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Policing the Police:
The Status of Immigration Checks in the
Context of Rodriguez v. United States

Vaishalee Yeldandi†

I. INTRODUCTION

A recent Supreme Court decision has the potential to change how
local and state law enforcement entities enforce immigration laws. In
Rodriguez v. United States,1 the Court examined whether police could
prolong an otherwise-completed traffic stop to conduct a dog sniff
absent reasonable suspicion.2 The Court held that a “police stop
exceeding the time needed to handle the matter for which the stop was
made violates the Constitution’s shield against unreasonable seizures.”3
Various courts across the country have relied on Rodriguez to decide
cases beyond traffic stops and dog sniffs, including “stop and frisks” and
ex-felon registration checks.4

Arizona v. United States5 partially upheld an Arizona state law
requiring local law enforcement to make reasonable attempts to
determine an individual’s immigration status if reasonable suspicion
exists that he or she is unlawfully present in the United States.6 In the
aftermath of Rodriguez, how should local and state officers approach
immigration enforcement in the context of law enforcement stops? After
the Department of Homeland Security repealed its own Secure
Communities Program, an immigration enforcement program
administered from 2008 to 2014, and implemented its replacement, the

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2 Id. at 1612.
3 Id.
4 See Gus M. Centrone & Brian L. Shrader, The Dog Days Are over: Terry Stops, Traffic
5 132 S. Ct. 2492 (2012).
6 Id. at 2507–10.
Priority Enforcement Program (PEP), how should local law enforcement interact with suspected undocumented immigrants during traffic stops? What are the consequences for immigration enforcement overall?

Under a broad interpretation of Rodriguez, this Comment argues that even in 287(g) communities or under the PEP, it should be unconstitutional for local or state law enforcement to inquire into an individual’s immigration status during the course of a stop, absent reasonable suspicion. As criminal convictions increasingly intersect with immigration consequences, this interpretation of Rodriguez would benefit law enforcement because it would provide a bright-line rule for officers to follow. In addition, immigrant communities that have traditionally avoided law enforcement for fear of being racially profiled would benefit, as extending Rodriguez to the immigration context would increase these communities’ confidence in and cooperation with officers.

This Comment applies Rodriguez to examine the viability of prohibiting immigration status checks during law enforcement stops. Part II provides background on one of the areas of the law that shapes this topic: the evolution of law enforcement stops. Part III examines how circuit courts have applied Rodriguez to cases beyond dog sniff searches and traffic stops. Part IV provides background on the immigration law, the second area of law that shapes this topic and intersects with criminal law. In Part V, this Comment discusses why extending a law enforcement stop to check an individual’s immigration status without reasonable suspicion should be unconstitutional under Rodriguez. This Comment concludes by suggesting that an additional way to comply fully with Rodriguez and avoid allegations of racial profiling would be for Congress to pass immigration reform or legislation directly aimed at ending racial profiling by law enforcement. However, given the current political climate and congressional gridlock, these reforms will likely not materialize in the near future. Thus, the Court should implement a bright-line rule that extends Rodriguez to prohibit inquiries into an individual’s immigration status during the course of a stop, absent reasonable suspicion.

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2 287(g) communities are those in which state and local law enforcement receive delegated authority to enforce immigration laws. See Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/287g [https://perma.cc/ZEV8-8AZ3] (last visited Apr. 6, 2016).
II. BACKGROUND ON LAW ENFORCEMENT STOPS

This section provides a brief introduction to one of the two areas of law that shape this Comment: law enforcement stops. It discusses the evolution of traffic stops and other law enforcement stops, the relevance of law enforcement's intent while stopping an individual, and the limitations on law enforcement's ability to search.

A. Traffic Stops, Terry Stops, and Reasonable Suspicion

The Fourth Amendment to the United States Constitution was adopted in the face of intrusive searches conducted during the Colonial era:

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.

Although the Fourth Amendment guarantees that search warrants will not be issued unless there is "probable cause," in practice, courts have allowed law enforcement some leeway when it comes to investigating individuals suspected of committing a crime.

*Terry v. Ohio* is a landmark Fourth Amendment case because the Court established law enforcement's use of the "reasonable suspicion" standard, a lower standard than probable cause. Reasonable suspicion allows an officer without probable cause—but whose "observations lead him reasonably to suspect" that an individual has committed, is committing, or is about to commit a crime—to briefly detain that person to "investigate the circumstances that provoke suspicion." The Supreme Court held that when an officer observes unusual conduct which leads him to reasonably conclude that there may be criminal activity and that the suspect may be armed and dangerous, the officer is entitled to protect himself and others in the area by conducting a

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10 U.S. Const. amend. IV.
12 Id. at 37 (Douglas, J., dissenting).
13 Centrone & Shrader, supra note 4, at 47 (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975)).
“carefully limited search of the outer clothing of such persons” to discover any hidden weapons that may be used in an assault.\textsuperscript{14}

Almost twenty years after \textit{Terry}, the Supreme Court held in \textit{Berkemer v. McCarty}\textsuperscript{15} that “roadside questioning of a motorist detained pursuant to a routine traffic stop”\textsuperscript{16} is more akin to “a so-called ‘Terry stop’ than to a formal arrest.”\textsuperscript{17} As a result, lower courts have taken the limitations imposed by \textit{Terry} and subsequent cases and applied them to cases alleging a Fourth Amendment violation during routine traffic stops.\textsuperscript{18}

