ARIZONA SENATE BILL 1070, *BRIGNONI*, AND THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: HAS THE UNITED STATES COMPLIED WITH ITS TREATY OBLIGATIONS, AND SHOULD IT IN THE FUTURE?

I. INTRODUCTION

On December 21, 1965, in the midst of apartheid and extreme racial tensions throughout the world, the General Assembly of the United Nations ("UN") signed and ratified the Convention on the Elimination of All Forms of Racial Discrimination ("CERD").[1] CERD seeks to "prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law."[2] While the United States signed the treaty with significant reservations, understandings, and declarations,[3] the United States is a signatory and party to the treaty;[4] therefore, it is obligated to comply with all provisions and eliminate federal and state legislation within that is contrary to the mandate of the treaty.[5]

Almost forty-four years later, on April 23, 2010, Arizona enacted the Support Our Law Enforcement and Safe Neighborhoods Act, Senate Bill 1070 ("S.B. 1070").[6] This statute is one of the strictest and most far-

1. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD] (entered into force Jan. 4, 1969). Although CERD was a "convention," it established the oldest treaty body in the world. Jose A. Lindgren Alves, *Race and Religion in the United Nations Committee on the Elimination of Racial Discrimination*, 42 U.S.F. L. REV. 941, 947 (2008). Treaty bodies, like the Committee, monitor the implementation of international covenants or conventions. *Id.* While the Committee is a separate and distinct organization from a UN treaty body, it does meet in Geneva twice a year for three-week sessions. *Id.* at 948.

2. CERD, *supra* note 1, art. 5.

3. *See infra* Part IV (discussing the U.S. reservations, understandings, and declarations to CERD).

4. *See* Declarations and Reservations to the International Convention on the Elimination of All Forms of Racial Discrimination, UNITED NATIONS TREATY COLLECTION (Mar. 7, 1966), http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-2.en.pdf [hereinafter CERD Declarations and Reservations].

5. CERD, *supra* note 1, art. 2 § 1(d). Parties must "prohibit and bring to an end, by all appropriate means, *including legislation* as required by circumstances, racial discrimination by any persons, group or organization." *Id.* (emphasis added).

6. Ariz. Rev. Stat. Ann. § 11-1051 (2010) (allowing law enforcement officers to stop any individual when a "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States").

reaching immigration laws in effect in the United States.[7] The law greatly increases the ability of state and local law enforcement to inquire into an individual's immigration status, and it broadens the power of Arizona law enforcement to carry out federal immigration laws against illegal immigrants.[8] Immigration enforcement, however, is an area reserved exclusively for the federal government.[9]

Supporters of the Arizona law believe that the federal government has neglected to enforce immigration laws,[10] a belief fueled by several perceptions about illegal immigration. One perception is that Arizona is simply overrun with foreigners who are breaking the law by immigrating illegally.[11] The statistics used to support this perception often use somewhat simplistic methods.[12] Another perception is that uncontrolled immigration leads to higher crime rates,[13] a perception that is supported by Hispanic U.S. citizens' and Hispanic immigrants' involvement in drug trade[14] as well as human and drug smuggling in the United States.[15] Others

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7. *See* Randall C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 23, 2010, at A1, *available at* http://www.nytimes.com/2010/04/24/us/politics/24immig.html (describing the law as the "broadest and strictest immigration measure in generations"). Ironically, for the past six years, Arizona has been home to the fourth largest number of refugees in the United States. *See* Jason DeParle, *Arizona is a Haven for Refugees*, N.Y. TIMES, Oct. 8, 2010, at A11, *available at* http://www.nytimes.com/2010/10/09/us/09refugees.html.

8. *See generally* § 11-1051.

9. *See* Chae Chan Ping v. United States, 130 U.S. 581, 603–09 (1889), Fong Yue Ting v. United States, 149 U.S. 698, 705–06 (1893).

10. Ginger Rough, *Ariz. Asks High Court to Rule on SB 1070*, TUCSON CITIZEN, Aug. 11, 2011, http://tucsoncitizen.com/arizona-news/2011/08/11/ariz-asks-high-court-to-rule-on-sb-1070/ ("It's not like immigration is an area of absolutely exclusive federal control, and with Arizona bearing such a disproportionate burden (of the immigration problem), a one-size-fits-all solution doesn't make sense.") (quoting Paul Clement, attorney for Arizona governor Jan Brewer).

11. DeParle, *supra* note 7 ("[Arizona] officials rage at what they have called the 'invasion' of illegal immigrants.").

12. *See* JEFFREY S. PASSEL, RANDY CAPPS & MICHAEL FIX, URBAN INSTITUTE IMMIGRATION STUDIES PROGRAM, UNDOCUMENTED IMMIGRANTS: FACTS AND FIGURES (2004) (stating that undocumented immigration statistics are calculated by subtracting the totals for legal foreign-born residents from the total of foreign-born residents, in which legal foreign-born residents are legal permanent residents; refugees, asylees, and parolees; and legal temporary residents). A non-profit research organization, the Center for Immigration Studies, estimated that the undocumented immigrant population in the United States in 2009 was 10.8 million. STEVEN A. CAMAROTA & KAREN JENSENIUS, CENTER FOR IMMIGRATION STUDIES, A SHIFTING TIDE: RECENT TRENDS IN THE ILLEGAL IMMIGRATION POPULATION (2009), http://www.cis.org/articles/2009/shiftingtide.pdf. This number shows a decline from 12.5 million in 2007. *Id.*

13. IMMIGRATION POLICY CENTER, AMERICAN IMMIGRATION COUNCIL, Q&A GUIDE TO STATE IMMIGRATION LAWS (2011), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/Guide_to_State_Immigration_Laws_042611_updated.pdf (finding that while the immigrant population in the U.S. almost tripled from 1990 to 2008, crime rates fell by almost forty percent; rates also fell in border cities and cities with large immigrant populations).

14. William Booth & Nick Miroff, *Wiretaps Show Mexican Drug Ring Set Up in U.S.*, PORTLAND PRESS HERALD (Oct. 20, 2010), http://www.pressherald.com/news/nationworld/wiretaps-

believe that high rates of immigration hurt the U.S. economy and decrease the number of jobs available to U.S. citizens.[16]

In response to these concerns, S.B. 1070 allows Arizona law enforcement officers to conduct a "lawful stop, detention or arrest" if a "reasonable suspicion exists that the person is an alien," and the officers must make an attempt to determine the person's immigration status before the person is released.[17] The law originally stated that officers cannot "solely" rely on race when determining whether a reasonable suspicion exists to inquire into citizenship status,[18] which raised concerns that officers would use racial profiling in enforcement.[19] In response, S.B. 2162 amended S.B. 1070 to prohibit law enforcement officers from taking into consideration "race, color or national origin" when deciding whether to conduct an immigration stop.[20] Even as amended, however, the law allows the use of race "to the extent permitted by the United States or Arizona Constitution."[21] Proponents of S.B. 1070 insist that the statute explicitly forbids the use of race in immigration enforcement; however, as Part II discusses, the U.S. Constitution does not prohibit the use of race in immigration enforcement.

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show-mexican-drug-ring-set-up-in-u_s__2010-10-20.html ("U.S. law enforcement officials say the most worrisome thing about the Fernando Sanchez Organization [a Mexican drug ring] was how aggressively it moved to set up operations in the United States, working out of a San Diego apartment it called 'The Office.'").

