NOTES

RANDOMIZING IMMIGRATION ENFORCEMENT: EXPLORING A NEW FOURTH AMENDMENT REGIME

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This Note draws upon immigration law to analyze a new Fourth Amendment regime put forth by criminal law scholars Bernard Harcourt and Tracey Meares. In Randomization and the Fourth Amendment, *Harcourt and Meares propose a model for reasonable searches and seizures that dispenses with individualized suspicion in favor of random, checkpoint-like stops. Randomization, the authors contend, will ensure that enforcement is evenhanded and will alleviate burdens that result from discriminatory targeting. This Note explores the possibility of randomization in immigration enforcement, a useful context to test the Harcourt-Meares model because it exemplifies the ills the authors seek to address. Though analysis demonstrates that randomization falls far short of its goals, its failures are instructive. Indeed, the lens of immigration enforcement illuminates essential conditions that must exist in order for randomization to be viable.*

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INTRODUCTION

In July 1997 in Chandler, Arizona—a city just over 100 miles north of the U.S.-Mexico border—the city's Police Department and U.S. Border Patrol agents joined forces to launch a massive immigration sweep. Nicknamed the "Chandler Roundup," the operation lasted for five days and resulted in the arrest of 432 unauthorized immigrants.[1] Although officers were instructed to make stops only upon probable cause of a violation of state or local law, probable cause was the exception, not the rule. In one two-hour period, only seven of forty-three vehicle stops were made upon probable cause.[2]

According to witnesses, the real basis for many of these stops was obvious: brown skin.[3] Officers descended upon the city's low-income and predominately Hispanic communities, stopping "Mexican-looking" people while allowing "non-Mexican-looking" people to pass, running records checks against individuals with Hispanic surnames without explaining the motivation for the check.[4] The City of Chandler ultimately paid $400,000 to settle a $35 million claim alleging unlawful racial profiling in connection with the sweep.[5]

What's wrong with this picture? Certainly the disparate impact on Hispanics triggers Equal Protection concerns, and the lack of probable cause contravenes the Fourth Amendment. These are the constitutional pegs on which racial profiling challenges typically rest.[6] But

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[1] J.J. Hensley & Michelle Ye Hee Lee, *How Profiling Cases Changed Arizona Policing*, ARIZ. REPUBLIC, July 26, 2010, http://www.azcentral.com/news/articles/2010/07/26/20100726arizona-profiling-cases.html; Carrie L. Arnold, Note, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113, 120 (2007).

[2] Arnold, *supra* note 1, at 119–20 & 120 n.48.

[3] *Id.* at 120.

[4] *Id.* at 120–21.

[5] Hensley & Ye Hee Lee, *supra* note 1.

[6] *See, e.g.*, Melendres v. Arpaio, No. PHX-CV-07-02513-GMS, 2013 WL 2297173, at *4 (D. Ariz. May 24, 2013) (holding that stops based on race violate the Fourth Amendment,

according to Bernard E. Harcourt[7] and Tracey L. Meares,[8] there is another, different Fourth Amendment problem that has gone unrecognized: targeting. The problem is that individuals from certain groups are unjustifiably singled out for enforcement.[9]

In *Randomization and the Fourth Amendment*, Harcourt and Meares propose an entirely new system for testing the reasonableness of proactive searches and seizures under the Fourth Amendment.[10] Individualized suspicion, which allows officer discretion in singling out individuals for enforcement, is abandoned.[11] Instead, enforcement is randomized through checkpoint-style stops of predetermined pools of people.[12]

Can such a system possibly work? Harcourt and Meares detail the justifications for their proposal at length but expend little ink discussing implementation. No scholarship to date has significantly engaged with their model.

This Note explores randomization in one potential context: enforcement of immigration law. The authors explicitly reference border patrol checkpoints as a context that fits their proposal.[13] Many of the existing problems in immigration enforcement—including rampant racial profiling and stigmatization of already marginalized groups—are precisely the ills Harcourt and Meares's model seeks to address. Were randomization to play out as the authors expect, it could provide valuable direction to immigration reform efforts. Yet this Note will show that, despite an auspicious beginning, randomization of immigration enforcement will almost certainly encounter some

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the Equal Protection Clause of the Fourteenth Amendment, and Title VII of the Civil Rights Act); Comm. for Immigrant Rights v. Cnty. of Sonoma, 644 F. Supp. 2d 1177, 1204 (N.D. Cal. 2009) (discussing Fourth, Fifth, and Fourteenth Amendment claims).

7 Bernard E. Harcourt is the Julius Kreeger Professor of Law & Criminology and Chair and Professor of Political Science at the University of Chicago. He is a leading scholar in the social and political theory of crime and punishment and is a noted critic of profiling in policing. *See Bernard E. Harcourt*, U. CHI. LAW SCH., http://www.law.uchicago.edu/faculty/harcourt (last visited Sept. 3, 2013) (profiling Harcourt and his scholarship).

8 Tracey L. Meares is the Walton Hale Hamilton Professor of Law at Yale Law School. She has written extensively on community policing, law enforcement legitimacy, and the sociology of crime. *See Tracy L. Meares*, YALE LAW SCH., http://www.law.yale.edu/faculty/tmeares.htm (last visited Sept. 3, 2013) (profiling Meares and her scholarship).

9 *See infra* notes 65–66 and accompanying text (describing the right not to be singled out or targeted).

10 Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809 (2011).

11 *See infra* Part I.A (explaining the Harcourt and Meares model of randomized checkpoints).

12 *See id.* (elaborating on Harcourt and Meares's randomized checkpoint program model).

13 Harcourt & Meares, *supra* note 10, at 838–40, 867 (noting that their analysis could apply to border patrol roadblocks and immigration checks).

major breakdowns that are likely to occur in other policing contexts as well. The upshot is that these breakdowns shed light on the requisite criteria for the model to succeed.

Part I of the Note provides an introduction to the current, confused state of Fourth Amendment jurisprudence and to Harcourt and Meares's paper. Their essential argument is that searches and seizures under the Reasonableness Clause should reflect the fact that suspicion attaches to groups, not individuals. Part I outlines their proposal and explains why it matters, illustrating the problems that an individualized suspicion regime engenders. It then concludes by showing immigration to be an initially promising context for randomization, primarily because the harms of disproportionate policing that Harcourt and Meares seek to redress are particularly acute in immigration enforcement.

Part II focuses on the first step in a randomized enforcement regime: defining a pool of suspects within which to randomize. At first blush this appears to be no task at all—enforcement officers can set up checkpoints in diverse communities and randomly check the immigration status of the people who pass them by. The catch is that Harcourt and Meares require each checkpoint to meet a threshold measure of success defined by hit rate. This Part argues that checkpoints will begin to converge on areas with large unauthorized populations—which also happen to be areas with large Hispanic populations—in excess of those populations' share of offending. As an alternative to pooling by location, law enforcement might randomize stops amongst people matching a certain profile. But characteristics indicative of unauthorized status are likely ones that implicate Hispanic ethnicity, such as Hispanic appearance, English-speaking ability, and proximity to the border. In immigration law, the rate of offending is highly tied up with ethnicity,[14] and under Harcourt and Meares's model there is no obvious way to disentangle them. Part II concludes by attempting to extract from this predicament the requisite conditions for randomization to function as advertised.

Part III moves from pooling problems to concerns about efficiency, administration, and official compliance. If randomization is to be viable, it must not be prohibitively costly or difficult to administer, and there should be some assurance that law enforcement officials will actually randomize stops. Here again, the success of randomizing

[14] Fifty-eight percent of the unauthorized immigrant population is from Mexico, and twenty-three percent is from other Latin American countries. *See infra* text accompanying note 132. This Note assumes that most (although certainly not all) of such immigrants appear Hispanic.

immigration enforcement looks dubious, and the problems illustrate the challenges randomization will face in other contexts.

Though the analysis demonstrates that randomization—at least in immigration—falls far short of its goals of eliminating unwarranted community burdens and stigmatization, its failures are instructive. Randomization as Harcourt and Meares envision requires that the rate of offending be uniform across sensitive characteristics such as race and ethnicity, or that there be some other reliable indicator of offending completely divorced from these characteristics. Enforcement should be limited to contexts that involve similar degrees of intrusiveness. Jurisdictions must have adequate mechanisms in place to ensure official compliance with the randomization scheme. If a policing context can meet these criteria, randomization may be a great improvement on the status quo. But in the immigration context and in others that share its essentials, Harcourt and Meares's model is bound to disappoint.

I
The Problem of Reasonableness and the Randomization Solution

A. Introduction to Reasonableness and the Harcourt-Meares Model

Harcourt and Meares's model is at its core a repudiation of the Court's analysis of reasonableness under the Fourth Amendment. The Fourth Amendment guarantees that "[t]he 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 . . . ."[15] Early Court decisions effectively collapsed these two clauses, finding searches presumptively unreasonable without a warrant.[16] Exigent circumstances doctrine excused the need for a warrant if delay would greatly endanger the lives of an officer or others,[17] would cause evidence to be destroyed or lost,[18] or would allow the escape of a fleeing felon of whom officers

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[15] U.S. Const. amend. IV.

[16] *See, e.g.*, Weeks v. United States, 232 U.S. 383, 393 (1914) (finding a home search unreasonable without a warrant), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961); *Ex parte* Jackson, 96 U.S. 727, 733 (1877) (requiring a warrant to open an individual's mailed letter).

[17] *See, e.g.*, Warden v. Hayden, 387 U.S. 294, 298–99 (1967) (finding warrantless entry into the home of a fleeing robber permissible, as "the exigencies of the situation made that course imperative" (quoting McDonald v. United States, 335 U.S. 451, 456 (1948))).

[18] *See, e.g.*, Vale v. Louisiana, 399 U.S. 30, 35 (1970) (listing the exceptions to the warrant requirement, including destruction of evidence).

were in hot pursuit.[19] Automobile searches and seizures were immunized from the warrant requirement because their inherent mobility created a risk that evidence might be removed from the jurisdiction.[20] Officers could also seize incriminating objects lying in plain view without a warrant, so long as officers were legitimately on the premises and the items were "visible and accessible and in the offender's immediate custody."[21] Until the middle of the twentieth century, however, waiver of the warrant requirement remained the exception, not the rule. Exceptions were to be construed narrowly such that, wherever possible, an officer's determination of probable cause was subjected to judicial scrutiny.[22]

From midcentury on, the Court began to divorce the concepts of reasonableness and warrants. The Justices ceased to consider whether a warrant could practically have been obtained when determining the validity of a search or seizure, turning instead to a totality-of-the-circumstances test for reasonableness.[23] Probable cause was generally still required, but this standard, too, began to wane. In *Terry v. Ohio*, the Court held that an officer could seize an individual and pat down his clothing for weapons without probable cause, so long as he had "acted reasonably" and his suspicion was based on "specific reasonable inferences."[24] In recent years the Court has been increasingly willing to sanction searches and seizures without any suspicion at all. The government may, for example, stop cars at DUI checkpoints and conduct random drug tests of government employees so long as the government need outweighs the intrusion on individual privacy.[25]

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[19] *See, e.g.*, Hester v. United States, 265 U.S. 57, 58 (1924) (finding no unlawful search or seizure where officers recover a jug of whiskey dropped by a fleeing suspect).