B. Relevance of an Officer’s Motive when Detaining Individuals

In \textit{Whren v. United States},\textsuperscript{19} the Supreme Court examined the relevance of a police officer’s intent in temporarily detaining a motorist.\textsuperscript{20} The Court held that the traffic stop in question and resulting seizure of drugs was reasonable under the Fourth Amendment, because the officers had probable cause to believe the defendants violated the District of Columbia’s traffic code.\textsuperscript{21} Although the defendants conceded that the officer had probable cause to believe the defendants had violated the traffic code, they argued that “in the unique context of civil traffic regulations” probable cause was not enough; the use of vehicles is so heavily regulated that complete “compliance with traffic and safety rules is nearly impossible” and a police officer will almost always be able to write up a motorist for a violation.\textsuperscript{22} This power could entice officers to use traffic stops as a way to investigate other law violations, even where no probable cause or articulable suspicion exists.\textsuperscript{23} This was particularly problematic for the defendants, who were both black, because they contended that police officers might decide whom to stop based on “decidedly impermissible factors, such as the race of the car’s occupants.”\textsuperscript{24} However, the Court

\begin{footnotes}
\item \textsuperscript{14} \textit{Terry}, 392 U.S. at 30.
\item \textsuperscript{15} 468 U.S. 420 (1984).
\item \textsuperscript{16} \textit{Id.} at 435.
\item \textsuperscript{17} \textit{Id.} at 439.
\item \textsuperscript{19} 517 U.S. 806 (1996).
\item \textsuperscript{20} \textit{Id.} at 808.
\item \textsuperscript{21} \textit{Id.} at 819.
\item \textsuperscript{22} \textit{Id.} at 810.
\item \textsuperscript{23} \textit{Id.}.
\item \textsuperscript{24} \textit{Id.}.
\end{footnotes}
stated that “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”

While the Court agreed with the defendants that the Constitution forbids the selective enforcement of the law based on factors such as race, the constitutional basis for challenging intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Whren’s logic confirms that an officer may pull a car over when the driver commits a traffic violation, even if the officer’s underlying motivation is to investigate some other crime. The case has been widely criticized for its perceived expansion of Terry and for the “criminalization of ‘driving while black.’” Thus, it is as though the Court adopted a new standard—the “could have” standard: “[A]ny time the police could have stopped the defendant for a traffic infraction, it does not matter that the police actually stopped him to investigate a crime for which the police have little to no evidence.”

C. Restraints on Law Enforcement’s Ability to Search

While the previously discussed opinions expanded the power of law enforcement during traffic stops, Knowles v. Iowa introduced restraints upon an officer’s ability to search a vehicle pursuant to a traffic stop. An Iowa police officer stopped the defendant for speeding, but elected to give him a citation rather than arresting him. Afterwards, however, the officer conducted a full search of the defendant’s car. The defendant was subsequently arrested on state drug charges.

The defendant moved to suppress the obtained evidence, arguing that the search did not fall under the “search incident to arrest” exception, because he had not been placed under arrest for the initial

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25 Id. at 813.
26 Id.
27 See id. at 816–17.
29 Id. at 146 (emphasis in original) (quoting David A. Harris, ‘Driving While Black’ and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. Crim. L. & Criminology 544 (1997)).
31 Id. at 114.
32 Id.
33 Id.
34 Id. at 116 (citing United States v. Robinson, 414 U.S. 218 (1973)) (noting that for the search incident to arrest to be justified, the officer must have “(1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial.”).
traffic violation. Although the police officer conceded that he did not have the defendant’s consent or probable cause to conduct the search, he contended that Iowa laws sanctioned the search because Section 805.1(4) provided that issuing a citation instead of an arrest “does not affect the officer’s authority to conduct an otherwise lawful search,” i.e., “a search incident to citation.” The Iowa Supreme Court interpreted that provision to authorize officers to conduct “full-blown search[es]” of a vehicle and driver in situations where the police issue a citation instead of making a custodial arrest.

The United States Supreme Court reversed the Iowa Supreme Court’s decision, holding that the search did not fall under the search incident to arrest exceptions: (1) officer safety, or (2) the need to preserve evidence. The defendant was not armed, and there was no need to discover and preserve evidence since all the evidence necessary to prosecute the traffic violation had been obtained once the citation was issued. Thus, the Court did not expand the Fourth Amendment exceptions to situations where there was no concern for officer safety, or the destruction or loss of evidence.

In *Illinois v. Caballes*, the Court examined the narrow issue of “[w]hether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop.” After the defendant was pulled over for speeding on an interstate highway, another Illinois State Trooper heard the report of the stop from police dispatch and headed to the scene with a drug-sniffing dog. While the defendant was in the first trooper’s vehicle waiting for his ticket, the second officer walked the dog around the defendant’s car. When the dog alerted at the trunk, the officers searched the trunk, discovered marijuana, and arrested the defendant.

The Supreme Court held that “[a] dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess

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35 Id. at 117–18.
37 *Knowles*, 525 U.S. at 115.
38 Id.
39 Id. at 117–18.
40 Id.
41 Id. at 118–19.
42 543 U.S. 405 (2005).
43 Id. at 407.
44 Id. at 406.
45 Id.
46 Id.
does not violate the Fourth Amendment.”47 Although the Court held that the search in *Caballes* was constitutional, it also noted the parameters of searches. The Court remarked that “[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.”48

In *Arizona v. Johnson*,49 the Supreme Court examined the authority of police officers to stop and frisk a passenger in an automobile, who was temporarily seized upon observation of a traffic violation.50 Other than the traffic infraction, the “officers [in Arizona] had no reason to suspect anyone in the vehicle of criminal activity.”51 While approaching the car, one officer noticed the defendant wearing clothing considered to be consistent with membership in the Crips gang and that the defendant had a police scanner in his jacket pocket.52

The officer asked to question the defendant away from the front seat passenger, and the defendant complied when the officer asked him to step outside the car.53 Because the officer suspected that the defendant may have been armed, she “patted [the defendant] down for officer safety[.]”54 The officer felt the butt of a gun near the defendant’s waist, and later charged the defendant with possession of a weapon by a prohibited possessor.55 The Supreme Court held that “[an] officer’s inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.”56 Under this standard, the Court upheld the pat down in *Johnson*.57

D. Setting the Boundaries of Traffic Stops

In *Rodriguez v. United States*, the Supreme Court once again revisited the constitutionality of traffic stops under the Fourth Amendment by building upon the holdings in *Caballes* and *Johnson*. A police officer pulled the defendant over after observing the defendant

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47 Id. at 410.
48 *Caballes*, 543 U.S. at 407.
50 Id. at 326.
51 Id. at 327.
52 Id. at 328.
53 Id.
54 Id.
55 Id. at 328–29.
56 Id. at 333.
57 Id. at 334.
veer onto the highway shoulder, a traffic violation. After the officer gathered the defendant’s license, registration, and proof of insurance, he asked the defendant to accompany him to the police car. When the defendant asked if he was required to do so, the officer responded that he was not and the defendant remained in his own vehicle. After completing the records check on the defendant, the officer asked the defendant’s passenger for his license and questioned the passenger on his travel plans.