15. *See* Lexington, *Arizona, Rogue State*, THE ECONOMIST, July 31–Aug. 6, 2010, at 25, *available at* http://www.economist.com/node/16693713.

16. *See* GEORGE J. BORJAS, HEAVEN'S DOOR—IMMIGRATION POLICY AND THE AMERICAN ECONOMY 63 (1999). Borjas finds that while there may be weak or ambivalent statistical evidence regarding the effects of immigration on American wages, immigration could both drive wages down and attract new jobs as more businesses open to take advantage of cheap labor. *Id.* at 63, 67.

17. Ariz. Rev. Stat. Ann. § 11-1051(B) (2010).

18. For a graphical view of the changes from S.B. 1070 to S.B. 2162, see *House Bill 2162*, ARIZONA STATE LEGISLATURE, http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/49leg/2r/bills/hb2162c.htm (last visited Sept. 25, 2010).

19. *See* Archibold, *supra* note 7.

20. Section B of S.B. 1070 states:

> For any lawful stop, detention or arrest made by a law enforcement official or a law enforcement agency of this state . . . in the enforcement of any other law or ordinance of a county, city or town or this state where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. Any person who is arrested shall have the person's immigration status determined before the person is released. . . . A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state *may not consider race, color or national origin in implementing the requirements of this subsection* except to the extent permitted by the United States or Arizona Constitution.

§ 11-1051(B) (emphasis added).

21. § 11-1051(B).

This Note explores to what extent constitutional jurisprudence permits the consideration of race in immigration enforcement.[22] Part II discusses the history of racial profiling in U.S. immigration law; Part III reviews international law relating to racial profiling, specifically CERD; Part IV examines the United States' and Europe's adherence to and compliance with CERD; and Part V analyzes the value and costs of using racial profiling in immigration law. In conclusion, this Note discusses whether the United States should remain a party to CERD and fully implement its provisions or withdraw.

II. HISTORY OF RACIAL PROFILING IN THE CONTEXT OF U. S. IMMIGRATION LAW

American case law pertaining to racial profiling involves profiling in both domestic criminal and immigration contexts. The Supreme Court decision in *Whren v. United States*[23] marked a turning point in the use of racial profiling in the domestic criminal context. *Whren* held that as long as reasonable, objective, probable cause to stop an individual exists, the actual motives or subjective intent of law enforcement in conducting the stop will not affect the constitutionality of the stop.[24] While the *Whren* decision might be more efficient than requiring a court to determine the subjective intent of the officer, some scholars believe that the Court in *Whren* adopted a policy of "color-blind racism" that merely increased the power of the police to discriminate in law enforcement.[25]

In the 1980s, the Reagan administration's War on Drugs[26] increased the degree to which individuals and immigrants of Latino descent were

22. Issues related to S.B. 1070, such as federal law preemption, are outside the scope of this Note unless related to the use of race in immigration enforcement. For the District Court of Arizona ruling regarding the issue of preemption and enjoining several provisions of S.B. 1070, see *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010). For an in-depth discussion of the constitutional issues raised by S.B. 1070, see COMM. ON IMMIGRATION AND NATIONALITY LAW, N.Y. CITY BAR, REPORT ON THE CONSTITUTIONALITY OF ARIZONA IMMIGRATION LAW S.B. 1070 (2010).

23. 517 U.S. 806 (1996).

24. *Id.* at 814–15. Justice Scalia examines the difficulties in determining subjective and objective intent of officers when considering the reasonableness of a stop, but his analysis upholds the Fourth Amendment requirement of objective probable cause: "For the run-of-the-mine case, which this surely is, we think there is no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure." *Id.* at 819.

25. KAREN GLOVER, RACIAL PROFILING RESEARCH, RACISM, AND RESISTANCE 25 (2009) (stating that color-blind racism in *Whren* "dismissed the salience of race in contemporary times and established greater latitude for police powers that have been used historically and contemporarily to oppress communities of color").

26. *See* FRED PAMPEL, RACIAL PROFILING, LIBRARY IN A BOOK 12 (2004).

targeted by racial profiling.[27] President Nixon created the Drug Enforcement Administration in 1973,[28] but large amounts of cocaine were still being brought into the United States from Latin America despite U.S. efforts.[29] A media frenzy surrounded the use of crack and its impact on U.S. citizens, which consequently increased pressure on the police to stop the flow of illegal drugs.[30]

A recent context in which racial profiling has been at issue is the profiling of persons of Middle Eastern descent after the attacks on September 11, 2001. Unlike profiling used to detect general criminal behavior in which no specific suspect was previously identified, the hijackers on September 11 were all of Middle Eastern descent[31] and therefore more readily fit a profile.[32] As one scholar noted, "The facts relating to terrorism remain clear: Islamic anti-American terrorism almost by definition involves Muslims from the Middle East or Asia. A system of random screening that ignores this fact can easily miss potential terrorists."[33] Similarly, in the context of immigration in Arizona, immigrants crossing the U.S.-Mexican border illegally are more likely Hispanic.[34] Therefore, as with terrorism, there is a higher correlation between race and illegal-border crossings than between race and general criminal behavior.

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27. *Id.* Scholars note that Hispanics have been treated more harshly than whites by law enforcement throughout the 1900s for a number of reasons. For instance, Border Patrol would allow illegal immigrants into the country for crop harvesting but then deport the immigrants once the harvest was over. Ramiro Martinez, Jr., *Revisiting the Role of Latinos and Immigrants in Police Research*, *in* RACE, ETHNICITY, AND POLICING NEW AND ESSENTIAL READINGS 435, 438–39 (Stephen K. Rice & Michael D. White eds., N.Y. Press 2010).

28. PAMPEL, *supra* note 26, at 12.

29. *Id.* Pampel notes that the involvement of Latin American military leaders and politicians as well as the wide-spread use of cheap, powerful crack cocaine made the drug trade of particular concern to U.S. government officials and the public at large. *Id.*

30. *Id.* at 13. Pampel states that in 1985 only one percent of Americans felt that drugs were the most important problem in America, but by 1989, sixty-four percent saw drugs as the most important problem in America. *Id.*

31. Kevin Sack with Jim Yardly, *After the Attacks: The Suspects; U.S. Says Hijackers Lived in the Open With Deadly Secret*, N. Y. TIMES, Sept. 14, 2001, at A1.

32. PAMPEL, *supra* note 26, at 22.

33. *Id.* Pampel notes that Israel has profiled young Arab men at its airports and that no airplane has been bombed there for more than thirty years. *Id.*

34. United States v. Brignoni-Ponce, 422 U.S. 873, 886–87 (1975) ("The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor."). Scholar Victor Romero analyzes Justice Powell's finding that race is relevant in an immigration stop. Victor C. Romero, *Racial Profiling: "Driving While Mexican" and Affirmative Action*, 6 MICH. J. RACE & L. 195, 201–04 (2000). Romero believes that Powell's approach is practical and recognizes our "[race] conscious society" and the "high correlation" between the appearance of one's race and immigration status. *Id.* at 203.

