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THE DISAPPEARING MEXICAN-AMERICAN LAW STUDENT

BRENT G. MCCUNE, M.S., J.D.,[1] LISA J. SOTO, J.D.,[2] WILLIAM G. WEAVER, J.D., PH.D.,[3] & ALEJANDRA HOBBS, LIC.[4]

> The Republic's young men are the most virile and unwasted in the world, and they pant for enterprise worthy of their power. . . . [T]he American Republic is a part of the movement of a race—the most masterful race of history—and race movements are not to be stayed by the hand of man. They are mighty answers to divine questions.
>
> Albert Beveridge, 1899[5]
>
> The ideal of a single civilization for everyone, implicit in the cult of progress and technique, impoverishes and mutilates us. Every view of the world that becomes extinct, every culture that disappears, diminishes a possibility of life.
>
> Octavio Paz, 1967[6]

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6. MIGRATION: IMMIGRATION AND EMIGRATION IN INTERNATIONAL PERSPECTIVE 18 (Leonore Loeb Adler & Uwe Peter Gielen eds., 2003) (quoting OCTAVIO PAZ, THE LABYRINTH OF SOLITUDE (1978)).

I. INTRODUCTION

Mexican-Americans are woefully underrepresented in law school.[7] No other ethnic group suffers from as large a negative proportional disparity as does the Mexican-American group.[8] Of course, this current situation stems from many factors over many years. One factor is that the Mexican-American population has grown at a fairly rapid rate over the last thirty years while Mexican-American law school first-year enrollments have remained stagnant over the same time period.[9] This trend presents a grim scenario. It will become increasingly difficult for Mexican-Americans to find advocacy and legal representation by attorneys who relate from a cultural perspective. While this portends an unfortunate predicament for Mexican-Americans, in a very real and larger sense, it bespeaks a social tragedy. Furthermore, this trend will most likely remain unchanged unless increased efforts are made to attract more Mexican-Americans to law school and to assist them along the legal education pipeline. However, given recent regulatory changes it will be all but impossible to measure the effectiveness of any such increased efforts on an aggregate scale.

In 2007, U.S. Department of Education regulations changed and educational institutions are no longer required to report to the Department ethnic subcategories within the Hispanic/Latino category, effective 2009.[10] While this change makes little social and cultural sense given that the largest Latino subgroups have little interaction with one another,[11] it effectively hides the

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7. Law Sch. Admission Council, *Volume Summary Matriculants by Ethnic & Gender Group* (2009), LSAC http://www.lsac.org/lsacresources/data/pdfs/ethgenmatrics.pdf; U.S. Census Bureau, *American Community Survey*, AMERICAN FACT FINDER, http://factfinder2.census.gov (last visited Feb. 13, 2013). Information was gathered from a table created using the following data sets: C03001: Hispanic or Latino Origin by Specific Origin – Universe: Total Population (2009) and C03002: Hispanic or Latino Origin by Race – Universe: Total Population (2009).

8. Law Sch. Admission Council, *supra* note 7; U.S. Census Bureau, *supra* note 7. This conclusion is based upon data availability and how the data is reported. For example, and as will be discussed below, Asian Americans/Pacific Islanders enjoy a positive disparity, which may not exist for all Asian American/Pacific Islander subgroups, e.g., Filipinos. Similarly, Other Hispanics suffer from a negative disparity. The nature and extent of the disparity for Other Hispanic subgroups, e.g., Cubans or Central Americans, is not known.

9. Dianne Schmidley & Arthur Cresce, *Tracking Hispanic Ethnicity: Evaluation of Current Population Survey Data Quality for the Question on Hispanic Origin, 1971 to 2004,* U.S. CENSUS BUREAU (2007), https://www.census.gov/population/www/documentation/twps0080/twps0080.pdf; *Legal Education Statistics from ABA-Approved Law Schools*, A.B.A. SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, (Mar. 7, 2013), http://www.americanbar.org/groups/legal_education/resources/statistics.html; U.S. Census Bureau, *supra* note 7. Information gathered using the following data sets: C03001: Hispanic or Latino Origin by Specific Origin – Universe: Total Population (2005, 2006, 2007, 2008, 2009); U.S. Census Bureau, *Statistical Abstract of the United States: 2012,* http://www.census.gov/compendia/statab/overview.html (last visited Feb. 13, 2013). Information was gathered from Sec. 1, 8, tbl 2, Population: 1960 to 2009.

10. *See* Proposed Guidance on Maintaining, Collecting and Reporting Data on Race and Ethnicity to the U.S. Dep't of Educ., 71 Fed. Reg. 44866 (Aug. 7, 2006); Final Guidance on Maintaining, Collecting and Reporting Racial and Ethnic Data to the U.S. Dep't of Educ., 72 Fed. Reg. 59266 (Oct. 19, 2007).

11. Kristi L. Bowman, *Looking to the Future: Legal and Policy Options for Racially Integrated Education in the South and the Nation,* 88 N.C. L. REV. 911, 936 (2010); Susan Welch & Lee Sigelman, *Getting to Know You? Latino–Anglo Social*

overwhelmingly negative Mexican-American disparity. The Department changes present an unnecessary dilemma: that of having no way to assess whether progress is being made in this area. In spite of the Department changes, resources must be marshaled to reshape the historical trend and to increase Mexican-American proportional representation in law school and in the legal field.

To be sure, Mexican-Americans have been occluded before, grouped as "Latino" and "Hispanic."[12] In the past, they have encountered and overcome obstacles and challenges to higher education and assimilation.[13] Now, more than at any time before, Mexican-Americans have resources and tools to enable themselves to pursue higher education and professional careers. Indeed, several programs across the country are tailored to guide and mentor Mexican-American students along the educational path that leads to a successful career as an attorney. The key is to ensure that these programs and resources have a wide reach and that they are used by ambitious and dedicated Mexican-American students.

This article discusses the underrepresentation of Mexican-Americans in law school. Its primary aim is to inform the legal education discussion and to shed light on the Mexican-American negative proportional disparity, for the problem can be remedied only after it has been identified and explored. Through this article, the authors hope to spark a national dialogue on how to measure Mexican-American participation in law school in light of the Department of Education's reporting changes and how to promote parity for this subpopulation in the legal field. Collaboration is essential as we work to improve Mexican-American representation in law school.

Part II of this article presents a brief history of the struggles Mexican-Americans have faced in this country, particularly with respect to access to education and assimilation. This history provides background and informs the present condition. Part III of this article further investigates the Mexican-American negative proportional representation in law school. Breaking down the section of the legal education pipeline that immediately precedes law school highlights how Mexican-Americans negotiate the steps to prepare for and apply to law school. Part IV of this article identifies some reasons as to why Mexican-Americans do not pursue a legal education in greater numbers. Programs and other resources that have been successful in helping Mexican-Americans along their path to becoming attorneys are highlighted.

Contact, 81 SOC. SCI. Q. 67, 80 (2000).

12. *See* Gloria Sandrino-Glasser, *Los Confundidos: De-Conflating Latinos/as' Race and Ethnicity*, 19 CHICANO-LATINO L. REV. 69 (1998).

13. Regarding the K–12 school level, *see* United States v. Tex., 680 F.3d 356 (5th Cir. 1982); Cisneros v. Corpus Christi Indep. Sch. Dist., Civ. No. 68-C-95 (S.D. Tex 1970); Mendez v. Westminster Sch. Dist., 64 F.Supp. 544 (C.D. Cal. 1946), *aff'd sub nom*, 161 F.2d 774 (9th Cir. 1947) (en banc). Regarding assimilation, *see* Kevin R. Johnson, *"Melting Pot" or "Ring of Fire"?: Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259 (1997).

II. THE STRUGGLE TO BE "AMERICAN"

The language of group identification matters. It cues public debate that leads to public policy initiatives or, alternatively, obscures socially important problems or misinforms the electorate. The expansive language of our founding documents tied "Americanism" to character and principle rather than race or ethnicity, and the gap between those founding principles and the reality of extensive and severe racism and sexism is the space where justice works. As our practices and beliefs became more aligned with founding principles, new questions arose as to how inclusion and assimilation were to take place and be fostered. Even as a progressive, nineteenth century historian Albert Beveridge had white men of West European descent in mind as the "mighty answers to divine questions," but this "whiteness" eventually moved toward a concept rather than a set of physical characteristics; it became shorthand for the character of an "American."[14] It began losing its attachment to color and adhered in the self-sufficient and rugged wiliness exemplified by the spirit of westward expansion, individualism, and equality conferred on people in the wilderness.[15] This sentiment still informs America, although modernization and technological change have altered it.[16]

In previous eras, groups and public sentiment reeled around the political landscape alternately discriminating against people of color and trying to "whiten" racial minorities so that they could participate more fully in American society.[17] The array of approaches to confronting race and ethnicity by politicians and leaders was stupefying and driven by one or more of local concerns, ignorant mobs, inbred racism, fear, state and federal legal and political machinery, and thoughtful and well-meaning approaches.

Unlike African-Americans, Mexican-Americans do not have a rectifying history that crystallizes their position in American politics; their struggle for voice and justice is far from settled but is instead ongoing as various political wings decry or defend matters and initiatives concerning immigration and the legal status of residents. The Civil Rights Movement is overwhelmingly seen as a black movement; while Mexican-Americans have the important legacy of the United Farm Workers founded by Cesar Chavez and Dolores Huerta, it is more narrowly set than the Civil Rights Movement and suffers from a perception of having an anti-immigration streak.[18] Americans of

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14. Julian Kunnie, *Apartheid in Arizona? H.B. 2281 and Arizona's Denial of Human Rights of Peoples of Color*, THE BLACK SCHOLAR, Winter 2010 at 16, 18; *see* Daniel Levine, *The Social Philosophy of Albert J. Beveridge*, 58 IND. MAG. HIST. 101, 102 (1962).

15. *See* RAY ALLEN BILLINGTON & MARTIN RIDGE, WESTWARD EXPANSION: A HISTORY OF THE AMERICAN FRONTIER 3 (6th ed. 2001).

16. *See* HOWARD P. SEGAL, FUTURE IMPERFECT: THE MIXED BLESSINGS OF TECHNOLOGY IN AMERICA 6 (1994).

17. *See* DAVID R. ROEDIGER, WORKING TOWARD WHITENESS: HOW AMERICA'S IMMIGRANTS BECAME WHITE 12 (2005).

18. EDWARD ERIC TELLES, MARK Q. SAWYER & GASPAR RIVERA-SALGADO, JUST NEIGHBORS? RESEARCH ON AFRICAN AMERICAN AND LATINO RELATIONS IN THE UNITED STATES 4, 12 (2011).

black African descent have the pit of slavery and the long ascent from those depths in the Civil Rights Movement to define them vis-à-vis the political landscape in the United States. Mexican-Americans have no widely perceived cognate to such systematic oppression, yet the history of Mexican-Americans in the United States is pocked with terrible violence and racism.[19] This history is less fixed in the minds of Americans than that of the black struggle for equality, even though these great injustices parallel each other. The historical literature of the polarizing and polarized discussion and investigation of race almost exclusively divides between black and white.[20] Generally lost in public perception and in historical treatments of race are the atrocities and depredations committed against Americans of Mexican descent.

When Mexico turned over much of its land to the United States in the mid-nineteenth century pursuant to the Treaty of Guadalupe Hidalgo, many Mexican nationals were left without a legal status;[21] while U.S. citizenship was granted to free whites and then to African-Americans after the passage of the Fourteenth Amendment, Mexicans—having indigenous roots—had to argue that they were white so that they should be granted citizenship.[22] They never moved, yet they lost their rights and became foreign invaders to their homeland. Across the latter nineteenth and early twentieth centuries, people of Mexican descent were lynched at rates near that of blacks, and "the chance of being murdered by a mob was comparable for both Mexican [American]s and African-Americans."[23] Between 1929 and 1939, hundreds of thousands of individuals of Mexican descent were pressured to leave the United States, many of whom were deported by the Immigration and Naturalization Service without due process.[24] But this history is largely left untold and ignored.

A. Education and Transformation

In the days when race was a legal category invariably tied to oppression, education—where available—was largely the only road to an approximation of "whiteness" that led to potential prosperity. Education is what makes people feel "American"; it is the place where common

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19. *See* Martha Menchaca, *Chicano Indianism: A Historical Account of Racial Repression in the United States*, 20 AM. ETHNOLOGIST 583 (1993).

20. *See* Eduardo Luna, *How the Black/White Paradigm Renders Mexicans/Mexican Americans and Discrimination Against them Invisible*, 14 BERKELEY LA RAZA L.J. 225, 226 (2003); Rachel F. Moran, *Unrepresented*, 55 REPRESENTATIONS 139 (1996); Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571, 573 (1995).

21. Menchaca, *supra* note 19, at 584.

22. *Id.* at 583.

23. William D. Carrigan & Clive Webb, *The Lynching of Persons of Mexican Origin or Descent in the United States, 1848 to 1928*, 37 J. SOC. HIST. 411, 414 (2003); Richard Delgado, *The Law of the Noose: A History of Latino Lynching*, 44 HARV. C.R.-C.L. L. REV. 297, 300 (2009).

24. Kevin Johnson, *The Forgotten "Repatriation" of Persons of Mexican Ancestry and Lessons for the "War on Terror,"* 26 PACE L. REV. 1, 4 (2005).

approaches and the myths created by the founding documents are given instantiation.[25] However, if education was a path to success, it was also a citadel that blocked access to power and professions. James Meredith's bravery as the first enrolled African-American at the University of Mississippi a half century ago immediately divided the Republic and brought America to the edge of insurrection in the South, for everyone either explicitly or intuitively understood that access to higher education would eventually lead to access to "whiteness"—access to position and power.[26]

And at the K–12 school level, five courageous fathers in *Mendez v. Westminster School District* successfully challenged segregated schools in Orange County, California.[27] However, it was not until 1970 that the *Brown v. Board of Education* decision was declared applicable to Mexican-Americans; it was then that the district court for the Southern District of Texas ordered the district to create desegregation plans.[28] And it is questionable as to whether the problem was solved at that point. In *United States v. Texas* in 1982, the Fifth Circuit reversed the district court's order to desegregate, for according to the Court, each school district should have the opportunity to be heard on an individual basis.[29] After *United States v. Texas*, tracking of Mexican-American students into vocational education and placement of Mexican-American students automatically into special education programs widely continued with little respite.[30] Also continuing in the public schools was punishment for speaking Spanish, where degradation and shame was the response to Mexican cultural manifestations among the students.[31] Without free and fair access to education, there could be no transformation, no pathway to power for members of historically oppressed groups.

Schools were often tools of oppression and tasked with eradicating the students' backgrounds and cultures and bringing them only to the twilight of "acceptable Americanism"; leaving them stranded in a gulch between what they were and what they could not become. With the advent of compulsory education came opportunities to press agendas onto populations of young people at a scale that had not before existed.[32] Under compulsory education laws it was inevitable that the question of an official language and the exclusion of cultural characteristics from the

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25. THOMAS P. CARTER, MEXICAN AMERICANS IN SCHOOL: A HISTORY OF EDUCATIONAL NEGLECT 86 (1970).

26. *See* SUSAN SALVATORE ET AL., NATIONAL HISTORIC LANDMARK SURVEY, RACIAL DESEGREGATION IN PUBLIC EDUCATION IN THE U.S. 8, 84 (2000).

27. Mendez v. Westminster Sch. Dist., 64 F.Supp. 544, 551 (S.D. Cal. 1946) *aff'd sub nom.*, 161 F.2d 774 (9th Cir. 1947) (en banc).

28. Cisneros v. Corpus Christi Indep. Sch. Dist., 324 F.Supp. 599, 628 (S.D. Tex. 1970), *supplemented*, 330 F. Supp. 1377 (S.D. Tex. 1971), *aff'd in part, modified in part and remanded*, 467 F.2d 142 (5th Cir. 1972).

29. United States v. Tex., 680 F.2d 356, 373–74 (5th Cir. 1982).

30. CARTER, *supra* note 25, at 67, 87, 92–95; *see also* Philip D. Ortego, *Montezuma's Children*, 3 CENTER MAG. 23 (1970).

31. RENATO ROSALDO, CULTURE & TRUTH: THE REMAKING OF SOCIAL ANALYSIS 149 (1989).

32. *See* CARTER, *supra* note 25.

classroom would arise. In *Meyer v. Nebraska*,[33] the state passed a law prohibiting the teaching in any school of any modern language other than English to students who had not passed the eighth grade.[34] The Nebraska Supreme Court upheld the conviction of a teacher in wording that captures the sentiment of the times:

> The salutary purpose of the statute is clear. The legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country. The statute, therefore, was intended not only to require the education of all children to be conducted in the English language, but that, until they had grown into that language and until it had become a part of them, they should not in the schools be taught any other language.[35]

On appeal to the U.S. Supreme Court, the Attorney General for Nebraska, pleading the state's cause, argued that "the object of the legislation . . . was to create an enlightened American citizenship in sympathy with the principles and ideals of this country. . . . It is a well[-]known fact that the language first learned by a child remains his mother tongue and the language of his heart."[36] As Ludwig Wittgenstein famously wrote, "a language is a form of life," and states used compulsory education to change the "form of life" of their youth.[37] The idea was that if people are what Richard Rorty termed "incarnated vocabularies," then deformation or interference with linguistic patterns was the quickest way to subvert the identity of the person or to prevent an identity from being formed in the first place.[38] The effort was to both assimilate the child into American ideals and to obscure the child's links to the past. The assumption was that if one's first language was not English one could not be subject to the "sunshine of American ideals."[39]

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33. Meyer v. Neb., 262 U.S. 390, 397 (1923).

34. *Id.*

35. Meyer v. State, 187 N.W. 100, 101 (1922).

36. Meyer v. Neb., 262 U.S. 390, 393–94 (1923).

37. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 241 (1953).

38. *See* RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 88 (1989).

39. *Meyer*, 262 U.S. at 394. Justice McReynolds, writing for the majority and finding the Nebraska law unconstitutional, explains only that the motivation of such laws is understandable though they "exceed the limitations upon the power of the state." *Id.* at 402. McReynolds gives virtually no other justification for striking down this law, as well as a number of other similar state laws dealt with at the same time. *See id.* Further, the Court in *Meyer* employed the rational basis test to analyze the constitutionality of the Nebraska statute. *Id.* at 400. The rational basis test, the least stringent test for a governmental entity to satisfy, merely requires that there be some articulable rational basis between the challenged legislation and the goal that legislation is purported to achieve. *See, e.g.*, United States v. Carolene Products Co., 304 U.S. 144, 152 (1938). In other words, the state merely has to show that the legislation is a way—not the least restrictive or even the most effective way—of achieving

B. Mexican-Americans: Evidently Invisible

The struggle for Mexican-Americans coming out of the era of abject violence and oppression was to both achieve full access to educational opportunity while preventing those forums from oppressing or marginalizing their heritage, culture, and language. Today, they seek to be "incarnated vocabularies" that encompass their successes and struggles as Americans and retain their origins. This is made more difficult as a political and social matter as Mexican-Americans have perpetually been the "second minority," overshadowed in fair measure by African-Americans and the victories of the Civil Rights Movement on the one hand and obscured by the conflated term "Hispanic" on the other. The Mexican-American community is often occluded, not directly addressed, and subjected to unflattering and misplaced allusions to "Hispanicism."[40] Even as the most recent presidential election brought into relief the importance of the "Hispanic" vote, it is left as exactly that—"Hispanic."[41] Mexican-Americans are made invisible by their own ethnicity; aggregated into an amorphous and nonspecific category that traces to no unique origin or particular set of cultural characteristics. They disappear into dilution by the liberal use of the homogenizing references "Latino" and "Hispanic."

But this homogenization is selectively ignored when convenient to highlight feared effects of Mexican-Americans on U.S. society. Some people who have been historically considered as within the ambit of mainstream political thought say and write things that would be unimaginable in tone if directed at other ethnic minority groups. Perhaps the starkest example of this is Samuel Huntington, the recently deceased, prestigious Harvard political scientist, who began a controversial article with the claim that:

> The persistent inflow of Hispanic immigrants threatens to divide the United States into two peoples, two cultures, and two languages. Unlike past immigrant groups, Mexicans and other Latinos have not assimilated into mainstream U.S. culture, forming instead their own political and linguistic enclaves—from Los Angeles to Miami—and rejecting the Anglo-Protestant values that built the American dream.[42]

In similarly charged language, Huntington goes on to say that "[t]he United States ignores

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the goals the state desires. As one might suspect, rarely has a state statute been struck down as unconstitutional for failure to meet the rational basis test. The Court in 1922 was hardly a friend of the individual invoking her constitutional civil liberties; it was seen as an ally of business and not terribly interested in protecting individuals from governmental action. But given the Court's strong support of nationalist legislative activities just before and during World War I, it is somewhat surprising that the Court would vote 7–2 in a case such as Meyer.

40. *See generally* Luna, *supra* note 20 (discussing the lack of attention paid to Mexicans and Mexican-Americans by popular culture and academia).

41. *See* Donna St. George & Brady Dennis, *Growing share of Hispanic voters helped push Obama to victory*, WASH. POST, Nov. 7, 2012, http://articles.washingtonpost.com/2012-11-07/politics/35505702_1_hispanic-voters-latino-votes-latino-decisions (referring to the Hispanic electorate rather than differentiating between races).

42. Samuel P. Huntington, *The Hispanic Challenge*, FOREIGN POL'Y, Mar.–Apr. 2004, at 30.

this challenge at its peril."[43] He openly acknowledges in seeming agreement that "at times, scholars have suggested that the Southwest could become the United States' Quebec."[44] While Huntington usually addresses Hispanics as a group in his remarks, it is clear that he is mainly concerned with Mexican-Americans.[45] He may not have wished ill on Mexicans or Mexican-Americans, but he does single them out for opprobrium because of their race.[46] Building from the attacks on multiculturalism from his Harvard professor predecessor and adviser to President Kennedy, Arthur Schlesinger, Jr., Huntington claims that Mexican immigration represents "a major potential threat to the country's cultural and political integrity," and he warned that unless this immigration is curbed, "an English-speaking United States would disappear."[47] In not so reasonable language he invokes military innuendo and the language of alarm: during the 1990s "Mexicans and other Hispanics were establishing beachheads elsewhere" besides New York, the Southwest, and Miami.[48] And Mexicans and Mexican-Americans are especially dangerous, for they "assert a historical claim to U.S. territory."[49] Though we have no reason to believe Huntington is motivated by malice, his language is just a short step away from that of Beveridge's claim of a "masterful race." And if America is a mighty answer to a divine question, it means that it is blessed and authorized to act in a way other cultures are not.

Observations interpreting multiculturalism as a liability rather than an asset are not new, and usually such complaints are driven by a concern to protect those who already have power. Whenever power looks into nature, it sees itself, and any deviation from that reflection is viewed with contempt and seen as a threat. But Huntington and his followers ignore the forces in society that encourage separation and isolation of ethnic minorities. Little attention is paid to the fact that historically, both as a matter of law and society, minorities were restricted in their interactions with whites and the power elite.[50] Assimilation came slowly, if at all.[51] Regardless of the policies behind language restriction and the "Americanist" movement, they send clear messages as to how people are to be valued. Of course this way of assessing people and evaluating Americanism allows

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43. *Id.*

44. *Id.* at 36.

45. *See id.* at 32 ("In this new era, the single most immediate and most serious challenge to America's traditional identity comes from the immense and continuing immigration from Latin America, especially from Mexico, and the fertility rates of these immigrants compared to black and white American natives.").

46. *See id.* at 36.

47. *Id.* at 32–33; *see also* ARTHUR SCHLESINGER, JR., THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY (1992).

48. *Id.* at 35.

49. *Id.* at 36.

50. *See* Clare Sheridan, *"Another White Race:" Mexican Americans and the Paradox in Jury Selection*, 21 LAW & HIST. REV. 109, 109–10 (2003) (discussing that because Mexican-Americans were classified as white by government, courts found no equal protection violation in their denial of jury selection).

51. *See* Bret Schulte, *Mexican Immigrants Prove Slow to Fit In,* U.S. NEWS & WORLD REP. (May 15, 2008), http://www.usnews.com/news/national/articles/2008/05/15/mexican-immigrants-prove-slow-to-fit-in.

the ready importation of racism into the operational activities of groups, organizations, government, and society at large.

Huntington's words and those who sympathized with him invited labels of bigotry and reflect sentiments that are well known to Mexican-Americans. To be sure, there are many conservative thinkers who reject the alarmism of Huntington and his allies. Daniel Griswold, for example, has written measured, defensible, analytical pieces on Mexican-American immigrants and their assimilation to larger U.S. society.[52] Assimilation to power of the Mexican-American community will occur, but how that assimilation takes place is in question. If fear controls the conversation as the Mexican-American population grows, then polarizing crises and social strife will characterize a disorderly fast break for power on the one side and resistance and descent into racism on the other.[53] And the constricted geography will contribute to possible social tension. Over 70% of Mexican-Americans reside in just four states (California, Texas, Arizona, and Illinois),[54] and much of the country has limited experience or interaction with Mexican-Americans. This separation will no doubt make it easier to advocate for and adopt policies that are damaging to Mexican-American interests, and politicians may target Mexican-Americans for political gain in regions where they make up a small segment of the population.

Questions concerning assimilation are real questions. Nathan Glazer noted that "assimilation" has become a dirty word, and this insulation from expectations of a former age have caused more than a few scholars to note that "once the normative pressure to identify as an American is reduced it should not be surprising if immigrants make less of an effort to assimilate."[55] Slipping into "identity politics" rather than "national identification," Mexican immigrants to the United States living in what "once were Mexican territories . . . [develop] an irredentist ideology claiming these areas as legitimately Mexican, not American."[56] One fear Glazer alludes to is that if access to education and social mobility are undermined, then the irredentism and lack of assimilation that many people fear will become real.[57]

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52. Daniel T. Griswold, *Mexican Migration, Legalization, and Assimilation*, CATO INST. (Oct. 5, 2005), http://www.cato.org/publications/speeches/mexican-migration-legalization-assimilation; Daniel T. Griswold, *Workers: Fixing the Problem of Illegal Mexican Migration to the United States*, CATO INST. (Oct. 15, 2002), http://www.cato.org/publications/trade-policy-analysis/willing-workers-fixing-problem-illegal-mexican-migration-united-states.

53. Jack Citrin et al., *Testing Huntington: Is Hispanic Immigration a Threat to American Identity?*, 5 PERSP. ON POL. 31, 33 (Mar. 2007) (stating that "identity politics pushes in the direction of ethnic mobilization rather than national identification").

54. Sharon R. Ennis et al., *The Hispanic Population: 2010*, 8, tbl. 4, 2010 Census Briefs C2010BR-04 (May 2011), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf (showing that 22,634,410 out of 31,798, 258 Mexicans in the United States reside in these states).

55. Citrin, *supra* note 53, at 33.

56. *Id.* (quoting SAMUEL HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY 219, 230 (2004)).

57. *See* Citrin, *supra* note 53 (noting that among Hispanics the young and better-educated are more identified with America and that assuring upward mobility is an effective response to the challenges of assimilation).

If assimilation is a main concern of Huntington and like-minded people, then they would do well to look at the law. There is no other tradition or profession more central to the American "way" than the law, and no other training transforms the student and practitioner in such broad and profound ways. If assimilation of Mexican-Americans to the broader interests and needs of society are to occur, a great portion of that assimilation will occur in the auspices of law. Substantial presence in the legal community serves both the interests of assimilationists such as Huntington and the needs of Mexican-Americans as a community. "Power" and "law" are synonyms in our society and to be without law, without a voice in the legal process, is to be nameless.

III. MEXICAN-AMERICANS IN LEGAL EDUCATION

Latino access to power through increased professional and advanced education is crucial to avoiding social ruptures and maintaining national continuity in education, law, public service, and politics. Since the Mexican-American population is growing rapidly in the United States,[58] it is crucial that we make continued progress in education to create upward social movement and participation in political processes. This is not solely a Mexican-American issue; this is an issue of importance for the country as a whole as "education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all."[59] There will be an increasing price to pay for the largest growing minority group in the nation to evaporate from the very profession that insures the integrity of our legal and democratic functioning. But the problem eludes public grasp since the unique challenges of Mexican-Americans in education are eradicated by conflation with other Hispanics. This makes it extremely difficult, if not impossible, to track the success or failure of Mexican-Americans as a group in higher education.

As we will see, the often cruel struggle for minorities to attain educational opportunity has been difficult and counter-stepped; even as gaps close and bars to access fall, the result has not been that "a rising tide lifts all boats." In evaluating minority group educational success, it is important to disaggregate Hispanics and address distinct ethnic groups, for not all groups perform in similar ways or partake in educational opportunities similarly. As Kristi Bowman notes, "The largest Latino/a sub-groups—people with Mexican, Puerto Rican, and Cuban heritages—often have little or no contact with one another. As the Latino/a population grows, the differences both between and within Latino/a subgroups become ever more apparent."[60] And in one study, "Most Mexicans reported no contact whatsoever with either Puerto Ricans or Cubans, and most Cubans and Puerto

58. Pew Research Hispanic Ctr., *The Mexican-American Boom: Births Overtake Immigration* (July 14, 2011), http://www.pewhispanic.org/2011/07/14/the-mexican-american-boom-brbirths-overtake-immigration/ (finding that between 2000 and 2010 the Mexican-American population grew by a total of 11.4 million).

59. Plyler v. Doe, 457 U.S. 202, 221 (1982).

60. Bowman, *supra* note 11, at 936.

Ricans reported none with Mexicans."[61] The disparity between Mexican-Americans and other diverse groups concerning participation in educational opportunity is alarming, even if almost completely ignored and now masked by a lack of disaggregated data. As the doors to higher education open and professional opportunity arises, Mexican-Americans seem to step back from their victories and fail to seize the rewards they fought and sacrificed for. This is clearly the case concerning law school.

Mexican-Americans attend law school in remarkably low numbers that portend a social catastrophe. If left unaddressed, the results will be the virtual elimination of Mexican-American presence in the profession of law in the coming decades. This is a recipe for social and political disaster for the Mexican-American community[62] and threatens atavism in a time that should be characterized by social progress for Mexican-Americans. While the proportional number of Mexican-Americans in the law shrinks, the legal needs and size of the community are increasing.[63] Unfortunately, the facts and problems of underrepresentation in law remain unexplored in scholarly literature.

It is difficult to see the problem, as is evident by the 2007 U.S. Department of Education changes to the regulations regarding the maintaining, collecting, and reporting of ethnic and racial data, because educational institutions are no longer required to report to the Department subcategories of ethnicities within the Hispanic/Latino category.[64] The U.S. Department of Education gave educational institutions the discretion to begin the new data collection system as early as the 2008–2009 school year but no later than the 2010–2011 year.[65] While the Department considered comments prior to the enactment of the final guidance, its response to the comments urging it to continue to require the collection of data in Latino/Hispanic ethnic subcategories was (a) that the costs and burdens of collecting such data outweighed the benefits, (b) that this new reporting method would be more similar to other federal agencies' reporting requirements, and (c) that this method of data reporting is sufficient for the Department to fulfill its various functions.[66] This reporting change has the unfortunate effect of now making it impossible, as of 2010, to see the underlying disparity of Mexican-American enrollment compared to other Latino ethnic subgroups

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61. Welch & Sigelman, *supra* note 11, at 80.

62. William Malpica & Mauricio A. España, *Expanding Latino Participation in the Legal Profession: Strategies for Increasing Latino Law School Enrollments*, 30 FORDHAM URB. L.J. 1393, 1395 (2003) (stating a lack of Latino lawyers limits advocacy for Latino interests and "denies [Latinos] full political power." Further, "an increase in the number of Latino lawyers can . . . enhance[] upward mobility for Latinos generally by exposing more Latino children to professional role models").

63. *Latino Populations are Growing Fastest Where We Aren't Looking,* NIELSON (May 1, 2013), http://www.nielsen.com/us/en/newswire/2013/latino-populations-are-growing-fastest-where-we-arent-looking.html.

64. *See* Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the U.S. Dep't of Educ., *supra* note 10.

65. *Id.*

66. *Id.*

or any success we might experience in working to correct the degree of the disparity.[67] Indeed, the reporting change explains why this article only addresses data through 2009–2010—the most recent data available where Mexican-Americans are reported separately from other Latino ethnic subgroups.

But before we even get to the effort of Mexican-Americans progressing in legal education, we have to remedy some basic matters. First, in light of the Department of Education's change to reporting rules, there needs to be broad recognition of the seriousness of the problem: the profound underrepresentation of Mexican-Americans pursuing and receiving law degrees even in comparison to other minority groups. Second, we need to track representation by disaggregating data concerning the Hispanic population. We can do little to help remedy imbalances and misalignments in education and professional careers if the very problem itself remains obscured by data collection methodologies that are too blunt and ill-advised to illuminate the problem.

A. "Facts Are Stubborn Things"[68]

A few years before becoming the 28th President of the United States, Woodrow Wilson addressed the American Bar Association in New Jersey and stated:

> We are lawyers. . . . We are servants of society, officers of the courts of justice. Our duty is a much larger thing than the mere advice of private clients. In every deliberate struggle for law we ought to be the guides, not too critical and unwilling, not too tenacious of the familiar technicalities in which we have been schooled, not too much in love with precedents and the easy maxims which have saved us the trouble of thinking, but ready to give expert and disinterested advice to those who [propose] progress and the readjustment of the frontiers of justice.[69]

Coupled with the fact that a degree in law, or doctor of jurisprudence, signifies "the ability to govern and discipline oneself by the use of reason"[70] in terms of the law, when factoring in the provision of "disinterested advice" and the "readjustment of the frontiers of justice," it is reasonable and necessary that the legal profession reflect the society it serves. Ideally, the demographics of the

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67. *Id.*

68. John Adams, *No. 64. Rex v. Wemms*, *in* 3 LEGAL PAPERS OF JOHN ADAMS 98, 269 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

69. Edward D. Re, *Professionalism for the Legal Profession*, 11 FED. CIR. B.J. 683, 688 (2002) (citing Woodrow Wilson, *The Lawyer and the Community, Address Before the American Bar Association in Princeton, New Jersey (1910)*, *in* 35 ABA REP. 419, 421 (1910)).

70. *See Prudence*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/prudence (last visited Feb. 23, 2013) (providing that definitions of "prudence" include [1] the ability to govern and discipline oneself by the use of reason; [2] sagacity or shrewdness in the management of affairs; [3] skill and good judgment in the use of resources; and [4] caution or circumspection as to danger or risk).

profession would mirror, at least to an approximate degree, the demographics of the United States.[71] By extension, this mirroring should also be found among law school students. This is simply not the case, however, and the lack of mirroring is especially pronounced with respect to Mexican-Americans. There is a bowstring tight tension in law school admissions between the desire to provide entry to historically underserved populations and the desire to honor the tradition of rugged individualism.[72] Admiration of self-sufficiency and personal effectiveness in survival developed cognates in social organizations and contends with the fact that many populations were cut off from opportunity, maltreated, and frequently dispossessed of what they were able to eke out of back-breaking work. The affirmative action cases represent the business end of this tension and this is at once a battle between atavism and progressivism and an important matter of distributive justice. Law schools must balance between serving social ends and honoring the tradition of rewarding the best individual performers.