[20] *See, e.g.*, Carroll v. United States, 267 U.S. 132, 156–62 (1925) (upholding a warrantless search of the car of a suspected bootlegger transporting intoxicating liquors).

[21] Go-Bart Importing Co. v. United States, 282 U.S. 344, 358 (1931). For a period of time at least some Justices believed that an officer must discover an incriminating object inadvertently in order for the exception to hold, but this requirement was eliminated in *Horton v. California*, 496 U.S. 128 (1990).

[22] *See* Trupiano v. United States, 334 U.S. 699, 708–10 (1948), *overruled by* United States v. Rabinowitz, 339 U.S. 56 (1950) ("[T]he right to search and seize should not be left to the mere discretion of the police, but should as a matter of principle be subjected to the requirement of previous judicial sanction wherever possible.").

[23] *See Rabinowitz*, 339 U.S. at 65–66 ("[S]earches turn upon the reasonableness under all the circumstances and not upon the practicability of procuring a search warrant . . . .").

[24] 392 U.S. 1, 27 (1968).

[25] *See, e.g.*, Mich. Dept. of State Police v. Sitz, 496 U.S. 444, 455 (1990) (finding a highway sobriety checkpoint, which served a legitimate state interest and involved minimal intrusion on motorists, was reasonable); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 633 (1989) (finding the government interest in suspicionless drug testing of railroad employees outweighed the individual privacy concerns).

The modern approach to reasonableness has been criticized on many fronts; Harcourt and Meares are certainly not the first to identify flaws. Scholars fault reasonableness balancing as insufficiently democratic, as it allows judges and not legislatures or juries to determine what kind of policing action is acceptable.[26] They decry it as increasingly pro-government, as the Court is more and more likely to find that the totality of the circumstances weigh against the defendant.[27] They reveal it as vague, a point the Court itself seems to acknowledge,[28] offering little guidance to enforcement officials.[29]

Harcourt and Meares argue that the major failing of the Court's reasonableness analysis is that it still conceives of suspicion as individualized.[30] In contrast to searches governed by the Warrant Clause, wherein law enforcement officers with information about a crime reactively investigate individual suspects, searches and seizures governed by the Reasonableness Clause are proactive and preventative,

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[26] *See* Melanie D. Wilson, *The Return of Reasonableness: Saving the Fourth Amendment from the Supreme Court*, *in* THE FOURTH AMENDMENT: SEARCHES AND SEIZURES 293, 293–94 (Cynthia Lee ed., 2011) [hereinafter SEARCHES AND SEIZURES] (proposing a reevaluation of Fourth Amendment reasonableness that allows juries, not judges, to determine when a search or seizure is reasonable); *see also* Devon W. Carbado, *(E)Racing the Fourth Amendment*, *in* SEARCHES AND SEIZURES, *supra* at 109, 118–19 (arguing that the Supreme Court should take race into account in determining whether a seizure has occurred); Tracey Maclin, *"Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, *in* SEARCHES AND SEIZURES, *supra*, at 121, 122 (same).

[27] *See* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 394 (1974) (advising that in the absence of clear rules, courts will defer to police determinations of reasonable conduct); *see also* THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION 502–07 (2008) (describing cases and doctrine that allow officials an increasing amount of discretion in effectuating searches).

[28] *See, e.g.*, *Terry*, 392 U.S. at 21 (1968) (noting the absence of a ready test for reasonableness); Camara v. Mun. Court, 387 U.S. 523, 528 (1967) (remarking that the challenge of translating reasonableness into workable guidelines has divided the Court).

[29] *See* Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1620 (2012) (noting the difficulty law enforcement faces in extracting a coherent rule from Fourth Amendment caselaw); *see also* Illinois v. Gates, 462 U.S. 213, 238 n.11 (1983) (noting that under a totality-of-the-circumstances test, "one determination will seldom be a useful 'precedent' for another").

[30] *See* Harcourt & Meares, *supra* note 10, at 814–15, 842–46 (observing that individualized suspicion has become a placeholder for reasonableness, which is inconsistent with the standard set out in the Fourth Amendment); s*ee also* Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 533–48, 624–25 (1995) (noting the Court's increasing allowance of suspicionless searches but defining suspicion, where required by the Court, as individualized). Other scholars have offered related objections to the Court's borrowing of probable cause from the Warrant Clause in interpreting the Reasonableness Clause. *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 782–85 (1994) (alleging that the Court has "tried to wrench the words 'probable cause' from one Clause and force them into another").

such as patrolling a high-crime neighborhood.[31] These proactive searches, the authors contend, involve suspicion that attaches not to individuals but rather to shared characteristics and behaviors. When the police stop someone who fits a drug courier profile, has a bulge in his pocket, or is seen fleeing the scene of a crime, they do so upon a determination that all people who share those "traits, conditions, or behaviors" are suspicious.[32] Suspicion is individualized only in the sense that it attaches to each member of the group, but not in the sense that it identifies a unique person apart from others sharing the same characteristics.[33]

One consequence of the individualized suspicion view is that it sets up a false dichotomy. Suspicion is either individualized (and therefore meets the demands of the Fourth Amendment) or it is not.[34] The authors contend that suspicion is better understood as a probability.[35] Take two scenarios: In the first, a patrolman sees a woman heading towards a bank wearing a ski mask and clutching an object in the apparent shape of a machine gun under her jacket. In the second, an officer observes an African-American man pacing the block, peering into a store window, and conferring with a few others. On an individualized suspicion standard, the police might stop the individual in both scenarios—indeed, they did so on the facts of the second example in *Terry v. Ohio*.[36] Although the probability of finding an arrestable offense is clearly much higher in the first scenario than in the second, the binary model gives police no guidance as to how much suspicion is required, leaving them to guess and hope their decision holds up in court.[37] The better Fourth Amendment question is not whether there is individualized suspicion, but whether the amount of suspicion triggered by a set of traits and behaviors is sufficient to justify a search or seizure.[38]

Harcourt and Meares believe that all people who share characteristics that meet a threshold probability of offending should be

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[31] *See* Harcourt & Meares, *supra* note 10, at 814–15, 829–34 ("Drawing metaphorically on the text of the Fourth Amendment itself, it is possible to think of the constitutional provision as itself containing two models—a Patrol Model and a Warrant Model."). The authors demonstrate that the average police officer spends much more time on patrol-model policing than on reactive, warrant-based policing. *Id.* at 824–29.

[32] *Id.* at 813–21, 832.

[33] *Id.* at 813, 832.

[34] *Id.* at 811–12.

[35] *Id.*

[36] *Id.* at 812 (citing *Terry*, 392 U.S. 1, 6–7 (1968)).

[37] *Id.* at 814.

[38] *Id.* at 833–34; *see also* FREDERICK F. SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES 158 (2003) (describing a way to identify suspects by overlaying numerous generalizations).

searched evenhandedly. They suggest a randomized checkpoint program whereby law enforcement officers stop or search every third, fifth, or tenth person within a suspicion-sufficient group. Although any number of characteristics might be used to identify a group, as discussed *infra* Part II.B, the authors propose that pooling be determined by space and time.[39] Rather than looking to physical traits or behaviors to define a group, officers post at predetermined, demographically diverse locations at specific times and randomize searches amongst the entire population they encounter.[40] An urban law enforcement agency would dispatch a handful of officers to specific intersections—some in the richer parts of town, some in the poorer—and instruct each officer to stop and frisk every *n*th person who passes by.[41] If the hit rate, or number of arrests per stop, falls below a certain threshold—a threshold the authors do not specify and contend must be established by the Supreme Court[42]—the checkpoint must be shut down.

The threshold requirement exists to ensure individuals do not have their privacy rights intruded upon without sufficient justification. The authors emphasize that their model is not an authorization of suspicionless searches; to call it such is to conflate the randomized nature of the search with a lack of suspicion.[43] Rather, every person stopped at a checkpoint inheres the same level of suspicion as determined by the hit rate.[44] To illustrate this point, the authors take the example of *Edmond v. Goldsmith*, in which Judge Posner of the Seventh Circuit struck down the city's system of randomized vehicle

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[39] Harcourt & Meares, *supra* note 10, at 866–67, 870.

[40] *See id.* (proposing, for example, randomized consent searches on the highway and randomized evening street stop-and-frisks in diverse socioeconomic neighborhoods).

[41] *Id.* at 866.

[42] Harcourt & Meares, *supra* note 10, at 817, 868. As the authors indicate, it is hard to know what level of suspicion the Court would require. The Court has never attached a percentage to probable cause or reasonable suspicion. *Id.* at 817, 848–49. In the past the Court has approved of checkpoint searches with very low hit rates. *See, e.g.*, Mich. Dept. of State Police v. Sitz, 496 U.S. 444, 454–55 (1990) (noting that 1.6% of stopped drivers at the DUI checkpoint were arrested for alcohol impairment, and that in *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976), the Court approved of border patrol checkpoints with a 0.5% rate of arrests to vehicles stopped). The difference is that while Harcourt and Meares interpret hit rate as an indicator of shared suspicion, the Court currently views hit rates as a measure of efficacy, which informs the government interest in making a *suspicionless* stop. Hit rates for policing programs requiring suspicion have been much greater. *See* Harcourt & Meares, *supra* note 10, at 849–50 (describing, *inter alia*, a 13.6% hit rate for New York City stop-and-frisks, and 19.1%, 12.3%, and 8.6% drug hit rates for whites, blacks, and Hispanics, respectively, in Missouri traffic stops). Although I periodically employ a five percent threshold to test various aspects of the model, it is simply too hard to know what percentage the Court might require.

[43] Harcourt & Meares, *supra* note 10, at 810.

[44] *Id.* at 817, 851.

searches for drug violations in a decision later affirmed by the Court.[45] While Judge Posner found there was no individualized suspicion and therefore no probable cause or even reasonable suspicion for the stops, Harcourt and Meares contend that since the roadblocks produced a hit rate of 4.74%, there was a 4.74% likelihood, or a 4.74% measure of "individualized suspicion," that any given driver was carrying drugs.[46]

Thus, under Harcourt and Meares's checkpoint system, the set of "traits, conditions, or behaviors" to which suspicion attaches is simply being at a given place at a given time.[47] The level of suspicion will often be difficult to know ex ante, at least until a program is well established, so agencies must conduct ex post analyses of the hit rate.[48] If the hit rate falls below the level required to meet constitutional demands, the checkpoint must be terminated and everyone wrongfully searched (that is, not arrested) is entitled to monetary compensation.[49] Compensation is designed not only to acknowledge individual privacy harms but also to incentivize law enforcement to terminate unconstitutional checkpoints.[50]

B. Randomization: A Solution to Discrimination?

Randomization, the authors argue, will fix a major failing of current Reasonableness Clause analysis—namely, that it enables discrimination on the basis of illegitimate criteria.[51] The evils of discrimination—the authors focus primarily on racial discrimination—are twofold: By distributing the burden of enforcement unevenly, discrimination (1) causes major damage to the targeted community,[52] and (2) violates the principle that justice should be distributed equitably, a principle the authors believe is inherent in the Fourth Amendment itself.[53]

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[45] *Id.* at 846–50 (citing Edmond v. Goldsmith, 183 F.3d 659, 666 (7th Cir. 1999), *aff'd sub nom.* City of Indianapolis v. Edmond, 531 U.S. 32 (2000)).

