economic conditions and border politics along the Texas borderlands.


17. See Border Patrol Hiring Blitz, supra note 11 (“Border Patrol recruits earn between $36,000 and $46,000 in their first year, with the potential of earning up to $70,000 per year within three years of service.”). The agency’s press release also notes that agents receive “federal health insurance, life insurance and retirement, and up to 25 percent additional pay in overtime opportunities.” Id. Sociologist Robert Lee Maril described the motivations of one Border Patrol agent in these words: “At first for [agent] Rodriguez it was about the steady paycheck and the job security. A federal job was a big deal in Rodriguez’s family. No one had ever held that kind of job security or earned that kind of paycheck. Not to mention the guaranteed retirement money.” ROBERT LEE MARIL, PATROLLING CHAOS: THE U.S. BORDER PATROL IN DEEP SOUTH TEXAS 24 (2004).

role in constructing the modern border as a geo-political barrier with immense racial implications. In Part III, the article traces the Supreme Court jurisprudence that enables immigration policing officials to engage in race-based investigations of people who "appear" Mexican and the application of this line of cases by lower courts. Lastly, Part IV discusses the unique consequences of relying on individuals who are themselves of Mexican ancestry to enforce immigration laws that explicitly allow the identification of individuals who appear to be Mexican as suspect.

II. RAISING THE BORDER

The Border Patrol's purpose is simple, yet profound: to police the rugged edge of the Río Grande River, the very river that gave birth to the border communities and on which generations of border residents have long depended for life.\(^{19}\) In carrying out its function, the agency propagates a sharp distinction between those who are welcomed in the U.S.A. and those who are not. As the Department of Homeland Security responds to the shrill cries of energetic opponents of immigration, the specter of a wall rises higher and higher along the once mighty Río Grande River, and the local voices that oppose its construction are drowned by the sounds of earth-moving equipment altering the region's geography.\(^{20}\) It is of little consequence that no wall—no matter how thick, tall, or technologically sophisticated—will stop the flow of dedicated migrants.\(^{21}\) "Yes, you can get over it; yes, you can get under it,"

19. Underscoring the importance of the Río Grande River to the early towns along the border, David Montejano explains: "In order to understand . . . the immediate cause of the Mexican War, we must . . . accept the fact that in the early nineteenth century the greatest expectations of the commercially minded settlers were pinned on that river." \textit{David Montejano, Anglos and Mexicans in the Making of Texas,} 1836–1986, at 15–16 (1987).

20. \textit{See, e.g., Carlos Guerra, Environmentalists See Bumps Ahead for Border Fence Efforts, San Antonio Express-News, June 24, 2008,} at B1 (describing lawsuits filed against the federal government's construction of a wall along the border with México); \textit{see also Carlos Guerra, As Border Fence Looms, Brownsville Sees Small Surge of Student Activism, San Antonio Express-News,} Jan. 23, 2008, at B1 (describing local opposition to the wall in South Texas). Some opponents of the construction of the border wall have resorted to international fora because domestic arenas do not provide room for meaningful discussion of opposing voices. \textit{See, e.g., Univ. of Tex. at Austin, Office of Pub. Affs., University of Texas Working Group to Testify on Human Rights Impacts of Texas/México Border Wall (Oct. 20, 2008),} http://www.utexas.edu/news/2008/10/20/border-wall/ (quoting Working Group member Denise Gilman: "It is unfortunate that we must go to an international forum to address the actions of the United States on its own border, but we are very pleased that this important human rights body will consider the extremely harmful impacts of the wall through a human rights lens.").

Michael Chertoff, Secretary of Homeland Security, admitted. 22 “But it is a useful tool that makes it more difficult for people to cross. It is one of a number of tools we have, and you’ve got to use all of the tools,” he told a reporter. 23

Today’s fencing is only the most recent attempt in a century of official government efforts to regulate the border. In 1919, Mexicans seeking to enter the U.S.A. were first required to apply for formal admission. 24 Ten years later, Congress instituted a now familiar aspect of immigration law; the new law provided that the failure of non-citizens to seek and gain official admission from immigration officials rendered them prosecutable as criminals. 25 For the first time in our nation’s history, individuals were present within our borders who were not only unwanted and legally removable, but also deemed criminal, thus placing them on the same societal plane as any other dangerous people worthy of punishment at the hands of the state. Legal historian Mae M. Ngai explains the far-reaching implications that these changes to immigration law had for the Texas borderlands:

After a decade of instability wrought by the Mexican Revolution and World War I, the border as a political marker became basically settled. During the 1920s, immigration policy rearticulated the U.S.-Mexico border as a cultural and racial boundary, as a creator of illegal immigration. Federal officials self-consciously understood their task as creating a barrier where, in a practical sense, none had existed before. 26


23. Id. Sociologist Saskia Sassen might disagree with Chertoff’s assertion that “you’ve got to use all of the tools” available to prevent migration. In describing the European Union’s recent efforts to stop immigration, she explains:

Much as EU states have resisted and found it incompatible with protecting their sovereign power, they have had to relinquish some forms of border control and have had to accept court rulings which support the human rights of immigrants and the civil rights of their citizens to sue their own government, often in connection with infractions of immigrant and refugee rights. And the world did not come to an end. Nor did this destroy the capacity of the nation-state to regulate immigration.

Sassen, supra note 18, at xx.


25. Act of March 4, 1929, ch. 690, § 2, 45 Stat. 1551 (declaring it a misdemeanor to enter the U.S.A. without inspection by immigration officials punishable by up to one year imprisonment or a maximum fine of $1,000). This requirement was and is imposed on all people, including those who are authorized to enter and exit the country regularly.

26. Ngai, supra note 24, at 67 (paragraph break omitted). See also Sassen, supra note 18, at 78 (arguing that “[t]he coupling of state sovereignty and nationalism with border control made the ‘foreigner’ an outsider”).
Consequently, by the second decade of the twentieth century, Mexicans and people of Mexican descent along the border could no longer be considered to possess what law professor Devon Carbado termed an "American identity," if indeed they had ever been able to claim such an identity before.27 According to immigration scholar Kevin Johnson, "Race profiling in immigration enforcement is therefore based on and further reinforces the perception that persons of Latin American ancestry, citizens and noncitizens alike, are 'foreigners.'"28 The criminalization of Mexicans who entered the U.S.A. without formal admission now rendered all Mexicans in this region, regardless of their actual, formal citizenship or permanent resident status, unable to claim to represent the nation's racial image.29

For almost a century it has been the responsibility of the Border Patrol to police this political boundary. From its origins in the 1920s, in the immediate aftermath of large numbers of Mexicans fleeing the violence of a ten-year civil war and taking refuge in the Southwest, the Border Patrol's purpose has been to interfere with immigrants' endeavors to enter the country.30 Indeed, there is no question but that the early focus of Border Patrol agents was on curtailing immigration from México.31

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27. See Devon W. Carbado, Racial Naturalization, 57 Am. Q. 633, 637–38 (2005). According to Natsu Taylor Saito, "Asian Americans, Latinos and Latinas, and people of Middle Eastern descent—all formerly deemed 'ineligible to citizenship'—continue to be portrayed and often treated as foreigners, regardless of their birthplace or citizenship. Perceived foreignness has been conflated with race and national origin and, in turn, with disloyalty." Natsu Taylor Saito, From Chinese Exclusion to Guantanamo Bay: Plenary Power and the Prerogative State 7 (2007).


29. See Berta Esperanza Hernández-Truyol, International Law, Human Rights, and LaCrit Theory: Civil and Political Rights—An Introduction, 28 U. Miami Inter-Am. L. Rev 223, 242 (1997) (stating that some "citizens by birth" were nonetheless "foreigned out of full citizenship by name, language, color, accent or appearance"); see also Ngai, supra note 24, at 8 ("The legal racialization of these ethnic groups' national origin cast them as permanently foreign and unassimilable to the nation. . . . [T]hese racial formations produced 'alien citizens'—Asian Americans and Mexican Americans born in the United States with formal U.S. citizenship but who remained alien in the eyes of the nation."); Natsu Taylor Saito, Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law, 76 Or. L. Rev. 261, 295–96 (1997) (arguing that Asian Americans, even though they have formal citizenship, are presumed to be "not really Americans").

