

# KEEPING CITIZENSHIP RIGHTS WHITE: ARIZONA'S RACIAL PROFILING PRACTICES IN IMMIGRATION LAW ENFORCEMENT

Mary Romero<sup>1</sup>

## INTRODUCTION

This article analyzes policing practices that result in the mistreatment of citizens and immigrants of color in Arizona and argues that discriminatory and discretionary policing, by both formal and informal means, connects citizenship rights to race. The article begins with an overview of racial profiling and by reviewing the conceptual frameworks primarily applied to the Black experience in the U.S. and demonstrate the usefulness of those frameworks in analyzing the experience of Latinos in the U.S. Next, the article identifies law enforcement racial profiling practices and examines the relationship between those practices and other discretionary powers used by law enforcement to deny Latinos the same treatment as white citizens or white immigrants. Then, drawing on newspaper accounts, law enforcement reports, human and civil rights reports, and lawsuits filed against Maricopa County, the article discusses the risk that citizens and immigrants of color face as a result of racial profiling in immigration law enforcement. This section focuses on narratives from *Melendres v. Arpaio* and a similar case involving Velia Meraz and her brother Manuel Nieto. I also analyze tactics used during the two-day raid in the town of Guadalupe, Arizona. The article concludes with a discussion of the consequences of denying civil and human rights to Latinos.

## HISTORY OF RACE/ETHNICITY AND DISPARATE TREATMENT FROM U.S. AUTHORITIES

One of the first studies completed on racial profiling highlights the seriousness of the problem. John Lamberth's study which focused on the New Jersey turnpike provided statistical evidence that "Driving While Black" (DWB)<sup>2</sup> meant receiving disparate treatment by race in the criminal justice system.<sup>3</sup> Numerous studies researching the presence of racial profiling have repeatedly found that the proportion of minorities stopped for traffic violations does not correspond to the rate of minorities arrested for carrying contraband or having outstanding warrants.<sup>4</sup> As David Harris points out, "[t]he

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1. Professor, Justice and Social Inquiry, Arizona State University; Ph.D. Sociology, University of Colorado, Boulder, CO. I thank the LAW JOURNAL FOR SOCIAL JUSTICE AT ARIZONA STATE UNIVERSITY for inviting me to participate in *Liberty and Justice for Some? A Symposium on the Implications of Recent Arizona Legislation*. I appreciate the opportunity to have worked with Salim Shleef, an ASU J.D. Candidate, and his colleagues. I thank Dr. Gabriella Sanchez for her research assistance. Portions of this paper were presented in the *CULP LECTURE* at the 2010 *LatCrit XV Conference* in Denver, Colorado.

2. DR. JOHN LAMBERTH, REVISED STATISTICAL ANALYSIS OF THE INCEIDENCE [sic] OF POLICE STOPS AND ARRESTS OF BLACK DRIVERS/TRAVELERS ON THE NEW JERSEY TURNPIKE BETWEEN EXITS OR INTERCHANGES 1 AND 3 FROM THE YEARS 1988 THROUGH 1991, (Nov.11, 1994), [http://www.lamberthconsulting.com/downloads/new\\_jersey\\_study\\_report.pdf](http://www.lamberthconsulting.com/downloads/new_jersey_study_report.pdf).

3. *Driving While Black: Statistician Proves that Prejudice still rules the road*, WASH. POST, Aug. 16, 1998 at C1, available at [http://www.lamberthconsulting.com/downloads/washingtonpost\\_article.pdf](http://www.lamberthconsulting.com/downloads/washingtonpost_article.pdf).

4. PAUL H. ZOUBEK, INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING (State of New Jersey, April 24, 1999), available at [http://www.state.nj.us/lps/intm\\_419.pdf](http://www.state.nj.us/lps/intm_419.pdf).

rate at which officers uncover contraband in stops and searches is not higher for blacks than for whites . . . the hit rate for drugs and weapons in police searches of African Americans in the same as or lower than the rate for whites. Comparisons between Latinos and whites yield even more surprising results; police catch criminals among Latinos at far lower rates than most whites.”<sup>5</sup>

The growing concern over the use of racial profiling as a policing practice in the late 1990s resulted in numerous state legislatures mandating data collection, and in some cases, legislatures developed laws prohibiting law enforcement from using racial profiling.<sup>6</sup> Research points to the correlation between the discretionary use of racial profiling and an abuse of other discretionary practices such as traffic stops for minor offences, search and seizure, stop and frisk, interrogations, detentions, and arrests. Since 1967, stops and frisks resulting from racial profiling have been identified as the cause of most police and minority group conflict.<sup>7</sup> Several national conferences focusing on racial profiling have been held by the Department of Justice to address effective police practices and improve police and community relations.<sup>8</sup> There is a continued call for data collection on traffic stops to measure racial profiling, improve benchmarks for analyzing data, and make findings available to the public.<sup>9</sup> In response to the problem of police and community relations, particularly regarding racial profiling, the Department of Justice (DOJ) hosted a conference in 1999 on “Strengthening Police-Community Relations.” Another related DOJ conference specifically addressing racial profiling was held a year later; “Traffic Stops and Data Collection: Analyzing and Using the Data.” Racial profiling continued to be a hot topic the following decade<sup>10</sup> and generated numerous studies presented at the conference, “Racial Profiling in the 21st Century: Implications for Racial Justice.”<sup>11</sup>

Unfortunately, the problem of racial profiling still remains. In its 2004 report, “Threat and Humiliation: Racial Profiling, National Security, and Human Rights in the United States,”<sup>12</sup> Amnesty International reported that only 29 states have passed laws addressing the use of racial profiling in law enforcement. However, racial profiling

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5. DAVID A. HARRIS, *PROFILES OF INJUSTICE: WHY POLICE PROFILING CANNOT WORK* 13 (2002).

6. DR. JOHN C. LAMBERTH, *DATA COLLECTION AND BENCHMARKING OF THE BIAS POLICING PROJECT: FINAL REPORT FOR THE METROPOLITAN POLICE DEPARTMENT IN THE DISTRICT OF COLUMBIA* 7 (Sept. 2006), available at <http://www.lamberthconsulting.com/downloads>.

7. See *supra* note 5, at 51 (citing the President’s Commission on Law Enforcement and Administration of Justice).

8. DR. JOHN C. LAMBERTH, *SAN ANTONIO REPORT: RACIAL PROFILING DATA ANALYSIS* (Dec. 2003), available at <http://www.lamberthconsulting.com/about-racial-profiling/documents/SanAntonioReport10804FinalVersion.pdf>.

9. *Id.* at 9.

10. See U.S. DEPT. JUSTICE, *FACT SHEET: RACIAL PROFILING* (June 17, 2003), available at [http://www.justice.gov/opa/pr/2003/June/racial\\_profiling\\_fact\\_sheet.pdf](http://www.justice.gov/opa/pr/2003/June/racial_profiling_fact_sheet.pdf).

11. Funding for the conference was obtained from the SOROS Foundation. The conference was co-hosted by the Institute on Race and Justice at Northeastern University the American Civil Liberties Union, the National Organization of Black Law Enforcement, and Lamberth Consulting. There were 52 papers presented at the conference. Racial Profiling in the 21st Century: Implications for Racial Justice Search Results, United States Department of Justice, [http://searchjustice.usdoj.gov/search?q=Racial+Profiling+in+the+21st+Century%3A+Implications+for+Racial+Justice&btnG.x=16&btnG.y=11&btnG=Search&sort=date%3AD%3AL%3Ad1&output=xml\\_no\\_dtd&ie=iso-8859-1&oe=UTF-8&client=default\\_frontend&proxystylesheet=default\\_frontend&site=default\\_collection](http://searchjustice.usdoj.gov/search?q=Racial+Profiling+in+the+21st+Century%3A+Implications+for+Racial+Justice&btnG.x=16&btnG.y=11&btnG=Search&sort=date%3AD%3AL%3Ad1&output=xml_no_dtd&ie=iso-8859-1&oe=UTF-8&client=default_frontend&proxystylesheet=default_frontend&site=default_collection) (last visited April 14, 2011).