In light of the relevance of race in illegal immigration, several important cases have established broader boundaries for the acceptable use of racial profiling in the context of U.S. immigration enforcement. In 1975, the Supreme Court in *United States v. Brignoni-Ponce*[35] established that law enforcement may consider "appearance" as one of many factors when determining whether a reasonable suspicion exists to inquire into an individual's immigration status.[36] The Court in *Brignoni* clearly stated that appearance alone cannot sustain a reasonable belief as to one's immigration status and limited U.S. Border Patrol powers to conduct arbitrary stops.[37] The Court, however, explicitly condoned racial profiling by deeming race a "relevant factor."[38]

In 2000, the Ninth Circuit's decision in *United States v. Montero-Camargo*[39] found the *Brignoni* factors no longer applicable.[40] Given the large size of the Hispanic population in the Southwest, the court stated that Hispanic appearance is "of little or no use" to law enforcement when garnering a reasonable suspicion to perform an investigatory immigration

35. 422 U.S. 873 (1975). The defendants in the case were driving on a highway on which there was a closed immigration checkpoint, and two officers were observing traffic from their car. *Id.* at 874–75. The officers spotted the defendants' car and admitted that they stopped the defendants solely because the "three occupants appeared to be of Mexican descent." *Id.* at 875. When the officers questioned the occupants and discovered that the two passengers were non-citizens who had entered the country illegally, all three occupants were arrested. *Id.*

36. *Id.* at 884–85 (finding that "[a]ny number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area" including "proximity to the border," "usual patterns of traffic on the particular road," "previous experience with alien traffic," "recent illegal border crossings in the area," "[t]he driver's behavior," "[a]spects of the vehicle," whether "[t]he vehicle may appear to be heavily loaded . . . [or] have an extraordinary number of passengers," or someone "observe[s] persons trying to hide"). In addition, trained officers may use "the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut." *Id.* at 885.

37. *Id.* at 882–83. The Government in *Brignoni* urged the Court to define the authority given to Border Patrol agents in 8 U.S.C. § 1357(a)(3) to include the power to conduct vehicle stops without reasonable suspicion or a violation, but the Court declined. *Id.* The Court explained, "Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." *Id.* at 884.

38. *Id.* at 886–87. The following year the Court implicitly affirmed *Brignoni* in stating that "apparent Mexican ancestry" was not a prohibited factor to use when deciding when to detain a suspect at the border. United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976).

39. 208 F.3d 1122 (9th Cir. 2000). In *Camargo*, the Hispanic defendants were detained after they made U-turns on a highway before a Border Patrol facility. *Id.* at 1126. The facility had previously been closed but had re-opened. *Id.* at 1127. The defendants made the U-turns after passing a sign stating the facility was open, and they stopped in the only place on the highway where the view from the facility was obstructed, a place which also was commonly used to drop off and pick up undocumented immigrants and illegal materials. *Id.* In addition to this behavior, the two cars were driving in tandem and had Mexicali license plates. *Id.* at 1128.

40. *Id.* at 1133.

stop.[41] The court considered the reasoning in *Brignoni* but found the reasoning outdated.[42] In its ruling, the court stated definitively that race cannot be used as a factor to question someone's immigration status.[43] While the reasoning in *Brignoni* still stands as law in the United States, many courts have followed the reasoning in *Carmargo*.[44]

Scholars have debated the impact of the reasoning in *Brignoni* on American immigration jurisprudence.[45] Some believe that the *Brignoni* reasoning is the minority view;[46] however, many believe that *Brignoni* has set a dangerous and broad precedent that could allow for the use of race or national origin in profiles outside the immigration context.[47] Some have

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41. *Id.* at 1133–34.

> *Brignoni-Ponce* was handed down in 1975, some twenty-five years ago. Current demographic data demonstrate that the statistical premises on which its dictum relies are no longer applicable. The Hispanic population of this nation, and of the Southwest and Far West in particular, has grown enormously—at least five-fold in the four states referred to in the Supreme Court's decision . . . . Accordingly, Hispanic appearance is of little or no use in determining which particular individuals among the vast Hispanic populace should be stopped by law enforcement officials on the lookout for illegal aliens. Reasonable suspicion requires *particularized* suspicion, and in an area in which a large number of people share a specific characteristic, that characteristic casts too wide a net to play any part in a particularized reasonable suspicion determination.

Id. (emphasis in original).

42. *Id.* at 1132–33 (finding the Census Bureau data relied on in *Brignoni* to be significantly different from current data at the time of the case). Anthony Cortese, in his essay concerning international and interdisciplinary studies of racial profiling, also notes that statistics of undocumented immigrants have changed markedly since the *Brignoni* ruling: "Now, Latinos constitute a much large[r] percentage of the legal U.S. populations and represent a smaller percentage of the undocumented people . . . . In 1975, Mexican immigrants were 85% of undocumented citizens–compared to 56% in 2005. The majority of Latinos in the United States are citizens." Anthony J. Cortese, *Racial Profiling Along Borders*, *in* RACIAL PROFILING AND BORDERS: INTERNATIONAL, INTERDISCIPLINARY PERSPECTIVES 71, 90 (Jeff Shantz ed., 2010) (internal citations omitted).

43. *Camargo*, 208 F.3d at 1135. The court does mention, however, that race may be used when "relevant," giving as an example that race may be used as one of many factors of a reasonable suspicion when a suspect has been identified as being of a particular race. *Id.* at 1134 n.21.

44. *See* Gabriel J. Chin & Kevin R. Johnson, *Profiling's Enabler: High Court Ruling Underpins Arizona Immigration Law*, WASH. POST, July 13, 2010, at A15 [hereinafter Chin & Johnson, *Profiling's Enabler*], *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/07/12/AR2010071204049.html (discussing how *Brignoni* has been "out of the constitutional mainstream" but could still greatly expand the ability for law enforcement officers to use racial profiling under S.B. 1070).

45. *Compare id.* (finding that *Brignoni* has had a limited impact on racial profiling in immigration, even if the potential impact is large), *with* Kevin Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 694 (2000) [hereinafter Johnson, *The Case Against Race Profiling*] (stating that *Brignoni* has had broad influence on racial profiling in immigration law).

46. *See* Chris & Johnson, *Profiling's Enabler*, *supra* note 44 ("As for the legal system as a whole: *Brignoni* has been exceptional and out of the constitutional mainstream since it was decided.").

47. Johnson, *The Case Against Race Profiling*, *supra* note 45, at 693–94 (finding that *Brignoni*'s reasoning, that Mexican appearance is relevant but not alone enough to sustain an immigration stop, has greatly shaped immigration enforcement). While Johnson's comments in this article might seem

agreed with the Ninth Circuit's reasoning in *Camargo* that "Mexican appearance" is no longer useful or an accurate criterion to use when deciding whether to conduct an immigration stop because individuals of Mexican descent have varied appearances and cannot be identified using a recognizable stereotype.[48] In addition, there is some evidence that Mexican immigrants overstay their visa periods at a far lower rate than immigrants from other countries.[49] Combined with *Carmargo*'s reasoning that the factors used in the *Brignoni* decision are no longer workable given the current immigrant populations, there are a number of persuasive reasons to limit the application of *Brignoni*.