[46] *Id.* at 847–48.

[47] *Id.* at 813–21, 832.

[48] *Id.* at 817.

[49] *Id.* at 834, 868–70.

[50] *Id.* at 869–70.

[51] *Id.* at 815. By "illegitimate," the authors appear to mean criteria with no rational basis. *See infra* notes 65–66 (arguing that Harcourt and Meares are only concerned about illegitimate targeting, not profiling that is rationally related to the risk of offending).

[52] Harcourt & Meares, *supra* note 10, at 852 (noting that the effect of targeting on communities is "likely to be immense"). For Harcourt and Meares, "[t]he central impulse at the heart of this Article is . . . to distribute more evenly the costs of policing throughout society." *Id.* at 877.

[53] *Id.* at 873–74 (noting a "value of evenhandedness at the heart of the Fourth Amendment"). Harcourt and Meares are not alone in insisting that the Fourth

Discrimination in law enforcement is, of course, not merely a normative possibility but a positive reality. Courts acknowledge that race and ethnicity are "routinely and improperly used as a proxy for criminality."[54] Harcourt and Meares offer studies from New York City, Los Angeles, Arizona, Illinois, and several other locations wherein minorities were searched more frequently than whites but had lower hit rates.[55] Myriad other studies of patrol-based stops show similar results.[56] Such discrimination is, in some sense, enabled by legal doctrine. As established in *Whren v. United States*, courts look only to the adequacy of an officer's articulated reasons for conducting a search or seizure and not to his underlying motivations.[57] As long as an officer cites sufficient legitimate factors and no illegitimate ones, a search or seizure may be found reasonable even when tinged with racial, ethnic, gender, or other bias.[58]

Where discrimination is widespread, individuals with certain traits are searched and apprehended in numbers disproportionate to their share of total offending. Disparate enforcement can change public perceptions of the targeted group,[59] limiting employment opportunities,[60] discouraging civic participation,[61] and causing

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Amendment inheres equality. *See* I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 37 (2011) (arguing that the Fourteenth Amendment "grafted a requirement of equal citizenship onto the Constitution as a whole, including the Fourth Amendment"). Prominent authorities, however, disagree. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 671 (1995) (O'Connor, J., dissenting) ("Protection of privacy, not evenhandedness, . . . is . . . the touchstone of the Fourth Amendment.").

54 United States v. Montero-Camargo, 208 F.3d 1122, 1135 n.24 (9th Cir. 2000) (citing studies).

55 Harcourt & Meares, *supra* note 10, at 854–59.

56 *See, e.g.*, Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 431–32 (1997) (studying traffic stops); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 957 (1999) (studying stop-and-frisks).

57 517 U.S. 806, 813–14 (1996) ("Subjective intentions play no role in ordinary probable-cause Fourth Amendment analysis.").

58 *See id.* (noting that the Equal Protection Clause, not the Fourth Amendment, protects against selective enforcement based on race).

59 *See* BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 220–21 (2006) (describing the stigmatizing effect of profiling).

60 William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 MO. L. REV. 771, 797 (1993) ("[W]idespread public feeling that 'where there's smoke, there's fire' often leaves a cloud of suspicion hanging over an arrestee even if no conviction follows. The result will often be lost employment opportunities . . . .").

61 Alexander A. Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. 1461, 1488–89 (2010) (noting that the government's focus on Middle-Eastern Muslims after 9/11 has caused some individuals to cease participation in political activity).

dignitary harm by suggesting that certain types of people are entitled to lesser constitutional protection.[62] Targeting is most harmful when it occurs at the intersection of race and geography. Not only are these two traits easily identifiable and thus more susceptible to stigmatization, they often correlate. Because ethnic minorities frequently group together to form ethnically concentrated residential communities, the impact of targeting on these groups is intensified and severe.[63]

Discrimination is not simply unfair—it conflicts with the "even-handedness at the heart of the Fourth Amendment."[64] The authors refer to Sherry F. Colb's theory that the Fourth Amendment protects two distinct rights: the right to privacy and the right not to be targeted or singled out.[65] An innocent person searched without requisite suspicion suffers a privacy harm, but if the innocent person is singled out for the search without a legitimate basis, he suffers an additional targeting harm.[66] A reasonableness analysis should ensure that the apprehended population represents an accurate snapshot of the offending population not only because disparate enforcement harms communities, but also because it violates constitutionally protected rights.[67]

Illegitimate targeting thus debilitates communities and threatens "the legitimacy of our criminal justice system" as a whole.[68] Randomization will not eliminate all of Colb's privacy harms; in fact, many will be searched without requisite suspicion as the government tests new checkpoints. But it does promise to protect against the targeting harms and their concomitant community burdens.

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[62] *See* United States v. Montero-Camargo, 208 F.3d 1122, 1135 (9th Cir. 2000) ("Stops based on race or ethnic appearance . . . send a clear message that those who are not white enjoy a lesser degree of constitutional protection—that they are in effect assumed to be potential criminals first and individuals second."); *see also id*. at 1135 n.23 (citing reports that race-based stops engender feelings of resentment and hostility).

[63] *See* Harcourt & Meares, *supra* note 10, at 854 ("[T]he costs [of law enforcement] are even higher when the aggregation occurs at the intersection of demography and geography.").

[64] *Id.* at 874; *see also supra* note 53.

[65] *See* Sherry F. Colb, *Innocence, Privacy, and Targeting in the Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1464 (1996) (identifying privacy and targeting harms as distinct Fourth Amendment concerns).

[66] It is important to note that Harcourt and Meares are aligned with Colb in their belief that the Fourth Amendment protects only against "illegitimate" targeting. *See* Harcourt & Meares, *supra* note 10, at 815–16 (stating that randomization avoids selection based on "illigitimate" criteria and therefore "promotes the values at the heart of the Fourth Amendment"). Where a profile is rationally related to risk of offending, they "do not care very much about the targeting costs." *Id.* at 852.

[67] *Id.* at 816 & n.16; *see also* HARCOURT, *supra* note 59, at 237 (When a higher-offending population is targeted to the exclusion of other populations, the searches "violate a core intuition of just punishment . . .").

[68] Harcourt & Meares, *supra* note 10, at 852.

C. Immigration: A Context Primed for Reform

The remainder of this Part will begin to explore the possibility of randomizing immigration enforcement.[69] Immigration offers a promising context to evaluate Harcourt and Meares's model for a number of reasons. First, although the authors position their model as a wide-ranging solution to all proactive policing,[70] they explicitly identify border patrol checkpoints as a context for implementation.[71] Second, the concerns about racial profiling that motivate a move to randomization speak to existent criticisms of immigration enforcement. Finally, as Parts II and III will reveal, the problems that randomizing immigration enforcement encounters, though major, are instructive and shed light on the viability of randomization writ large.

1. Fourth Amendment Standards in Immigration

It should be noted at the outset that the Fourth Amendment applies to noncitizens.[72] There are, however, some limitations. The Court's plurality opinion in *United States v. Verdugo-Urquidez* suggested the Fourth Amendment does not apply to most noncitizens searched abroad and may not apply to noncitizens within the territory who lack "substantial connections" to the United States.[73] Furthermore, since immigration hearings are civil proceedings, the exclusionary rule does not prevent the government from using unlawfully obtained evidence of a noncitizen's unauthorized status to deport him, except in very limited circumstances.[74] These limitations, however, have little bearing on the proper analysis of immigration checkpoints: Any diminished constitutional status that noncitizens may possess

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[69] I intend to use the term "immigration enforcement" to refer primarily to prevention and removal of unlawful entrants, as this task has historically been the government's top enforcement priority. *See* U.S. Customs and Border Protection, *Border Patrol Overview*, CBP.GOV (Jan. 5, 2011), http://www.cbp.gov/xp/cgov/border_security/border_patrol/border_patrol_ohs/overview.xml (naming detection and prevention of illegal entry as its "primary mission"); U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE STRATEGIC PLAN FY 2010–2014, at 5–7, *available at* http://www.ice.gov/doclib/news/library/reports/strategic-plan/strategic-plan-2010.pdf (claiming removal of aliens seeking illegal entry as a primary goal).

[70] *Id.* at 851–52.

[71] *Id.* at 838–40, 867.

[72] Karen Nelson Moore, *Madison Lecture: Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 834 (2013).

[73] *Id.* at 835–36 (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990)). Only four Justices joined the portion of the opinion discussing the "substantial connection" requirement, 494 U.S. at 271, leaving the influence of this standard unclear. Lower courts have been divided in their interpretation of the opinion. Moore, *supra* note 72, at 837.

[74] *See infra* note 169.

should not alter decisions about an enforcement regime that will undoubtedly affect citizens alike.[75]

Nevertheless, although the Fourth Amendment applies in immigration cases, courts have exhibited a willingness to depart from the traditional requirements of reasonable suspicion and probable cause. Within 100 miles of the border, U.S. Customs and Border Protection (CBP), a division of the Department of Homeland Security (DHS), may stop cars at fixed checkpoints along the road without any suspicion,[76] and officers may refer individuals to secondary inspection on the basis of criteria that would not satisfy a reasonable suspicion requirement.[77] U.S. Immigration and Customs Enforcement (ICE), the DHS agency responsible for enforcement in the interior, conducts many investigations via suspicionless, purportedly consent-based questioning that looks very much like a seizure.[78] At least one court has dispensed with individualized suspicion in favor of group-based suspicion in issuing a workplace raid warrant.[79] In short, Fourth Amendment standards in the immigration enforcement context are non-traditional, ill-defined in places, and seem to welcome overhaul.

2. Racial Profiling Run Wild

The enormous discretion immigration officers are afforded often results in racial profiling.[80] During the famous Swift & Company raids, in which hundreds of federal agents dressed in riot gear arrested over 1200 workers in meatpacking plants across the country, witnesses reported that agents singled-out individuals who appeared to be

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[75] In holding open a Fourth Amendment challenge to Arizona's immigration laws, the Court in *Arizona v. United States* nowhere indicated the law would be tested against a lower constitutional standard. 132 S. Ct. 2492, 2509 (2012).

[76] 8 U.S.C. § 1357(a)(3) (2012) (permitting search of vehicles for illegal entrants within a "reasonable distance" of any border); 8 C.F.R. § 287.1(a) (2001) (defining "reasonable distance" as within "100 air miles" of any border).