30. For more about the origins of the Border Patrol, see Ngai, supra note 24, at xx, 58–61.

31. For example, while immigration officials relied on Canadian railroad companies to inspect the status of individuals entering through Canada, immediately upon its creation the Border Patrol increased Mexican deportation exponentially. See id. at 67–70. More recently, one commentator stated that "most of the Border Patrol's work is focused on the United States-[M]exico[b]order and the illegal immigration of Mexican citizens." Tory A. Cronin, Comment, The Wrong Solution: An Examination of President Bush's Proposed Temporary Worker Program, 7 Scholar 183, 186 (2005).
Using a tactic that remains common today, agents performed large raids in which they arrested hundreds of people at a time. "By the early 1930s," writes Ngai, "the Immigration Service was apprehending nearly five times as many suspected illegal aliens in the Mexican border area as it did in the Canadian border area."32 Working-class Mexicans were especially vulnerable to abuse. According to Ngai,

Inspection at the Mexican border involved a degrading procedure of bathing, delousing, medical-line inspection, and interrogation. The baths were new and unique to Mexican immigrants, requiring them to be inspected while naked, have their hair shorn, and have their clothing and baggage fumigated. Line inspection . . . required immigrants to walk in single file past a medical officer. . . . [A]t El Paso the service exempted all Europeans and Mexicans arriving by first class rail from line inspection, the baths, and the literacy test.33

To be sure, the new agency’s decision to target Mexicans was not universally appreciated in the Texas border region, even by wealthy white settlers. Historian David Montejano points out that many white business people and politicians at the time, concerned about the impact of abusive agents on their supply of cheap labor, complained of the agency’s flagrant disregard for basic legal rights.34 According to Montejano, Elmo O’Meara, the presiding officer of Dimmit County in southwest Texas, complained,

The immigration officers are violating the bill of rights against unlawful search and seizure, and are perjuring and throwing Mexicans in jail until they say they were born in Mexico. . . . They stop Mexicans who were born here and search them and throw them into jail and cuss them.35

Eventually, the blatant racism of which O’Meara—and countless Mexicans along the border—complained became cloaked in constitutional law. Or, more precisely, the extraconstitutional status of immigration law. Or, more precisely, the extraconstitutional status of immigration law.36 That is, it has been decided by the U.S. Supreme Court that many of our commonly known constitutional guarantees do not con-

32. See Ngai, supra note 24, at 70. This focus on the Mexican border has not changed significantly.
33. See id. at 68 (emphasis added).
34. See Montejano, supra note 19, at 236.
35. Id. (alteration in original); see Tex. Loc. Gov’t Code Ann. § 81.001 (defining the county judge as the presiding officer of the commissioners court of each county in Texas). The sentiment expressed by O’Meara is consistent with the prevailing attitude of immigration officials at the time, which considered Mexican immigration as a labor concern rather than an immigration concern. See Ngai, supra note 24, at 64.
36. See Saito, supra note 27, at 5 (arguing that the plenary power doctrine places immigration law and national security matters beyond the reach of the Constitution).
strain immigration law enforcement. In discussing why such a ruling is politically palatable, immigration law scholar Kevin R. Johnson notes:

As long as noncitizens are afforded minimal procedural safeguards, the courts have afforded Congress free reign with respect to exclusion and deportation of noncitizens. Because of the unpopularity of—even hatred toward—foreigners among the general population in times of crisis and social unrest, a meaningful political check on the unfair treatment of immigrants does not exist. As a result, both Congress and the president have the ability to direct the most extreme action toward noncitizens with little fear of provoking a judicial response.

Thus, immigrants have regularly been deprived of constitutional protections guaranteed to citizens. For example, in 1903, Congress rejected a proposal to prohibit the advocacy of anarchism or revolution by citizens at the same time that it enacted a law to bar entry into the country for any non-citizen that engaged in the same type of political advocacy—effectively punishing non-citizens for engaging in speech that is ordinarily protected by the First Amendment when uttered by citizens.

The Fourth Amendment's prohibition against unreasonable search and seizure is similarly limited in the context of immigration proceedings. According to the Supreme Court, individuals present when immigration officials converge on a particular location are not "seized" for purposes of the Fourth Amendment even when agents are posted at the factory doors. Going even further, Justice Sandra Day O'Connor

37. See Hiroshi Motomura, Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation, 100 YALE L.J. 545, 550–60 (2000) (providing an overview of the development of the plenary power doctrine, the theoretical foundation of immigration law's frequently extraconstitutional status); id. at 564 ("[T]he plenary power cases provide, as a matter of explicit constitutional theory, that the immigration context is different, and that therefore we cannot directly apply mainstream constitutional norms in immigration cases.").


40. INS v. Delgado, 466 U.S. 210, 217–19 (1984) ("We reject the claim that the entire workforces of the two factories were seized for the duration of the surveys when the INS placed agents near the exits of the factory sites."). In criminal prosecutions, although "not all personal intercourse between policemen and citizens involves 'seizures' of persons," if "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave," a seizure has occurred within the meaning of the Fourth Amendment. See Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968); United States v. Mendenhall, 446 U.S. 544, 554 (1980). Since a person might not feel free to leave when the only avenue for leaving a location is blocked by law enforcement officials, the Supreme Court's decision in Delgado that individuals caught in the midst of a workplace inspection by immigration officials were not seized for purposes of the Fourth Amendment suggests that the only distinguishing criterion is that the Delgado
explained that the legality of an arrest is irrelevant to the harshest punishment routinely meted out against immigrants—deportation. "[T]he mere fact of an illegal arrest has no bearing on a subsequent deportation proceeding," O'Connor wrote. Where a citizen arrested for a crime can challenge the state's ability to prosecute that crime if the arrest is unlawful.

The absence of many cherished constitutional protections from our immigration law enforcement regimen means that immigration police have wide latitude to act. Peter J. Smith, the special agent in charge of immigration raids carried out on Long Island in September 2007, expressed the hard reality of this extraconstitutional jurisprudence when he reportedly dismissed complaints that his officers had entered homes without search warrants by explaining, "We didn't need warrants. We don't need warrants to make the arrests. These are illegal immigrants." Although there are several situations in which warrantless searches and seizures have been found to be in compliance with the Fourth Amendment's warrant requirement, the typical exceptions to the warrant requirement are based on the nature of the circumstances, rather than, as Smith explained, the perceived identity of the individuals. Interestingly, even Smith acknowledged implicitly, though without evidencing any concern, that his expressed reliance on the perceived identity of the raids' targets as so-called "illegal immigrants" was itself inaccurate since incident occurred in the immigration context rather than the traditional criminal law context. See, e.g., United States v. Halliburton, 1992 U.S. App. LEXIS 37885, at *9–10, 1992 WL 138433, at *3–4 (6th Cir. 1992) (finding that the defendant could not reasonably feel free to leave when a police officer "physically blocked the courthouse door").


43. See U.S. CONST. amend. IV ("The 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."); Katz v. United States, 389 U.S. 347, 357 (1967) (stating that a warrant is required unless a narrow exception to the warrant requirement is met). Exceptions to the Fourth Amendment warrant requirement include: the regulatory authority exception; the third party intervention exception; the emergency exception; the plain view exception; the inventory search exception; the hot pursuit exception; the community caretaking exception; the consent search exception; the search incident to arrest exception; the deceptive guest exception; and the automobile exception. See State v. Moore, 853 A.2d 903, 906 (N.J. 2004) (listing several exceptions to the warrant requirement recognized by the United States Supreme Court).
some citizens were arrested as well. That, Smith said, “is not uncommon.”

Almost a hundred years after Elmo O’Meara, the Dimmit County, Texas official, complained about the Border Patrol’s disregard of the Bill of Rights in its treatment of Mexicans during the early decades of the twentieth century, government officials of Nassau County on Long Island lodged a similar complaint against the Border Patrol’s twenty-first century cousin agency, Immigration and Customs Enforcement, operating under the supervision of Peter J. Smith: “You have to have some reason to believe the target will be there when you enter a home,” the Nassau County police commissioner Lawrence W. Mulvey reportedly said. “When you have 96 warrants and you only find six of them, it’s hard to make the argument that you had a good faith basis to enter those houses.”