The officer completed a records check on the passenger and called for a second officer. The officer then returned to the defendant’s vehicle for a third time to serve a written warning for the traffic violation. He then asked for permission to walk his dog around the defendant’s vehicle. The officer testified that although he had “got[ten] all the reason[s] for the stop out of the way,” he did not consider the defendant “free to leave.” When the defendant denied permission to walk the dog around the vehicle, the officer instructed the defendant to exit the vehicle and stand in front of the patrol car until a second officer arrived. After the second officer arrived, the first officer led the dog around the defendant’s vehicle and the dog alerted to the presence of drugs; a search of the vehicle revealed a large bag of methamphetamine. Approximately seven to eight minutes elapsed between when the officer issued the written warning and when the dog alerted to the presence of drugs.

The defendant moved to suppress the seized evidence, contending that the first officer “had prolonged the traffic stop without reasonable suspicion in order to conduct the dog sniff.” The Magistrate Judge recommended that the motion be denied. Although he found no probable cause to search the car other than the dog alert or reasonable suspicion to support the defendant’s detention once the written warning had been issued, he concluded that prolonging the stop by “seven to eight minutes” for the dog sniff was only a de minimis

59 Id. at 1613.
60 Id.
61 Id.
62 Id.
63 Id.
64 Id.
65 Id.
66 Id.
67 Id.
68 Id.
69 Id.
70 Id.
intrusion of the defendant’s Fourth Amendment rights and, therefore, was permissible under Eighth Circuit precedent.71

Based on the Magistrate Judge’s factual finding and legal conclusions, the District Court denied the defendant’s motion to suppress, relying on the same Eighth Circuit precedent.72 The Eighth Circuit affirmed, holding that the “seven- or eight-minute delay” in this case resembled delays that it had previously decided were permissible. Thus, the seven-to-eight minute time period was an acceptable de minimis intrusion on the defendant’s personal liberty.73

The Supreme Court granted certiorari to resolve a split between lower courts on whether police may regularly “extend an otherwise-completed traffic stop, without reasonable suspicion, in order to conduct a dog sniff.”74 The Court reversed the Eighth Circuit’s ruling, holding that, although an officer may conduct unrelated checks during an otherwise lawful stop, she may not do so in such a way that extends the length of the stop, absent the reasonable suspicion typically required to justify detaining a suspect.75

Based on the precedent it set in cases like Caballes and Johnson, the Court noted that, like a Terry stop, “the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure’s ‘mission’—to address the traffic violation that warranted the stop, and attend to the related safety concerns.”76 In addition, beyond deciding whether to issue a traffic citation, an officer’s mission includes “ordinary inquiries incident to [the traffic] stop,” like checking the driver’s license, checking for outstanding warrants on the driver, and examining the vehicle’s registration and proof of insurance.”77 Checking these documents and databases serves the same purpose as enforcing the traffic code—ensuring that automobiles on the road are operating safely and responsibly.78

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71 Id. (citing United States v. Alexander, 448 F.3d 1014, 1016 (8th Cir. 2006)).
72 Id. at 1613–14 (quoting Alexander, 448 F.3d at 1016) (“[D]og sniffs that occur within a short time following the completion of a traffic stop are not constitutionally prohibited if they constitute only de minimis intrusions.”).
73 Id. at 1614.
74 Id.
75 Id. at 1615. On remand, the Eighth Circuit held that the exclusionary rule exception, present in Davis v. United States, 131 S. Ct. 2419, 2423–24 (2011), did not apply in the defendant’s case. The circumstances of Davis’s seizure fell directly within the Circuit’s case law and the search was conducted in objectively reasonable reliance on the Circuit’s precedent; thus the court affirmed the defendant’s conviction. See United States v. Rodriguez, 799 F.3d 1222, 1224 (8th Cir. 2015).
76 Rodriguez, 135 S. Ct. at 1614 (emphasis added).
77 Id. at 1615 (citations omitted).
78 Id.
Rather than addressing safety concerns, a dog sniff is aimed at identifying evidence of criminal wrongdoing. The Court noted that a dog sniff would not be fairly characterized as part of the officer’s traffic mission because it does not have the same close connection to road safety as document and database checks do. While recognizing that traffic stops are particularly fraught with danger to police officers and thus an officer may need to take “certain negligibly burdensome precautions in order to complete his mission safely,” on-scene investigation of other crimes “detours from that mission.” Thus, a dog sniff cannot be justified on the same basis as other safety precautions because “[h]ighway and officer safety are interests different in kind from the Government’s endeavor to detect crime in general or drug trafficking in particular.” Although the Supreme Court clarified that the tolerable duration of police inquiries in the traffic stop context is determined by the seizure’s mission—and in this context a dog sniff search did not qualify—the Court provided no clear guidance as to what qualifies as part of the seizure’s mission.