[77] *See* United States v. Martinez-Fuerte, 428 U.S. 543, 562–63 (1976) (holding that no individualized suspicion is necessary for an initial checkpoint stop or referral to secondary inspection).

[78] *See, e.g.*, I.N.S. v. Delgado, 466 U.S. 210, 212, 218 (1984) (finding the fact that INS agents stood blocking the exits of a factory while other agents questioned workers did not indicate that workers were not free to leave and that questioning was therefore consensual and did not trigger Fourth Amendment protection).

[79] *See* Blackie's House of Beef, Inc. v. Castillo, 659 F.2d 1211, 1224 (D.C. Cir. 1981) (holding that probable cause in the criminal sense was not required for an INS workplace search warrant). *Contra* Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson, 643 F. Supp. 884, 890–91 (N.D. Cal. 1986) (requiring traditional probable cause).

[80] Eighty-one percent of the unauthorized immigrant population is from Mexico or Latin America. *Infra* text accompanying note 132. As such, this Note focuses on racial profiling based on Hispanic appearance, while recognizing that other minority groups are similarly subject to racial and ethnic discrimination and profiling.

Hispanic or of other minority ethnicity.[81] Reports abound of ICE officials entering homes in Hispanic areas without probable cause.[82] Local law enforcement officers with authority to make immigration arrests pursuant to formal agreements with the federal government[83] have been accused in several jurisdictions of targeting Hispanics.[84] As one commentator states, racial profiling in immigration law is so prevalent that "no one familiar with the realities of immigration enforcement would suggest the contrary."[85]

The observation that racial profiling is common practice is not to suggest that the government encourages immigration officers to do so. Agencies have attempted to guide officer discretion through stipulated factors that inform individualized suspicion. ICE has published "indicators" for certified local officers to consider in making immigration arrests, including proximity to the border, number of occupants in a vehicle, disheveled manner of dress, and English-speaking ability.[86]

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[81] NAT'L COMM'N ON ICE MISCONDUCT & VIOLATIONS OF 4TH AMENDMENT RIGHTS, RAIDS ON WORKERS: DESTROYING OUR RIGHTS 18 [hereinafter ICE MISCONDUCT], *available at* http://www.icemisconduct.org/docUploads/UFCW%20ICE%20rpt%20FINAL%20150B_061809_130632.pdf?CFID=7542395&CFTOKEN=51211272. *See also Problems with ICE Interrogation, Detention, and Removal Procedures: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., and Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. 36–37 (2008) (testimony of Mr. Michael Graves, Member, United Food and Commercial Workers Union) (describing the intrusive questioning and search of three Hispanic Swift & Company workers by ICE agents).

[82] *See* ICE MISCONDUCT, *supra* note 81, at 47–49 (noting that ICE agents generally only carry "warrants of removal," which are administrative warrants that do not authorize the holder's entry into a home under the Fourth Amendment); Stephanie Francis Ward, *Illegal Aliens on I.C.E.: Tougher Immigration Enforcement Tactics Spur Challenges*, A.B.A. J., June 2008, at 44, 44–45 ("[W]ithin the last year, ICE has been sued at least four times . . . for allegedly entering homes without a warrant in violation of the Fourth Amendment."); *see also* Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1615 (2010) (listing numerous allegations of ICE misconduct).

[83] *See* 8 U.S.C. § 1357(g) (2012) (authorizing the Attorney General to enter into such agreements).

[84] *See*, *e.g.*, Ortega Melendres v. Arpaio, 598 F. Supp. 2d 1025 (D. Ariz. 2009) (describing alleged racial profiling of Hispanic driver by deputies in the Maricopa County Sherriff's Office, which later had its 287(g) authorization revoked); Comm. for Immigrant Rights v. Cnty. of Sonoma, 644 F. Supp. 2d 1177, 1204 (N.D. Cal. 2009) (describing alleged policy of "relying on race to stop, detain and question persons who appear to be Latino to probe their immigration status without reasonable suspicion or probable cause"); ICE MISCONDUCT, *supra* note 81, at 51 (describing testimony from hearings in several jurisdictions that recounts targeting of Hispanics by 287(g) law enforcement officers).

[85] Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 707 (2000) (quoting ELIZABETH HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS 100 (1985)).

[86] *See* Defendants' Response to Plaintiffs' Statement of Facts in Support of Plaintiffs' Motion for Partial Summary Judgment and Controverting Statement of Facts, Ortega-Melendres v. Arpaio, 836 F. Supp. 2d 959 (D. Ariz. 2011), No. CV–07–2513–PHX–GMS,

Arizona law enforcement officers are given a similar non-exclusive list of considerations when formulating reasonable suspicion of unlawful presence.[87] The Supreme Court itself effectively created a profile in *Brignoni-Ponce* by stipulating a laundry list of factors that a Border Patrol officer may consider in making stops along the border.[88]

The failure of such profiles to prevent racial profiling is manifest. Most obviously, both the ICE indicators and the *Brignoni-Ponce* factors *permit* consideration of race or ethnicity so long as those traits are not relied on exclusively.[89] Parts II.B and II.C of this Note include a broader discussion of race and ethnicity in the immigration context and consider whether, if Hispanic appearance is statistically correlated with unauthorized status, its use by law enforcement amounts to the kind of "illegitimate" profiling the authors seek to avoid. This normative debate notwithstanding, scholars note that even a "statistically legitimate 'profile that includes race'" is likely to become discriminatory in effect.[90] Where one factor is more salient than others—as is the case with race, gender, or ethnicity—that factor tends to acquire disproportionate weight.[91] Officers acting on the *Brignoni-Ponce* and ICE factors will unduly rely on Hispanic appearance, creating a vastly

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at *10 [hereinafter *Ortega-Melendres* Defendants' Response] (listing approved indicators). Notable indicators include:

> (a) an overcrowded vehicle; (b) none of the occupants have luggage or only small items of property easily transported; (c) the people in the vehicle are unrelated or do not know each other; (d) whether the people in the vehicle are dressed in a disheveled manner; (e) pungent body odor of the people in the vehicle; (f) the vehicle is located in a known human smuggling corridor.

Id. *See also* J.J. Hensley, *Arpaio Uses ICE Manual to Back Enforcement Tactics*, ARIZ. REPUBLIC, Oct. 23, 2009, http://www.azcentral.com/arizonarepublic/local/articles/2009/10/23/20091023mcsopolicy1023.html (reporting that an ICE manual trains authorities to interrogate suspected unlawful immigrants based on "a series of identifiable facts including language, appearance and demeanor").

87 *See* ARIZONA PEACE OFFICER STANDARDS AND TRAINING BOARD (AZPOST), LAW ENFORCEMENT TRAINING ON IMMIGRATION LAWS—2010: TRAINING PROGRAM OUTLINE 2, *available at* http://www.azpost.state.az.us/bulletins/1070_Outline.pdf (noting that training will cover factors used to develop reasonable suspicion that a person is unlawfully present).

88 United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975) (including among the factors "proximity to the border," "usual patterns of traffic" in the area, officer's previous experience with illegal traffic, information about illegal crossings in the area, the "driver's behavior," various enumerated aspects of the vehicle itself, and whether the driver has "the characteristic appearance of persons who live in Mexico").

89 *Id.* at 886–87 (deeming "Mexican appearance a relevant factor"); *see also* Melendres v. Arpaio, No. PHX-CV-07-02513-GMS, 2013 WL 2297173, at *74 (D. Ariz. May 24, 2013) (noting that all Maricopa County Sheriff's deputies testified to being taught in ICE training that race, among other factors, is an indicator of unlawful presence). The Ninth Circuit has since determined that use of race or ethnicity is no longer permissible. United States v. Montero-Camargo, 208 F.3d 1122, 1132–35 (9th Cir. 2000).

90 SCHAUER, *supra* note 38, at 196.

91 *Id.* at 187.

overinclusive profile that subjects masses of U.S. citizens and lawful residents to unwarranted investigation.[92]

Even if Hispanic appearance was not an approved factor in officially sanctioned profiles, its exclusion would not prevent officers from considering it. Officers at Chicago's O'Hare Airport employing a drug courier profile, which did not include race or ethnicity as a factor, disproportionately stopped African-American women and subjected them to humiliating body-cavity searches.[93] Unfettered bigotry is not the only explanation for racial profiling. An officer's own experience may lead him to believe race and ethnicity are legitimate indicators. Unofficial norms may develop within agencies as officers share information and develop a profile of "the usual suspects."[94] Finally, officers may discriminate unwittingly through what one scholar describes as "the unconscious failure to extend to a minority the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one's own group."[95] A wealth of literature suggests the danger of implicit bias is real and prevalent.[96]

3. Acute Community Burdens

The harm that befalls communities as a result of the current individualized suspicion model and the discrimination it engenders is readily apparent in the immigration context. Hispanics have raised

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[92] *See* Melendres v. Arpaio, No. PHX-CV-07-02513-GMS, 2013 WL 2297173, at *6–7 & n.4 (D. Ariz. May 24, 2013) (noting that while 94% of unauthorized aliens in Maricopa County are Hispanic, over 31% of county residents are Hispanic or Latino, and the "considerable majority" of them—probably somewhere between 73% and 81%—are lawfully present); Johnson, *supra* note 85, at 707–11 (noting that as Hispanics make up an ever-growing percentage of the population, race-based profiling becomes increasingly overinclusive).

[93] *See* SCHAUER, *supra* note 38, at 195–96 (suggesting overuse of race and ethnicity implies these factors ought to be omitted from a profile even if relevant).

[94] *Id.* at 193.

[95] Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7–8 (1976); *see also* Hope Lewis, *Human Rights Implications of* Arizona v. United States, SCOTUSBLOG (July 14, 2011, 12:48 PM), http://www.scotusblog.com/2011/07/human-rights-implications-of-arizona-v-united-states/ ("[E]ven well-intentioned officers may . . . rely on subjective beliefs and stereotypes.").

[96] *See generally, e.g.*, Alex Geisinger, *Rethinking Profiling: A Cognitive Model of Bias and Its Legal Implications*, 86 OR. L. REV. 657, 658 (2007) (arguing that racial profiling is the result of an "inescapable," unconscious process); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006) (surveying psychological literature showing that unconscious processes play a significant role in discriminatory acts); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007) (arguing that both judges and jurors unconciously misremember the facts of cases in racially biased ways).

their voices in court,[97] in Congress,[98] in administrative complaints,[99] and in the media[100] to make known the dignitary harms they suffer. Concentrated enforcement efforts can tear at the fabric of communities and cause divisiveness between minority and non-minority residents.[101] Hispanic children suffer scrutiny and stigmatization in schools[102] and develop fear of law enforcement.[103] The economic toll of disproportionate enforcement is heightened in the immigration context because deportation, not just jail time, is at stake. The impact on Hispanic neighborhoods can be severe: stores abandoned, service jobs unfilled, communities decimated.[104] Put simply, immigration enforcement presents the precise problems randomization purports to solve.

