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Are Immigration Officials Overturning Plyler v. Doe?

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Are Immigration Officials Overturning *Plyler v. Doe?*

By

Andres Ortiz

I. Introduction

In 1982, the Supreme Court struck down a Texas law that effectively denied undocumented children access to free public elementary and secondary education.¹ The Court held that denying undocumented children equal access to schools would create a caste of people because the denial of educational, social, economic, intellectual and psychological benefits of schooling would foreclose any possibility of a secure future.² *Plyler* was truly a monumental decision that typified the power the law possesses to empower even the most marginalized people and to that point some immigration scholars have praised as “the true high water mark of immigrants rights in the U.S.”³

However, in the years following *Plyler*, a number of states and localities have attempted to chill the affects of this groundbreaking decision. These laws range considerably in breadth, from requiring parents to provide Social Security Numbers for their children’s initial registration in public schools⁴, to attempting to deny admission to public schools to children whose family

¹ See generally *Plyler v. Doe*, 457 U.S. 202 (1982).

² *Id.* at 218 and 222

³ Michael A. Olivas, *Holding the Line: The Implementation of Plyler v. Doe* at 25, Presented at The 25th Anniversary of *Plyler v. Doe*: Access to Education and Undocumented Children, 1 (2007). From here on *Holding the Line*; see also

⁴ Olivas, *Holding the Line*, 18-22 (the numerous state and local SSN/ITIN initiatives that has had a chilling affect on undocumented children’s school attendance. Specifically, “any use of a SSN or TIN by school officials will cause undocumented parents to avoid transaction, where possible, and children will suffer as a result”).

entered with a B-2 visa that had expired (also known as “Helicopter Children”)⁵, to Proposition 187.⁶ Nonetheless, federal courts have been fairly consistent in upholding the right to education *Plyler* established.

Lately, federal immigration agents and local law enforcement agencies have taken a more active and effective role in denying undocumented children equal access to public education.⁷

The emerging pattern of questioning Latino children about their immigration status in and around schools has had devastating effects on the students, schools and communities at large where the practice has occurred. For example, in Roswell, New Mexico, an eighteen year-old, pregnant senior was deported after a school resource officer (SRO) discovered she was here without documentation.⁸ In response, Latino parents whose children collectively possessed all immigration statuses were afraid to allow their children to attend schools. The fear of being exposed created a barrier that prevents these children from truly integrating to American Society.

This paper seeks to address the harms that immigration law enforcement in schools has on students and communities, as well as advance legal approaches to challenge this practice. Part II will outline a number of factual scenarios where immigration or local law enforcement officials have questioned Latino children of all immigration statuses. The purpose of this section is twofold. First, this section will paint a picture of the environment these Latino children face in

⁵ *Id.* at 26 (explaining how the Delmwood Park School Board attempted to deny public education to a child whose family entered with a B-2 visa that had expired. The State Board of Education threatened to withhold funds and the local school board reversed its policy).

⁶ Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WAULQ 675, 734-735 (describing the California initiative that would have banned undocumented immigrants from receiving public benefits including public education.) From here on, *Case Against Race Profiling*.

⁷ *Infra* section II, explaining the factual scenarios where undocumented and children, as well as U.S. citizen children have been questioned about their immigration status because of their “Hispanic appearance.”

⁸ *Infra* section II. C.

their pursuit of education. Second, it will outline the multiple harms Latino students, both undocumented and those with a legal status, face as a result of immigration enforcement at or around schools. Principally, undocumented children are particularly affected because the enforcement of immigration law creates a barrier to their education. Additionally, this section will address how Latino children, regardless of immigration status, are confronted with the reality that they are second-class peoples who are never above suspicion of being perceived as foreigners and how this discriminatory profiling may contribute to physical, psychological, and emotional harms that are symptomatic of serious mental health problems.

Part III will serve two purposes. First, it will discuss the historical and legal significance of *Plyler* as it relates to immigrant children. Second, although *Plyler*'s recognized that it would be fundamentally unjust to deny undocumented children access to education and the similarity in harms undocumented children face by having immigration laws enforced in schools, the problems presented in *Plyler* and immigration enforcement in schools are two different constitutional questions. Thus this portion of the section will address why *Plyler*'s holding is not sufficient to remedy the current form of discrimination faced by undocumented students attempting gain equal access to schools.

Recognizing these fundamental differences, Parts IV and V explore alternative challenges to immigration enforcement practices in schools. Part IV will examine how inquiries about immigration status based on a student's "Hispanic appearance" may violate Latino children's Fourth Amendment rights against unlawful searches and seizure because at least one United States Circuit Court has recognized that reliance on this factor serves no probative value in determining individualized suspicion for determining a person's lawful presence.

Part V will argue in alternative to the search and seizure approach that targeting Latino students in immigration status inquiry violates the Equal Protection Clause of the 5th and/or 14th Amendment. Both past judicial decisions and immigration history may be able to provide evidence of intentional discrimination that is required to satisfy the Supreme Court's heavy burden of proof in establishing discriminatory intent requirement for a facially neutral law could be met.⁹ Because, discriminatory intent towards any race violates that race's civil rights regardless of immigration status, thus these actions contribute to stigmatic harm and create a barrier to equal access to education for all Latinos.

II. Factual Scenarios

Since 2006, the number of incidents of immigration enforcement in and around schools has increased.¹⁰ Yet little attention has been brought to these egregious acts perpetuated by both local law enforcement agencies and immigration enforcement officials. This section will discuss three instances where law enforcement agents have unlawfully seized children because of their "Hispanic appearance," and the harms inflicted upon these children and their communities as a result of this form of immigration enforcement in schools.

A. Albuquerque

In Albuquerque, New Mexico,¹¹ three boys, Ruben Tarango, Sergio and Carlos Gonzalez, all students at Del Notre High School, were detained after being questioned about their

⁹ Johnson, *Case Against Race Profiling*, at 687 (citing *Washington v. Davis*, 426 U.S. 229, 238-239 (1976) "Announcing requirement that to prevail on an Equal Protection claim plaintiff must establish that State actor had a "discriminatory purpose.")

¹⁰ *Infra* the rest of Section II, (Since 2006, there have been documented cases of immigration enforcement in Chaparral, New Mexico; Roswell, New Mexico; Tucson, Arizona; San Diego, California; Ortero County, New Mexico; and Oakland, California schools.)

¹¹ Racial Demographics for the City of Albuquerque, New Mexico, <http://www.helloalbuquerque.com/Census.Cfm> (2000) (Citing the 2000 Census where Latinos constituted 39.9% of the population.); see also Multichannel News, *Census 2000, American*

immigration status, despite the absence of probable cause or reasonable suspicion of committing any crime other than unlawful presence.¹² Del Norte High School is a grades 9-12 high school in northeast Albuquerque, and of the 1503 students, 49% are Latino.¹³

Two of the plaintiffs, Sergio Gonzalez and Ruben Tarango were in Mr. Tarango's car on the Del Norte Campus when the school resource officer (SRO) stopped the two boys because he suspected they were undocumented.¹⁴ The two boys were ordered out of the car by uniformed and armed SROs.¹⁵ Despite not being suspected of committing any crime, the two boys were instructed to spread their legs, put their hands on the hood of the car, and were searched by the SRO.¹⁶ After searching these children, the officers were still unable to find any evidence these children had engaged in any illegal activity.¹⁷

The SRO's actions were clearly outside of the officer's scope of enforcement capabilities because, neither the school district nor the Albuquerque Police Department are a party to a 287(g) agreement with an immigration enforcement agency.¹⁸ The 287(g) program allows ICE officials to train local law enforcement officers on some aspects of immigration enforcement so that local

Factbook for US 1990 and 2000 Quick Tables for Cities, (2001), (Albuquerque was among the 20 largest Latino Markets in the 2000 Census).

¹² *Gonzalez v. The City of Albuquerque*, (Compl. ¶ 22-41); see also *Holding the Line*, at 24 (describing the factual scenario when students were questioned because they were suspected to be out of status and ultimately turned over to Border Patrol Agents. Olivas also adds that the questioning took place 300 miles from the U.S.- Mexico Border).

¹³ School Demographics for Del Norte High School, <http://www.greatschools.org/cgi-bin/nm/other/54#students> (2007).

¹⁴ *Gonzalez v. The City of Albuquerque*, at 22-24.

¹⁵ *Id.* at 23.

¹⁶ *Id.*

¹⁷ *Id.* at 24 .

¹⁸ See Immigration and Customs Enforcement 287(g) Factsheet, January 5, 2010, http://www.ice.gov/pi/news/factsheets/section287_g.htm (The only law enforcement agency in New Mexico that has a 287(g) agreement is the New Mexico Department of Corrections).

law enforcement officers can participate in the investigation of *criminal aliens*.¹⁹ Investigating unlawful presence, in the absence of reasonable suspicion or probable cause of these students' involvement in any crime as well as appropriate training by immigration authorities would place this investigation completely beyond scope of permissive conduct for these officers.

