

LA MIGRA IN THE MIRROR: IMMIGRATION ENFORCEMENT,
RACIAL PROFILING, AND THE PSYCHOLOGY OF ONE
MEXICAN CHASING AFTER ANOTHER

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Good morning, it is a pleasure to be here. I would like to thank Professor Anthony Farley, the editors of the *Albany Law Review*, and the *Albany Law Journal of Science & Technology* for inviting me in, and for all of you for being here this morning.

I would like to spend my time this morning talking about racial profiling. Specifically, I plan to discuss one area of the law where racial profiling remains firmly embedded explicitly in several decades of U.S. Supreme Court jurisprudence. In the area of immigration law enforcement, racial profiling remains alive and well. I plan to address the implications, specifically, of race-based immigration policing in South Texas, where the vast majority of the population is of Mexican ancestry and where the Border Patrol heavily relies on agents of Mexican ancestry to enforce its race-based immigration policing calculus. I argue that in South Texas, the Border Patrol's reliance on Mexican-Americans to police the border creates a dichotomized intragroup racial divide that is destructive of the people who are charged with doing the policing, that is destructive of the people who are being targeted, and that is destructive of the very social fabric that has held the communities along the border together for generations.

In the early and mid-1800s—to give a brief historical overview of this region—the Río Grande River served as a unifying force for communities in this region. It was a source of commerce for the early communities that sprang up along both sides of the river. Back then, obviously, both sides of the river were part of the same country. After a lot of bloodshed, by the turn of the twentieth century, the Río Grande had become firmly established as a political

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boundary between Mexico and the United States of America.¹ Nonetheless, it remained a largely porous border.

Into this scene entered the Border Patrol. From its origins in the 1920s and the immediate aftermath of the Mexican Revolution—when unprecedented numbers of Mexican refugees entered what was, by then, the southwest of the United States of America—the Border Patrol’s purpose has been to interfere with immigrants’ endeavors to enter into this country. The agency’s focus then was on the nation’s southern border, and the focus has not changed since then. By the early 1930s, the Border Patrol was apprehending nearly five times as many suspected, undocumented people along the nation’s southern border, as it was along the nation’s Canadian border.² In those early years, the Border Patrol in Texas was comprised mainly of young gun slingers.³ These were individuals who had been recruited from the Texas Rangers, the state police force, which, to say the least, did not have a very peaceable relationship with the Mexican population of South Texas.⁴ The Border Patrol’s charge, then, was to enforce immigration laws⁵—laws that from a very early period had embraced racism and by the turn of the twentieth century, were beginning to be imbued with a criminal aspect as well. In 1919, for example, Congress for the first time enacted a law requiring that everyone seeking to enter the country go through a formal admissions process, the predecessor of the admissions process that we all go through today anytime we want to enter into the country.⁶ Ten years later, in 1929, Congress added another component to this, which was that failure to seek and acquire admission through the formal admissions process constituted a crime—it constituted a criminal misdemeanor—punishable by imprisonment.⁷

These changes had a significant impact on the Texas border region, where generations of residents had gone back and forth across the river without regard to government regulation. The free

¹ MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 67 (2004) (“After a decade of instability wrought by the Mexican Revolution and World War I, the border as a political marker became basically settled.”).

² *Id.* at 70.

³ *See id.* at 68.

⁴ *See id.*

⁵ *Id.* at 69.

⁶ *Id.* at 64.

⁷ Act of Mar. 4, 1929, ch. 690, § 2, 45 Stat. 1551 (declaring it a misdemeanor to enter the U.S.A. without inspection by immigration officials, punishable by up to one year imprisonment or a maximum fine of \$1,000).

flow of people across the river continued, only now their travels were either lawful or unlawful, depending on whether they complied with the government regulations.⁸

Today, the Border Patrol maintains a constant presence in the Texas border region. Its agents meander through crowded shopping areas, public roadways, and private land. In 2006, immigration officials nationwide detained approximately 1.2 million people.⁹ About ninety percent of that was done by the Border Patrol.¹⁰

My interest, though, is not merely in the Border Patrol's presence in South Texas, but in its composition.

The agency is currently engaged in the biggest hiring campaign of its history, and it is targeting Spanish speakers native to South Texas. It promises to put Spanish-speaking recruits on a fast track training process that will have them in the field in about one-third the time that it takes for other recruits to get into the field. In South Texas, where the agency's ads are everywhere, from newspapers, to radio, to TV, to emblazoned on the side of Border Patrol vehicles themselves, jobs in the federal government are very difficult to resist.