Arguably, the Court in *Brignoni* could have taken a *Whren*-like colorblind approach, finding that any objective violation makes an immigration stop reasonable,[50] but perhaps the Court wanted to give law enforcement even broader discretionary power to enforce immigration laws if a totality of certain circumstances exists. Alternatively, the Court could have taken a *Camargo*-like approach, recognizing the correlation between race and citizenship status[51] but still forbidding the use of

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inconsistent with his comments in Chin & Johnson, *Profiling's Enabler*, *supra* note 44, *Brignoni* could have greatly impacted the power of immigration enforcement officials while also being a minority-view case. *See also* PAMPEL, *supra* note 26, at 8 (finding that the Supreme Court in *Brignoni* did not explicitly rule that race could be used in broader profiles, but the Court set the precedent in the immigration context that could lead the way for broader constitutional use of racial profiling).

48. Johnson, *The Case Against Race Profiling*, *supra* note 45, at 714–15. Johnson argues that there is not a singular "Hispanic appearance" and notes that many Hispanic people can have blond hair, red hair, blue eyes, and hazel eyes. *Id.* at 715. In addition to problems with appearance itself, the author comments on appearance in mixed-status families:

> To further complicate matters, "nearly 1 in 10 U.S. families with children is a mixed-status family, that is to say, a family in which one or more parents is a noncitizen and one or more children is a citizen." Thus, a nuclear family with "Hispanic appearances" may have members with different immigration statuses, thereby making enforcement efforts based on physical appearance more problematic. Moreover, due to family ties, some undocumented persons in these families are eligible to become lawful permanent residents.

Id.

49. *See* IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE, 1997 INS STATISTICAL YEARBOOK 199 (1997) (finding that while sixteen percent of the Mexican undocumented population overstayed visas, twenty-six percent of Central American undocumented immigrants have overstayed visas and ninety-one percent of undocumented immigrants from all other countries outside Mexico and Central America have overstayed visas). The INS findings, however, need to be assessed in light of the fact that most Latin American individuals are not granted travel visas unless there is evidence of intent to return to the home country. Such evidence could include children or property in the home country.

50. Whren v. United States, 517 U.S. 806, 814–15 (2006).

51. This approach could fit under Critical Race Theory, which recognizes that racism is part of normal society, culture is self-interested, and dominant groups will allow or encourage the advancement of other races when it is in the dominant group's best interest. Romero, *supra* note 34, at 204. In the context of *Brignoni*-type stops, Romero suggests that using race would serve only to "perpetuat[e] the continuation of racial oppression through the reinforcement of a stereotype and

profiling due to the potential for racial profiling to violate the rights of both citizens and non-citizens.[52] Under this approach, the Court could have mandated the use of race-neutral immigration laws that, even if much less effective, afford greater protection under the Constitution[53] and comply fully with the United States' obligations under international law.[54]

III. INTERNATIONAL LAW AGAINST RACIAL PROFILING: CERD

Under CERD, all forms of racial profiling are prohibited regardless of their use or effect. CERD, however, does relax its obligations on states in immigration law. In particular, CERD notes that it "shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens."[55] One reason for this distinction could be that CERD was enacted during a neo-colonial period in the height of apartheid in South Africa.[56] At the time of drafting, the focus of the UN was on discrimination between different races of citizens within a country rather than discrimination between citizens and non-citizens.[57] An alternative explanation is that states have sole control over their immigration law, and the treaty had to recognize this sovereign power in order to be ratified.[58] However, CERD does directly state in its

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harassment of a marginalized ethnic group." *Id.* Romero notes, however, that Critical Race Theorists might support the use of race in affirmative action programs giving minorities more educational and employment opportunities, in contrast to using race as a reason for law enforcement to be suspicious of minorities' immigration statuses. *Id.* at 205.

52. *See Arizona, Rogue State*, *supra* note 15 ("Barack Obama said in April that the law raised the spectre of Hispanic Americans being harassed when they took their children for ice cream."). While the Court in *Brignoni* recognizes an empirical relationship between race and undocumented status, the *Brignoni* opinion lacks normative analysis on whether constitutional law should recognize and accept this correlation and risk encouraging racial profiling. Romero, *supra* note 34, at 203.

53. Romero suggests "making race a factor for all by making it a factor for none" and stopping every motorist at the border. Romero, *supra* note 34, at 205. This solution, while based on a racial standard, seems unworkable, especially at some high-traffic borders.

54. *See infra* Part III.

55. CERD, *supra* note 1, art. 1, § 2.

56. Gay J. McDougall, *Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All Forms of Racial Discrimination*, 40 HOW. L.J. 571, 581–82 (1997).

57. *Id.* at 582. McDougall notes that, although there were highly contentious Cold War-influenced debates over which countries had caused the severe racial discord in Africa, there was very little debate over the definition of racial discrimination in CERD. *Id.* The definition of racial discrimination was taken largely from the United Nations Educational, Scientific, and Cultural Organization (UNESCO) definition and from the International Labor Organization ("ILO") definition. *Id.*

58. Even though CERD recognizes the autonomy of states to determine their immigration laws, the Committee's Concluding Observations have often taken note of parties' compliance with international law regarding the treatment of non-citizens. *See* David Weissbrodt, *The Approach of the*

recommendations that racial discrimination cannot be used in the immigration context, regardless of state power over immigration law.[59]

The Committee on the Elimination of Racial Discrimination ("the Committee"), a treaty body, was created to implement CERD, monitor parties' progress, and review individual complaints.[60] Parties to the treaty are required to report periodically on their compliance and implementation of the treaty.[61] The Committee reviews these reports and issues observations and recommendations on states' progress.[62] These observations and recommendations are considered official jurisprudence on the treaty.[63]

IV. UNITED STATES AND EUROPEAN ADHERENCE TO CERD SINCE RATIFICATION

CERD came into force in the United States on November 20, 1994,[64] but with extensive reservations, understandings, and declarations ("RUDs").[65] The U.S. RUDs state that CERD is not a self-executing treaty[66] and therefore does not establish a private right of action.[67] In

Committee on the Elimination of Racial Discrimination to Interpreting and Applying International Humanitarian Law, 19 MINN. J. INT'L L. 327, 341 (2010). *But see* General Recommendation 30, Discrimination Against Non-Citizens, CERD, 64th Sess., Feb. 23–Mar. 12, 2004, ¶ 19, U.N. Doc. CERD/C/64/Misc.11/rev.3 (May 4, 2005) [hereinafter CERD General Recommendation 30].

59. CERD General Recommendation 30, *supra* note 58, ¶ 7 (stating that parties must "[e]nsure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens").

60. *See* Stephen H. Legomsky, *The Ethnic and Religious Profiling of Non-Citizens: National Security and International Human Rights*, 25 B.C. THIRD WORLD L.J. 161, 187 (2005) (outlining the Committee's roles and duties and finding that the Committee reviews each of the state parties' reports on their compliance with CERD, issues general recommendations to the General Assembly, reviews complaints of state parties that other parties have violated the treaty, and reviews individual complaints of state party violations if a party recognizes a private right of action under the treaty); *see also* Weissbrodt, *supra* note 58, at 332. Note that while it is possible for an individual to submit a complaint to the Committee, the United States does not recognize a private right of action under the treaty. *See infra* note 67 and accompanying text.

61. Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 282 (2009).

62. *Id.*

63. *Id.* It should be noted that there is no enforcement mechanism for the Committee's recommendations, nor are there sanctions for parties' lack of compliance. *Id.*

64. Fellner, *supra* note 61, at 258 n.3.

65. *Id.*

66. *Id.* at ch. III.