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[97] *See, e.g.*, First Amended Complaint ¶ 143, Melendres v. Arpaio, No. PHX-CV-07-02513-GMS, 2013 WL 2297173 (D. Ariz. May 24, 2013), 2008 WL 4195040 (stating that racially motivated searches and seizures without reasonable suspicion inflicted "public humiliation and additional harms" on plaintiffs).

[98] *See, e.g.*, *Problems with ICE Interrogation, Detention, and Removal Procedures: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., and Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. 36–38 (2008) (testimony of Michael Graves, Member, United Food and Commercial Workers Union) (describing degrading treatment and prolonged detention of slaughterhouse workers by ICE agents).

[99] *See, e.g.*, Letter from ACLU affiliates to Tamara Kessler, Acting Officer for Civil Rights and Civil Liberties, Dep't of Homeland Security, and Charles K. Edwards, Acting Inspector Gen., Dep't of Homeland Security (May 9, 2012), *available at* http://www.acluaz.org/sites/default/files/documents/ACLU%202012%20CBP%20Abuse%20Complaint.pdf (expressing concern about excessive force, due process violations, and prolonged detentions at the border).

[100] *See, e.g.*, Mexican American Legal Defense and Educational Fund, News Release: MALDEF Condemns Intimidation of Latinos in Utah (July 14, 2010), http://www.maldef.org/news/releases/maldef_condemns_intimidation_07142010/index.html (describing the dehumanizing effect of an anonymous group's compilation of and dissemination to law enforcement a list of Utah residents with Hispanic surnames); *see also* Johnson, *supra* note 85, at 723 ("Race profiling singles Latinos out as a group for immigration inquiries and reinforces their suspect and subordinated status in the United States.").

[101] *See* ICE MISCONDUCT, *supra* note 81, at 28 (citing testimony that an ICE raid destroyed the progress of one community towards integration and tolerance, leaving discrimination in its wake).

[102] For example, in an email to Arizona State Senator Russell Pearce, a substitute teacher attested that "most of the Hispanic students do not want to be educated but rather be gang members and gangsters. They hate America and are determined to reclaim this area for Mexico." Email to Senator Russell Pearce (Mar. 15, 2011), Exhibit E-24 to the Declaration of Daniel Pochoda, Valle Del Sol v. Whiting, No. CV-10-01061-PHX-SRB (D. Ariz. 2012), *available at* http://www.azcentral.com/kpnx/pdf/Pochada-pearce-emails.pdf. The teacher noted that she instructed the students not to speak Spanish to each other. She implored Senator Pearce to "remove the illegals out of our schools." *Id.*

[103] *See, e.g.*, ICE MISCONDUCT, *supra* note 81, at 25 (recounting testimony of the daughter of a worker arrested in the Swift raids: "Many kids are scared of the boogieman, but [my siblings are] afraid of ICE." (alteration in original)).

[104] *See id.* at 31 (noting that years after ICE raids "[s]mall towns remain economically devastated—small businesses and restaurants abandoned, service jobs gone").

II
Pooling Problems: A Return to the Usual Suspects

The first step of the Harcourt-Meares model is determining the pool of individuals to stop. The time- and location-based method the authors propose seems easy. The pool is simply the people passing through a checkpoint. But a deeper look suggests that this approach—and the plausible alternative of pooling by traits and behaviors—will eventually converge on Hispanic populations and populations near the Southern border (that is, states on the United States-Mexico border or in the Deep South).

A. Location-Based Pooling and Convergence on the Border

Harcourt and Meares require the government to place checkpoints in demographically diverse locations to ensure representative sampling of the population.[105] Since immigration enforcement policy is set at the national level, the government would have to place checkpoints across the nation, or at least throughout the 100-mile border region of CBP's jurisdiction.[106] Such a setup would require a sea change from the current strategy. All but one of CBP's fixed checkpoints and the bulk of its temporary checkpoints and roving patrol officers are currently located along the Southern border.[107] Under Harcourt and Meares's model, checkpoints and roving patrol officers would be scattered up and down the coasts and near the U.S.-Canada border, and in the interior, ICE raids would have to target equally blue-collar factories and white-collar offices.[108]

While Harcourt and Meares might fairly expect local law enforcement agencies to diversify the neighborhoods they patrol for stop-and-frisks, it is hard to imagine that the government would actually scatter immigration checkpoints throughout the country. First, enforcement efforts may encounter strong opposition where they present an

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[105] Harcourt & Meares, *supra* note 10, at 866–67, 871.

[106] *See supra* note 76 and accompanying text (describing the authorization for CBP's power near the border).

[107] U.S. Gov't Accountability Office, Border Patrol: Available Data on Interior Checkpoints Suggest Differences in Sector Performance 2 (July 2005), *available at* http://www.gao.gov/new.items/d05435.pdf.

[108] Although ICE enforcement raids constitutionally require warrants (and are not technically the patrol-based Reasonableness Clause type of policing Harcourt and Meares aim to redress), raids are in reality often conducted without warrants or probable cause and involve the abuses of police discretion that Harcourt and Meares seek to eliminate. *See* ICE Misconduct, *supra* note 81, at 46–49 (describing unlawful workplace and home entry raids).

inconvenience to affluent, politically powerful communities.[109] Moreover, because ethnicity is highly correlated with immigration status, certain communities—Bloomfield Hills, Michigan, for example, with its 87% white and 1.5% Hispanic or Latino population[110]—presumably have very small undocumented populations.[111] A checkpoint in Bloomfield Hills would produce a very small hit rate, likely a tiny fraction of a percent, which would be insufficient to meet even a very forgiving constitutional minimum. Officers would effectively be handing out compensation checks every time they made a stop,[112] and such a checkpoint would not last long, because ineffective checkpoints must be shut down.[113]

Thus, even if the government initially established checkpoints across the country, such a system would never endure. Resources from communities like Bloomfield Hills would be redeployed to more successful areas—mostly those in the Southern border region. The twelve states with the most unauthorized immigrants account for seventy-seven percent of the total unauthorized population.[114] Within those top twelve states, states along the Southern border account for sixty-eight percent of the unauthorized population.[115] Checkpoints

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109 The authors recognize that the average person stopped under their regime has superior political capital to those stopped under discriminatory systems. They suggest this political power will result in more efficient, respectful enforcement action. *See* Harcourt & Meares, *supra* note 10, at 859 ("[T]he more likely it is that the typical person who encounters the police in a checkpoint reflects the median voter in a given community, the more likely it is that police will be attentive to the demands of that voter when shaping and developing policy."). But it is likely that political capital will be used to resist inconvenient checkpoint placement.

110 U.S. CENSUS BUREAU, U.S. CENSUS 2010, *available at* http://factfinder2.census.gov/ (search for "Bloomfield Hills city, Michigan" and select "Population, Age, Sex, Race, Households and Housing . . ." under "2010 Census").

111 *See infra* note 134 and accompanying text (noting that eighty-one percent of unauthorized immigrants are from Mexico and Latin America, a large percentage of whom presumably look Hispanic, as opposed to white/non-Hispanic).

112 *See* Harcourt & Meares, *supra* note 10, at 817 (stating that under their regime, individuals found to have been stopped without requisite suspicion should receive monetary compensation).

113 *See id.* at 851 ("Critically, checkpoints are constitutional only when . . . the resulting hit rate meets a certain level of suspicion."). Note that where more affluent neighborhoods have lower rates of offending and are more likely to be compensated, the Harcourt-Meares model raises serious distributive concerns. *See id.* at 869 (acknowledging this concern).

114 PEW HISPANIC CENTER, UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, at 15 (Feb. 1, 2011), *available at* http://www.pewhispanic.org/files/reports/133.pdf [hereinafter PEW HISPANIC CENTER, UNAUTHORIZED IMMIGRANT POPULATION].

115 *Id.* at 14 (listing the estimated populations of unauthorized immigrants in each of the states). States on the Southern Border have an estimated unauthorized population of approximately 5.85 million, while the total estimated population of unauthorized immigrants in the top twelve states is 8.59 million. *See id.*

would not converge exclusively on the border—New York and New Jersey also have large unauthorized populations,[116] and some cities in non-border states may have a sufficient unauthorized population for a checkpoint to endure. But the point remains that the high concentration of unauthorized immigrants in limited geographies raises the probability that enforcement will eventually focus on these communities.

In fact, these communities would be burdened in excess of their share of offending. The creation of a threshold hit rate immunizes certain geographies from enforcement at the expense of others. To take a simplified example, assume the unauthorized population is uniform across a given state. If the Supreme Court established a constitutional minimum hit rate of five percent,[117] checkpoints could operate only in the five states—Arizona, California, Nevada, New Jersey, and Texas—where unauthorized persons represent at least five percent of the total population.[118] These states would shoulder one hundred percent of the enforcement burden despite housing less than half of the country's total unauthorized population. Moreover, because these five states also have among the highest percent Hispanic population, checkpoint concentration would implicate race as well as geography.[119]

Relaxing the assumption of even distribution of unauthorized persons throughout each state suggests the concentration-immunization trend will occur city-by-city rather than state-by-state. The takeaway, however, is that Harcourt and Meares's method fails to achieve the touchstone result that the apprehended population

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116 *Id.*

117 A five percent hit rate is purely hypothetical. *See supra* note 42 (discussing the difficulty of anticipating what hit rate the Supreme Court might require). A higher threshold would increase the convergence effect discussed in this Subpart, while a lower threshold would lessen the effect. Lowering the threshold too much, however, would effectively abandon the concept of suspicion altogether, which the authors explicitly state they do not intend to do. *See* Harcourt & Meares, *supra* note 10, at 810–11 (noting that "random" should not be conflated with "suspicionless"); *supra* notes 42–46 and accompanying text (discussing the difficulty of determining an appropriate hit rate).

118 PEW HISPANIC CENTER, UNAUTHORIZED IMMIGRANT POPULATION, *supra* note 114, at 15.

119 PEW HISPANIC CENTER, STATISTICAL PORTRAIT OF HISPANICS IN THE UNITED STATES, 2010 tbl.13 (Feb. 11, 2012), *available at* http://www.pewhispanic.org/2012/02/21/statistical-portrait-of-hispanics-in-the-united-states-2010/#14; *see also* United States v. Montero-Camargo, 208 F.3d 1122, 1133 n.18 (9th Cir. 2000) (noting that in four border counties in the Rio Grande valley, Hispanics accounted for eighty-eight percent of the one million legal residents (citing Jim Yardley, *Some Texans Say Border Patrol Singles Out Too Many Blameless Hispanics*, N.Y. TIMES, Jan. 26, 2000, http://www.nytimes.com/2000/01/26/us/some-texans-say-border-patrol-singles-out-too-many-blameless-hispanics.html?pagewanted=all&src=pm)).

mirrors the offending population. Checkpoints will neither even the burden across communities nor align immigration enforcement with the equitable principles of the Fourth Amendment.