B. Current Status

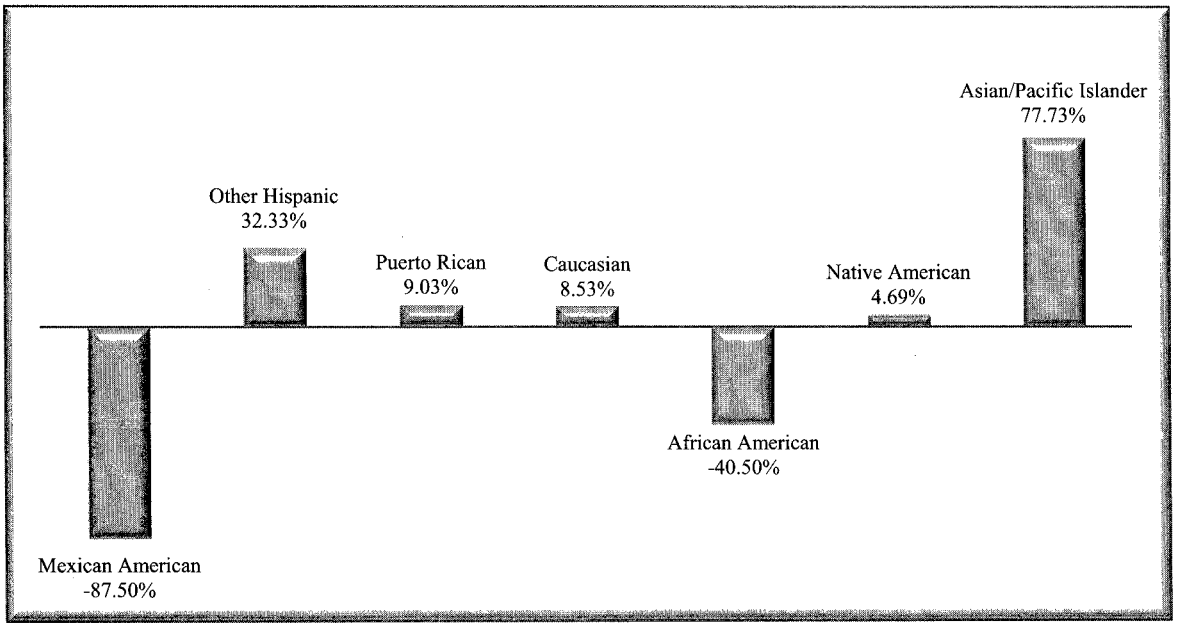
The disputes surrounding affirmative action are, ultimately, beside the point when discussing law school admissions for Mexican-Americans. This is so because the numbers in the law school pipeline are so small that affirmative action policies have little effect on proportional representation or numbers of Mexican-Americans in law school. Figure 1 illustrates the proportional disparity of law school representation as compared to the U.S. population for selected ethnicities. Based on 2009 data from the Law School Admission Council (LSAC) and the U.S. Census Bureau, Asians/Pacific Islanders enjoy a 78% positive disparity.[73]

71. *See, e.g.*, ABA PRESIDENTIAL INITIATIVE COMM'N ON DIVERSITY, AM. BAR ASS'N, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS 10 (2010) (comparing the need for diversity in the legal profession to studies conducted on diversity in the medical profession that found that minorities in the profession "improve communication, comfort level, trust, and decision making in the patient–practitioner relationship . . . and the quality of advocacy in health policy reform").

72. *See, e.g.*, Ryan Fortson, Comment, *Affirmative Action, The Bell Curve, and Law School Admissions*, 24 SEATTLE U. L. REV. 1087, 1089 (2001) (characterizing the debate between proponents and opponents of affirmative action for law school admissions).

73. Law Sch. Admission Council and U.S. Census Bureau, *supra* note 7. *See also* discussion on whether reported disparities exist for unreported ethnic subgroups, e.g., Filipinos, Cubans, or Central Americans, *supra* note 8.

Figure 1: Proportional Disparity in Law School Representation (2009)



Thus, based on expectations derived from proportion of population, where we would expect to find 100 Asians/Pacific Islanders as law school matriculants we find 178. Mexican-Americans are at the opposite end of the spectrum; they suffer from an 88% negative disparity.[74] Where one would expect to find 100 Mexican-Americans matriculating to law school, we find only 12.[75] Indeed, in Fall 2009 only 630 Mexican-Americans matriculated at law school out of a U.S. population that exceeded 31 million.[76]

Of particular interest is the trend among Other Hispanics. As indicated in Table 1, in 2000 Other Hispanics accounted for 4.00% of the total population and 3.62% of law school matriculants, representing a 9.50% *negative* disparity.[77] In 2009, the same percentages were 3.99% and 5.28%, respectively.[78] With a 32% *positive* disparity, the proportional representation of Other Hispanics improved significantly. The same cannot be said for Mexican-Americans. Over the same time frame, their negative disparity worsened from 77% to 88%.[79]

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74. Law Sch. Admission Council and U.S. Census Bureau, *supra* note 7.
75. *See id.* (citing data used to calculate this value).
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*

Table 1

	Other Hispanics			Mexican-Americans		
Year	U.S. Pop.	Matrics	Disparity	U.S. Pop.	Matrics	Disparity
2000	4.00%	3.62%	-9.50%	7.33%	1.72%	-76.53%
2009	3.99%	5.28%	32.33%	10.32%	1.29%	-87.50%

These figures demonstrate the flaw in discussing diversity and advances in law and legal education at the aggregate Hispanic or Latino level. It makes little sense to combine these Hispanic subgroups when one subgroup is seeing its negative disproportion turn into a positive disproportion while another subgroup's negative disproportion is dramatically worsening. Mexican-Americans bear all of the negative disparity of representation of Latinos entering law school.[80] This is a bleak situation considering Mexican-Americans make up nearly two-thirds of all Hispanics in the United States and have a growing share of the Hispanic sum.[81]

C. Historical Trends

It would be natural to assume that whatever the state of admissions is now, it certainly must have improved over the last thirty-five years for Mexican-Americans, but improvements among Mexican-Americans have significantly lagged behind those of other ethnic groups. Table 2 provides the percent change, measured in absolute numbers, in first-year law school enrollment from 1973–1974 to 2009–2010.[82] Mexican-Americans experienced the smallest percent increase (80.33%) over this time period.[83] And with an 83.49% percent increase, African-Americans were the only other ethnic group that did not enjoy a 100% increase or more.[84] Particularly puzzling is why the Other Hispanic group experienced the largest percent increase (1,769.53%) at the same time Mexican-Americans saw the smallest percent increase.[85]

Table 2: First-year Law School Enrollment Overall Percent Change (1973–74 to 2009–10)

Other Hispanic	Mexican American	Puerto Rican	African-American	Asian / Pac. Isl.	Native American	Total Enroll.
1769.53%	80.33%	156.25%	83.49%	1100.90%	310.00%	39.52%

80. *Id. See also* discussion on whether reported disparities exist for Other Hispanic subgroups, *supra* note 8 & 73..

81. *See* Ennis et al., *supra* note 54, at 3, tbl 1.

82. *Legal Education Statistics from ABA-Approved Law Schools, supra* note 9. It should be noted here that ABA data and LSAC data do not match for those years in which data is available from both entities. ABA data was used because LSAC data before 2000 is unavailable.

83. *Id.*

84. *Id.*

85. *Id.*

In particular, the relatively small percent increase in Mexican-American first-year law students over the past thirty-five years is especially troubling in light of the growth of the Mexican-American population in the United States. In 1974, there was one Mexican-American law school first-year enrollee for every 12,000 Mexican-Americans in the U.S. population, but by 2009 the ratio grew to one first-year enrollee for nearly every 31,000 of the overall population.[86] Put another way, proportional Mexican-American representation in law school is approaching one-third of what it was thirty-five years ago. Looking at the law school pipeline helps shed light on the stark and growing negative disparity in representation of Mexican-Americans in law school.

D. The Law School Pipeline

Arguably, the law school pipeline begins in high school, if not middle school or even earlier, as students learn basic competency skills in reading, writing, and critical thinking. This section, however, focuses on the area of the pipeline that immediately precedes law school. This area of the pipeline is broken down into the following stages: test takers of the Law School Admission Test (LSAT); persons who apply to law school; individuals admitted to law school; and, finally, those who matriculate at law school. Each stage is discussed below and analyzed for Fall 2009. Furthermore, this analysis is limited to only ABA-approved law schools.

1. LSAT Takers[87]

The pre-law school section of the pipeline at the university level is obviously the most vulnerable point in the sequence of events and opportunities that affect minority group representation in law school. Therefore our analysis of the pipeline section begins in Table 3 by comparing whether the demographics of LSAT takers reflect the demographics of the overall population.[88] Unsurprisingly, the greatest negative disproportion exists among Mexican-Americans. With respect to this group, there is one LSAT taker for every 17,102 persons in the overall population.[89] This ratio far exceeds the LSAT takers per population in the country (one LSAT taker per 2,679 in the population), and the next largest ratio among minorities is found among African-Americans (one LSAT taker per 2,813 in the population).[90] Mexican-Americans and African-Americans were the only minority groups to have lower proportional representation

86. *Id.*; U.S. Census Bureau, *supra* note 9.

87. SUSAN P. DALESSANDRO ET AL., LAW SCH. ADMISSION COUNCIL, LSAT PERFORMANCE WITH REGIONAL, GENDER, AND RACIAL/ETHNIC BREAKDOWNS: 2003–2004 THROUGH 2009–2010 TESTING YEARS (2010), *available at* http://www.lsac.org/lsacresources/research/tr/tr-10-03.asp (describing that the report averaged scores for repeat test takers within a testing year and only counted them once within a testing year.).

88. *Id.* at tbl. 4A; U.S. Census Bureau, *supra* note 9.

89. *Id.*

90. *Id.*

among LSAT takers when compared to proportional representation in the overall population.[91] But even here, African-Americans take the LSAT at roughly six times the proportional rate of Mexican-Americans. Furthermore, Mexican-Americans made up only 1.62% of LSAT takers in the 2008–2009 testing year, yet they comprised 10.32% of the total population.[92] These figures suggest that the negative disproportion of Mexican-Americans in law school, and by extension, the legal profession, surfaces at the LSAT stage of the legal education pipeline.

Table 3: Percent of LSAT Takers and Percent of the U.S. Population (Fall 2009)

	Other Hispanic	Mexican American	Puerto Rican	African-American	Asian / Pacific Island	Native American
LSATs	6.04%	1.62%	2.15%	11.52%	8.47%	0.73%
Population	3.99%	10.32%	1.44%	12.10%	4.58%	0.64%

2. Applicants to Law School

This stage of the pre-law school section of the legal education pipeline refers to those LSAT takers who applied to law school. Table 4 provides a breakdown of law school applicants for Fall 2009.[93] Mexican-Americans had the lowest percent (64.22%) of LSAT takers who applied to law school.[94] Notably, this percentage is more than ten percentage points lower than the overall percent (75.57%) of LSAT takers who applied to law school.[95] Additionally, only 1.37% of all law school applicants were Mexican-American.[96]

Table 4: Percent of LSAT Takers Who Applied to Law School (Fall 2009)

Other Hispanic	Mexican American	Puerto Rican	African-American	Asian / Pacific Islander	Native American	Total Applicants
74.44%	64.22%	64.91%	74.82%	77.58%	78.48%	75.57%

3. Admitted Applicants to Law School

This stage of the pre-law school section of the legal education pipeline consists of those LSAT takers who applied to and were admitted to law school. Table 5 provides a breakdown of

91. This statement does not reflect any analysis of unreported subgroups within the reported ethnic groups, *see supra* note 8, 73 & 80.

92. DALESSANDRO ET AL., *supra* note 87; U.S. Census Bureau, *supra* note 9.

93. *See* DALESSANDRO ET AL., *supra* note 87, at 19; Law Sch. Admission Council, *Volume Summary Applicants by Ethnic & Gender Group* (2009), LSAC http://www.lsac.org/lsacresources/data/pdfs/ethgenapps.pdf.

94. *Id.*

95. *Id.*

96. *See* Law Sch. Admission Council, *supra* note 93.

law school admitted applicants for Fall 2009.[97] For the first time along the pre-law school section of the legal education pipeline, Mexican-Americans do not have the most dismal numbers. While still lagging the overall percent (67.44%) of admitted applicants, 62.18% of Mexican-American applicants were admitted to law school.[98] In fact, when compared to other minority groups, only Asian/Pacific Islanders had a higher percent (64.94%) of admitted applicants.[99] But Mexican-American admitted applicants still accounted for only 1.27% of all admitted applicants.[100]

Table 5: Percent of LSAT Takers Who Applied to and Were Admitted to Law School (Fall 2009)

Other Hispanic	Mexican American	Puerto Rican	African-American	Asian / Pacific Islander	Native American	Total Admits
58.45%	62.18%	54.38%	42.31%	64.94%	60.61%	67.44%

4. Matriculants to Law School

This is the last stage of the pre-law school section of the legal education pipeline—the stage where applicants become law students. Table 6 provides a breakdown of matriculants to law school for Fall 2009.[101] Similar to the admitted applicants stage of the pipeline, this stage shows positive numbers for Mexican-Americans. Indeed, for the first time along the pre-law school section of the legal education pipeline, the percent of admitted applicants who matriculate to law school is higher for Mexican-Americans (85.14%) than for the overall percent of matriculants (83.73%).[102] Yet Mexican-American matriculants still accounted for only 1.29% of all law school matriculants.[103]

Table 6: Percent of Admitted Applicants Who Matriculated to Law School (Fall 2009)

Other Hispanic	Mexican American	Puerto Rican	African-American	Asian / Pacific Islander	Native American	Total Admits
85.71%	85.14%	88.51%	84.21%	81.39%	82.50%	83.73%

5. Putting It All Together

In the aggregate, these pipeline numbers tell a dismal story. Out of a population that exceeded 31 million in the United States, only 1,190 Mexican-Americans applied to law school in

97. *See* Law Sch. Admission Council, *supra* note 93; Law Sch. Admission Council, *Volume Summary Admitted Applicants by Ethnic & Gender Group* (2009), LSAC http://www.lsac.org/lsacresources/data/pdfs/ethgenadmits.pdf.

98. *See id.*

99. *See id.*

100. *See* Law Sch. Admission Council, *supra* note 97.

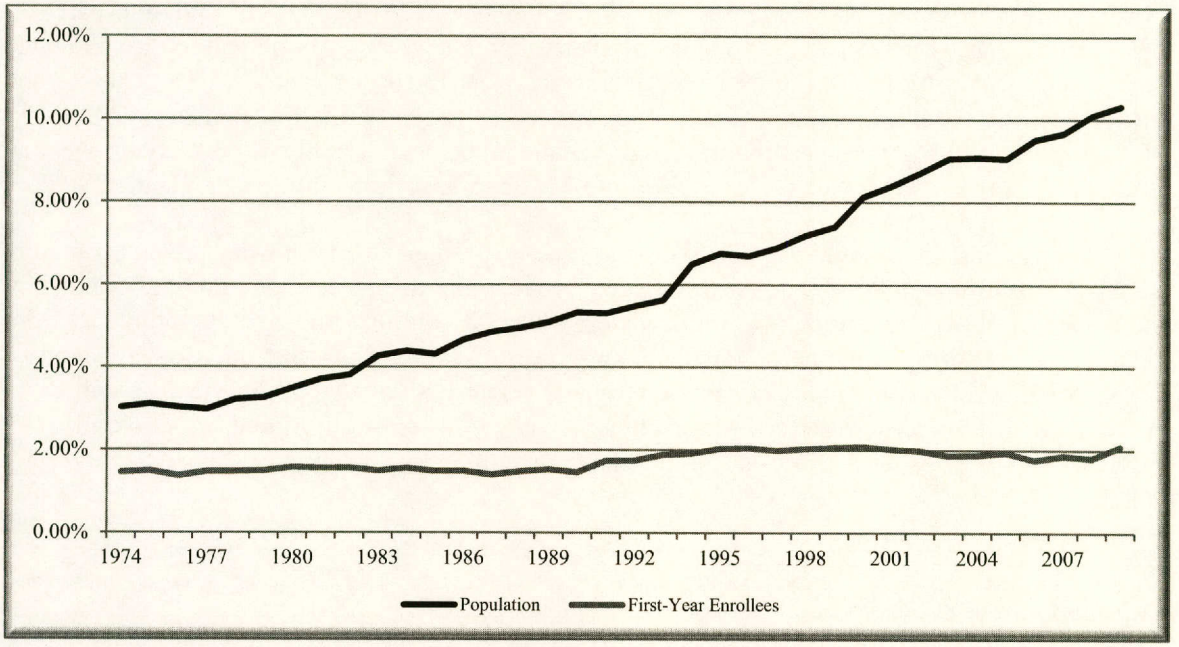
101. *See* Law Sch. Admission Council, *supra* note 7; *See* Law Sch. Admission Council, *supra* note 97.

102. *Id.*

103. *See* Law Sch. Admission Council, *supra* note 7

2009, with 740 applicants being offered admission and 630 admitted applicants actually matriculating to law school.[104] As examined earlier, however, the root of the problem appears to surface at the LSAT and application stages of the pre-law school section of the legal education pipeline.[105] Quite frankly, too few Mexican-Americans are taking the LSAT. And of those who take the LSAT, too few are applying to law school. Once these challenges are met, Mexican-Americans seem to pursue law school with only slightly below average acceptance rates and higher than average matriculation rates.[106] It appears that diversity efforts should focus on increasing the numbers of Mexican-Americans who take the LSAT and apply to law school. If increasing efforts do not surface, the Mexican-American proportional negative disparity in law school will not only persist but grow. Notably, the number of Mexican-Americans enrolling in their first year of law school has remained fairly stable across the years, even though their proportional number in our society has dramatically increased. Their underrepresentation in law schools, and of course as lawyers, grows each year that the pipeline remains so constrained (see Figure Two).[107]

Figure 2: Percent of Mexican-American Total Population and Law School First-Year Enrollees



104. *See* Law Sch. Admission Council, *supra* note 7; Law Sch. Admission Council, *supra* note 93; Law Sch. Admission Council, *supra* note 97; U.S. Census Bureau, *supra* note 7.

105. *See supra* text accompanying notes 87–92.

106. *See supra* text accompanying notes 97–103.

107. Schmidley & Cresce, *supra* note 9; *Legal Education Statistics, supra* note 9; *U.S. Census Bureau, supra* note 9.

IV. WHY DOES THE DISPARITY EXIST FOR MEXICAN-AMERICANS?

While one cannot say with certainty why the disparities of representation in the law exist so severely for Mexican-Americans, we can postulate by first stepping back to examine the sociological roots of Mexican culture and the notions of ambition and dreaming of one's future. Next, we look to factors visible among Mexican-American students and culture in the United States. Finally, we postulate based on our own empirical data: observations concerning the more than 300 students who have gone through the Law School Preparation Institute at The University of Texas at El Paso and attended law school. Over 70% of the students in this program are Mexican-American, as participants reflect the demographics of UTEP.[108]

In his book *Mexicanidad y Esquizofrenia: Los Dos Rostros del MexiJano*, Mexican political scientist Agustín Basave discusses the Mexican culture that allows corruption to persist in the country.[109] He addresses the duality of the culture that on the one hand desires a better way and on the other hand is unknowing of the way to change the political system so as to effect positive reform.[110] Basave looks within Mexican culture to understand what serves to inspire people to come together to create and legitimize an honest democracy with integrity and transparency. Unsurprisingly, he sees higher education as the avenue for a new wave of political reform and civic engagement that will lead to prosperity and social participatory power.[111] He analyzes the phenomenon that Mexican culture often does not place its hopes within the context of its reality, and he aspires to link dreams and ambition to pragmatic processes.[112] In his works, perhaps we may be enlightened as to the Mexican roots of what is a Mexican-American culture in the United States.

According to Basave, Mexicans do not have a problem dreaming but rather a problem knowing how to dream.[113] There is a disjunction between the dream or vision and the orientation and design of how to realize that dream or vision, a mental void that prevents the individual from joining one's desires with one's actual circumstances.[114] He posits that there is a cognitive dissonance that reflects the bipolarity in the Hispanic versus native roots of the Mexican culture.[115] In the name of propriety, Mexican culture circumlocutes so as to not to offend or be too direct.[116] Niceties overtake substance. This "social plasma" of emotions and sentiments serves to complicate

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108. The University of Texas at El Paso 2011-2012 Undergraduate Catalog, General Information, http://catalog.utep.edu/content.php?catoid=1&navoid=7 (last visited June 22, 2013).

109. AGUSTÍN BASAVE, MEXICANIDAD Y ESQUIZOFRENIA LOS DOS ROSTROS DEL MEXIJANO 53 (2010).

110. *Id.* at 45–46.

111. *Id.* at 56.

112. *Id.* at 33–34.

113. *Id.* at 33.

114. *Id.* at 34.

115. *Id.* at 28.

116. *See id.*

and obstruct access to reality.[117] And according to Basave, complexity is the friend of corruption, while simplicity is its enemy.[118] Complexity masks truth and accountability; complexity makes it difficult for individuals to clearly carve out the concrete steps involved in getting from where they are to where they want to be.[119]

With Basave's backdrop, and applying his insights to Mexican-Americans in the United States, we see problems similar to those Basave attributes to Mexican nationals. Success for Mexican-Americans is found in those who can pay their bills; it is the fulfillment of not having to live in Mexico in "real" poverty where there is not enough to eat and where corruption abounds and safety is never assumed.[120] Success, or at least satisfaction in living the American dream, is having peace, safety, a decent life and home, and perhaps a flat screen television and a smart phone.[121] The costs alone of the long haul of education cut against that financial stability and immediate pride and safety of paying bills and not sinking into debt. In one study, almost three-quarters of Latino youth (aged 16 to 25) who have a high school education or less cited the need to help support their families financially as the reason for not going further in their education; about half reported that they had limited English skills; about four in ten did not like school; four in ten said they could not afford to go to school; about four in ten reported that they did not need further education for the career they wanted; and about two in ten said that their grades were too low to continue.[122] On the surface, life for Mexican-Americans is more comfortable than the life created in Mexico, and the realization of equality and a fair political system is already far ahead of what exists in Mexico.

Higher education in the United States is marketed as an individual endeavor for the purpose of increasing one's earning potential in the long term; one in which the investment in education will be returned over the resulting lifetime of earnings.[123] This narrow view of higher education, especially in terms of law school, which today involves a large financial investment and debt load at the front end, serves to dissuade Mexican-Americans from pursuing a law degree. The positive externalities—the impact on society at large and the importance of Mexican-American civic leadership and wielding of legal power in a country whose population is increasingly Mexican-

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117. *Id.* at 51, 141.

118. *Id.* at 57.

119. *See* Tamera K. Harevan, *The History of the Family and the Complexity of Social Change,* 96 AM. HIST. REV. 95 (1991).

120. *The Story of Hispanics in The Americas*, INTERNATIONAL WORLD HISTORY PROJECT, http://history-world.org/hispanics.htm (last visited Mar. 4, 2013).

121. *See, e.g.*, Richard Prince, *Will Devices Attract Blacks, Hispanics as Smartphones Do?*, MAYNARD INST. (April 2, 2012), http://mije.org/richardprince/tablet-computers-seen-future-newspapers.

122. PEW RESEARCH HISPANIC CENTER, LATINOS AND EDUCATION: EXPLAINING THE ATTAINMENT GAP (2009), *available at* http://www.pewhispanic.org/files/reports/115.pdf. The survey was conducted from August 5 through September 16 of 2009 among a randomly selected, nationally representative sample of 2,012 Hispanics ages 16 and older, with an oversample of 1,240 Hispanics ages 16–25. The survey was conducted in both English and Spanish.

123. John Burkhardt &Tony Chambers, *Kellogg Forum on Higher Education for the Public Good: Contributing to the Practice of Democracy*, 7 DIVERSITY DIG. 1 (2003), *available at* http://www.diversityweb.org/digest/vol7no1-2/burkhardt.cfm.

American—are largely ignored or overlooked.[124]

Until the Basave-described hunger for civic participation and leadership in a system that provides access to all drives Mexican-American youth, the desire to commit to higher education will continue to languish. Ironically, this social complacency leads to well-defined failures of public service that should stimulate the Mexican-American community to seek educational remedies. For example, Mexican-Americans do not access critically needed legal help due to "cultural and linguistic barriers."[125] Without sufficient culturally and linguistically competent attorneys within the Mexican-American community, the powerless become even more marginalized and justice is an empty proposition. Even in the face of such clear and repetitive systemic failure, various community and commonly held familial imperatives impede Mexican-Americans from pursuing legal education. But "a law school education can be a tool for socioeconomic change [and] [a]n increase in the number of Latino lawyers can have a multiplier effect, enhancing upward mobility for Latinos generally by exposing more Latino children to professional role models."[126]

Education begets education, and success in high school and college are prerequisites to gaining a seat at a law school and succeeding in a very competitive academic environment.[127] Once exposed to the merits and allure of the field of law—beyond simply the long-term financial rewards—students must realize early on and understand the necessary steps to prepare for admission to law school. Once again, there is an uncoupling between the dream of becoming an attorney and the concrete steps necessary to arrive at that goal. Latino high school dropout rates are the highest of any tracked race or ethnicity.[128] Without role models and access to training and guidance, by the time a student conceives of law as a possible career it is often too late.[129] We see students who come to the idea of going to law school near the end or after their undergraduate studies, and even though they may have sufficient intellect, their track record is set and there is little that can be done to make them attractive to law schools.

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124. Xochitl Bada & Luis Escala-Rabadan, Mexican Migrant Civic and Political Participation in the U.S.: The Case of Hometown Association in Los Angeles and Chicago 17–18 (2005) (paper presented at the seminar "Mexican Migrant Social and Civic Participation in the United States"), *available at* http://www.gcir.org/system/files/riverabadaescala1.pdf.

125. Malpica & España, *supra* note 62, at 1395.

126. *Id.*

127. *Planning for College: Law School,* COLLEGE ANSWER, https://www.collegeanswer.com/planning-for-college/choosing-a-college/law-school/law-school-admission-requirements.aspx (last visited Feb. 13, 2013).

128. *The Condition of Education 2012 Table A-33-1 (NCES 2012-045),* NAT'L CTR. FOR EDUC. STATISTICS, http://nces.ed.gov/fastfacts/display.asp?id=16 (last visited Apr. 22, 2013).

129. Richard Delgado, *Locating Latinos in the Field of Civil Rights: Assessing the Neoliberal Case for Radical Exclusion,* 83 TEX. L. REV. 489, 509 (2004) (describing the lack of role models in the Latino population).

A. What can we do? Concrete Steps For Change

1. Addressing the Pipeline Before College

We must reach out to high school students to expose them to the field of law and the profession in general and spark their interest.[130] The hope is to develop in underrepresented youth an interest in law. Students must grasp the importance of succeeding in high school as a basic stepping stone to college, and we must also work to equip them with the tools to achieve success in high school and beyond.[131] Part of equipping them with skills and tools should include college admissions test preparation for these underrepresented students.

We must provide role models to the students. If the students see someone like themselves with law degrees in positions of power, they will be more likely to envision that for themselves.[132] In the Mexican-American community, especially if youth are outside the heavily Mexican-American populated Southwest, it may be difficult to even find attorneys of the same background to serve as role models.[133] For many Mexican-American youth, their only perceptions of attorneys are what they see on television.[134] Once the vision is there, then comes the Basave link from the dream to reality: understanding the steps involved in getting from where they are to where they want to be, so that they may appreciate and understand the path.

Successful programs exist throughout the country to address these issues and recruit youth into the legal field. Street Law and other state bar-promulgated "Law Related Education" programs are available from state to state, many of which have been designed for ready implementation into the classroom by teachers and also by visiting attorneys.[135] Legal communities such as several local bar associations in Texas are active in going into schools at the elementary, middle, and high school levels and engaging with the students through many different law related competitions, educational and mentorship endeavors, role modeling activities, shadowing and interning opportunities, trainings, and scholarship opportunities.[136]

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130. *See* Malpica & España, *supra* note 62, at 1413–24 (mentioning some programs that highlight the various components that have proven effective in the effort to enhance enrollments to high-school students to law school).

131. *See id.* at 1425–26 (highlighting an initiative that inspires young people to achieve academic excellence to create college admission opportunities, ensuring that the participants ultimately possess the qualifications necessary to successfully compete for law school admission).

132. *Id.* at 1415.

133. *See id.* at 1418 (citing Stacey Mobley, *Priming the Pipeline to Diversity in the Legal Profession*, 19 ACCA DOCKET 79, 80 (2001), identifying the lack of legal role models for young minority children as a primary challenge resulting in the low representation of minority lawyers).

134. *Id.* at 1423.

135. *See id.* at 1417 (describing how Street Law, Inc., a nonprofit organization, is dedicated to improving the lives of young people through law-related education).

136. *See e.g.*, *Pipelines Programs*, DALLASBAR.ORG, http://www2.dallasbar.org/president/fstevenson/pipelinebrochure.pdf

With more legal communities active in this way , more can be done to augment the influx of Mexican-American students into the law school pipeline. The High School Law Camp at The University of Texas at El Paso, a program funded by a Law School Admission Council grant, teaches students problem solving skills as well as critical thinking and communication skills and exposes them to law and legal concepts and terminology, the workings of legal offices, and mentors.[137] This program also works to educate parents in the El Paso community regarding the importance of investing in higher education.[138] These efforts prove challenging as many families have meager financial means and there is a strong sense of community and familial responsibility.[139] Other outreach takes place in collaboration with the El Paso legal and judicial community where attorneys and judges offer opportunities to speak with pre-college students, work with them in tournaments and competitions, engage in law-related education, provide opportunities to observe the inner workings of the courts, and provide mentorship and role modeling.[140] Above all, the idea is to help students understand lawyering in a larger social, political, and historical context so that it may be appreciated as a tool for civic leadership, full access to the legal system, and equality in the democratic process.

Programs such as Sponsors for Educational Opportunity (SEO) take a holistic approach to helping low income high school students in New York City and San Francisco by supplementing their overall education to posture them for long-term education success and opportunity in higher education and their careers.[141] With the SEO support and the consequent motivation and commitment engendered in the students, the educational success rates among its students are impressive.[142] While SEO serves to better educate and level the playing field for minority students in these urban areas, it is unfortunate that it takes the supplementation of regular K–12 education to level the playing field for many minority students.

(last visited Mar. 7, 2013); *Houston Bar Association Committees*, HOUSTON BAR ASSOCIATION, http://www.hba.org/folder-committees/listing.htm (last visited Aug. 10, 2013).

137. *See High Sch. Law Camp*, UNIV. OF TEX. AT EL PASO LAW SCH. PREPARATION INST. (June 2013), http://academics.utep.edu/Default.aspx?tabid=67717; *Mission and Goals*, UNIV. OF TEX. AT EL PASO LAW SCH. PREPARATION INST., http://academics.utep.edu/Default.aspx?tabid=67363 (last visited Mar. 7, 2013).

138. *See Mission and Goals*, *supra* note 137.

139. *See id.* (detailing the mission and goals of the UTEP Law School Preparation Institute).

140. *See, e.g., High Sch. Law Camp, supra* note 137 ("[A] three-week, all-day summer program that gives high school students an opportunity to explore a career in law and prepare for college. Camp participants engage in a variety of activities, including case law instruction, field trips to legal community organizations, professional skills development, and a mock trial exercise."); *LSPI High School Moot Court Competition*, UNIV. OF TEX. EL PASO LAW SCH. PREPARATION INST. (April 2013), http://academics.utep.edu/Default.aspx?tabid=67720 (thanking attorneys of the local bar who served as judges for the high school students' Moot Court competition).

141. *SEO Scholars*, SPONSORS EDUC. OPPORTUNITY, http://www.seo-usa.org/our-programs/seo-scholars./ (last visited Mar. 8, 2013).

142. *See* SOC. IMPACT RESEARCH, ROOT CAUSE, SPONSORS FOR EDUCATIONAL OPPORTUNITY 1 (2010) (reporting that 84% of SEO students graduate from college within 4 years, compared to only 21% from New York State Public Schools, and that 80% of graduating SEO seniors matriculated in at least "very competitive" colleges).

2. Addressing the Pipeline at the College Level

At the college level, there is also much to be done. First, the student must know about and become interested in a possible career in the law. As many students within the Mexican-American community have little contact with the law, conceivably, that is the first hurdle even at the college level. Pre-law student clubs—especially those involving law student mentorship of college students, speaking engagements with members of the bar, shadowing, role modeling, and mentorship—serve to expose students to the legal field and answer questions they may have.[143]

Just as with the high school level, many parallel programs exist at the college level to help students learn more about a career in law and prepare for law school, such as those run by SEO, the Council on Legal Education Opportunity, and colleges and law schools throughout the country.[144] The Law School Preparation Institutes at multiple public universities in Texas provide students mock first-year law school classes and experiences in legal research, writing, and advocacy.[145] Some of these programs also provide much needed LSAT preparation instruction for those students who go through the full program to prepare for applying to law school.[146] The University of Texas at El Paso (UTEP) also offers legal internships for undergraduate students with federal and state judges, as well as local non-profit organizations involving all areas of law, and at federal and state

143. *See* Southwest Ass'n of Pre-Law Advisors, *The Role and Responsibilities of Pre-Law Advisors,* (2011), *available at* http://swapla.org/Resources/Documents/Pre-Law%20Advisor%20Role%20and%20Responsibilities%20revised10132011%20(2).docx (last updated Oct. 13, 2011) ("Many pre-law advisors have found that a student pre-law club has been of great value in helping students gain knowledge of the legal profession; its options, opportunities, and pitfalls. Such a club or organization can serve as a vehicle for the dissemination of information and as a focal point for law school admissions officers, practicing lawyers, and others who are invited to campus.").

144. *See, e.g., College Scholars,* COUNCIL ON LEGAL EDUC. OPPORTUNITY, http://www.cleoscholars.com/index.cfm?fuseaction=Page.viewPage&pageId=483 (last visited Mar. 8, 2013); *LSPI College Program Directory,* UNIV. OF TEX. EL PASO LAW SCH. PREPARATION INST., http://academics.utep.edu/Default.aspx?tabid=49400 (last visited Mar. 8, 2013); *SEO Scholars, supra* note 141.

145. Law School Preparation Institutes created in collaboration with The University of Texas School of Law exist in Texas public universities at UTEP, UTSA, Prairie View A&M University, and UTPA. *LSPI Summer College Program,* UNIV. OF TEX. EL PASO LAW SCH. PREPARATION INST. (June 2013), http://academics.utep.edu/Default.aspx?tabid=67726 (describing the classes taken by college students though the program); *Pre-Law Information,* UNIV. OF TEX. PAN AM. (Mar. 8, 2013), http://portal.utpa.edu/utpa_main/daa_home/csbs_home/polisci_home/polisci_prelaw ("[The program] includes instruction in analytical reasoning, writing skills, the nature of legal education, and LSAT preparation. Visiting staff and faculty from the University Of Texas School Of Law also participate."); *Pre-Law Institute for Mentoring Students Program,* PRAIRIE VIEW A&M UNIV., http://www.pvamu.edu/pages/6568.asp (last visited Mar. 8, 2013) ("The Pre-LIMS Program is a four-week summer institute which will: (1) introduce students to law school and the legal profession; (2) provide students with substantive academic skills to strengthen their preparation for law school; and (3) educate and prepare students for the application and admission process."); *The Institute for Law & Public Affairs Summer Academy,* UNIV. OF TEX. SAN ANTONIO, http://www.utsa.edu/ilpa/academy.html (last visited Mar. 8, 2013) ("The Summer Law School Preparation Academy encompasses 12 hours of coursework specifically designed to hone the reading and writing skills students need to successfully gain admission to and excel in law school.").

146. *See, e.g., LSPI College Summer Program, supra* note 145 (UTEP's Law School Preparation Institute is a summer program that offers, among other things, LSAT preparation).

governmental agencies in the El Paso community.[147] With strong mentorship and supervision from attorneys at internship placement offices, students are able to gain practical skills in offices where they experience the law in action.