67. *See* Tucker v. N.Y. Police Dept., 2008 WL 4935883, at *13 (D.N.J. Nov. 18, 2008) (finding that CERD is neither self-executing nor has it been enacted domestically through enabling legislation); Johnson v. Quander, 370 F. Supp. 2d 79, 101 (D.D.C. 2005) (agreeing with other district courts that CERD is not self-executing and does not give rise to a private right of action); United States v. Perez,

addition, the RUDs also state that the International Court of Justice will have jurisdiction over the United States only with the federal government's consent.[68] The RUDs qualify and amend the U.S. ratification of CERD to such an extent that one scholar believes that the ratification was simply "rhetorical commitment" instead of a true dedication to all terms of the treaty.[69] The RUDs could also go so far as to violate the "object and purpose" of the treaty.[70]

Notably the RUDs claim that the U.S. Constitution provides "extensive" protections of individual liberties,[71] but these protections might not reach as far as the United States claims. CERD explicitly prohibits racial discrimination "in purpose or effect"[72] and appears to reach both facially discriminatory and facially neutral laws.[73] In contrast, U.S. jurisprudence does not treat facially discriminatory laws with the same scrutiny as facially neutral laws,[74] so CERD offers stronger

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2004 WL 935260, at *17 (D. Conn. Apr. 29, 2004) (stating that non-self-executing treaties such as CERD require domestic implementation, otherwise they are not judicially applicable).

68. CERD Declarations and Reservations, *supra* note 4, at 10 ("[B]efore any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.").

69. McDougall, *supra* note 56, at 587. McDougall states that the RUDs the United States attached to CERD are similar to the ones it attached when ratifying the International Convention on Civil and Political Rights and Convention Against Torture. *Id.* Overall, McDougall believes that the RUDs employ a "practice of defensively isolating U.S. law and practice from meaningful international scrutiny." *Id.*

70. *Id.* at 588–89. Legomsky notes that if the Human Rights Committee finds that a reservation is invalid, the party will be bound to the treaty notwithstanding the reservation. Legomsky, *supra* note 60, at 187. The Human Rights Committee has questioned before whether any "non-self-executing" RUDs comply with the objectives of human rights treaties. *Id.* However, if the non-self-executing RUDs are valid, the RUDs become part of the treaty with respect to U.S. obligations, and there is no private right of action under CERD. *Id.*

71. CERD Declarations and Reservations, s*upra* note 4, at 10. The RUDs state in pertinent part:

> I. The Senate's advice and consent is subject to the following reservations:
>
> (1) That the Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States.

Id.

72. CERD, *supra* note 1, art. 1 para. 1.

73. McDougall, *supra* note 56, at 585–86.

74. *Compare* CERD, *supra* note 1, art. 2 para. 1(c) ("Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists."), *with* Washington v. Davis, 426 U.S. 229 (1976) (finding that laws which use facially neutral language, even if they have the effect of discriminating against racial minorities, will be analyzed under rational basis review; in contrast, laws that are discriminatory on their face receive strict scrutiny review). *See also* McDougall, *supra* note 56, at 585–86. Many commentators believe that Article 2 of CERD affords greater protection against discrimination than the Fourteenth Amendment because of

protections against racial discrimination than the U.S. Constitution. In defense of the different standards between U.S. law and CERD, the United States has stated that it will evaluate claims of discrimination arising from neutral laws in limited contexts.[75] In addition, laws may be struck down if circumstantial evidence demonstrates that the law has a disguised discriminatory intent.[76] Some U.S. courts have noted that regardless of the provisions of CERD and whether they afford equal or greater protections than the U.S. Constitution, courts will not employ higher protections against racial profiling than those offered by the Constitution.[77]

In its initial report to the Committee, the United States describes the improvements in race relations in the country over the past fifty years.[78] In

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the Fourteenth Amendment's restrictive requirement of discriminatory intent. *Id.* at 585. In addition, McDougall notes that the use of the death penalty in the United States would be particularly affected by the full implementation of CERD because the death penalty has a large discriminatory impact on racial minorities in the United States. *Id.* at 585–86. The United States has not addressed these disparate impacts or the differences in protection offered by the Constitution and CERD in the RUDs. *Id.*

For an in-depth comparison of the protections offered by the U.S. Constitution and CERD, see Fellner, *supra* note 61, at 283–85. Fellner specifically notes:

> The requirements of a malign intent as well as a racially disparate effect for a finding of racial discrimination in United States constitutional jurisprudence differ from those in the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which the United States has ratified. In defining discrimination, the treaty decouples intent from impact. . . . Indeed, full compliance requires elimination of racial inequalities resulting from structural racism.

Id. at 257–58.

75. U.S. DEP'T OF STATE, PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION 106 (2007).

76. *Id.* Furthermore,

> It is also consistent with the standards used in litigation of equal protection claims under the Fifth and Fourteenth Amendments of the U.S. Constitution, for which statistical proof of racial disparity, particularly when combined with other circumstantial evidence, is probative of the discriminatory intent necessary to make out a claim. In the view of the United States, article 1 (1) (c) does not impose obligations contrary to existing U.S. law.

Id.

For a discussion of the requirements CERD imposes on its members states, see Fellner, *supra* note 61, at 258 n.8. Fellner notes:

> The obligation to review and eliminate racial discrimination is not contingent on lawsuits by aggrieved individuals or groups or, indeed, on any petition to the congressional or legislative branches. CERD does, however, require State parties to ensure that "competent national tribunals and other State institutions" offer effective protection and remedies against racial discrimination and to ensure that everyone has the right to seek reparation in court for damages suffered because of the discrimination.

Id.

77. Gambaro v. United States, No. CA 06-391-ML, 2007 WL 2245907, at *7 (D.R.I. Aug. 2, 2007) ("It follows that, *irrespective of its provisions*, the CERD cannot confer greater rights than those provided by the Constitution." (emphasis added)).

78. Reports Submitted by State Parties Under Article 9 of the Convention, CERD, ¶ 71, U.N. Doc. CERD/C/351/Add.1 (Oct. 10, 2000) [hereinafter Initial Report], *available at* http://www.state

particular, the report notes the legislative action taken to remedy discrimination in employment of immigrants.[79] The report does admit problems with enforcing Article V's prohibition against racial discrimination in the immigration context,[80] yet nowhere in the report does the United States mention *Brignoni* specifically. The report uses vague language in admitting that "[s]ome also contend that U.S. immigration law and policy is either implicitly or explicitly based on improper racial, ethnic and national criteria."[81]

Since this initial report, the Committee has issued further observations that address several issues of U.S. adherence to the treaty.[82] The 2008 Committee notes in its Concluding Observations the continuing differences between the definition of discrimination in the U.S. judicial

.gov/www/global/human_rights/cerd_report/cerd_index.html. For the text of U.S. reports to the Committee on the Elimination of Racial Discrimination, see U.S. DEP'T OF STATE, COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (CERD) REPORT, http://www.state.gov/g/drl/rls/cerd_report/index.htm (last visited Jan. 18, 2011).

In its Initial Report to the Committee, the United States once again reiterated the protections provided by the U.S. Constitution but noted that not all of CERD's provisions have been enacted. Initial Report, *supra* note 78, ¶ 71. The Initial Report notes that while racial discrimination has decreased since CERD's enactment, discrimination against immigrants remains: "Whether legal or illegal, recent immigrants often encounter discrimination in employment, education and housing as a result of persistent racism and xenophobia. Some also contend that U.S. immigration law and policy is either implicitly or explicitly based on improper racial, ethnic and national criteria." *Id.* ¶ 71(n).