Notwithstanding the lack of evidence of criminal activity and personal knowledge that the boys were students at Del Norte, the SROs demanded that they produce identification.²⁰ Ruben Tarango produced his student identification card and Sergio Gonzalez did not have his identification card on his person, but assured the officers that he was a student at Del Norte.²¹ The SROs then contacted Albuquerque Police Department and asked them to contact the Border Patrol because they suspected the two boys were undocumented.²² The two boys were held for an hour and a half before the Border Patrol agent arrived.²³ Without their consent, Border Patrol Agent Patrick Hernandez interrogated the two boys while still at Del Norte High School.²⁴ Upon concluding his interrogation, Agent Hernandez placed the two students into his vehicle.

Before Agent Hernandez left, the SROs informed him there was another who child they believed to be illegally present in the United States. Solely relying on the SROs' suggestion, Agent Hernandez ordered Carlos Gonzalez to be removed from class to question him about his immigration status, as well.²⁵ Although the security officer also found no evidence the third child

¹⁹ *Id.*

²⁰ *Id.* at 27.

²¹ *Id.* at 28-29.

²² *Id.* at 32.

²³ *Id.* at 33.

²⁴ *Id.* at 33-34.

²⁵ *Id.* at 35-37.

had been involved in criminal activity,²⁶ Carlos was removed from a classroom while he was attending a class and brought to Agent Hernandez for questioning.²⁷

At no time during the ordeal were the three boys suspected of or cited for violating any criminal law or school policy.²⁸ The complaint that was subsequently filed on behalf of the boys not only alleged that they suffered mental and emotional distress as a result of their detentions, but that all undocumented students in Albuquerque and their parents became fearful of schools and school officials.²⁹ Moreover, the actions of the SROs and the Border Patrol had a “chilling effect” on the access of education for undocumented students.³⁰

In response to the actions taken by the SROs and the Border Patrol, MALDEF and other civil rights organizations filed suit against the City of Albuquerque, the Albuquerque Police Department and School Resource Officers and the US Border Patrol, alleging that the officers violated the students’ constitutional rights.³¹ However, the complaint was never adjudicated, and the parties settled out of court.³² As part of the settlement, the City and Albuquerque Public Schools agreed to adopt an official policy that created strict and specific protocol for dealing with attempted immigration enforcement in schools.³³ Although the Albuquerque School District and

²⁶ *Id.*

²⁷ *Id.* at 38.

²⁸ *Id.* at 40-41.

²⁹ *Id.* at 44.

³⁰ *Id.*

³¹ *Id.*; see generally Olivas, *Holding the Line*, at 25 (discussing generally the allegations brought by MALDEF and ACLU).

³² Amy Miller, *Migrants are Sage at APS*, *Albuq. J.*, June 2, 2006, at C1.

³³ *Proposed Board Policy J.20*, Proposed Procedural Directive on “Safe Schools” (2007) (The settlement contained a number of provisions that sought to protect undocumented students’ identity, as well as provide a strict protocol for addressing immigration inquiries. In compliance with the Family Educational Right and Privacy Act (FERPA), school administrators were instructed to remove any immigration related information from student records, thus eliminating any incentive for ICE to ask school staff about their students’ immigration status. To address situations where ICE or any other law enforcement agency attempts to investigate, interrogate or

the Border Patrol eventually adopted a reasonable policy to ensure that all students, regardless of immigration status, have equal access to public schools, it took the deportation of the three boys in this instance to achieve these ends.³⁴

B. Roswell, NM

Roswell, New Mexico, a town where 44% of residents and 60% of public school students are Latino,³⁵ was left in turmoil as result of immigration enforcement in its schools. On November 27, 2007, Karina Acosta, an eighteen year-old pregnant Roswell High School senior, drove her friend, Brenda Molina and Molina's younger brother to school.³⁶ Acosta stopped in a fire lane so that the girls could drop off Molina's younger brother at a local middle school.³⁷ SRO Charlie Corn noticed the illegally parked car.³⁸ Mr. Corn, who had a reputation for requesting that Latino children provide proof of their residency,³⁹ followed Acosta from the middle school to the Roswell High School parking lot, where he issued her a ticket.⁴⁰ When Acosta could not produce a driver's license, the police officer demanded she provide proof of legal residency.⁴¹ Ms. Acosta said she was not able to produce her residency card, and then Mr. Corn instructed her

detain a student because of their immigration status, the request will be *initially denied*. The request will then be relayed to the principal and superintendent, who will only agree to authorize any attempted immigration law enforcement after consulting with the Albuquerque Public School (APS) attorneys. Additionally, APS are to instruct all school employees and district administrators that they are *in no way required to comply with orders from immigration officials, absent a warrant*. (emphasis added))(on file with author).

³⁴ *Holding the Line*, at 25 ("The children were sent back to Mexico, although they were allowed to return to New Mexico to testify in the legal proceedings).

³⁵ Nicholas Riccardi, *Deportation of Student Stirs Up City*, L.A. TIMES, Feb. 18, 2008, at A 17.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* (Contained in a written statement by Brenda Molina)

⁴¹ Deborah Baker, *Deportation of High-School Student Draws N.M. Protests Roswell Schools Usually Safe Havens for Illegal Immigrants*, Seattle Times, Mar. 6, 2008 at A3.

to bring it to him the following day.⁴² After five days, Officer Corn went into Ms. Acosta's classroom and removed her so that she could provide him with her proof of legal residency.⁴³ When she could not do so, Mr. Corn contacted federal immigration officers.⁴⁴ The officers instructed Corn to hold the child so she could be deported.⁴⁵ Ms. Acosta was then taken to a juvenile detention center, where she accepted deportation rather than fight her immigration case.⁴⁶ Like in Albuquerque, these actions were not done pursuant to any 287(g) agreement.⁴⁷

Ms. Acosta's deportation greatly polarized the town and deleteriously affected all Latinos in the area. Soon thereafter, parents, teachers, and students were confronted with the reality of the risk that undocumented children in Roswell take every day they attend school. Delores Fresquez, Ms. Acosta's former teacher lamented, "[t]he thing that made me angry is that schools are supposed to be safe for any student, regardless of what nationality, what age they may be"⁴⁸ and that "[m]y kids from Mexico are angry and hurt, [supporters of the deportation] don't understand how many [children] in this school are here illegally."⁴⁹ This sentiment was not just held by the undocumented population. Adolfo Reyes, a U.S. citizen, also voiced his concern that his children would be targeted by law enforcement officers because of their ethnicity: "[W]e're concerned they're going to call [immigration] on our kids. Our kids don't carry their birth certificates or

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Riccardi, *Deportation of Student Stirs Up City*, A17.

⁴⁷ *Supra* note 18.

⁴⁸ Riccardi, *Deportation of Student Stirs Up City*, A17.

⁴⁹ Baker, *Deportation of High-School Student Draws N.M. Protests Roswell Schools Usually Safe Havens for Illegal Immigrants*, A3.

IDs.”⁵⁰ In response to Acosta’s deportation, many parents kept their children home from school, and the entire Roswell school district suffered a dip in attendance as a result.⁵¹

After Acosta’s deportation, dozens of concerned parents protested and held meetings with the school superintendent and the police chief to discuss their disapproval of Officer Corn’s actions.⁵² School officials reiterated to parents that it is the school’s policy to not inquire about immigration status of their children.⁵³ Further, the school officials stated that Corn’s actions were neither approved nor a part of normal district protocol.⁵⁴ Subsequently, Mr. Corn was removed from his position as an SRO.⁵⁵ However, John Balderston, Roswell Police Chief, defended Mr. Corn’s actions.⁵⁶ Unfortunately, it took the deportation of a pregnant mother before the Roswell School District halted this police program in its schools.

C. Chandler, Arizona

In July 1997, two girls, aged seven and ten, were questioned outside of their school pursuant to what has become known as “The Chandler Round-Up.” The program was a five-day joint operation between Chandler police and Tucson Border Patrol. Local police officers questioned and harassed local residents about their immigration status based on their “Hispanic

⁵⁰ Riccardi, *Deportation of Student Stirs Up City*, A17.