Without question, the Border Patrol has utilized this constitutional flexibility to effectuate its mandate. The agency itself claims that its “priority mission” is to keep “terrorists and their weapons” out of the country. Along the border, the agency’s omnipresent advertising on roadside billboards and television touts the opportunity to “protect our borders.” This claim is belied, however, by the agency’s feverish emphasis on immigrants crossing the southern border, not terrorists. For example, Asa Hutchinson, former Under Secretary for Border and Transportation Security for the Department of Homeland Security, admitted that there is more evidence of terrorist activity along the Canadian border than the Mexican border; nonetheless, he added, “The best border security on the northern border is the grandmother who has lived in her house on the border for seventy years. She sits in her home and watches that border and calls border patrol when she sees something suspicious.”

44. Bernstein, supra note 42, at C12.
46. Id. (expressing complaints made by Nassau County officials about the conduct of Immigration and Customs Enforcement agents during an immigration raid).
48. See Asa Hutchinson, Keynote Address, 59 ADMIN. L. REV. 533, 541 (2007). Though the border with Canada remains vastly more open than the border with México, recent changes made in the name of enhancing security have received widespread criticism by residents of the Quebec-Vermont border where generations have been accustomed to a fluid international boundary. See, e.g., Bill Taylor, Life in Border Towns Has Always Presented Challenges for Residents, But What About a Community That Straddles Both Sides of the Canada-U.S. Divide?, TORONTO STAR, Apr. 15, 2006, at F1 (describing the effects of increased border-crossing requirements on communities along the Quebec-Vermont border).
Indeed, border enforcement is quickly on the rise. According to an analysis of government data by the non-governmental organization Migration Policy Institute, in 2006 immigration officials detained 256,842 individuals, a twenty-three percent increase from 2001.49 The Border Patrol alone accounted for approximately ninety percent of the government's apprehensions in 2006.50 One year later, the government reported that it deported 276,912 individuals and detained 29,786 per day.51

To be fair, the agency has merely responded to presidential and congressional instruction. In the 1990s,

Border enforcement became one of the nation's highest priorities and received great increases in funding. Greater immigration enforcement was consistent with the tough stance on crime adopted by the Democratic president Bill Clinton . . . . In 1996, Congress enthusiastically joined the fray. Bent on curbing undocumented immigration, deporting criminal aliens, protecting the nation from terrorists, and guarding the public fisc, Congress passed a series of "get tough on immigrant[s]" laws. Detention of many aliens became mandatory, with the number of immigrants detained increasing dramatically in local jails, federal penitentiaries, and privately run detention facilities.52

Almost a century after its creation, the Border Patrol is now equipped with unprecedented financial resources to police immigration. The omnipresent appearance of the agency's green and white sport utility vehicles along the border can not be missed. Agents sit in airports, drive through urban shopping districts, and park their vehicles under the shade of the sturdy mesquite trees that dot the region's rural landscape.53

III. THE CONSTITUTIONAL LIBERTY TO PRACTICE RACIAL PROFILING

Six months ago, I feared this Nation might be entering another era that would become one more blight in our Nation's history. Based upon the witness testimony I have read for today and a long list of other individual cases, I feel we have arrived at that era where an

49. See Terrazas, supra note 5.
50. See id.
53. Indeed, I proofread this section while waiting to answer the obligatory "Yes, sir," to a Border Patrol agent's "Are you a citizen?" at a permanent immigration checkpoint along a major highway in South Texas.
overzealous government is interrogating, detaining, and deporting its own citizens while treating noncitizens even worse.

—Representative Zoe Lofgren

In the most egregious and wide-reaching example of the Supreme Court’s unwillingness to extend important constitutional protections to non-citizens, the Court in a 1975 decision firmly approved racial profiling in the immigration policing context. The Court allowed racial profiling—that is, “the formal and informal targeting of African Americans, Latinos, and other racial minorities for investigation on account of their race”—even though such practices remain taboo policy in the traditional constitutional framework in which allegations of race-based decision-making are scrutinized under the Equal Protection Clause.

In this decision, United States v. Brignoni-Ponce, a case in which the Court directly addressed the Border Patrol’s authority to stop and question people who appear to be Mexican, the Supreme Court explained, “The Government makes a convincing demonstration that the public interest demands effective measures to prevent the illegal entry of aliens at the Mexican border. . . . These aliens create significant economic and social problems, competing with citizens and legal residents for jobs, and


55. See Johnson, supra note 28, at 676. Professor Deborah Ramirez and attorneys Jennifer Hoopes and Tara Lai Quinlan argue that racial profiling exists when race or nationality is inappropriately used to determine suspicion of criminality: “[R]acial profiling exists when race or nationality is used as a factor in determining whom to stop, search, question, or arrest—whether in an investigative stop and frisk, a motor vehicle pretext search, or a security search—unless there is a suspect-specific or crime-specific exception to this general rule.” Deborah Ramirez et al., Defining Racial Profiling in a Post-September 11 World, 40 AM. CIM. L. REV. 1195, 1206 (2003).

This framework parallels the Department of Justice’s guidelines for using race in federal law enforcement efforts: “[U]se of race or ethnicity is permitted only when the officer is pursuing a specific lead concerning the identifying characteristics of persons involved in an identified criminal activity.” Civ. Rts. Div., U.S. Dep’t of Justice, Guidance Regarding the Use of Race by Federal Law Enforcement Agencies 5 (2003), quoted in Priyamvada Sinha, Police Use of Race in Suspect Descriptions: Constitutional Considerations, 31 N.Y.U. REV. L. & SOC. CHANGE 131, 139 (2006).

56. See Johnson, supra note 28, at 691; see also Ramirez, supra note 55, at 1195–96 (“Using race to signal criminality, either as the sole factor or based on a general or circumstantial perception that there is a correlation between the race of an individual and her propensity to commit a particular crime, violates civil liberties and hinders potential short- and long-term law enforcement effectiveness.”). For another discussion of post-September 11 racial profiling and one especially unusual judicial foray into embracing this rightfully maligned policy outside the context of immigration law, see Margaret Kwoka, The Return of Legalized Racial Profiling?, Z MAG., June 2008, at 7.
generating extra demand for social services."\textsuperscript{57} Embracing the tired refrain that immigrants are a drain to the nation's economic stability and national security,\textsuperscript{58} the Supreme Court positioned itself to condone an unwavering record of governmental attacks on migrants.

Perhaps in recognition of the accepted constitutional wisdom that racial profiling is both unconstitutional and not sound policy,\textsuperscript{59} Justice Lewis F. Powell closed the Court's decision in \textit{Brignoni-Ponce} with an attempt at limiting its embrace of race-based immigration enforcement: "The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone does not justify stopping all Mexican-Americans to ask if they are aliens."\textsuperscript{60} This apparent limitation was in fact specious. Rather than providing immigration officers nothing more than one more factor which they are constitutionally allowed to consider in determining a given individual's legal right to be present in this country, the Court's embrace of "Mexican appearance" as a factor has, according to one scholar, rendered race "the only factor in automobile border stops."\textsuperscript{61}

\textsuperscript{57} 422 U.S. 873, 878–79 (1975).
\textsuperscript{58} Countless commentators from myriad disciplines have convincingly challenged the assertion that immigration is an overall drain on social resources. See, e.g., JOHNSON, OPENING THE FLOODGATES, \textit{supra} note 52, at 140 (summarizing economic data before concluding that "undocumented immigrants benefit the U.S. economy in at least two ways: (1) they provide relatively cheap labor, which reduces costs of many goods and services for consumers and fuels the overall domestic economy; and (2) they spend money in the economy, thereby stimulating further economic activity."); Anna Gorman, \textit{Illegal Residents, Diligent Owners: Data Show That Fewer Immigrants Than U.S. Citizens are Delinquent on Their Mortgages}, \textit{L.A. Times}, Oct. 6, 2008, at B1 (claiming that across the country homeowners who are not in compliance with immigration laws "generally have had fewer delinquencies than similar loans held by U.S. citizens").
\textsuperscript{59} See DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 34–41 (1999). Cole criticizes the use of pretext stops by police agencies to question people of color. These stops, Cole argues, are motivated by police officers' suspicions of people of color based on nothing more than race. \textit{Id.}
\textsuperscript{60} \textit{Brignoni-Ponce}, 422 U.S. at 886–87.
\textsuperscript{61} Victor C. Romero argues that [Justice] Powell's decision to allow the use of race as a factor in \textit{Brignoni-Ponce} reflects the relevance of race but perpetuates the continuation of racial oppression through the reinforcement of a stereotype and harassment of a marginalized ethnic group. Moreover, another adverse effect of having race be a permissible factor in immigration enforcement is that race becomes the only factor in automobile border stops.