Clinical programs may also help to draw students into law. Clinical programs can spark an interest in advocacy and legal education and provide students with hands-on experience and advocacy development through experience in the courtroom.[148] At UTEP one clinical program teaches Children's Rights Law and Advocacy while serving children in the child welfare system through the Court Appointed Special Advocates of El Paso.[149] Another clinical program has undergraduate students work in the Juvenile Justice System through a deferred prosecution program for first-time, low-risk juvenile offenders with serious mental illness.[150] Part of the allure of these programs to students in El Paso is that the cultural capital of the UTEP students serves the children and families in both the child welfare and the juvenile justice systems well. While Mexican-Americans are grossly underrepresented in the legal field, they are overrepresented in the juvenile justice system.[151] The families and children involved in these cases often feel more comfortable and provide more information that can then be used in the representation of the children's best interest when they feel that they can relate to those representing them.[152] When the UTEP students work on these cases and see the effectiveness in advocacy brought on not only by strong skills but by the cultural and linguistic compatibility with the families, the legal field becomes all the more appealing as the students experience the rewards of working to effect justice for these most vulnerable populations.

Whatever the source of the interest in law, once a student knows that she may potentially pursue a law degree, she must understand that everything she does in college can help or hurt her law school application. Accordingly, the hope is that the student would undertake college with the

147. *See Internships,* UNIV. OF TEX. AT EL PASO LAW SCH. PREPARATION INST. (June 2013), http://academics.utep.edu/Default.aspx?tabid=49401 ("Interns are required to work 20 hours a week for 12 weeks doing research for and otherwise assisting a judge, attorney in a public interest project, or a faculty member.").

148. *See, e.g., CASA Initiative,* UNIV. OF TEX. AT EL PASO LAW SCH. PREPARATION INST., http://academics.utep.edu/Default.aspx?tabid=67715 (last visited March 7, 2013) (The CASA Initiative educates students in "children's rights law while assigning them to be advocates for children in the court system.").

149. *See id.* ("The Court Appointed Special Advocate program (CASA) of El Paso trains and assigns volunteers from the community to advocate for abused and neglected children involved in the court system, most of whom are in foster care.").

150. *EMPOWER Program: Encouraging More Positive Opportunities with Empathy and Respect,* UNIV. OF TEX. AT EL PASO LAW SCH. PREPARATION INST., http://academics.utep.edu/Default.aspx?tabid=73268 (last visited Mar. 7, 2013).

151. *See* JEFF ARMOUR & SARAH HAMMOND, NAT'L CONFERENCE OF STATE LEGISLATURES, MINORITY YOUTH IN THE JUVENILE JUSTICE SYSTEM: DISPROPORTIONATE MINORITY CONTACT (2009), *available at* http://www.ncsl.org/print/cj/minoritiesinjj.pdf ("Minority youth are disproportionately represented throughout the juvenile justice systems in nearly every state in the nation."); *see e.g.*, TEXAS JUVENILE JUSTICE DEPARTMENT, STRATEGIC PLAN 2013–2017 26 (2012), *available at* https://www.tjjd.texas.gov/publications/reports/TJJD%20Strategic%20Plan%20-%20FINAL%20-%20JULY%202012.pdf (reporting that in Fiscal Year 2011, Texas Juvenile Justice Department youth population was forty-eight percent Hispanic and thirty-one percent African-American.)

152. *See* Malpica & España, *supra* note 62, at 1395.

mindset that college is not the end but is instead yet another step and preparatory endeavor along the path to professional life. This manner of thinking should be nurtured in students by role models, mentors, parents, and educators before the students arrive at the college campus. It is important to note that many Mexican-American college students are first-generation college students,[153] and it is already a significant step that they have reached the college level, as students whose parents do not have a college education are less likely to reach the college level themselves.[154] The experience and understanding, and consequently the ability to support those academic pursuits, are naturally more limited than with those parents who have gone through the process successfully themselves.[155] These factors, along with language and writing deficiencies in the Mexican-American community, often create an unequal start at the college level. And the same goes for other diverse and impoverished populations. By virtue of their overrepresentation in urban school districts across the nation, the quality of education and institutional educational disparities serve to create an unlevel playing field going into college.[156] It is important to acknowledge these issues, along with the culture shock that comes with first generation students leaving home, to help provide extra support to Mexican-American students in college so that they may succeed and graduate.

Again, in college like in high school, the goal is to continue to develop those critical thinking, problem solving, logic, reading comprehension, and communication skills to prepare students for success in law school. Good counseling with an emphasis on preparing the student to become a successful law school applicant is essential. The student must know that top grades and extracurricular and community involvement are critical components in the process. The student should be counseled in putting together a successful law school application. And of equal importance is preparation for the Law School Admission Test. Again, financial barriers exist to proper preparation in this regard, and underrepresented students should be encouraged and supported to fully prepare for the LSAT.

3. Educational Motivation

It is clear that the sooner the student starts working toward long-term educational success, the better prepared she will be to get to law school one day. Several trends may be noted in factors

153. Jenny J. Lee et al., *Understanding Students' Parental Education Beyond First-Generation Status*, COMMUNITY C. REV., Summer 2004, at 1, 8.

154. *See* SUSAN P. CHOY, NAT'L CTR. FOR EDUC. STAT., STUDENTS WHOSE PARENTS DID NOT GO TO COLLEGE: POSTSECONDARY ACCESS, PERSISTENCE, AND ATTAINMENT 7 (2001), *available at* http://nces.ed.gov/pubs2001/2001126.pdf ("As parents' education increases, so does students' likelihood of enrolling in postsecondary education.").

155. *See id.* at 10 ("[H]igh school graduates whose parents did not go to college tended to report lower educational expectations, be less prepared academically, and receive less support from their families in planning and preparing for college than their peers whose parents attended college.").

156. *See, e.g.*, *The* Williams *Case—An Explanation*, CAL. DEP'T OF EDUC. (Sept. 4, 2012), http://www.cde.ca.gov/eo/ce/wc/wmslawsuit.asp (explaining the legislative impact of the settlement in *Williams v. California*, in which plaintiffs alleged that the state did not provide equal access to quality schools and teachers).

that motivated Mexican-American and Latino attorneys to become attorneys. Some entered the field of law because they or their families experienced discrimination or automatic educational tracking into a vocational field—they "turn[ed] anger into energy."[157] Others overcame difficulties and legal challenges, infringement of their rights, or abuse and resolved to enter into a field where they will be empowered to stand up for themselves and provide independently for their families and not "get stuck" in bad situations.[158] Some attorneys used positive messages from their mentors, teachers, and role models as motivation to succeed and they believed in themselves.[159] This highlights the critical importance of exposure to role models and mentors, especially those within the legal field, not only to inculcate in students the belief that they can do it, but also to show them the steps along the path of success and help them walk it.

V. CONCLUSION

The failure to understand and account for differences between discrete cultural groups struggling for a place in the American conversation will have profound political and social consequences. Our nation, political system, educational industry, business sectors, and news media are acculturated to the all-embracing terms "Latino" or "Hispanic," but, as we have noted, these terms may truncate people and cultures in unhelpful ways. These are terms imposed from the outside, a category created out of observation of phenotype rather than an understanding of culture. As previously noted, there is very little interaction between the discrete cultural groups that find themselves vacuumed up by the Hispanic and Latino labels.[160] With so little crossover, it is unhelpful and misleading to average out the successes and challenges of all people in the U.S. who trace their cultural origins to the Iberian Peninsula. In no instance does this seem more apparent than in the case of cultural group representation in law school. The "Hispanic" or "Latino" label will mask the fact that one distinct group—Mexican-Americans—suffers under a large negative disparity in proportional representation.

A seemingly simple and—at the time—relatively noncontroversial change promulgated by the U.S. Department of Education to eliminate data collection on subcategories of Hispanics now works to mask marked disparities and inhibits the measurement of success in education and success among culturally distinct groups. The aggregation of these groups for statistical purposes is

157. Maria Chávez, *The Rise of the Latino Lawyer: New Study Reveals Inspiring Successes, Lingering Obstacles*, ABAJOURNAL.COM. (Oct. 1, 2011, 5:30 AM), http://www.abajournal.com/magazine/article/the_rise_of_the_latino_lawyer_new_study_reveals_inspiring_successes/.

158. *See id.*; *see also* Sarah Valenzuela, Communicative Behaviors that Lead Latinos to Pursue a Legal Career (unpublished paper presented at the National Communication Association 98th Annual Convention in Nov. 2012) (on file with TEX. HISP. J.L. & POL'Y). Valenzuela is a former UTEP LSPI student who is currently a 2015 J.D. candidate at The University of Texas School of Law.

159. *See id.*

160. *See supra* text accompanying notes 58–67.

expedient, but that convenience should not come at the cost of hiding extraordinary variation in accomplishment and challenges to success among cultural groups.

In light of the disparities discussed here, and the impact these will have on legal, business, political, and social aspects of American society, we need to work to understand the problem and find ways to aid Mexican-American communities in sending their bright and aspiring students to law school.

LEGAL SERVICE AWARENESS OF THE LATINO POPULATION IN SOUTHERN NEVADA

EDGAR FLORES

I. INTRODUCTION[1]

In 2008 the Nevada Supreme Court Access to Justice Commission published a report titled *Assessment of Civil Legal Needs and Access to Justice in Nevada.* The report revealed that in Nevada only "20% of those with one or more legal problems received help from a lawyer for at least one but not all of the legal problems they identified."[2] Furthermore, they found that over "two-thirds of low to moderately low income households experience significant civil legal problems that would ordinarily require at least some assistance from an attorney in order to resolve them."[3] In Nevada, the greatest population increase has been among Latino residents and it is projected to continue, with Latinos reaching an estimated 31% of the total population by 2020.[4] The growing immigrant population poses a unique challenge that makes difficult the task of ensuring adequate legal services are accessible to all.[5] The purpose of this directed research project was to learn how informed the Latino community is of programs or organizations that offer free or inexpensive legal services (Services).

Through random sampling, self-identified Latinos over the age of seventeen living in Las Vegas, Henderson, and North Las Vegas, Nevada (Target Population) were asked a series of questions to help assess their knowledge of Services. Education, income, and language barriers were each tested to understand how significant they were in influencing whether someone is more or less likely to know of Services and were all found to be significant. The data revealed that those with some college education are 221 times more likely to be aware of Services than those with a high school diploma or less. Also as income increases so does the likelihood of knowing of Services. Lastly, language barriers will deter people from seeking Services.

In addition to assessing whether the Target Population knows of Services, the survey asked secondary questions that explored whether the lack of awareness of Services led people to use alternatives. Specifically, the survey asked why the Target Population resort to using non-attorneys to resolve their legal issues and what sources of information the Target Population turns to when

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1. This project would not have been possible without the generous donation of Mr. Otto Merida, the extensive mathematical contribution of Sean Najera, and the countless hours volunteered by Gil Lopez. I would like to thank the following people for volunteering their time to make this project possible: Jeremy Aguero, Jairo Castellanos, Krystian Romero-Colosio, Cynthia Vasquez, Dianna Payan, Dawrin Mota, Kimberly Amparo, Eliana Martinez, Kelly Espinoza, Dario Figueroa, Fabiola Maralazon, Alex Avalos, Vianett Achaval, Maria Alvarez, Armando Perez, Ivett Sanchez, Lino Mejia Jr., Deysi Colon, Mayra Garay, Raquel Garay, Ricardo Reyna, Bianca Payan, Maria Rodriguez, Michelle Aguilar, Genesis Vasquez, Gina Cortes, Michael Klein, and Jenny Cortes.

2. NEV. SUPREME COURT ACCESS TO JUSTICE COMM'N, ASSESSMENT OF CIVIL LEGAL NEEDS AND ACCESS TO JUSTICE IN NEVADA 2 (2008), http://www.legalhotlines.org/library/Nevada_Civil_Legal_Needs__Assessment_Report_05160 8.pdf [hereinafter Access to Justice].

3. *Id.*

4. *Id.* at 9.

5. *Id* at 56.

seeking legal services.[6] Throughout Nevada different organizations are raising awareness of how the Latino community is turning to *notarios públicos* (notaries public) in lieu of attorneys for legal advice.[7] Latinos turn to notaries because in Latin American countries the title of *notario público* is limited to lawyers, and they are cheaper and are recommended within the community. This paper will not address whether *notarios públicos* are beneficial or detrimental to the Latino community. Instead, the role of the *notario público* will be considered in the context of how it correlates to the Target Population's lack of access to Services.

The data will also be used to suggest better means of surveying the Latino community in future studies. More importantly, the data will offer solutions to reverse the present lack of awareness the Target Population has of Services.

Part II discusses the methodology of the survey, including the concerns of having a sufficiently large random sampling, the development of the survey questions, and a quick summary of the statistical model. Part III explains the results drawn from the analysis. Part IV surveys the reasons why the Latino population has been turning to non-lawyers as alternatives to attorneys and what Nevada has done to address the problem. Part V suggests solutions based on the results, while Part VI explains some limitations of the project and suggests areas for further research. The Appendix contains the data collected, as well as further explanations of the results and the statistical tests used.

II. METHODOLOGY OF THE SURVEY

A. Random Sampling

Surveying community members is one of the most effective means of understanding what forces are at play in their decision-making. Hence, a random sampling was the ideal approach to better understand the Latino community's awareness of Services. The Target Population is composed of self-identified Latinos over the age of seventeen living in Las Vegas, Henderson, or North Las Vegas. While each city might face a different set of challenges, Latino families in all three cities share similar barriers.[8] Furthermore, finding Services often entails traveling beyond

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6. *See generally* Anne E. Langford, *What's in a Name?:* Notarios *in the United States and the Exploitation of a Vulnerable Latino Immigrant Population*, 7 HARV. LATINO L. REV. 115 (2004) (discussing at length how and why *notarios publicos* take advantage of Latino immigrant families).

7. Tovin Lapan, *Fraudulent Legal Services Costly in Multiple Ways to Immigrants*, LAS VEGAS SUN, Feb. 23, 2012, http://www.lasvegassun.com/news/2012/feb/23/fraudulent-legal-services-costly-multiple-ways-imm/.

8. *See* Access to Justice, *supra* note 2, at 6 (finding that there is a shortage of low cost legal services, specialty clinics, and pro bono and immigration attorneys across Nevada).

respective city boundaries. The decision to focus on individuals over the age of seventeen was made because interviewing minors requires parental consent, and legal concerns within most families are handled by adults. Finally, to obtain the most accurate data, face-to-face interviews were conducted,[9] notwithstanding the extra time and expense, as live interviews yield better responses and more attentive survey participants.[10]

Area probability sampling was the method used in this project because the U.S. Census data provided a detailed panorama of how the Latino population is distributed by geographic region. Area probability sample is a method in which geographic areas with known probability are sampled.[11] Areas are selected as part of a clustered or multi-stage design.[12] In such designs, households, individuals, businesses, or other organizations are studied, and they are sampled within the geographical areas selected for the sample.[13]

Table 1: Latino Population 2010 (Las Vegas, Henderson, and North Las Vegas, NV)

City	Total Population	Number of Hispanic/Latino Origin	Percentage of Hispanic/Latino Origin
Las Vegas	583,756	183,883	31.5%
Henderson	257,729	38,402	14.9%
North Las Vegas	216,961	84,181	38.8%
Total:	1,058,446	306,466	28.9%

Source: U.S. Census Bureau, 2010.[14]

As Table 1 indicates 1,058,446 people were living in Las Vegas, Henderson, and North Las Vegas in 2010.[15] Of that figure, 28.9% were Latino.[16] Using the U.S. Census data, the three cities from the Target Population were broken up into five major regions.[17] The Latino population in each region was measured as a proportion of the total number of Latinos living in Las Vegas, Henderson, and North Las Vegas. Through statistical analysis, it was determined that a significant random

9. RONALD CZAJA & JOHNNY BLAIR, DESIGNING SURVEYS A GUIDE TO DECISIONS AND PROCEDURES 50–55 (Jerry Westby et al. eds., 2d ed. 2005).

10. *Id.*

11. John Hall, *Area Probability Sample*, *in* ENCYCLOPEDIA OF SURVEY RESEARCH METHOD 1, 33 (Paul J. Lavrakas ed., 2008).

12. *Id.*

13. *Id.*

14. *See State & County QuickFacts*, U.S. CENSUS BUREAU, http://quickfacts.census.gov (last visited May 1, 2012).

15. *Id.*

16. *Id.*

17. *Interactive Population Map*, U.S. CENSUS BUREAU, http://2010.census.gov/2010census/popmap/ (last visited May 1, 2012).

sampling required surveying at least 384 people.[18] Ultimately, 391 people were surveyed, and the survey was conducted in high foot-traffic areas in each of the five major regions based on the following three criteria: location, name recognition, and size. These included: Walmarts, Mariana's Supermarkets, La Bonita Supermarkets, Smiths, and all Department of Motor Vehicles Offices.

Volunteers were broken up into teams and were assigned a region to survey. The volunteers went to their assigned location and surveyed people as they were exiting the store or DMV. This was done repeatedly at different hours of the day and during different days of the week. All of the volunteers were sent to regions where they did not live, to reduce the risk of their meeting individuals they knew. Furthermore, the volunteers were briefed and trained on how to objectively ask each question. Also, on the dates and times the interviews were conducted there was no manner in which anyone administering the survey could have known who was going to be visiting any of the stores or DMVs. Lastly, the participants were unaware that they would be asked to participate in a survey if they went to the store or DMV on a particular day or time because it was not announced to the public that a survey would be conducted.

B. Survey Questions

A series of focus groups were conducted where the participants were asked to identify questions they felt would help understand whether the Target Population is aware of Services. The potential focus group participants were first asked if they had any predispositions as to what the answer would be. Those who shared strong feelings were removed from participating in the focus groups to avoid tainting the objectivity of the survey and eliminating the possibility of biased or pointed questions.[19] A total of twelve questions were included in the survey.[20] Questions number 2 and 3 were just disclaimer questions, the remaining ten will be discussed in detail.

1. Are you of Hispanic or Latino origin?

4. Are you over the age of seventeen?

5. Have you ever used free or inexpensive legal services?

6. Are you familiar with any organization that offers free or inexpensive legal services?

7. Have you ever been involved in a legal dispute?

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18. *See generally* PETER V. MARSDEN, HANDBOOK OF SURVEY RESEARCH 603 (Peter V. Marsden & James D. Wright eds., 2d ed. 2010) (discussing how bias in any survey is a constant concern, but eliminating all bias is nearly impossible).

19. *Id.*

20. *Id.*(discussing how cultural barriers, social norms, and individual experience are among the many factors that need to be taken into consideration when formulating questions).

8. Have you ever gone to a notary public for legal services?
   a. If yes, why did you choose a notary public instead of an attorney?

9. What source would use to find legal services? (Television, Friend/Family, Internet, Radio, or Newspaper)

10. How much do you make a year? (Less than $25,000; $25,000 to $50,000; $50,000 to $75,000; Over $75,000)

11. What is the highest grade level you completed? (Less than high school, High school diploma/GED, Some college, Bachelors degree or higher)

12. What zip code do you live in?

Questions 1 and 4 were to ensure that only members of the Target Population were surveyed. Questions 5 and 6 focused on the extent to which the Target Population is informed of Services. Question 7 was intended to give guidance on how many members of the Target Population have found themselves in need of legal assistance. Question 8 was included for a comparison with question 6, allowing us to learn if there is any correlation between the Target Population turning to notaries for legal advice and knowledge of Services.[21] Question number 8(a) was designed to gain insight into the thought process that is driving the Target Population to seek legal services from notaries. Question 9 reveals the most effective means of outreach to the Target Population. Questions 10 and 11 tested whether income and education were significant factors that influence whether the Target Population knows of Services. Because of the proximity of the three cities where the survey was conducted, it was necessary to include the final question to ensure the data was composed of survey-takers from all areas in the Target Population. Surveying people in a particular area would not automatically mean they lived in that area as it is not uncommon for people to visit stores or DMVs outside their immediate surroundings.

Lastly, although not a written question, at the beginning of the survey, each participant was asked his or her primary language, as language barriers negatively impact access to Services.[22] It was necessary to provide the survey in both English and in Spanish to ensure that non-English speaking members of the Latino community could participate in the survey.[23]

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21. *See generally* Langford, *supra* note 6, at 2 (discussing the difficulties immigrants can encounter when distinguishing between a notary and a *notario*).

22. RACE, CULTURE, PSYCHOLOGY, AND LAW 249–50 (Kimberly Barrett & William H. George eds., 2005).

23. Kristtyan Romero-Colosio, Clark County School District Bilingual Translator/ Interpreter, assisted in translating the survey from English to Spanish.

C. *Method Used to Test the Data*[24]

The data collected from randomly surveying the Target Population fulfills the properties of a multinomial experiment. Under the properties of a multinomial experiment, a loglinear model was derived that best predicts the number of members of the Target Population that are aware of Services based on three factors: education, income, and preferred language. Once the best model for the data was created, and after significance tests were performed to ensure the legitimacy of the model, the model produced odds ratios that postulated the true odds of the Target Population being aware of Services. In conjunction with the loglinear model, a large sample test of hypothesis about the target population proportion of awareness of Services was conducted to test whether the majority of the Target Population was aware of Services.

III. ANALYSIS

The research revealed that Latinos in the Target Population are dangerously uninformed of how to seek out adequate legal advice. There are several factors, such as income and education, that significantly impact whether the Target Population will know of Services.

Table 2: Awareness of Inexpensive Legal Services

Aware of Inexpensive Legal Services	Number of Latinos
Aware	71
Not Aware	320

Table 2 shows that only 18% of the survey takers knew of Services.[25] This statement may not come as a surprise because as noted previously, the Nevada Supreme Court Access to Justice Commission released a report with similar findings.[26] That the current discourse already acknowledges the Latino community's disconnect to Services is further supported by the discussion with the focus group participants where the issue was frequently raised.

There are a number of reasons that explain why the Target Population does not use or know of Services. Different cultural backgrounds often translate to a lack of understanding of how the United States legal system works and where one's rights stand.[27] Furthermore, some immigrant

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24. *See infra* Appendix (offering a complete explanation and detailed analysis of all the data collected from the survey).

25. *Id.*

26. *See* Access to Justice, *supra* note 2, at 83.

27. *See id.* at 20 ("Cultural backgrounds can be a significant factor in inhibiting access to legal services, regardless of language and immigration status. A report by the Asian Pacific American Legal Center noted that different ethnic groups have 'distinct cultural patterns and practices, sometimes contrary to mainstream American cultural assumptions and expectations' that impact their views of the legal system.") (citing ASIAN PAC. AM. LEGAL CTR., *EXPANDING LEGAL SERVICES: SERVING LIMITED*

families attempt to never allow family problems to leak into the public eye for a host of cultural reasons.[28] Also, many of the legal services providers have limitations imposed on them by the federal government, only allowing them to use funding to help U.S. citizens.[29] In 2010 there was a combined total of 130,225 people living in Las Vegas, Henderson, and North Las Vegas that did not have U.S. citizen status.[30]

Income is a significant factor that correlates with whether a Latino in the Target Population knows of Services.[31] The data demonstrates that members of the Target Population who earn an annual income of more than $75,000 are twenty-two, thirty, and thirty-three times more likely to be aware of Services than Latinos who earn an annual income between $50,000 and $75,000, between $25,000 and $50,000, and less than $25,000, respectively.[32] The data indicates that as income increases so does the likelihood of knowing of Services. There is a greater disparity of awareness in the Target Population as the income level surpasses $75,000. What this translates to is that those who would typically not qualify for Services because their income is too high are more likely to know of the Services than those who would qualify and need them the most.

Education also proved to be a significant factor. The greatest disparity of awareness in the Target Population occurs between education levels, with an almost certain likelihood that a Latino with some college education will be more aware of Services than a Latino with a high school diploma or less. The data demonstrates that those in the Target Population with at least some college education are 221 times more likely to be aware of Services than those with a high school diploma or less.[33] Several reasons explain this disparity. Historically access to higher education has helped underrepresented communities in the United States gain legitimacy and counter disadvantages.[34] Also, at a minimum, colleges offer settings that promote dialogue and interaction among students, increasing the flow of information. Basic research and computer skills can be incredibly useful in finding help.[35] Lastly, the longer someone participates in the education system the stronger one's mastery of English, which in turn, combats language barriers.[36]

ENGLISH PROFICIENT ASIANS AND PACIFIC ISLANDERS (2003), http://www.courts.ca.gov/partners/documents/ExpandingLegalServices-APALC.pdf).

28. Access to Justice, *supra* note 2, at 58 (discussing that language barriers decrease access to Services).

29. *Id.*

30. *See American Fact Finder,* U.S. CENSUS BUREAU (2010), http://factfinder2.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t (Search American Community Survey and select Selected Social Characteristics in the United States) (last visited May 1, 2012).

31. *See infra* Appendix.

32. *See infra* notes 90–98 and accompanying text.

33. *Id.* at 29.

34. STRATIFICATION IN HIGHER EDUCATION: A COMPARATIVE STUDY 190 (Yossi Shavit et al. eds., 2007).

35. *See* Access to Justice, *supra* note 2, at 82.

36. Access to Justice, *supra* note 2, at 58.

Unlike education and income, the results for language are only 85% conclusive when based on the data collected from this survey alone.[37] However, the 85% certainty finding is supported by recent studies that have conclusively revealed that language barriers affect access to Services.[38] As Table 3 shows, limited English proficiency is an issue affecting thousands in Las Vegas, Henderson, and North Las Vegas.

Table 3: Spanish Primary Language Spoken at Home 2010 (Las Vegas, Henderson, North Las Vegas, NV)

Primary Language Spoken at Home	Total Number of People Who Speak Spanish at Home	Out of Total Number That Speak Spanish at Home, Number That Speak English Less Than "Very Well"	Percentage of Total Number Who Speak English Less than "Very Well" Out of Total Number That Speak Spanish at Home
Las Vegas	133,021	71, 444	53.7%
Henderson	18,246	5,101	27.9%
North Las Vegas	57,349	28,735	50.1%
Total	208,616	105,280	50.4%

Source: U.S. Census Bureau, American Community Survey, 2010.[39]

The survey data highlights that more people who took the survey in Spanish are unaware of Services than the amount of people who took the survey in English. Furthermore, 73% of the survey takers took the survey in Spanish. The correlation that exists between those who took the survey in Spanish and the lack of knowledge of the existence of Services is likely a consequence of fear of embarrassment, inability to communicate, and other language-related factors that keep people from seeking appropriate help.[40]

Finally, these results suggest that typical outreach methods are not reaching the Latino community. "Legal aid programs rely on telephone intake systems and/or walk-in appointments to handle clients.... [O]utreach or marketing is usually project-specific and relies on written brochures, fliers, and understaffed or sporadic general community presentations."[41] These outreach

37. *See infra* Figure 9.

38. *See* Access to Justice, *supra* note 2, at 58.

39. *See* U.S.CENSUS, *supra* note 30.

40. *See* Access to Justice, *supra* note 2, at 8 (stating that a primary language at home that is not English makes it harder for residents to learn about legal services).

41. Access to Justice, *supra* note 2, at 93 (quoting ASIAN PAC. AM. LEGAL CTR., EXPANDING LEGAL SERVICES: SERVING LIMITED ENGLISH PROFICIENT ASIANS AND PACIFIC ISLANDERS, www.apalc.orgwww.apalc.orgwww.apalc.orgwww.apalc.orgwww.apalc.org(2003), http://www.courts.ca.gov/partners/documents/ExpandingLegalServices-APALC.pdf).

methods are not effective because they do not overcome the language barriers, nor do they help counter the cultural influences that keep members of the community from using government funded services.[42]

IV. CONSEQUENCES

A. Why the Notario Público

As noted above whether *notarios públicos* are beneficial or detrimental to the Latino community will not be discussed here, instead the focus will be on what role the *notario público* plays in the Latino community and what factors advocate for their continued existence. Alarmingly, 29% of the survey-takers stated they had gone to a notary public for legal assistance. When asked why they used a notary public as opposed to a lawyer, a majority of the survey-takers made some variation of the following statements about lawyers: not accessible, too expensive, difficult to communicate with, not interested in small cases, and not trustworthy. To the contrary, the same majority said the following of *notarios públicos*: inexpensive, accessible, speak Spanish, and work faster. The survey-takers' opinions of attorneys were rarely based on experience, they were relying on what they have heard from other members of the community.

Table 4: Awareness of Inexpensive Legal Services and Previous Use of Notary Public

Aware of Inexpensive Legal Services	Have Previously Been to a Notary Public	Number of Latinos
Not Aware	No	234
Aware	No	44
Not Aware	Yes	86
Aware	Yes	27

Table 4 illustrates that more people in the Target Population have gone to a notary public for legal services than know of Services. Only 18.1% of the survey-takers were aware of Services, while 29% of them indicated they had gone to a notary public for legal services. The data indicates that, for the Target Population, not knowing about offered Services and not trusting attorneys lead them to resort for help to *notarios públicos*.

Although notary public is an exact English translation of *notario público*, its definition is drastically different. The root of the confusion is that, according to the legal system in most Latin American countries, in order to have the title of *notario público* a person must be an attorney. For

42. *Id.*

example, to become a notary in Mexico a person must meet the following requirements: a) be a Mexican by birth, b) be between the ages of twenty-five and sixty, c) be without previous record of bad conduct, d) be licensed to practice law, e) must have been a legal clerk to a practicing notary for eight consecutive months, f) must not have been sentenced in criminal proceedings, and g) have passed the notary exam.[43] To be a *notario público* requires much more than a law degree. Many professions are identical in duties regardless of whether they are practiced in the United States or a Latin American country, hence Latinos frequently presume the same is true for notary publics.

B. Nevada Rules for Notarios Públicos

Nevada Revised Statute section 240.085 provides:

> 1. Every notary public who is not an attorney licensed to practice law in this State and who advertises his or her services as a notary public in a language other than English by any form of communication, except a single plaque on his or her desk, shall post or otherwise include with the advertisement a notice in the language in which the advertisement appears. The notice must be of a conspicuous size, if in writing, and must appear in substantially the following form:
>
> I AM NOT AN ATTORNEY IN THE STATE OF NEVADA. I AM NOT LICENSED TO GIVE LEGAL ADVICE. I MAY NOT ACCEPT FEES FOR GIVING LEGAL ADVICE.
>
> 2. A notary public who is not an attorney licensed to practice law in this State shall not use the term notario, notario p[ú]blico or any other equivalent non-English term in any form of communication that advertises his or her services as a notary public, including, without limitation, a business card, stationery, notice and sign.[44]

Section 2 was added in 2005.[45] The amendment highlights that there has been a growing concern regarding the unauthorized practice of law. The question then becomes whether this statute is fulfilling its goal. A search through the Nevada business database did not yield a single business that contains *notario* in the title.[46] The statute might effectively be deterring businesses from advertising or calling themselves *notarios públicos*, but it is not creating public awareness that only

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43. Jonathan A. Pikoff & Charles J. Crimmins, *Lost in Translation: Texas Notary Public v. Mexico* Notario Público, TEX. SEC'Y OF STATE, http:// www.sos.state.tx.us/statdoc/notariopublicoarticle.shtml (last visited May 15, 2012).

44. NEV. REV. STAT. § 240.085 (2012).

45. *Id.*

46. *See Nevada Business Search,* NEV. SEC'Y OF STATE, http://nvsos.gov/sosentitysearch/CorpSearch.aspx (last visited Feb. 13, 2013) (indicating that conducting a search for business entities using the word "*notario*" in the Nevada Business Database yields no results).

licensed attorneys can offer legal advice.

As previously mentioned, 29% of the survey-takers indicated they have gone to a *notario público* for legal assistance. This finding is problematic for several reasons. There are no businesses in Las Vegas, Henderson, or North Las Vegas that are registered under the name of *notario público* and yet members of the Latino community are asserting that they are going to *notarios* for legal assistance. Furthermore, none of the survey-takers made the clarification that a notary public cannot offer legal advice. The result is that while no business is advertising itself as a *notario público*, the Target Population nevertheless refers to some businesses as such and resorts to them for legal services.

Instead of focusing on preventing businesses from calling themselves *notarios públicos* the government should channel its energies to raise awareness throughout the Latino community of the unauthorized practice of law. Several of the survey-takers, when asked why they used a notary public as opposed to an attorney, did not use the key phrase *notario público* and instead explained that *multiservicios* (multi-services) are cheaper and faster. There are businesses that offer Hispano Services or *multiservicios* scattered throughout southern Nevada in areas that are densely populated by Latino families.[47] Not all businesses that include those phrases in their advertisement or business names are conducting unauthorized practice of law, but at a minimum, they should be subject to some scrutiny. These businesses are notorious for setting up shop in unsuspecting neighborhoods and taking advantage of community members. By the time the word spreads of their deceiving practices the businesses are closed and no one is held accountable. This is supported by a search of the Nevada business registry that revealed that recently four businesses that include both *Hispano* and *services* or *servicios* in their title have had their licenses revoked.[48] Three other businesses with *multiservicios* in their title also had their license revoked.[49]

Several pressing issues emerge. First, preventing businesses from using certain key phrases or terms only puts a small dent in the bigger issue of lack of awareness, because new phrases and terms are now being used as trigger words to signify *notario público* to the Latino population, such as *multiservicios*. Colloquial language will evolve as needed to replace words prohibited in advertisements. Attention should move away from the businesses and back to the Latino community. There is a direct correlation between not knowing of Services and going to a *notario público* for legal assistance.[50] It is important to keep in mind that the Target Population seeks legal advice from businesses that are unauthorized to offer it because there is still a great misunderstanding of who is authorized to offer legal advice, as evidenced by the survey-takers

47. *Id.; License Status,* CITY OF NORTH LAS VEGAS, http://www.cityofnorthlasvegas.com/departments/finance/businesslicense/BLLicStat.aspx (last visited May 8, 2012) (Revoked means the business failed to renew their business license).

48. *Nevada Business Search, supra* note 46.

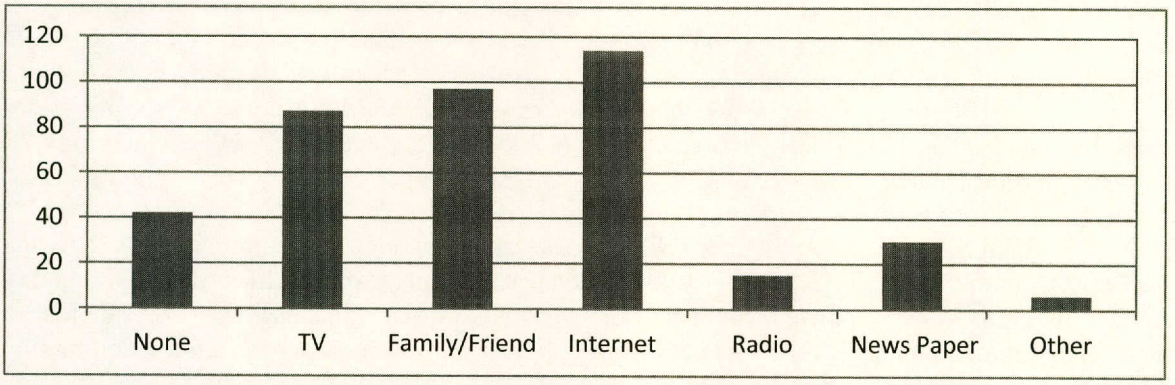
49. *Id.*

50. *See supra* note 43 and accompanying text.

speaking so freely of going to *notarios públicos* for legal assistance. The warning about the unauthorized practice of law needs to continue to spread throughout the Latino community.

V. SOLUTIONS

Figure A: Sources of Information



Raising awareness in the Latino community is a daunting task with constant challenges dictated by cultural barriers. It is imperative that raising awareness of available Services continues to be a priority. Information needs to be made available in Spanish as well as in English. Often, organizations are confident that their information is available to the community at large, but overlook the fact that it is not in Spanish.[51] This is a dilemma because too much of the Spanish speaking population in Las Vegas, Henderson, and North Las Vegas still does not speak English well.[52] Cultural barriers are often difficult to penetrate, thus it is particularly important that trusted members of the Latino community take it upon themselves to disperse the needed information and raise consciousness of the available programs and organizations that offer Services.