III. CIRCUIT COURT APPLICATION OF RODRIGUEZ

In cases applying Rodriguez where law enforcement had prior knowledge of alleged criminal activity, “the interaction can move forward, and the search will be upheld.” For example, in United States v. Zuniga, the Sixth Circuit held that law enforcement was justified in extending the traffic stop for a dog sniff because the officer had reasonable suspicion based on an FBI wiretap, the defendant’s implausible travel plans, and the defendant’s uneasiness when asked for his insurance card and driver’s license.

Although federal courts have not yet addressed immigration checks in the context of Rodriguez, circuit courts have expanded its holding to cases beyond dog sniff searches during traffic stops. For example, in United States v. Evans, the Ninth Circuit relied on Rodriguez to hold that the officer violated the Fourth Amendment when he prolonged the traffic stop to conduct an ex-felon registration and dog sniff. The court noted that after stopping the defendant, the officer conducted “ordinary

79 Id.
80 Id.
81 Id. at 1616.
82 Id.
83 Centrone & Shrader, supra note 4, at 50.
84 613 F. App’x 501 (6th Cir. 2015).
85 Id. at 507–08.
86 786 F.3d 779 (9th Cir. 2015).
87 Id. at 780–81.
inquiries incident to the traffic stop,” i.e., checking the vehicle records and outstanding warrants. After completing those record checks, however, the officer then requested an ex-felon registration check of the defendant, which the court found to be “wholly unrelated” to the officer’s “mission” of ensuring that vehicles on the road are operating safely and responsibly.

The court was not concerned when the ex-felon registration check occurred during the seizure, but instead whether the check added time to the stop. Here, the ex-felon registration check took about eight minutes, i.e., almost half of the duration of the traffic stop prior to the dog sniff, and the court noted that this check did not advance officer safety (the officer conducted the check after he told the defendant that he would not be cited for the traffic violation). On remand, the district court found that the officer had unreasonably prolonged the traffic stop for the ex-felon registration check without independent reasonable suspicion.

Similarly, the Second Circuit applied Rodriguez in United States v. Watson, a case involving a police officer searching for a robbery suspect neither during a traffic stop nor during a dog sniff. The officer initially stopped Watson because he believed that the defendant looked similar to their suspect. Even though the defendant produced valid identification proving that he was not the suspect in question, the officer proceeded to search him and discovered a weapon and bags of crack cocaine. The district court granted the defendant’s motion to suppress evidence from the arrest, which the Second Circuit upheld. Citing Rodriguez, the Second Circuit held that law enforcement’s “authority for the seizure thus ends when tasks tied to the reason for the stop “are—or reasonably should have been—completed”: in this case, determining whether Watson was the robbery suspect.”

Thus, Evans and Watson suggest that Circuit Courts of Appeals view Rodriguez as applicable to cases beyond those involving the

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8 Id. at 786.
89 Id.
90 Id.
91 Id. at 786–87.
93 787 F.3d 101 (2d Cir. 2015).
94 Id. at 102.
95 Id.
96 Id.
97 Id. at 105 (quoting Rodriguez v. United States, 135 S. Ct. 1609, 1614 (2015)).
validity of a dog sniff search. Furthermore, as *Watson* demonstrates, *Rodriguez* can be applied to cases involving other types of law enforcement stops, like *Terry* stops. These cases suggest that an officer should conduct a stop based only upon his or her initial reasoning, absent reasonable suspicion or probable cause that would justify further inquiry.98

IV. THE INTERSECTION OF CRIMINAL LAW, IMMIGRATION ENFORCEMENT, AND DEPORTATION

A. Background on Immigration Law

Although the United States has always been a nation of immigrants, it has long struggled with the parameters of immigration enforcement. The Constitution does not explicitly reference the ability of the federal government to oversee the entry of foreigners, but, in the *Chinese Exclusion Case*,99 the Supreme Court read Section 8 of Article I to mean that “international migration is a form of international commerce,” establishing that Congress had the authority to set immigration policy.100 The Court also held that the nature of immigration enforcement is civil in nature, rather than criminal; thus even immigrants who had been residents in the United States for a long time could be detained or deported with little or no due process.101 Since a deportation order is not punishment for a crime, a deported immigrant has not been deprived of life, liberty, or property without due process.102

As noted by the Court in *Padilla v. Kentucky*,103 another critical development in the area of immigration law has been the concurrently expanding class of deportable offenses and the diminishing authority of judges to alleviate the severe consequences of deportation.104 The Immigration Act of 1917 authorized the deportations of noncitizens based on criminal conduct committed on American soil for the first time.105 That law also provided important protections to minimize the risk of unjust deportations—within thirty days of a sentencing, the sentencing judge in state and federal prosecutions had the power to

98 Centrone & Shrader, supra note 4, at 50.
101 Id. at 138 (citing Fong Yue Ting v. United States, 149 U.S. 698, 702 (1893)).
102 See *Fong Yue Ting*, 149 U.S. at 730.
104 See id. at 360.
105 Id. at 361.
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recommend that the defendant not be deported, which effectively prevented the deportation. However, Congress eliminated this judicial discretion in 1990 and went further to jettison the Attorney General's authority to grant discretionary relief from deportation in 1996. In addition to the shrinking authority of the executive and judicial branches to provide relief from deportation, Congress also expanded greatly the number and types of offenses that would trigger removal proceedings if committed by a noncitizen.

Recently, the distinction between the civil and criminal implications has begun to fade. More than a hundred years after the Chinese Exclusion Case and Fong Yue Ting v. United States, the Supreme Court examined the intersection of criminal law and immigration enforcement and the consequences of that intersection. In Padilla v. Kentucky, the petitioner faced a virtually mandatory deportation because he relied on his attorney's erroneous advice that his immigration status would not be affected if he pleaded guilty to drug charges. Reversing the criminal conviction and remanding the case, the Court held that attorneys must inform their clients when pleading guilty carries the risk of deportation.