12. See AMESTY INTERNATIONAL U.S. DOMESTIC HUMAN RIGHTS PROGRAM, *THREAT AND HUMILIATION: RACIAL PROFILING, NATIONAL SECURITY, AND HUMAN RIGHTS IN THE UNITED STATES* (Sept. 2004) available at [http://www.amnestyusa.org/racial\\_profiling/report/rp\\_report.pdf](http://www.amnestyusa.org/racial_profiling/report/rp_report.pdf).

remains a serious problem due to the lack of state and federal coverage and consistency. For example:

Forty-six states do not ban racial profiling based on religion or religious appearance. Thirty-five states do not ban racial profiling of pedestrians (and the majority of the fifteen states that do, use a definition of racial profiling that make the ban virtually unenforceable in most circumstances). The scope of Tennessee's current racial profiling law is so limited that it only pertains to the conditions under which fingerprint records are obtained. In June 2003, the Department of Justice issued its Guidance Regarding the Use of Race by Federal Law Enforcement Agencies forbidding racial profiling by federal law enforcement officials. Yet, the guidance does not cover profiling based on religion, religious appearance, or national origin; does not apply to state or local law enforcement agencies; does not include any enforcement mechanisms; does not specify punishment for violating officers/agencies; and contains a blanket exception for 'national security' and 'border integrity' cases.<sup>13</sup>

#### RACE/ETHNICITY AND DISPARATE TREATMENT IN IMMIGRATION LAWS AND ENFORCEMENT

In order to highlight the racial conflict and ethnic nationalism, a growing number of immigration scholars describe the current global migration as a form of apartheid.<sup>14</sup> Predominately white and wealthy countries perceive poorer migrants, particularly from Africa, Central and South American, Asia and the Middle East, as threats to their economic and national security.<sup>15</sup> The "regime of identification"<sup>16</sup> or the construction of numerous bureaucracies employed by these wealthier countries requires valid identification for driving, access to lodging, education, health care and freedom of movement. The way these countries restrict access to such identification is closely characteristic of South African apartheid.<sup>17</sup> Rather than destroying the existence of apartheid in the world, scholars argue that we have created global apartheid regulating the

13. *Id.*

14. See DAVID SPENER, *CLANDESTINE CROSSINGS: MIGRANTS AND COYOTES ON THE TEXAS-MEXICO BORDER* (2009) (discussing the ways that apartheid explains race relations regulating the U.S.-Mexico border); Nandita Sharma, *Anti-Trafficking Rhetoric and the Making of a Global Apartheid*, 17 *NWSA J.* 88 (2005) (applying global apartheid to the case of human smuggling); Salih Booker & William Minter, *Global Apartheid*, *THE NATION*, July 9, 2001, available at <http://www.thenation.com/article/global-apartheid> (Calling attention to the apartheid's role at regulating labor and managing political rights in addition to racial segregation); Gernot Kohler, *The Three Meanings of Global Apartheid: Empirical, Normative, Existential*, 20 *ALT.* 403 (1995) (Addressing the growing significance of mechanisms to keep racial minorities from crossing national boundaries); ANTHONY H. RICHMOND, *GLOBAL APARTHEID: REFUGEES, RACISM, AND THE NEW WORLD ORDER* (1994) (Examining the impact of globalization on international migration, racial conflict and nationalism).

15. See STEPHEN CASTLES & MARK J. MILLER, *THE AGE OF MIGRATION: INTERNATIONAL POPULATION MOVEMENTS IN THE MODERN WORLD* (4th ed., 2008); see also INTERNATIONAL LABOUR OFFICE, *INTERNATIONAL MIGRATION, RACISM DISCRIMINATION AND XENOPHOBIA*, (Aug./Oct. 2001) available at [http://www.ilo.org/public/libdoc/ilo/2001/101B09\\_218\\_engl.pdf](http://www.ilo.org/public/libdoc/ilo/2001/101B09_218_engl.pdf).

16. JOHN TORPEY, *THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP, AND THE STATE* 7 (2000).

17. See generally John Torpey, *Coming and Going: On the State Monopolization of the Legitimate Means of Movement*, 16 *SOC. THEORY* 239 (1997); *Id.*

labor and political rights of immigrants of color.<sup>18</sup>

The trend of racial immigration policies is not new in the United States.<sup>19</sup> The connection between race and citizenship in the U.S. was established long ago by laws limiting or restraining the immigration and opportunity of persons of color.<sup>20</sup> These laws were bolstered by the institutionalization of mechanisms for “White” persons to gain unearned privileges.<sup>21</sup> Beyond the laws themselves, the judiciary has also played a role in discriminating against persons of color in immigration cases.<sup>22</sup>

Some of the most egregious examples of the legal social exclusion of immigrants of color were the Chinese exclusion laws,<sup>23</sup> the Gentleman’s Agreement between the U.S. and Japan,<sup>24</sup> the decision in *United States v. Thind*,<sup>25</sup> the 1924 national origins quota system,<sup>26</sup> and the Immigration Act of 1965.<sup>27</sup>

Immigrant law enforcement is similarly focused on people of color. This focus is evidenced by militarized campaigns along the border, such as Operation Wetback, Operation Blockade, Operation Hold the Line and Operation Gatekeeper.<sup>28</sup> These immigration law enforcement operations place immigrants and citizens of Mexican ancestry, in harm’s way while other people residing in the U.S. are allowed to stay out of danger. In *United States v. Brignoni-Ponce*, the Supreme Court held that the Fourth Amendment allows law enforcement officers (1) to use “Mexican appearance” as “a legitimate consideration under the Fourth Amendment for making an immigration stop” and (2) to question persons about their citizenship and immigration status as long as the racial profiling is not the sole factor.<sup>29</sup> In *United States v. Martinez-Fuerte* (1976), the Supreme Court found that the Fourth Amendment was not violated when the Border

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18. See generally ANTHONY H. RICHMOND, *GLOBAL APARTHEID: REFUGEES, RACISM, AND THE NEW WORLD ORDER* (1994); Nandita Sharma, *Anti-Trafficking Rhetoric and the Making of a Global Apartheid*, 17 *NWSAJ* 88, 88-111 (2005); Edward Murguía & Kim Diaz, *Mexican Immigration Scenarios Based on the South African Experience of Ending Apartheid*, 3 *SOCIETIES WITHOUT BORDERS* 209, 209-227 (2008); JOSEPH NEVINS, *DYING TO LIVE: A STORY OF U.S. IMMIGRATION IN AN AGE OF GLOBAL APARTHEID* (2008); David Spener, *Global Apartheid, Coyotaje and the Discourse of Clandestine Migration: Distinctions Between Personal Structural, and Cultural Violence*, First Semester 2008 *MIGRACION Y DESARROLLO* 116, 116-140 (2008).

19. See generally BILL ONG HING, *DEPORTING OUR SOULS—VALUES, MORALITY, AND IMMIGRATION POLICY* (2006); KEVIN JOHNSON, *THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS* (2004).

20. *Id.*

21. See generally IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* (2005); DAVID R. ROEDIGER, *WAGES OF WHITENESS* (2006); THOMAS SHAPIRO, *THE HIDDEN COSTS OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY* (2005); MEIZHU LUI, BARBARA ROBLES, BETSY LEONARD-WRIGHT, ROSE BREWER & REBECCA ADAMSON, *THE COLOR OF WEALTH: THE STORY BEHIND THE U.S. RACIAL WEALTH DIVIDE* (2006).

22. See generally IAN HANEY LOPEZ, *WHITE BY LAW* (1997) (Instances where the Courts have become involved in racial immigration by determining whiteness and eligibility for citizenship are chronicled in Ian Haney Lopez’s research which demonstrates the social construction of race in the courts).

23. *Id.* at 37-8.

24. ROGER DANIELS, *THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION* (1999).

25. *United States v. Thind*, 261 U.S. 204, 212-215 (1923).

26. U.S. DEPT. OF JUSTICE, *supra* note 10.

27. See Immigration Act of 1924, ch. 190, 43 Stat. 153, *repealed by* Immigration and Nationality Act of 1952, ch. 477, tit. IV, § 403(a)(23), 66 Stat. 163, 279.

28. ARMANDO NAVARRIO, *THE IMMIGRATION CRISIS: NATIVISM, ARMED VIGILANTISM, AND THE RISE OF A COUNTERVAILING MOVEMENT* (2009) (Describes the nativism behind establishing each operation and the targeting of Latinos, particularly Mexicans and Mexican Americans).

29. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 887 (1975).

Patrol routinely stopped vehicles at checkpoints without identifying probable cause.<sup>30</sup> Both these decisions embolden immigration law enforcement officers to focus on people of color and are examples of formal legal constructs or macro-aggressions that subordinate the citizenship status of Mexican Americans.<sup>31</sup>

Repressive and restrictive policies passed over the last decades in the U.S. assure that migrants crossing the Mexican border into the U.S. have more difficulty doing so legally.<sup>32</sup> Even when migrants are successful in legally crossing, they are unlikely to experience the same opportunities and treatment as their European counterparts.<sup>33</sup> Forced into a “social space of ‘illegality,’” migrants face “forced invisibility, exclusion, subjugation, and suppression.”<sup>34</sup> For those migrants of color from Mexico, Central, and South America who are not fortunate enough to cross legally, they must face life-threatening crossings in one of the most desolate deserts in the world.<sup>35</sup>

Unlike the Canadian or coastal water borders, the militarization of the Mexican border is unique and unprecedented in our history.<sup>36</sup> Even after crossing the border, immigrants of color face dangers from U.S. immigration law enforcement practices in ways that white unauthorized immigrants do not.<sup>37</sup> Consequently, immigrants of color remain a vulnerable work force willing to work for lower wages, without benefits, and in unsafe working conditions.<sup>38</sup>

Immigration legislation and law enforcement make distinctions between full citizenship rights granted to Whites and the limited rights for non-whites.<sup>39</sup> Kevin

30. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 562 (1976) (holding that “stops and questioning at issue may be made in the absence of any individualized suspicion at reasonably located checkpoints”).