Furthermore, as Figure A indicates, patience is necessary because the Target Population still relies heavily on word of mouth, slowing the pace at which information can travel within networks.[53] However, the data is promising because, as Figure A shows, the Target Population is

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51. *See, e.g.*, http://www.lasvegashomes.com/.

52. *See , American FactFinder – Selected Social Characteristics in the United States 2007-2011, Nevada*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_5YR_DP02&prodType=table, (last visited on Feb. 14, 2013) (reporting that over 237,000 Nevadans who speak Spanish are classified as speaking English less than "very well").

53. JUANA M. MORA & DAVID R. DIAZ, IN LATINO SOCIAL POLICY: A PARTICIPATORY RESEARCH MODEL 251 (2004) (discussing how organizations and people who are trying to help the Latino community need to first establish a personal

also frequently referring to the Internet to access help. The Internet is replete with sources of information. As technology becomes more and more accessible, the Latino community will have increased access to resources.

Increasing access to Services requires a commitment by all members of the legal community. The legal community should feel obligated to ensure the law is accessible to all. This idea is best exemplified by the incredible commitment and hard work of Legal Aid Center of Southern Nevada (LACSN). In 2011, over 60,000 people used their services and programs.[54] Of that amount, 45,000 people were helped through the Civil Law Self Help Center.[55] Of all the people who used their services in 2011, approximately one-third (20,000) identified themselves as Latinos.[56] LACSN always gives those who walk through their door the contact information for other resources such as the Self-Help Centers, the State Bar Lawyer Referral Services, Ask-A-Lawyer programs, and LACSN free classes.[57]

William S. Boyd School of Law (BLS) is also taking an admirable approach to helping the Las Vegas community. All BSL first-year law students are required to participate in the community service program where students conduct workshops and offer valuable legal information to members of the community.[58] BSL is also helping bridge the disconnect between the community and the university by offering different in-house legal clinics on a variety of topics.[59] BSL, through its emphasis on community service, exemplifies the obligation attorneys have to constantly seek to ensure the law is accessible to all.

There are other organizations and programs that are also in the frontlines helping the Latino community, but ultimately there is a dire need for more Services. Even if everyone who needed Services knew where to find them, staff and funding limitations would foreclose the possibility of helping everyone. Latinos face the same legal challenges as other residents, but are among the least likely to obtain professional legal assistance.[60] Advertising Services to the Latino community must be tailored with the understanding that there are major barriers that inhibit their willingness to utilize services even when they are available.[61]

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connection with members of the community, and that, with time, the information will get out that a particular person or organization is well intentioned and reliable via word-of-mouth).

54. Email Interview with Lynn Etkins, Development Director, Legal Aid of Southern Nevada (May 16, 2012).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Community Service Program,* WILLIAM S. BOYD SCHOOL OF LAW, http://law.unlv.edu/academics/service-learning/community-service-program.html (last visited May 5, 2012).

59. *Id.*

60. *See* Access to Justice, *supra* note 2, at 6–7.

61. *Id.* at 58–59.

VI. LIMITATIONS

It was clear prior to creating the survey that the results would undoubtedly lead to more questions than answers. We will consider this survey to be an absolute success if it encourages any individual or organization do further research on this topic. This endeavor posed challenges at every stage. Limited funding constrained this project because it was difficult to find enough volunteers who could donate their time to fill all the preselected dates and time slots. Thus, the sample size was large enough to draw significant data from it, but not to allow the liberty to test a greater number of factors. Future studies should survey larger sample sizes of the Target Population to test the roles of additional factors such as age and gender.

Another limitation is that the survey focused on Latinos over the age of seventeen. This project demonstrates that even when the goal is to allow insight to the needs of an underrepresented community, the constraints of limited resources often silence the perspective of the most marginalized members of that community, in this case Latino children. Children in need are greatly underserved and rarely have their needs appropriately assessed.[62] Moreover, in order to gauge the integration of any community into society it is necessary to hear the voice of the entire population. Future studies should consider addressing the awareness of Services in the under-eighteen population.

The data for individuals who would not be found in the areas that were surveyed, because they do not shop at the particular stores where the interviews were conducted and do all their DMV transactions online or via postal mail, were also excluded. It is a daunting, yet necessary, task to create a random sampling that adequately encapsulates an entire population.

The method used to sample the Target Population was area probability sampling. Future studies should consider using the stratified sampling method.[63] For example, the Latino population could be broken down categorically into geographical origin; then the data could be tested to understand whether Central-Americans are more or less likely to know of Services than South Americans, and so on. The population could also be divided by country of origin to test, for example, if a person from Peru is more or less likely to know of Services than someone from Mexico. An alternative question that could be explored is whether someone who was born in a foreign country rather than in the United States affects the awareness of Services. It is unclear from the data if one group from the Target Population is affected more than others. Understanding whether some groups in the Target Population are more affected than others helps programs and organizations that offer free or inexpensive legal services focus their resources more effectively.

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62. *See* Access to Justice, *supra* note 2, at 6.

63. *See* ALLEN RUBIN & EARL R. BABBIE, RESEARCH METHODS FOR SOCIAL WORK 369 (Seth Dobrin et al. eds., 7th ed. 2009) (explaining that a stratified sampling method is where the objective is to ensure that appropriate numbers of elements are drawn from homogeneous subsets of that population).

VII. CONCLUSION

Even if the supply equaled the current unmet demand, these resources could go unused because the Target Population is unaware of Services. Income, education, and language are significant factors that affect whether a Latino from the Target Population knows of Services or not. This project suggests that several interwoven factors make-up the burning fuse behind the detonating reality that the Latino community in Las Vegas, Henderson, and North Las Vegas is unaware of Services. The dilemma is complex because the factors are interwoven; thus, addressing only one of them does not resolve the problem. A collective, systematic effort is necessary to ensure the available resources are not exhausted on a single factor. Communication among organizations and programs is pivotal to comprehend what factors are not being addressed.

The use of traditional outreach methods to inform the Latino community of Services needs to be reassessed to overcome cultural barriers that interfere with the flow of information to the Latino community.[64] Trusted members of the Latino community are integral to achieving successful information campaigns promoting Services throughout the Latino community.[65] Too many of the survey-takers indicated that they rely on word of mouth; hence, it is imperative that organizations and programs recognize its importance, even if they do not see immediate results.

The Target Population avoids attorneys for a host of reasons and consequently they are left in need of an alternative. The *notario público* is currently filling the void. To counter state law restricting notary publics, different phrases are starting to take on the same meaning as *notario público*, as made apparent by 29% of the survey-takers who claimed to have visited a *notario público* for legal assistance despite the fact that the Nevada business registry lists no business using the title "*notario público*."[66]

Nevada Revised Statute section 240.085 might effectively be deterring businesses from misrepresenting themselves as *notarios públicos*, but not enough is being done to address the Latino community's misunderstanding of the capabilities of *notarios públicos*. This inference is supported by the fact that more participants indicated they had gone to a *notario público* for legal assistance than the number of participants who stated they knew of Services.

Future studies should study more in-depth the role of *notarios* in serving the Target Population. Furthermore, future studies should consider using the stratified sampling method to sample the Target Population to get a better understanding of which sub-groups within the Latino community are most affected. Equally as important, future studies should incorporate as a primary

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64. *See* Access to Justice, *supra* note 2, at 59 (describing why outreach methods are often not effective in reaching Latino communities because of cultural barriers).

65. MORA & DIAZ, *supra* note 53.

66. NEV. SEC'Y OF STATE, *supra* note 46.

objective collecting data on children who are part of the Latino community. Presently, the legal needs of children within the Latino community are not fully understood.

At the most fundamental level, access starts with information. Language and cultural barriers serve as impediments that can keep people from using Services even when they know where to find them, but at least they know about this option. LACSN and BLS are among some of the many organizations, programs, and institutions that are reinforcing how everyone can positively contribute to this issue in different manners: the trusted community member takes the information into the Latino community, the institution encourages future attorneys to serve the community, the organization seeks funding to be able to provide legal assistance, and the list goes on. All are essential to the equation of having a more aware Latino community that knows how to access Services. The legal community carries the burden of resolving this issue; an officer of the court has a fundamental obligation to ensure that the law is accessible to all.

APPENDIX: DATA

An analysis of key variables helps identify trends and allows for inferences to be made regarding the Target Population. This discussion will focus on the data, the response variable, the explanatory variables, and the log-linear model used to fit the data, as well as ancillary hypothesis tests.

A. The Raw Data

Table A

Aware of Inexpensive Legal Services	Annual Income	Education Level	Preferred Language	Number of Latinos	Category Number
Not Aware	<$25K	High School Diploma or Less	Spanish	146	1
Not Aware	<$25K	High School Diploma or Less	English	36	2
Not Aware	<$25K	At Least Some College	Spanish	6	3
Not Aware	<$25K	At Least Some College	English	3	4
Not Aware	$25K–$50K	High School Diploma or Less	Spanish	75	5
Not Aware	$25K–$50K	High School Diploma or Less	English	18	6
Not Aware	$25K–$50K	At Least Some College	Spanish	6	7
Not Aware	$25K–$50K	At Least Some College	English	10	8
Not Aware	$50K–$75K	High School Diploma or Less	Spanish	2	9
Not Aware	$50K–$75K	High School Diploma or Less	English	8	10
Not Aware	$50K–$75K	At Least Some College	Spanish	1	11
Not Aware	$50K–$75K	At Least Some College	English	4	12
Not Aware	>$75K	High School Diploma or Less	Spanish	3	13
Not Aware	>$75K	High School Diploma or Less	English	0	14
Not Aware	>$75K	At Least Some College	Spanish	0	15
Not Aware	>$75K	At Least Some College	English	2	16
Aware	<$25K	High School Diploma or Less	Spanish	23	17
Aware	<$25K	High School Diploma or Less	English	11	18
Aware	<$25K	At Least Some College	Spanish	6	19
Aware	<$25K	At Least Some College	English	2	20
Aware	$25K–$50K	High School Diploma or Less	Spanish	11	21
Aware	$25K–$50K	High School Diploma or Less	English	0	22
Aware	$25K–$50K	At Least Some College	Spanish	2	23
Aware	$25K–$50K	At Least Some College	English	6	24
Aware	$50K–$75K	High School Diploma or Less	Spanish	2	25
Aware	$50K–$75K	High School Diploma or Less	English	0	26

Aware	$50K–$75K	At Least Some College	Spanish	0	27
Aware	$50K–$75K	At Least Some College	English	2	28
Aware	>$75K	High School Diploma or Less	Spanish	3	29
Aware	>$75K	High School Diploma or Less	English	0	30
Aware	>$75K	At Least Some College	Spanish	0	31
Aware	>$75K	At Least Some College	English	3	32

Table A is a display of the raw data collected from randomly sampling 391 individuals from the Target Population. The first four columns of Table A refer to questions 5, 10, 11, and 12 of the survey, respectively. The fifth column of Table A refers to the number of sampled individuals that answered questions 5, 10, 11, and 12 in a particular row of Table A. The sixth column uniquely identifies all 32 possible combinations of answers to question 5, 10, 11, and 12.

Tables B–D analyze the marginal effects between two specific factors.

Table B

Aware of Inexpensive Legal Services	Number of Latinos
Aware	71
Not Aware	320

Table C

Aware of Inexpensive Legal Services	Have Previously Been to a Notary Public	Number of Latinos
Not Aware	No	234
Aware	No	44
Not Aware	Yes	86
Aware	Yes	27

Table D

Aware of Inexpensive Legal Services	Have You Been Involved in a Legal Dispute	Number of Latinos
Not Aware	No	253
Not Aware	Yes	67
Aware	No	42
Aware	Yes	29

B. *Modeling the Data*

1. Sampling Assumptions

We wish to adhere to certain properties in order to properly infer conclusions from the data. The relevant properties are the properties of a multinomial experiment which are defined as follows:

Property 1. The experiment consists of n identical trials;

Property 2. There are k possible outcomes/categories to each trial;

Property 3. The probabilities of the k outcomes/categories, denoted by $p_1, p_2, \ldots, p_k$, where $p_1 + p_2 + \ldots + p_k = 1$, remain the same from trial to trial;

Property 4. The trials are independent;

Property 5. The random variables of interest are the outcome/category-counts of the number of observations that fall into each of the k categories.[67]

Considering that each of the n=391 surveys was administered identically to each subject, that the number of outcomes(categories) is k=32, that the probabilities $p_1, p_2, \ldots, p_{32}$, of a Latino falling into any of the k=32 categories are approximately equal from survey to survey, that our random area probability sampling method ensures independent trails from survey to survey, and that our interest lies in the number of Latinos that fall into each category, one can safely assume that the experiment is a multinomial experiment.

2. Variable Definitions

Each of the 32 categories in Table A can be uniquely characterized by four factors: Awareness of Inexpensive Legal Services, Annual Income, Education Level, and Preferred Language. We define independent variables A, I, E, and L, corresponding to each of the four factors, respectively. These independent variables will be defined in Table E as follows:

67. JAMES T. MCCLAVE & TERRY SINCICH, STATISTICS 744 (Christine Hoag et al. eds., 11th ed., 2009).

Table E

Factor	Independent Variable	Implicit Value	Explicit Value
Awareness of Inexpensive Legal Services	A	a	1=Aware 0=Not Aware
Annual Income	I	i	1=<$25K 2=$25K–$50K 3=$50K–$75K 4=>$75K
Educational Level	E	e	1=High School Diploma or Less 0=At Least Some College
Preferred Language	L	l	1=English 0=Spanish

The variables $p_1, p_2, \ldots, p_{32}$ will be defined as the unknown probability of any one Latino in the target population falling into category 1, 2, . . ., or 32, respectively. [68]

The variable $p_{a,i,e,l}$ is the unknown probability that uniquely corresponds $p_1, p_2, \ldots,$ *or* p_{32} based on the four factor values. For example, $p_{1,4,1,0}$ uniquely corresponds to p_{29} since category 29 is defined by the factors a=1(Aware), i=4(>$75k), e=0(High School Diploma or Less), and l=0(Spanish).

The response variable $\Lambda_{a,i,e,l}$ will be defined as the transformation of $p_{a,i,e,l}$ using the canonical log link function: $\Lambda_{a,i,e,l} = log(p_{a,i,e,l})$.[69]

3. Fitting the Model

We will now fit the loglinear model for our response variable $\Lambda_{a,i,e,l}$, implementing a stepwise procedure to find the best model:

Step 1: In the first step, we look for a *starting model*, one that is close to the best model. We begin by choosing a significance level, say .05, and then test for the goodness-of-fit of all models of uniform orders. A model of uniform orders contains all interaction terms involving the same number of factors.

Step 2: In the second step, we apply the stepwise procedure to the starting model found in Step 1 in order to reach the best model.[70]

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68. *Id.*
69. CHAP T. LE, APPLIED CATEGORICAL DATA ANALYSIS 70 (Vic Barnett et al. eds., 1st ed., 1998).
70. *Id.* at 90.

The *starting model* will be defined with all three-factor interaction terms:

$$H_3 : \lambda + \lambda_A + \lambda_I + \lambda_E + \lambda_L + \lambda_{AI} + \lambda_{AE} + \lambda_{AL} + \lambda_{IE} + \lambda_{IL} + \lambda_{EL} + \lambda_{AIE} + \lambda_{AIL} + \lambda_{AEL} + \lambda_{IEL}$$

The summary of the model is given by the R command, *summary()* :

Figure 1

```
> summary(H3)
Call:
glm(formula = n ~ (Aware + Income + Education + Language)^3,
   family = poisson, data = legal.data)

Deviance Residuals:
1          2          3          4          5          6          7          8          9
0.11623   -0.23036   -0.53227    0.98562   -0.09938    0.20698    0.37121   -0.26570   -0.34960
10         11         12         13         14         15         16         17         18
0.19389    0.68091   -0.25686    0.00000   -0.00010   -0.00010    0.00000   -0.28618    0.44144
19         20         21         22         23         24         25         26         27
0.62319   -0.82304    0.26763   -1.31448   -0.54006    0.37121    0.41936   -1.03533   -1.03533
 28         29         30         31         32
0.41936    0.00000   -0.00009   -0.00009    0.00000
(Dispersion parameter for poisson family taken to be 1)

Null deviance: 976.7392  on 31  degrees of freedom
Residual deviance: 8.3389  on 3  degrees of freedom
AIC: 158.61Number of Fisher Scoring iterations: 17.[71]
```

Using the sum of the squared Pearson Residuals, we obtain the following test statistic given by R:

Figure 2

```
> Test.Statistic<-sum((resid(H3,type="pearson"))^2)
> Test.Statistic =  6.751625.[72]
```

71. Mark E. Irwin, Model Assessment – Part II (2006), http://www.markirwin.net/stat149/Lecture/Lecture14.pdf .

72. Mark E. Irwin, *Log-linear Models for Contingency Tables* (2006), http://www.markirwin.net/stat149/Lecture/Lecture18.pdf.

To test goodness-of-fit for the H_3 model, the test statistic, 6.75, on 3 residual degrees of freedom will be used to obtain the following p-value given by R:

Figure 3

```
> pchisq(6.75, 3, lower.tail=F)
0.08025011.[73]
```

With a p-value of .08, we accept the H_3 as a good fit for the data at a .05 significance level.[74]

The next step is to proceed with a backwards elimination. The R command, *anova(),* will be used to assess the significance level of terms in the model.[75] A term will be eliminated at the .05 significance level.[76]

73. *Id.*
74. LE, *supra* note 69, at 90.
75. Mark E. Irwin, *Three-way Contingency Tables* (2006), http://www.markirwin.net/stat149/Lecture/lecture19.pdf.
76. *Id.*

Figure 4

> anova(H3,test="Chisq")
Analysis of Deviance Table
Model: poisson, link: log
Response: n
Terms added sequentially (first to last)

	Df	Deviance Resid.	Df	Resid. Dev	P-Value(>|Chi|)
NULL			31	976.74	
Aware	1	171.54	30	805.20	< 2.2e-16 ***
Income	3	363.50	27	441.70	< 2.2e-16 ***
Education	1	231.74	26	209.96	< 2.2e-16 ***
Language	1	87.07	25	122.89	< 2.2e-16 ***
Aware:Income	3	8.42	22	114.47	0.038087 *
Aware:Education	1	16.02	21	98.45	6.275e-05 ***
Aware:Language	1	2.06	20	96.40	0.151693
Income:Education	3	23.24	17	73.15	3.591e-05 ***
Income:Language	3	21.69	14	51.46	7.574e-05 ***
Education:Language	1	21.85	13	29.62	2.954e-06 ***
Aware:Income:Education	3	1.09	10	28.52	0.778579
Aware:Income:Language	*3*	*2.76*	*7*	*25.77*	*0.430743*
Aware:Education:Language	*1*	*0.20*	*6*	*25.56*	*0.651861*
Income:Education:Language	*3*	*17.23*	*3*	*8.34*	*0.000635* ***

The analysis of deviance table shows that the interaction term λ_{AL} is insignificant with a p-value of 0.151.[77] The interaction terms λ_{AIE}, λ_{AIL}, and $\lambda_{AEL}$are also insignificant with p-values of 0.778, 0.430, and .651, respectively.[78] Therefore, those terms are eliminated from the model, and the best model for the data is

$$H_{Best} : \lambda + \lambda_A + \lambda_I + \lambda_E + \lambda_L + \lambda_{AI} + \lambda_{AE} + \lambda_{IE} + \lambda_{IL} + \lambda_{EL} + \lambda_{IEL} .$$

77. LE, *supra* note 69, at 93.
78. *Id.*

4. Model Diagnostics

To assess how well the model fits the data, we will perform a goodness-of-fit test for the model H_{Best}.[79] The H_{Best} model summary is given below.

Figure 5

```
> summary(Hbest)
Call:
glm(formula = n ~ (Aware + Income + Education + Language)^2 -
    Aware:Language + Income:Education:Language, family = poisson,
    data = legal.data)

Deviance Residuals:
     Min        1Q    Median        3Q       Max
-1.97946  -0.33158  -0.00009   0.37378   1.59123
(Dispersion parameter for poisson family taken to be 1)

Null deviance: 976.739  on 31  degrees of freedom
Residual deviance: 14.538  on 11  degrees of freedom
AIC: 148.8
Number of Fisher Scoring iterations: 17
```

The test statistic will again be the sum the squared Pearson Residuals.[80]

Figure 6

```
> Test.Statistic<-sum((resid(Hbest,type="pearson"))^2)
> Test.Statistic = 13.27402
```

The p-value for the test will be given by R.[81]

Figure 7

```
> pchisq(13.274,11,lower.tail=F)
 0.2757948
```

With a p-value of .275, we accept H_{Best} as a good fit at the .05 significance level.[82]

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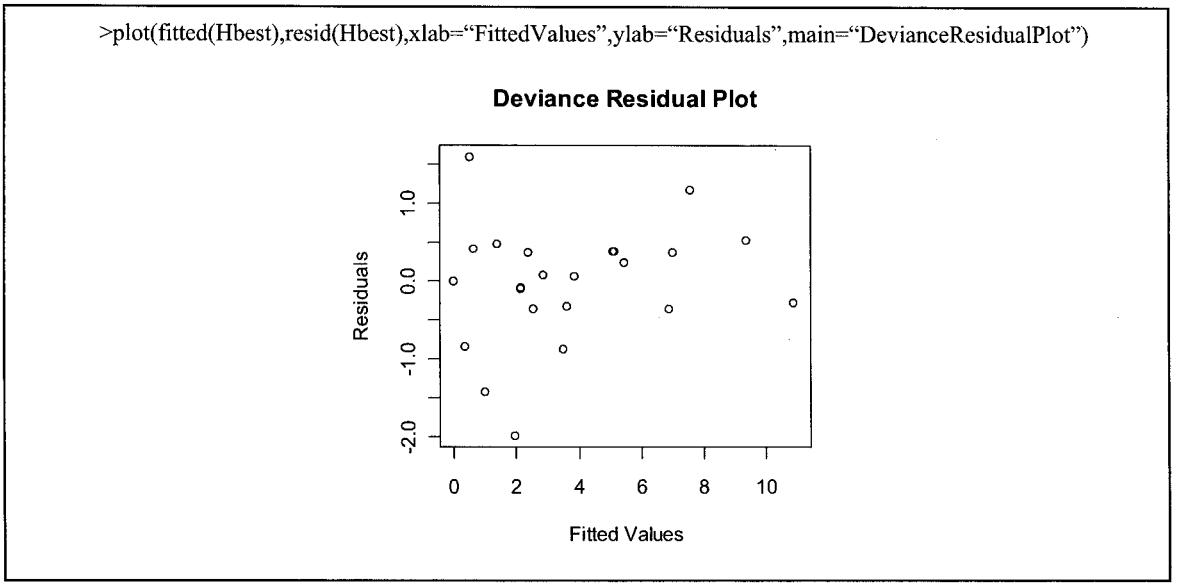
79. Irwin, *supra* note 71.
80. Irwin, *supra* note 72.
81. *Id.*
82. LE, *supra* note 69, at 90.

We will also plot the deviance residuals versus the fitted values. The graph will be produced in R using the function *plot()*.[83]

Figure 8



The random pattern in the deviance residual plot shows that the data samples are in fact random.[84] The deviance residual plot also contains no outlier that could potentially contaminate the model H_{Best}.[85]

C. *Model Analysis and Results*

The model H_{Best} shows that different language preferences are not related to one's awareness of free legal services in the targeted population since the interaction term λ_{AL} was insignificant.[86] The measure of association between Awareness and Income and between Awareness and Education Level can be calculated from the model estimated coefficients λ_{AI} and λ_{AE}, respectively. These coefficients will be obtained using the R command *$coefficients*.[87]

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83. Mark E. Irwin, *Model Assessment* (2006), http://www.markirwin.net/stat149/Lecture/lecture13.pdf.
84. Irwin, *supra* note 71.
85. *Id.*
86. LE, *supra* note 69, at 93.
87. PETER DALGAARD, INTRODUCTORY STATISTICS WITH R 97 (J Chambers et al. eds., 1st ed., 2002).

Figure 9: >Hbest$coefficients

(Intercept)	Aware1	Income2
1.9313625	-0.3019069	-0.2376207
Income3	Income4	Education1
-2.3717283	-21.7284608	3.0230058
Language1	Aware1:Income1	Aware1:Income2
-0.8754687	-0.5042431	-0.4517482
Aware1:Income3	Aware1:Income4	Aware1:Education1
-0.2899926	1.2458157	-1.348987
Aware1:Education0	Income1:Education1	Income2:Education1
1.348987	-16.3467335	-0.3776318
Income3:Education1	Income4:Education1	Income2:Language1
-1.3305063	18.0548716	1.5686159
Income3:Language1	Income4:Language1	Education1:Language1
2.6672282	21.0094373	-0.4042824
Income2:Education1: Language1	Income3:Education1: Language1	Income4:Education1: Language1
-1.8528403	-0.6943299	-40.1146607

From odds ratio formula, we obtain the following odds ratio of awareness between education levels 1 and 0:

$$OR_{\substack{\textit{At Least Some College} \\ vs \\ \textit{High School Diploma or Less}}} = exp\left[2\left(\lambda_{AE(1,0)} - \lambda_{AE(1,1)}\right)\right] = exp\{2[1.34987 - (-1.34987)]\} = 221.2913.$$[88]

This means that Latinos in the Target Population with at least some college are 221 times more likely to be aware of inexpensive legal services than Latinos with a high school diploma or less.[89] Applying the formula for odds ratio to income levels 1, 2, 3, and 4, we obtain the following 6 odds ratios between all income levels:

$$OR_{\substack{>\$75k \\ vs. \\ \$50k-\$75k}} = exp\left[2\left(\lambda_{AI(1,4)} - \lambda_{AL(1,3)}\right)\right] = exp\{2[1.2458 - (-0.2899)]\} = 21.57676$$[90]

88. LE, *supra* note 69, at 96.
89. *Id.* at 97.
90. *Id.* at 96.

$$OR_{\substack{>\$75k \\ vs. \\ \$25k-\$50k}} = exp\left[2\left(\lambda_{AI(1,4)} - \lambda_{AL(1,2)}\right)\right] = exp\{2[1.2458157 - (-0.4517482)]\} = 29.81846^{91},$$

$$OR_{\substack{>\$75k \\ vs. \\ <\$25k}} = exp\left[2\left(\lambda_{AI(1,4)} - \lambda_{AL(1,1)}\right)\right] = exp\{2[1.2458157 - (-0.5042431)]\} = 33.11935^{92},$$

$$OR_{\substack{\$50k-\$75k \\ vs. \\ \$25k-\$50k}} = exp\left[2\left(\lambda_{AI(1,3)} - \lambda_{AL(1,2)}\right)\right] = exp\{2[(-0.2899926) - (-0.4517482)]\} = 1.381972^{93},$$

$$OR_{\substack{\$50k-\$75k \\ vs. \\ <\$25k}} = exp\left[2\left(\lambda_{AI(1,3)} - \lambda_{AL(1,1)}\right)\right] = exp\{2[(-0.2899926) - (-0.5042431)]\} = 1.534955^{94},$$

$$OR_{\substack{\$25k-\$50k \\ vs. \\ <\$25k}} = exp\left[2\left(\lambda_{AI(1,2)} - \lambda_{AL(1,1)}\right)\right] = exp\{2[(-0.4517482) - (-0.5042431)]\} = 1.110699.^{95}$$

From the odds ratios, we see that Latinos in the Target Population who earn an annual income of more than $75,000 are 22, 30, and 33 times more likely to be aware of inexpensive legal services than Latinos who earn an annual income between $50,000 and $75,000, between $25,000 and $50,000, and less than $25,000, respectively.[96] Latinos in the Target Population who earn an annual income between $50,000 and $75,000 are 1.38 and 1.53 times more likely than Latinos who earn between $25,000 and $50,000 and Latinos who earn less than $25,000, respectively.[97] Latinos in the Target Population who earn between $25,000 and $50,000 are 1.1 times more likely than Latinos who earn less than $25,000.[98]

These odd ratios imply that while there is an equal to slightly higher chance of Latinos in the Target Population of being aware of inexpensive legal services as annual income levels increase from less than $25,000 to $75,000, there is a greater disparity of awareness in the Target Population as the income level surpasses $75,000. Moreover, the greatest disparity of awareness in the Target Population occurs between education levels, with an almost certain likelihood that a Latino with some college education will be more aware of inexpensive legal services than a Latino with a high school diploma or less.

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91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 97.
97. *Id.*
98. *Id.*

D. Analysis of Table B

Table B shows the number of Latinos sampled from the Target Population who answered "Yes" or "No" to question 5 of the survey. Since the response to question 5 follows a binomial distribution, with a success defined as the "Yes" response and number of Latinos sampled, equal to 391, a hypothesis test of the population proportion, p, can be administered to test whether the population proportion of Latinos who are aware of Services is at least one-half; that is, the majority of Latinos are aware.[99] A Large-Sample Test of Hypothesis about p will be used to test the null hypothesis that $p = 1/2$ against the alternative hypothesis that $p < 1/2$ at the .05 significance level.[100] The elements of the test are as follows:

$$H_0: p = {}^1/_2 \; vs. \; H_a: p < {}^1/_2$$

$$Test\ statistic: z = \frac{\hat{p} - \frac{1}{2}}{\sigma_{\hat{p}}} \approx \frac{\frac{71}{391} - \frac{1}{2}}{\sqrt{\frac{\frac{1}{2} * \frac{1}{2}}{391}}} = -12.59$$

$$Rejection\ Region: z < -z_{.05} = -1.96.^{101}$$

Since the test statistic falls into the rejection region, we reject the H_0 and assume H_a at the .05 significance level.[102] The statistical test purports that the majority of Latinos in the Target Population are unaware of Services.

99. MCCLAVE & SINCICH, *supra* note 67, at 196.

100. *Id.* at 381.

101. *Id.*

102. *Id.*

SECURE COMMUNITIES, RACIAL PROFILING, & SUPPRESSION LAW IN REMOVAL PROCEEDINGS

AMELIA FISCHER

I. INTRODUCTION

Almost thirty years ago, the United States Supreme Court decided *I.N.S. v. Lopez-Mendoza*, declaring that generally, the Fourth Amendment's exclusionary rule does not apply in immigration proceedings to suppress illegally obtained evidence.[1] The Court noted, however, that its decision did not rule out Fourth Amendment claims concerning "egregious violations" and "violations that might transgress notions of fundamental fairness," thereby providing the current and limited suppression standard used in immigration courts today.[2]

This restricted application of the exclusionary rule in removal proceedings has made prevailing on suppression claims in immigration court incredibly difficult.[3] By applying a heightened egregiousness standard to the Fourth Amendment violation analysis, the U.S. immigration justice system accepts evidence that would be squarely rejected in U.S. criminal courts; immigration officials then rely on this evidence to deport countless numbers of people without concern for the illegality of their initial apprehensions. The Supreme Court based its decision in *Lopez-Mendoza* on several factors, including the fact that removal is considered a civil, not criminal, matter; that there would be a low deterrence effect on immigration officials at a great social cost; and that a normal application of the exclusionary rule would frustrate the already difficult immigration enforcement efforts.[4] In justifying its ruling, therefore, the Supreme Court relied on the particularities of immigration enforcement at the time, when people were placed in deportation proceedings overwhelmingly by immigration officer actions and immigration stops, detentions, and arrests.

But we no longer live in that world. Secure Communities (SComm)[5] has forever changed the manner in which immigration enforcement is carried out.[6] In an unprecedented way, state and local law enforcement officers are now important players in the apprehension of undocumented immigrants and other immigrants subject to removal. As such, the path to deportation increasingly begins with a traffic stop or a criminal arrest executed by state and local police officers, occurrences

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1. I.N.S. v. Lopez-Mendoza, 468 U.S. 1032 (1984).

2. *Id.* at 1050–51.

3. There are regulatory provisions in the Immigration and Nationality Act that provide for similar claims against immigration officers in removal proceedings, but those regulations are not the subject of this paper and provide little (if any) protection now, given the recent BIA decision that the regulations do not apply until after a Notice to Appear has been filed, usually months after the arrest. *See In re* E-R-M-F & A-S-M-, 25 I. & N. Dec. 580 (B.I.A. 2011).

4. *Id.*

5. Secure Communities is a federal program that marshals police officers into the immigration enforcement realm by making them active participants in immigrants' apprehension. For a more in-depth explanation of how it works *see infra* Part I.B.

6. The focus of this paper is SComm's effect on immigration enforcement and on the way SComm should affect suppression law in immigration court, but the author acknowledges that other federal-local partnerships, like the Criminal Alien Program and § 287(g) of the Immigration and Nationality Act, are also responsible for the way in which immigration enforcement has changed.

the *Lopez-Mendoza* Court failed to contemplate.

The *Lopez-Mendoza* justifications have no place in this new immigration enforcement landscape. The decision resulted in different standards and factors in suppression law analysis based on the components of who the actors were and the type of stop, detention, or arrest challenged. Because immigration enforcement is changing and transforming the very components of suppression law standards, the way immigration courts apply the Fourth Amendment in removal proceedings should change as well. Regardless of where the suppression claim is litigated, the character of the initial stops under SComm remains the same: the stops always involve state and local police, and they always require reasonable suspicion of either a *traffic violation* or *criminal activity*.[7] In criminal courts, the legality of such stops is analyzed using the Fourth Amendment in its unlimited form, regardless of the immigration status of the alleged offender. Accordingly, the full powers and protections of the Fourth Amendment should also dictate the resolution of respondents' claims challenging the lawfulness of SComm stops in immigration court. To afford immigrants anything less, like a limited version and lax application of the exclusionary rule currently touted by Immigration and Customs Enforcement (ICE) and employed by immigration judges, is inconsistent with the purpose of the Fourth Amendment, traditional suppression law treatment, and the vision of the Due Process Clause of the Fifth Amendment.

Part II of this paper provides a comprehensive overview of the federal Secure Communities program and explains how its application has led, and continues to lead, to racial profiling. The discussion then shifts in Part III to how suppression through the Fourth Amendment's Exclusionary Rule works in immigration court, including an overview of how the Exclusionary Rule is applied in normal criminal proceedings. Part III concludes with an explanation of barriers immigrants face in making suppression claims in immigration court that criminal defendants in criminal proceedings do not. Part IV offers a discussion of local law enforcement's role in immigration enforcement, discussing in particular what police officers are and are not legally able to do in enforcing immigration laws. Finally, Part V, the concluding section, argues why the Fourth Amendment, in its full form as used in criminal proceedings, should also be applied in immigration court and why the prevailing case law on suppression in immigration court no longer has a place in the world of immigration enforcement today.

7. *See* Terry v. Ohio, 392 U.S. 1, 30 (1968) (holding that the Fourth Amendment prohibition on unreasonable searches and seizures is not violated when a police officer stops a suspect if the police officer has a reasonable suspicion that the person has committed, is committing, or is about to commit a crime).

II. SECURE COMMUNITIES: OVERVIEW OF THE PROGRAM AND THE RACIAL PROFILING IT ALLOWS

Piloted under the Bush Administration in 2008, SComm is a federal program that creates partnerships between ICE and state and local law enforcement agencies, involving those law enforcement agencies in the apprehension of immigrants who may be removable.[8] Under SComm, which is designed to identify immigrants in jails and flag them for ICE's review, law enforcement authorities, when booking an arrestee, submit his fingerprints not only to federal criminal databases, but to immigration databases, as well.[9] If the person's fingerprints reveal that the person is undocumented or otherwise removable, ICE is automatically informed; ICE then issues a detainer against the arrestee, requesting that the law enforcement agency hold the person (for a period not to exceed forty-eight hours) until ICE can come to pick him up.[10] If the person is removable, ICE will generally then initiate deportation proceedings.