The Río Grande Valley, the four-county region where I was born and raised and where I currently live, has always lagged behind the rest of the nation economically. In 2007, in McAllen, my hometown and the region's second biggest city, the annual average wage was \$27,750—about \$13,000 less than in the country as a whole.¹¹ It is not surprising, then, that in this economic reality, jobs with the Border Patrol that promise a starting salary ranging from thirty-six to forty-six thousand dollars a year¹² are hard to turn away from, especially when you take into account some of the additional perks

⁸ NGAI, *supra* note 1, at 70.

⁹ AARON TERRAZAS, IMMIGRATION ENFORCEMENT IN THE UNITED STATES (2008), *available at* <http://www.migrationinformation.org/USfocus/display.cfm?id=697#18>.

¹⁰ *Id.*

¹¹ U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, MAY 2007 NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES: UNITED STATES (2008), *available at* http://www.bls.gov/oes/current/oes_nat.htm#b00-0000 (providing the most recent available national data); U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, MAY 2007 METROPOLITAN AND NONMETROPOLITAN AREA OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES: MCALLEN-EDINBURG-MISSION, TX (2008), *available at* http://www.bls.gov/oes/current/oes_32580.htm#b00-0000 (providing the most recent available data for the McAllen-Edinburg-Mission metropolitan statistical area).

¹² *See, e.g.*, U.S. CUSTOMS AND BORDER PROTECTION, BORDER PATROL RECRUITS AGENTS IN EL PASO TO REACH PRESIDENTIAL MANDATE (2008), http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/2008_news_releases/oct_2008/10222008_3.xml ("Border Patrol recruits earn between \$36,000 and \$46,000 in their first year, with the potential of earning up to \$70,000 per year within three years of service.")

of working for the federal government—everything from job security to another rare commodity in this region, health insurance.

What this means, then, is that racial profiling is being conducted by people with similar racial, cultural, linguistic, and presumably physical characteristics as the people being targeted.¹³ I want to now turn to exactly how it is that racial profiling is sanctioned by the U.S. Supreme Court.

In a 1975 decision, *United States v. Brignoni-Ponce*,¹⁴ the Court identified six factors that Border Patrol agents are allowed to consider when determining who to stop during roving patrol stops.¹⁵ According to the Court—and these factors are in no particular order or preference—one of the factors is the characteristics of the area in which the stop occurs.¹⁶ Other factors are the proximity to the border, the traffic patterns of the roadway where the stop occurs, the driver's behavior, the characteristics of the vehicle, and the appearance of the passengers themselves.¹⁷

Now, two of these factors, I argue, are virtually guaranteed in the Texas border region. The first of these is proximity to the border. You are obviously close to the border if you are in the four-county border region. My principal focus, though, is on the sixth factor, the appearance of the passengers in the vehicle. Justice Powell, writing for the majority in *Brignoni-Ponce*, gave us some indication of what the Court was thinking about when it embraced this criterion.

According to Powell, trained officers can recognize that characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircuts.¹⁸ As a result, having the wrong haircut or the wrong clothes can render someone who is near the border to have satisfied a third of the six-factor calculus that the *Brignoni-Ponce* Court issued. The Court, however, did not stop at allowing agents to consider clothing and hairstyles when determining suspicion of criminality. Rather, Powell went on to explicitly allow agents to consider unchangeable physical characteristics in their calculus. “The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does

¹³ See James Pinkerton, *Hispanics Bolster Border Patrol: They Now Hold 52 Percent of Agent's Jobs*, HOUSTON CHRONICLE, Dec. 29, 2008, at 1 (noting that the majority of Border agents are Latina/o).

¹⁴ 422 U.S. 873 (1975).

¹⁵ *Id.* at 884–85.

¹⁶ *Id.*

¹⁷ *Id.* at 885.

¹⁸ *Id.*

not justify stopping all Mexican-Americans to ask if they are aliens,” Powell wrote.¹⁹ The Supreme Court, though, was not done even at that. One year later, the Court addressed the proper standard for Border Patrol agents to use when deciding who to order to submit to a secondary inspection at a permanent immigration checkpoint located in the interior of the country—that is, at some distance from the border itself.²⁰

These interior checkpoints are very common along the Texas border region, and have been for many, many decades. Everyone passing through them is required to submit to primary inspection. In *United States v. Martinez-Fuerte*, the Court discussed the criteria for requiring an individual to submit to a secondary, more in-depth inspection, at some short distance off to the side of the primary inspection location.²¹ The Court could not have been clearer that racial profiling, in this context, was entirely permissible. “[E]ven if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation,” Justice Powell again explained.²² Since the Court, one year earlier, had found that there was a “high enough” correlation between Mexican ancestry and foreign birth, its decision in *Martinez-Fuerte*, though addressing a different factual context from its earlier decision in *Brignoni-Ponce*, simply allowed Border Patrol agents to be more suspicious of anyone who they think is of Mexican ancestry, than of people who they think are not of Mexican ancestry.