⁵¹ *Id.*

⁵² Rene Romo, *Pregnant Roswell Student Deported: Officer Contacted Agents After Parking Violation*, Albuquerque Journal, Dec. 13, 2007, at A1.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* (quoting Balderston, “It’s very unfortunate, but as far as I can tell, the officer did act appropriately.” Also he added it was standard procedure to contact Border Patrol or immigration authorities when they suspect someone is undocumented. Moreover, he offered rationale for his seemingly racist profiling procedure, “It’s not just people coming from Mexico, we have concerns about Middle Eastern men. If we don’t check (immigration status), if we turn our back, we’re going our country a disservice”).

appearance.”⁵⁷ The Chandler Police Department (CPD) claimed that officers were instructed to stop vehicles *solely based on probable cause of violation of state and local laws* and not on belief the suspects were undocumented immigrants.⁵⁸ However, it was apparent that during the five-day operation, the CPD stopped and interrogated “Mexican-looking” individuals at local grocery stores, gas stations, and convenience stores for no reason other than the color of their skin.⁵⁹ For example, a CPD officer approached a woman sitting in her automobile and said, “Hey lady, you look Mexican, huh?”⁶⁰ During the officer’s investigation, he only inspected the woman’s immigration documents, but never asked for her driver’s license, proof of insurance, or vehicle registration.⁶¹ Moreover, the woman was neither issued a citation nor told why she had been questioned.⁶² After an investigation, Arizona’s Attorney General, Grant Woods, agreed that the motivations for the Chandler Round-Up were motivated by animus towards the Latino community.⁶³ The Chandler Round-Up resulted in the deportation of 432 undocumented Latinos.⁶⁴ Undoubtedly these deportations occurred at the expense and violation of the Equal Protection and Fourth Amendment rights of countless Latinos, regardless of their immigration status, in the Chandler area.⁶⁵

⁵⁷ Romero, Mary and Marwah Serag, *Violation of Latino Civil Rights Resulting from INS and Local Police Use of Race, Culture and Class Profiling: The Chandler Roundup in Arizona*, 52 Clev. St. L. Rev. 75, 75-80 (2005). From here on *The Chandler Roundup in Arizona*.

⁵⁸ Carrie L. Arnold, Note, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 Ariz. L. Rev. 113, 120- 121 (2007) (citing the results of the Chandler Survey, conducted by the Arizona Office of the Attorney General).

⁵⁹ *Id.* at 120.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 121.

⁶⁴ *Id.* at 120.

⁶⁵ *Id.* at 121 (referring to the Arizona Attorney General’s conclusions based on its investigation the “Chandler Round-Up”).

Among the victims of the operation were two Mexican-American sisters who were questioned about their immigration status at their elementary school:

On July 30, 1997, Q was running [a] little late picking up her daughters, age 7 and 10, from Frye School in Chandler, so the girls started walking home. When Q caught up with them, half a block from school, the girls were crying. Q asked why they were in tears and they told Q, “It is your fault,” and asked, ‘What is a birth certificate?’ The girls pointed down the street and said that the officers told us to keep our birth certificates with us or they will send us back to Mexico. Both girls kept saying, ‘Mom, we don’t know Mexico’ ... Now, when someone is at the door, the girls hide, bundle up with each other, and ask their mother not to open the door because it ‘maybe it is the police.’ Before this incident both girls were always eager to go with her on errands; now, they cry so she will let them stay at home. Both girls insist on having their birth certificates pinned to their clothes or around their necks and no longer want to walk home from school or play outdoors.⁶⁶

Clearly, this experience challenged the two girls’ perception of their place in American society. Although they were too young to understand the concept of citizenship, the CPD taught the girls that the color of their skin relegates them to a second-class status in this country.⁶⁷

D. Harms

As a result of immigration enforcement in schools, both students and families have experienced a number of harms that not only serve as a barrier to education, but also reinforce Latinos’ subordinated status in American society. This section will address two types of harms. The first subsection addresses the notion that immigration enforcement in schools serves as a barrier to accessing schools, which negatively impacts undocumented children’s access to education. I argue that in many situations, this type of enforcement isolates immigrant families

⁶⁶ Romero, *The Chandler Roundup in Arizona* at 75.

⁶⁷ *Id.* at 79 (discussing how both micro and macro aggressions taken toward Latinos in this particular situation, and immigration enforcement in general, deny “equal access to equal opportunities and fair dealings before the law”).

from all governmental institutions. The second subsection highlights the dignitary harms Latino children encounter as a result of race-based immigration enforcement in schools.

1. Access to School and Other Civic Institutions

In all cases where immigration enforcement occurred in schools, the affected school- and even the affected school district -- saw a precipitous drop in attendance. For example, when ICE agents entered a Migrant Head Start facility attached to Sunrise Elementary in Chaparral, New Mexico, the entire district lost hundreds of students for the entire year.⁶⁸ Albuquerque and Roswell experienced similar drops in attendance because of immigration enforcement in schools.⁶⁹

Historically and contemporarily, schools are regarded as the great equalizer in American society. Horace Mann, the Father of American Education, believed that increasing educational opportunities would decrease poverty and socialize children with proper values in mainstream society.⁷⁰ School attendance is the threshold to education becoming the great equalizer, because absences have a deleterious effect on a child's ability to learn. This is because classroom instruction and academic learning time (both student-driven and teacher-supported learning time) are essential components of academic development. Students who do not attend classes miss out on these two vital elements of education, thus creating greater barriers to academic achievement.

⁶⁸ Janet Murguía, National Council of La Raza, "*The Implications of Immigration Enforcement on America's Children*," testimony before the House Comm. on Educ. and Labor, Subcomm. on Workforce Protections (May 20, 2008) (noting that after ICE entered a Head Start program, which was attached to Sunrise Elementary, the Head Start program struggled to enroll children in the program and has yet to meet pre-enforcement numbers. Additionally, in the weeks following the incident, the Gadsden Independent School District, which is Sunrise Elementary's school district, "documented that approximately 200 students were absent and a small number returned to school during the remainder of the school year").

⁶⁹ *Supra* notes 30 and 52.

⁷⁰ Lawrence A. Cremin, *The Republic and the School: Horace Mann On the Education of Free Men*, 8 (1957).

Undoubtedly, parents and children's reaction to these traumatic experiences serve as a barrier to their performance in schools.⁷¹ In these situations, parents of undocumented children face a dilemma. They must choose between allowing their children to participate in the most meaningful and transformative American institution, at the risk of possibly exposing them and their families to the negative consequences of immigration enforcement, or remain in the shadows and foreclose any hope of their children having a better life than themselves.

For obvious public health and public safety reasons, it is simply unwise to completely shield off undocumented immigrants from all government institutions. In many cases, immigrants have traditionally regarded public schools as the sole safe governmental institution.⁷² Undoubtedly, immigration enforcement in schools compromises the school's ability to provide a safe environment for all children, not just undocumented students. Cecilia Doran, principal of Sunrise Elementary, powerfully encapsulated the fallout her school faced as a consequence from being forced to assist armed ICE agents to detain one of her students. Ms. Doran recalled that children were "frightened and traumatized" when she escorted the father and the armed immigration officer into the classroom to detain the child.⁷³ She noted that it took months for the faculty and staff to regain student trust.⁷⁴ In the meantime, hundreds of students district-wide left school and did not return.⁷⁵ When the school is no longer a safe place to learn and develop as a person and a student does not feel secure in his/her learning environment, s/he will simply struggle to reach his/her full potential as a student. Clearly in these scenarios, immigration enforcement in schools

⁷¹ Len Feldman, *Students Shouldn't Pay Price of Immigration Raids*, California Educator, vol. 13, issue 7, April, 2009.

⁷² *Supra* notes 30 and 51.

⁷³ Letter from Cecilia Doran, Principal, Sunrise Elementary School to Andres Ortiz, Summer Legal Clerk for Mexican American Legal Defense and Educational Fund (*MALDEF*) (Aug. 7, 2009) (on file with author).

⁷⁴ *Id.*

⁷⁵ *Supra* note 68.

serves as an outright barrier to education for undocumented students and also drives a wedge between the sole institution that has historically had a positive relationship with undocumented immigrants.⁷⁶

2 Unequal Membership in Society

Principally, race-based immigration enforcement in schools overrules the spirit of *Plyler* and *Brown v. Board of Education*⁷⁷ by reconstructing the barriers to access education that previous generations fought so tirelessly to bring down. It seems contrary to the spirit of these two landmark decisions to punish Latino children for participating in the civic institution to which they supposedly have equal access. Ultimately, immigration enforcement in schools reinforces the belief that all Latinos are unequal members of society. In the factual scenarios such as the ones recounted above, affected students displayed two behaviors that indicate Latino students know they are unequal members of American society. First, the affected students develop avoidance behaviors that may be symptomatic of greater mental health issues; and second, they are forced to constantly have to prove they belong in the United States.

Looking to the incident in Chandler, the CPD caused the two girls to question their role as members of American society.⁷⁸ Here, Q (the girls' mother) knew that her children did not have knowledge of their ethnicity. However, they understood "they were at risk before the law," unfortunately for these girls, for inexplicable reasons.⁷⁹ Moreover, the girls' fear of being discovered forced them to alter their behavior to prevent them from being separated from their

⁷⁶ For further discussion infra section IV. B. 3. Distrust of Governmental Institutions

⁷⁷ See *Brown v. Board of Education*, 347 U.S. 483 (1954).

⁷⁸ Mary Romero, *The Inclusion of Citizenship Status in Intersectionality: What Immigration Raids Tells Us About Mixed-Status Families, the State and Assimilation*, International Journal of Sociology of the Family, Vol. 34, No. 2, 131, 145 (2008).