The Court recognized that, although a deportation is not in a strict sense a criminal sanction, it is "intimately related to the criminal process." Since immigration law has been amended to trigger removal for a wide range of noncitizen offenders, the Court found it difficult to "divorce the penalty from the conviction in the deportation context." Due to its close connection to the criminal process, it is "uniquely difficult" to classify deportation as either a direct or collateral consequence of a criminal conviction.

B. The Fourth Amendment Rights of Non-Citizens

There is a binary system of Fourth Amendment rights of non-citizens, depending on where an individual is in relation to the nation's borders. With a focus on combatting unlawful immigration and contraband entering the United States, the Supreme Court created an
exception to the warrant and probable cause requirements for searches and seizures that occur at the border and their functional equivalents.\textsuperscript{116} Thus, routine examination without a warrant or suspicion is presumed to be reasonable “simply by virtue of the fact that they occur at the border.”\textsuperscript{117} At ports of entry, the Supreme Court gives the government much more leeway with respect to what is deemed to be a reasonable search and seizure.\textsuperscript{118}

But in theory, individuals apprehended within the interior of the United States by local and state enforcement are entitled to full protection under the Fourth Amendment, without regard to their immigration status.\textsuperscript{119} This view was reinforced in Arizona v. United States. Although the Supreme Court held that most of the state laws passed to address issues related to the number of undocumented immigrants living in Arizona (S.B. 1070)\textsuperscript{120} were preempted,\textsuperscript{121} it declined to hold the section requiring state officers to make a “reasonable attempt . . . to determine the immigration status” of any individual they stop, detain, or arrest on some other legitimate basis if “reasonable suspicion exists that the person is an alien and is unlawfully present in the United States” as facially unconstitutional.\textsuperscript{122} In the context of Arizona v. Johnson and Illinois v. Caballes, the Court expressed caution that the constitutionality of this section would be questioned if individuals were detained solely to verify their immigration status.\textsuperscript{123}

V. EXTENDING RODRIGUEZ TO PROHIBIT SUSPICIONLESS IMMIGRATION STATUS CHECKS

Law enforcement confront a multitude of issues during a traffic or Terry stop. As Rodriguez held, an officer may conduct certain unrelated checks during an otherwise lawful stop, but she may not do so by prolonging the stop unless there is reasonable suspicion justifying the detention of the individual.\textsuperscript{124} Once an officer achieves the mission of the stop, results from any search or inquiry cannot be considered by the


\textsuperscript{117} Id. at 616.


\textsuperscript{119} Id.

\textsuperscript{120} ARIZ. REV. STAT. ANN. § 11-1051 (2010), invalidated by Arizona v. United States, 132 S. Ct. 2492 (2012).

\textsuperscript{121} Arizona, 132 S. Ct. at 2501–07.

\textsuperscript{122} Id. at 2507–10.

\textsuperscript{123} Id. at 2509.

\textsuperscript{124} See 135 S. Ct. 1609, 1615 (2015).
court absent some other independent and articulable suspicion.\textsuperscript{125} Under this reasoning, checking an individual's immigration status during a traffic stop is unrelated to the “mission” of the stop and thus should not be allowed. The effects of a traffic citation as minor as a broken tail light can have the domino effect of triggering immigration removal proceedings for noncitizens who do not have criminal records. Thus, it is crucial to determine if and when immigration checks are part of the mission of a law enforcement stop.

A. Relation of Immigration Status to the Mission of a Stop

The \textit{Rodriguez} Court held that beyond deciding whether to issue a traffic citation, an officer’s mission includes “ordinary inquiries incident to [the traffic] stop,” like checking the driver’s license, checking for outstanding warrants on the driver, and examining the vehicle’s registration and proof of insurance.\textsuperscript{126} The purpose of checking these documents and databases serves the same purpose as enforcing the traffic code—ensuring that vehicles on the road are operating safely and responsibly.\textsuperscript{127}

In addition, checking the immigration status of an individual during a traffic stop parallels a dog sniff search—both would not be fairly characterized as part of the officer’s traffic mission because they do not have the same close connection to road safety as document and database checks do.\textsuperscript{128} An invalid driver’s license or fraudulent document should raise reasonable suspicion of an individual being in the country illegally and thus could trigger checking immigration databases. However, in states where residents can apply for driver’s licenses and state identification regardless of immigration status, extending a traffic stop for an immigration status check beyond any reasonable suspicion should be unconstitutional under \textit{Rodriguez}. In those states, identification documents provide no probative value of legal immigration status if immigration status is irrelevant to the ability to obtain them. Currently, twelve states (as well as the District of Columbia and Puerto Rico) offer access to licenses, regardless of immigration status.\textsuperscript{129} Presumably, in these states, if an individual has valid identification, that should end any inquiry or suspicion of undocumented immigration status.

\textsuperscript{125} \textit{Id.}
\textsuperscript{126} \textit{Id.}
\textsuperscript{127} \textit{Id.}
\textsuperscript{128} See \textit{id.}
Furthermore, the immigration status of a person in and of itself does not pose a safety risk to the officer. While the Rodriguez Court recognized that traffic stops are particularly fraught with danger to police officers and thus an officer may need to take "certain negligibly burdensome precautions in order to complete his mission safely," on-scene investigation of other crimes "detours from that mission."{130} Just as a dog sniff cannot be justified on the same basis as other safety precautions because "[h]ighway and officer safety are interests different in kind from the Government's endeavor to detect crime in general or drug trafficking in particular,"{131} checking an individual's immigration status also cannot be justified on the same basis as other safety precautions.