While SComm does give state and local police a role in immigration enforcement, the program as it now stands does not authorize or request that those officers make immigration stops, detentions, arrests, or determinations of immigration status at the front end.[11] The detention of individuals under ICE's request should result always from standard criminal law enforcement unrelated to immigration matters.[12] Presumably, then, a standard SComm situation should arise when, for example, an undocumented person breaks a law, the local police arrest him for breaking that law and, through their routine booking procedures, take his fingerprints, which are then sent to ICE. Once notified of the person's immigration status and presence in that local jail, ICE issues a detainer and later takes him into custody.[13] There is neither room nor need in that context, which

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8. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *SECURE COMMUNITIES: A COMPREHENSIVE PLAN TO IDENTIFY AND REMOVE CRIMINAL ALIENS* 3 (2009), *available at* http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesstrategicplan09.pdf.

9. *Id.* at 2.

10. Am. Immigration Counsel , *Secure Communities: A Fact Sheet*, IMMIGRATION POLICY CENTER, http://www.immigrationpolicy.org/just-facts/secure-communities-fact-sheet(last updated Nov. 29, 2011); U.S. Immigration and Customs Enforcement, *Secure Communities: The Secure Communities Process*, *available at* www.ice.gov/secure_communites/ (last visited May 9, 2012).

11. U.S. Immigration and Customs Enforcement, *Secure Communities*, http://www.ice.gov/secure_communities/ (last visited May 9, 2012).

12. *Id.* As this paper will explain, with the advent of SComm, the line between standard law enforcement and law enforcement in the context of undocumented immigrants has become increasingly blurred. An example, discussed *infra*, is how police deal with a person who has no driver's license. In an increasing number of states, undocumented immigrants cannot get driver's licenses, providing a strong pretext for their arrest, whereas people who do not fit the profile of what a police thinks an undocumented immigrant looks like would only get a citation. Is it standard law enforcement to arrest one and not the other? Is it becoming standard law enforcement?

13. *See* NAT'L IMMIGRATION FORUM, IMMIGRATION BEHIND BARS: HOW, WHY, AND HOW MUCH? 7 (2011), *available at* http://immigrationforum.org/images/uploads/2011/Immigrants_in_Local_Jails.pdf (discussing the time restraints of detainers and two lawsuits due to the violation of those time restraints). By its terms, the detainer allows ICE an extra forty-eight hours to take someone into custody, but these time limits are routinely ignored. People have brought lawsuits seeking damages for

should be the prototypical SComm scenario, for state and local police to meddle in immigration affairs. They are to hold the person until ICE can come to take him away, and that is it.

Of course, SComm has not been implemented that way. Despite the program's purpose of "identifying and removing the most serious criminal offenders," 60% of the people SComm has been responsible for deporting had no criminal history or had committed only minor offenses, like a traffic violation.[14] The percentages in some jurisdictions are higher. In Travis County, Texas, for example, 82% of those deported had a clean or minimal criminal record.[15] The numbers suggest strongly that police are not targeting criminals, but instead stopping and arresting people whom they suspect are in violation of immigration laws based on the way they look. The fear (and accusation, by many) is that, by giving police a role in immigration enforcement, SComm has opened the door to widespread civil rights violations, such as racial profiling and pretextual and wrongful arrests.[16]

The fear is not unfounded. Many reputable sources have echoed the concern. Dean Kevin R. Johnson from the University of California Davis School of Law, an expert both in immigration law and racial profiling, has expressed that "besides frightening immigrant communities from reporting crime and otherwise assisting community law enforcement, state and local involvement in [immigration] enforcement will worsen the existing problems with racial profiling in law enforcement."[17] And the American Immigration Lawyers Association (AILA) in a recent report warned that "[a]ny contact with the police, no matter how trivial, can result in immigration enforcement and removal. Police may initiate stops for the sole or primary purpose of enforcing immigration laws, and may engage in racial profiling or other abusive practices to accomplish this."[18]

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excessive holding times, with some success.

14. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, SECURE COMMUNITIES IDENT/IAFIS INTEROPERABILITY MONTHLY STATISTICS THROUGH FEBRUARY 28, 2011 (2011), *available at* http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2011-feb28.pdf(prepared on May 23, 2011). For more information on the program and other criticisms, *see* MICHELE WASLIN, THE SECURE COMMUNITIES PROGRAM: UNANSWERED QUESTIONS AND CONTINUING CONCERNS, (2010), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/Secure_Communities_112911_updated.pdf; Julia Preston, *U.S. Identifies 111,000 Immigrants With Criminal Records*, Nov. 12, 2009, http://www.nytimes.com/2009/11/13/us/13ice.html?_r=0.

15. Tony Plohetski, *Travis County Leads Nation in Deporting 'Noncriminal' Immigrants, Groups Find*, AUSTIN AM.-STATESMAN, Aug. 10, 2010, http://www.statesman.com/news/news/local/travis-county-leads-nation-in-deporting-noncrimina/nRwws/.

16. *See* Am. Immigration Counsel, *supra* note 10 http://www.immigrationpolicy.org/just-facts/secure-communities-fact-sheethttp://www.immigrationpolicy.org/just-facts/secure-communities-fact-sheet(mentioning profiling and pretextual arrests as concerns caused by Secure Communities).

17. 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, 1042–43 (2010).

18. AM. IMMIGRATION LAWYERS ASS'N, *IMMIGRATION ENFORCEMENT OFF TARGET: MINOR OFFENSES WITH MAJOR CONSEQUENCES* 5 (2011), *available at* http://www.aila.org/content/fileviewer.aspx?docid=36646&linkid=236762.

Additionally, several studies have found compelling evidence to support the contention that SComm's implementation in many cases violates people's basic civil rights, particularly the right to not be judged by their race. The Berkeley Law School's Warren Institute recently published an in-depth study on the matter, focusing on the ICE and law enforcement partnership in Irving, Texas.[19] Among other things, the Institute found that after the implementation of SComm and similar programs, arrests of Hispanics for petty offenses and traffic violations skyrocketed by 150% and 223%, respectively.[20] The authors concluded that there was "strong evidence to support claims that Irving police engaged in racial profiling of Hispanics in order to filter them through" their immigration screening systems.[21] Another study, conducted by AILA, took a sampling of immigration cases from across the country, focusing on how the immigrant in each case had gotten into removal proceedings.[22] The cases solidly suggested that SComm and similar programs "encourage those police officers who would choose to engage in questionable practices to do so."[23] Because many of the cases involved arrests based on fabricated charges or people being stopped or questioned without cause and then held for ICE, the study indicates that the "prime motivation for the stop may have been to assess the person's immigration status," showing powerful evidence of racial profiling.[24] The report cites cases where, for example, "individuals were accused of rolling through a stop sign at an intersection where no stop sign exists or driving while intoxicated when testing showed a 0.0 blood/breath alcohol level."[25] In another case, a man was arrested for burning leaves in his yard, something that was not even against the law.[26]

The potential for and evidence of state and local law enforcement officers' race-based actions in carrying out what they believe to be their SComm duties cannot be ignored and should have serious bearing on the state of suppression law in removal proceedings. The conversion of state and local law enforcement into quasi-immigration officials and the different degrees of applicability of the exclusionary rule, depending on the forum where the suppression is litigated, create troublesome ambiguities regarding the acceptability of the use of race in traffic stops and the kinds of stops state and local law enforcement are allowed to make. Those ambiguities allow police officers to engage in race-based behavior that would be impermissible in any other context. For example, in *In re Quinteros* the respondent brought a suppression claim in immigration court challenging the lawfulness of a police officer's stop of his vehicle.[27] The stop at issue was a

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19. TREVOR GARDNER II & AARTI KOHLI, THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM 1 (2009), *available at* http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf.

20. *Id.*

21. *Id.* at 5–6.

22. AM. IMMIGRATION LAWYERS ASS'N, *supra* note 18.

23. *Id.* at 12.

24. *Id.* at 11.

25. *Id.*

26. *Id.*

27. *In re* Quinteros, Alien Registration Number unknown (B.I.A. March 21, 2011), *available at*

quintessential SComm traffic stop, the kind analyzed at length by the AILA study discussed above. Even though it was evident that the police officer had engaged in unlawful race-based behavior, the immigration judge refused to even address the claim, stating that the police officer's actions were unrelated to the immigration proceedings and thus irrelevant to the respondent's case.[28]

The involvement of state and local police in the immigration enforcement arena along with the racial profiling opportunities created and clearly capitalized upon present a real danger to the undocumented population. As this paper will discuss, justifying in legally acceptable terms what is actually a race-based stop for immigration enforcement purposes is not difficult, and the limited way in which the Fourth Amendment applies in removal proceedings provides little hope for meaningful remedies. Taken together, these phenomena create a world where immigration courts not only sanction but encourage unlawful and reprehensible behavior by state and local law enforcement agencies in their encounters with the immigrant community. This world is unacceptable and inconsistent with our constitutional values, and it must be made right. Marshaling the complete protections of the Fourth Amendment in immigration court is a good place to start.

III. FIGHTING FOR SUPPRESSION IN REMOVAL PROCEEDINGS

The Fourth Amendment offers broader protections to defendants in criminal court than to respondents in immigration proceedings.[29] The exclusionary rule's principles are noble, and in articulating its purpose, courts have eloquently described justifications that are relevant to all, whether standing as an accused in a criminal court or as a respondent in a removal proceeding.[30] Unfortunately, the state of the law today, regarding not only the limited applicability of suppression law in immigration court but also the analysis of pretextual stops in general, does not reflect those principles and creates even more pitfalls for immigrants' suppression claims in removal. Complicating matters even further, the Supreme Court created yet another standard in suppression law when the behavior in question involves immigration officials on roving patrol making immigration stops.[31] This Part will explain the Fourth Amendment's application to criminal stops in criminal courts and discuss and criticize its limited applicability in removal proceedings, while noting the nuances and ambiguities that state and local law enforcement involvement in

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https://docs.google.com/a/utexas.edu/file/d/0B_6gbFPjVDoxMDA0NzYxMGQtNDY4Zi00YjFkLTkzNDQtOTE3OGVkYmVmNDZk/edit?hl=en.

28. *See id.* While the BIA ultimately overturned the immigration judge's ruling regarding the race issue, the relevant fact that immigration judges are able to take hold and advantage of these ambiguities to deny legitimate suppression claims remains.

29. *See* I.N.S v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) (discussing the applicability of the exclusionary rule in civil deportation hearings).

30. *See id.* at 1041 (explaining the framework for deciding if the exclusionary rule is appropriate).

31. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 880 (1975) (discussing standard applied during immigration stops).

immigration matters creates, ending with some of the practical and legal difficulties immigrants face in raising their suppression claims in immigration court.

A. The Fourth Amendment's Exclusionary Rule in its Full Form

The Fourth Amendment declares:

> 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.[32]

Under the exclusionary rule, evidence obtained as a result of unlawful searches and seizures, will be inadmissible as "fruit of the poisonous tree," in order to protect individuals and deter such police practices.[33] Further, the Fourth Amendment's prohibition against unreasonable searches and seizures applies without regard to immigration status to citizens and noncitizens alike.[34] The Amendment's application to all makes sense, especially considering the exclusionary rule's aim: "[i]ts purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[35]

The Fourth Amendment's exclusionary rule applies to both stops and arrests, but each has its own standard due to their differing degrees of intrusion into one's freedom. Because this paper is concerned mostly with the former, a quick review of the latter is all that is needed here. In order for a police officer to arrest a person without a warrant, he must have probable cause.[36] "Probable cause exists where 'the facts and circumstances within [the officers'] trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed by [the person to be arrested]."[37]

In the context of SComm and race-based police actions, however, stops are of more serious concern. As the studies suggest[38], while many SComm deportations at some point involve probable

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32. U.S. CONST. amend. IV.

33. Wong Sun v. United States, 371 U.S. 471, 484–88 (1963).

34. *See* Martinez-Aguero v. Gonzalez, 459 F.3d 618 (5th Cir. 2006) (clarifying that the Fourth Amendment applies to the national community and aliens with substantial connections to the United States).

35. *See* Elkins v. United States, 364 U.S. 206, 217 (1960) (discussing the aim of the exclusionary rule).

36. *See* Brinegar v. United States, 338 U.S. 160 (1949) (affirming that the search of Brinegar's car by police was constitutional, despite lack of a search warrant, because the police officer had probable cause).

37. *Id.* at 175–76 (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)).

38. *See supra* notes 17–26 and accompanying text.

cause arrests for the violation of some traffic law or other misdemeanor, they begin with an investigatory (usually a traffic) stop. In protecting people "against unreasonable searches and seizures,"[39] the Fourth Amendment extends its reach over such stops, which are deemed seizures for the purposes of suppression law.[40] In deciding the standard to be applied to investigatory stops, the *Terry* court balanced the public interest with the individual's right to personal security "free from arbitrary interference by law officers."[41] Ultimately, the court adopted a two-part reasonable suspicion inquiry, asking whether the officer's action was (1) "justified at its inception"; and (2) "reasonably related in scope to the circumstances which justified the interference in the first place."[42]

For a traffic stop to be "justified at its inception," an officer must have an objectively reasonable suspicion that illegal activity (like a traffic violation) has occurred, or is about to occur, before stopping the car.[43] In analyzing reasonableness, the Supreme Court has said courts must look "to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing."[44] To be particularized, there must be reasonable suspicion that "the particular person being stopped ha[d] committed or [was] about to commit a crime."[45] "An officer cannot rely solely on generalizations that, if accepted, would cast suspicion on large segments of the law-abiding populations."[46] "[R]easonable suspicion exists when the officer can point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the search and seizure."[47]

To meet the second prong of the *Terry* test, generally, "detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop."[48] While effectuating the stop, an officer may examine the driver's license and registration and run a computer check for any outstanding warrants.[49] An officer may also ask questions of the driver, and those questions need not be related to the purpose of the traffic stop and can be wide-ranging.[50] However, once all computer checks have come back clean, reasonable suspicion no longer exists and, generally,

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39. U.S. CONST. amend. IV.

40. United States v. Valadez, 267 F.3d 395, 397 (5th Cir. 2001).

41. United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).

42. *Valadez*, 267 F.3d at 398.

43. United States v. Breeland, 53 F.3d 100, 102 (5th Cir. 1995).

44. United States v. Arvizu, 534 U.S. 266, 273 (2002) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)).

45. *See* United States v. Montero-Camargo, 208 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (explaining requirement for a particularized suspicion).

46. United States v. Manzo-Jurado, 457 F.3d 928, 935 (9th Cir. 2006).

47. United States. v. Lopez-Moreno, 420 F.3d 420, 430 (5th Cir. 2005).

48. United States v. Brigham, 382 F.3d 500, 507 (5th Cir. 2004) (en banc).

49. *Id.* at 507–08.

50. *Id.* at 508.

continued questioning prolongs the detention unconstitutionally.[51] There is a recognized exception to this rule: "if additional reasonable suspicion arises in the course of the stop and before the initial purpose of the stop has been fulfilled, then the detention may continue until the new reasonable suspicion has been dispelled or confirmed."[52]

The state of pretextual stop and arrest law opens the door to racial profiling in such instances and presents a real threat to undocumented immigrants in an SComm world, which is all the more worrisome given the way their suppression claims will be judged in removal proceedings.

In the 1996 case *Whren v. United States*,[53] the Supreme Court squarely faced the question of the constitutionality of pretextual arrests, precisely:

> [W]hether the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment's prohibition against unreasonable seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws.[54]

The Court said no, foreclosing any inquiry into the subjective intent of the arresting officers in reviewing traffic stops under the Fourth Amendment.[55] "So long as a traffic law infraction that would have objectively justified the stop had taken place," the Supreme Court decided, "the fact that the police officer may have made the stop for a reason other than the occurrence of the traffic infraction is irrelevant for purposes of the Fourth Amendment."[56] In so stating, the Court allowed police officers to base a stop for the investigation of any matter—including, of course, immigration status—on a violation of traffic laws; the officer's actual subjective motivations are simply of no consequence.[57]

This watershed decision opened the floodgates for lower courts to approve of pretextual stops more broadly. For example, in evaluating the respondent's claim that the officer's stop and arrest were pretextual, the Fifth Circuit in *Lopez-Moreno* allowed even post hoc rationalizations for

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51. *See id.* at 510 (citing a series of cases in which the actions of police officers were ruled unconstitutional after they had received negative results from computerized checks yet continued to detain individuals).

52. *Lopez-Moreno*, 420 F.3d at 431. This relatively recent Fifth Circuit case provides a solid and relevant illustration of how the *Terry* reasonable suspicion test works in application, especially because it involves a police-initiated traffic stop. The outcome of the case is troubling, especially considering the fact that the court upheld the entire stop, detention, and arrest based on its taking the officer's word that the taillights were out, a disputed fact issue.

53. Whren v. United States, 517 U.S. 806, 808 (1996).

54. Johnson, *supra* note 17, at 1055.

55. *See Whren*, 517 U.S. 806 (reaffirming the probable cause test based on the reasonable police officer standard).

56. Goodwin v. Johnson, 132 F.3d 162, 173 (5th Cir. 1997).

57. Johnson, *supra* note 17, at 1026.

traffic stops, noting that "the fact that the officer did not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."[58] In fact, the court upheld the stop even in light of the fact that the officer's proffered reason for initiating the stop turned out to be mistaken.[59] Along with the Eighth and Sixth Circuits, the Fifth Circuit has held that "so long as there was an objectively reasonable basis for the stop, it is justified even if it was *admittedly* a pretext."[60]

The impact *Whren* and its circuit progeny have on undocumented immigrants and their suppression claims is devastating. Pretextual arrest law in its current state does nothing to prevent or dissuade state and local law enforcement from pulling someone over, because of the way that he looks, to investigate his immigration status; in fact, by allowing post hoc rationalizations and looking the other way when police actually admit that they engaged in pretextual stops, courts encourage it. As Justices Kennedy and O'Connor have pointed out, because police officers can almost invariably find at least one technical violation of the traffic code for just about anyone on the roads,[61] little deters race-based, deportation-motivated stops. Coupling that recognition with the findings of the above-mentioned studies and the fact that most people's SComm deportations begin with a traffic stop or misdemeanor arrest,[62] there can be little speculation about the kind of injustice courts allow against immigrant populations in our country. The Court's refusal in *Whren* to consider the intent of law enforcement in its Fourth Amendment analysis created a safe haven for racial profiling, and immigrants' only weapon to fight it in deportation proceedings is a weak, limited version of a standard that already endorses that kind of conduct.[63] At the very least, given the availability of and danger for race-based law enforcement actions, the exclusionary rule with its full protections—a stronger weapon—should apply in immigration court.

Putting aside pretextual race-based actions, under the Fourth Amendment courts allow police officers to consider race explicitly as a factor when conducting investigatory stops and executing arrests in only one instance: if the description of a suspect known to that police officer

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58. United States v. Lopez-Moreno, 420 F.3d 420, 432 (quoting Scott v. United States, 436 U.S. 128, 138 (1978)).

59. *Id.*

60. Johnson, *supra* note 17, at 1067; *see also* United States v. Linkous, 285 F.3d 716 (8th Cir. 2002); United States v. Wellman, 185 F.3d 651 (6th Cir. 1999) (reaching the same holding as the Fifth Circuit).

61. Johnson, *supra* note 17, at 1067.

62. *See* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *supra* note 14.http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2011-feb28.pdfhttp://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2011-feb28.pdf

63. *See* Johnson, *supra* note 17, at 1054. This paper focuses on Fourth Amendment claims in immigration proceedings; the possibility of bringing civil rights litigation for racial profiling is thus beyond the topic of this paper. Suffice it to say that while civil rights claims, like Equal Protection challenges, have been and can be brought, there are many barriers that make such cases incredibly difficult to win, including immunity obstacles, the complexity of class actions and getting injunctive relief in general, and the inherent near-impossibility of proving that an officer's subjective intent was race-based.

includes race.[64] But that is not the case when it comes to immigration enforcement.[65] In the 1975 case *United States v. Brignoni-Ponce*, the Supreme Court created a new standard with regard to the lawfulness of seizures involving immigration stops conducted by immigration officers, especially near the border.[66] The introduction of yet another different standard in suppression law that applies only to immigrants further blurs the line between what kinds of factors should be allowed to be considered in what kinds of stops (and by whom), confusing even more so the analysis of suppression law in immigration court and inviting immigration judges to toss legitimate Fourth Amendment claims against SComm stops aside.[67]

In 1973, two immigration agents on roving patrol near the United States–Mexico border stopped a vehicle, "saying later that their only reason for doing so was that its three occupants appeared to be of Mexican descent."[68] The driver was later charged with transporting undocumented immigrants and brought a Fourth Amendment claim in federal criminal court.[69] The central issue before the Court was the Border Patrol's "authority to stop automobiles in areas near the Mexican border" and question its occupants when the only ground for suspicion was the occupants' race.[70]

In balancing the relevant interests, the Supreme Court focused on the difficulty of policing the border and enforcing immigration laws, and on "the importance of the governmental interest at stake" given the great number of undocumented immigrants in the country.[71] The Court came to the conclusion that roving patrol stops would be analyzed under a *Terry*-type reasonable suspicion test, holding that Border Patrol officers on roving patrols may stop persons and question them about their immigration status "only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country."[72] The Court also provided a number of factors[73] that could be taken into account, based almost entirely on the characteristics of the border area and roads, and

64. United States v. Waldon, 206 F.3d 597, 604 (6th Cir. 2010).

65. United States v. Brignoni-Ponce, 422 U.S. 873, 885–86(1975).

66. *See id.* at 884–85 (stating that officers may only stop vehicles near the border if they are aware of specific articulable facts and rational inferences from those facts).

67. I will argue *infra* that the *Brignoni-Ponce* holding applies only to stops legally allowed to be immigration-related stops (as opposed to pretextual traffic stops motivated by an immigration-enforcement purpose) by immigration officers, and not to stops conducted by state and local law enforcement that begin (at least objectively) as a traffic stop and end with the discovery of some immigration violation; however, that is not the way courts have applied this rule, providing another reason why stronger suppression protections than currently apply should exist in immigration courts.

68. *See Brignoni-Ponce*, 422 U.S. at 874–75 (applying the term "roving patrol" to the fact pattern of the case).

69. *Id.* at 875.

70. *Id.* at 874, 876.

71. *Id.* at 881–82.

72. *Id.* at 884.

73. For a complete list of the factors, *see id.* at 884–85.

immigration officers' expertise and experience with smuggling operations.[74] The Supreme Court relied on factors that are unrelated and inapplicable to traffic stops by state and local law enforcement in the interior of the United States.[75]

Ultimately, the Court held that the immigration officers had violated the defendant's Fourth Amendment rights because they had relied *exclusively* on race.[76] But, instead of leaving race fully out of the equation the way it is done with non-immigration stops and non-immigration law enforcement officers, the Court allowed Mexican appearance to be a relevant factor considered by Border Patrol in making a stop.[77] Reminiscent of the effect of pretextual arrest law on state and local law enforcement, a study of immigration enforcement found that "officers can easily strengthen their reasonable suspicion for an interrogation after they have begun talking to an individual. . . . It is easy to come up with the necessary articulable facts after the fact."[78] The Court's explicit acceptance of the use of race as a factor in stops, however, has created unique problems for immigrants' Fourth Amendment challenges, especially of SComm stops, in immigration court.

B. An Overview of the Application of the Exclusionary Rule in Immigration Proceedings

In *Lopez-Mendoza*, the Supreme Court decided that the exclusionary rule of the Fourth Amendment does not ordinarily apply in removal proceedings.[79] In reaching that decision, the Court balanced the "likely social benefits of excluding unlawfully seized evidence against the likely costs," and focused on such factors as deterrence value, the importance of having a streamlined deportation system, and the "staggering" number of undocumented immigrants in the country.[80] The Court's justifications relied primarily on features unique to immigration officers and their enforcement practices.[81] However, because all persons in the United States are entitled to due

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74. *See id.* (listing and explaining relevant factors to consider when evaluating reasonable suspicion).

75. *See id.* at 884 ("[E]xcept at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicle contains aliens who may be illegally in the country. Any number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area.")

76. *Id.* at 885–86.

77. *Id.* at 886–87.

78. Edwin Harwood, *Arrests Without Warrant: The Legal and Organizational Environment of Immigration Law Enforcement*, 17 U.C. DAVIS L. REV. 505, 531 (1984).

79. *See* I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1041–50 (1984) (explaining why the exclusionary rule of the Fourth Amendment does not ordinarily apply in removal proceedings). This section simply provides an overview of how suppression law applies in removal proceedings. A criticism of the Supreme Court's reasoning in *Lopez-Mendoza*, along with an argument that such reasoning, even if it were correct at one point, no longer applies in the immigration enforcement world of today will be discussed *infra Part V*.

80. *Id.* at 1040–50.

81. *See id.* (highlighting features that include the nature of deportation proceedings, characteristics of arrests by INS

process of law under the Fifth Amendment,[82] the Court creaked open the Fourth Amendment door a bit, allowing for the exclusionary rule to apply in removal proceedings where there was either widespread abuse by immigration officers or where "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness undermine the probative value of the evidence obtained."[83]

Subsequent lower court decisions have clarified the exclusionary rule's use in immigration proceedings and developed a framework for its application through case law that, again, has almost exclusively involved immigration officers and immigration stops.[84] Determining whether a respondent's suppression claim will prevail in immigration court involves a three-step analysis.[85] First, the court must determine whether an officer seized the respondents. If there was no seizure, there was no Fourth Amendment violation. Second, the court will ask whether the officer had a lawful reason for the seizure. Finally, even if there was no lawful reason for the seizure, the exclusionary rule will only apply if the officer's conduct was particularly egregious.[86] If the conduct is particularly egregious, then the exclusionary rule will operate to suppress statements made and evidence gathered as a result of the seizure.

The Supreme Court has held that a seizure occurs when a reasonable person, in light of all the circumstances, would have believed he was not free to leave.[87] Whether there was a lawful reason for the seizure is typically interpreted as equivalent to the probable cause and reasonable suspicion standards.[88] Courts rely primarily on immigration-specific standards in analyzing this second step, including immigration officers' expertise and training.[89] Additionally, immigration agents have special authority to make warrantless arrests if they have a reason to believe a person is unlawfully present in the United States.[90] Whether state and local police have that same authority is a chief topic in this paper, the answer to which *should* have major implications for how suppression law is analyzed in immigration courts given the change in immigration enforcement practices

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agents, and the scheme the INS has developed to counteract such possible violations, among others).

82. *See* Reno v. Flores, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.").

83. *Lopez-Mendoza*, 468 U.S. at 1050.

84. *See* Decision and Order of the IJ, IJ Javier Balasquide (New York, New York) (Nov. 21, 2008), on file with the Journal (providing the general framework for how the exclusionary rule applies in immigration proceedings).

85. *Id.* at *4.

86. *Id.*

87. I.N.S. v. Delgado, 466 U.S. 210, 215 (1984).

88. *See* Martinez v. Nygaard, 831 F.2d 822, 828 (9th Cir. 1987) (discussing the validity of a detention by INS agents); *see also supra* Part III.A.

89. *See* United States v. Cortez, 449 U.S. 411, 418–19 (1981) (noting that those charged with halting illegal entry into this country may recognize certain facts, which would be meaningless to the untrained, in order to form a reasonable suspicion).

90. Immigration and Nationality Act § 287(a)(2), 8 U.S.C. § 1357 (2006).

SComm has spurred.

The key inquiry when evaluating suppression claims in removal proceedings is whether the seizure was egregious; if it was, then the evidence that flows therefrom is suppressible.[91] As *Lopez-Mendoza* made clear, even when an officer had no reasonable suspicion whatsoever to seize an individual, relief for respondents in immigration court only exists if the violation was egregious or fundamentally unfair, something that would implicate the notion of fundamental fairness and give rise to a due process claim under the Fifth Amendment.[92] In defining egregiousness, courts have looked to the manner in which the seizure was conducted (like if it was coercive or intrusive) or whether it violated a clearly established Fourth Amendment principle.[93] The Second Circuit explains the standard well:

> First, the egregiousness of a constitutional violation cannot be gauged solely on the basis of the validity (or invalidity) of the stop, but must also be based on the characteristics and severity of the offending conduct. Thus, if an individual is subjected to a seizure for *no* reason at all, that by itself may constitute an egregious violation, but only if the seizure is sufficiently severe. Second, even where the seizure is not especially severe, it may nevertheless qualify as an egregious violation if the stop was based on race (or some other grossly improper consideration).[94]

But if the stop is challenged on race-based grounds, the stop must be based *solely* on race to be sufficiently egregious.[95] The race-alone rule implies that if race is not the only factor, even if it is a factor, the stop will not be sufficiently egregious. It is reminiscent of the *Brignoni-Ponce* standard, which allowed immigration officers to consider race as a factor in forming reasonable suspicion.[96] Disturbingly, however, no such limitations seem to constrain the use of race when the egregiousness of a seizure is analyzed in immigration court.[97]

C. Barriers to Prevailing on a Suppression Claim in Immigration Court

Respondents in immigration court face significant hurdles in presenting Fourth Amendment challenges unique to the removal proceeding setting. Defying federal caselaw striking down the

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91. I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1056 (1984).

92. *See id.* at 1051 (evidence will be excluded if the circumstances surrounding a particular arrest and interrogation would render use of the evidence obtained thereby "fundamentally unfair" and in violation of due process requirements of the Fifth Amendment).

93. *In re* Toro, 17 I. & N. Dec. 340, 343 (B.I.A. 1980).

94. Almeida-Amaral v. Gonzales, 461 F.3d 231, 235 (2006).

95. *See id.* at 237; Gonzalez-Rivera v. I.N.S., 22 F.3d 1441, 1452 (9th Cir. 1994).

96. United States v. Brignoni-Ponce, 422 U.S. 873, 885–86 (1975).

97. *See infra* Part III.C.

silver platter doctrine[98], ICE uses two existing suppression law norms, the independent evidence doctrine and the identity-is-not-suppressible rule, in concert to make the illegality of stops, no matter how egregious, totally irrelevant. Further, the limited applicability of the exclusionary rule in immigration proceedings has led to an egregiousness standard so high that few can meet the burden, which is a substantial problem in light of both the confusion about acceptable law enforcement behavior[99] and the judicial tolerance of pretextual stops and arrests. These obstacles become all the more debilitating in an SComm world, where state and local involvement allows police officers to behave in a way inconsistent with Fourth Amendment principles, something that is nevertheless sanctioned by immigration courts.

In *Elkins v. United States*, the Supreme Court declared unconstitutional the silver platter doctrine, which had previously made admissible, in federal criminal trials, evidence obtained by unreasonable searches and seizures by state officers as long as federal officers had not been involved.[100] In so holding, the *Elkins* Court stood for the proposition that no longer would state officers be able to hand federal agents illegally obtained evidence on a "silver platter" for their own use in prosecutions.[101] The Supreme Court's reasoning inherently relied on principles tied to the practice of state and federal cooperation in law enforcement and, as such, should apply in a similar manner to suppression claims as they relate to SComm-initiated removal proceedings. Predictably, it does not.[102]

1. The Independent Evidence Doctrine

Despite the Supreme Court's rejection of the silver platter doctrine, ICE is able to use the independent evidence doctrine to admit evidence that would be inadmissible in criminal proceedings. SComm-caused removal proceedings begin with state and local law enforcement involvement, like a traffic stop, which creates a separation between the stop and the immigration evidence gathered therefrom. Because all ICE needs to prove up removability in most cases is identity and alienage, ICE's use of the doctrine makes the illegality of the initial stop completely immaterial in removal proceedings. [103]

The exclusionary rule's protections extend to evidence deemed to be "fruit of the poisonous

98. *See infra* notes 102–04 and accompanying text.

99. As discussed previously, this confusion is created, in part, by *Brignoni-Ponce*'s allowance of race as a relevant factor in reasonable suspicion. *See supra* notes 66–80 and accompanying text.

100. Elkins v. United States, 364 U.S. 206, 223–24 (1960).

101. The "silver platter" label stems from a phrase in the opinion *Lustig v. United States*, 338 U.S. 74, 79 (1949), referring to such conduct.

102. It does not because, under a weakened suppression standard, state officers are able to hand over evidence to federal (immigration) officers for use in immigration court that would otherwise be inadmissible in state court.

103. I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1043 (1984).

tree," which is evidence that is discovered as a direct result of unlawful activity.[104] If a search or seizure is determined to be unlawful, the "fruits" inquiry asks whether the evidence "has come by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."[105] If the government can prove, however, that the evidence was either discovered through independent means or was so attenuated from the illegality "to be purged of the primary taint of the Fourth Amendment violation," then the evidence is admissible.[106]

The independent evidence rule applies equally, at least theoretically, in immigration proceedings.[107] Examples of evidence found to be independent in immigration proceedings include a respondent's failure to object to admission of documents establishing removability,[108] a respondent's own admission of removability during proceedings,[109] evidence gathered from an independent source,[110] and a respondent's own statements or submission of forms in his removal hearing,[111] Additionally, the Government's pre-existing records of the respondent—like his A-file—will be deemed to be independent evidence so that if the government uses its knowledge of the respondent's name to connect to ICE pre-existing records, that evidence is not suppressible.[112]

A review of recent immigration judge decisions indicates that ICE counsel use the independent evidence doctrine frequently to sneak in evidence as proof of alienage that is not truly independent, but instead is "fruit of the poisonous tree."[113] For example, in a removal hearing in San Antonio, Texas, an ICE trial attorney argued that documents obtained through information gathered by police (whose actions the respondent claimed were illegal) was independent.[114] Similarly, in a removal proceeding in New York, an ICE trial attorney tried to bring in nationality documents it had obtained using information gathered in an illegal search.[115] Also in New York, an ICE trial

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104. Wong Sun v. United States, 371 U.S. 471, 485 (1963).

105. *Id.* at 488.

106. *Id.*

107. *See Lopez-Mendoza*, 468 U.S. at 1043 (discussing the deterrence value of the exclusionary rule in deportation proceedings).

108. *Id.* at 1040.

109. *In re* Carrillo, 25 I. & N. Dec. 99 (B.I.A. 2009).

110. Segura v. United States, 468 U.S. 796 (1984).

111. Rodriguez-Gonzalez v. I.N.S., 640 F.2d 1139 (9th Cir. 1981).

112. *See* United States v. Herrera-Ochoa, 245 F.3d 495, 489 (5th Cir. 2001); United States v. Roque-Villanueva, 175 F.3d 345 (5th Cir. 1999). There are significant legal questions regarding whether even pre-existing records should be deemed independent evidence, given that knowledge of the respondent's name sprung directly from the stop being challenged, but that issue is beyond the scope of this paper and a short discussion would not do it justice.

113. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471, 485 (1963).

114. *See, e.g., In re* Lazaro Soto-Ugarte, A 087 899 912, DHS Response to the Respondent's Motion to Suppress p. 7–9 (San Antonio, Texas), on file with author (demonstrating that ICE counsel have claimed documents allegedly obtained illegally by police were independent).

115. Decision and Order of the IJ pg. 4, IJ Javier Balasquide (New York, New York) (November 21, 2008), on file with

attorney fought the suppression of a form generated during the respondent's detention, which had resulted from an unlawful seizure.[116] In all of these cases, the evidence ICE sought to introduce as independent had been obtained through investigations ICE was able to conduct only by using information gathered during an illegal search or seizure. However, once that evidence is deemed to be independent, the illegality of the stop, no matter how egregious, simply does not matter.