⁷⁹ *Id.*

family.⁸⁰ Fear of being discovered and attempting to hide from law enforcement undoubtedly affects a child's willingness to attend school for two reasons. First, they are separated from their primary caregivers, their parents. Second, they are being placed right back into the environment that caused the harm. Furthermore, these avoidance behaviors may be signs of serious mental health illnesses like post-traumatic stress disorder (PTSD),⁸¹ which could affect school performance and contribute to delayed identity, emotional, and mental development.⁸²

Both the Chandler and Albuquerque incidents provide evidence that because Latinos do not “belong,” and their survival is predicated upon their ability to constantly prove that they belong. In Chandler, Q's daughters could not conceptualize what it meant to be a citizen, yet they insisted on having their birth certificates pinned to them whenever they are outside the house.⁸³ Likewise, in Roswell, Adolfo Reyes voiced a similar concern on behalf of his U.S. citizen Latino children in response to Karina Acosta's deportation.⁸⁴ The fact that Latinos feel the need to affix documents that prove belonging – their right to membership - is strong evidence that Latinos are internalizing the view that they are “aliens” in the United States, no matter what immigration status they may be. Ultimately, the desire to be free from harassment causes an intraracial rift between Latinos that prevents both groups from fully participating as members of American society.⁸⁵ These conclusions are similar to the ones Dr. Kenneth Clark came to in his famous doll test.⁸⁶ Both scientists and courts have observed that this type of stigmatization affects the ability and desire to

⁸⁰ *Id.*

⁸¹ See generally David Eisenman, et al., *PTSD in Latino Patients: Illness, Beliefs, Treatment Preferences and Implications for Care*, *Journal of General Internal Medicine*, 1386 (2008).

⁸² For further discussion, *Infra* section IV. B. 1. Stigmatization Is a Barrier to Education.

⁸³ *Supra* note 66.

⁸⁴ *Supra* note 50.

⁸⁵ For further discussion, *Infra* section IV. B. 2. Self-Hate as a Barrier to Intra-Group Relationships.

⁸⁶ *Brown*, 347 U.S. at 494.

learn, because of the effects this type of stigmatization has on a child's self-esteem and self-efficacy.

Ultimately, this type of immigration enforcement burdens Latino children as a whole, because it serves as both a literal and figurative barrier to education.

III. Plyler

In 1975, the Texas Legislature revised section 21.031 its education code.⁸⁷ The change allowed local school districts to withhold entry into public elementary and secondary schools from students who were not “legally admitted” into the United States. These students could attend the local public schools if their families paid “full tuition” for the students’ education.⁸⁸ In July 1977, the Tyler Independent School District imposed a \$1,000 annual tuition on all students who had not been “legally admitted” to the United States.⁸⁹ MALDEF initiated suit against the school district and its superintendent James Plyler, challenging the enactment of the statute as a violation of the Fourteenth Amendment. United States District Judge William Wayne Justice found in favor of the plaintiffs and enjoined the Texas statute from being enforced.⁹⁰ The judgment of the district court was ultimately appealed all the way to the United States Supreme Court, where it was consolidated with pending actions against other local school boards, Texas

⁸⁷ *Plyler* 457 U.S. at 205.

⁸⁸ *Id.*

⁸⁹ Hiroshi Motomura, *Immigration Outside the Law*, 108 Colum. L. Rev. 2037, 2041(2008). From here on *Immigration Outside the Law*.

⁹⁰ Nina Rabin, Mary Carol Combs, and Norma González, *Understanding Plyler's Legacy: Voices from Border Schools, Presented at The 25th Anniversary of Plyler v. Doe: Access to Education and Undocumented Children*, 1 (2007); and Lucy Hood, *Educating Immigrant Students*, 4 CARNEGIE REP. 2 (Spring 2007) (interview with Judge William Wayne Justice, the district court judge who presided over the original case considered it his greatest accomplishment because of the millions of undocumented children who have been educated as a result of *Plyler*.), available at <http://www.carnegie.org/reporter/14/immigrant/index.html>.

state agencies and officials.⁹¹ Finally, in 1982, in a 5-4 decision, the Court ruled that the statute violated undocumented children's Constitutional right to equal access to public education.

Justice Brennan, who authored the decision, framed the issue by focusing on the plight of undocumented children, recognizing that the harms inflicted on them are the result of circumstances that are largely out of their control. The Supreme Court recognized that many, if not most of these children are the sons and daughters of parents "whose presence is tolerated, whose employment is perhaps even welcomed, but who are virtually defenseless against any abuse, exploitation, or callous neglect to which the state or the state's natural citizens and business organizations may wish to subject them."⁹² The Court further reasoned that if these children were denied equal access to education, they too would remain in the shadows.⁹³ Even though the decision in *Plyer* does not extend heightened scrutiny to undocumented persons generally,⁹⁴ the Court did recognize the need for a different approach in analyzing the appropriate level of scrutiny for undocumented children.⁹⁵ In analyzing the law under an intermediate scrutiny standard,⁹⁶ the state simply could not meet its burden of showing a substantial state

⁹¹ *Id.*

⁹² *Plyler*, 457 U.S. at 219.

⁹³ *Id.* at 222 ("The inability to read and write will handicap the individual deprived of a basic education each and every day of his life")

⁹⁴ *Id.* ("We reject the claim that "illegal aliens" are a "suspect class."")

⁹⁵ *Id.* at 219-220 ("These arguments [about not granting undocumented immigrants a suspect class] do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants... But the children of those illegal entrants are not comparably situated. Their 'parents have the ability to conform to societal norms,' and presumably the ability to remove themselves from the State's jurisdiction; but the children who are plaintiffs in these cases "can affect neither their parents' conduct or their own status.' *Trimble v. Gordon*, 430 U.S. 762, 770 (1977).")

⁹⁶ The Court chose the middle standard situated between two ridged extremes of the judicial continuum. On one side is the rational basis review, which gives states the ability to enact laws that even if wrong or ill-advised will still be upheld so long as the law is *rationaly related* to a legitimate state purpose. And on the other side is strict scrutiny, which imposes a substantial

interest.⁹⁷ In the Court’s view, it would be fundamentally unjust to punish children for their parents’ decision to enter the U.S. without authorization by denying them participation in the public school system,⁹⁸ and § 21.031 was not an effective measure to “stem the tide of illegal immigration”⁹⁹ because very few, if any, families immigrate to the U.S. to receive free public education.¹⁰⁰

Legal scholars hold *Plyler* in high regard not just because of the practical effect it had on undocumented children’s access to education, but because it stands as a sort of high-water mark in immigrants rights jurisprudence.¹⁰¹ Among the laudable results of *Plyler*, three aspects stand out as particularly important. First, the decision overturned a sub-federal law meant to indirectly regulate immigrants on Equal Protection grounds instead of on preemption grounds.¹⁰² This decision was of particular significance because it acknowledged the constitutional rights of undocumented children instead of merely preventing a state government from taking away ability to indirectly regulate immigration. Second, and closely related to the Equal Protection grounds effect, although the Court expressly declined to extend any level of scrutiny to all undocumented immigrants, it created some level of heightened scrutiny of constitutional claims against the government for undocumented children.¹⁰³ Third, at least one legal scholar has argued the holding in *Plyler*, particularly Justice Marshall’s concurrence, leaves hope that education may one

burden on the state to prove the law is *narrowly tailored* to a compelling state interest and there are no other less intrusive means to meet the interest.

⁹⁷ *Plyler*, 457 U.S. at 230.

⁹⁸ *Id.* at 220 (citing *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972) “... Obviously no child is responsible for his birth and penalizing the ... child is an ineffectual—as well as unjust – way of deterring the parent.”)

⁹⁹ *Id.* at 228.

¹⁰⁰ *Id.* at 229.

¹⁰¹ See generally Motomura, *Immigration Outside the Law*; and Olivas, *Immigration Outside the Law*.

¹⁰² Motomura, *Immigration Outside the Law* at 2059.

¹⁰³ *Supra* note 1 at 218.

day be considered a fundamental right.¹⁰⁴ In the short term, the practical effect of *Plyler* is that it opened the door for approximately two million undocumented children to have had the opportunity to pursue primary and secondary education.¹⁰⁵

Despite *Plyler*'s tremendous achievements, the decision has been deemed to be somewhat of an anomaly in the annals of immigration history.¹⁰⁶ Moreover, although the decision granted undocumented children access to education, the public school systems, this decision is ill equipped to deal with the newest barriers imposed by ICE and local law enforcement agencies have instituted.

Although *Plyler* invalidated a sub-federal immigration regulation as a violation of the Equal Protection Clause of the Fourteenth Amendment,¹⁰⁷ there is little to no applicability to a Fifth Amendment challenge prohibiting federal immigration law enforcement agents from enforcing immigration law in schools. There are two compelling reasons why the federal courts would never outright prevent ICE from enforcing immigration laws in schools based on a Fourteenth Amendment equal protection challenge, both of which are evident from the majority opinion in *Plyler*. First, the Court declined to classify all undocumented immigrants as a suspect

¹⁰⁴ Maria L. Ontiveros and Joshua R. Drexler, *The Thirteenth Amendment and Access to Education for Children of Undocumented Workers: A New Look at Plyler v. Doe*, 42 U.S.F. L. Rev. 1045, 1052-1053 (2008) (Arguing that by Justice Marshall's dissent in *San Antonio Indp. Sch. Dist. v. Rodriguez* and his concurrence in *Plyler* signal that there may be a different analysis had these school districts denied children an opportunity to receive a "minimally adequate education.").