Although the act of being present in the United States without authorization violates immigration law, that does not suggest a further propensity to commit serious crimes. First, most immigration violations are handled by civil proceedings. Second, according to the American Immigration Council (AIC), there is actually an inverse relationship between crime and immigration.{132} Immigrants, whether they are here legally or unauthorized, are less likely to commit serious crimes or be imprisoned.{133} From 1990 to 2013, the foreign-born percentage of the population in the United States increased from 7.9 percent to 13.1 percent, and the number of unauthorized immigrants increased dramatically from 3.5 million to 11.2 million.{135} During that same time frame, FBI data shows that the violent crime rate decreased 48 percent, including declining rates of aggravated assault, robbery, rape, and murder.{136} Similarly, the property crime rate decreased 41 percent, including falling rates of motor vehicle theft, larceny/robbery, and burglary.{137} These trends hold steady for both cities that have traditionally been viewed as "gateways" for immigrants (for example,

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130 Rodriguez, 135 S. Ct. at 1616.
131 Id.
133 Id. at 3.
134 The AIC report relies on U.S. Census Bureau data, which refers to "foreign born" as anyone who was not born a U.S. citizen, which includes naturalized U.S. citizens, lawful permanent residents, temporary migrants (e.g., foreign students), humanitarian migrants (e.g., refugees and asylees), and undocumented immigrants. "Native born" persons refer to individuals born in the United States or one of its territories, or persons born abroad to at least one U.S. citizen parent. See About, U.S. CENSUS BUREAU, https://www.census.gov/topics/population/foreign-born/about.html [https://perma.cc/SU9K-RACQ] (last visited Oct. 4, 2016).
135 Id. et al., supra note 132, at 5.
136 Id.
137 Id.
Miami, Chicago, El Paso, and San Diego), and for newer immigration hubs such as Austin.\footnote{Id. at 6.}

Critics could argue that comparing the foreign-born population to the native-born population fails to account for the possibility that even if foreign-born individuals commit less crime, it is possible that the majority of those committing the crimes are undocumented. However, an empirical study of the Secure Communities Program (S-COMM)\footnote{As discussed infra Part V.B., the program detected and deported undocumented immigrants present in the United States.} shows that deporting undocumented immigrants at a higher rate had little to no effect on reducing crime rates.\footnote{See Thomas J. Miles & Adam B. Cox, \textit{Does Immigration Enforcement Reduce Crime? Evidence from Secure Communities}, 57 J. L. & ECON. 937, 969 (2014).} Research showed that the program failed to reduce meaningfully the FBI's overall index crime rate and failed to reduce meaningfully the rate of any individual violent offense, although modestly reduced the rate of two property crimes.\footnote{Id. at 969.} Furthermore, research suggests that "the marginal immigrant detainee is a much less serious offender than the marginal prisoner in the criminal justice system[,]" even when the immigrant detainee is detained based on a program intended to target the most serious immigrant criminal offenders.\footnote{Id. at 970.} If undocumented immigrants committed serious crimes at much higher levels than other populations, there should have been a correlated decrease in the rate of serious crime. However, the lack of such correlation suggests that undocumented immigrants commit serious crimes at lower levels than native-born individuals.

In addition, the AIC report uses epidemiological data to examine the likelihood of immigrants versus native-born citizens to engage in criminal behavior. A 2014 study examining violent and/or nonviolent antisocial behavior found that immigrants in the United States were much less likely than native-born Americans to engage in that type of behavior.\footnote{Ewing et al., supra note 132, at 9.} In fact, native-born Americans were three times more likely than immigrants from Latin America and four times more likely than immigrants from Asia or Africa "to report violent behavior." When looking at "high risk" adolescents over almost a decade, another 2014 study focusing on adolescent health found that immigrants were less likely than native-born young people to be repeat offenders of a serious offense.\footnote{Id.} Taken together, this range of studies shows that the
immigration status of a person itself does not increase the likelihood of criminality and thus does not pose a threat to an officer during a stop.

Critics may argue that any percentage of the immigrant population that are criminals should allow law enforcement to treat the whole population as a safety risk. From efficiency and from community policing perspectives, this viewpoint makes little sense. An examination of the "Stop and Frisk" program utilized by New York City, and similar programs in other cities, provides a useful analogy of the perils of assigning criminality to a group as a whole.

*Terry v. Ohio*\(^{146}\) validated the practice of stop and frisk when the Court held that if an officer has reasonable suspicion that a suspect was involved in serious criminal conduct and that he or she is "armed and dangerous," the officer may pat down or "frisk" the suspect.\(^{147}\) Since that ruling, law enforcement has greatly expanded its power of stop and frisk to encompass all suspected criminal activity, regardless of how trivial, and "under circumstances where the conduct observed may be fully consistent with innocence."\(^{148}\) The New York Police Department (NYPD) in particular has come under significant scrutiny for its use of stop and frisk, which the New York Civil Liberties Union (NYCLU) has tracked since 2002.

At the height of stop and frisk in 2011, the NYPD stopped New Yorkers 685,724 times, but 88 percent of the individuals (605,328) were found to be completely innocent.\(^{149}\) Of particular concern is the fact that young black men made up 25.6 percent of NYPD stops despite comprising only 1.9 percent of the city's population, and young Latino men made up 16.0 percent of NYPD stops despite comprising only 2.8 percent of the city's population.\(^{150}\) In addition, black and Latino New Yorkers were more likely to be frisked than their white counterparts, yet they were less likely to be found with a weapon.\(^{151}\) Not only does stop and frisk come under scrutiny for racial discrimination, the data also shows that the practice does not effectively stop or deter crime. Examining the 4.4 million stop-and-frisk encounters between January 2004 and June 2012, of the 52 percent of stops that were followed by a

\(^{146}\) 392 U.S. 1 (1968).


\(^{148}\) Id. (quoting United States v. Arvizu, 534 U.S. 266, 274–75, (2002)).


\(^{151}\) Id.
frisk for weapons, a weapon was found in only 1.5 percent of those frisks.\textsuperscript{152} In other words, 98.5 percent of the time, no weapon was found.\textsuperscript{153}

The stop-and-frisk data illustrates the problem when law enforcement assigns wholesale criminality to a particular population—in this case, blacks and Latinos. Based on the data provided earlier that immigrants are less likely to commit crimes, an important corollary can be made: law enforcement should not assign criminality to this population simply because of their immigration status. Given that, as a whole, immigrants are not likely to be more dangerous than the native-born population, they pose no greater risk to officers during a traffic stop. Thus, courts should not consider checking a suspect's immigration status as part of the mission of a stop.