2. The Identity-Is-Not-Suppressible Rule

Similarly, the way the identity-is-not-suppressible rule (the ID rule) is both argued and applied in some circuits and immigration courts makes the illegality of the initial seizure of no consequence. In *Lopez-Mendoza*, the Supreme Court reiterated the rule that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred."[117] A debate erupted among the circuit courts regarding whether the Supreme Court's statement referred only to the court's jurisdiction over the defendant/respondent or, much more broadly, to all evidence relating to identity, including identity documents.[118] While the reasoning of the circuit courts that argue for a jurisdictional reading of the rule seems more in line both with the logic and structure of *Lopez-Mendoza* and the very purposes of the Fourth Amendment itself,[119] the other side has unsurprisingly gained more popularity.[120]

The interpretation of the ID rule that admits all identity-related evidence, regardless of how it is obtained, makes the illegality of the underlying stop insignificant. All ICE needs to prove to establish removability in most cases is alienage, and that reading of the rule blurs the line between

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Journal.

116. *Id.*

117. I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984).

118. This issue is a very interesting but complicated one that is beyond the scope of this paper. For a discussion of the issue, including the differing circuit court opinions, *see* Brian K. Smithweck, *What Impact Will* United States v. Oscar-Torres *Have on the Suppression of Identity-Related Evidence Obtained as a result of an Unlawful Arrest?*, 32 A.M. J. TRIAL ADVOC. 391 (2008). The Third Circuit in *United States v. Bowley*, 435 F.3d 426, 430 (3rd Cir. 2006), the Sixth Circuit in *United States v. Navarro-Diaz*, 420 F.3d 581, 584 (6th Cir.2005), and the Fifth Circuit in *United States v. Pineda-Chinchilla*, 712 F.2d 942, 943 (5th Cir. 1983), and *United States v. Roque-Villanueva*, 175 F.3d 345, 346 (5th Cir. 1999), have taken the position that the Supreme Court was referring to all identity-related evidence, while the Tenth Circuit in *United States v. Olivares-Rangel*, 458 F.3d 1104, 1106 (10th Cir. 2006), and the Eighth Circuit in *United States v. Guevara-Martinez*, 262 F.3d 751, 754–55 (8th Cir. 2001), support a jurisdictional reading. The Supreme Court has yet to take up the issue.

119. For a great explanation of why the *Lopez-Mendoza* Court could not have possibly been referring to all identity-related evidence when it articulated the ID rule, *see* United States v. Olivares-Rangel, 458 F.3d 1104, 1111–12 (10th Cir. 2006) ("[T]he 'identity' language . . . refers only to jurisdiction over a defendant and it does not apply to evidentiary issues pertaining to the admissibility of evidence obtained as a result of an illegal arrest and challenged in a criminal proceeding. Instead, we utilize the . . . Fourth Amendment exclusionary rule.").

120. *See* Smithweck, *supra* note 120, at 401–04 (discussing the circuit split on this issue).

identity and alienage, since proof of alienage is typically a birth certificate or consular ID card which, technically, are identity-related evidence. Applying the ID rule in this manner makes it so that alienage evidence obtained, even as a result of an unlawful seizure, will not be suppressed because it is considered identity-related evidence. For example, in *United States v. Bowley* the court refused to exclude the immigrant's passport that had been gathered *during* the unlawful seizure as proof of alienage, because it deemed the passport to be identity-related evidence and therefore not suppressible.[121]

The independent evidence doctrine and ID rule are typically used in concert, and operate to establish alienage and squash legitimate suppression claims, allowing unlawful enforcement actions to go unpunished. In fighting against the suppression of identity documents obtained from information gathered during an unlawful seizure, ICE attorneys usually argue—quite successfully—that ICE independently gathered the evidence after the seizure by using the respondent's biographical data, which is part of a person's identity and thus cannot be suppressed.[122] The involvement of state and local police in immigration enforcement under SComm makes these dangers more pronounced and further flouts Fourth Amendment principles. Following the logic of those cases, it is perfectly permissible in immigration court for a police officer to stop a vehicle solely on the basis of race, obtain the person's name, and give it to ICE on a silver platter. ICE can then use the information to find a document online stating that the person seized is a Mexican national, institute removal proceedings, establish alienage through that "independently obtained evidence," and get the person deported. This reasoning not only creates a massive barrier for succeeding on suppression claims in immigration court, but it also ignores unlawful behavior and allows police to treat immigrants in ways that would be unconstitutional in any other context.

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121. United States v. Bowley, 435 F.3d 426, 430 (3rd Cir. 2006) ("The 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred." (quoting INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984))).

122. *See, e.g., id.* at 431("[T]here is no sanction to be applied when an illegal arrest only leads to discovery of the man's identity and that merely leads to the official file or other independent evidence." (quoting Hoonsilapa v. I.N.S., 575 F.2d 735, 738 (9th Cir.1978))); United States v. Navarro-Diaz, 420 F.3d 581, 588 (6th Cir. 2005) (interpreting the holding in *Lopez-Mendoza* to require that a motion to suppress the information received pursuant to questioning regarding his identity be denied); United States v. Guzman-Bruno, 27 F.3d 420, 422 (9th Cir. 1994) ("An illegal arrest would not serve to suppress [claimant's] identity since there is no sanction to be applied when an illegal arrest only leads to discovery of the man's identity and that merely leads to the official file or other independent evidence." (quoting United States v. Orozco-Rico, 589 F.2d 433 (1979)); United States v. Roque-Villanueva, 175 F.3d 345, 346 (5th Cir. 1999) ("We affirmed the denial of the defendant's motion to suppress, holding that the defendant had no legitimate expectation of privacy in his INS file and, therefore, had no standing to challenge its introduction into evidence."); and United States v. Pineda-Chinchilla, 712 F.2d 942, 943 (5th Cir. 1983) ("If an illegal arrest brings to the attention of authorities the fact that an individual is present in the United States and a subsequent check of independently created and maintained records indicates that the individual is an illegal alien, must the independent government records be suppressed as the product of the illegal arrest because they are 'the fruit of the poisonous tree'? We answer this question in the negative and affirm the judgment of the district court.")).

3. The Heightened Egregiousness Standard

Another obstacle standing in the way of suppressing illegally obtained evidence in removal proceedings made worse by the advent of SComm is the incredibly high egregiousness standard immigration courts impose. Because the exclusionary rule applies in immigration proceedings only in a limited manner, it is not enough for the stop to be unlawful; it must also be sufficiently egregious.[123] Because the legality of SComm stops is litigated in immigration court, state and local police officers' actions are held to a lesser standard than in criminal court, allowing them to engage in behavior that violates the Fourth Amendment in their dealings with immigrants.

To begin with, most egregiousness findings include actions, like home raids, not present in typical SComm seizures.[124] Additionally, quite severe enforcement tactics—like harsh interrogations wrought with regulatory violations, detentions by armed agents, and seizures that last for hours without explanation—have all been held to be not sufficiently egregious.[125]

This picture becomes all the more bleak when we recall the state of pretextual stop and arrest law[126] Because post hoc rationalizations are allowed and because it would be impossible for a respondent to refute all possible theoretical reasons officers may give for a stop, a respondent will rarely be able to meet the heightened egregiousness standard when challenging the legality of an SComm stop. Police officers can easily explain away or deny a factor that would make the stop egregious enough, or, if the egregious factor has to do with the officer's subjective motivations, it would not matter anyway. The rest of his unlawful actions will be dismissed because they will not rise to the level of egregiousness needed. In some cases, immigration judges even read in a possible additional reason for the stop *unarticulated* by ICE, so that race will not be the sole factor and thus not rise to the requisite level of egregiousness.[127] Additionally, because race must be the *sole* factor relied upon for the stop to be sufficiently egregious, local police giving race plus any other reason, even if found to be insufficiently suspicious, may suffice to negate egregiousness.[128] A limited

123. *See* Almeida-Amaral v. Gonzales, 461 F.3d 231, 235 (2006). ("[E]xclusion of evidence is appropriate under the rule of *Lopez-Mendoza* if record evidence established either (a) that an egregious violation that was fundamentally unfair had occurred, or (b) that the violation—regardless of its egregiousness or unfairness—undermined the reliability of the evidence in dispute.").

124. *See* Orhoraghe v. INS, 38 F.3d 488 (9th Cir.1994) (where the respondent's Nigerian-sounding name was insufficient to justify seizure, but where the agents' intrusion into respondent's home without consent made the seizure egregious); Lopez-Rodriguez v. Mukasey, 536 F.3d 1012 (9th Cir. 2008).

125. *Almeida-Amaral*, 461 F.3d 231; Melnitsenko v. Mukasey, 517 F.3d 42 (2d Cir. 2008).

126. *See supra* Part II.

127. *In re* Perez-Ramirez, A089715604, Written Decision of the Immigration Judge, Glenn P. McPhaul (San Antonio, Texas) (Dec. 1, 2010), on file with the Journal.

128. *Id.* The immigration judge found the stop to not be egregious enough because even though the number of passengers in the car was neither a sufficient nor reasonable explanation, it was one more reason given besides race, which meant that race was not the sole reason; this indicates that something more egregious than racial profiling is needed.

version of the exclusionary rule allows courts to make those kinds of determinations and does not adequately protect against race-based actions. With the racial profiling police are proven to engage in when performing SComm stops,[129] something stronger is needed to make sure police are held to their constitutional obligations.

Barriers immigrants face in prevailing on their suppression claims in removal proceedings, like the independent evidence doctrine, the ID rule, and the heightened egregiousness standard, become even more acute when state and local police participate in immigration enforcement. Their involvement creates a separation between their actions and those of ICE, allowing immigration courts to view unlawful police behavior as divorced from the removal proceedings at hand and thus irrelevant for suppression purposes, when, in reality, they are directly tied: the officer's actions are the very reason the person is in proceedings in the first place. And even when courts do analyze unlawful police conduct, the limited application of the exclusionary rule holds police officers to a lesser standard than they should be held to, simply because their actions are being judged in immigration court. It sends the message that police officers are not required to treat immigrants as they do citizens. The way these rules and practices act in concert—unique to the immigration court setting—creates almost insurmountable hurdles for respondents, implicitly and dangerously restores the silver platter doctrine, and allows SComm to operate in an extra-constitutional manner. To avoid these perils, the Fourth Amendment's complete powers should apply in immigration court.

IV. THE NEW SCOMM WORLD AND THE LOCAL LAW ENFORCEMENT ROLE: THE POWER OF POLICE TO EFFECTUATE IMMIGRATION STOPS

SComm has redesigned the world of immigration enforcement. The actors involved in the apprehension and deportation of immigrants have changed; where once federal immigration officers almost entirely occupied the field, state and local law enforcement are now major players—it is their stops, detentions, and arrests that pull immigrants into the grasp of SComm, which has become responsible for the deportations of tens of thousands of people.

The caselaw regarding suppression law's application to removal proceedings has developed certain standards unique to immigration matters, like the limited exclusionary rule and the availability of race as a permissible factor in reasonable suspicion[130] These standards wavered from traditional Fourth Amendment protections, but courts justified their decisions in large part based on the enforcement powers available to federal immigration agents and their special knowledge and expertise. But state and local police are not federal immigration agents. They do not have the same

129. *See* GARDNER & KOHLI, *supra* note 19, at 1 (reporting strong evidence to support claims that Irving police engaged in racial profiling of Hispanics in order to filter them through their immigration screening systems).

130. *See supra* Part III.A–B.

authority to enforce immigration laws. Consequently, it is legally unclear, as the discussions above have indicated, what Fourth Amendment standards should apply in immigration court. Deciphering police officers' enforcement powers in the immigration realm may shed light on what suppression standards to apply to SComm stops and detentions in removal.

The most recent legal authority on state and local police power to enforce immigration laws is the Office of Legal Counsel (OLC) Opinion, handed down in 1996.[131] In the opinion, the U.S. Department of Justice announced that state and local police may constitutionally detain or arrest people who have violated *criminal* provisions of the Immigration and Naturalization Act (INA), echoing the Ninth Circuit's decision in *Gonzales v. City of Peoria*.[132] "State police," the opinion continued, "lack recognized legal authority to arrest or detain aliens solely for purposes of civil deportation proceedings."[133] Additionally, the opinion notes that while the INA *permits* state and local law enforcement officers to detain and arrest for criminal immigration violations, whether they can do so is "subject to the provisions and limitations of state law."[134] For example, in a 1977 opinion, the Attorney General of Texas announced that Texas peace officers cannot arrest and detain a person on the suspicion that the person has illegally entered the United States.[135] The opinion allowed police to arrest and detain immigrants only on suspicion that a felony had been committed or when a misdemeanor was being committed in their presence.[136] California, New York, and Oklahoma place the same limitations on their officers.[137] Criminal violations of the INA include illegal entry (a misdemeanor), re-entry after deportation, and harboring and smuggling provisions, while civil violations include visa overstays and illegal presence.[138] Thus, under such state directives it would seem that police officers cannot arrest someone for being unlawfully present in the country, and they can only arrest for illegal entry if such entry occurs in their presence.

However, whether an officer has the authority to stop and arrest someone for being unlawfully present is a different question than whether an officer has the authority to inquire as to

131. Assistance by State and Local Police in Apprehending Illegal Aliens, 20 Op. O.L.C. 26 (1996).

132. *See id.* at *3 (citing Gonzales v. City of Peoria, 722 F.2d 468 (9th Cir. 1983), which held that "federal law does not preclude local enforcement of the criminal provisions of the [Immigration and Naturalization] Act.").

133. *Id.* at *1.

134. *Id.* at *3.

135. Tex. Att'y. Gen. Op. H-1029 (1977).

136. *Id.*

137. *See* Memorandum from the Migration Policy Inst., Authority of State and Local Officers to Arrest Aliens Suspected of Civil Infractions of Federal Immigration Law, 10 (June 11, 2002), *available at* http://www.migrationpolicy.org/files/authority.pdf (providing a comprehensive account of the history and development of law in this area).

138. Nat'l Immigration Forum, Immigration Law Enforcement by State and Local Police, 1 (Aug. 2007), http://www.policyarchive.org/handle/10207/bitstreams/11652.pdf.

the immigration status of the person he has stopped. This authority-to-inquire issue is important—especially in the context of SComm—because if police do have such authority, then the only question regarding whether the stop was unlawful is whether the officer had reasonable suspicion to make the stop initially, which, as discussed above, is an incredibly unproblematic standard to meet given the breadth of traffic violations available and the state of pretextual stop law. Despite this danger, both caselaw and the OLC opinion make quite clear that state and local law enforcement have general investigative authority to inquire into possible immigration violations, civil or criminal, once a lawful stop has been made.[139] The OLC opinion explains:

> [O]bservations made while investigating or processing the primary offense may provide independent basis for reasonable suspicion that either the driver or the passengers are violating the federal immigration laws, which would then justify further detention to investigate such violations within the bounds permitted by *Terry* and its progeny. Moreover, police would be permitted to inquire as to the immigration status of passengers in such a stopped vehicle as long as they do not unnecessarily prolong the length of the initial detention for that purpose. The responses to such inquiries could then provide a basis for detention or arrest of the passengers by creating a reasonable suspicion or probable cause that they have committed an illegal entry or are aliens lacking proper registration documents.[140]

Thus, even though state and local police are not allowed to initially stop a vehicle on suspicion of a civil immigration violation like unlawful presence, that limitation does not seem to be of much consequence, since the authority to ask about immigration status is quite broad. Furthermore, especially if the questioning does not prolong the seizure, it seems that police do not need reasonable suspicion to inquire as to immigration status because, technically, there is no additional seizure.[141] And even if the seizure was prolonged, the reasonable suspicion standard is not a significant deterrent, because officers will be able create new reasonable suspicion based on the responses they receive or other objectively reasonable factors which, given the low threshold, require almost no effort to articulate.

There is yet a more troubling aspect of the OLC opinion and the current authority given police officers that, depending on how it is interpreted, can provide a legal basis for a traffic stop to turn into an immigration case, which would in effect provide police the opportunity and incentive to make race-based SComm stops. Despite the OLC's repeated pronouncements in its opinion that state and local law enforcement do not have the authority to stop, detain, or arrest for civil

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139. *See* Assistance by State and Local Police in Apprehending Illegal Aliens, *supra* note 133, at 6; United States v. Lopez-Moreno, 420 F.3d 420 (5th Cir. 2005); United States v. Salinas-Calderon, 728 F.2d 1298 (10th Cir. 1984); United States v. Torres-Monje, 433 F.Supp.2d 1028 (D.N.D. 2006) (citing Muehler v. Mena, 544 U.S. 93, 97 (2005)).

140. Assistance by State and Local Police in Apprehending Illegal Aliens, *supra* note 133, at 6 (citations omitted).

141. Muehler v. Mena, 544 U.S. 93, 97 (2005).

immigration violations (the most salient being unlawful presence), which seems to preclude detentions by state officers based *solely* on suspicion of deportability, the opinion notes that "state police may . . . legally detain alien suspects for disposition by federal agents when there is reasonable suspicion that the suspects *have violated* or are violating the two commonplace misdemeanor provisions of the INA, 8 U.S.C. § 1304(e) (lack of alien registration documents) or § 1325 (illegal entry), or other criminal provisions of the INA."[142]

The granting of this authority to state and local police could make both the limitation regarding civil immigration enforcement and the state requirements that a misdemeanor must occur in the presence of the police for an arrest meaningless. Because a great number of those unlawfully present in the United States, a *civil* violation, got here by having violated § 1325—entering without inspection—this authority could mean that police can detain someone on the reasonable suspicion that the person is unlawfully present, thereby skirting the law that allows police to stop, detain, and arrest only for suspected criminal immigration violations. Under this logic, it seems that, while police do not have the authority to make a stop on suspicion of unlawful presence, they do have the authority to stop a vehicle on reasonable suspicion of, say, a traffic violation, and then detain that person on the suspicion that the person has, in the past, illegally entered the country. The inherent difficulty here is that a police officer cannot detect, merely by looking at a person, whether the person is unlawfully present due to an illegal entry or due to a visa overstay. Thus, how a police officer untrained in immigration law can identify whether § 1325 was violated would be a mystery if it were not for the broad authority they are given to inquire into immigration status. In effect, this interpretation of the OLC authorization at issue allows police to meddle in the realm of civil immigration law and has serious SComm implications, since the interpretation seemingly opens the door for police to make a traffic stop in order to determine whether someone is in the country unlawfully.[143] This possibility again demonstrates the dangers of both the state of pretextual stop law and the limited applicability of the exclusionary rule in removal proceedings, and paints quite a desolate picture for immigrants hoping to suppress their SComm traffic stops on the claim of race-based action.

Nevertheless, a stronger argument can be made for the proposition that, in granting the authority to police to detain someone on reasonable suspicion that the person violated the INA's illegal entry statute, the OLC meant to cover only a recent violation of § 1325, and not, for example, a violation that occurred ten years prior.[144] First of all, the veracity of the prior interpretation would mean that the OLC explicitly contradicts itself in the same opinion by, on the one hand decrying

142. Assistance by State and Local Police in Apprehending Illegal Aliens, *supra* note 133, at 2 (emphasis added).

143. This very issue of the potential for police to stop someone pretextually for deportation purposes was raised in *Mt. High Knitting, Inc. v. Reno*, 51 F.3d 216 (9th Cir.1995). The Ninth Circuit remanded the case for a finding as to whether reasonable immigration agents would have arrested the person solely for the explanation given absent a suspicion of illegal entry.

144. This interpretation would save a great majority of SComm victims, who have been living and working in the United States for years.

police authority to stop *or detain* for civil immigration violations and, on the other, providing an avenue for police to do exactly that. Secondly, in listing the acceptable factors for reasonable suspicion that a person violated § 1325, the OLC lists and discusses the *Brignoni-Ponce* factors, all of which involve an aspect of smuggling, recent border crossings, and proximity to the border, indicating that a recent violation of the illegal entry statute is what the OLC had in mind in fashioning this grant of authority.[145] Furthermore, the opinion cites approvingly a proposition from the Ninth Circuit that, "while the lack of documentation or 'other admission of illegal presence may be some indication of illegal entry,' it does not without more provide probable cause for a violation of 8 U.S.C. §1325(a)," and discusses at length the significant distinction between illegal entry and illegal presence, which "generally provides grounds only for civil deportation and is therefore not subject to non-federal enforcement."[146]

These ambiguities, together with the broad authority of police to both inquire about the immigration status of the person seized and to inform immigration officers if there is suspicion of deportability, allow for the quintessential race-based deportation-motivated SComm stop to occur: a police officer can pull someone over on the pretext of any traffic violation, and in the course of the stop ask the driver for his driver's license; when the driver indicates he has none, or even before then, the police officer can ask the driver questions about his immigration status; based on the responses and anything else he gathers, the officer can then detain the person for ICE investigation or arrest the person for driving without a license and bring him into the station, where ICE will place a detainer on the person.[147] The respondent will then be forced, if he is lucky enough to have an attorney, to litigate his legitimate suppression claim in the face of a limited exclusionary rule that does little to protect his constitutional rights. That is a reality that not only stands in stark opposition to the principle that police cannot make civil immigration stops, but also provides enough justification in and of itself for the application of a more robust exclusionary rule in immigration court.

At the very least, the OLC opinion indicates that police cannot initially stop a person for suspicion of a civil immigration violation, which means that there must be reasonable suspicion of a traffic violation or some other criminal activity in order to seize someone originally.[148] Police-formulated reasonable suspicion of a traffic violation or of another crime and the resulting stop and detention, which is how all SComm cases must begin, fall into the criminal law realm, regardless of

145. *See* Assistance by State and Local Police in Apprehending Illegal Aliens, *supra* note 133, at 7.

146. *See id.* at 8 (quoting Mt. High Knitting, Inc. v. Reno, 51 F.3d 216, 218 (9th Cir.1995)).

147. Based on the lack of driver's license alone, a police officer may arrest a person; thus, a police officer need not even delve into immigration status questions. However, as the above-mentioned studies and a review of case law strongly suggest, the suspicion that someone is undocumented, whether motivated by responses to immigration status questions or race or both, factor into police officers' decisions regarding whom to arrest since they are generally not required to arrest for Class C traffic violations.

148. Assistance by State and Local Police in Apprehending Illegal Aliens, *supra* note 133, at 6.

whether the legality of the stop is litigated in immigration or criminal court. As such, immigration courts should evaluate those stops under a different standard than immigration stops, because they are, as the OLC opinion explains, different. Despite its uncertainties, the OLC's opinion made one thing clear: the authority given state and local police is not the same as the authority given immigration officials.[149] Their actions, therefore, should be judged differently. Police officers should be held to their full constitutional obligations under the Fourth Amendment, regardless of where unlawful stop victims litigate their claims and regardless of their immigration status.

V. FINAL POINTS AND CONCLUSION: *LOPEZ-MENDOZA*'S DISREGARD FOR FOURTH AMENDMENT PRINCIPLES AND WHY THE FULL POWERS OF THE FOURTH AMENDMENT SHOULD APPLY TO SCOMM ACTIONS IN IMMIGRATION COURT

Even though SComm, in its design and more so in the way it has been carried out, marshals state and local law enforcement into the immigration realm, it does not confer upon those police officers any more authority other than what they already have to enforce immigration laws. SComm only requests that they provide ICE with information gathered as a result of working within their standard policing efforts, which involve enforcing criminal laws and traffic violations. Police cannot enforce civil immigration laws, like unlawful presence; only immigration officers can do that. A line divides acceptable law enforcement efforts from those of immigration officers. That same line should distinguish the Fourth Amendment standards that regulate their behaviors. It is not appropriate, then, to apply the *Lopez-Mendoza* and *Brignoni-Ponce* standards to SComm suppression claims. Their continued use in removal proceedings, despite any attendant SComm nuances, unacceptably disrespects Fourth Amendment principles.

A. The Lopez-Mendoza *Decision Is Not Relevant to SComm Immigration Enforcement*

Even if the Supreme Court correctly decided *Lopez-Mendoza* at the time,[150] neither the decision nor the Court's reasoning resonate with the world of immigration enforcement in which we

149. *See id.* (discussing the power of state and local police as compared to immigration officials in detaining suspected aliens).

150. Whether the Supreme Court made the correct decision in *Lopez-Mendoza* is highly debatable but is not within the scope of this paper.

now live. The Supreme Court relied on characteristics unique to immigration matters, like immigration officers and immigration stops, at a time when police officers were not involved in immigration enforcement as deeply as they are today. The ruling's continued application to suppression claims in removal proceedings, especially as those claims pertain to SComm actions, should thus be seriously questioned.

To come to its decision that, generally, the exclusionary rule would not apply in immigration court, the *Lopez-Mendoza* Court weighed the likely social benefits of excluding evidence unlawfully obtained against the likely costs.[151] The Court's analysis focused mainly on what deterrence value the rule would have were it to be applied in removal proceedings.[152] A careful consideration of the factors the Supreme Court contemplated in estimating that value shows that those factors have no applicability to SComm-related immigration enforcement.

The first factor the Supreme Court considered in justifying its finding that applying the exclusionary rule in immigration court would have a low deterrent value is that, in immigration enforcement, the "agency officials who effect the unlawful arrest are the same officials who subsequently bring the deportation action."[153] Such is not the case with SComm: SComm stops begin with police officers, but immigration officers bring the deportation action. Tellingly, the Court added, "the exclusionary rule is likely to be most effective when applied to . . . intrasovereign violations."[154] SComm is an "intrasovereign" partnership, and if a police officer executes an unlawful stop that ICE later takes advantage of, that violation is an "intrasovereign" one. That is when, according to Supreme Court itself, the exclusionary rule is rendered *most effective*. The deterrence value, then, cannot be said to be the same for SComm stops as it was in *Lopez-Mendoza*.[155]

The Supreme Court also pointed to the availability of "alternative remedies for *institutional practices by the INS* that might violate Fourth Amendment rights," like declaratory relief.[156] The possibility of such relief was predicated on the fact that the INS is "a single agency, under central federal control, and engaged in operations of broad scope but highly repetitive character."[157] With

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151. *See* I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1040–41 (1984) ("The general rule in a criminal proceeding is that statements and other evidence obtained as a result of an unlawful, warrantless arrest are suppressible if the link between the evidence and the unlawful conduct is not too attenuated.." (citing Wong Sun v. United States, 371 U.S. 471 (1963)).

152. *Id.* at 1041.

153. *Id.* at 1043.

154. *Id.*

155. The deterrence value to police if such behavior were condemned more fully in immigration court, theoretically, would be that making race-based stops for immigration purposes turns out to be a waste of their time and a drain on ICE resources, perhaps leading ICE to pressure police to make only lawful stops.

156. *Lopez-Mendoza*, 468 U.S. at 1045 (emphasis added).

157. *Id.*

SComm-related immigration enforcement, that factor no longer exists in its original form. The actor is no longer just ICE, nor is it one single agency. State and local law enforcement agencies—under different operations, guidelines, and protocols—are the SComm abusers. Additionally, the opportunity of declaratory relief is an almost illusory one; if the removal proceeding is successful, as most are, the person whose constitutional rights have been violated will be on the next plane out of the country without the chance to bring suit against anyone.[158]

The most important factor the Supreme Court relied on in reaching its conclusion that the deterrence value of the exclusionary rule's application in removal proceedings would be too low to matter was that the INS (now ICE) had "its own comprehensive scheme for deterring Fourth Amendment violations by its officers."[159] While it may be true that ICE has its own system in place to address these issues,[160] this factor does not apply because with SComm, the initial violation is not an immigration officer's. More significant, however, is the fact that police officers, when it comes to immigration cases, have no such system. And, because the complainant is already in removal proceedings, it is unlikely that there will be a criminal case against him where the officer's actions could be challenged. There is thus no place left for the immigrant to bring his claim. Providing no real forum for reprisals of this kind of conduct condones and encourages unlawful behavior on the part of police officers in their dealings with immigrants, disregarding the exclusionary rule's primary purpose of deterring the very actions with which SComm has proven to be fraught.

Other factors the Supreme Court relied on include ICE's "investigatory burden" given the "staggering" number of immigrants in the United States, which does not apply to SComm stops where police are not charged with the task of deporting people, and the idea that terminating proceedings would allow a criminal to continue to commit an ongoing crime, something that is legally incorrect regarding immigrants whose only violations are non-continuing crimes—like illegal entry—or civil—like unlawful presence.[161] Finally, the Supreme Court focused on the administrative difficulties and costs (most of which are unique to enforcement by immigration officers) involved with allowing immigrants to bring Fourth Amendment claims available to criminal defendants.[162] But concerns with the "ensuing delays and inordinate amount of time spent on such cases" should shrink when such fundamental rights are at stake and should never

158. Even if a person were able to bring an action for declaratory relief against state police, that complicated litigation requires lawyers, time, and money, and most immigrants simply cannot afford it. Additionally, the most meaningful remedy here surely for most people is relief from removal, not monetary damages. And this is to say nothing about the almost insurmountable challenges people face in bringing suit against government entities, especially on discrimination grounds.

159. *Lopez-Mendoza*, 468 U.S. at 1044.

160. The actual effectiveness of this scheme, and the seriousness with which ICE employs it, has been called into serious question. *See* Bill Ong Hing, *Border Patrol Abuse: Evaluating Complaint Procedures for Victims*, 9 GEO. IMMIGR. L.J. 757 (1995).

161. *Lopez-Mendoza*, 468 U.S. at 1047–48. Recall from the discussion above that illegal entry is not a continuing crime and unlawful presence is a civil, not a criminal, violation.

162. *Id.*

overpower the government's constitutional obligations to its people.[163]

Unquestioning adherence to *Lopez-Mendoza*'s ruling applying a limited exclusionary rule to *all* suppression claims in removal proceedings, even to those challenging police-initiated SComm stops, is legally unsound and makes a mockery of Fourth Amendment principles. When the actions being challenged as unlawful are those of state and local law enforcement—as they are in SComm stops, detentions, and arrests—*Lopez-Mendoza* has no place in suppression claims, regardless of the forum. The full protections of the Fourth Amendment should govern.

B. Brignoni-Ponce*'s Allowance of Race as a Factor Should Not Apply to SComm Stops*

The *Brignoni-Ponce* decision developed a suppression standard that should be limited to claims against immigration officers and immigration stops. Their extension to police officer actions, including SComm stops, is legally inconsistent with the opinion's reasoning and allows state and local law enforcement to engage in impermissible race-based behavior without repercussions. Given the dismissive state of the law regarding pretextual stops and the proof that police participating in SComm are executing traffic stops based on race and with deportation-minded motivations,[164] the potential for racial profiling is great and appropriate safeguards should be put in place.

Instead, courts have gone the other way. The *Lopez-Mendoza* decision and its progeny implicitly adopted *Brignoni-Ponce*'s approval of race as a factor when forming reasonable suspicion by developing and implementing for immigration court the heightened egregiousness standard, under which a stop, detention, or arrest will be found to be egregious if race was the *sole* reason for the seizure.[165] That standard, the *Brignoni-Ponce* rule, allows for stops in which race was only one of the factors given to be declared completely lawful.[166] However, Fourth Amendment case law makes clear that police officers cannot use race as a factor in formulating reasonable suspicion.[167] Even though an SComm stop may be being challenged in immigration court, the stop occurred in the criminal law realm and it was the police who initiated it. Race should not be a

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163. *Id.*

164. AM. IMMIGRATION LAWYERS ASS'N, *supra* note 18; GARDNER & KOHLI, *supra* note 19.

165. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 885–86 (1975) (holding that the Fourth Amendment does not permit the Border Patrol to stop a vehicle near the Mexican border and question its occupants about their citizenship and immigration status, when the only ground for suspicion is that the occupants appear to be of Mexican ancestry).

166. *See id.* at 886–87 (holding that suspicion of Mexican ancestry can be a relevant factor for a Border Patrol stop; however, standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.)

167. *See, e.g.*, United States v. Swindle, 407 F.3d 562, 569–70 (2d Cir. 2005) (no reasonable suspicion to order stop based on driver being same race as suspect); Farm Labor Org. Comm. v. Ohio State Highway Patrol, 308 F.3d 523, 533 (6th Cir. 2002) (potentially no reasonable suspicion when police may have relied on suspect's inability to speak English); United States v. Jones, 242 F.3d 215, 218 (4th Cir. 2001) (no reasonable suspicion when tip solely described race and officer pulled over car despite lack of traffic or equipment violations); Buffkins v. Omaha, 922 F.2d 465, 470 (8th Cir. 1990) (no reasonable suspicion when informant's tip merely described race of person and person carried toy animal that appeared to be re-sewn).

permissible factor in reasonable suspicion when evaluating the lawfulness of SComm stops. A normal application of the exclusionary rule to such stops would take race out of the equation.

Brignoni-Ponce concerned, as mentioned above, immigration officials' immigration stops near the border.[168] In reaching its decision, the Supreme Court relied on the training and expertise of immigration agents, and focused on the factors of border proximity, recent illegal entries, and smuggling operations. [169] Those elements provided the basis for formulating a different standard of reasonable suspicion. Conversely, SComm stops are not immigration stops, even if they do end with an ICE detainer or other immigration consequences. They are conducted by state and local law enforcement for the purpose of usual police functions, like investigating a *criminal* or *traffic* violation, and they can happen anywhere, whether near the border or deep in the interior of the United States. Additionally, as a district court has noted, the racial statistics the Supreme Court relied upon in *Brignoni-Ponce* were not probative of "any type of criminal conduct other than immigration violations."[170] Police, then, should have no excuse to rely on race in SComm stops, where the initial reasonable suspicion formed can have only to do with criminal conduct. Accordingly, the *Brignoni-Ponce* standard should have no application to SComm stops, especially since the Supreme Court in *Brignoni-Ponce* allowed immigration agents to rely on race "in their enforcement efforts in a manner that would be impermissible for standard law enforcement efforts."[171]

Predictably, the *Brignoni-Ponce* standard blurs this distinction. While immigration officers may consider race in deciding whether to stop a vehicle, especially if they are near the border, state and local police cannot.[172] Still, because *Brignoni-Ponce* provides a different suppression standard for immigration-related cases, there is great danger that the application of that standard will bleed into the analysis of stops and arrests by police officers that end up involving immigration matters. It has happened before. For example, in finding that a local police officer had not violated the Fourth Amendment in stopping a vehicle, the Fifth Circuit approvingly mentioned that the officer's suspicion was "piqued" when he saw a van "being driven by a Hispanic immigrant."[173] This

168. The factor of border proximity to whether the *Brignoni-Ponce* reasonable suspicion standard can apply is of great importance. Its viability is seriously called into question once the stop occurs a substantial distance away from the border. *See* United States v. Rodriguez-Rivas, 151 F.3d 377 (5th Cir. 1998) (noting that the factor of "border proximity" is missing if there is no reason to believe that the vehicle has come from the border or when the stop occurs a substantial distance from the border).

169. *Brignoni-Ponce*, 422 U.S. at 885–86.

170. Farag v. United States, 587 F. Supp. 2d 436, 464 (E.D.N.Y. 2008).

171. Abby Sullivan, *On Thin ICE: Cracking Down on Racial Profiling of Immigrants and Implementing a Compassionate Enforcement Policy*, 6 HASTINGS RACE & POVERTY L.J. 101 (2009).

172. Recall that, under *Waldon*, police are only allowed to use race if it is part of the description of a suspect. United States v. Waldon, 206 F.3d 597, 604 (6th Cir. 2010).

173. United States. v. Lopez-Moreno, 420 F.3d 420, 433 (5th Cir. 2005).

happened far from the border.[174] Similarly, a court upheld a state trooper's stop as reasonable, after mentioning almost dismissively that the officer's immigration questioning began immediately after the officer noticed the two men he had pulled over for speeding "appeared to be Hispanic."[175] This happened in North Dakota, as far from the Mexican border as one can get.[176]

Those are the very kinds of stops that, through SComm, land hundreds of thousands of people in removal proceedings, where their potentially legitimate Fourth Amendment claims stand small chance at success. Those dismal odds are due, in part, to the incorrect and muddied application of *Brignoni-Ponce*'s standard approving of race-based immigration enforcement actions to traffic stops and to the fragile exclusionary rule that exists in immigration court, where the lawfulness of the stop is challenged, regardless of who conducted the stop. The potential for police to behave in a constitutionally abusive manner based on race in conducting SComm stops compounds the impact on the immigrant community, creating a situation where racial profiling is easy to engage in and unlikely to be punished. To guard against this danger and make clear that SComm does not give police officers license to engage in race-based stops, the exclusionary rule in its full form, which better protects against race-based law enforcement efforts, should apply in removal proceedings.