¹⁰⁵ *Id.* at 1050.

¹⁰⁶ Motomura, *Immigration Outside the Law* at 2059 (Professor Motomura suggests the *Plyler* was decided on Equal Protection and not preemption grounds is because of the "unique combination of children and education."); see also Maria Pabon Lopez, *Immigration: Reflections on Educating Latino and Latina Undocumented Children: Beyond Plyler v. Doe*, 35 Seton Hall L. Rev. 1373, 1385 (2005) (Stating that *Plyler* was "groundbreaking" because it was the first time the Supreme Court clearly stated that any undocumented persons could be protected under the Equal Protection Clause of the Fourteenth Amendment.).

¹⁰⁷ *Supra* note 106 (specifically the Motomura cite).

class. Thus, an equal protection claim would have to overcome Justice Brennan’s recognition that undocumented children, while not in control of their predicament, are still present without authorization and thus removable.¹⁰⁸ Further, *Plyler* did not support the conclusion that undocumented children have a *right to equal presence* in the United States. Instead, the Court was protecting undocumented children’s right to equal access to public educational institutions. Under this framework, using *Plyler* to invalidate federal immigration laws would simply be an impermissible end-around to immigration enforcement.

Second, the Court did not have enough votes to overturn *Rodriguez*.¹⁰⁹ Perhaps if education was a fundamental right¹¹⁰ and undocumented children were able to establish immigration enforcement as a barrier to acquiring a K-12 education, the analysis would be different. However, as the law currently stands, the Immigration and Nationality Act (INA) specifically grants ICE broad authority to enforce federal immigration law, and the courts have been extremely reluctant to invalidate or limit that authority.¹¹¹ Professor Kevin Johnson powerfully illustrates this point, “(“(“This doctrine [plenary power], originally enunciated by the Supreme Court in *The Chinese Exclusion Case* effectively immunizes from judicial review the substantive provisions of the immigration laws governing the admission of immigrants into the

¹⁰⁸ *Plyler*, 457 U.S. at 219 (“We reject the claim that ‘illegal aliens’ are a ‘suspect class’”).

¹⁰⁹ *Supra* note 104.

¹¹⁰ See Justice Marshall’s dissent in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28-29 (1973) (arguing that education is a fundamental right) and concurrence in *Plyler* at 230 (“While I join the Court opinion, I do so without in any way retreating from my opinion in *Rodriguez*. I continue to believe that the individual’s interest in education is fundamental, and that this view is amply supported “by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values.” (Citation omitted)).

¹¹¹ 8 U.S.C. § 1103(a)(1)

United States on the ground that Congress has plenary power to decide such matters.”¹¹²

Therefore, even if undocumented children were deprived of a fundamental right, an equal protection challenge would likely fail because the Court has historically used the Plenary Power Doctrine to avoid addressing constitutional issues arising from the treatment of undocumented immigrants.¹¹³ *Plyler* may be used to challenge indirect state-created restrictions on immigration enforcement; however, it was not intended to extend to questions of the legality of ICE’s authority to enforce immigration law against undocumented children. For these reasons, any Equal Protection claim would have to focus on undocumented children being part of a greater class of people. Focusing on undocumented students only will simply be insufficient.

Thus, the best way to ensure that undocumented children have access to schools is not by addressing the legality of immigration law enforcement around school, it is by addressing *the way immigration law is enforced in and around schools*.

IV. Unlawful Search and Seizure

¹¹² Kevin Johnson, *A Case Against Race Profiling in Immigration Enforcement*, 78 Wash. U. L.Q. 675, 692 (2000). From here on *Case Against Race Profiling*; see generally the Chinese Exclusion cases, *Ekiu* and *Fong Yue Ting*; *Chae Chan Ping v. U.S.*, 130 U.S. 581 (1889) (Holding that because the Federal Government has an inherent ability to regulate its borders, the “last in time” principle could apply to invalidating Congress’ certificate program that would have granted the plaintiff reentry upon returning from his trip to China.); *Ekiu v. U.S.*, 142 U.S. 651 (1892) (The Court held that Congress has the implied power to create and execute immigration laws, so a the immigration officer’s determination that her documentation was not valid sufficed for due process.); *Fong Yue Ting v. U.S.*, 149 U.S. 698 (1893) (3 Chinese laborers contested constitutionality of the regulation that required a white witness needed to verify that they were residents of the US at the time of a passage of immigrant act. Again, the Court avoided the issue by deferring to Congress via the Plenary Power Doctrine).

¹¹³ *Supra* note 112.

In 1975, the Supreme Court's decision in *Brignoni-Ponce*¹¹⁴ held that although it is unconstitutional to rely solely on a person's "Hispanic appearance" in an immigration stop, it could however, be used as a factor in determining individualized suspicion of a persons' undocumented immigration status.¹¹⁵ Scholars have noted that the concept of racial profiling, while generally not acceptable in the criminal context¹¹⁶ is not only widely accepted in the civil immigration context, but actually encouraged.¹¹⁷ Undoubtedly, the government's embrace of this practice has led to selective enforcement against Mexican citizens in immigration law enforcement. This view is encapsulated by Department of Homeland Security's (DHS) institutional reliance on border security, while nearly forty percent of the undocumented population is comprised of visa overstays, and Mexican nationals only constitute six percent of

¹¹⁴ *U.S. v. Brignoni-Ponce*, 422 U.S. 873 (1975) (Border officers on roving patrol stopped defendant's car, while solely relying on the members of the car appearing to be of Mexican descent. Subsequently, the officers learned that the passengers had entered the country illegally and the defendant was charged with knowingly transporting undocumented immigrants into the country. At trial, the defendant filed a motion to suppress testimony regarding the passengers, claiming the evidence was illegally seized. The Supreme Court affirmed the judgment of the appellate court because the officers' reliance on a single factor to justify stopping defendant's car, the apparent Mexican ancestry of the occupants, did not furnish reasonable suspicion to believe that the three occupants were undocumented immigrants).

¹¹⁵ *Brignoni-Ponce*, 422 U.S. at 884-885 (In dictum, the Court stated that ethnic appearance could be a factor to consider by immigration officers when deciding whether an immigration stop is justified.).

¹¹⁶ Johnson, *Case Against Race Profiling* at 683 ("As a nation, we appear to be moving toward a consensus on the illegitimacy on the exclusive reliance on a person's race in determining whether he or she is a criminal suspect."); see generally Kevin Johnson, *The Case for African American and Latina/o Cooperation in Challenging Race Profiling in Law Enforcement*, 55 Fla. L. Rev. 341 (symposium) (2003).

¹¹⁷ Kevin Johnson, *The Case for African American and Latina/o Cooperation in Challenging Race Profiling in Law Enforcement* at 347-348, (Noting that in *United States v. Cruz-Hernandez*, 62 F.3d 1353, 1356 (11th Cir. 1995); and *United States v. Rodriguez*, 976 F.2d 592, 595 (Ninth Cir. 1992), immigration officers routinely rely on "Hispanic appearance" in determining whether to make a stop).

that population.¹¹⁸ Fortunately, some circuit courts of appeals are questioning immigration enforcement authorities practices of using race as a factor in determining individual suspicion.¹¹⁹

This section will discuss the Ninth and Fifth Circuit Court of Appeals cases that have either distinguished or overruled this language in *Brignoni-Ponce*, and how these decisions are applicable to race-based immigration enforcement in schools. These courts have held that using race as a factor in questioning a person's immigration status in areas where that person is in the racial majority serves little or no probative value in determining individual suspicion and should be prohibited.¹²⁰ This rule should be strictly applied in the racially segregated schools in the Southwest, where the majority of the race-based immigration enforcement in schools is occurring.¹²¹ In arriving at this conclusion, this section will focus on the application of this

¹¹⁸ Johnson, *Case Against Race Profiling* at 708 (“According to the latest INS estimates, Mexican citizens comprise roughly half of the undocumented population.”); see also at 729 (Noting that 1996, slightly over forty percent of undocumented people were admitted legally, but overstayed their visas. These visa overstays are largely unaffected by stricter border control, that is targeted at unlawful entry. Furthermore, only “about 6 percent of the Mexican undocumented population are nonimmigrant overstays, compared to 26 percent of those from Central America, and 91 percent from other countries.”).

¹¹⁹ See *infra* the rest of IV, *U.S. v. Montero-Camargo*, 208 F. 3d 1122 (9th Cir. 2000); *Murillo v. Musegades*, 809 F. Supp. 487 (W.D.T.X. 1992); *Ortega v. Arpaio*, 598 F. Supp. 2d. 1025 (D.C. Ariz. 2009); *Orhorhaghe v. INS*, 38 F. 3d 488, 498 (9th Cir. 1994); *LaDuke v. Nelson*, 560 F. Supp. 158 (9th Cir. 1982); *Matter of Perez-Cruz*, A95 748 837, Los Angeles Immigration Court (Tabaddor, I.J.) (Feb. 9, 2009), on appeal ____ .