31. See *Whren v. United States*, 517 U.S. 806, 818 (1996) (the Court holds that an observation of a violation of the traffic code by a police officer established probable cause to stop and search the vehicle). In addition, I would argue that the *Whren* decision to include any traffic offense as a legally sanctioned stop and search, also serves to subordinate the citizenship status of persons of color, particularly the poor and lower-middle class since they are mostly likely to be stopped for minor traffic violations.

32. See generally JOSEPH NEVINS, *OPERATION GATEKEEPER, THE RISE OF THE “ILLEGAL ALIEN” AND THE MAKING OF THE U.S.-MEXICO BOUNDARY* (2002); PETER ANDREAS, *BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE* (2000); TIMOTHY J. DUNN, *THE MILITARIZATION OF THE U.S.-MEXICO BORDER* (1996).

33. See generally *id.*

34. See Nicholas De Genova, *Migrant “Illegality” and Deportability in Everyday Life*, 31 ANN. REV. ANTHRO. 419, 427 (2002).

35. See generally Karl Eschbach, Jacqueline Hagan, Nestor Rodriguez, Rúben Hernández-León & Stanley Bailey, *Death at the Border*, 33 INT’L MIGRATION REV. 430 (1999); Wayne A. Cornelius, *Death at the Border: Efficacy and Unintended Consequences of US Immigration Control Policy*, 27 POPULATION AND DEV. REV. 661 (2001); RAQUEL RUBIO-GOLDSMITH, M. MELISSA MCCORMICK, DANIEL MARTINEZ, INEZ M. DUARTE, *THE “FUNNEL EFFECT” & RECOVERED BODIES OF UNAUTHORIZED MIGRANTS PROCESSED BY THE PIMA COUNTY OFFICE OF THE MEDICAL EXAMINER, 1990-2005* (Binational Migration Inst., Mexican Am. Stud. & Res. Center at the U. of Ariz., 2006).

36. See generally TIMOTHY J. DUNN, *THE MILITARIZATION OF THE U.S.-MEXICO BORDER* (1996); PETER ANDREAS, *BORDER GAMES, POLICING THE U.S.-MEXICO DIVIDE* (2000); JOSEPH NEVINS, *OPERATION GATEKEEPER, THE RISE OF THE “ILLEGAL ALIEN” AND THE MAKING OF THE U.S.-MEXICO BOUNDARY* (2002).

37. See Mary Romero, *Racial Profiling and Immigration Law Enforcement: Rounding Up of Usual Suspects in the Latino Community*, 32 CRIT. SOC. 449 (2006) (analyzing the consequences of immigration law enforcement when race is used as a proxy for citizenship status).

38. See Francisco L. Rivera-Batiz, *Undocumented workers in the labor market: An analysis of the earnings of legal and illegal Mexican immigrants in the United States*, 12 J. POPULATION ECON. 91 (1999) (presenting research findings that show wage differentials between documented and undocumented immigrants); Nicholas Walter, Philippe Bourgois & H. Margarita Loinaza, *Masculinity and Undocumented Labor Migration: Injured Latino Day Laborers in San Francisco*, 59 SOC. SCI. & MED., 1159, (2004) (study examining the experience of injury, illness and disability among undocumented Latino day laborers in San Francisco who are rendered vulnerable by the structural conditions of undocumented immigrant status).

39. Kevin R. Johnson, *Race, The Immigration Laws, and Domestic Race Relations: A “Magic Mirror” Into the Heart of Darkness*, 73 IND. L.J. 1111 (1998).

Johnson explains that “the differential treatment of citizens and noncitizens serves as a ‘magic mirror’”<sup>40</sup> and “the harsh treatment of noncitizens reveals just how this society views citizens of color.”<sup>41</sup> Robert Chang notes that the “[e]xamination of the immigrant allows us to observe the dynamics of racial formation as immigrants enter the political/cultural/legal space of the United States and ‘become’ differentially racialized as Asian American, Black, Latina/Latino, and White.”<sup>42</sup> Like other Critical Race Theory scholars, Johnson and Chang have demonstrated the embedment of racial inequality and the privileges of whiteness in the overall legal process.<sup>43</sup> Laws appearing race neutral become race-based through law enforcement practices.

Critical criminologists who examine injustice in the legal system have examined the erosion of rights under the Fourth and Fourteenth Amendments.<sup>44</sup> Micro and macro-aggressions are useful constructs in classifying the practices used by police. Micro and macro-aggressions are the everyday and persistent affronts that citizens of color experience and are constant reminders of their subordinate citizenship status. Rather than micro-aggressions, Georges-Abeyie describes “the discriminatory and discretionary actions of police officers during the informal stages, such as pre-arrest,” as “petit apartheid.”<sup>45</sup> Building on Georges-Abeyie’s conceptualization of “petit apartheid,” Dragan Milovanovic and Katheryn K. Russell created a typology of discriminatory practices ranging from covert or informal to overt and formal practices. Their construct developed a continuum of petit apartheid practices that include everything from non-verbal to verbal (both official and unofficial) practices to overt actions.<sup>46</sup> The framework is useful in analyzing the wide range of discretionary power used in immigration law enforcement and the range of verbal and non-verbal actions accompanying racial profiling.<sup>47</sup> Acknowledging the micro and macro-aggressions involved in racial profiling is crucial in understanding its function to subordinate citizens of color.<sup>48</sup> Framing immigration law enforcement in a typology of petit apartheid reinforces the sobering reality that race and citizenship are inextricably linked.

#### MCSO IMMIGRATION PRACTICES

Clearly it was racial profiling because they were targeting corn vendors who fit a certain profile, and not the hot dog vendors, for example. Corn vendors are from South America. They’re mostly Mexican; some are from Honduras or El Salvador. The officers would

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40. *Id.*

41. *Id.* at 1116.

42. ROBERT S. CHANG, *DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE* 29 (1999).

43. *See generally* IAN HANEY LOPEZ, *WHITE BY LAW* (1997); KATHERYN K. RUSSELL, *THE COLOR CRIME* (1998); DERRICK BELL, *AT THE BOTTOM OF THE WELL* (1993); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

44. *See generally* BRIAN MACLEAN AND DRAGAN MILOVANOVIC, *RACISM EMPIRICISM AND CRIMINAL JUSTICE* (1990); MARTIN D. SCHWARTZ AND DRAGAN MILOVANOVIC, *RACE, GENDER AND CLASS IN CRIMINOLOGY* (1996); DANIEL GEORGES-ABEYIE, *THE CRIMINAL JUSTICE SYSTEM AND BLACKS* (1984); KATHERYN K. RUSSELL, *THE COLOR CRIME* (1998); DRAGAN MILOVANOVIC AND KATHERYN K. RUSSELL *PETIT APARTHEID IN THE U.S. CRIMINAL SYSTEM: THE DARK FIGURE OF RACISM* (2001).

45. *See* *PETIT APARTHEID IN THE U.S. CRIMINAL JUSTICE SYSTEM, THE DARK FIGURE OF RACISM* xv (Dragan Milovanovic & Katheryn Russell eds., 2001).

46. *Id.* at xx.

47. *Id.* at 23.

48. RUSSELL, *supra* note 47, at 138-141.

just surround them in their police cars, start questioning them and then just round them up in handcuffs for operating without a license. Most of the people who were rounded up ended up being deported, but there were a few who were U.S. citizens, who were also arrested.<sup>49</sup>

This description of a raid in the Maryvale area of West Phoenix characterizes the highly selective policing of Latinos in Maricopa County, Arizona. The raid, led by the Maricopa County Sheriff's Office [hereinafter MCSO] exclusively targeted Latino-owned businesses for lacking vendor permits and selling contaminated food. During another raid that lasted nine days and covered the Wickenburg, Cave Creek, and downtown Phoenix areas, MCSO exclusively stopped drivers of Latino descent and raided businesses popular with Latino shoppers.<sup>50</sup> MCSO claimed that the county-wide raids were "crime suppression sweeps" geared at eliminating criminal immigrants from the community. The head of MCSO, Sheriff Joe Arpaio, insisted that his department's law enforcement practices did not include racial profiling.<sup>51</sup> In response to the growing public criticism that the MCSO sweeps were only executed in areas with large number of Latino residents, Sheriff Arpaio included his own neighborhood, Fountain Hills, in one of the raids.<sup>52</sup> However, this publicity stunt has not inhibited MCSO from selectively stopping people who appear to be of Mexican ancestry and only served to enhance the public view that non-citizenship status and criminality are inscribed on brown bodies.<sup>53</sup> Furthermore, by establishing a phone hotline for residents to call and report undocumented immigrants and criminals engaged in trafficking, Sheriff Arpaio has essentially encouraged average citizens to racially profile their neighbors.<sup>54</sup> The creation of the hotline presumes that laypeople are knowledgeable of immigration law, able to identify types of immigration statuses, and can recognize human trafficking.<sup>55</sup> Arpaio has even advertised his call to action in bold red lettering on his fleet of Ford Econoline vans that appear at the command centers during raids: "HELP SHERIFF JOE ARPAIO FIGHT ILLEGAL IMMIGRATION & TRAFFICKING CALL 602.876.4145 WITH

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49. AMERICAN CIVIL LIBERTIES UNION OF ARIZONA, *DRIVING WHILE BLACK OR BROWN: AN ANALYSIS OF RACIAL PROFILING IN ARIZONA* 17 (April 2008).