C. The Limited Exclusionary Rule Disparages the Fourth Amendment Principles

In *Elkins*, the Supreme Court declared unconstitutional the silver platter doctrine; no longer, in theory, would evidence illegally obtained by *state* officers and handed over to *federal* officers be admissible in federal courts.[177] The decision, which focused on the "commendable practice of state and federal agents to cooperate with each other," resonates strongly in our new immigration enforcement world, where partnerships between ICE and state police officers, like SComm, abound.[178]

The parallelisms are so powerful that one could read the *Elkins* decision today and think that it was written to address the very types of suppression issues discussed in this paper, but for one detail: the way the Fourth Amendment applies in immigration court as it pertains to SComm stops, detentions, and arrests utterly disregards the opinion's foundational principles. The Court wrote that "a rule that implicitly invites federal officers to withdraw from such association [with state officers' unlawful behavior] and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom" ignores the exclusionary rule's purpose to deter such

174. *See id.* at 425 (specifying that the stop was made in Greenwood, Louisiana).

175. United States v. Torres-Monje, 433 F.Supp. 2d 1028, 1030 (D.N.D. 2006).

176. *Id.*

177. Elkins v. United States, 364 U.S. 206 (1960).

178. *Id.* at 211.

behavior.[179] But that is precisely what suppression standards in immigration court do when they are applied to SComm stops: the barriers to prevailing on suppression claims in immigration court along with the application of both a significantly weakened exclusionary rule and *Brignoni-Ponce*'s endorsement of race as a relevant factor encourage police officers to engage in racial profiling and other Fourth Amendment violations because the threat of repercussions is slight, especially when the rejection of a suppression claim ends in the deportation of the person whose rights have been abused.

The state of suppression law in removal proceedings and the (at best) feeble protections it provides immigrants turns immigration courts into "accomplices in the willful disobedience of a Constitution they are sworn to uphold."[180] Given the continued limitations on the authority of police, even under SComm, to enforce civil immigration laws, there can be no real logical distinction between the way the lawfulness of SComm stops and standard criminal or traffic stops are analyzed, regardless of whether the SComm stop results in an immigration case. The Supreme Court in *Elkins* said it best:

> The Constitution is flouted equally in either case. To the victim, it matters not whether his constitutional right has been invaded by a federal agent or by a state officer. It would be a curiously ambivalent rule that would require the courts of the United States to differentiate between unconstitutionally seized evidence upon so arbitrary a basis. Such a distinction indeed would appear to reflect an indefensibly selective evaluation of the provisions of the Constitution.[181]

The use of a weakened Fourth Amendment in immigration court dismisses state and local law enforcement officers from their constitutional obligations, makes SComm a dangerous tool of racial profiling with incredibly severe effects and little recourse, and ignores the constitutional promise that *all people*, regardless of immigration status, shall be free from unlawful searches and seizures.

It is time immigration courts and SComm live up to that promise.

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179. *Id.* at 221–22.

180. *Id.* at 223.

181. *Id.* at 215.

PLAYING THE RACE CARD: WHITE AMERICANS' SENSE OF VICTIMIZATION IN RESPONSE TO AFFIRMATIVE ACTION

BRETT HAMMON

Abstract:

"They marched on Washington to reclaim civil rights. They complained of voter intimidation at the polls. They called for ethnic studies programs to promote racial pride. They are, some say, the new face of racial oppression in this nation—and their faces are [W]hite."[a] A 2011 poll indicates that Whites have now come to view anti-White bias as a bigger problem than anti-Black bias.[b] Based on recent Supreme Court opinions, most of the Justices apparently agree that Whites are today's true victims, as the Court has continued to steadfastly stand up for the rights of White plaintiffs against discrimination in the form of affirmative action.

In determining whether to provide a class with heightened protection, the Supreme Court is inevitably tasked with making some observations about that class's lot in society. In the past few years, many have advanced the narrative that Whites are in need of protection against discrimination, including the Tea Party, Rush Limbaugh, the state of Arizona, and even the Berkeley College Republicans. Given these social expressions of White victimization, it is no surprise that the Supreme Court has extended its protections to Whites against any laws that Whites perceive as harming their interests.

In this piece, I seek to explore these social expressions of White victimization and ultimately explain, by employing psychological research, how and why this narrative has it backwards. While many pieces of legal scholarship have analyzed the recent popular schema of colorblindness as a normative goal and description of modern America, this piece analyzes an even more recent trend—a divergence from colorblindness, as some Whites are not pretending that race is irrelevant, but are in fact claiming their race as a badge of discrimination.

[a] John Blake, *Are Whites Racially Oppressed?*, CNN, Mar. 4, 2011, http://www.cnn.com/2010/US/12/21/White.persecution/index.html.

[b] Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game That They Are Now Losing*, 6 PERSP. ON PSYCHOL. SCI. 215, 215–18 (2011).

INTRODUCTION

In the fall of 2011, the Berkeley College Republicans held an "Increase Diversity Bake Sale," in which they charged different prices for pastries based on the gender and race of the buyer.[1] For each pastry, the group charged Whites two dollars, Asian-Americans one dollar and fifty cents, Latinos one dollar, Blacks seventy-five cents, Native Americans twenty-five cents, and gave all women a twenty-five cent discount.[2] Various other California campuses joined the Berkeley College Republicans in the bake sale, meant to protest S.B. 185, which would have countered Proposition 209 and permitted the use of race in the college admissions process.[3] The asserted purpose of the bake sale was to argue that differential treatment on the basis of race is always

1. Malia Wollan, *A 'Diversity Bake Sale' Backfires on Campus*, N.Y. TIMES, Sept. 26, 2011, http://www.nytimes.com/2011/09/27/us/campus-diversity-bake-sale-is-priced-by-race-and-sex.html.

2. *Id.*

3. Holly Yan and Michael Martinez, *A Cupcake Sellout at 'Inherently Racist' Bake Sale by UC Berkeley Republicans*, CNN, Sept. 27, 2011, http://articles.cnn.com/2011-09-27/us/us_california-racial-bake-sale_1_bake-sale-baked-goods-cupcakes/2?_s=PM:US.

wrong.[4] The pricing structure reflects the view of the College Republicans that Whites have to "pay more" to get the same thing as people of color since people of color are given so much "special treatment."[5]

When the Civil Rights Movement finally achieved the eradication of formal de jure racism, many White Americans were happy to pretend that we lived in a "colorblind" society, one in which we ignored the fact that Whites occupied a distinctly superior position in that society. Where de facto racism persisted, many leaders felt an obligation to help right that wrong through affirmative action programs. Yet, when institutions enacted the most modest of remedial measures, many Whites began to play the victim. Today, conservative Whites seek to analogize modern "discrimination against Whites" (better known as affirmative action) with Jim Crow era discrimination against Blacks. They argue that both forms of discrimination ought to receive the same exacting level of review from the Supreme Court: strict scrutiny. In determining what level of review a class of people deserves, the Court cannot consult a statute. Instead, the Court is required to make some observations about that class's role in society, and some Whites are beginning to advance a narrative of White victimization, which may lead the Court to conclude that Whites are a class worthy of heightened protection. A 2011 report indicates that "Whites have now come to view anti-White bias as a bigger societal problem than anti-Black bias."[6] A recent poll reveals that "40% of adults in America think racism against White people is widespread in the United States."[7] How can so many people feel that discrimination against Whites is widespread when Whites are the most materially well-off group using almost any conceivable measure? That *feeling* of White victimization simply does not comport with the reality of White privilege.

The cliché example of "playing the race card" involves a Black person being criticized for something unrelated to his or her race and responding, "It's because I'm Black, right?" Today, when White Americans do not attain their highest educational or vocational aspirations, many are beginning to exclaim, "It's because I'm White, right?" In this piece, I seek to document this pervasive perception of anti-White bias, as it is reflected in social expressions.[8] I consult

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4. *Id.*

5. *Id.*

6. Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game That They Are Now Losing*, 6 PERSP. ON PSYCHOL. SCI. 215, 215–18 (2011).

7. Alex P. Kellogg, *Has 'Whiteness Studies' Run Its Course at Colleges?*, CNN (Jan. 30, 2012), http://inamerica.blogs.cnn.com/2012/01/30/has-Whiteness-studies-run-its-course-at-colleges/?hpt=hp_bn1; *see also* Jeffrey M. Jones, *Majority of Americans Say Racism Against Blacks Widespread*, GALLUP POLL (Aug. 4, 2008), http://www.gallup.com/poll/109258/majority-americans-say-racism-against-blacks-widespread.aspx (providing statistics on the percentage of adults who believe racism against whites is widespread).

8. A sociologist explains the position of many Whites: "We went from being a privileged group to all of a sudden becoming Whites, the new victims . . . . You have this perception out there that Whites are no longer in control or the majority. Whites are the new minority group." John Blake, *Are Whites Racially Oppressed?*, CNN (Mar. 4, 2011), http://www.cnn.com/2010/US/12/21/White.persecution/index.html.

psychological research to explain why the perception does not match the reality. And, in looking at the Supreme Court's factors for determining the appropriate level of review, I seek to establish that "discrimination" against Whites in the form of affirmative action ought to receive a lower level of review than discrimination against non-Whites. In Part I, I lay out the Court's equal protection jurisprudence as it relates to affirmative action and the level of scrutiny that so-called "reverse racism" claims receive. In Part II, I explore social expressions of this perception of an anti-White bias in order to construct the conservative case for the application of strict scrutiny to "reverse racism" affirmative action claims. In Part III, I refute that conservative case by demonstrating that Whites are still the oppressors, not the oppressed. In Part IV, I use psychological evidence to explain how that public perception can be so out of sync with reality—the reality that White Americans do not occupy a place in our society that merits heightened scrutiny.

I. THE SUPREME COURT'S TREATMENT OF "REVERSE RACISM" AGAINST WHITES

It is highly unlikely that the drafters of the Fourteenth Amendment ever envisioned their contribution toward equality being used to protect *Whites* from discrimination. Yet in case after case, White plaintiffs allege that affirmative action policies discriminate against them in violation of the Equal Protection clause. Allan Bakke, a White male, was rejected from the University of California Davis School of Medicine, despite the fact that his academic scores were higher than many Blacks and Latinos who were admitted.[9] Wendy Wygant, a White schoolteacher, lost her job when layoffs became necessary due to a policy of laying off non-minorities first.[10] Frank Ricci, a White dyslexic firefighter, devoted significant time and money toward studying for a test that determined promotions.[11] His hard work paid off as he placed sixth out of seventy-seven test-takers, but the results were thrown out because of a desire to promote more Black firefighters.[12] These are the faces of modern injustice. These are the victims of discrimination, standing alongside Fred Korematsu, who was interned by the U.S. government simply because he was Japanese-American and whose case first prompted the Supreme Court to apply strict scrutiny to racial discrimination.[13] The Court offered the same level of protection to Fred Korematsu as it did Allan Bakke—incidentally, Bakke won his case and was forcibly admitted to Davis Medical School, while Korematsu lost his case and was forcibly placed in a relocation camp.[14]

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9. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 277 (1978).

10. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 271 (1986).

11. Ricci v. DeStefano, 557 U.S. 557, 568 (2009).

12. *Id.* at 607.

13. Korematsu v. United States, 323 U.S. 214, 216 (1944).

14. *See id.* at 214 (holding that exclusion order for Japanese American internment was constitutional); *Bakke*, 438 U.S. at 265 (holding that the university's special admissions program was not constitutional).

I do not at all intend to mock the White plaintiffs in the aforementioned cases. I believe that White people can suffer legitimate misfortune and certainly can be victims of discrimination because of other aspects of their identity. After all, "having [White] privilege does not mean one cannot be oppressed in other ways."[15] Some people hold a real anti-White bias, which can legitimately harm White people based on the color of their skin. I simply disagree with the legal contentions of the White plaintiffs and maintain that anti-White bias and the harm it causes Whites is entirely different than racism and the harm it causes people of color. It is a matter of kind, not degree, when comparing discrimination against the oppressor versus discrimination against the oppressed. The Supreme Court does not see it this way.

The Supreme Court applies strict scrutiny to any case where one race is treated differently than another, including in cases of affirmative action.[16] It does not matter that there is no intended target of discrimination; Whites still claim to be harmed by affirmative action policies because they are not the beneficiaries of such policies.[17] The Court has unequivocally stated, "'[R]acial classifications of any sort must be subjected to 'strict scrutiny.'"[18]

The Court has not clearly stated a set of factors that are necessary or sufficient to qualify a class of persons for heightened scrutiny. But the Court frequently utilizes a few general qualifications for heightened review:

- The group has been historically discriminated against, perhaps including subjection to stigma and stereotypes;
- The group possesses an immutable trait;
- The group is a discrete and insular minority;
- The group is powerless to protect itself using the political process.[19]

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15. Julie A. Helling, *"Allowing" Race in the Classroom: Students Existing in the Fullness of Their Beings*, SCHOOL OF EDUC., JOHNS HOPKINS UNIV., http://education.jhu.edu/newhorizons/strategies/topics/multicultural-education/allowing-race-in-the-classroom/index.html (last visited Feb. 16, 2013).

16. *See, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 202 (1995) (explaining the use of strict scrutiny in analyzing racial classifications); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (explaining the application of strict scrutiny in cases where races are treated differently from each other).

17. *See* Richard Morin & Sharon Warden, *Americans Vent Anger at Affirmative Action*, WASH. POST, Mar. 24, 1995, http://www.washingtonpost.com/wp-srv/politics/special/affirm/stories/aa032495.htm (discussing results of a survey on Americans' opinions regarding affirmative action policies).

18. *Adarand*, 515 U.S. at 220 (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986)).

19. *See* Lyng v. Castillo, 477 U.S. 635, 638 (1986) ("Close relatives are not a 'suspect' or 'quasisuspect' class. As a historical matter, they have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority or politically powerless"); United States v.

I will argue that Whites do not satisfy these criteria. One may respond that whether Whites satisfy the criteria is not the appropriate question; if Latinos satisfy the criteria, then any law that treats Latinos differently than Whites ought to be reviewed with strict scrutiny. Laws with a hateful intent against Latinos will be struck down, but also laws that may ostensibly appear innocuous ought to be closely reviewed just in case they harm Latinos, given our nation's shameful history of racism. This argument applies especially well in the gender context, where women meet the above criteria, at least enough to earn intermediate scrutiny.[20] Laws that are not ostensibly aimed at harming women—laws that even appear to benefit women—often actually reinforce gender norms that oppress women. Justice Brennan wisely explained that our traditional notions of male and female roles are driven by a "'romantic paternalism,' which, in practical effect, put women, not on a pedestal, but in a cage."[21] Therefore, it is of no consequence that men as a class do not satisfy the suspect class criteria; any law that treats men and women differently, regardless of whether it might hurt men or hurt women, is treated with heightened scrutiny.[22]

In *Frontiero v. Richardson*, Sharron and Joseph Frontiero brought the suit because a policy automatically qualified women for the military's medical benefits based on the assumption that women were dependent on their husbands.[23] Because the couple was not able to prove that Joseph was dependent on his military wife Sharron "for more than one half of his support," Sharron's application for military benefits was denied.[24] A law that seemingly favored women also served to reinforce the norm that women are dependent on their husbands—a norm that encourages women to stay in the home and discourages women from seeking gainful employment and independence.

This analogy simply does not hold up in the race context, however.[25] Justice Powell has made the argument that affirmative action reinforces the problematic presumption that minorities

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Carolene Prod. Co., 304 U.S. 144, 155 n.4 (1938) (asking "whether prejudice against *discrete and insular minorities* may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." (emphasis added)).

20. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 568 (1996) ("We have no established criterion for 'intermediate scrutiny...but essentially apply it when it seems like a good idea to load the dice. So far, [intermediate scrutiny] has been applied...to discrimination based on sex.").

21. Frontiero v. Richardson, 411 U.S. 677, 684 (1973).

22. *See id.* at 688 ("We can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.").

23. *Id.* at 680.

24. *Id.*

25. I do not mean to say that discrimination against men should necessarily receive heightened scrutiny while discrimination against Whites should receive rational basis scrutiny—that affirmative action on the basis of race ought to survive equal protection analysis while affirmative action on the basis of sex ought to fail. I believe there is a distinction between policies that "help women" by assuming that they are dependent on their husbands so that they may, for instance, qualify for military medical benefits, and policies that give women preferential treatment in the college admissions process. However, the focus of this piece is legislation that employs race-based classifications; gender-based classifications serve as a foil within the scope of this argument.

are incapable of succeeding without preferential treatment.[26] But that is not the thrust of the opposition to affirmative action; people of color are not lining up as plaintiffs to challenge affirmative action because of this stigma. In light of lessons learned from history, Chief Justice Roberts explains that "humility" should overcome any "confidence in [the Court's] ability to distinguish good from harmful governmental uses of racial criteria."[27] But, while a lawmaker could conceivably say a law will help women while secretly intending to keep them in the home, I am not aware of anyone who has ever articulated an argument that a lawmaker could introduce an affirmative action bill and say it will help Latinos, while secretly intending to hurt them. There is a tenable argument that there may be some negative consequences of affirmative action on Blacks and Latinos, including stigma, but there is no tenable argument that affirmative action policies are *intended* solely to cause those negative consequences on Blacks and Latinos. So, even though Justice Roberts clings to his belief in the unknowability of intent, regular people who are not on the Supreme Court seem to have no trouble deciphering whom these affirmative action laws are intended to help. Hence, Blacks and Latinos close to unanimously support affirmative action, while some White plaintiffs identify the ways in which it hurts Whites.[28]

Do the lawmakers behind affirmative action policies intend preferential treatment for people of color *in spite of* the adverse consequences on Whites, or do they intend preferential treatment for people of color *because of* the adverse consequences on Whites? I believe in the former, but I seek to explore the ideas of the many Americans who believe in the latter characterization. The only theory that has been articulated describing an intent to harm behind affirmative action is that the policies may be intended as "reverse racism," an idea tied up with the racial politics of revenge against Whites.[29] Therefore, if affirmative action policies are to be reviewed using strict scrutiny, it must be because we want to avoid unnecessarily hurting *Whites*, as they are a suspect class. For those reasons, the relevant question is whether Whites meet the suspect class criteria. And if one believes Glenn Beck, then Whites have indeed suffered a history of discrimination, albeit a very short history, they are an immutable group, and they are increasingly powerless in our government.[30]

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26. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978) ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection . . . .").

27. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 742 (2007) (quoting Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 609–10 (1990) (O'Connor, J., dissenting)).

28. *See supra* notes 9–22 and accompanying text (evaluating the applicability, and the effects of, pivotal court decisions involving race, such as *Bakke*).

29. *See* Walter Williams, *Affirmative Action or Racism?*, WND (Jan. 29, 2003), http://www.wnd.com/2003/01/16984/ (discussing different views of affirmative action, one of which is that affirmative action is a racist policy).

30. *See Glenn Beck: Obama is a Racist*, CBS NEWS (July 29, 2009), http://www.cbsnews.com/2100-250_162-5195604.html (illustrating Beck's views of Whites as victims of racism).

II. EXPRESSIONS OF THE BELIEF THAT WHITES ARE A DISCRIMINATED AGAINST, POWERLESS GROUP

"They marched on Washington to reclaim civil rights. They complained of voter intimidation at the polls. They called for ethnic studies programs to promote racial pride. They are, some say, the new face of racial oppression in this nation—and their faces are [W]hite."[31] A decade ago, there was a taboo on Whites talking about race, and a feeling that only a fringe White supremacist group would openly acknowledge the "threat" of people of color. Today, a substantial number of Whites are finally acknowledging their own Whiteness, but they are exclaiming that they are the modern *victims* of racism.[32] A recent study by Norton and Sommers reveals that Whites think discrimination against Whites is a bigger problem in society today than discrimination against Blacks.[33] It notes that "these trends epitomize a more general mindset gaining traction among Whites in contemporary America: the notion that Whites have replaced Blacks as the primary victims of discrimination."[34]

Norton and Summers look at Justice O'Connor's infamous prediction in 2003 that affirmative action would no longer be necessary by 2028, and note that "many Whites believe that the moment O'Connor foresaw has already passed, and that the pendulum has now swung beyond equality in the direction of anti-White discrimination."[35] Rather than taking twenty-five years, many Whites believe it took less than a decade for the need for remedial measures to expire and that at this point "remedial measures" are just exacerbating discrimination in the opposite direction.[36] In fact, 56% of White people surveyed agreed with the statement that the government has paid too much attention to the problems of racial minorities over the past few decades, whereas only 24% of Blacks and 37% of Latinos surveyed were in agreement with the statement.[37] The same survey reveals that 58% of Whites believe that racism against Whites has become as big a problem as racism against racial minorities while, in comparison, only 24% of Blacks and 39% of Latinos held

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31. Blake, *supra* note 8.

32. *See id.* (discussing the notion of a growing number of Whites that they are today's victims of racism).

33. Norton & Sommers, *supra* note 6, at 215.

34. *Id.*

35. *Id.* at 217; *see also* Juan Williams, Op-Ed., *Affirmative Action's Untimely Obituary*, WASH. POST (July 26, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/07/24/AR2009072402101.html?sid=ST2009072403325 ("[Conservatives] pretend that the nation is already so transformed that a colorblind America is a reality and that affirmative action is superfluous . . . .").

36. *See* Norton & Sommers, *supra* note 6, at 217 ("[M]any Whites believe that the moment O'Connor foresaw has already passed, and that the pendulum has now swung beyond equality in the direction of anti-White discrimination.").

37. ROBERT P. JONES ET AL., PUB. RELIGION RES. INST. & GEORGETOWN UNIV. BERKLEY CTR. FOR RELIGION, PEACE, & WORLD AFFAIRS, A GENERATION IN TRANSITION: RELIGION, VALUES, AND POLITICS AMONG COLLEGE-AGE MILLENIALS 36 (2012), *available at* http://publicreligion.org/site/wp-content/uploads/2012/04/Millennials-Survey-Report.pdf [hereinafter *Millenials Survey*].

such belief.[38] Radio host James Edwards claims, "[W]hatever mistakes might have been made in our pasts, they have not only been corrected, but they've been overcompensated for."[39] This belief may follow from the fact that Whites are most likely to frame affirmative action as a preference for less qualified candidates, often through the use of quotas.[40] Whites think that quotas give resources to people of color *at the expense of Whites*, while Blacks are most likely to frame affirmative action as "outreach" for certain groups, and Latinos are most likely to frame it as a tie-breaking procedure, or as providing training to certain groups so that they may compete equally.[41] Thus, a growing number of conservative Whites think people of color champion affirmative action not *in spite* of its adverse consequences on Whites, but partially *because of* its adverse consequences on Whites.[42] One conservative journalist explains that rather than moving beyond race in America, racism may instead be "under new management, [where leaders use] reverse discrimination as racial payback for past injustices."[43]

A. To Some Whites, Race is Finally Becoming Visible, Even Salient

The invisibility of Whiteness is a key feature of White privilege. Barbara Flagg calls this "the transparency phenomenon: the tendency of Whites not to think about Whiteness, or about norms, behaviors, experiences, or perspectives that are White-specific."[44] While the invisibility of Whiteness used to be a privilege, some now claim it as a badge of discrimination. For a less than academic look at expressions of this sentiment, one need look no further than Urban Dictionary's user-generated definition of "reverse racism": "Blacks having a special TV station [B.E.T.], award shows, and even their own month, and Whites not having this."[45] As most major networks are controlled by Whites and feature predominantly White actors, it can be argued that Whites already have their own networks: ABC, NBC, FOX, and CBS. It can similarly be argued that eleven months out of the year celebrate White culture. But this is not enough for some conservative Whites who

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38. *Id.* at 36–37.

39. Blake, *supra* note 8.

40. Hillary Haley & James Sidanius, *The Positive and Negative Framing of Affirmative Action: A Group Dominance Perspective*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 656, 663 (2006), *available at* http://nrs.harvard.edu/urn-3:HUL.InstRepos:3205412.

41. *Id.* at 662–63.

42. I do not mean to say that affirmative action necessarily has adverse consequences on Whites. An increase in diversity at school or the workplace is actually beneficial to Whites. However, some conservative Whites ignore the benefits and focus on the costs to Whites in displaced opportunities.

43. Thomas Sowell, *Reverse Racism*, NAT'L REV. ONLINE (Oct. 11, 2011), http://www.nationalreview.com/articles/279698/reverse-racism-thomas-sowell.

44. *See* Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993).

45. 2thumbsup, *Posting Under* Reverse Racism, URBAN DICTIONARY (Jan. 28, 2004), http://www.urbandictionary.com/define.php?term=reverse%20racism.

want a network explicitly for Whites—a W.E.T. to complement B.E.T.[46] Many Whites are still content with the status quo and profess a colorblind ideology in which we *pretend* that everything is equal while Whites occupy a superior position in society. Nevertheless, there is an emerging feeling among some Whites that colorblindness does not define America anymore, as Whites are increasingly becoming targets of discrimination based on the color of their skin.

As evidence of discrimination against Whites, some Whites point to racist epithets and hurtful stereotypes. Tim Wise describes his experience lecturing about racism against people of color at a high school, when several White students became upset that Wise did not address "reverse racism," citing use of the slurs "honky" and "cracker" to demean White students.[47] In one Berkeley undergraduate course on race, the moderator instructed, "[Y]ell up to us all of the stereotypes you associate with White people."[48] The students replied, "Rich. No rhythm. Redneck. Socially unaware. In denial. Drunk. Flip flops. Pearl earrings. Nalgene water bottles. Bleeding heart liberals. Conservative. Scared. Uptight. Hate poor people. Hippies. Gap . . . ."[49] Of course, many of the stereotypes associated with White people are neutral, or even positive, but Whites find some of them hurtful. Thus, when a teacher in another classroom attempted to convince the students that the real social evil is discrimination against people of color, one White student would not accept it. This student, Tracey, explained, "[I]t seemed like the focus was on Black people or Puerto Ricans or other minorities that are discriminated against, but I've been discriminated against too and I'm a White person, so it happens, you know, to everyone."[50] Tracey and other victimized Whites seek to (a) analogize anti-White discrimination with anti-Black/Latino discrimination, and (b) maintain that anti-White discrimination has *replaced* anti-Black/Latino discrimination as today's main obstacle to a just society.[51]

In the twentieth century, some Whites thought of Blacks and Latinos as subhuman—their concern was that these minorities were dangerous and multiplying everywhere—but today it appears that Whites look at Blacks and Latinos as superhuman—able to leap from the oppressed to the oppressors as they take the jobs and money of Whites. Whites worry that this new position of power may lead to the imposition of Black and Latino culture on all Americans. John Blake writes,

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46. *See* Blake, *supra* note 8 (explaining how many Whites feel they are no longer the majority in America and lack the attention other races receive both in education and popular culture, among other things).

47. Tim Wise, *A Look at the Myth of Reverse Racism*, RACE AND HISTORY (June 24, 2002), http://www.raceandhistory.com/selfnews/viewnews.cgi?newsid1024893033,80611,.shtml.

48. *What's Race Got To Do With It?: Film Transcript*, WHAT'S RACE GOT TO DO WITH IT?, http://www.whatsrace.org/pages/transcript-film.htm (last visited Mar. 4, 2013).

49. *Id.*

50. Sandra M. Lawrence & Takiema Bunche, *Feeling and Dealing: Teaching White Students About Racial Privilege*, 12 TEACHING & TCHR. EDUC. 531, 538 (1996).

51. *See id* at 537–40 (discussing and describing study participants' responses).

"Some White Americans. . . . feel excluded by popular culture."[52] Some Whites are scared by the fact that our commander in chief, most of our star athletes, and our idolized entertainers are now Black.[53] Some also fear the massive influx of Latinos and worry that the United States will become a dual-language nation.[54] Further, there is a concern that the new Black leadership has imposed a culture of political correctness that has gone too far, as it can have demonstrable "negative impact[s] for Whites—on communication, performance, and self-presentation."[55] Some Whites thus argue that this culture of political correctness impedes their ability to freely express themselves.[56]

B. A White Rallying Cry in the Media: Glenn Beck, Rush Limbaugh, and the Response to Trayvon Martin

The emergence of the Tea Party mirrors the cry for a defense of White culture. A recent poll found that "44% of Americans surveyed identify discrimination against Whites as being just as big as bigotry aimed at [B]lacks and other minorities," and that number shot up to 61% for respondents in the Tea Party.[57] To many Republicans and Democrats, the election of Barack Obama symbolizes that we have finally transcended race and now live in a post-racial, colorblind society.[58] Conversely, many Tea Party members believe that the election of Barack Obama symbolizes White disenfranchisement, as Blacks begin to overpower Whites.[59] A professor of government and politics compares the Tea Party movement to the conservative movement in the 1970s: "That movement was driven in part by racial hostility and the ability of its leaders to convince White followers that

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52. Blake, *supra* note 8.

53. *See id.* ("The face of America is changing, says Wise, author of 'White Like Me.' American culture has become so multicultural that many of the nation's icons—including celebrities, sports heroes, and other leaders—are people of color.").

54. *See, e.g.*, Samuel P. Huntington, *The Hispanic Challenge*, FOREIGN POL'Y (Mar. 1. 2004), http://www.foreignpolicy.com/articles/2004/03/01/the_hispanic_challenge?page=0,0 ("Despite the opposition of large majorities of Americans, Spanish is joining the language of Washington, Jefferson, Lincoln, the Roosevelts, and the Kennedys as the language of the United States. If this trend continues, the cultural division between Hispanics and Anglos could replace the racial division between [B]lacks and [W]hites as the most serious cleavage in U.S. society.").

55. Michael I. Norton et al., *Color Blindness and Interracial Interaction: Playing the Political Correctness Game*, 17 PSYHCOL. SCI. 949, 952 (2006).

56. Blake, *supra* note 8.

57. *Id.*

58. *See e.g.*, Daniel Schorr, *A New, 'Post-Racial' Political Era in America*, NPR (Jan. 28, 2008), http://www.npr.org/templates/story/story.php?storyId=18489466 (describing many people's belief of a new post-racial political era in America after President Obama's election); Shelby Steele, *Obama's Post-Racial Promise*, L.A. TIMES, Nov. 5, 2008, http://www.latimes.com/news/opinion/opinionla/la-oe-steele5-2008nov05,0,6049031.story (describing the belief that President Obama's election would help usher in a post-race society, and criticisms of that belief).

59. *See* Bob Cesca, *The Tea Party is All About Race*, THE HUFFINGTON POST, March 3, 2010, http://www.huffingtonpost.com/bob-cesca/the-tea-party-is-all-abou_b_484229.html (discussing the racism underlying many of the Tea Party's political views).

they were victims."[60]

Jared Taylor, a conservative writer, explained that while the election of Obama caused many Whites to realize their victimhood in 2008, the tables had actually turned some time before 2008:

> To the extent that White people in some inchoate way see Obama as a symbol of their dispossession, it's only that they have not been seeing what has been going on for years. . . . No other people in the history of the world has given up numerical and cultural dominance willingly. The majority of Whites did not vote for Barack Obama.[61]

Taylor assumes that a Black leader cannot impartially represent the interests of Whites but likely had no problem with our previous White president representing the interests of people of color, even if the majority of those voters of color voted against him.

Glenn Beck echoes this critique of Obama when he says that the President has a "deep-seated hatred for White people and White culture."[62] Of course, when Katie Couric pushed Beck to define "White culture," Beck squirmed and provided no answer.[63] Beck asserts that as a result of Obama's hatred for White people, Whites are in need of their own civil rights movement.[64] He thus held a "Rally to Restore Honor" in the same place as, and on the anniversary of, Dr. Martin Luther King Jr.'s "I Have A Dream" speech.[65]

One news blog goes so far as to use a photoshopped image of President Obama in a Ku Klux Klan outfit with the caption, "Grand Dragon Obama."[66] The blog post discusses the President's Executive Order to curb the disproportionate punishment of Black students in our schools, which the author fears will result in White students being suspended for things for which Black students will not be suspended.[67] Echoing Glenn Beck's sentiments, the author begins,

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60. Robin Abcarian et al., *Conservatives Say It's Their Turn for Empowerment*, L.A. TIMES, Sept. 17, 2009, http://articles.latimes.com/2009/sep/17/nation/na-White-victimhood17.

61. *Id.*

62. Blake, *supra* note 8.

63. *See* Stef, *Katie Couric Asks Glenn Beck to Define "White Culture"*, DAILY KOS (Sept. 25, 2009), http://www.dailykos.com/story/2009/09/25/786487/-Katie-Couric-Asks-Glenn-Beck-to-Define-White-Culture (showing Beck unable to give a definitive answer when Couric repeatedly asked him to define "White culture").

64. *See* Blake, *supra* note 8 (discussing Beck's rally to reclaim the civil rights movement).

65. *See Turnout Strong as Beck Rallies Americans to Restore 'Honor' to the Nation*, FOX NEWS (Aug. 28, 2010), http://www.foxnews.com/politics/2010/08/28/thousands-expected-glenn-beck-rally-civil-rights-leaders-protest-event/ (discussing Beck's rally).

66. Pat Dollard, *Obama Racist Executive Order Violates 14th Amendment With Race-Based School Discipline*, CHI. NEWS BENCH, Jul. 27, 2012, http://rogersparkbench.blogspot.com/2012/07/obama-violates-14th-amendment-with.html.

67. *Id.*

"Barack Obama is a racist. He has admitted it. He has demonstrated it. It is undeniable. Equal treatment for all? Not under Obama, nope. A 'colorblind society?' Not if Obama can help it . . . ."[68]

Rush Limbaugh also blames Obama for making Whites the new "oppressed minority."[69] In 2009, two Black students beat up a White student on a school bus, and although there was no indication that the attack was racially motivated in any way, Limbaugh was indignant at the absence of hate crime charges in this case. In his radio program, Limbaugh exclaimed, "It's Obama's America, is it not? Obama's America, White kids getting beat up on school buses now."[70] In response, comedian Jon Stewart joked on *The Daily Show* that "[B]ecause Barack Obama is president, it is now open season on White children . . . and [B]lack people are now allowed to hit them."[71] Rush Limbaugh was not laughing. Concerned about the complacency of Whites in their own subjugation, Limbaugh explains that Whites need a "civil rights movement" of their own because too many Whites currently sit at the "back of the bus."[72]

If any event should be a rallying cry for the notion that Blacks are the victims, not the victimizers, it is the tragic death of an unarmed Black teen, Trayvon Martin. However, conservative Whites try to portray George Zimmerman,[73] as well as some White individuals who were attacked by young Blacks in response to their frustration over Martin's death as the real victims.[74] One conservative periodical, *The Examiner*, described soon after that "[n]ow it has reached a point where the media in some markets are refusing to even report [B]lack on [W]hite hate crimes."[75]

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68. *Id.*

69. Blake, *supra* note 8.

70. Amanda Terkel, *Limbaugh Cares About Hate Crimes Only When Whites Are Victims*, THINK PROGRESS (Sept. 15, 2009, 1:22 PM), http://thinkprogress.org/politics/2009/09/16/60883/limbaugh-hate-crimes/?mobile=nc.