¹²⁰ *Montero-Camargo* 208 F. 3d at 1131-1132 (“Where, as here, the majority (or any substantial number) of people share a specific characteristic, that characteristic if of little or no probative value in such a particularized and context-specific analysis.” However, the Ninth Circuit Court provided support for effective immigration enforcement without using race as a factor when it upheld the district court's finding that while disagreeing with the race-based factors, there were sufficient non-race-based factors to support reasonable suspicion); see also *Rodriguez-Sanchez*, 23 F. 3d at 1492 (holding that reasonable suspicion cannot be based ‘on broad profiles which cast suspicion on entire categories of people without any individualized suspicion of the particular person to be stopped’”).

¹²¹ *Supra* notes 11 and 35; see also School Demographics for Frye Elementary School, <http://www.greatschools.org/cgi-bin/az/other/704#students> (2007) (Noting that 70% of students at Frye are Latino, while the state average is only 40%.)

rationale to the school context, where officers unlawfully seize these children and do so without reasonable suspicion.

A. Reasonable Suspicion

Traditionally, courts have upheld an individual's right to an "expectation of privacy," and that people are entitled to be free from unreasonable governmental intrusion.¹²² And for this reason, courts seek to protect the constitutional prohibition against unreasonable searches and seizures.¹²³ The Ninth Circuit applied this principle when it upheld an injunction that prohibited INS agents from searching migrant farm worker facilities without using articulable, objective facts to make rational inferences that support a reasonable *individualized* suspicion that a person is illegally present in the U.S.¹²⁴ In *LaDuke*, the Ninth Circuit concluded that generalized suspicion, anonymous phone calls and *the fact that undocumented immigrants were present in the migrant farm worker housing complex* did not meet the individualized suspicion standard.¹²⁵ *Montero-Camargo*,¹²⁶ expanded upon this idea by holding that if, at some point, there may have

¹²² *Terry v. Ohio*, 392 U.S. 1, 8 (1968).

¹²³ *Id.*

¹²⁴ *LaDuke*, 560 F. Supp. 158, 162 (ED Wash. 1982) (citing, *ILGWU v. Sureck*, 681 F. 2d 624 (9th Cir. 1982)).

¹²⁵ *Id.* (emphasis added?)

¹²⁶ The Ninth Circuit upheld the lower court's denial of a motion to suppress when Border Patrol agents observed suspicious behavior near a checkpoint in El Centro, California. The agents investigated the suspicious behavior and subsequently arrested the defendants on drug charges. The defendants' motion was based on a number of non-racial facts, as well as partial reliance on race. In denying the motion to suppress, the court rejected any probative value to using race as a factor.

been or may presently be undocumented immigrants in an area is not sufficient for sustaining a determination of individualized suspicion.¹²⁷

More importantly, the *Montero-Camargo* court held that “Hispanic appearance is, in general, of such little probative value that it may not be considered as a relevant factor where particularized or individualized suspicion is required.”¹²⁸ To reach this conclusion, the court overruled the portion of *Brignoni-Ponce* that permitted INS agents to use “Hispanic appearance” as a probative factor. The Ninth Circuit held that it was not bound to follow dictum if there was good reason to decline in doing so, and because *Brignoni-Ponce*’s was a dictum that was based on purely faulty premises, it did just that.¹²⁹ First, the Ninth Circuit concluded that, in spite the Supreme Court’s own contrary findings, it relied on an INS estimation that 85% of the undocumented immigrants in the U.S. are from Mexico.¹³⁰ Second, the Ninth Circuit noted that the demographic data the Court relied upon in 1975 was entirely antiquated.¹³¹ Because of these

¹²⁷ *Id.* at 1130

¹²⁸ *Id.* at 1135.

¹²⁹ *Id.*

¹³⁰ Johnson, *Case Against Race Profiling* at 694-695 (quoting *Brignoni-Ponce*, but noting that the government estimate is almost certainly incorrect in lieu of the Court’s recognition “that a relatively small percentage of the Mexican ancestry population in the United States is undocumented.”); see also *Brignoni-Ponce*, 422 U.S. at 574 (Criticizing the Court because “It failed to entertain the possibility that the percentage of arrested deportable immigrants who were Mexican might be a different than the percentage of deportable immigrants, arrested, or not, who were Mexican.”)

¹³¹ *Id.* at 1133 (noting that the Latino population in the Southwest and Far West has grown at least five-fold in the four states referred to by the Supreme Court in *Brignoni-Ponce*. The court went on to note that in California alone, the Latino population was estimated at 10,112,986 in 1998, and Latinos in Los Angeles County already constitute the largest racial group. Even more telling is that in border towns like El Centro, the Latino population is approximately 73%.); compare *U.S. v. Chavez-Villarreal*, 3 F.3d 124,127 (5th Cir. 1993) (The court observed that Chavez-Villarreal’s license plate was from a state with a “substantial Hispanic population”; the 1990 census indicated 18.8% of Arizona residents were Latino); see also Kristin Connor, *Updating Brignoni-Ponce: A Critical Analysis of Race-Based Immigration Enforcement*, 11 N.Y.U. J. Legis. & Pub. Pol’y 567, 584 (2008) (Citing *Case Against Race Profiling*, that while an estimated

factual inaccuracies, the Ninth Circuit found little wisdom in upholding the *Brignoni-Ponce* Court's dictum.

The Ninth Circuit went on to recognize that reliance on these inaccurate premises would certainly “cast suspicion on entire categories of people without any individualized suspicion of the particular person being stopped.”¹³² And lacking particularized suspicion would likely drag countless innocent individuals into the fray of reasonable suspicion because “that characteristic casts too wide a net to play any part in a particularized reasonable suspicion determination.”¹³³ Additionally, the Ninth Circuit wryly recognized the Supreme Court's proclamation that “[c]lassifications based on race carry a danger of stigmatic harm¹³⁴ ... Our Constitution is color-blind and neither knows nor tolerates classes among citizens.”¹³⁵ Thus, stopping a Latino based on the color of his or her skin color clearly indicates a lesser degree of constitutional protection than whites.¹³⁶

Murillo v. Musegades also offers guidance on the unacceptability of using race as a factor in determining particularized suspicion for Latino individuals. The plaintiffs in *Murillo* were Latino students and residents in the area surrounding Bowie High School in El Paso, Texas.¹³⁷

57% of undocumented immigrants are from Mexico, approximately 90% of Latinos are present in the U.S. legally).

¹³² *Id.* (quoting *US v. Rodriguez-Sanchez* at 1492); see also *Murillo* generally (holding that the mere fact that the densely Latino populated school is in close proximity to the border does not cast suspicion on any one Latino).

¹³³ *Id.* at 1134.

¹³⁴ *Id.* (quoting *J.A. Croson v. City of Richmond*, 488 U.S. 469, 493 (1989)).

¹³⁵ *Id.* (quoting *Croson* 488 U.S. at 521).

¹³⁶ *Id.* at 1135.

¹³⁷ *Murillo v. Musegades*, 809 F. Supp. 487, 495 (W.D.T.X. 1992) (the court described a high school whose close proximity to the Mexican-American Border was frequented by the El Paso Border Patrol, often in tremendously intrusive ways. “The El Paso Border Patrol has a regular, consistent and prominent presence on the Bowie High School campus, whether the presence be by parking in the parking lots, speeding along the service roads, jumping across the curbs or driving across the concrete sidewalks and grassy areas.”)

After a failed “gentlemen’s agreement,” the residents surrounding Bowie High School sought injunctive relief against the Border Patrol prohibiting the agency from harassing Bowie High School students and their families based at least in part on their race.¹³⁸ The District Court held that the government’s interest in enforcing immigration laws did not outweigh the rights of citizens and legal permanent residents to be free from unreasonable searches and seizures.¹³⁹ More importantly, the court observed the importance of schools and how the intrusions by the El Paso Border Patrol created an undue interference with the students’ ability to participate in the “most vital institution for the preservation of a democratic system of government.”¹⁴⁰ In sum, the Border Patrol’s activities were an invasion of the Bowie High School District’s civil rights and ruined the “oasis of safety and freedom” the school provided to its residents.¹⁴¹

The next two subsections will discuss how the law enforcement officers violated Latino students’ constitutional rights. First, these factual scenarios illustrate how a direct application of the *Montero-Camargo* considerations for individualized suspicion standard in the school setting would prove there is no valid basis for a stop. Second, the section also argues that even if questioning students about their immigration status was permissible, it still goes beyond the officers’ acceptable scope of authority under these circumstances. Because of the law enforcement officers’ egregious behavior, the only way to ensure Latino students’ constitutional rights are protected is to ensure that immigration enforcement in schools is confined to instances when officers possess a warrant.

1. Reasonable Suspicion Standard Applied

¹³⁸ *Id.* at 496-497.

¹³⁹ *Id.* at 497.

¹⁴⁰ *Id.* at 498 (citing *Plyler*, 457 U.S. at 221).

¹⁴¹ *Id.* at 495.