Unlike immigration officials who are allowed to consider a motorist's "Mexican appearance," police engaging in pretext stops in the criminal law context are not constitutionally sanctioned to stop a motorist based on race. \textit{Brignoni-Ponce}, 422 U.S. at 887; \textit{Whren v. United States}, 517 U.S. 806 (1996). Rather, police must identify a non-racial reason for stopping a motorist. See COLE, \textit{supra} note 59, at 38–39.
One year after its decision in *Brignoni-Ponce*, the Supreme Court proceeded to adopt an even broader allowance of race-based immigration policing in the context of permanent immigration checkpoints located near the border, thus eviscerating any remaining limitation on profiling. In *United States v. Martinez-Fuerte*, the Supreme Court granted Border Patrol agents the right to stop and question people "of apparent Mexican ancestry" at an immigration checkpoint located on a public highway approximately 100 miles from the nearest border, common throughout the border region.\(^6\) No other criterion is necessary, the Court explained, "because the flow of illegal aliens cannot be controlled effectively at the border"—the government's offered purpose in establishing these permanent checkpoints—and any intrusion on motorists is minimal.\(^6\) Justice Powell, writing for the majority of the Supreme Court, explained that the Constitution requires even less of Border Patrol agents who "refer motorists selectively to the secondary inspection area"—essentially a location at a short distance from the principal inspection location where only some motorists are required to stop—than it requires of police officers conducting routine roving traffic stops.\(^6\) "Even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation," Powell added.\(^6\)

In addition, in their efforts to make use of the flexibility that the Supreme Court has given them, Border Patrol agents are empowered with an array of tools, many of which enable racial profiling. "Officers may consider the characteristics of the area in which they encounter a vehicle. Its proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic are all relevant," wrote Justice Powell in *Brignoni-Ponce*.\(^6\) At least one of these criteria is always guaranteed in the Texas borderlands—proximity to the border, where 90% of the population would "appear" to be of Mexican ancestry. Nonetheless, Justice Powell continued to equip immigration agents with additional factors which they are allowed to consider, including factors that are inextricably tied up in race:

They may also consider information about recent illegal border crossings in the area. The driver's behavior may be relevant, as erratic driving or obvious attempts to evade officers can support a reasonable suspicion. Aspects of the vehicle itself may justify suspicion. For instance, officers say that certain station wagons, with large compartments for fold-down seats or spare tires, are frequently used for transporting concealed aliens. The vehicle may

\(^{63}\) *See id.* at 556, 559.
\(^{64}\) *See id.* at 563.
\(^{65}\) *Id.*
\(^{66}\) *Brignoni-Ponce*, 422 U.S. at 884–85.
appear to be heavily loaded, it may have an extraordinary number of passengers, or the officers may observe persons trying to hide. The Government also points out that trained officers can recognize that characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut.67

In essence, the Brignoni-Ponce Court allowed individual immigration agents to use ingrained stereotypes about appearance and innocuous information about the smuggler’s preferred vehicle and unrelated traffic

67. Id. (emphasis added) (internal citations omitted); see also Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 232 (S.D.N.Y. 1981) (upholding a private employer’s ability to fire an employee for failure to comply with the employer’s ban on braided hair because “an all-braided hairstyle . . . is not the product of natural hair growth but of artifice. An all-braided hair style is an ‘easily changed characteristic,’ and, even if socioculturally associated with a particular race or nationality, is not an impermissible basis for distinctions in the application of employment practices by an employer.”). Interestingly, the factors offered as guidance by the Brignoni-Ponce Court bear striking resemblance to the phenomenon of “driving while black” in which police officers determine who is “suspicious” based on such factors as the characteristics of the neighborhood, the vehicle in which the suspects are located, and, most problematically, “[s]kin color becomes evidence, and race becomes a proxy for general criminal propensity.” See David A. Harris, The Stories, The Statistics, and the Law: Why “Driving While Black” Matters, 84 Minn. L. Rev. 265, 268 (1999). Harris adds that “[d]riving while black’ has begun to threaten the integrity of the entire [criminal] process not only in the eyes of African-Americans, but of everyone.” Id. at 269.

Twenty-five years after the Supreme Court issued its opinion in Brignoni-Ponce, the Ninth Circuit Court of Appeals provided a helpful summary of Brignoni-Ponce’s past and present status:

Those factors, however, have been largely ignored by lower courts, in favor of a broader reading of Mexican or Hispanic appearance. In reaching our holding, we do not reject the use of factors such as dress or haircut when they are relevant. Nor do we preclude the use of racial or ethnic appearance as one factor relevant to reasonable suspicion or probable cause when a particular suspect has been identified as having a specific racial or ethnic appearance, be it Caucasian, African-American, Hispanic or other. We note, however, that a stop based solely on the fact that the racial or ethnic appearance of an individual matches the racial or ethnic description of a specific suspect would not be justified.

United States v. Montero-Camargo, 208 F.3d 1122, 1134 n.21 (9th Cir. 2000).

This is a rather generous appraisal of the implementation of Brignoni-Ponce by the federal courts. As recently as 1999, the Fifth Circuit Court of Appeals, for example, affirmed its adherence to Brignoni-Ponce’s allowance that Border Patrol agents may consider an individual’s appearance as a factor in determining reasonable suspicion. See United States v. Orozco, 191 F.3d 578, 581 (5th Cir. 1999). Similarly, in 1986 the Ninth Circuit stated that “the Supreme Court has recognized that Mexican appearance can be considered as one factor [taken into account by immigration officials] in the determination whether to stop a vehicle.” United States v. Magana, 797 F.2d 777, 781 (9th Cir. 1986).
on a particular road to target anyone they choose who happens to be near
the border.\textsuperscript{68}

The significance of the language in \textit{Brignoni-Ponce}—"Mexican
appearance"—and \textit{Martinez-Fuerte}—"of apparent Mexican ancestry"—
cannot be overstated.\textsuperscript{69} With those words the Supreme Court
launched the modern immigration control regime in which the targeting of
anyone who appears "Mexican" is sanctioned. It then became the role of
immigration officers to determine exactly what it means to be of "Mexican
appearance." Rereading Justice Powell's words in \textit{Brignoni-Ponce} and
\textit{Martinez-Fuerte}, I am reminded of how broad these factors reach.
Recently, my family and I were in Seattle celebrating my brother's gradu-
ation from law school. Ten of us were crammed into a seven-person van,
including two of us who were crouched in the rear cargo compartment.
Many of us were born in México and lived there at least a few years of
our lives. A few of us currently live directly on the border. Our driver,
my oldest brother, was unfamiliar with the Seattle neighborhood in
which we were traveling. After the graduation ceremony, on our way
back to the large house that we rented for the weekend, he got lost and
circled an industrial waterfront neighborhood full of warehouses and
cargo ports. I can only imagine how erratic and heavily loaded our over-
sized vehicle looked, and how "Mexican" its passengers appeared. I can
only be grateful that we were not near "the border and its functional
equivalents" where immigration officers have the Supreme Court's seal of