79. *Id.* ¶ 103:

> Anti-discrimination Provision of the Immigration and Nationality Act (INA), 8 U.S.C. Sec 1324b. This law was enacted in 1986 in response to concerns that employers, faced with sanctions against knowingly hiring unauthorized immigrants, would refuse to hire people they perceived to be foreign, based on their accents or appearances. The law prohibits citizenship status and national origin discrimination with respect to hiring, firing, or referral or recruitment for a fee. The law also prohibits unfair documentary practices with respect to employment eligibility verification. All U.S. citizens and nationals and work-authorized immigrants are protected from national origin discrimination and unfair documentary practices. U.S. citizens and nationals, permanent residents, asylees, refugees, and temporary residents are protected from citizenship status discrimination.

80. Initial Report, *supra* note 78, ¶ 71(n).

81. *Id.* In a later report the U.S. Assistant Attorney General and Assistant Secretary of State to the UN Committee on the Elimination of Racial Discrimination cited *Whren* as an example of a "safeguard" against racial profiling. Glover, *supra* note 18, at 28. Due to the legacy of *Whren*, some believe these officials cited *Whren* by mistake. *Id.* However, the officials might have believed that *Whren* complies with CERD by declaring racial profiling illegal and have simply ignored how the ruling increased power of police to use traffic violations as a pretext for illegal stops.

82. *See generally* Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, CERD, July 30–Aug. 17, 2001, 59th Sess., U.N. Doc. ICERD/C/59/Misc.17/Rev 3 (Aug. 14, 2001) [hereinafter Concluding Observations 2001]; *see also* Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination, United States of America, CERD, 72d Sess., Feb. 18–Mar. 7, 2008, U.N. Doc. ICERD/C/USA/CO/6 (May 8, 2008) [hereinafter Concluding Observations 2008].

system and the definition of discrimination in CERD; the restrictive RUDs adopted by the United States in signing CERD; disparities in representation, treatment, and sentencing of racial minorities in the criminal justice system;[83] and problems with domestic implementation of CERD.[84] The permitted use of race in criminal immigration enforcement is not mentioned in the Committee's observations.[85] NGOs have conducted separate studies and issued "shadow reports,"[86] finding that the U.S. obligations under CERD are not understood domestically and full implementation is unlikely.[87] Overall, there has been no explicit implementation of CERD domestically, and U.S. courts have not employed any of the heightened protections against racial discrimination in CERD that rise above the lower U.S. constitutional protections, such as the CERD protections of minorities from laws that discriminate facially *and* in effect.[88] While most international courts and countries have not

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83. Concluding Observations 2008, *supra* note 82; *see also* Fellner, *supra* note 61, at 285–89.

84. Concluding Observations 2008, *supra* note 82, ¶ 36 (2008). The Concluding Observations comment that the United States should

> organize public awareness and education programmes on the Convention and its provisions, and step up its efforts to make government officials, the judiciary, federal and state law enforcement officials, teachers, social workers and the public in general aware about the responsibilities of the State party under the Convention, as well as the mechanisms and procedures provided for by the Convention in the field of racial discrimination and intolerance.

Id.

85. *See id*.

86. Hope Lewis, *Transnational Dimensions of Race in America*, 72 ALBANY L. REV. 999, 1024–25 (2009).

87. Fellner, *supra* note 61, at 260 n.15 ("In 2007, Human Rights Watch contacted the attorneys general of each state; not one of them was aware of CERD and their obligations under it."). One academic notes:

> A coalition of non-governmental organizations, activists, and academics used the opportunity created by the U.S. submission of its 2007 periodic report to the U.N. on the ICERD to highlight racial discrimination in the U.S. The shadow report critiques the inadequacies of the U.S. official report and places "domestic" issues such as Katrina, racial profiling, prison conditions, abuses against immigrants, education, housing, and health care, indigenous peoples' rights, the rights of women of color, sexual orientation, and other issues on the international agenda.

Lewis, *supra* note 86, at 1024–25.

88. *See supra* note 55. Interestingly, Justice Ginsburg utilized Article 2, Section 2 of CERD in her concurrence in *Grutter v. Bollinger*. 539 U.S. 306, 344–47 (2003) (Ginsburg, J., concurring). Article 2, Section 2 states, in relevant part, that State Parties shall take "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them." *Id.* at 344; CERD, *supra* note 1, art. 2, § 2. Justice Ginsburg used Article 2, Section 2 of CERD to justify the Court's ruling upholding the policy of the University of Michigan Law School. *See* Grutter, 539 U.S. at 344. The policy allowed consideration of the race of applicants when admitting students in order to ensure that minority students were admitted to the school. *See id*. While the use of international law in Supreme Court opinions is rare, Justice Ginsburg appears to have used CERD as support for her view that some remedial forms of racial discrimination could be constitutional. *Id*. *See*

decided cases of racial discrimination based solely on CERD, many countries consider CERD to have persuasive authority when deciding applicable cases.[89]

In Europe, the European Convention for the Protection of Human Rights of Fundamental Freedoms ("European Convention on Human Rights") established the European Court of Human Rights,[90] which decides cases based on the rights in the European Convention on Human Rights.[91] The court also considers other international law, including CERD. In the case of *Andrejeva v. Latvia*,[92] a non-citizen of Latvia was subjected to a different set of pension restrictions than Latvian citizens.[93] The majority did not consider CERD; however, a dissenting justice considered Section 2 of Article 1 of CERD and determined that, in the context of pensions, parties to CERD have the right to differentiate between citizens.[94] Similar to U.S. cases,[95] CERD was not utilized as mandatory authority in *Andrejeva*, although Latvia is a party to the treaty.[96]

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also McDougall, *supra* note 56, at 584 (finding that "ICERD carves out from the definition of racial discrimination the possibility of extensive affirmative action programs").

89. *See* A and others v. Sec'y of State for the Home Dep't, [2004] UKHL 56 (H.L.) [63] (appeal taken from Eng.), *available at* http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&others.pdf. Lord Bingham cites to a number of international law sources and notes that none of the law is binding on the United Kingdom. *Id.* However, Lord Bingham notes that the United Kingdom ratified CERD and the international law he cites is "inimical to the submission that a state may lawfully discriminate against foreign nationals by detaining them but not nationals presenting the same threat." *Id.*

90. *See* European Convention of the Protection of Human Rights and Fundamental Freedoms, arts. 19–51, Nov. 4, 1950, 213 U.N.T.S. 221.

91. *Id.*

92. 2009 Eur. Ct. H.R. 297.

93. *Id.* ¶ 3. The applicant was a citizen of the USSR and had been born in Kazakhstan. After the dissolution of the USSR in 1991, the applicant became a permanent resident, non-citizen of Latvia where she had lived since the age of twelve. *Id.* When the applicant applied for her pension upon retirement, the Latvian government refused to count towards her pension the time the applicant worked in Latvia for a company based in Kiev and Moscow. *Id.* If the applicant had been a citizen, the time would have been counted. *Id.*

94. *Id.* ¶ 38 (Ziemele, J., dissenting in part). The justice finds the pension context to be compelling enough to justify differentiating between citizens and non-citizens. *Id.* Relating CERD to other influential international law, the justice notes:

> It is true that the Committee on the Elimination of Racial Discrimination has construed this exception strictly but none of the developments in human rights law, including the European Convention on Human Rights, have abolished the sovereign right of a State to impose distinctions between citizens and non-citizens in so far as their purpose or effect contains no element of discrimination based on race, colour, descent, or national or ethnic origin.