50. See Press Release, Maricopa County Sheriff's Office, Sheriff's Office Not Waiting for Loitering and Soliciting Ordinances to Take Effect (September 27, 2007), available at [http://www.mcso.org/include/pr\\_pdf/CC.pdf](http://www.mcso.org/include/pr_pdf/CC.pdf).

51. See Howard Witt, *Does Crackdown Cross Line? Arizona Efforts Stir Racial Profiling Claims*, CHICAGO TRIBUNE, May 26, 2008, available at [http://www.chicagotribune.com/news/nationworld/chi-profiling\\_wittmay26,0,4678882.story](http://www.chicagotribune.com/news/nationworld/chi-profiling_wittmay26,0,4678882.story)

52. See Press Release, Maricopa County Sheriff's Office, Mesa Drop House (May 8, 2008) available at <http://www.mcso.org/MultiMedia/PressRelease/mesa%20drop%20house%2050808.pdf>.

53. See Mary Romero, *Racial Profiling and Immigration Law Enforcement: Rounding Up of Usual Suspects in the Latino Community*, 32 CRIT. SOC. 449 (2006) (analyzing the consequences of racial profiling in immigration law enforcement).

54. See Press Release, Maricopa County Sheriff's Office, Sheriff Office Continues Arrests of Illegal Immigrants, Arpaio says Hot Line Tips are Paying-Off, (August 29, 2007), available at [http://www.mcso.org/MultiMedia/PressRelease/Arrests\\_082907.pdf](http://www.mcso.org/MultiMedia/PressRelease/Arrests_082907.pdf); First Amended Complaint at 16, *Melendres v. Arpaio*, 598 F. Supp.2d 1025 (D. Ariz. 2009) (No. CV07-02513) (The "hotline invites individuals to equate race with immigration status and allows some to pursue personal grievances by way of a hotline complaint.").

55. *Id.*

TIPS ON ILLEGAL ALIENS.<sup>56</sup>

While Arizona has recently become ground zero in the national immigration debate,<sup>57</sup> federal law enforcement needs to acknowledge the environment created for Sheriff Arpaio's success in profiling immigrants as criminals.<sup>58</sup> For instance, a September 24, 2010 Homeland news release stated that:

ICE's Fugitive Operations Teams (FOTs) give top priority to cases involving aliens who pose a threat to national security and public safety, including members of transnational street gangs and child sex offenders. . . . ICE's Fugitive Operations Program is just one facet of the Department of Homeland Security's broader strategy to heighten the federal government's effectiveness at identifying and removing dangerous criminal aliens from the United States.<sup>59</sup>

However, a close look at immigrants arrested in MCSO crime sweeps indicate that not all the immigrants arrested had a criminal record.<sup>60</sup> Furthermore, the information in MCSO's press releases do not provide details identifying the seriousness of prior criminal convictions but rather suggests the arrests follow the FOT's priority of dangerous criminal aliens.<sup>61</sup> Referring to his immigration raids as crime suppression sweeps, Sheriff Arpaio reinforced the notion that there is an eminent threat of criminals posed by among immigrant populations. ICE has provided Arpaio extensive latitude in immigration law

56. See ROXANNE LYNN DOTY, *THE LAW INTO THEIR OWN HANDS: IMMIGRATION AND THE POLITICS OF EXCEPTIONALISM* 102 (2009); Daniel Gonzalez, *Arpaio Keeps Heat on Migrants*, *THE ARIZONA REP.* Oct. 17, 2007, at A1 (By July 2007, MCSO "advertised the hotline on 24 billboards and also on department owned trucks."); Judi Villa & Yvonne Wingett, *Sheriff Unveils Migrant Hotline*, *THE ARIZONA REP.*, July 21, 2007, at B1 (Muzaffar Christy, the director of the Migration Policy Institute's Office at New York University School of Law, summed up the problem with the hotline as follows: "It makes every citizen, by proxy, an immigration cop, . . . This hard-line (plan) is a direct line on vigilantism.").

57. See Dennis Wagner & Emily Bazar, *Arizona has Become "Ground Zero" of Immigration Fight*, *USA TODAY*, Jan. 14, 2010, available at [http://www.usatoday.com/news/nation/2010-01-14-immigration\\_N.htm](http://www.usatoday.com/news/nation/2010-01-14-immigration_N.htm); Miriam Jordan, *Arizona Seizes Spotlight in U.S. Immigration Debate*, *WALL ST. J.*, Feb. 1, 2008, available at <http://online.wsj.com/article/SB120181961483433401.html> (referencing Arizona as a laboratory for new ways to crack down on illegal immigrants).

58. See AARTI SHAHANI & JUDITH GREENE, *LOCAL DEMOCRACY ON ICE: WHY STATE AND LOCAL GOVERNMENTS HAVE NO BUSINESS IN FEDERAL IMMIGRATION LAW ENFORCEMENT: A JUSTICE STRATEGIES REPORT* 36 (Justice Strategies Report, Feb. 28, 2009), available at <http://www.justicestrategies.org/publications/2009/local-democracy-ice-why-state-and-local-governments-have-no-business-federal-immig> (discussing the strong anti-immigrant sentiment in Arizona, along with Sheriff Arpaio's record "took the handcuffs off law enforcement" in Arizona).

59. *Id.* But see RUBÉN G. RUMBAUT & WALTER A. EWING, *THE MYTH OF IMMIGRANT CRIMINALITY AND THE PARADOX OF ASSIMILATION: INCARCERATION RATES AMONG NATIVE AND FOREIGN-BORN MEN* (Immigration Policy Center, 2007), available at <http://www.immigrationpolicy.org/special-reports/myth-immigrant-criminality-and-paradox-assimilation> (research does not support the claim that undocumented immigrants commit more crime than citizens).

60. See Press Release, Maricopa County Sheriff's Office, Sheriff Will Conduct Another Crime Suppression Operation in Phoenix Prior to May 1st, (Apr. 13, 2010) available at [http://docs.google.com/viewer?a=v&q=cache:iNkz44V98LcJ:www.mcso.org/include/pr\\_pdf/April%252013%2520load%2520News%2520Release.pdf+april+mcso+load+news+release+illegals+arrested&hl=en&gl=us&pid=bl&srcid=ADGEEsJTeHxrp8y1V83ru8fomxQLmHR\\_MOz7JmHP3SNtpjOpVuzIFBhf2KVqguYstcPSyDDIMODKCB5VsyxovKS0bbMtRRYGr7NWdMcyFs-FjpuQvB\\_Vwkae017uIw-BdwM16LY7S8&sig=AHIEtbTE66P4BaLN5NMfEu\\_P9dIIPaAg](http://docs.google.com/viewer?a=v&q=cache:iNkz44V98LcJ:www.mcso.org/include/pr_pdf/April%252013%2520load%2520News%2520Release.pdf+april+mcso+load+news+release+illegals+arrested&hl=en&gl=us&pid=bl&srcid=ADGEEsJTeHxrp8y1V83ru8fomxQLmHR_MOz7JmHP3SNtpjOpVuzIFBhf2KVqguYstcPSyDDIMODKCB5VsyxovKS0bbMtRRYGr7NWdMcyFs-FjpuQvB_Vwkae017uIw-BdwM16LY7S8&sig=AHIEtbTE66P4BaLN5NMfEu_P9dIIPaAg) (because MCSO uses the smuggling law to charge immigrants as being involved in their own smuggling, these numbers are questionable).

61. See Jean Comaroff & John L. Comaroff, *Figuring Crime: Quantifacts and the Production of the Un/Real*, 18 *PUB. CULTURE* 209 (2006) (discussing the way the statistics are presented to distort the actual danger of crime).

enforcement in signing a 287(g) agreement with MCSO.<sup>62</sup> Although 287(g) was added to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, ICE did not begin establishing partnerships with local law enforcement officers to engage in immigration law enforcement.<sup>63</sup> Citing from an ICE Fact Sheet:

The 287(g) program is designed to enable state and local law enforcement personnel, incidental to a lawful arrest and during the course of their normal duties, to question and detain individuals for potential removal from the United States, if these individuals are identified as undocumented illegal aliens and they are suspected of committing a state crime.<sup>64</sup>

The conditions of the 287(g) contract stipulate that the program is not aimed at “day labor activities” and that the police have authority to use the 287(g) “when people are taken into custody as a result of violating state or local criminal law,” which is “more than a traffic offense.”<sup>65</sup>

Using the new partnership programs with ICE, Sheriff Joe Arpaio turned his attention to immigration law enforcement.<sup>66</sup> The partnership granted Maricopa County “the most robust 287(g) contract in the country”<sup>67</sup> and opened the door to racial profiling through the abuse of discretionary power.<sup>68</sup> The potential for MCSO to use this contract to racially profile should have been apparent when ICE granted the contract because at that time, Sheriff Arpaio was already known for violating civil and human rights.<sup>69</sup> While ICE emphasizes that a working partnership local law enforcement provides the “latitude to pursue investigations relating to violent crimes, human smuggling, gang/organized crime activity, sexual-related offenses, narcotics smuggling and money laundering,”<sup>70</sup> MCSO uses its partnership with ICE to arrest Latinos for nothing more

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62. See U.S. IMMIGRATION AND CUSTOM ENFORCEMENT, *supra* note 10; See ICE Statement, *supra* note 11 (“Other initiatives that figure prominently in this effort are the Criminal Alien Program, Secure Communities and the agency’s partnerships with state and local law enforcement agencies under 287(g).”).