71. Abcarian, *supra* note 60.

72. Blake, *supra* note 8.

73. The primary take-away from the Trayvon Martin case comes from the race of the victim. Nevertheless, conservatives are also upset about the treatment of the perpetrator, Zimmerman. Zimmerman is half White and half Latino but has been referred to by news outlets simply as "White." *See, e.g.*, Erik Wemple, Op-Ed., *Why Did PBS Call George Zimmerman 'White'?*, WASH. POST, Apr. 11, 2012, http://www.washingtonpost.com/blogs/erik-wemple/post/why-did-pbs-call-george-zimmerman-white/2012/04/11/gIQAZsC4AT_blog.html. Furthermore, an NBC News edit takes the 911 call out of context and portrays Zimmerman as more racist than the full transcript makes him out to be. *See George Zimmerman Sues NBC Over Edited 911 Tape*, HUFFINGTON POST, Dec. 6, 2012, http://www.huffingtonpost.com/2012/12/06/george-zimmerman-sues-nbc_n_2253095.html. While it is unfair that Martin was perceived as a dangerous Black, conservatives will also point out that it is unfair to portray Zimmerman as a racist White when in reality he is neither racist nor white.

74. *Compare* Dave Gibson, *Mob Beats Man on His Own Front Porch "for Trayvon" . . . press ignores*, EXAMINER.COM (April 24, 2012), http://www.examiner.com/article/mob-beats-man-on-his-own-front-porch-for-trayvon-press-ignores (reporting that the beating of Matthew Owens, a white resident of Mobile, Ala. was triggered by the killing of Trayvon Martin), *with* Jamie Burch, *Witness Changes Her Story About Matthew Owens Beating*, WKRG.COM (April 23, 2012), http://www2.wkrg.com/news/2012/apr/23/83/man-beaten-mob-critical-condition-ar-3659891/ (including statements from Mobile, Ala. police emphasizing that the Trayvon Martin case was not a motivating factor in the attack on Matthew Owens).

75. Kyle Rogers, *Media Censored Seven Hate Crime Mob Attacks in Grand Rapids*, THE EXAMINER (Apr. 13, 2012),

Peter Brimelow, author and owner of the ultra-conservative site VDare.com,[76] "asserts that much of White America's anxiety derives from living under a [B]lack president and changing demographics."[77] VDare's official Twitter site features tweets from April 16, 2012 saying "Black Mob Attack Whites Seven Separate Times, Prompted by #TrayvonMartin Case" and "#Obama Regime War On Whites Continues."[78] On April 2, 2012, VDare tweeted, "The FBI Still Doesn't Get Hate Crimes, Especially Anti-White Ones."[79] Another conservative journalist writes that the Obama Administration and the Justice Department tolerated and tacitly encouraged intimidation of voters all across the country in 2008, "so long as those being victimized were White and the victimizers were [B]lack."[80] In the 2012 election, Black Panther Jerry Jackson stirred up controversy by showing up as a poll watcher in Philadelphia.[81] A Fox News article explains, "[c]ritics complain that they are an intimidating presence and could discourage [W]hite voters, who may be more likely to vote Republican, from entering polling sites."[82] The article then discusses accusations that President Obama and Attorney General Eric Holder harbor a "racial bias" because they dismissed charges against Jackson and the party in 2008.[83] Not until the very last sentence of the article does the author mention that there were no complaints of any kind of intimidation at the polling place.[84]

Because of the alleged disenfranchisement of White Americans, radio host James Edwards says Whites have become the "dispossessed majority" and must organize like other stigmatized groups.[85] He explains, "[t]here is no organization to stand up to advance the interests of the

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http://www.examiner.com/article/media-censored-seven-hate-crime-mob-attacks-grand-rapids.

76. Blake, *supra* note 8.

77. *Id.*

78. Virginia Dare Foundation, TWITTER (April 16, 2012, 8:43PM), https://twitter.com/vdare/status/192065612539899905; Virginia Dare Foundation, TWITTER (April 16, 2012, 7:57PM), https://twitter.com/vdare/status/192054256956747777.https://twitter.com/#!/vdarehttps://twitter.com/#!/vdarehttps://twitter.com/#!/vdarehttps://twitter.com/#!/vdarehttps://twitter.com/#!/vdarehttps://twitter.com/#!/vdare.

79. Virginia Dare Foundation, TWITTER (April 2, 2012, 9:26PM), https://twitter.com/vdare/status/187003124148477954. https://twitter.com/#!/vdarehttps://twitter.com/#!/vdarehttps://twitter.com/#!/vdarehttps://twitter.com/#!/vdarehttps://twitter.com/#!/vdarehttps://twitter.com/#!/vdare

80. Thomas Sowell, *Obama's 'Department of Payback'*, WND COMMENTARY (Oct. 10, 2011), http://www.wnd.com/2011/10/354309/; *see also* Blake, *supra* note 8 ("Conservative news outlets ran a number of stories last summer highlighting an incident from the 2008 elections, in which activists from the New Black Panther Party appeared to be intimidating voters at a polling place. Those claims were never proven.").

81. Joshua Rhett Miller, *New Black Panthers Back at Philly Voting Site*, FOX NEWS (Nov. 6, 2012), http://www.foxnews.com/politics/2012/11/06/new-black-panthers-back-at-philly-voting-site/#ixzz2EnNwbWZU.

82. *Id.*

83. *Id.*

84. *Id.*

85. Blake, *supra* note 8; *see also* Abcarian, *supra* note 60 (describing one disgruntled White woman who exclaimed, "It's like we are the forgotten people").

dispossessed majority."[86] Chief among the ways in which White interests get trampled is affirmative action, according to Edwards.[87] The pendulum has swung too far, as Whites are the new victims of discrimination. Edwards says, "They're the victims of it every day."[88]

Although it may seem that I have merely documented the opinions of some extremists, the sentiment has clearly gained traction with many Americans, as reflected by survey data.[89]

C. White Victimization in the 2012 Election: "[I]t would be helpful to be Latino."

The notion that Whites are the modern day victims even permeated the 2012 presidential election. In the now infamous videotape at a Florida fundraiser, presidential hopeful Mitt Romney stated:

> My dad, as you probably know, was the governor of Michigan and was the head of a car company. But he was born in Mexico . . . and had he been born of Mexican parents, I'd have a better shot at winning this. But he was unfortunately born to Americans living in Mexico. He lived there for a number of years. I mean, I say that jokingly, but it would be helpful to be Latino.[90]

In addition to getting a better price on pastries, apparently being Latino is also helpful in winning the Presidency. Romney's statement may also imply that President Obama, as a candidate of color, had an advantage when it came to winning the presidency.

According to Senator Scott Brown, Romney was not the only candidate who thought it would be advantageous to be a person of color.[91] Brown alleged that his opponent, Elizabeth Warren, falsely claimed to be Native American for professional gain.[92] Brown began their first debate, "Professor Warren claimed she was a Native American, a person of color—and as you can

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86. Blake, *supra* note 8.

87. *See id.* ("Those [W]hite interests have been compromised by what he sees as the 'preferential treatment' [B]lacks have received in the job market to compensate for slavery, Edwards says.").

88. *Id.*

89. *See* Kellogg, *supra* note 7 ("A 2008 poll by USA Today/Gallup showed that 40% of adults in America think racism against [W]hite people is widespread in the United States. A study published last year said that bias against [W]hites is a bigger problem than bias against [B]lacks.").

90. *See* Ruben Navarrette Jr., *Romney Better Off as a Latino?*, CNN (Sept. 19, 2012), http://www.cnn.com/2012/09/19/opinion/navarrette-romney-latino/index.html (quoting Mitt Romney).

91. *See, e.g.*, Sean Sullivan, *The Fight Over Elizabeth Warren's Heritage, Explained*, WASH. POST, Sept. 27, 2012, http://www.washingtonpost.com/blogs/the-fix/wp/2012/09/27/the-fight-over-elizabeth-warrens-heritage-explained/ (explaining that Senator Brown has questioned "whether [Elizabeth] Warren used her claim to Native American heritage to her professional advantage").

92. *Id.*

see, she is not."[93] In response, Warren released a political ad in which she stated, "I never asked for and never got any benefit because of my heritage. The people who hired me have all said they didn't even know about it."[94] The implication that both Brown and Warren seem to buy into is that *if* Warren's employers knew about her status as a person of color, it would have been a benefit. And yet, if there were such an "electoral affirmative action," then one would expect to see more people of color holding elected offices. Ruben Navarrette Jr. points out that despite Romney's sentiment, there has not been a single Latino president, "if you don't count Jimmy Smits playing president-elect Matt Santos on the final season of 'The West Wing.'"[95]

Navarrette ponders why the crowd was so receptive to Romney's aside about the desirability of being a Latino candidate:

> Are these the kind of people who tell themselves that their sons and daughters would have gotten into Yale or Princeton if some [B]lack kid hadn't taken their spot? Do they really believe that racial and ethnic minorities have it easy in this country? And if so, what country are they living in?[96]

I cannot speak to the individuals in the audience that night, but to answer Navarette's first question, many Whites do seem to think that they would have gotten into Yale or Princeton if not for discriminatory affirmative action policies—these Whites line up as plaintiffs like Allan Bakke, Frank Ricci, and most recently Abigail Fisher, a White female who was denied admission to the University of Texas in part, she alleges, because of the school's affirmative action policies.[97]

These frustrated White plaintiffs, along with the frustrated White presidential candidate, believe they are the oppressed, not the oppressors. "By suggesting that he'd have a better chance at winning this election if he were Latino, Romney is playing the victim. Poor me, I had the misfortune to be born a [W]hite male."[98]

D. An Education: The Role of Critical Race Theory in Creating Anti-White Bias

Aside from the workplace, debates over affirmative action primarily center on the

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93. *Id.*

94. Sean Sullivan, *Elizabeth Warren in New TV Ad: I 'Never Got Any Benefit Because of My Heritage'*, WASH. POST, Sept. 24, 2012,http://www.washingtonpost.com/blogs/the-fix/wp/2012/09/24/elizabeth-warren-in-new-tv-ad-i-never-got-any-benefit-because-of-my-heritage/.

95. Navarrette, *supra* note 90.

96. *Id.*

97. Adam Liptak, *Justices Weigh Race as Factor at Universities*, N.Y. TIMES, Oct. 10, 2012, http://www.nytimes.com/2012/10/11/us/a-changed-court-revisits-affirmative-action-in-college-admissions.html?pagewanted=all.

98. Navarrette, *supra* note 90.

classroom. Advocates of affirmative action can point to data indicating that people of color are currently underrepresented in institutions of higher learning and that discrimination against minority students remains a problem on college campuses.[99] On the other hand, most opponents of affirmative action argue that we are post-racial, and no group faces discrimination in school, meaning there is no need for racial tinkering in admissions.[100] And, an emerging conservative voice goes further by arguing that people of color in fact have *too much* power in the classroom, and it is instead Whites who face discrimination in school.[101]

One Texas group called the "Former Majority Association for Equality" has started to provide scholarships to White male students.[102] The group's president contends that other groups get preferential treatment so targeting resources toward White male students simply levels the playing field.[103] He explains, "[l]iving in America, you hear about this minority or that minority, but it's never been used in the same sense for Caucasian Americans."[104]

Some critics blame the persecution of White students on the emergence of ethnic studies departments and Critical Race Theory. Arizona recently passed H.B. 2281, which effectively bans ethnic studies courses in the state's schools.[105] The bill specifically prohibits all courses that "promote resentment toward a race or class of people."[106] Proponents of the bill say that ethnic studies courses are "divisive," but Tucson Unified School District officials believe that "Chicano studies classes benefit students and promote critical thinking."[107] Thus, some Whites ideologically

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99. SEAN F. REARDON, RACHEL BAKER & DANIEL KLASIK, CTR. FOR EDUC. POLICY ANALYSIS, STANFORD UNIV., RACE, INCOME, AND ENROLLMENT PATTERNS IN HIGHLY SELECTIVE COLLEGES, 1982–2004 2 (2012), *available at* http://cepa.stanford.edu/sites/default/files/race%20income%20%26%20selective%20college%20enrollment%20august%203%20 2012.pdf; SYLVIA HURTADO & ADRIANA RUIZ, HIGHER EDUC. RESEARCH INST., UNIV. OF CAL. L.A., THE CLIMATE FOR UNDERREPRESENTED GROUPS AND DIVERSITY ON CAMPUS 1 (2012), *available at* http://heri.ucla.edu/briefs/urmbrief.php.

100. *See* Stanley Fish, *The Nifty Nine Arguments Against Affirmative Action in Higher Education*, 27 THE J. OF BLACKS IN HIGHER EDUC. 79 (2000) (explaining that affirmative action is not needed because "discrimination is already illegal" and "the pendulum has already swung too far in the direction of women and minorities").

101. *See Does Affirmative Action Punish Whites?* NBCNEWS.COM (April 28, 2009), http://www.nbcnews.com/id/30462129/#.UTJS_qVmZUQ ("[M]ore Americans [have come] to believe that affirmative action is no longer necessary, and that instead of leveling the playfield for minorities, it unfairly punishes [W]hites.").

102. Blake, *supra* note 8; Brian Braiker, *Texas Nonprofit Gives Scholarships to White Males Only*, ABC NEWS (Feb. 28, 2011), http://abcnews.go.com/US/nonprofit-scholarships-white-males/story?id=13002066.

103. *See* Blake, *supra* note 8 (discussing the purpose behind and effect of the Former Majority Association for Equality's offer of scholarships exclusively to white males).

104. *Id.*

105. *See* Nicole Santa Cruz, *Arizona Bill Targeting Ethnic Studies Signed into Law*, L.A. TIMES, May 12, 2010, http://articles.latimes.com/2010/may/12/nation/la-na-ethnic-studies-20100512 (mentioning that H.B. 2281 bans schools from teaching classes that are designed for students of a particular ethnic group, promote resentment, or advocate ethnic solidarity over treating pupils as individuals).

106. HB 2281, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

107. Santa Cruz, *supra* note 105.

oppose the goals and very existence of race and ethnicity studies, in part because they worry that these classes teach students of color to hate Whites and also because they object to the idea of providing a resource to students of color that is not provided to Whites. A White student is of course allowed to enroll in a Black history class or Chicano literature class, but the perception is that these departments are created *for* students of color, and there is no department *for* White students, assuming that one does not count, for example, history, economics, political science, or English.

Beyond ethnic studies, many have specifically identified Critical Race Theory as the more dangerous threat to White students.[108] Some individuals, including Arizona Governor Jan Brewer, object to the very idea of a class studying Black history.[109] A larger number of individuals contest the tenets of Critical Race Theory, which many consider to be more radical than an ethnic studies course.[110] In 2012, conservatives began attacking President Obama by linking him to Derrick Bell, the late Harvard Law Professor and pioneer of Critical Race Theory.[111] Thereafter, various media outlets and pundits, including Joel Pollak and Soledad O'Brien, began fighting to define exactly what Critical Race Theory means and how damaging Obama's association with the field should be because of the allegedly anti-White lessons it has to offer.[112]

Consistent with his other beliefs, Rush Limbaugh opposes teaching Critical Race Theory in law schools.[113] On his April 4, 2012 show, Limbaugh denounced Harvard Law School's Critical Legal Studies program, Critical Race Theory program, and Derrick Bell, for attempting to dismantle racial injustice:

> That's how they view it. And they view the Constitution as a mechanism for rich [W]hite guys to always hold onto all of the power. This is what

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108. *See* Ben Shapiro, *Critical Race Theory Explained*, BREITBART (Mar. 11, 2012), http://www.breitbart.com/Big-Government/2012/03/11/What%20Is%20Critical%20Race%20Theory ("Racism cannot be ended within the current system; the current system is actually both a byproduct of and a continuing excuse for racism [or so the theory goes] . . . . This is a deeply disturbing theory. It is damaging both to race relations and to the legal and Constitutional order.").

109. *See* Santa Cruz, *supra* note 105 (discussing how Governor Jan Brewer signed a bill that bans schools from teaching classes designed for students of a particular ethnic group).

110. *See* Tom Cohen, *Obama's Harvard Law Professor Challenged U.S. Racism*, CNN (Mar. 9, 2012), http://www.cnn.com/2012/03/09/election/2012/derrick-bell-profile/index.html (discussing an alleged connection between Obama and a radical academic with an anti-White message).

111. *Id.*

112. *See* James Crugnale, *Soledad O'Brien and Breitbart's Joel Pollak Clash Over Critical Race Theory*, MEDIAITE (Mar. 8, 2012), http://www.mediaite.com/tv/soledad-obrien-and-breitbarts-joel-pollak-clash-over-critical-race-theory/ (discussing the debate between Joel Pollak and Soledad O'Brien over the meaning of the Critical Race Theory and their opinions on the implications of Obama's possible association with it).

113. *See What Obama Will Say if Obamacare Loses*, THE RUSH LIMBAUGH SHOW (Apr. 4, 2012), http://www.rushlimbaugh.com/daily/2012/04/04/what_obama_will_say_if_obamacare_loses (describing Rush Limbaugh's opposition to the teaching of the Critical Race Theory).

> they are taught. And so their objective is to take that apart, to strike that down, and this is where critical legal studies comes into play.[114]

Limbaugh seems to think that Critical Race Theory is a vehicle to teach students of color to go out into the world and discriminate against Whites. One White student discusses the lessons that came out of a Berkeley undergraduate course on race: "teaching someone that . . . . 'Okay, [W]hite man is the enemy.' Then . . . . I feel that someone would look at me and say, 'Okay, he's [W]hite, that's the enemy.' I'm a [W]hite man, right? So that's how I take it."[115] A piece from the School of Education at John Hopkins describes the stress that discussing race in the classroom can have on White students, noting that "one comment can upset a [W]hite student so much that it impacts the student's educational experience."[116] Some Whites feel that courses on race inherently victimize Whites in the classroom. As one White student explains, "I feel silenced . . . I do not feel safe. I do not want to come to class."[117]

One might think that the emergence of Critical Whiteness Studies would appease those conservatives who complain that students of color are given their own ethnic studies departments, while Whites get nothing. Instead, "detractors have said the field itself [Critical Whiteness Studies] demonizes people who identify as [W]hite."[118] Conservatives have "derided [W]hiteness studies as anti-[W]hite."[119] It thus seems that in higher education, Whites feel discriminated against by the very existence of ethnic studies departments, including Whiteness studies, and are especially victimized when they enroll in such a class and become the target of all the anti-White prejudice in the room. Given the lack of some explicitly pro-White class, it is no wonder so many "White Americans . . . feel ignored in higher education."[120]

E. The Supreme Court Weighs in on the "New Minority of White Anglo-Saxon Protestants"

The Supreme Court has picked up on and in some instances fueled this sentiment that Whites are the true victims of racism in America today. Judges must make observations about society to determine how much Whites are discriminated against. But, as the law and society movement has taught us, that flow is not unidirectional; the law also informs our cultural

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114. *Id.*

115. *What's Race Got To Do With It?: Film Transcript*, *supra* note 48.

116. Helling, *supra* note 15.

117. *Id.* To clarify, the Helling article does not endorse the idea that race studies in school is unfair to Whites. Rather, it provides a mouthpiece to some White students who object to race studies and presents strategies for helping these students to accept the existence of White privilege.

118. Kellogg, *supra* note 7.

119. *Id.*

120. Blake, *supra* note 8.

commonsense.[121] Judges' opinions on White victimization are relevant because judges generate both legal and social norms.

In *City of Richmond v. J.A. Croson Co.*, Justice O'Connor feared the tyranny of the majority—the Black majority.[122] O'Connor justified the application of strict scrutiny for a law that favored minority-owned businesses at the cost of White businesses because half the city's population was Black, and a majority of the City Council was Black.[123] She writes, "[A] law that favors Blacks over Whites would be suspect if it were enacted by a predominantly Black legislature."[124]

In *Bakke*, Justice Powell wrote that if liberals got their way and every minority group got special protection from the Court in the form of heightened review, then only one group would be left with no protection: "a new minority of White Anglo-Saxon Protestants."[125]

Finally, the Supreme Court's reversal of Sonia Sotomayor's *Ricci* opinion can be construed as a vindication of White victimhood. Cheryl Harris and Kimberly West-Faulcon explain that some believe that "Judge Sotomayor's decision in favor of New Haven in the court below was a grave racial injustice."[126] Thus, when Justice Sotomayor was nominated to the Supreme Court, Frank Ricci himself appeared to tell the Senators that this Latina woman whom they were considering for the highest court in the land "had discriminated against him in an appellate case because he is White."[127] The Senators heard Ricci's message and some capitalized on this sense of White victimization: "[t]hey attacked her as a racist, and where they scored points is with a lot of Americans—not only with conservatives, but a lot of Democratic White males—who have been on the losing end of affirmative action."[128]

Conservative opponents of affirmative action have thus created a case for treating Whites as a suspect class: they are a discriminated against group, and they are powerless to use the political

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121. *See, e.g.*, Susan S. Silbey, *Law and Society Movement, in* 2 LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA 860–63 (Herbert M. Kritzer ed., 2002), *available at* http://web.mit.edu/~ssilbey/www/pdf/law_soc_movt.pdf (summarizing the law and society movement as an inquiry into the exchange between the law and societal forces).

122. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495–96 (1989) (stating a law protecting Blacks where there is a Black majority can be a violation of the Equal Protection clause).

123. *Id.*

124. *Id.* at 496 (quoting John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 739, n.58 (1974)).

125. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 295–96 (1978).

126. Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 76 (2010).

127. *See* Abcarian, *supra* note 60 (discussing Sonia Sotomayor's alleged discriminatory behavior).

128. *Id.*

process to protect themselves. Students in our schools are being taught to hate Whites, our racist President ignores (or despises) his White constituents, and Whites cannot find jobs because of racial quota systems. And, the icing on the cake: now, Whites have to pay twice as much to buy a pastry.

III. THE EMERGING "WHITES AS VICTIM" NARRATIVE HAS IT BACKWARDS

Although I criticized this emerging White victimization narrative in Part II, in this Part, I go further and offer a brief look at why that narrative is factually incorrect. I examine some basic statistics in this country to show that Whites today in fact occupy a superior position in America. Suffice it to say, there are greater tragedies facing this nation than Allan Bakke having to settle for his second choice medical school. A snapshot of a few of those tragedies includes:

> ☙ The unemployment rate for Blacks is roughly twice as high as that of Whites.[129] The unemployment rate of Latinos is a third higher than that of Whites.[130]
>
> ☙ As for powerful professionals, "[B]lacks and Hispanics make up a mere four to six percent of the nation's lawyers, doctors and engineers."[131]
>
> ☙ Whereas fourty-five percent of Blacks and fourty-seven percent of Latinos own homes, the homeownership rate for Whites is seventy-five percent.[132]
>
> ☙ The median household income for Whites is $20,000 per year more than both Blacks and Latinos.[133]
>
> ☙ The percentage of Blacks and Latinos living below the poverty line is more than double the percentage of Whites.[134]
>
> ☙ "[B]lacks are six times more likely and Hispanics are three times more likely than [W]hites to be incarcerated."[135]

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129. *Table A-2. Employment Status of the Civilian Population by Race, Sex, and Age*, BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, http://www.bls.gov/news.release/empsit.t02.htm (last modified February 1, 2013).

130. *Id.*

131. Williams, *supra* note 35.

132. Christian E. Weller, Jaryn Fields & Folayemi Agbede, *The State of Communities of Color in the U.S.*, CENTER FOR AM. PROGRESS (Jan. 21, 2011), http://www.americanprogress.org/issues/2011/01/coc_snapshot.html.

133. *Id.*

134. *Id.*

135. NAT'L URBAN LEAGUE, *THE STATE OF BLACK AMERICA 2010* 2 (March 2010), *available at*

Thus, modern America is better explained by White privilege than White victimization. But, it goes beyond Whites having more money than people of color; Whites hold implicit biases against people of color. Some people of color also harbor biases against Whites, but Glenn Beck and Rush Limbaugh would be surprised to learn that most people of color actually exhibit biases *in favor* of Whites.[136] Still, evidence suggests that Whites, as the more advantaged group, are likely to harbor more intense biases against outside groups than those biases of the disadvantaged groups.[137] The problem becomes even more acute where the same group that harbors the most intense biases also has the most power in society, so that institutional structures replicate those biases.

IV. THE PSYCHOLOGY OF PRIVILEGE: HOW THE PERCEPTIONS OF WHITES CAN BE SO OUT OF SYNC WITH REALITY

In looking at the vast and readily apparent inequalities that exist between Whites and people of color, as well as the myriad of recent research on implicit bias, the emerging notion that Whites are the true victims of discrimination today is baffling.

Russell Robinson offers an explanation for this "Whites as victims" phenomenon in *Perceptual Segregation*, where he unpacks how Whites can be blind to the discrimination against people of color going on right in front of them, shedding some light on the rationale behind this irrational perception.[138] "In particular, studies have shown that many White people overestimate the socioeconomic progress that African Americans have achieved in employment, wages, and other important measures of advancement."[139] That overestimation is likely heightened by White individuals' perception that people of color are getting constant leg-ups due to affirmative action. This explains why some Whites think that people of color have overtaken Whites, and discrimination against Whites is now the problem. The incongruity of reality and the perceptions of these Whites is displayed in my unscientific charts below, where the x-axis is time and the y-axis is the percentage of fictional units of power and resources that each group has:

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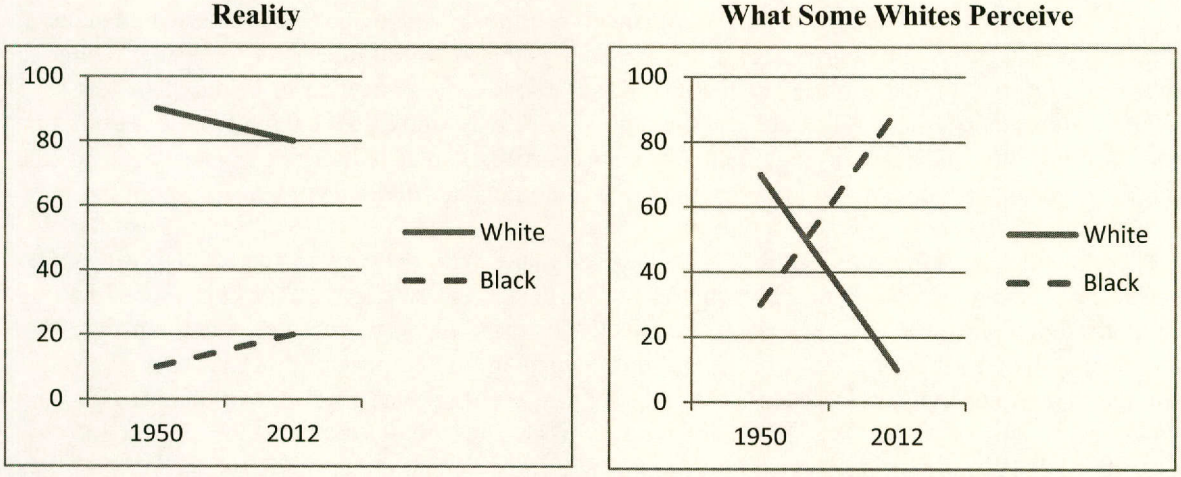
http://nul.iamempowered.com/sites/nul.iamempowered.com/files/attachments/EXECUTIVE%20SUMMARY%20SOBA.pdf.

136. *See* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 955–58 (2006) (concluding that African Americans showed greater favoritism to the dominant European American group); Brian A. Nosek, Mahzarin R. Banaji & Anthony G. Greenwald, *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS: THEORY, RES. & PRAC. 101, 105 (2002) (concluding that even though both Whites and Blacks demonstrated an implicit bias against each other, Blacks' implicit bias was not as strong as White's implicit bias).

137. *See* Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 143 (2004) ("Individuals who belong to socially advantaged groups typically exhibit more implicit preference for their ingroups and bias against outgroups than do members of socially disadvantaged groups.").

138. Russell Robinson, Perceptual Segregation, 108 COLUM. L. REV. 1093, 1163 (2008).

139. *Id.*



Psychologists have developed the Prospect Theory, further illuminating the discrepancy between perception and reality. Eibach and Keegan confirm that Whites tend to think that there has been greater progress toward equality than Blacks do.[140] They apply the Prospect Theory, which holds that changes seem greater when framed as losses rather than gains.[141] So, while Whites perceive progress toward equality as a *loss* in their share of resources, and Blacks view that same progress as a gain, Whites are more likely to overestimate the amount of progress that has been made.[142]

The Prospect Theory also relates to another psychological and economic theory: the endowment effect, which holds that people are likely to pay less to gain X than they would charge to give up X once they own it.[143] In one famous experiment, participants in a study were given mugs, and they were only willing to part with those mugs for twice the price that other participants were willing to pay to gain ownership of the mugs.[144] Theoretically, if a rational person valued a

140. *See* Richard P. Eibach & Thomas Keegan, *Free at Last? Social Dominance, Loss Aversion, and White and Black Americans' Differing Assessments of Progress Towards Racial Equality*, 90 J. OF PERSONALITY AND SOC. PSYCHOL. 453, 459–60 (2006) ("The difference in White and non-White perceptions of racial progress was also significant in the minority gain/White loss condition.").

141. *Id.* at 453.

142. *Id.* at 464–65.

143. *See* Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. OF POL. ECON. 1325, (1990) (providing an explanation of the endowment effect).

144. *Id.* at 1331–32.

mug at $5, she would be willing to pay $5 for it or sell it for $5. However, most of us humans are irrational and inflate the value of a good as soon as we gain a proprietary interest in it—meaning we would not sell for less than $10. In American society, Whites own a disproportionately high stake of power and resources. The endowment effect informs us that it would take a lot for many Whites to be willing to give up that proprietary interest. For example, when one seat in Congress is lost by a White congressperson to a Black congressperson, Whites may think they have given up a lot, while Blacks think their gain is marginal. This thinking confirms that it is harder to give up power and privilege than it is to give up the urgency to gain it after a history of so many years without it.

Besides their personal gain and loss, Blacks and Whites perceive the change differently because of their reference points. Eibach and Ehrlinger demonstrate that Whites are more likely to compare today's progress to the past, while Blacks are more likely to compare today's progress to the ideal.[145] The further one looks back, the more considerable the progress of Blacks seems to be, comparatively speaking. With this in mind, it makes sense that this "racial unease is more pronounced among older White Americans . . . . The idea that we're losing our country is something that's not going to have a lot of resonance for someone under 30. These are White folks who don't remember the country that their parents are talking about."[146] It would thus seem that the only reason Whites think that Blacks have taken over as the dominant group is that they are comparing today with the "good ole days" of outright White supremacy.

However, this age trend does not comport with the story that Glenn Beck and company tell. If an older person had witnessed Black students kept out of school because of their race, one would think the older person would be sympathetic to targeting attention toward getting Black students into schools today. And, it would instead be the young people who never lived through the Jim Crow era who would not understand why Blacks seem to be getting handouts. White youths have not seen the history of racism and their only experience with race has been growing up with seemingly unfair affirmative action policies, so one would think that young Whites would be leading the Rally To Restore Honor. That is not the case though. Instead, it is older Whites that think the pendulum has swung too far. Older Whites have lost more of their privilege in the last few decades and that loss looms larger than both the gains that Blacks have seen and the small loss that young Whites have experienced.[147] This suggests that the ideal equilibrium is different for different people—that it is not just race that colors perception but age as well. Blacks and young Whites think we are not there yet, but old Whites think we have already passed that point—suggesting that the ideal point of "equality" for many older Whites is actually a state of unspoken, subtle superiority.

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145. Richard P. Eibach & Joyce Ehrlinger, *"Keep Your Eyes on the Prize": Reference Points and Group Differences in Assessing Progress Towards Equality*, 32 PERSONALITY AND SOC. PSYCHOL. BULL., 66, 66–77 (2006).

146. Blake, *supra* note 8 (quoting Tim Wise).

147. I do not mean to subscribe to the zero-sum model by assuming that gains by Blacks *necessarily* entail losses for Whites. Nevertheless, that is how many Whites see it, so I include that perspective for the purposes of my analysis.

So, while Glenn Beck's story is that Whites have been okay with the progress of Blacks up until they crossed the line into superiority, history shows that Whites have actually been worried about losing their status of superiority at every increment of progress in the struggle for racial justice. As sociologist Matt Wray put it, "[W]hites have never really felt terribly secure in their majority status. It's often said that it is lonely at the top, but it's also an anxious place to be, because you live in constant fear of falling."[148] Whites worried about slave revolts in the 1800s, they worried about "uppity negroes" at the time of segregation,[149] and today they are worried about affirmative action. Yet, at none of these stages is it fair to say that Blacks surpassed Whites as the dominant group in America.

CONCLUSION

Despite the insistence of many that we live in a "colorblind" society, there is an increasing number of Whites who are affirmatively owning their White racial identity, not necessarily to fight for White supremacy, as some hate groups have been doing for centuries, but rather to coalesce as an oppressed minority. If one believes this story of Whites losing the presidency, losing cultural icons, losing college admission opportunities, and losing jobs, then it would make sense to treat discrimination claims against Whites with strict scrutiny. However, we have seen that this *perception* of White victimization is not in line with a reality where Whites occupy a distinctly superior position in society, as Whites hold more than their proportional share of wealth and are disproportionately represented in positions of power, including government positions. This perception is likely a result of psychological phenomena whereby Whites feel like they have lost more than they actually have lost, because of the immense power and resources they had to begin with.

Far from being a minority in need of the Court's protection, White Americans have *not* suffered a history of discrimination and are *not* powerless to use the political process. The Supreme Court stands behind a veil of know-nothingness when it comes to the motives and effects of affirmative action, claiming that *any* law that distinguishes races has the potential to hurt someone on the basis of their skin color, an inherently unjust outcome. However, the Court ought to come right out and say who they are worried about hurting: White people. This argument is not intended to discredit Justice Thomas's concern about the potential stigma and adverse consequences that affirmative action may have on people of color, but that concern has never appeared to be the core of the Court's opposition to affirmative action. The Court cannot know for sure what policymakers

148. Blake, *supra* note 8.

149. *Id.*

intend to do when crafting affirmative action programs, but the concern is whether there is a hidden intent to hurt *Whites*, as there is no tenable argument that legislators write affirmative action policies to stigmatize people of color and thus maintain White superiority.

Moreover, the only state interest that the Court has accepted as compelling enough to justify any affirmative action is "diversity," an interest that benefits Whites. Remedying past societal discrimination is not framed to help Whites and, perhaps not coincidentally, has been rejected as a compelling state interest. Affirmative action can actually create a diverse classroom though, which will lead to a richer classroom experience *for Whites* than they otherwise would have had in a homogenously White classroom. Thus, in weighing the costs and benefits of affirmative action, the Court is actually weighing the costs to Whites against the benefits to Whites. Unfortunately, from the perspective of most Whites, that is a balancing act that affirmative action cannot survive.

There is hope, however. The more that we engage and respond to those who advance a theory of White victimization, the more we can convince them that it is people of color, not Whites, who are in need of heightened protection through our legal system. Although people can lead highly successful and fulfilling lives without a college degree, education is key to dispelling the myth that Whites are today's victims. Individuals who have a bachelor's degree are significantly less likely than individuals who have not completed high school to agree with the statement that discrimination against Whites has become as big a problem as discrimination against Blacks and other minorities (57% vs. 43%).[150] Moreover, despite the discrepancies between the views and reference points of people of color and Whites, psychological research indicates that President Obama's rhetoric "has the potential to substantially bridge these racial divisions."[151] Thus, it is possible for us to one day live in an America where everyone has an equal opportunity to succeed and where everyone will pay the same price for a pastry.

150. *Millenials Survey*, *supra* note 37, at 37.

151. Richard P. Eibach & Valerie Purdie-Vaughns, *Change We Can Believe In: Barack Obama's Framing Strategies For Bridging Racial Divisions*, 6 DU BOIS REV.: SOC. SCI. RES. ON RACE 137, 137–51 (2009).