B. The Risk of Increasing Racial Profiling Allegations when Checking Immigration Status During a Stop

Even though immigration violations are crimes and thus fit within the Government's endeavor to deter crime in general, most immigration infractions are civil in nature. Unless the officer has reasonable suspicion that the person committed the felony of illegally reentering the United States after being deported,\textsuperscript{154} or some other type of more serious immigration crime (for example, human trafficking),\textsuperscript{155} it would be difficult to articulate what the reasonable suspicion of undocumented status would be, e.g., would an immigration check be triggered by a suspect's accent, skin color, or type of clothing? More likely than not, these questions would raise allegations of racial profiling. Although the Court in \textit{Whren} held that the motive of police is immaterial to the validity of a stop, even accusations of racial profiling could lead to mistrust between the community and law enforcement. In addition, the officer could open herself up to questions of whether she was prolonging the traffic stop to conduct an immigration check once the checks related to the traffic violation have been completed.

Some anecdotal evidence suggests that local police check immigration status after the mission of the stop has been completed and base their decisions on racial profiling, rather than reasonable suspicion or probable cause. A troubling internal email from a Department of Homeland Security (DHS) attorney recently raised


\textsuperscript{153} Id.

\textsuperscript{154} 8 U.S.C. § 1326(a).

\textsuperscript{155} 8 U.S.C. § 1328.
questions as to the extent of ethnic and racial profiling used by local police when interacting with immigrants.\textsuperscript{156} According to the email, Louisiana police detained two Honduran men waiting for a ride to their construction jobs on loitering charges because they looked Latino.\textsuperscript{157} Although the two men were not charged with any crimes, the local police nevertheless transferred them to DHS, which detained them because they are unauthorized immigrants who had been previously deported.\textsuperscript{158} Despite the Obama Administration’s focus on keeping families together and deporting only the most serious criminals, a DHS official expressed concern that “[t]he men appear to have been arrested, transported and detained for an extended period of time, without any local law-enforcement interest in charging them with a crime, solely for an immigration status check.”\textsuperscript{159} Local police claimed that the men were not singled out for being Latino but because they were standing in a location where people were known to loiter and use drugs.\textsuperscript{160} Nevertheless, Homeland Security officials continue to be apprehensive that local police are using stops to racially profile individuals suspected of being in this country illegally.\textsuperscript{161} If that is in fact the case, this could be an example of where \textit{Arizona v. United States} and \textit{Rodriguez} intersect.

While the Border Patrol is generally responsible for enforcing immigration laws at the border of the United States, Immigration and Customs Enforcement (ICE) is responsible for enforcing immigration laws within the nation’s interior.\textsuperscript{162} Under Section 287(g) of the Immigration and Nationality Act, non-federal officers aid ICE in its federal immigration enforcement.\textsuperscript{163} Under the 287(g) program, state and local law enforcement receive delegated authority to enforce immigration laws by entering into a partnership with ICE under a joint


\textsuperscript{157} Id.


\textsuperscript{159} Id. The two individuals featured in this article were subject to removal orders because they had been previously removed and thus still met the second priority for deportation under the Priority Enforcement Program. Jose Adan Fugin-Cano was deported and Gustavo Barahon-Sanchez is expected to be deported imminently (as of October 2015).

\textsuperscript{160} Tanfani & Bennett, \textit{supra} note 156.

\textsuperscript{161} Id.


\textsuperscript{163} 8 U.S.C. § 1357(g) (2012).
Memorandum of Agreement (MOA). Even without an MOA, local and state law enforcement may "cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present." From October 2008 until November 2014, the Secure Communities Program (S-COMM) aided ICE in its efforts to detect and deport undocumented immigrants present in the United States, with the overall purported goal of "keep[ing] communities safer from violent crime." S-COMM required local and state law enforcement to share the biometric data of anyone arrested with federal authorities; ICE would then submit detainer requests to local authorities to hold individuals it believed to be in the United States illegally until the agency could pick them up to place them in removal proceedings.

Based on criticism that S-COMM was misunderstood by state and local entities and that it led to the detainment of vulnerable populations and U.S. citizens, DHS announced that it would end the program and replace it with the Priority Enforcement Program (PEP). PEP focuses on detaining and removing only those undocumented immigrants who pose a national security threat or were convicted of specific enumerated crimes.

As stated earlier, the Arizona v. United States Court expressed caution that the constitutionality of the S.B. 1070 provision would be questioned if individuals were detained solely to verify their immigration status. Although officers like the ones in Louisiana could claim that they did not stop individuals only to check their immigration status, they could still be violating Rodriguez if the immigration check prolonged the stop once the mission of the stop (e.g., investigating the loitering violation) had been completed or if the Court definitely decides that immigration status is unrelated to the mission of a stop. If the Court undertakes the latter action, allegations of racial profiling would be reduced because there would not even be a pretext as suggested by the defendants in Whren that the officer was stopping an individual because of suspected undocumented status.

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166 Miles & Cox, supra note 140, at 969.


168 John Memo, supra note 7, at 1–2.


Critics of this approach to searches may assert that an immigrant choosing not to disclose her immigration status does not have a "legitimate interest in privacy," and thus official conduct determining an individual's immigration status is not a search subject to the Fourth Amendment. Relatedly, the Court has "held that any interest in possessing contraband cannot be deemed 'legitimate,'" and thus, governmental conduct that only reveals the possession of contraband 'compromises no legitimate privacy interest.'" In addition, for states that prohibit undocumented immigrants from applying for driver's licenses, it is plausible that that population either drives without a license or procures fraudulent identification (either by buying a stolen identity or counterfeiting documents). Regardless of whether the holder of this type of identification is undocumented or not, such individual would in fact be in possession of contraband.