63. See SHAHANI & GREENE *supra* note 58.

64. See First Amended Complaint at 22, *Melendres v. Arpaio*, 598 F. Supp. 2d 1025 (Dist. Ariz. 2009) (No. CV07-02513).

65. *Id.* at 23.

66. See Ted Robbins, “America’s Toughest Sheriff” Takes on Immigration, NPR.ORG, <http://www.npr.org/templates/story/story.php?storyId=88002493> (last visited Mar. 10, 2008).

67. See SHAHANI & GREENE *supra* note 58, at 4.

68. See Spencer S. Hsu, *Ariz. Sheriff Accused of Racial Profiling*, WASH. POST, July 17, 2008, at A02; Stephen Lemons, *Joe Arpaio’s deputies placed “hold” on U.S. Citizen Israel Correa, failed to inform ICE*, PHOENIX NEW TIMES, Jan. 25, 2008, [http://blogs.phoenixnewtimes.com/bastard/2008/01/joe\\_arpaio\\_deputies\\_placed\\_a.php](http://blogs.phoenixnewtimes.com/bastard/2008/01/joe_arpaio_deputies_placed_a.php).

69. See Yvonne Wingett & Jourdan Rassas, *Supervisors are asked to rein in sheriff*, THE ARIZONA REP., July 24, 2008, at B1 (“The Sheriff’s Office has paid out more than \$30.5 million in verdicts and claims that were settled to defendants and their attorneys since Arpaio took office in 1993, according to country figures.”); JJ Hensley & Yvonne Wingett, *Abuse Lawsuits Against Arpaio Settled*, THE ARIZONA REP., April 25, 2008, available at <http://www.azcentral.com/news/articles/2008/04/25/20080425manning-letter0425.html> (“The Sheriff’s Office has paid out more than \$30.5 million in verdicts and claims that were settled to defendants and their attorneys since Arpaio took office in 1993, according to country figures.”).

70. See U.S. IMMIGRATION AND CUSTOM ENFORCEMENT, *supra* note 10; see also Stephen Lemons, *Joe Arpaio’s Circus Comes to Buckeye: Assault Rifles, Body Armor, Ski Masks and Traffic Stops*, PHOENIX NEW TIMES, Jan. 9, 2009, [http://blogs.phoenixnewtimes.com/bastard/2009/01/joe\\_arpaio\\_buckeye\\_circus\\_ass.php](http://blogs.phoenixnewtimes.com/bastard/2009/01/joe_arpaio_buckeye_circus_ass.php).

than being employed without authorized documentation.<sup>71</sup> MCSO's use of pretextual traffic violations, rather than detective work, to initiate contact with suspected undocumented aliens highlights the racial profiling used under Arpaio's management.<sup>72</sup> While each operation or raid is followed by an MCSO press release announcing the number of persons arrested, the number of Latinos stopped, detained, frisked, searched, and released is never revealed. MCSO also withholds the number of persons arrested in the raids with prior arrest records or outstanding warrants. Because of this lack of information, residents assume these arrests lead to safer communities because dangerous criminals were arrested.<sup>73</sup> Contrary to this assumption, former Mesa Police Chief George Gascon argues that the way MCSO conducts sweeps actually creates a potential for violence.<sup>74</sup> Other local police chiefs and politicians are also critical of MCSO tactics and claim that Sheriff Arpaio has created a sanctuary city for hardened criminals since serious crime is not investigated and warrants are not served.<sup>75</sup> Instead of targeting these most dangerous criminals, MCSO expends an enormous amount of equipment and staff to arrest landscapers and daylaborers.<sup>76</sup> These criticisms that point to unprofessional police practices and departmental waste are supported when MCSO police records are compared to records of other law enforcement offices in the Arizona. Sheriff Arpaio's arrest record has fallen below that of Phoenix Police Chief Jack Harris or Mesa Police Chief George Gascon, both of whom use "routine policing operations" and follow "well-formulated city policies, state and federal laws."<sup>77</sup>

#### MCSO'S RACIAL PROFILING TACTICS AND THE USE OF DISCRETIONARY POWER

71. See generally Richard Ruelas, *Arpaio Stays Silent on Real ICE Plan*, THE ARIZONA REP., March 2, 2007, at B10; see also Casey Newton, *Critics say crackdowns amount to racial-profiling*, THE ARIZONA REP., April 5, 2008, at A1 (Here, Dan Pochoda, Legal Director of ACLU of Arizona, states "Arpaio's use of a volunteer posse in his immigration crackdowns goes beyond the scope of the scope of his 287(g) agreement with Immigration and Customs Enforcement[.]").

72. See Stephens Lemons, *Joe Arpaio's Circus Comes to Buckeye: Assault Rifles, Body Armor, Ski Masks and Traffic Stops*, PHOENIX NEW TIMES, Jan. 9, 2009, available at [http://blogs.phoenixnewtimes.com/bastard/2009/01/joe\\_arpaio\\_buckeye\\_circus\\_ass.php](http://blogs.phoenixnewtimes.com/bastard/2009/01/joe_arpaio_buckeye_circus_ass.php)

73. See News Release, U.S. Immigration and Customs Enforcement, ICE Reports Records Number of Deportations in Arizona 2008 Removals Increase by More than 5,500 over Similar Period in 2007 (July 21, 2008) available at <http://www.ice.gov/news/releases/0807/080721phoenix.htm> (The Phoenix Office of Detention and Removal Operations (DRO) field office director, Katrina S. Kane, claimed that "One of ICE's top enforcement priorities is to improve public safety in Arizona communities. . . By focusing our resources on programs that identify criminal aliens for removal from the United States, we are succeeding in our mission to keep foreign-born criminals off the streets in Arizona").

74. See Senta Scarborough, *Mesa Police Ask Arpaio for a Heads-up Before Sweeps*, THE ARIZONA REP., April 9, 2009, available at <http://www.azcentral.com/community/mesa/articles/2008/04/09/20080409mr-union.html>.

75. See Mike McClellan, *Arpaio Seeks Publicity, Not Criminals*, EAST VALLEY-SCOTTSDALE TRIB., July 27, 2009, updated March 10, 2010, available at [http://www.eastvalleytribune.com/article\\_814220df-ea80-57c1-9ef6-51446c867ecc.html](http://www.eastvalleytribune.com/article_814220df-ea80-57c1-9ef6-51446c867ecc.html); Bill Richardson, *The Numbers Don't Match Arpaio's Hype*, EAST VALLEY-SCOTTSDALE TRIB., May 27, 2009, updated March 10, 2010, available at [http://www.eastvalleytribune.com/article\\_0d55b363-2ce6-500e-9f57-372d884e96bd.html?mode=story](http://www.eastvalleytribune.com/article_0d55b363-2ce6-500e-9f57-372d884e96bd.html?mode=story); Scott Wong, *Gordon: Sheriff Arpaio Giving State Bad Reputation*, THE ARIZONA REP., Mar. 27, 2009, available at <http://www.azcentral.com/news/articles/2009/03/27/20090327gordon0327-ON.html>; JJ Hensley & Senta Scarborough, *Lawmen Arpaio, Gascón a Study in Contrasts*, THE ARIZONA REP., June 29, 2008, available at <http://www.azcentral.com/news/articles/2008/06/29/20080629arpaio Gascon06290.html>; Casey Newton & JJ Hensley, *Phoenix Mayor Gordon calls for FBI investigation of Arpaio*, THE ARIZONA REP., Apr. 13, 2008, available at <http://www.azcentral.com/news/articles/2008/04/13/20080413gordonarpaio0413.html>.

76. *Id.*; see also CLINT BOLICK, MISSION UNACCOMPLISHED: THE MISPLACED PRIORITIES OF THE MARICOPA COUNTY SHERIFF'S OFFICE (Goldwater Institute, No. 229, Dec. 2, 2009), available at <http://www.goldwaterinstitute.org/Common/Img/Mission%20Unaccomplished.pdf> (conservative think tank also critical of Arpaio's waste of resources in sweeps).