Id. (internal citation omitted).

95. *Grutter*, 539 U.S. at 344; *see also supra* note 67.

96. *See* CERD Declarations and Reservations, *supra* note 4.

The United Kingdom, when determining the validity of detaining individuals after the 9/11 terrorist attacks,[97] also reviewed the allowance in Section 2 of Article 1 to treat non-citizens differently from citizens.[98] The court noted that while the allowance might seem to exempt discrimination against non-citizens from the scope of treaty, the Committee still inquires into whether there was a disparate impact on non-citizens based on the illicit criteria.[99] However the court, like the European Court of Human Rights and the U.S. courts, did not use CERD in its official holding.[100]

These U.S., European Court of Human Rights, and U.K. cases make clear that while CERD allows parties to distinguish based on citizenship, the Committee will not tolerate any act that borders on discrimination, even in effect. It is possible that parties to the treaty have not included a CERD analysis in their official jurisprudence in order to avoid evaluating whether their immigration laws and other laws that distinguish based on citizenship actually discriminate.

Regarding S.B. 1070 specifically, the drafters could have been trying to distinguish between citizen and non-citizen status by using race as one of many rational factors employed to quickly evaluate an individual's citizenship status near the border.[101] By adopting the *Brignoni* criteria through the clause "to the extent of the United States Constitution,"[102] S.B.

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97. A and others, [2004] UKHL 56 (H.L.) [63] ¶¶ 6–7.

98. *Id.* ¶ 62.

99. *Id*. Lord Bingham referred to the General Recommendation 14 adopted by the Committee, which states:

> The Committee observes that a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of article 1, paragraph 4, of the Convention. In considering the criteria that may have been employed, the Committee will acknowledge that particular actions may have varied purposes. In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.

Id. See also General Recommendation XI: Non-citizens (Art. 1), U.N. HIGH COMM'R FOR HUMAN RIGHTS (Mar. 19, 1993), http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/7b38ac12b0986d86c12563ee004a8af0?Opendocument. In 2004, the Committee updated its comments on non-citizens and added that states must "[c]ombat ill-treatment of and discrimination against non-citizens by police and other law enforcement agencies and civil servants by strictly applying relevant legislation and regulations providing for sanctions and by ensuring that all officials dealing with non-citizens receive special training, including training in human rights." *General Recommendation No. 30: Discrimination Against Non-citizens*, U.N. COMM'R FOR HUMAN RIGHTS. ¶ 21 (Oct. 1, 2004), http://www.unhcr.org/refworld/docid/45139e084.html.

100. A and others, [2004] UKHL 56 (H.L.) [63] ¶ 63.

101. Similarly, Latvia could have been distinguishing between citizens and non-citizens in its pension program as an efficient way to cut down on pension costs. *Andrejeva*, 2009 Eur. Ct. H.R. 297.

102. Ariz. Rev. Stat. Ann. § 11-1051(B) (2010).

1070 seems to push against, if not cross over, the line between distinctions based on race and discrimination. If S.B. 1070 does violate CERD, the next question is whether the situation in Arizona justifies or necessitates racial profiling, and, if so, whether the United States should withdraw from the treaty.

V. THE COSTS AND BENEFITS OF RACIAL PROFILING IN IMMIGRATION LAW

Particularly in the immigration context, scholars have grappled with the advantages and disadvantages of racial profiling. While the correlation between illegal immigration and a Hispanic race may be higher than the correlation between criminal behavior, such as drug dealing, and a minority race, such as African American,[103] the same costs associated with racial profiling of African Americans and other minorities in the criminal context exist with the racial profiling of immigrants. When weighing the costs and benefits of racial profiling in immigration, scholarship on profiling of minorities can provide useful information on the effects profiling can and likely will have on immigrants at the Arizona-Mexico border.[104]

One of the strongest arguments in favor of racial profiling is that the use of a profile, while it may violate constitutional rights of citizens and non-citizens, can make police work more efficient and effective.[105] Profiling advocates contend that randomly selecting drivers to stop at a checkpoint instead of using a profile could waste time and effort, just as stopping an elderly European woman at the airport would likely be fruitless if she has none of the characteristics of a terrorist profile.[106] Supporters of racial profiling could also use as support the statistics that

103. This argument draws comparisons from Pampel's argument that "a stronger connection exists between Middle Eastern Muslim background and terrorism than the connection between race and drug distribution." PAMPEL, *supra* note 26, at 23.

104. *See infra* notes 115–17, 123 and accompanying text.

105. PAMPEL, *supra* note 26, at 8. Pampel suggests that the best way to deal with the benefits and costs of racial profiling is to balance the protection of individual rights and the interest in fighting crime. *Id.* Pampel suggests that liberals tend to push for protecting individual rights while conservatives tend to side with fighting crime, although politicians on both sides take a stance against racial profiling. *Id.*

106. *Id.* at 29. Pampel makes the "common sense" argument that law enforcement should not waste time on investigating individuals whose background is not associated with any type of illegal activity. *Id.* He also notes that empirical data demonstrates that in New Jersey, when the police ceased their use of a felony-offender profile because of the risk of "inappropriate stereotype," drug charges from police stops dropped dramatically. *Id.* at 30. However, murder rates, which are related to drug trafficking, increased in certain cities during the same period. *Id.*

show a higher criminal arrest rate for minorities;[107] however, instead of these statistics supporting racial profiling tactics, racial profiling could be the cause of the high rate of minority arrests.[108] Many minorities, both citizens and non-citizens, suffer from economic discrimination, language barriers, and lack of general opportunity to succeed in America.[109] On the other hand, law enforcement officers argue that they must continue to fight crime regardless of the race of the perpetrators and cannot remedy the large social injustices that minorities face.[110]

While some of the disadvantages of racial profiling might seem intuitive, "[p]rofiling may violate the civil rights of minority groups, reduce public support for the police, and ultimately increase crime."[111] Racial profiling may offend the Fourteenth Amendment Equal Protection clause, which has been used to strike down distinctions that laws make based on race.[112] The Supreme Court has found that constitutional protections apply to non-citizens within the United States;[113] therefore, some scholars believe that racial classifications used to curb immigration could be invalid under the Equal Protection clause.[114]

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107. *Id.* at 26.

108. *Id.* at 34. The arrests rates in a way become a "self-fulfilling prophecy." *Id.* The same argument would not apply to Hispanics since, with or without profiling, most of the illegal immigrants at the Arizona-Mexico border will be Hispanic; other criticisms, however, still affect the usefulness of the Hispanic profile.

109. *Id.* at 24.