\textsuperscript{68} Government regulations authorize Border Patrol and ICE agents to conduct
regular patrols within 100 miles from the border—defined as a "reasonable distance"—
though this distance may be extended if deemed necessary. 8 C.F.R. § 287.1(a)(2), (b);
see 8 U.S.C. § 1357(a)(3) (authorizing agents "within a reasonable distance from any
external boundary of the United States, to board and search for aliens any vessel within
the territorial waters of the United States and any railway car, aircraft, conveyance, or
vehicle"). Importantly, application of the \textit{Brignoni-Ponce} factors is not limited to the 100-mile
"reasonable distance" zone; on the contrary, the factors identified by the \textit{Brignoni-Ponce}
Court, including an individual's "Mexican appearance," may be considered in areas
beyond the 100-mile buffer zone when immigration officials decide to operate outside the
100-mile zone by exercising their authority to extend the "reasonable distance" from the
border in which they are authorized to board and search vehicles. See 8 C.F.R.
§ 287.1(a)(2), (b); Orozco, 191 F.3d at 582 n.3 (citing \textit{Magana}, 797 F.2d at 780; United
States v. Leyba, 627 F.2d 1059, 1065 (10th Cir. 1980)). Nonetheless, the \textit{Brignoni-Ponce}
Court's allowance of race as a factor in determining who to stop for questioning and the
\textit{Martinez-Fuerte} Court's allowance of race as the principal factor in determining who to
subject to additional questioning, combined with the particular racial composition of
South Texas—where approximately ninety percent of the population is Latina/o—means
that the Border Patrol is allowed to stop or subject to more in depth questioning almost
every individual who resides near the border. See \textit{Martinez-Fuerte}, 428 U.S. at 563;
\textit{Brignoni-Ponce}, 422 U.S. at 887; see also infra note 87 and accompanying text (stating the
percentage of the population of four South Texas counties that is of Hispanic or Latino
origin).

\textsuperscript{69} See \textit{Martinez-Fuerte}, 428 U.S. at 563; \textit{Brignoni-Ponce}, 422 U.S. at 887.
constitutional approval to stop and question families like mine—too large, too Mexican, too lost—who are riding in a suspicious vehicle, an enormous blue van with sliding doors, fold-down seats, spare tires, and out-of-state license plates—to blend into the landscape.\textsuperscript{70}

Indeed, twenty-five years after the Supreme Court's decision in \textit{Brignoni-Ponce} and eight years before my family's trip to Seattle, the Fifth Circuit Court of Appeals approved a Border Patrol stop in circumstances strikingly resemblant of my family's Seattle adventure. Along an isolated stretch of highway in southwestern Texas, near the border town of Del Rio, Border Patrol agent Jesús Zertuche "spotted a blue van traveling northbound at a normal speed, between fifty and fifty-five miles per hour."\textsuperscript{71} There were no reports of suspicious activity, the Court noted, but Zertuche nonetheless decided to make a sharp u-turn across the highway, speed up to catch the van, and turn on his vehicle's high beam lights "so that he could better observe the van and its passengers."\textsuperscript{72}

As Zertuche sped toward the van and flipped on his high beams, he noticed that the van slowed down and the driver had a hard time keeping the van in the right lane. Zertuche thought he saw several people in the van, but he could not determine their nationality.\textsuperscript{73} He thought the passengers looked to be slouching in their seats.\textsuperscript{74} Even though this all occurred during the evening, Zertuche took this to mean not that the passengers—who he was not sure even existed—were asleep, but that they were trying to avoid detection by immigration officials.\textsuperscript{75} At the same time, Zertuche decided that the van's deceleration and erratic movement meant "that the driver was nervous and 'possibly looking in the rear view mirror to see who's behind him,'" a sure sign, thought Zertuche, that the passengers were undocumented.\textsuperscript{76} He stopped the van, questioned everyone about their immigration status, and detained a few undocumented people.\textsuperscript{77}

In justifying its decision that Zertuche had the required reasonable suspicion to stop and question the people who he was not entirely sure were riding in the admittedly ordinary van, the federal appellate court judges explained that a van with several passengers, some of whom are slouched in their seats at night, is not unusual but is nonetheless "consistent" with undocumented immigration.\textsuperscript{78} Applying the other factors embraced by the Supreme Court in \textit{Brignoni-Ponce}, the appeals court also

\textsuperscript{70} See \textit{Brignoni-Ponce}, 422 U.S. at 884–85.
\textsuperscript{71} See \textit{United States v. Zapata-Ibarra}, 212 F.3d 877, 879 (5th Cir. 2000).
\textsuperscript{72} See \textit{id.}
\textsuperscript{73} See \textit{id.}
\textsuperscript{74} See \textit{id.}
\textsuperscript{75} See \textit{id.}
\textsuperscript{76} See \textit{id.}
\textsuperscript{77} See \textit{id. at} 880.
\textsuperscript{78} See \textit{id. at} 882–83.
determined that it was acceptable for Zertuche to consider that the vehicle was traveling away from the border and was approximately twenty-four miles from the border when he spotted it. 

"[P]roximity to the border," the judges wrote, "is a 'paramount factor' in determining reasonable suspicion." Combined, the van's location and direction led the Court to determine that "it was reasonable to consider it likely that Zapata-Ibarra's journey originated at the border," thus "support[ing] the objective reasonableness of Zertuche's suspicion."

Again I am reminded of my own family's experience. Living so close to the border that it is customary to say that we live on the border rather than near it, we easily fit the court's description of suspicious people. Being as we are of Mexican ancestry, presumably we appeared to be of Mexican ancestry every day of our lives, satisfying one of the Supreme Court's requirements. Between my parents and siblings there were seven of us. Because public transportation in the South Texas of the 1980s, when my siblings and I were children, did not exist, anytime we went anywhere—from trips to a doctor in México to Easter barbecues at a local park—we traveled by car. Moreover, we had a suspicious vehicle—a yellow station wagon with room for spare tires (but no fold-down seats) about which my mom, to this day, speaks adoringly. As the youngest of the children my memory might not be entirely accurate, but I imagine that five kids and two adults crammed into a single old station wagon with no air conditioning in the South Texas heat would make for an inherently chaotic driving experience through the streets of our remote border town—well within the twenty-four miles that the Zapata-Ibarra Court deemed to objectively support Border Patrol agent Zertuche's suspicion. A suspicious Border Patrol agent might have reasonably characterized our station wagon as erratic, as agent Zertuche did in the facts that led to the Zapata-Ibarra decision.

Often we even drove away from the border—that is, north. Sometimes we did so at night on lightly traveled roads. On some of those

79. See id. at 881.
80. Id. But lack of proximity to the border does not foreclose application of the Brignoni-Ponce factors. See, e.g., United States v. Orozco, 191 F.3d 578, 581 (5th Cir. 1999) (upholding a Border Patrol agent's roving stop that occurred 200–300 miles from the border); United States v. Lamas, 608 F.2d 547, 548 (5th Cir. 1979) (applying Brignoni-Ponce to a Border Patrol agent's roving stop approximately 190 miles from the border).
81. Zapata-Ibarra, 212 F.3d at 881 (citing Orozco, 191 F.3d at 581). But see United States v. Chavez-Villareal, 3 F.3d 124, 127 (5th Cir. 1993) (finding that the Fourth Amendment was violated where a Border Patrol agent stopped a motorist under similar circumstances 350 miles from the nearest border).
84. See Zapata-Ibarra, 212 F.3d at 881.
nights my siblings and I fell asleep and slouched into the seats, yet another factor tipping the balance toward identifying us as unlawfully present in our hometown. I imagine that courts applying the guidance given by the *Brignoni-Ponce* Court would find my family sufficiently suspicious if they knew that my siblings and I fell asleep and slouched in the station wagon so often that my parents frequently threw pillows into the cargo compartment so that we could sleep comfortably, especially when we went to Reynosa and planned to return after dark. I can only imagine how my father, always protective of us, would have reacted had he been driving our loaded station wagon along an isolated road when suddenly, in the dead of night, a vehicle like the ubiquitous green van used by the Border Patrol in those days had appeared in the rear view mirror quickly accelerating to catch up with us, flashed its high beams into our station wagon, and proceeded to follow us. Had we been stopped, the Border Patrol agent would have found an agitated father, a mother with limited ability to speak English, and a wagon full of slouching Mexican kids. And none of us would have been carrying proof of citizenship (in fact, a few of us were not citizens but lawful permanent residents at the time).