One final critique of pooling by location is that it creates hotspots that both unauthorized immigrants and lawful residents will seek to avoid. Once it becomes apparent that checkpoints operate only in historically successful locations, unauthorized immigrants will move out of those areas and fewer violators will be caught.[120] Even citizens and lawfully present immigrants may wish to move out of checkpoint-laden areas to escape inconvenience, thereby exacerbating the economic stress and stigmatization.[121]

These shortcomings would be largely resolved by requiring geographies to be policed according to their hit rates. Rather than the authors' all-or-nothing approach that allows for no enforcement in areas that do not meet the minimum hit rate and theoretically limitless enforcement in areas that do, areas with higher rates of offending could be made to bear a larger enforcement burden than areas with lower rates. There might be ten checkpoints in Tulsa and forty in Dallas, but no area would be immunized at the expense of others unless it truly had no incidence of offending.[122] This modification, however, would dissolve the threshold suspicion requirement. Since the authors argue that minimum suspicion is essential to protect the privacy interests endangered by suspicionless search regimes, elimination of a threshold is fundamentally at odds with their proposal.[123]

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[120] One might argue against this result by pointing out that the current concentration of CBP and ICE officials at the border has not resulted in a major change in immigration patterns. *See supra* note 107 and accompanying text (noting concentration of CBP checkpoints). Certainly there are factors, such as a desire to be close to family, that might dissuade an unauthorized immigrant from moving away from the Southern border. But the incentives to move are greater under the Harcourt-Meares model. Whereas ICE and CBP can now theoretically move their operations wherever they want, under the authors' plan an immigrant who moves to an area with low unauthorized population density is quite literally out of the reach of the law.

[121] *See* AMNESTY INTERNATIONAL, IN HOSTILE TERRAIN: HUMAN RIGHTS VIOLATIONS IN IMMIGRATION ENFORCEMENT IN THE US SOUTHWEST 31 (2012) (describing the frustration of a citizen of the Tohono O'odham nation who must cross through immigration checkpoints regularly to access groceries and supplies).

[122] A plausible ratio might be one that equalizes the burden placed on *non-offending* populations. If ninety-nine of every one hundred people in Neighborhood A are lawfully present and only ninety out of every one hundred in Neighborhood B are lawfully present, the enforcement burden, or search rate, is lowered in Neighborhood A such that the product of search rate and probability of lawful presence are uniform across neighborhoods. In other words, 99/100 * (search rate A) = 90/100 * (search rate B), so that (search rate A) = 10/11 (search rate B). Neighborhood B is searched at only a *slightly* higher rate than Neighborhood A, despite having nine times the rate of offending.

[123] Harcourt & Meares, *supra* note 10, at 811.

B. A Traits-Based Alternative and Convergence on Ethnicity

There is a possible alternative to Harcourt and Meares's setup that would preserve the essentials of their proposal as a system of randomized stops amongst suspicion-sufficient groups of people. Because suspicion inheres from shared "traits, conditions, or behaviors,"[124] individuals might be pooled based on such characteristics. The authors even suggest that linking traits and behaviors to risk of offending is essentially what law enforcement does already, albeit badly. For instance, many New York Police Department stops are predicated on a simple behavior—flight from the scene of a crime.[125] Only one in every twenty-six stops results in an arrest, suggesting that flight is not a good indicator of suspicion.[126] The crux, however, is that suspicion can be determined algorithmically by looking at traits and behaviors. Law enforcement just has to find the right ones.

The authors acknowledge the possibility of traits-based pooling.[127] Although they express concern with associating certain traits with risk of offending,[128] it is worth investigating this approach as a potential solution to the failures of the location-based method, particularly because in the immigration context officials already employ traits-based profiles to identify potential offenders.[129] A randomization scheme might thus start with the *Brignoni-Ponce* factors or ICE indicators—for example, driving in an overcrowded vehicle, disheveled manner of dress, proximity to the border—and determine whether these characteristics, or combinations of them, produce an adequate ratio of stops to arrests.[130] Such an approach would make a more exact science of the present approach; it would prove the statistical relevance of certain traits, mitigating the concern that profiling is "illegitimate" or discriminatory. Unlike current

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[124] *Id.* at 832 (noting that what we care about is the level of suspicion that attaches to groups sharing "traits, conditions, or behaviors").

[125] *See id.* at 862–65 (citing a fifteen-month study conducted by the New York Office of the Attorney General, which found that 289 out of 383 stops were predicated on the person's flight from a crime scene).

[126] *Id.* at 863.

[127] *Id.* at 862 ("[I]t is in fact possible to measure the level of suspicion associated with group traits and to assess whether that level of suspicion satisfies a constitutional standard . . . .").

[128] *See id.* at 870 (rejecting randomization by group trait because "the stigmatizing harm of being publically identified as a potential wrongdoer by a law enforcer is often a distinct conjunction of geography and group trait").

[129] *See, e.g.*, United States v. Neufeld-Neufeld, 338 F.3d 374 (5th Cir. 2003) (relying on the *Brignoni-Ponce* factors and finding suspicion sufficient where the defendant was found near the border, near a known drug-smuggling corridor, and exhibited evasive behavior towards Border Patrol officers).

[130] *See supra* notes 86–89 (explaining the *Brignoni-Ponce* factors).

practice, officers would conduct stops randomly, eliminating the risk that officers might afford certain factors disproportionate weight.

But the traits-based approach has a critical downside: It theoretically permits pooling based on any factor positively correlated with offending. In the immigration context, race and ethnicity might legitimately be used as a proxy for unauthorized status—as mentioned earlier, the *Brignoni-Ponce* and ICE profiles include Hispanic appearance.[131] According to the 2011 Pew Hispanic Center report, fifty-eight percent of the unauthorized immigration population is from Mexico, and another twenty-three percent is from other Latin American countries.[132] Presuming that many (though admittedly not all) unauthorized immigrants from these countries look Hispanic, the government could include Hispanic appearance in the profile, layering on other characteristics if Hispanic appearance alone does not produce a sufficient hit rate.

Use of race and ethnicity might be precluded for policy reasons, but the results would probably not be much affected by their exclusion. Because of the close correlation between ethnicity and unauthorized status, other factors that suggest unauthorized status (such as poor English ability and proximity to the border) will also be linked with ethnicity.[133] Removing Hispanic appearance from the profile may protect against some of the dignitary harms of explicit racial profiling, but the heavy economic toll on certain communities and the problem of evenhandedness remain.

Traits-based pooling, like location-based pooling, results in enforcement burdens that go beyond a population's share of offending. A pool might include, for example, a) Hispanic-looking people b) near the border c) riding in pickup trucks, with the result that Asian-looking people shoulder zero percent of the enforcement burden despite representing eleven percent of the unauthorized population, and Hispanic-looking people bear one-hundred percent of the burden while representing only eighty-one percent of the unauthorized population.[134]

Requiring common characteristics also enables checkpoint-dodging by making explicit the conditions and behaviors one must

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[131] *See supra* note 89 and accompanying text.

[132] PEW HISPANIC CENTER, UNAUTHORIZED IMMIGRANT POPULATION, *supra* note 114, at 11.

[133] *See* HARCOURT, *supra* note 59, at 221 ("Even when law enforcement uses an innocuous trait, profiling tends derivatively, rather than directly, to create stigma along unintended dimensions.").

[134] PEW HISPANIC CENTER, UNAUTHORIZED IMMIGRANT POPULATION, *supra* note 114, at 11 (explaining that immigrants from Mexico and other Latin American countries represent eighty-one percent of the unauthorized immigrant population).

conceal or avoid to escape detection. Although some traits, such as Hispanic appearance or poor English-speaking ability, are not easily obscured, targeted enforcement may result in substitution effects that undercut efficiency gains. If immigration enforcement falls heavily on Hispanics, prospective unlawful immigrants of other ethnicities will no longer be deterred, increasing the overall rate of offending.[135]

C. Pooling Lessons: What Immigration Teaches About Pooling More Broadly

Under either the location-based pooling tactic suggested by the authors or the traits-based alternative, a randomized immigration enforcement regime appears to disappoint. This finding begs the question: Is immigration just ill-suited to the model, or will the model fall short in other arenas? The answer is probably both. The example of immigration shows the model to depend on the truth of at least one of two major assumptions, both of which are particularly debunked in immigration: Either rates of offending must be relatively uniform across important demographics such as race, socioeconomic class, and gender, or, if not, it must at least be possible to construct pools that do not implicate innocent people based on these sensitive characteristics.

1. Hit Rate Variance and Demography

If enforcement is to remain evenly distributed, hit rates must be relatively uniform across all types of communities. Indeed, the authors assume that this will happen, noting that "[w]hen we require a certain level of suspicion, it turns out, we have identified a group of individuals . . . of different races, ethnicities, gender, and so on."[136] It may well be that a checkpoint in a predominately white neighborhood would produce the same hit rate for speeding or drug possession as one in a Hispanic or African-American community. But where

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[135] *See* Harcourt & Meares, *supra* note 10, at 872–73 (noting that profiling likely increases the overall rates of targeted crime due to substitution effects); *see also* HARCOURT, *supra* note 59, at 24–26 (explaining that if the profiled group is less responsive than other groups to increased enforcement, targeting this group may not have the desired effect of lowering crime rates). Efficacy of traits-based pooling may be further undermined by civil disobedience in response to the explicit targeting of certain populations. For example, the activist group No Papers, No Fear encourages unauthorized immigrants to engage in civil disobedience to draw attention to the perceived injustice of immigration policy. *See* Daniel González, *3 Arizona Immigration Protesters Arrested*, ARIZ. REPUBLIC, Sept. 5, 2012, http://www.azcentral.com/news/articles/2012/09/04/20120904arizona-immigration-protesters-arrested.html (reporting on the arrest of protesters at the 2012 ccc]Democratic National Convention).

[136] Harcourt & Meares, *supra* note 10, at 815.

incidence of offending varies along ethnic and geographical lines, pooling will converge on these problematic traits.

Narrowing the suspect pool in this manner triggers concerns about Colb's targeting harms.[137] Randomization ensures no individual is singled out for enforcement, but whole communities may suffer collective targeting harms. Perhaps we shouldn't be troubled by pooling that implicates certain traits so long as those traits are statistically correlated with risk of offending.[138] But approval of "accurate" group targeting seems incommensurate with concerns about stigmatization and "rac[ing] crime in a particular way."[139] The consequences of disparate enforcement—diminished social status, economic harms, exclusion from jobs and services—occur regardless of the accuracy of a profile. Even proponents of profiling tend to reject race-based distinctions, finding the efficiency gains insufficient to justify further stigmatization of marginalized groups, particularly where the offense to be avoided is minor.[140] Moreover, the all-or-nothing nature of the minimum hit rate requirement means that communities with concentrated populations of offenders incur an enforcement burden that goes beyond what might be statistically justified by their share of offending.[141] The authors criticize the existing individualized suspicion model as creating a false binary,[142] but because of the minimum hit rate requirement, their model suffers the same defect so long as rates of offending are divergent.