However, it is a stretch to conflate one's immigration status with contraband. In the immigration context, the interest of the otherwise law-abiding immigrant in not disclosing her immigration status is fundamentally different from the contraband arguments. While ICE and Border Patrol agents have authority to question individuals on their immigration status, different jurisdictions have different rules as to whether an individual is required to disclose her immigration status to local and state law enforcement. In jurisdictions where local and state law enforcement have entered into 287(g) agreements with ICE, those officers can perform certain functions of an immigration officer. Under those circumstances, an individual may have to disclose her immigration status to the local or state officer.

On the other hand, New York City passed an executive ordinance that included immigration status under the umbrella of confidential information that cannot be disclosed by any city officer or employee, unless the individual is suspected by an officer of engaging in illegal activity, other than mere status as an undocumented immigrant. In addition, law enforcement officers may not inquire about an individual's immigration status unless they are investigating illegal activity other than mere status as an undocumented immigrant. For example, if an undocumented immigrant is not the target of a criminal investigation but rather is assisting law enforcement in the

172 Id. (emphasis in original).
175 Id.
investigation, she should not have to fear that her immigration status will be revealed in the process of interacting with the New York Police Department.

C. Policy Recommendations May Alleviate Allegations of Racial Profiling During a Law Enforcement Stop

This Comment contends that the Supreme Court should extend *Rodriguez* to hold that checking an individual's immigration status is unrelated to the "mission" of the stop and thus should not be conducted after the stop is completed. If the Supreme Court chooses not to clarify the reach of *Rodriguez* in the immigration context, the legislative and executive branches could take indirect action to rein in officers who use law enforcement stops as a pretext to check an individual's immigration status.

Congress should pass comprehensive immigration reform, because it would allow undocumented people currently living in fear to come forward without fear of deportation. For example, the comprehensive bill passed by the Senate in 2013 ("S. 744") would have allowed undocumented individuals to apply for legalized status and eventually earn a path to citizenship, in addition to deterring future unauthorized immigration. The Congressional Budget Office calculated that of the estimated 11.5 million undocumented immigrants in the United States in 2011, approximately 8 million individuals in that population would obtain legal status under S. 744. If undocumented immigrants are given the opportunity to legalize their status, they will have less fear of interacting with law enforcement. In addition, officers may be less likely to assume that someone speaking with an accent or someone with darker skin is in the United States without legal status, depending on how effective and how broad a path to citizenship would be, and how successful deterrence of future unauthorized immigration would be.

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However, without a bright-line rule from the Court or an explicit legislative provision clarifying that immigration status is unrelated to the mission of a stop and cannot be used to prolong a stop, comprehensive immigration reform is not a panacea. The End Racial Profiling Act (ERPA) is an example of such a legislative provision. Lawmakers have introduced ERPA in every Congress since 2001. As introduced in the 114th Congress, the bill would prohibit any law enforcement officer or agency (federal, state, and local) from engaging in racial profiling. The bill would incentivize state and local law enforcement agencies applying for certain federal law enforcement grants to certify that they maintain adequate policies and procedures for eliminating racial profiling and have eliminated any existing practices that permit or encourage racial profiling. More narrowly, Congress could also enact a bill with respect to racial profiling within the immigration context. For example, S. 744 had a provision prohibiting federal officers from using race or ethnicity to inform routine or spontaneous law enforcement decisions in any capacity unless a specific description of the suspect exists.

Finally, the Department of Justice could update its racial profiling guidance to include certain DHS actions and local and state law enforcement activities. In December 2014, the Obama administration updated the initial guidance issued in 2003 by Attorney General John Ashcroft. In addition to banning profiling based on race and ethnicity, the revised rules ban profiling based on religion, national origin, gender, sexual orientation, and gender identity. The guidance also bans the use of racial profiling in the national security context, except when screening airline passengers or guarding the Southern border. However, the guidance does not apply to local or state law enforcement, potentially allowing those entities to racially profile individuals during law enforcement stops.


See DEPT OF JUST., GUIDANCE FOR FEDERAL LAW ENFORCEMENT AGENCIES REGARDING THE USE OF RACE, ETHNICITY, GENDER, NATIONAL ORIGIN, RELIGION, SEXUAL ORIENTATION, OR GENDER IDENTITY JUSTICE (Dec. 2014).

VI. CONCLUSION

Immigration enforcement has perplexed the United States for decades. Enforcement is spread out among several federal agencies, in addition to the 287(g) agreements that allow local and state law enforcement to partake in administering immigration law. As a result, the parameters of the Fourth Amendment during traffic stops and Terry stops play an important role in determining the limits for law enforcement. Furthermore, federal priorities are often at odds with local and state priorities, including situations where the current administration is criticized simultaneously for being too lax and too harsh on enforcement.

Although Rodriguez v. United States addressed the dog-sniff searches during a stop, it also has important implications for immigration enforcement. While the Court held that an officer may conduct unrelated checks during an otherwise lawful stop, she may not do so in such a way that it extends the length of the stop, absent the reasonable suspicion typically required to justify detaining a suspect. Circuit Courts have already applied Rodriguez to cases beyond dog-sniff searches.

Within this construct, immigration status should be considered unrelated to the mission of the stop and thus law enforcement should not be allowed to conduct an immigration check if it extends the length of a traffic or Terry stop. Following this guideline would provide a bright-line rule for local and state law enforcement who may not be as well-versed in the complexities of immigration law. In addition, this clear-cut rule would provide a shield against allegations of ethnic or racial profiling perpetrated by law enforcement. Although Congress may pass comprehensive immigration reform and/or the Department of Justice may update its racial profiling guidance, the Supreme Court should nonetheless address future cases of immigration status checks within the context of Rodriguez. The Court is the most appropriate avenue for this change within current Fourth Amendment precedent.