Immigration officers' unprecedented power to police the border region, combined with the Border Patrol's history of exploiting migrants, uniquely positions the agency within border life. In border regions like the Río Grande Valley of South Texas, where almost ninety percent of the population is of Mexican descent, and therefore is presumably "of apparent Mexican ancestry," agents are legally entitled to stop almost everyone in sight, including the faces they see in the mirror. Court cases from around the country suggest that immigration officials are all too willing to take full advantage of the latitude the Supreme Court gives them. From Los Angeles arose a case in which an immigration agent suspected that "certain property, namely persons, namely illegal aliens," some of whom appeared to be "persons of apparent Latin decent [sic]."

85. See id. at 883.

86. Suggesting that no one of "Mexican appearance" is immune to this type of Border Patrol stop, a federal judge in South Texas was reportedly stopped because a Border Patrol agent thought the judge's car had too many people inside it. Jim Yardley, *Some Texans Say Border Patrol Singles Out Too Many Blameless Hispanics*, N.Y. TIMES, Jan. 26, 2000, at A17.

87. U.S. Census Bureau, State and County QuickFacts, Cameron County, 2006 (stating that 86.1% of the population of Cameron County in 2006 was of Hispanic or Latino origin); U.S. Census Bureau, State and County QuickFacts, Hidalgo County, 2006 (stating that 89.5% of the population of Hidalgo County in 2006 was of Hispanic or Latino origin); U.S. Census Bureau, State and County QuickFacts, Starr County, 2006 (stating that 97.4% of the population of Starr County in 2006 was of Hispanic or Latino origin); U.S. Census Bureau, State and County QuickFacts, Willacy County, 2006 (stating that 86.6% of the population of Willacy County in 2006 was of Hispanic or Latino origin).
worked at a particular factory. From Texas, a situation in which, according to a federal judge, "the [Border Patrol] stop was based upon no more than the border patrolmen's speculation that poor and dirty Hispanic appearing persons might possibly be Mexican aliens who had crossed the border illegally." Lastly, from Eugene, Oregon—far from the first place most people think of when it comes to immigration patrols—a case in which immigration officers pulled over a truck full of seven men "who appeared to be of Mexican ancestry." One man stood out from the other passengers because he "wore a different type of clothing (a football jersey)." The others "appeared to be farm workers." Immigration officers were so sure that these men were undocumented that the court noted that one of the men wore a hat which the officers emphasized was indicative of someone who came from the Mexican state of Jalisco. They stated that such hats, while often worn by illegal aliens, were seldom worn by anyone who had lived in the United States for very long because it would bring them to the attention of the INS.

In each of these cases the courts upheld the officers' actions. In doing so, the courts, purposely or not, reinforced what the prolific commentator of contemporary urban life Mike Davis has described as the "INS police state"—that is, the constant fear that la migra is hovering nearby. Neither distance from the border nor lawful residency status lets someone with the wrong look feel secure. "It feels like occupied territory. It does not feel like we're in the United States of America," a judge in South Texas reportedly said. The border is anywhere and everywhere. Sometimes it seems that the border creeps up on people when they least suspect. "Borders tend to follow working-class Latinos wher-

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88. Int'l Ladies Garment Workers' Union v. Sureck, 681 F.2d 624, 627 n.5 (9th Cir. 1982).
89. United States v. Garcia, 732 F.2d 1221, 1228 (5th Cir. 1984) (Tate, J., dissenting).
90. United States v. Magana, 797 F.2d 777, 781 (9th Cir. 1986). The Magana Court applied Brignoni-Ponce in spite of the fact that the stop occurred approximately 1,500 miles from the nearest international border. See id. at 780.
91. Id. at 781.
92. Id.
93. Id. The assertion that no one would wear this particular type of hat for fear of attracting the attention of immigration officials lends credence to the Pew Hispanic Center's recent findings that a large number of Latina/os claim to have been asked to prove their immigration status regardless of their actual citizenship. MARK HUGO LOPEZ & SUSAN MINUSHKIN, PEW HISPANIC CTR., 2008 NATIONAL SURVEY OF LATINOS: HISPANICS SEE THEIR SITUATION IN U.S. DETERIORATING, OPPOSE KEY IMMIGRATION ENFORCEMENT MEASURES (Sept. 2008).
94. DAVIS, supra note 1, at 59.
95. See, e.g., United States v. Magana, 797 F.2d 777, 778 (9th Cir. 1986) (discussing an immigration stop that occurred near Eugene, Oregon).
96. Yardley, supra note 86, at A17.
ever they live and regardless of how long they have been in the United States," writes Davis. From my hometown in South Texas—where immigration patrols have long been a fact of life—to my college town in Rhode Island—where the owner of a refrigeration supply store demanded Social Security cards from two Spanish-speaking customers who merely wanted to buy a spare part for a boiler—the threat of immigration harassment for looking like an outsider never completely disappears.

IV. THE OPPRESSOR WITHIN

Whether the complaint is of "cultural distance" in Europe or the "quality of immigrants" in the United States, racialization of immigration populations is a common condition.

—Saskia Sassen

Few people have chronicled the cultural traditions and transformation of the Texas borderlands better than the incomparable Chicano folklorist Américo Paredes. Born and raised in Brownsville, Texas, directly on the Río Grande River, Paredes was intimately familiar with the Río Grande Valley's evolution from an isolated early-twentieth century collection of small towns linked more to México than any city in the U.S.A., to the mid-twentieth century, post-irrigation creation of an agricultural haven providing inexpensive citrus fruits and vegetables to distant markets in the U.S.A.

In George Washington Gómez, a novel based in a barely fictionalized South Texas town, Jonesville-on-the-Grande, Paredes addresses the dilemma of "[t]he return of the hometown boy made good sort of thing." The novel's main character and namesake transforms from a poor Mexican boy with few prospects to a highly-educated, Anglicized big-city hotshot. Paredes, whose own upwardly mobile life in many ways

97. Davis, supra note 1, at 60.
100. Sassen, supra note 18, at xvi.
101. Without question, the best historical treatment of the South Texas region is David Montejano's Anglos and Mexicans in the Making of Texas. Part III especially describes the region's economic transformation in the first half of the twentieth century and its impact on social relations. See Montejano, supra note 19, at 159–254. For a detailed treatment of Paredes' life and work, see José R. López Morín, The Legacy of Américo Paredes 33–69 (2006).
102. See Paredes, supra note 13, at 285.
is mirrored by his protagonist’s, leaves no doubt that much of George’s success results directly from the support he receives from family and friends. The key insight that Paredes offers, though, is less celebratory. After years studying and working away from the border, George finally becomes a lawyer and is sent back to his native South Texas with a new wife and new perspective on the world.

The only problem with this picture perfect story is that the myopically ambitious George is not looking to nourish his local roots. On the contrary, he is looking to yank out whatever remains of his prior life. Though he publicly claims to work for a land developer, he unwillingly reveals to his uncle Feliciano—George’s surrogate father—that he actually works for the Army. He has been sent to the border to spy on Chicana/o political activists who might threaten the nation’s security during wartime. In the novel’s final scene, Feliciano identifies a sentiment in George applicable to the Border Patrol’s recruitment efforts in South Texas. After Feliciano accuses George of doing the bidding of his masters, George responds: “I have no ‘masters.’ I am doing what I do in the service of my country.” “And your career of course,” his uncle fires back. “What is wrong with that?” George asks. With an insider’s knowledge of a community to which he no longer pledges allegiance, George is the ideal covert agent—ready to benefit himself and his employer at the expense of people whose actions and motivations he does not support, but with whose language and customs he is familiar.

Paredes’ tale is a reminder that the most profound form that oppression takes occurs only when the oppressed internalize the cultural values and perspective of the oppressor. This internalization of norms is what the renowned Brazilian theorist Paulo Freire described as the “hosting” or “housing” of the oppressor within the minds of the oppressed.