2. *Identification Without Stigmatization*

The "harm" of disparate enforcement is best understood as one that attaches to innocent people. It would be hard to argue against "racing" drug crime if every African American in America were a drug dealer. But that is obviously not the case and it is the vast majority of African Americans who are not drug offenders whom we worry about.[143] This leads to an alternate assumption that might allow Harcourt and Meares's system to work: If the rate of offending is not

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137 *See supra* notes 65–66 and accompanying text (noting Colb's theory that innocent people targeted for searches suffer targeting harms).

138 After all, the authors contend, "[w]hen police get it right, we do not care very much about the targeting costs." Harcourt & Meares, *supra* note 10, at 852.

139 *Id.* at 854.

140 SCHAUER, *supra* note 38, at 189–90; *see also* HARCOURT, *supra* note 59, at 21 (noting that while risk-based profiling has become the norm, "racial profiling may be suspect because of the sensitive issues surrounding race").

141 *Supra* Part II.A.

142 *Supra* notes 34, 37 and accompanying text.

143 *See* United States v. Weaver, 966 F.2d 391, 397 (8th Cir. 1992) (Arnold, C.J., dissenting) (remarking that DEA agent's partial reliance on race in developing reasonable suspicion effectively labels "large groups of citizens as presumptively criminal").

demographically uniform, there must be a way to identify suspects without also implicating many innocent people on the basis of traits susceptible to stigma.

The idea can be expressed in terms of Bayesian analysis: The concern is with false positives.[144] Bayes's theorem teaches that where a condition is rare, most people who test positive for that condition will be misidentified, even where a test is very accurate.[145] The fact that a drug courier profile will successfully identify most drug traffickers is not sufficient to conclude it is a good test. A further and indispensible question is how many other, innocent people will the profile also encompass? Emily Berman eloquently describes this concern in the context of profiling for terrorists in the aftermath of September 11th:

> Many will argue that . . . counterterrorism efforts should focus on those groups or on those who come from countries with majority Muslim, Arab, or South Asian populations. . . . [B]ut in combating this threat we cannot indict the millions of law-abiding people who happen to be part of the communities from which the threat may emanate. . . . [T]he vast majority of Muslims are not terrorists.[146]

In the immigration context, characteristics that many unauthorized immigrants share and may therefore be "good" indicators of offending—ethnicity, proximity to the border, poor English-speaking ability—will generate many false positives when used as a pooling mechanism. There is only a fifteen percent chance that a Hispanic person in California or Texas, the states with the largest unauthorized populations, is also an unauthorized immigrant.[147] And yet, a fifteen

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144 *See generally* Michael O. Finkelstein & William B. Fairley, *A Bayesian Approach to Identification Evidence*, 83 HARV. L. REV. 489 (1970) (discussing the use of Bayesian analysis in determining the probative value of evidence).

145 *See* Richard E. Myers II, *Detector Dogs and Probable Cause*, 14 GEO. MASON L. REV. 1, 15 (illustrating that "[w]ith a pretty good dog, but a largely innocent population," drug-sniffing dogs will correctly alert only sixteen percent of the time).

146 EMILY BERMAN, N.Y.U. SCH. L., BRENNAN CENTER FOR JUSTICE, DOMESTIC INTELLIGENCE: NEW POWERS, NEW RISKS 32 (2011), *available at* http://ssrn.com/abstract=2112175.

147 The probability (P) that someone is unauthorized (U) given that they are Hispanic (H) can be expressed as $P(U/H) = P(H/U)*P(U) / P(H)$. *See* Finkelstein & Fairley, *supra* note 144, at 498–99 (describing the formula for determining "the probability of the joint occurrence of two events"). $P(U)$ is 0.07, the percentage of the population that is unauthorized. $P(H)$ is 0.38, the percentage of the population that is Hispanic. To find $P(H/U)$, I made the very rough generalization that all unauthorized immigrants from Mexico and Latin America and none from other countries look Hispanic and then further simplified the problem by assuming the percentage of unauthorized immigrants who look Hispanic in California is the same as the national average, giving 0.81.

percent hit rate might be well above a Court-imposed constitutional minimum.[148]

Perhaps it is possible in the case of some crimes to identify a set of traits and conditions that do not implicate sensitive characteristics. Overinclusiveness may be of significantly less concern if it does not center on race, ethnicity, or religion.[149] If a sufficient number of unauthorized immigrants owned a white car or carried a briefcase on Tuesdays, law enforcement could construct pools around these characteristics and the concern about stigma would be much diminished. But where the most obvious indicators of offending are ethnicity, class, or other traits that implicate large groups of people based on highly sensitive characteristics (such as presence in ethnically concentrated border communities), randomization that relies on those indicators will fail to solve the problem of stigma.[150]

III
Administration and Compliance Problems

Part II focused on the normative concern that a randomization regime will resurrect the same uneven enforcement and stigmatization that currently plague immigration enforcement. This Part discusses the more practical questions of efficiency, administration, and compliance. Although Harcourt and Meares insist that these issues should not predominate over fairness concerns,[151] reform must, at minimum, be practical if it is to be viable. There would be little point in considering randomization on even a theoretical level if it were impossible to administer, prohibitively costly, or unlikely to be complied with by officers on the ground. While the ensuing analysis surfaces some concerns on each of these points, it is again possible to distill some key standards for success.

A. Efficiency and Administration

The authors contend that a checkpoint system will be more standardized and involve shorter detentions than the current model,

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[148] *See* City of Indianapolis v. Edmond, 531 U.S. 32, 52 n.5 (2000) (Rehnquist, C.J., dissenting) (suggesting that had the Court taken a hit-rate based approach to evaluating the drug-interdiction program at issue, the 4.2% success rate would mitigate in favor of finding it constitutional).

[149] *But see supra* note 133 (noting that even "innocuous" traits tend to be linked to ethnicity).

[150] *Supra* Part II.B.

[151] *See* Harcourt & Meares, *supra* note 10, at 873 (arguing that "[e]fficiency is not the litmus test of constitutional interpretation" and that their proposal should be implemented regardless of efficiency concerns).

making it easier and more efficient to implement.[152] However, the system will not be more efficient if it is significantly less effective. The checkpoint-dodging and substitution concerns discussed in Part II suggest that randomization may not be an optimal way to reduce the overall rate of offending. Moreover, any cost reduction from standardization is likely mooted by the requirement of monetary compensation for those unconstitutionally searched.[153] As the authors point out, non-offenders may seek out checkpoints in hopes of receiving compensation, thereby reducing the hit rate and making compensation even more probable.[154]

Compensation aside, checkpoints may not be as standardized, and thus as efficient, as the authors suggest. In establishing a constitutionally permissible minimum level of suspicion, it is unlikely that the Supreme Court would apply one blanket threshold to all contexts. Current Reasonableness Clause jurisprudence dictates that the invasiveness of a checkpoint is justified only where the security gain outweighs the privacy cost.[155] The minimum hit rate, then, might vary according to both the invasiveness of the stop and the nature of the crime to be prevented.[156] The authors themselves suggest in a footnote that under their regime, the suspicion threshold for misdemeanor offenses might rightly be higher than that for serious crimes.[157]

Immigration checkpoints would almost certainly require a multiplicity of standards. Courts already require a higher standard of suspicion for roving patrol stops,[158] which often occur "at night on seldom-traveled roads,"[159] than for the less intrusive fixed checkpoint stops, of which a motorist has or may reasonably obtain advance notice.[160] Immigration violations range from sneaking across the

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[152] *See id.* at 859, 872 (arguing that people will be stopped for shorter periods of time, that targeting increases accuracy, and that profiling increases crime).

[153] *See id.* at 869–70 (noting problems with providing compensation for violations). Compensation would mark a significant departure from existing law. Although civil damages for Fourth Amendment violations exist in theory, they are in practice rarely awarded. *See infra* note 181 and accompanying text.

[154] Harcourt & Meares, *supra* note 10, at 869.

[155] *See supra* notes 23, 25 (citing cases exemplifying this balancing approach).

[156] For example, a city may set up highway roadblocks to serve "special" and "emergency" government needs, such as removing drunk drivers from the road and preventing the escape of a dangerous criminal, but not to detect evidence of "ordinary" criminal conduct. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 40–44 (2000).

[157] Harcourt & Meares, *supra* note 10, at 865 n.221.

[158] *E.g.*, United States v. Brignoni-Ponce, 422 U.S. 873, 881–82 (1975) (holding that reasonable suspicion is required).

[159] United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976).

[160] *See id.* at 562 (holding that no individualized suspicion is required for traffic stops at the border). The Ninth Circuit has applied varying standards to temporary checkpoints. *Compare* United States v. Hernandez, 739 F.2d 484 (9th Cir. 1984) (finding that inspection

border to engaging in terrorist activity.[161] It would seem illogical to impose the same hit rate requirement for a checkpoint designed to catch smugglers in a known human trafficking corridor as for a checkpoint outside a factory intended to bust employees working without authorization.[162] But allowing for variance means the reasonableness of every checkpoint may be challenged based on its particular circumstances, inviting a system of case-by-case judicial review no more administratively efficient than the current model.

B. Compliance Challenges

A further challenge exists in ensuring that stops be randomized. Instructing officials to stop every *n*th person will not necessarily eliminate targeting by those who currently do so in knowing violation of policy. If immigration officers currently rely on Hispanic appearance more than other factors only because they believe the agency rules so allow, they will presumably comply with instructions to randomize numerically. However, if officers profile on Hispanic appearance despite an understanding that their use of ethnicity goes beyond permissible bounds, there is no obvious reason they will stop doing so even in a regime that calls for randomization.

Of course, a randomization regime might impose safeguards to encourage better compliance. Officers could be held accountable via internal benchmarking. The stops made by one immigration officer would be compared with the stops made by another in the same geographical area at the same time of day to see, for example, if one officer stopped significantly more people with Hispanic-sounding surnames.[163] Benchmarking would allow for internal agency review and sanctions and would provide ready evidence for potential litigants.

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of all vehicles for unauthorized aliens at a visible temporary checkpoint did not violate the Fourth Amendment), *and* United States v. Quiroz-Reyna, 500 F.2d 1223, 1223 (9th Cir. 1974) ("[F]or purposes of retroactivity a stationary checkpoint, even though temporary, is similar to a fixed checkpoint."), *with* United States v. Maxwell, 565 F.2d 596, 596 (9th Cir. 1977) (finding checkpoint intermittently operated for 25 years to be temporary and to require reasonable suspicion for stops).

[161] *See* I.N.A. § 212(a)(3)(A)–(B) (stating terrorism grounds for removability); I.N.A § 212(a)(6)(A)(i) (making removable anyone who enters the country without being admitted or paroled).

[162] *Cf.* Arizona v. United States, 132 S. Ct. 2492, 2499 (2012) ("Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime.").

[163] *See* Melissa Whitney, Note, *The Statistical Evidence of Racial Profiling in Traffic Stops and Searches: Rethinking the Use of Statistics to Prove Discriminatory Intent*, 49 B.C. L. REV. 263, 277–78 (2008) (describing the internal benchmarking test). Comparing stops in similar contexts eliminates the need to control for difficult-to-calculate variables such as the ethnic makeup of a particular region. *See id.* at 269–71 (describing the difficulties of compiling reliable data).