77. See Bill Richardson, *supra* note 75.

Even before Sheriff Arpaio's participation in immigration raids, racial profiling had been identified as a problem in Arizona.<sup>78</sup> In a 2004 study published and presented in *Arnold v. Arizona*, Arizona Department of Public Safety ("DPS") researchers concluded, "Hispanics and African Americans are consistently being stopped by DPS officers at rates disproportionately greater than their representation within the violator population; and, white, non-Hispanics are consistently being stopped at rates disproportionately less than their representation within the violator population. These differences are statistically significant and fit the Supreme Court's definition of the presence of racial and ethnic discrimination."<sup>79</sup> Similarly, a recent report commissioned by the ACLU of Arizona found that along with racial profiling, persons of color were more likely to be detained for longer periods of time, ticketed instead of given a warning, searched, and frisked.<sup>80</sup> The ACLU study found that "African Americans, Hispanics and Native Americans were searched more frequently than whites and that these search rates are not justified by the rates of contraband seizures."<sup>81</sup> Additionally, African Americans, Hispanics and Middle Easterners were detained for longer periods of time when stopped by DPS officers."<sup>82</sup> In 2008, the University of Cincinnati Policing Institute conducted a study of traffic stop data for Arizona DPS.<sup>83</sup> The data uncovered from that study suggests that police use racial profiling and an abusive level of discretion in stopping drivers who appear to be of Mexican ancestry.<sup>84</sup> They found that "Hispanic drivers were significantly more likely than other racial/ethnic groups to be issued citations for violations related to drivers' licenses, seat belts/child restraints, required safety equipment, and insurance."<sup>85</sup> Minor violations, such as lacking a driver's license or insurance are hardly likely to be visible prior to a stop. The finding that Latinos are "more likely than other racial/ethnic groups to be asked for consent to search, and significantly less likely than members of other racial/ethnic groups to refuse consent to search"<sup>86</sup> strongly suggests that Latinos recognize their subordinate citizenship rights.

The use of minor traffic violations to cover the racial profiling occurring in MCSO's immigration raids is gaining more attention from the growing number of lawsuits being filed against Sheriff Arpaio and his office.<sup>87</sup> Of course, lawsuits are not new to the Sheriff. "Between 2004 and 2007, 2700 lawsuits were filed against Sheriff Joe Arpaio in Federal and County Courts" because of the state of his prison facilities. This is estimated to be "50 times the number of New York, Los Angeles, Chicago and Houston [prison systems] combined."<sup>88</sup> Civil rights violations arising from MCSO's raids, referred to

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78. See, CIVIL RIGHTS DIVISION AND OFFICE OF INTERGOVERNMENTAL AFFAIRS, OFFICE OF THE ARIZ. ATTORNEY GENERAL, REPORT ON RACIAL PROFILING (2001), available at [www.azag.gov/law\\_enforcement/racial%20profiling.PDF](http://www.azag.gov/law_enforcement/racial%20profiling.PDF).

79. *Arnold v. Ariz. Dep't of Pub. Safety*, No. CV-01-1463-PHX-LOA, 2006 WL 2168637 (D. Ariz. 2006).

80. See AMERICAN CIVIL LIBERTIES UNION OF ARIZONA, DRIVING WHILE BLACK OR BROWN: AN ANALYSIS OF RACIAL PROFILING IN ARIZONA 17 (April 2008).

81. *Id.*

82. *Id.* at 14.

83. ROBIN S. ENGEL, JENNIFER C. CHERKAUSKAS, & MICHAEL R. SMITH, TRAFFIC STOP DATA ANALYSIS STUDY: YEAR 2 FINAL REPORT xiii (U. of Cincinnati Policing Inst., 2008).

84. *Id.*

85. *Id.* at xiii.

86. *Id.* at xvii.

87. See *FACT SHEET: Sheriff Joe Arpaio's Notorious Record*, AMERICA'S VOICE ONLINE, <http://americasvoiceonline.org/page/-/resources/sheriffjoe.pdf> (last visited April 24, 2011).

88. *Id.*

“crime suppression sweeps” have resulted in lawsuits too. A class action lawsuit filed by several civil rights groups against MCSO identifies uses of the 287(g) agreements that go beyond the law and points to numerous abuses resulting from racial profiling.<sup>89</sup> The civil rights groups in the case identify a wide-range of practices used in MCSO raids conducted between 2007 and 2008 that violate the conditions established by the contract with ICE.<sup>90</sup> The groups allege that MCSO’s “us[e] [of] pretextual and unfounded stops, racially motivated questions, searches and other mistreatment, and often baseless arrests” of Latinos<sup>91</sup> resulted from “the abuse of unchecked discretion” Sheriff Arpaio gives MCSO deputies and members of the posse.<sup>92</sup> The practices used in the treatment of several of the individual plaintiffs in the lawsuit exemplify MCSO officers’ discretionary stops for traffic violations, such as tinted dark windows and improper change of lanes.<sup>93</sup> The actions of MCSO alleged in these cases are representative of the many incidents documented by Immigrants Without Borders and Somos America. Both these immigrant-rights coalitions send members to cruise the streets with video cameras and keep detailed information on deputies’ encounters.<sup>94</sup>

Plaintiff, Mr. Manuel de Jesus Ortega Melendres encountered MCSO officers as a passenger, rather than a driver, during a sweep on September 26, 2007.<sup>95</sup> Officers told the White driver he was stopped for speeding but was not given a citation. Mr. Ortega however, was asked for identification. After showing his U.S. visa, his Mexican Federal Voter Registration, and a stamped permit valid until November 2007, issued by the U.S. Department of Homeland Security, Mr. Ortega was ordered to get out of the vehicle.<sup>96</sup> He was submitted to excessive force and unprofessional behavior as he was patted down and handcuffed.<sup>97</sup> During his four hour detention in jail, he was not read his Miranda rights, given the opportunity to make a phone call, told why he was being detained or provided a Spanish-language translator.<sup>98</sup> Later he was taken to the local ICE office where his handcuffs were finally removed.<sup>99</sup> After a total of nine hours without water or food, the ICE official reviewed Mr. Ortega’s identification documents, and he was released without any paper trail other than a case number.<sup>100</sup> At no time was Mr. Ortega read his Miranda rights, informed of any charges, or given any information about the reason for the arrest.<sup>101</sup>

Similarly, Velia Meraz and Manuel Nieto encountered MCSO as they pulled into the local Quick Stop near their family business; Manuel’s Auto Repair. MCSO had two

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89. First Amended Complaint at 22, *Melendres v. Arpaio*, 598 F. Supp. 2d 1025 (Dist. Ariz. 2009) (No. CV07-02513).

90. *Id.*

91. *Id.* at 11 (Lawsuit claims the violations of civil rights are the result of “policy and practice and failure to provide adequate training and supervision . . .”).

92. See *Ortega Melendres v. Arpaio*, *supra* note 64.

93. *Id.*

94. See Senta Scarborough, et al., *Sheriff’s deputies conduct sweep under watchful eyes*, THE ARIZONA REP., June 26, 2008, available at <http://www.azcentral.com/community/mesa/articles/2008/06/26/20080626sweep0626-ON.html>.

95. See Judi Villa, *Lawsuit accuses Arpaio of profiling*, THE ARIZONA REP., Dec. 13, 2007, available at <http://www.azcentral.com/news/articles/1212arpaio-ONL.html>.

96. *Id.*

97. See *supra* note 75 at 60, 65.

98. See *supra* note 92.

99. *Id.*

100. *Id.*

101. *Id.*

Latino-looking men in handcuffs and yelled at Mr. Nieto to leave immediately.<sup>102</sup> Ms. Meraz asked why and claimed that all she was doing was singing along with the Spanish radio station.<sup>103</sup> Before leaving Quick Stop, Mr. Nieto asked for the officer's badge number.<sup>104</sup> The officer responded to the question by using his radio to call for more officers.<sup>105</sup> Mr. Nieto left the area and proceeded to return home.<sup>106</sup> While driving home, Mr. Nieto was followed by a motorcycle officer and three sheriffs' vehicles.<sup>107</sup> When Mr. Nieto was told to pull over, he called "911 and reported being harassed by Sheriff's officers for no apparent reason."<sup>108</sup> He drove into his family business and was immediately confronted by officers raising their weapons and blocking the area off.<sup>109</sup> Mr. Nieto was pulled from the car and thrown against the car and handcuffed.<sup>110</sup> Mr. Nieto's father came out of the business and told the officers "that Mr. Nieto and Ms. Meraz were his children and they all were U.S. citizens."<sup>111</sup> The officers lowered their weapons and the handcuffs were taken off Mr. Nieto.<sup>112</sup> The officers checked Mr. Nieto's identification and, not finding any outstanding warrants or other violations, left the scene without answering Mr. Nieto's question about why they were initially stopped.<sup>113</sup> The officers departed without giving an explanation for their action or an apology.