103. See Morin, supra note 101, at xii–xiii (describing Paredes’ life from his hometown of Brownsville, Texas to becoming a celebrated professor at the University of Texas at Austin).
104. See Paredes, supra note 13, at 285.
105. See id. at 284 (describing George’s willingness to change his name after his future father-in-law ridicules it and George’s lack of desire to have his fiancée, then wife, meet his family in his hometown).
106. See id. at 293, 299.
107. See id. at 299.
108. Id. at 302. Anthropologist Martha Menchaca chronicled a similar phenomenon in post-conquest America. “To demonstrate their loyalty,” she explained about conquered indigenous leaders in what is now México, “hatoques and caciques often repressed anti-Spanish political revolts. Through this process of repression, the Spanish were able to create a ‘middleman’ political infrastructure to govern the masses.” Martha Menchaca, Recovering History, Constructing Race: The Indian, Black, and White Roots of Mexican Americans 50 (2001).
109. See Paulo Freire, Pedagogy of the Oppressed 33, 84 (Myra Bergman Ramos trans., 1970); see also Martha Minow, Not Only for Myself: Identity, Politics, and Law, 75 Or. L. Rev. 647, 666 (1996) (“The internalized sense of inferiority and the
elite few that rise from the marginalized masses, Freire suggests in his classic *Pedagogy of the Oppressed*, become the apparatchiks of the repressive regime. "As soon as they complete the [leadership training] course and return to the community with resources they did not formerly possess," he argues in a passage that is easily applicable to Paredes’ fictional George,

they either use these resources to control the submerged and dominated consciousness of their comrades, or they become strangers in their own communities and their former leadership position is thus threatened. In order to not lose their leadership status, they will probably tend to continue manipulating the community, but in a more efficient manner.110

Later, Freire describes this elite as "an anesthetic, distracting the oppressed from the true causes of their problems and from the concrete solution of these problems. They splinter the oppressed into groups of individuals hoping to get a few more benefits for themselves."111

Internalized oppression in turn is manifested through individualized expressions of conscious and unconscious bias.112 The psychiatrist and theorist Frantz Fanon observed such a phenomenon in countries with large black populations that had been colonized by European nations. According to Fanon, young black students in the French Antilles often explicitly identified themselves with French colonial history in spite of the obvious historical fact that these children and their ancestors had been the direct subjects of French colonization. "The black schoolboy in the Antilles," Fanon wrote, "who in his lessons is forever talking about ‘our ancestors, the Gauls,’ identifies himself with the explorer, the bringer of civilization, the white man who carries truth to savages."113

Though Freire was assuredly not thinking about immigration officers when he developed his framework, his insight is nonetheless applicable. In the words of the Ninth Circuit Court of Appeals, “Border

assumption that human relationships must be marked by hierarchy and domination are legacies of oppression. A piece of the oppressor, then, lies within each person.”).

110. FREIRE, supra note 109, at 139. This phenomenon is manifested in Paredes’ novel after George’s return to his hometown. He is invited to join a nascent Latina/o political mobilization, but instead ridicules the efforts of his childhood acquaintances and expresses support for the long-running white mayor. In response, one of the Latina political activists calls George a “[c]abr6n” and a “[v]endido sanavabiche.” See PAREDES, supra note 13, at 294.

111. FREIRE, supra note 109, at 149.

112. See Johnson, supra note 28, at 687; see also Gonzalez-Rivera v. INS, 22 F.3d 1441, 1450 (9th Cir. 1994) ("[R]acial stereotypes often infect our decision-making processes only subconsciously.”) (citing United States v. Bishop, 959 F.2d 820, 826–28 (9th Cir. 1992)); MARIL, supra note 17, at 259 (explaining that Border Patrol agents’ “work experience could reinforce a racist mentality”).

113. FRANTZ FANON, BLACK SKIN, WHITE MASKS 147 (Charles Lam Markmann trans., 1967).
Patrol officers may use racial stereotypes as a proxy for illegal conduct without being subjectively aware of doing so.” The officials, in their pressed uniforms and regal insignia, look the part of the government’s paramilitary arm, and with their vast discretionary authority they act it. As the Border Patrol’s recent efforts to recruit thousands of Spanish-speakers suggests, immigration agents are so often the brown faces “of apparent Mexican ancestry” that the Supreme Court envisioned—according to one recent report, a clear majority of Border Patrol agents are Latina/o. They understand the local diction, and can sense discomfort in the peculiar manner that only a person with a lifelong familiarity with the region’s norms can do. Moreover, South Texans of Mexican ancestry are frequently fluent in the region’s vernacular. According to journalist Tobar, “Here people speak a strange Spanglish that can be impossible for outsiders to decipher, what linguists call pidgin, a language meshing English and Spanish grammar and border

114. Gonzalez-Rivera, 22 F.3d at 1450 (citing Charles R. Lawrence III, The Id, The Ego, and Equal Protection: Reckoning With Unconscious Racism, 39 STAN. L. REV. 317, 322 (1987)). In the passage cited by the Gonzalez-Rivera Court, Lawrence states: Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual’s race and induce negative feelings and opinions about non-whites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.

Lawrence, supra, at 322.

115. Contrast United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975) (refusing to grant Border Patrol agents “broad and unlimited discretion” to conduct roving patrol stops along the border without suspicion that the passengers have violated a law) with United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976) (allowing immigration officials to stop motorists at routine highway checkpoints without probable cause because these stops involve limited discretion by officers); see Terri Yuh-lin Chen, Comment, Hate Violence as Border Patrol: An Asian American Theory of Hate Violence, 7 ASIAN L.J. 69, 90 (2000) (“Because so much of their job is based on discretionary judgments, Border Patrol agents possess a very powerful tool against anyone they perceive to be foreign. Border Patrol agents can subjectively determine whether reasonable suspicion exists that someone entered the U.S. illegally and have the right to stop and question a person solely to discern if the person has the right to be in the United States.”); Jesús A. Treviño, Comment, Border Violence Against Illegal Immigrants and the Need to Change the Border Patrol’s Current Complaint Review Process, 21 HOUS. J. INT’L L. 85, 91 (1998) (“Border Patrol agents have a great deal of discretion when dealing with detention and arrest situations.”); see also 8 U.S.C. § 1252(g) (granting the Attorney General sole discretion regarding whether to initiate removal proceedings with limited possibility of judicial review); Kleindienst v. Mandel, 408 U.S. 753, 769 (1972) (refusing to review the Attorney General’s denial of a waiver of excludability).

slang." The renowned writer and South Texas native Gloria Anzaldúa described this linguistic practice as "a secret language." This secret language, she adds, allows Latina/os native to the Texas borderlands to "connect their identity to" language and allows them "to identify ourselves as a distinct people," that is, distinct from all people raised outside South Texas, whether north or south of the Río Grande. This, Ngai suggests, has long been known to the Border Patrol and incorporated into its official policies. In the early years of the agency's history, Ngai explains, applicants were required to take a civil service exam which included sections on "math, writing an English essay, and demonstrating knowledge of Spanish as spoken along the . . . border."

Freire's warning that the insider elite acts as a "splinter" which "manipulat[es]" the masses to prolong their own privileged position accurately reflects the Border Patrol's unique position within border communities. With the discretion afforded them by federal courts and the ability of Mexican-descendant agents to most effectively distinguish the nuances of local cultural practices, Border Patrol agents enforce the myth that the border needs protecting from the perceived Mexican-looking hordes which threaten to flock into the nation if only given the opportunity. Today, among the many tools at the disposal of immigration officials is a mixed-medium fence reminiscent of Berlin peering out of the brushy South Texas landscape like a scar on the horizon.