Taking into account the Ninth Circuit's concerns with wrongfully casting the net so wide that it is incompatible with notion of *individualized* suspicion, it is difficult to understand how immigration enforcement and local law enforcement's actions in the Chandler and Albuquerque situations could be constitutionally justified. The geographic areas in question, coupled with the racial composition of the accompanying school districts,¹⁴² typify the environment in which courts have held that immigration officials cannot derive probative value from using race as a factor in determining whether reasonable suspicion exists in the immigration enforcement context.

In *Gonzalez v. Albuquerque*, three boys were detained and eventually turned over to the Border Patrol when local police officers suspected they were present in the U.S. without authorization, despite suspicion of committing a crime or any civil violation other than unlawful presence.¹⁴³ Similarly, in Chandler, Arizona, the police officers that stopped two elementary school girls and questioned them about their immigration status did so pursuant to authorization from Tucson Border Patrol.¹⁴⁴ In both instances, Latinos were either the majority of or the largest minority race of students enrolled in the school. As the Ninth Circuit and the *Murillo* court held in these environments, where immigration officers or local law enforcement offers have relied on race as a factor in determining immigration status, race was too broad of a classification to contribute to any individualized suspicion. *Murillo*'s holding appears to be consistent with the

¹⁴² In Chandler, Arizona, Latinos are the largest minority at 21%, (see *U.S. Census Bureau Quick Facts: Chandler, Arizona*, 2006 estimates, <http://quickfacts.census.gov/qfd/states/04/0412000.html>) and in Frye Elementary Latinos constitute 70% of the population, which is clearly the largest racial group in the school. In Albuquerque, New Mexico nearly 40% of the population is Latino, (see *U.S. Census Bureau Quick Facts: Albuquerque, New Mexico*, 2000 estimates, <http://quickfacts.census.gov/qfd/states/35/3502000.html>) and in Del Notre High School 49% of the students are Latino, which is also the largest racial group.

¹⁴³ Olivas, *Holding the Line* at 24.

¹⁴⁴ *Supra* note 67.

severe trauma and avoidance behaviors the two girls from Frye Elementary suffered as a response to their encounter with local police officers who inquired about their immigration status.¹⁴⁵

Additionally, the *Murillo* court observed that racially driven immigration enforcement in schools disrupts the learning process itself.¹⁴⁶ Moreover, the schools themselves are also victimized by immigration enforcement occurring on its campus. Affected campuses experience widespread absences after immigration enforcement occurs on school grounds because children and families no longer see the school as a safe environment.¹⁴⁷ Thus, continuing this practice will likely deprive Latino students of their constitutional right to an “expectation of privacy” as well as unreasonably disrupt the safety of all students as well as the school’s learning environment.¹⁴⁸

2. Beyond the Permissible Scope of Investigation

Even if there was no direct applicability of the individualized suspicion standard, factual scenarios like the Roswell case still support the same conclusion that it is unconstitutional for law enforcement officials to inquire about immigration status based, at least in part, on “Hispanic appearance.” Courts have a long history of restricting the scope of searches to the matters reasonably related to the initial investigation.¹⁴⁹ Thus the constitutionality of this question will

¹⁴⁵ *Supra* note 67.

¹⁴⁶ *Murillo* 809 F. Supp. at 497 (quoting *Plyler* 457 U.S. at 221 (the school system is of “supreme importance” and “public schools... [are]... a most vital civil instruction for the preservation of a democratic system of government.” Quoting *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) and *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963)).

¹⁴⁷ *Supra* note 51 (After Acosta was deported, numerous parents prohibited their children from attending school, because they feared their children would also be deported).

¹⁴⁸ *Murillo*, 809 F. Supp. at 495.

¹⁴⁹ *Ortega v. Arpaio*, (Pl.’s Res. to Summ. J. Mot. Dismiss), (citing *Terry* at 19-20 (“The stop must be justified at its inception and be reasonably related in scope to the circumstances that justified it.”); see also *Florida v. Royer*, 460 U.S. 491, 500 (1983) (“investigative detention must ‘last no longer than is necessary to effectuate the purpose of the stop’”); *Carrasca v. Pomeroy*, 313 F. 3d 828, 836 (3d Cir. 2002) (the stop must be “carefully tailored” to the underlying reason); *U.S. v. Valdez*, 267 F.3d. 395 (5th Cir. 2001)).

turn on whether investigating possible immigration violations is also reasonably related to the scope of the investigation.

It is a fairly well settled principle that local law enforcement officers are permitted to investigate possible immigration violations when investigating a criminal provision of federal immigration law.¹⁵⁰ Perhaps the most illustrative case demonstrating this point is *Mena v. Muehler*, where Los Angeles police officers who were investigating a valid criminal search warrant, did not need to present additional reasonable suspicion to question the suspect about her immigration status.¹⁵¹ However, reliance on the Court's holding in *Muehler* in the Roswell context would be misguided. In *Muehler*, the police officers were investigating a felony and learned about an immigration violation, which is a civil violation.¹⁵² In *Roswell* there was no felony involved, thus there should be a different scope when investigating Ms. Acosta's driving without a license for two reasons; first, New Mexico is one of the few states that allows undocumented immigrants to receive driver's licenses.¹⁵³ Therefore, by relying on a document where people, regardless of immigration status, may receive the benefit, Officer Corn simply could not have articulated tangible facts that could give way to a reasonable suspicion of unlawful presence by Ms. Acosta's failure to prevent a license. Second, neither the Roswell Police

¹⁵⁰ Motomura, *Immigration Outside the Law* at 2058.

¹⁵¹ *Mena v. Muehler*, 544 U.S. 93, 100-101 (2005) (in overturning the Ninth Circuit's decision the Court held, " This holding, it appears, was premised on the assumption that the officers were required to have independent reasonable suspicion in order to question Mena concerning her immigration status because the questioning constituted a discrete Fourth Amendment event. But the premise is faulty. We have 'held repeatedly that mere police questioning does not constitute a seizure'").

¹⁵² *Id.*

¹⁵³ See, N.M. STAT. ANN. § 66-5-9(B); and N.M. ADMIN. CODE § 18.19.5.12(D) (allowing foreign national to obtain driver license with federal tax identification number and valid foreign passport or Matrícula Consular card).

Department nor the SROs had a valid 287(g) agreement with ICE.¹⁵⁴ Since Officer Corn was not authorized to investigate civil immigration violations and because of New Mexico's drivers license statutes, his questioning Ms. Acosta was not *justified at the onset*.¹⁵⁵ And thus because this investigation was unjustified, Officer Corn's investigation violated Ms. Acosta's constitutional rights.

B. Searches and Seizure

It is a well-settled legal principle that warrantless searches are presumptively unconstitutional.¹⁵⁶ Similarly, immigration searches without a warrant constitute a seizure unless the officer possesses articulable, objective facts and is able to make rational inferences from those facts to support a reasonable suspicion that the person in question is present without authorization.¹⁵⁷ *Murillo* refines the meaning of a seizure in the absence of reasonable suspicion: the individual must "reasonably believe[s] he or she is free to walk away."¹⁵⁸ When a person reasonably believes s/he is no longer free to walk away, that person is detained for the purposes of the Fourth Amendment.¹⁵⁹ Thus, absent reasonable suspicion, any responses given to law enforcement officials must be offered voluntarily.¹⁶⁰

In determining whether an individual's responses to law enforcement are voluntary, courts have also recognized that there is no "one-size fits all" standard for when a person reasonably believes s/he is no longer free to walk away. Thus, unconstitutional seizures turn on the factual scenario in which the investigation occurred. *LaDuke* offered a number of considerations that

¹⁵⁴ *Supra* note 18.

¹⁵⁵ *Supra* note 149.

¹⁵⁶ *Kyllo v. United States*, 533 U.S. 27, 32 (2001).

¹⁵⁷ *LaDuke*, 560 F. Supp. at 162 (citing *ILGWU v. Sureck*, 681 F.2d 624 (9th Cir. 1982)).

¹⁵⁸ *US v. Anderson*, 663 F. 2d. 934, 939 (9th. Cir. 1981).

¹⁵⁹ *Murillo*, 809 F. Supp. at 499, citing *Brignoni-Ponce*, 422 US 873, 878 (1975).

¹⁶⁰ *Id.*

could help to determine whether immigration or local law officers effectively seized the person suspected of unlawful presence:

The INS officers did not advise the residents of any right to refuse either interrogation or searches of their residences ... and [the immigrants] have an inherent fear of uniformed officers. Their limited knowledge of the power to which INS has in dealing with them places them in a more disadvantageous position than the average citizen.¹⁶¹

Clearly, if a law enforcement officer lacks individualized suspicion, the burden is quite high for law enforcement officers to prove that they have not seized an individual they wish to question in the immigration context. Taking the *LaDuke* factors into consideration within the school context, the burden should undoubtedly be higher to prove these children are not unconstitutionally seized under the Fourth Amendment.