110. *Id.*

111. *Id.* at 4. With regards to the first concern, racial profiling can have significant psychological affects on its targets, similar to post-traumatic stress disorder. *Id.* at 37. These psychological effects can lead minorities to dress differently, travel to different areas, drive different cars, and shop differently in reaction to profiling. *Id.* Scholars have commented that racial profiling can create a feeling of unequal treatment and second-class citizenship among the targeted group, whether the group has done something illegal or not. *The Case Against Race Profiling*, *supra* note 45, at 717–18. Johnson draws connections between the targeting of Hispanics in current immigration law to the Chinese exclusion laws of the 1800s, Japanese internment during World War II, strict quota systems on immigration from eastern and southern Europe in the twentieth century, restrictions on African immigration, and seemingly racially-oriented refugee and asylum laws. *Id.* Johnson's comparisons draw compelling similarities between these past racially-motivated policies and *Brignoni*'s expansion of immigration enforcement power.

112. *See id.* at 719 n.242 and accompanying text.

113. Plyler v. Doe, 457 U.S. 202, 212 (1981) (finding that the Fourteenth Amendment applies to all persons within a state); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1885) ("'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the protection of the laws is a pledge of the protection of equal laws.").

114. *See* Johnson, *The Case Against Race Profiling*, *supra* note 45, at 720–21. Johnson notes that the Supreme Court held in *Brignoni* and during the time of Chinese exclusion that the Plenary Power doctrine did not override the constitutional rights of people within the U.S. borders. *Id.* at 721.

Additionally, the open use of racial profiling increases distrust towards law enforcement and decreases assimilation and naturalization.[115] In the immigration context, border patrol officers claim to focus efforts on curbing commercial smuggling, yet smugglers can avoid the Border Patrol by employing non-Hispanic drivers.[116] For example, drug dealers in California have used non-Hispanic teenagers as drug runners.[117] Since offenders have continuously adapted to racial profiling by law enforcement, some police profiles have become completely contradictory or include so many elements that every driver or airplane passenger fits the profile.[118] Minorities are so accustomed to being disproportionately targeted by police that terms such as "driving while black,"[119] "driving while Mexican,"[120] and "flying while Arab"[121] have now become part of the English vernacular.[122]

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115. *Id.* at 716.

116. *Id.* at 711.

117. *See* Booth & Miroff, *supra* note 14.

118. PAMPEL, *supra* note 26, at 35–36. For example, some of the elements of an airplane passenger profile include passengers who "arrived late at night, arrived early in the morning, [or] arrived in the afternoon," passengers who were "one of the first to deplane, one of the last to deplane, [or] deplaned in the middle," and passengers who "walked quickly through the [the] airport, walked slowly through [the] airport, [or] walked aimlessly through [the] airport." *Id.* at 36.

119. *See generally* David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997). Harris analyzes the effects of the Supreme Court decision in *Whren* and notes that police can use traffic violations to stop disproportionate amounts of African Americans under the pretext of a traffic stop; however, police were already stopping disproportionate numbers before *Whren*. *Id.* at 546. Harris states,

> In fact, the stopping of black drivers, just to see what officers can find, has become so common in some places that this practice has its own name: African-Americans sometimes say they have been stopped for the offense of "driving while black." With *Whren*, we should expect African-Americans and Hispanics to experience an even greater number of pretextual traffic stops. And once police stop a car, they often search it, either by obtaining consent, using a drug sniffing dog, or by some other means. In fact, searching cars for narcotics is perhaps the major motivation for making these stops.

Id.

120. *See generally* Romero, *supra* note 34 (describing the origins and uses of the terms).

121. *See* Legomsky, *supra* note 60, at 178.

122. *See* PAMPEL, *supra* note 26, at 26. Pampel notes:

> The figures for 2000 . . . disclose that 27.9 percent of all persons arrested are black and 69.7 are white. Further, of all persons arrested for weapons violations, 36.8 percent are black and 61.3 are white; of all persons arrested for drug abuse violations, 34.5 percent are black and 64.2 percent are white; and of all persons arrested for murder, 48.8 are black and 48.7 are white. Although white arrests outnumber black arrests, blacks make up about 13 percent and whites (including Hispanics) make up about 82 percent of the population.

Id. In addition, the "hit rates," the percentage of police searches in which drugs are found, is 6.2% for blacks and 6.7% for whites. *Id.* at 35. Hit rates for Hispanics are much lower at 2.8%. *Id.*

Pampel finds that profiling can adversely affect the entire judicial system because jurors, whether or not profiling victims themselves, may acquit a guilty defendant if they suspect that the accused was

Lastly, some believe that state endorsement of racial profiling leads to greater private discrimination and racial hostility, such as the rise of private citizens enforcing borders in the Southwest.[123] The government's acceptance of private discrimination and discrimination in law enforcement could be one impetus for Arizona's increase in anti-immigrant sentiment.

The concerns that could arise from racial profiling in immigration enforcement through a law like S.B. 1070 are two-fold. Not only will legal permanent residents and U.S. citizens of Hispanic descent be singled out by a law like S.B. 1070, but Hispanic non-citizens will also be treated differently from other non-citizens. Even if profiling could be rational in a situation like that in Arizona, rational racial profiling laws are not always justified laws.[124]

While racial profiling may not be a preferable enforcement tactic, the situation in Arizona has become heated and contentious,[125] and the benefits of racial profiling could outweigh the costs. Clashes occur between citizen militias and immigrants crossing the border, and the effects of the out-of-control drug regimes in Mexico spill into the United States.[126] The United States should weigh the costs and benefits of profiling to determine what steps it can to take in Arizona.

VI. CONCLUSION

If S.B. 1070 truly discriminates based on race, then the United States would be required to strike down the legislation to remain compliant with CERD.[127] Striking down this legislation would also be an implicit overruling of *Brignoni*, which would be a considerable step to take in recognizing international law. However, there are benefits to complying with CERD, including increasing perceptions of U.S. legitimacy, bolstering the image of the United States as a nation that respects international consensus on certain human rights issues, and fully

racially profiled. *Id.* at 38. Occasionally entire cases will need to be dismissed and convictions overturned because of racial profiling. *Id.* The state most affected judicially by racial profiling is most likely New Jersey. *Id.* New Jersey has had to overturn convictions, has been subjected to federal investigations, and has faced litigation for its extensive use of profiling. *Id.*

123. Johnson, *The Case Against Race Profiling*, *supra* note 45, at 732–35.

124. Legomsky, *supra* note 60, at 178.

125. *Arizona Immigration Conflict Heats Up*, CBS NEWS (Apr. 26, 2010), http://www.cbsnews.com/stories/2010/04/26/national/main6434031.shtml.

126. *See* Booth & Miroff, *supra* note 14.

127. CERD, *supra* note 1, art. 2, § 1(c) ("Each State Party shall . . . rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination.").

implementing a treaty that delineates a clear line regarding the use of race in legislation and law enforcement tactics. From a legitimacy and public policy perspective, the United States may wish to both admit its shortcomings and make advances towards meeting the provisions of CERD. Implementation could be most important in Arizona where the provisions of CERD are most directly at odds with local law.

In the alternative, the United States could remain a party to the treaty but decline to apply the treaty solely in Arizona. The United States could frame the situation in terms of an emergency for which extreme policies are needed. Lastly, if the United States has no intention of following CERD and elevating protections from racial profiling above the current constitutional protections, the United States should withdraw from CERD. The United States gains little by remaining a party to a treaty with which it does not comply. Backing out of the treaty could raise questions about United States' dedication to fighting discrimination; however, the United States should stand by its constitutional jurisprudence if it believes its laws provide adequate protection for individual rights and are flexible enough to handle extreme situations such as that in Arizona.

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