Nonetheless, for all the physical barriers and technological innovations, the Border Patrol's most frightening tactic is its oldest: the lone agent with immense discretion. Indeed, while I was in the process of writing this article and an edited version of it was sitting in the back seat of a borrowed car, my girlfriend, who is white, and I took a walk in a

117. Tobar, supra note 15, at 82.
118. See Anzaldúa, supra note 98, at 77. More broadly, Stavans defines Spanglish as a "mestizo language, part English, part Spanish, used predominately in the United States since WWII." Stavans, SPANGLISH, supra note 8, at 222.
119. See Anzaldúa, supra note 98, at 77.
120. See Ngai, supra note 24, at 68–69 (internal quotation omitted & emphasis added).
122. See Johnson, supra note 28, at 702 ("By granting vast discretion to the Border Patrol, the Supreme Court invites race to dominate immigration enforcement."). Similarly, Fanon described the use of black soldiers in colonial armies. "Whenever there has been any attempt at insurrection," he wrote, "the military authorities have ordered only colored soldiers into action. They were 'men of color' who nullified the liberation efforts of other 'men of color.'" Fanon, supra note 113, at 103.
state park in the Río Grande Valley near the Río Grande River only to encounter the immense discretion of two Border Patrol agents—one white and one Latino. Not five minutes after we began our walk down a dirt road ever alert to the presence of rattle snakes, the two agents pulled up beside us in their large sport utility vehicle, rolled down the passenger side window, and asked us what we were doing. “Taking a walk,” I responded, feeling guilty for being flippant even though it was the truth. After a couple of seconds of staring at us inquisitively, we were allowed to go on our way with only a warning to be careful. “The river is that way,” the white agent said as his darker-skinned partner looked on. “Good,” my girlfriend and I said to each other after we had left the agents behind, “we’re heading in the right direction.” On the border, physical appearance and geography combine to give agents virtually unbridled flexibility. It is no surprise, then, that, according to sociologist Robert Lee Maril, “[v]alley residents considered . . . the agents of the Border Patrol, Las Patrullas Fronterizas, the real criminals” whose actions plague the region.125

V. CONCLUSION: TIME TO LEAVE RACIST PRACTICES IN THE PAST

It is a shameful truth, but one that should not be ignored: historically, the Border Patrol’s central purpose has been to instill fear in Latina/os along the border. For almost a hundred years it has policed the border. First the agency relied on a band of avowedly racist white gunslingers; now it uses high-powered weaponry, twenty-first century electronic sensors, time-tested fencing, and an ever-larger number of Latina/o agents. At the time of this writing, the federal government continues to detain massive numbers of non-citizens. Citizens of this country are also being detained by immigration officials; on occasion, they are even deported.126 Underlying the agency’s raison d’être is the belief that

123. Indeed, our purpose was to see the border. She had never walked up to the river, and feared that one day such a walk would no longer be possible.


125. MARIL, supra note 17, at 140.

126. See NGAI, supra note 24, at 68, 266; Stewart M. Powell, Virtual Border Fence May Become Reality in Texas, HOUS. CHRON., May 9, 2008, at A6 (describing a proposed “virtual fence” along the border as a chain of “high-tech surveillance towers, cameras, radar, ground sensors and unmanned aerial drones”).

127. See DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 4 (2007). According to Kanstroom, the federal government detained 235,000 people in 2004 while Congress approved the construction of 40,000 additional beds for immigration detention centers. Id.

dangerous hordes of people constantly threaten to invade. These hordes, we are to believe, are supposedly amassed south of the Rio Grande River and hiding in cities and towns throughout the country.

The unsavory reality of the nation’s immigration policing was exposed recently when one of the country’s most conservative federal courts, the Fifth Circuit Court of Appeals, upheld a jury’s criminal conviction of two Border Patrol agents who were found guilty of shooting a Mexican man and then trying to cover up the incident. The agents, the Court explained, encountered what they thought—correctly it turns out—to be a drug smuggler heading toward the Mexican border at a high speed in a van near Fabens, Texas, a small town near El Paso. According to the Court, “The government’s evidence showed that the agents had no reason to shoot the drug smuggler—that he had abandoned his van loaded with marijuana, that he was running on foot back to Mexico, that he posed no physical threat to either officer, and that he was shot in the buttocks.”

E. Rosenbloom, Human Rights Fellow, Center for Human Rights and International Justice at Boston College) (stating that researchers at Boston College have “documented at least eight cases in recent years in which U.S. citizens have been removed” from the U.S.A. and that they “believe, based on anecdotal evidence, that there are additional cases that have not been publicly reported”); see also Nina Bernstein, Citizens Caught up in Immigration Raid, N.Y. TIMES, Oct. 4, 2007, at B5 (describing a frightening raid conducted by gun-wielding immigration agents against the home of a citizen and her family).

129. See United States v. Brignoni-Ponce, 422 U.S. 873, 879 (1975). Saskia Sassen describes a similar phenomenon in Germany in which “a relatively small number of immigrants can take over the public imaginary and come to be seen as representing a threat to the integrity of the ‘nation’ and of the state.” Sassen, supra note 18, at 74.

130. The fear of immigrant masses streaming across the Mexican border is not limited to Mexican immigrants. As recently as July 2008, a member of Congress wrote that “[t]he open borders of the United States amount to a national security exposure,” then went on to discuss the Mexican border without a single reference to the Canadian border. Duncan Hunter, National Security=Border Security: Terrorists Work to Infiltrate Southern U.S. Border, WASH. TIMES, June 12, 2008, at A17. According to Hunter, individuals from countries “such as Communist China, Iran and North Korea” have entered the U.S.A. through México. Id. Similarly, in 1919 the New York Times printed an article that claimed that up to 100 “Russian Reds” were entering into the U.S.A. through México. Anarchists Flock Here From Mexico: Dangerous Aliens Smuggled Across the Border at Rate of 100 a Day, N.Y. TIMES, Nov. 24, 1919, at 1.

131. United States v. Ramos, 537 F.3d 439, 466 (5th Cir. 2008); see Daniel Gilbert, Shooting Case has Border Agents on Edge, CHRISTIAN SCI. MONITOR, June 5, 2007, at 3 (describing the incident that led to the conviction of Border Patrol agents José Compean and Ignacio Ramos); see also Susan Carroll, Ex-Border Patrol Agent Pleads Guilty to Civil Rights Violations: Former Officer Admits He Used Pistol in Incidents With Immigrants, HOUS. CHRON., Aug. 20, 2008, at B2 (reporting that “[a] former U.S. Border Patrol agent . . . pleaded guilty in federal court in Houston to violating the civil rights of two undocumented immigrants, admitting he pistol-whipped an unarmed man and forced another to his knees and held a gun to his head.”).

132. Ramos, 537 F.3d at 442.
The mythologization of Border Patrol agents as heroic front-line defenders of the nation’s security would be innocent if its consequences were not so dangerous. Through judicially sanctioned racial profiling, millions of people every day are at risk of suffering under the coercive arm of the immigration police state. The simple fact of failing to fit the image of what it is to be an “American” renders countless individuals who find themselves in the path of immigration officials subject to interrogation at best and banishment at worst. No wonder, then, that one in ten Latina/os report that they have recently been asked their immigration status by police or other government officials.133

The solution to the problem of racial profiling in immigration policing is, of course, as complicated as the history of race relations in this country and the legal system’s consistent failure to protect marginalized communities.134 This article has attempted to “name[ ] the injury [that is constitutionally sanctioned racial profiling by immigration police] and identif[y] its origins, origins that are often well disguised in the rhetoric of shared values and neutral legal principles.”135 Identifying immigration policing as racial profiling allows us to take a necessary step toward eliminating this clouded pillar of our legal regime—engaging in “[a]n aggressive campaign not only to protect the civil rights of racialized Others but to expose and fundamentally uproot institutionalized racism [so as to] make it much more difficult to perpetrate race-based injustices on ‘national security’ grounds” or for any other reason.136 Moreover, naming the Border Patrol’s emphasis on recruiting Mexican-descendant agents as a manifestation of internalized oppression allows us to position this agency’s law enforcement strategy alongside similar moments in human history, thereby challenging its merits.

133. LOPEZ & MINUSHKIN, supra note 93, at i. This study, performed by the Pew Hispanic Center, also found that 57% of Latina/os worried some or a lot that they, a family member, or a close friend would be deported. See id. at ii.
134. See, e.g., Johnson, supra note 28, at 688 (noting that “[t]o the extent that [criminal] law enforcement remains discriminatory, scholars, activists, and policymakers search for solutions”); id. at 736 (advocating for the consideration of race as a suspect classification under the Equal Protection Clause for purposes of immigration law enforcement).
136. See SAITO, supra note 27, at 91. In the words of Supreme Court Justice Murphy, “Only by zealously guarding the rights of the most humble, the most unorthodox and the most despised among us can freedom flourish and endure in our land.” Bridges v. Wixon, 326 U.S. 135, 166 (1945) (Murphy, J., concurring).