#### GUADALUPE: AN EXAMPLE OF ABUSED DISCRETION

When MCSO began conducting immigration raids under the 287(g) agreement in 2006, racial profiling moved from the major state highways to the neighborhoods and community streets of Maricopa County. Sheriff Arpaio's raids profiled low-wage workers of Mexican ancestry. MCSO's raid in the town of Guadalupe, Arizona, offers numerous examples of the discretionary use of racial profiling under the guise of "crime suppression sweeps."<sup>114</sup> This classification of police operation is specifically designed for arresting criminals residing in the U.S.<sup>115</sup> However, the actual tactics used and the number of criminals arrested does not support the claim that the operation was a "crime suppression sweep."<sup>116</sup>

Guadalupe is a small town located between Tempe and Phoenix, Arizona that consists

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102. See Daniel Gonzalez, *U.S. citizens claim profiling, join lawsuit against Sheriff Arpaio*, THE ARIZONA REP., July 17, 2008, available at <http://www.azcentral.com/news/articles/2008/07/17/20080717profiling0717.html>.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. See Daniel Gonzalez, *U.S. citizens claim profiling, join lawsuit against Sheriff Arpaio*, THE ARIZONA REP., July 17, 2008, available at <http://www.azcentral.com/news/articles/2008/07/17/20080717profiling0717.html>.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. Press Release, Maricopa County Sheriff's Office, *Sheriff's Operation in Guadalupe Returns: Arpaio Disregards Mayor Jimenez's Request to Leave town (April 4, 2008)*, available at <http://www.mcso.org/MultiMedia/PressRelease/Guadalupe%202008.pdf>

115. See U.S. IMMIGRATION AND CUSTOM ENFORCEMENT, *supra* note 10.

116. See *Arpaio's "crime suppression" sweep results murky*, THE TUCSON CITIZEN, Oct. 6, 2008, available at <http://tucsoncitizen.com/morgue/2008/10/06/98653-arpaio-s-crime-suppression-sweep-results-murky/>.

of one square mile and is home to about 5,500.<sup>117</sup> Guadalupe was founded by Yaqui Indians around the the turn of the twentieth century.<sup>118</sup> The Yaquis, having ancestral roots in Mexico, have regularly intermarried with Mexican immigrants and Mexican Americans over the years. MCSO conducted their two-day raid in Guadalupe with 200 deputies and members of Arpaio's posse on April 3 and 4, 2008.<sup>119</sup> Without gaining permission, Sheriff Arpaio initially established his Command Center with a fleet of Ford Econoline vans at the Family Dollar store parking lot.<sup>120</sup> On the second day, Arpaio moved his command center to the MCSO substation in Mesa.<sup>121</sup> As helicopters circled a two miles radius over the little town, Sheriff's deputies and posse members appeared in helmets on horseback, while other armed deputies flooded the streets in patrol cars, unmarked SUVs, sedans, and motorcycles.<sup>122</sup> In some cases, deputies and posse members stopped residents as they drove or walked.<sup>123</sup> Some residents reported being chased as they ran to their homes for refuge.<sup>124</sup> The raid impacted the confirmation ceremonies scheduled at Our Lady of Guadalupe Catholic Church.<sup>125</sup> The police action was characterized as stopping anyone with brown skin and terrorizing the community.<sup>126</sup>

From the very beginning of the two-day raid in the town of Guadalupe, MCSO was met with resistance. Activists from numerous civil and human rights groups protested the raids and documented abuses.<sup>127</sup> MCSO's use of discretionary power in racially profiling brown-skinned drivers and walkers was evident from newspaper accounts.<sup>128</sup> Residents who protested the raids were targeted for special surveillance.<sup>129</sup> Copwatch<sup>130</sup> volunteers

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117. See *Guadalupe History*, TOWN OF GUADALUPE, [http://www.guadalupeaz.org/index.asp?Type=B\\_BASIC&SEC={0EEC810A-13EB-43EB-A33E-8DB587C9CDA4}](http://www.guadalupeaz.org/index.asp?Type=B_BASIC&SEC={0EEC810A-13EB-43EB-A33E-8DB587C9CDA4}) (last visited Jan 14, 2011).

118. *Id.*

119. See Stephen Lemons, *Guadalupe Made it Clear That Joes Arpaio's Attacking Anyone With Brown Skin*, PHOENIX NEW TIMES, May 29, 2008, available at <http://www.phoenixnewtimes.com/2008-05-29/news/guadalupe-made-it-clear-that-joe-arpaio-s-attacking-anyone-with-brown-skin/>.

120. *Id.*

121. *Id.*

122. *Id.*

123. See Stephen Lemons, *Joe Arpaio's Circus Comes to Buckeye: Assault Rifles, Body Armor, Ski Masks and Traffic Stops*, PHOENIX NEW TIMES, Jan. 9, 2009, available at [http://blogs.phoenixnewtimes.com/bastard/2009/01/joe\\_arpaio\\_s\\_buckeye\\_circus\\_ass.php](http://blogs.phoenixnewtimes.com/bastard/2009/01/joe_arpaio_s_buckeye_circus_ass.php).

124. *Id.*

125. See Andrew Stelzer, *The Selma of Immigration Rights. In Arizona, immigrants protest Sheriff Joe's nativist agenda*, IN THESE TIMES, Nov. 12, 2008, available at [http://www.inthesetimes.com/article/3973/the\\_selma\\_of\\_immigration\\_rights/](http://www.inthesetimes.com/article/3973/the_selma_of_immigration_rights/); See also Craig Harris & JJ Hensley, *Hundreds Protest as Arizona's Immigration Law Takes Effect*, THE ARIZONA REP., Jul. 30, 2010, available at <http://www.azcentral.com/arizonarepublic/news/articles/2010/07/30/20100730arizona-immigration-law-protest.html#ixzz10lpA2ynT>.

126. See Stephen Lemons, *Guadalupe Made it Clear That Joes Arpaio's Attacking Anyone With Brown Skin*, PHOENIX NEW TIMES, May 29, 2008, available at <http://www.phoenixnewtimes.com/2008-05-29/news/guadalupe-made-it-clear-that-joe-arpaio-s-attacking-anyone-with-brown-skin/>.

127. *Id.*

128. *Id.*

129. Stephen Lemons, *The MCSO Retaliates Against a Guadalupe Activist*, PHOENIX NEW TIMES, Oct. 29, 2009, available at <http://www.phoenixnewtimes.com/2009-10-29/news/mcso-retaliates-against-a-guadalupe-activist-and-john-huppenthal-cries-during-a-prejudice-party-at-the-arizona-capitol/>; See also Stephen Lemons, *Joe Arpaio's Worst Nightmare: Salvador Reza Triumphant*, PHOENIX NEW TIMES, Aug. 3, 2010, [http://blogs.phoenixnewtimes.com/bastard/2010/08/joe\\_arpaio\\_s\\_worst\\_nightmare\\_sa.php](http://blogs.phoenixnewtimes.com/bastard/2010/08/joe_arpaio_s_worst_nightmare_sa.php) (article covers the arrest and release of one of the leading activists).

reported that drivers were stopped for minor traffic violations, such as broken taillights, cracked windshields, improper use of a car horn, a dim license plate light, and failure to signal.<sup>131</sup> Others reported being stopped for children bouncing in the back seat of the car when, in fact, no children were present.<sup>132</sup> Resident accounts made it clear that racial profiling was being used, that the purpose of the raid was about immigration, not crime, and that they felt scared and harassed. Mayor Rebecca Jimenez confronted Sheriff Arpaio about the inaccuracy of his claim that the town's officials requested the raid.<sup>133</sup> The Mayor also publically demanded that Arpaio cease the operation and criticized his use of racial profiling.<sup>134</sup> In retaliation, Arpaio threatened the Mayor that she had ninety days to find services of another police force and promised to return the following day in full force. Like other small towns, Guadalupe cannot afford its own police force and pays MCSO \$1.2 million a year for police protection.<sup>135</sup> However, many residents feel that the raid was another publicity stunt and expressed concern that the town does not receive the police services that it pays for.<sup>136</sup>

Incidents reported from the immigration raid in Guadalupe and in the various lawsuits are consistent with practices in immigration law enforcement that place "Mexican Americans at risk: (1) discretionary stops based on ethnicity and class; (2) use of intimidation and other forms to demean and subordinate persons stopped; (3) restricting the freedom of movement of Mexicans but not others in the same vicinity; (4) reinforced stereotypes of Mexican as 'alien,' 'foreign,' inferior and criminal; and (5) limited access to fair and impartial treatment before the law."<sup>137</sup> Equal protection is non-existent in a climate of fear of the police that is created by the reign of terror created by the militarized approach to traffic violations, which approaches brown-skinned persons as potentially

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130. PHOENIX COPWATCH, <http://www.phoenixcopwatch.org/index.html> (last visited April 24, 2011). Copwatch is a national program that documents the misuse of power, especially excessive use of police force. The local chapter, Phoenix Copwatch "is a grassroots volunteer organization that works to end police brutality in the Phoenix, Arizona area. We believe that one of the best ways to prevent police abuse is by directly observing the cops in action."

131. See Stephen Lemons, *Guadalupe Made it Clear That Joe Arpaio's Attacking Anyone With Brown Skin*, PHOENIX NEW TIMES, May 29, 2008, available at <http://www.phoenixnewtimes.com/2008-05-29/news/guadalupe-made-it-clear-that-joe-arpaio-s-attacking-anyone-with-brown-skin/>; See also Stephen Lemons, *Open Rebellion: Guadalupe Mayor Rebecca Jimenez Demands Sheriff Joe Arpaio Cease Anti-Immigrant Sweep*, PHOENIX NEW TIMES, April 4, 2008, [http://blogs.phoenixnewtimes.com/bastard/2008/04/open\\_rebellion\\_guadalupe\\_mayor.php](http://blogs.phoenixnewtimes.com/bastard/2008/04/open_rebellion_guadalupe_mayor.php).