Recent judicial decisions suggest an evolving willingness of courts to consider statistical evidence to infer discriminatory intent.[164]

Comparing one officer to the next, however, will not reveal impermissible targeting if such behavior permeates the agency—that is, if many of the officers are engaging in racial profiling. Widespread non-compliance will not occur if incentives are sufficient to deter the average officer. But evidence suggests that deterrence strategy in the immigration context is wanting. Despite the Court's approval of INS's compliance mechanisms thirty years ago in *Lopez-Mendoza*,[165] such policies have since been widely criticized.[166] Effective oversight is further diminished by procedures that make it difficult for victims of abuse to pursue a complaint with the agency. Thus, ICE and CBP may not know when impermissible targeting occurs.[167]

Nor is recourse to the courts a promising remedy. The chief deterrence mechanism for Fourth Amendment violations historically has been the exclusionary rule, which suppresses unlawfully obtained evidence from criminal proceedings.[168] The rule, however, does not operate in removal proceedings absent evidence of an egregious violation or widespread abuse.[169] Once removed on the basis of unlawfully obtained evidence, an unauthorized immigrant has no real

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164 *See id.* at 274 n.81, 291 (noting instances in which courts have considered statistical evidence to infer intent).

165 468 U.S. 1032, 1045 (1984) (indicating that the INS procedure for investigating and punishing Fourth Amendment violations provides deterrent value).

166 *See, e.g.*, AMNESTY INTERNATIONAL, *supra* note 121, at 45–46 (citing claims that CBP and ICE policies are entirely unchecked).

167 *See* Bill Ong Hing, *Border Patrol Abuse: Evaluating Complaint Procedures Available to Victims*, 9 GEO. IMMIGR. L.J. 757, 779 (1995) (citing a study in which only 12.8% of residents in one border community knew it was possible to file a complaint).

168 CLANCY, *supra* note 27, at 609–10.

169 *Lopez-Mendoza*, 468 U.S. at 1050. The widespread abuse exemption has never been successfully invoked, *see* Oliva-Ramos v. Att'y Gen. of U.S., 694 F.3d 259, 279 (3d Cir. 2012) ("To our knowledge, no court has explicitly adopted or applied the [widespread] portion of the *Lopez-Mendoza* pronouncement . . . ."), but several circuits have adopted the position that a stop based on race alone is egregious. *See, e.g.*, Gonzalez-Rivera v. INS, 22 F.3d 1441, 1448–52 (9th Cir. 1994) (holding that a stop bassed only on Hispanic ancestry "constituted a bad faith, egregious consitutional violation that warrants application of the exclusionary rule"); Almeida-Amaral v. Gonzales, 461 F.3d 231, 237 (2d Cir. 2006) (explaining that if "the stop was based on race, the violation would be egregious and the exclusionary rule would apply"). The Third Circuit has recently endorsed a more flexible approach for egregiousness. *See Oliva-Ramos*, 694 F.3d at 279 (naming as relevant factors whether a violation was intentional; whether a seizure was itself gross or unreasonable; whether an improper search or seizure occurred under threat, coercion, or abuse; the extent to which the agents exhibited unreasonable force; and whether the seizure or arrest was based on race or ethnicity). An unauthorized immigrant who can make the difficult showing that a stop was based on race or ethnicity alone may be able to prevent information about his illegal status from being used to deport him. The scarcity of successful claims, however, seriously minimizes the deterrent value of this remedy.

way to bring suit.[170] Lawfully present victims of profiling may be hampered by poor English skills or lack of legal know-how,[171] and may not wish to file suit and risk inviting unwanted attention on their communities.

C. Practical Lessons: What Immigration Teaches About Administration and Compliance

As with pooling problems, the compliance and administration challenges highlighted in the immigration context help define the model's conditions for success. As administration goes, the rationale requiring higher levels of suspicion for certain enforcement encounters applies just as logically outside of the immigration context. The Court might require more suspicion where a checkpoint is on a side road versus a highway, or where a stop occurs by night versus by day,[172] and it might require a higher threshold hit rate to search for drugs than for weapons.[173] To minimize these administrative concerns, randomization should be limited to a discrete number of offenses, and enforcement should only occur in contexts that involve similar degrees of intrusiveness.[174]

As for compliance, CBP and ICE are not the only agencies with a poor track record for deterring official misconduct. In 2005, the New York City Police Department instituted a random subway search program, whereby police located at subway stations throughout the city were to randomly search a fraction of passengers.[175] In February of 2009, the American Civil Liberties Union filed a complaint on behalf of Jangir Sultan, a New York City resident of South Asian appearance,

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[170] *See Lopez-Mendoza*, 468 U.S. at 1055 (White, J., dissenting) ("[O]nce the Government has improperly obtained evidence against an illegal alien, he is removed from the country and is therefore in no position to file civil actions in federal courts."); Stella Burch Elias, *"Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting* Lopez-Mendoza, 2008 WIS. L. REV. 1109, 1154 (2008) ("The opportunities available to immigration respondents to vindicate their constitutional rights by bringing a civil action were already scant in 1984 and have become even more so in 2009.").

[171] *Lopez-Mendoza*, 468 U.S. at 1055 (White, J., dissenting) (noting that lawfully present victims of profiling are likely to be poor, uneducated, and unskilled in English); Elias, *supra* note 170, at 1154 (noting that in the post–September 11 environment, it is unrealistic to expect immigrants to seek recompense for wrongs suffered by filing civil suits).

[172] *See supra* notes 158–60 and accompanying text.

[173] *See supra* note 156.

[174] DUI checkpoints, for example, might be limited to major highways and to certain hours of the day.

[175] The program was upheld by the Second Circuit in *MacWade v. Kelly*, 460 F.3d 260, 263 (2d Cir. 2006).

who allegedly had been stopped twenty-one times in three years.[176] The odds of being searched so many times in a truly randomized program were one in 165 million. The only plausible explanation for the results, the ACLU argued, was that the officers were engaged in racial profiling.[177] The New York Police Department prohibited officers from recording demographic data about those searched, so it had no mechanism to screen for discriminatory practices.[178] Agencies must do a better job monitoring their officials if randomization is to have any teeth.

Recourse to the judicial system is similarly dubious outside of immigration. In recent years, the Court has limited the role of the exclusionary rule even in criminal proceedings, holding it universally inapplicable to knock-and-announce violations, for example.[179] Some scholars predict the Court may soon abolish the exclusionary rule entirely.[180] Civil damages, which can operate to deter official misconduct in other areas of law, lack force in the Fourth Amendment context. While such remedies theoretically exist, they are "expensive, time-consuming, not readily available, and rarely successful."[181] In sum, new avenues to facilitate relief must be considered to ratchet up deterrence given the anemic nature of the current judicial remedies.[182]

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176 Complaint at 1, Sultan v. Kelly, No. 09 CIV 698 (E.D.N.Y. Feb. 19, 2009), *available at* http://www.nyclu.org/files/SultanvCityofNewYorkComplaint2-19-09_0.pdf.

177 *Id.* at 14.

178 *Id.* at 13–14. In the ensuing settlement dealings, Sultan offered to forego damages if the City agreed to better monitor its officers. Letter From Plaintiff's Counsel to David Hazan, Senior Corp. Counsel, New York City Law Dep't. (May 19, 2009), *available at* http://www.nyclu.org/files/SultanRule68Letter5-19-09.pdf. The City refused to change its policies and paid Sultan $10,000 in damages. Stipulation and Order of Settlement and Discontinuance at 2–3, Sultan v. Kelly, No. 09 CIV 698 (E.D.N.Y. June 29, 2009) *available at* http://www.nyclu.org/files/FinalSettlementStipulation_sultan_6-30-09.pdf.

179 *See* David A. Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, *in* SEARCHES AND SEIZURES, *supra* note 26, at 215, 215–21 (discussing cases holding the exclusionary rule inapplicable to knock-and-announce practices).

180 *See id.* at 221 (stating that the Court has "openly declared war on the exclusionary rule"); Silas Wasserstrom and William J. Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?*, *in* SEARCHES AND SEIZURES, *supra* note 26, at 206, 207–08 (describing the Court as attacking the exclusionary rule originally with a "whittling knife" but more recently "with a machete").

181 Hudson v. Michigan, 547 U.S. 586, 610 (2006) (Breyer, J., dissenting) (quoting Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1388 (1983)); *see also id.* at 2174 (noting the majority's failure "to cite a single reported case in which a plaintiff has collected more than nominal damages"); CLANCY, *supra* note 27, at 657 (suggesting that juries may not be willing to assess damages against an officer except in extreme cases).

182 For a few examples of such proposals, see Amar, *supra* note 30, at 811–16 (proposing entity liability and the abolition of qualified immunity; punitive damages; expanded class

CONCLUSION

Harcourt and Meares contemplate a system that protects communities from stigmatization and ensures that no person is unfairly targeted for enforcement. But in at least one application, their model falls short of these goals. Moreover, the lessons from immigration suggest its success depends on some very demanding requirements.

Randomization will only eliminate discrimination if there are sufficient safeguards to prevent misconduct. Adherence to strict randomization rules is doubtful where officials currently flout Fourth Amendment standards—where officials stop and frisk without reasonable suspicion, make traffic stops for "driving while black,"[183] and detain Hispanics along the Southern border based on skin color alone. The contexts in which abuses are most common, and consequently where the need for reform is the greatest, are also the ones where the model is least likely to succeed.

Even perfect compliance will not ensure that enforcement burdens are evenly allocated across the population. The authors' location-based approach will target low income and ethnically concentrated communities where those communities have higher crime rates. An alternative, traits-based approach will target based on sensitive characteristics such as race or gender any time those characteristics are positively correlated with risk of offending—or on benign characteristics that implicate the sensitive ones.[184] The authors may not care about the targeting costs of accurate profiling, but as has been shown, both location-based and traits-based pooling will concentrate the burden on groups in excess of their share of offending.[185]

The only contexts in which randomization seems viable are those in which risk of offending does not significantly vary by race, gender, class, etc., or where it is possible to associate risk with some other, nonsensitive characteristic. Perhaps such a criminal context exists. But in immigration, randomization will accomplish little but a return to the usual suspects.

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actions; and awards of attorney's fees, injunctive relief, and regulatory relief); Alan Dalsass, Note, *Options: An Alternative Perspective on Fourth Amendment Remedies*, 50 RUTGERS L. REV. 2297, 2315–20 (1998) (proposing a "hybrid" model that would allow judges to assess punitive damages, apply the exclusionary rule, or both).

183 *See generally* Floyd D. Weatherspoon, *Racial Profiling of African-American Males: Stopped, Searched, and Stripped of Constitutional Protection*, 38 J. MARSHALL L. REV. 439, 450–60 (2004) (describing pretextual and suspicionless stops of black drivers).

184 *See supra* note 133 and accompanying text.

185 *See supra* Part II.A–B.