What, then, are the implications of this suspicion calculus in South Texas, where approximately ninety percent of the population is of Mexican ancestry, so presumably they are also of apparent Mexican ancestry? Or maybe they are not of apparent Mexican ancestry—one of the problematic issues that is inherent to this analysis. The effect, therefore, is quite simple. The Supreme Court’s decision allowing Mexican ancestry to be linked to suspicion of unlawful presence renders virtually everyone in this four-county region suspect. It is not surprising, then, that one county judge described this region as an “occupied territory.”²³ Or in my personal favorite example, a few weeks ago my partner and I were

¹⁹ *Id.* at 886–87.

²⁰ *United States v. Martinez-Fuerte*, 428 U.S. 543, 545 (1976).

²¹ *Id.*

²² *Id.* at 563.

²³ See Jim Yardley, *Some Texans Say Border Patrol Singles Out Too Many Blameless Hispanics*, N.Y. TIMES, Jan. 26, 2000, at A17 (quoting Cameron County Judge Gilberto Hinojosa).

walking through a state park located adjacent to the river when two Border Patrol agents stopped us and asked us what we were up to. We were going for a walk, so we said, “we are going for a walk.” They came up from behind, so presumably they had not seen us; they just questioned us, asking what we were up to and let us go. I guess we either did not have Mexican looking hair or Mexican looking clothes—maybe it was her white skin, maybe it was our flawless English. My point is that given the broad reach of the Supreme Court’s decisions in *Brignoni* and *Martinez-Fuerte*, the reasons used are almost always constitutionally permissible. In the words of a dissenting judge from a Fifth Circuit case, “the [Border Patrol] stop was based upon no more than the border patrolman’s speculation that poor and dirty Hispanic appearing persons might possibly be Mexican aliens who had crossed the border illegally.”²⁴ That was the dissent; the stop was upheld.²⁵

So what happens when the people doing the policing are of identical ancestry as the people being policed? What happens is that by relying on agents of Mexican ancestry, native to South Texas, the government has tapped into the cultural ties that bind communities in South Texas for the purpose of determining who belongs north of the Río Grande and who does not. The government depends on the insider knowledge and trust that only comes with genuine, life-long experience to enforce divisive policies which it can apply to approximately ninety percent of the population. The Supreme Court’s instruction that factors such as clothing and hairstyles indicate Mexican origin and that anyone of apparent Mexican ancestry might be from somewhere else requires agents to adopt racial stereotypes to do their job. What does Mexican clothing look like? What does Mexican hair look like? The Supreme Court tasks the individual Border Patrol agent with the job of deciding exactly what a Mexican looks like. Do I look like a Mexican? Does my blonde, blue-eyed sister look like a Mexican?

In relying on racial stereotypes enforced by agents of Mexican ancestry, the Border Patrol has repeated the time-tested reality that the most profound form of oppression occurs only when the oppressed internalize the cultural values and perspectives of the oppressor. As theorists Paulo Friere and Frantz Fanon suggest in their classic studies on colonization, the hosting of the oppressor is bad for the agents, it is bad for the targeted individuals, and it is

²⁴ U.S. v. Garcia, 732 F.2d 1221, 1228 (5th Cir. 1984) (Tate, J., dissenting).

²⁵ *Id.*

bad for the rest of us, who in one way or another are caught up in the wide sweep of immigration policing along the border.²⁶ For agents of Mexican ancestry, this policy is harmful insofar as it requires that they utilize racial stereotypes of people who look exactly like themselves to perform their job function.

In their role as Border Patrol agents, they are allowed to engage in race-based policing. In their role as people of apparent Mexican ancestry living in close proximity to the border, they are eligible to be policed. For the people being profiled—and as I have said—this is virtually everyone in the Río Grande Valley, this is harmful because it renders almost all of us perpetually suspect of being here unlawfully. We are all suspected criminals, for simply being who we were born as, and for simply living where we choose to live. Lastly, racial profiling that relies on stereotypes and uses deep-rooted cultural practices to detect insiders and outsiders is destructive of the very community fabric that has kept generations of families along the Texas border going through economic hardship and geographic isolation. By exploiting cultural and linguistic practices to serve policies that target the very people who share those practices the Border Patrol threatens to forever destroy the foundations of South Texas communities. That, I believe, is a travesty for everyone involved. Thank you.

²⁶ See, e.g., FRANTZ FANON, TOWARD THE AFRICAN REVOLUTION 3, 57 (Haakon Chevalier trans., 1967) (1964); PAULO FREIRE, PEDAGOGY OF HOPE: RELIVING *PEDAGOGY OF THE OPPRESSED* 10 (Robert R. Barr trans., 1994) (1992).