132. *Id.*

133. See Maricopa County Sheriff's Office, *supra* note 114; See also Stephen Lemons, *Open Rebellion: Guadalupe Mayor Rebecca Jimenez Demands Sheriff Joe Arpaio Cease Anti-Immigrant Sweep*, PHOENIX NEW TIMES, April 4, 2008, available at [http://blogs.phoenixnewtimes.com/bastard/2008/04/open\\_rebellion\\_guadalupe\\_mayor.php](http://blogs.phoenixnewtimes.com/bastard/2008/04/open_rebellion_guadalupe_mayor.php).

134. See also Stephen Lemons, *Open Rebellion: Guadalupe Mayor Rebecca Jimenez Demands Sheriff Joe Arpaio Cease Anti-Immigrant Sweep*, PHOENIX NEW TIMES, April 4, 2008, available at [http://blogs.phoenixnewtimes.com/bastard/2008/04/open\\_rebellion\\_guadalupe\\_mayor.php](http://blogs.phoenixnewtimes.com/bastard/2008/04/open_rebellion_guadalupe_mayor.php).

135. See *Maricopa County Sheriff's Office Police Protection*, TOWN OF GUADALUPE, [http://www.guadalupeaz.org/index.asp?Type=B\\_DIR&SEC={3E9082FC-A96C-4382-97BE-FA554462EBE3}&DE={CCBE4281-A864-414B-809D-77FB73BA682E}](http://www.guadalupeaz.org/index.asp?Type=B_DIR&SEC={3E9082FC-A96C-4382-97BE-FA554462EBE3}&DE={CCBE4281-A864-414B-809D-77FB73BA682E}) (last visited March 19, 2011); See also Lemons, *supra* note 131.

136. TOWN OF GUADALUPE, *supra* note 135; Lemons, *supra* note 68 (The slow response time for MCSO is a concern that residents note).

137. Mary Romero, *Racial Profiling and Immigration Law Enforcement: Rounding Up of Usual Suspects in the Latino Community*, 32 CRIT. SOC. 447, 463 (2006).

criminal.<sup>138</sup>

The use of racial profiling, intimidation, and the potential for excessive force apparent in the micro and macro-aggressions embedded in MCSO's implementation of their 287(g) contract reinforces the full citizenship rights for Whites and limited rights for non-Whites. Submission to micro and macro-aggressions that are sanctioned by the State result in fear of terrorization by the law and a population that is less likely to file complaints of civil rights violations. Residents who feel humiliated and violated by state-sanctioned police action experience a subordinated citizenship and unequal treatment before the law.<sup>139</sup> These individuals are less likely to insist on their right not to have their vehicle or persons searched without a warrant and thus require that officers state probable cause before engaging in a fishing expedition to search for evidence.<sup>140</sup> The selective stopping of persons of Mexican ancestry restricts freedom of movement without proof of citizenship and has apartheid-like characteristics and consequences. The range of discretionary and discriminatory practices used by MCSO's officers do fit Georges-Abeyie's construct of petit-apartheid. Encouraging all citizens to engage in racial profiling by setting up "hotline" to the sheriff's office to report "illegal immigrants and trafficking" fortifies the analogy of U.S. citizenship with whiteness and strengthens images of immigrants as criminals and dark-skinned Latinos as "alien," "foreign" and "inferior." Maintaining that the immigration raids are "crime suppression sweeps" that are operations in the pursuit of investigations of violent crimes, human smuggling, gang/organized crime activity, sexual-related offenses, narcotics smuggling and money laundering" adds to the stereotyping of Latinos as unworthy of U.S. citizenship. Furthermore, the more support Sheriff Arpaio receives from hate-groups, such as the Motorcycle Group and the American Freedom Riders, the more legitimacy white supremacy groups have in their racial attacks against immigrants.<sup>141</sup>

### UNEQUAL CITIZENSHIP & RACIAL PROFILING

As presented in the cases in the previous section, racial profiling accompanies the

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138. See Dennis Wagner, *Impact of Arpaio's crime Sweeps is unclear*, THE ARIZONA REP., Oct. 4, 2008, available at <http://www.azcentral.com/news/articles/2008/10/04/20081004arpaio-sweeps1004.html> ("Phoenix Police Chief Jack Harris has argued that illegal-immigrant sweeps divert resources from serious crime-fighting and undermine law enforcement by making illegal immigrants fearful of the police."); See Lourdes Medrano, *Joe Arpaio: Sheriff's star rises with "tea party," illegal immigration fight*, THE CHRISTIAN SCIENCE MONITOR, Sept. 20, 2010, available at <http://www.csmonitor.com/USA/Politics/2010/0920/Joe-Arpaio-Sheriff-s-star-rises-with-tea-party-illegal-immigration-fight> (Mary Giovagnoli, director of the immigration Policy Center described Arpaio's law enforcement serves "to create a 'reign of terror among immigrant groups'" rather than the claim to opening up more jobs for US citizens or saving taxpayers' money.).

139. Erin Kelly, *Arpaio not major topic at house immigration hearing*, THE ARIZONA REP., available at <http://www.azcentral.com/news/articles/2009/04/02/20090402arpaio-hearing0402-ON.html>; see also Press Release, Committee on the Judiciary, Judiciary Committee Members Call for Investigation of Sheriff Arpaio's Disregard for Rights of Hispanic Residents (Feb. 13, 2009), available at <http://judiciary.house.gov/news/090212.html>.

140. See HARRIS, *infra* note 5 at 38-39 (David Harris explains that several assumptions must be made to believe that a search is a consent search. Persons do not necessarily feel that the request to search is a voluntary choice and will be allowed to refuse the search. Therefore the assumption that persons view this as voluntary and giving consent is questionable. Furthermore, the Court assumes that once a person refuses the search, this ends the police encounter. However, this is not the case. Considerable pressure can be brought upon individuals and they may be detained for a long period of time).

141. See *Phoenix Day Labor Battle Heats Up*, S. POVERTY L. CENTER INTELLIGENCE REPORT, Spring 2008, available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2008/spring/nativist-movement>.

use of other discretionary powers that many police agencies have actively tried to eliminate over the last decade. Many police chiefs have argued for the continued division of labor between local police and immigration law enforcement. The most frequently cited costs related to state and local law enforcement of immigration laws are: (1) reduced trust and cooperation in immigrant communities;<sup>142</sup> (2) increased victimization and exploitation of undocumented immigrants;<sup>143</sup> (3) police misconduct;<sup>144</sup> (4) large financial costs of immigration enforcement diverts resources from traditional law enforcement activities; (5) complexity of federal immigration law and difficulty in verifying immigration status;<sup>145</sup> (6) racial profiling and other civil litigation costs;<sup>146</sup> and (7) immigrants fearful of accessing municipal services.<sup>147</sup> Given the number of lawsuits and controversy over the use of racial profiling, the continuation of this law enforcement practice is shocking considering the strong evidence that policing is more likely to be hindered than enhanced by using racial profiling.

“Rather than dividing populations of color into immigrants and citizens, concepts such as racial profiling emphasize connections between the treatment of all racially stereotyped groups and recognize citizenship status is a social construct.”<sup>148</sup> Unequal citizenship and treatment under the law between Latinos and other citizens and immigrants is not an acceptable collateral damage. Racial profiling both violates the Fourteenth Amendment and assures that Latinos and other immigrants and citizens of color are not granted equal protection of the law. Discriminatory treatment of persons based on their race, color and ethnicity submit individuals to public humiliation and places them in the harm’s way of law enforcement. Discretionary treatment in the justice system of citizens and residents of color blurs the relationship between citizenship status and benefits and contributes to lessening “a common national identity” and “sense of obligation to the state.”<sup>149</sup> When every citizen is no longer assured membership in a national political community recognized by state officials, then security and protection are no longer guaranteed. Treating race the same as citizenship status, moves the U.S. away from citizenship as civic and back to primordial. Such action only increases racial tension, ethnic and religious divisions and moves Arizona further away from a democratic society.<sup>150</sup> Such action increases racial, ethnic and religious tension, by which Arizona moves further away from a democratic society.

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142. See MARIA MALINA, *THE ROLE OF LOCAL POLICE STRIKING A BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES* 23 (Police Foundation, Washington, D.C., April 2009), available at <http://www.policefoundation.org/strikingabalance/strikingabalance.html>; Susan Carroll, *DPS Plan Welcomed at Migrant Summit: 12 State Officers Would Help Feds*, THE ARIZONA REP. July 13, 2005, at A1 (Article quotes Tucson Police Chief Richard Miranda “It’s very important for the federal agencies to understand that when they come into our communities, they have a significant impact on the relationships we have been building with our Hispanic communities”).

143. *Id.* at 25.

144. *Id.* at 26.

145. *Id.* at 27.

146. *Id.* at 28.

147. *Id.* at 30.

148. Mary Romero, *Crossing the immigration and race border: A critical race theory approach to immigration studies*, 11 CONTEMP. J. REV. 23, 27 (March 2008).

149. KAMAL SADIQ, *PAPER CITIZENS* 197 (2009).

150. See *supra* note 10, at 24 (“Arizona faces \$2 billion budget deficit – among the largest for the state in the nation. The cost of immigration enforcement campaigns to state and local taxpayers, while yet to be itemized, is undoubtedly sizeable. Perhaps the greatest casualty of immigration enforcement in Arizona is local democracy”).