The rest of the section will address three theories under which the students from Albuquerque, Roswell, and Chandler have been effectively been seized because of the nature of the questioning in the absence of reasonable suspicion. First, in Chandler, the officers did not explain the scope of their investigations in a constitutionally sufficient manner. When an individual is stopped for the purpose of obtaining identification, the individual has the right to refrain from answering the question and given two girls' age it is clear they neither understood they had the right to walk away nor the understood the legal significance of the questions asked of them.¹⁶² Second, the children from Albuquerque were not only seized, but also searched without meeting the requisite standard for a more probing detention immigration stop.¹⁶³ Courts recognize a search involves a higher degree of intrusion, thus immigration enforcement agents

¹⁶¹ *LaDuke*, 560 F. Supp.at 162.

¹⁶² *Murillo*, 809 F. Supp. at 498-499.

¹⁶³ *Supra* section II. A.

must meet a higher standard to justify their actions.¹⁶⁴ Third, and perhaps most importantly, the *LaDuke* court recognized that various social, educational, and cultural factors put the individuals whom immigration officials wished to question at different levels.¹⁶⁵ Because *children* are being exposed to the combination of all or some of these impermissible actions, the bar should set an exceedingly high level to protect these children from wrongfully suffering such intrusions.

1. Lack of Consent

In *Chandler*, the girls were stopped so they could be interrogated as to their immigration status. Without the existence of reasonable suspicion, individuals in these situations become seized when they no longer feel as though they have the right to walk away.¹⁶⁶ Because of the girls' ages, their education levels, and the discrepancy of power between children and police officers indicate a very high burden that the officers must meet to prove the girl's responses were voluntary.

Although recent decisions like *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County*, expanded a police officer's ability to request identification when a suspect questioning,¹⁶⁷ this decision is easily distinguishable to the *Chandler* scenario for two reasons; first, the police officers were investigating a possible assault,¹⁶⁸ and second, because the defendant's truck and approximate location fit the caller's description, reasonable suspicion clearly existed.¹⁶⁹ With the

¹⁶⁴ *Murillo*, 809 F. Supp. at 499-500 (Explaining the standard set forth in *Chambers v. Maroney*, 399 U.S. 42, 51 (1970) (An INS agent may not search an individual or his/her belongings unless the arrest is made pursuant to a lawful arrest or if there is probable cause the suspect will destroy evidence.); and *Murillo* at 498 ("Furthermore, the INS agent may not frisk any individual who has not been arrested unless the INS agent has a reasonable suspicion, based on articulable facts, the individual is armed.")).

¹⁶⁵ *LaDuke*, 560 F. Supp. at 163.

¹⁶⁶ *Supra* note 158.

¹⁶⁷ See *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County*, 542 U.S. 177 (2004).

¹⁶⁸ *Id.* at 180.

¹⁶⁹ *Id.*

absence of these two factors, the CPD officers' conduct implicates a different set of considerations when questioning the two schoolgirls. At this point the burden shifts to the officers to prove that the responses were in fact voluntary.

In *Schneckloth v. Bustamonte*, the Supreme Court considered a number of factors to determine whether a defendant consented to the interrogation; these factors included the age, the lack of education and the lack of advice to the accused about his/her constitutional rights.¹⁷⁰ These girls' age in itself should create a significant burden for the CPD to prove their immigration related questioning was voluntary. Generally speaking the police officers should not have reasonably expected two girls, aged seven and ten, to realistically understand and articulate their immigration status.¹⁷¹

Additionally, all of these children are clearly under the age and developmental period in their lives where they would be able to appreciate the legal ramifications or consent to answer these questions. It is unrealistic to expect elementary school children to have a concept of what unlawful presence is or what it means. Even Congress recognizes this concept, 8 U.S.C. § 1304(e) states that individuals over eighteen must carry their valid immigration documents.¹⁷² This statutory language in itself places a lower burden on children for proving their status, which suggests children should be treated differently in these interrogative scenarios.

Moreover, like the *LaDuke* court, which considered the education and linguistic capabilities of a suspect compared to an INS agent.¹⁷³ The court observed that these inherent differences create a higher burden for immigration law enforcement officers to prove an

¹⁷⁰ *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

¹⁷¹ *Supra* note 67.

¹⁷² 8 U.S.C. § 1304(e)

¹⁷³ *Supra* note 161.

individual has not been seized within the purview of the Fourth Amendment.¹⁷⁴ Considering the difference in the linguistic capabilities between immigration and law enforcement officers, and the fact that they are targeting children, it would seem that the bar should be much higher in order to prove that the children have not been unlawfully seized. All children attend school to develop general knowledge and to acquire the tools to acculturate to American Society. The very fact that they are attending school evidences the fact these children are not of equal academic stature as law enforcement agents, and that they cannot be equal intellectual footing with the officers. Furthermore, most of these children are classified as English Language Learners (ELLs), which as far as the state is concerned, means that these children are not on equal linguistic footing as their peers, much less adult law enforcement agents who must achieve a certain level of linguistic competency in English to even qualify for a law enforcement position.

Although no one factor is dispositive, by considering the totality of the circumstances, it simply cannot be justifiable to stop these girls and expect them to be able to process the immigration inquiries after freely consenting to answering the questions. At a minimum, it would seem that officers are required to inform the children they were soliciting a voluntary response. Like the students in *Murillo*, it is completely reasonable for children to feel as though they were seized when the officers acted so aggressively towards girls of such a young age and thus their responses should not be considered voluntary.

2. More Severe Intrusions: “Searches” v. Brief Detentions

Murillo also set forth the standard for more intrusive investigations of students.¹⁷⁵ The court differentiated between a typical seizure that requires only a brief detention and traditional

¹⁷⁴ *Id.*

¹⁷⁵ *Supra* note 164.

search and arrest, which is more intrusive.¹⁷⁶ A court considers two factors in determining whether the physical search is permissible: one, whether the frisk took place pursuant to a lawful arrest and two, if there is probable cause that a suspect will destroy pertinent evidence.¹⁷⁷

The facts in *Gonzalez* contain important similarities with the facts in *Murillo*. In *Murillo*, the students and school staff were subjected to detentions, where they were frisked and had their cars searched, at least in part because of their Latino ancestry. In assessing *Murillo*'s first consideration, at no point were any of the Albuquerque students suspected of committing a crime other than unlawful presence in the United States,¹⁷⁸ yet all of the boys were questioned, had their cars searched, were frisked and eventually detained in a detention facility for further questioning.¹⁷⁹ Considering that the three boys were not cited or even suspected of committing any crime, their arrests certainly raise questions about the constitutionality of the SRO's actions. Because it is doubtful these boys were lawfully arrested, Border Patrol would have a difficult time meeting the first prong of the *Murillo* standard. In assessing the second prong, it is unclear what, if any, evidence needed to be preserved. Considering that in all likelihood the first prong cannot be met, it is unlikely there could be any probable cause to believe these boys had pertinent evidence that would or could be destroyed before any adjudication process took place.

3. Inherent Inequities Between the Suspect and the Officer

The *LaDuke* court held that various social, educational, and cultural factors inherently put an individual that immigration officials wish to question on unequal levels.¹⁸⁰ These factors, in conjunction with the fact that the suspects are children in a school environment, should raise the

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Supra* note 29.

¹⁷⁹ *Supra* note 27.

¹⁸⁰ *Supra* note 161.

bar for showing that a child can reasonably feel that s/he can walk away. First, the *LaDuke* court recognized Mexican nationals have an inherent fear of uniformed officers.¹⁸¹ This consideration is applicable for Latino children living in the Southwest, where merely contacting law enforcement officers means that Latinos run the risk of having their residency questioned. In Albuquerque, “there was evidence that City police officers would call immigration authorities whenever there was a need for translation services.”¹⁸² Further, in Roswell, other Latino students from Roswell High School alleged that Officer Corn required them to prove their immigration status and that he was responsible for one other student’s deportation in addition to Ms. Acosta.¹⁸³ And Arizona as a whole has a torrid history of its police officers acting antagonistically towards suspected immigrants. Of particular note are the “Chandler Round-Up,”¹⁸⁴ the activities of Sheriff Joe Arpaio in Maricopa County, and the recent passage of Senate Bill 1070.¹⁸⁵ Similar to the court’s recognition in *LaDuke*, blatantly hostile behavior toward Latinos in the Southwest undoubtedly justifies a feeling of distrust towards law enforcement agents and creates a sense of fear and distrust between immigration officers and Latino suspects. Considering the reputation of law enforcement officers in the Southwest, the courts should reasonably raise questions of whether US law enforcement officers should be afforded the same consideration as was given to Mexican law enforcement officers were in *LaDuke*.

¹⁸¹ *Id.*

¹⁸² Olivas, *Holding the Line* at 25 (citing conversations between the author and MALDEF attorneys on March 27, 2007 (notes on file with author)).

¹⁸³ *Supra* note 39.

¹⁸⁴ *Supra* section II. C.

¹⁸⁵ *See Ortega v. Arpaio*, (ACLU Immigrants’ Rights Project and MALDEF filed suit against Sheriff Arpaio under Fourth and Fourteenth Amendment for illegally profiling Latinos in Maricopa County during traffic stops.)

Second, the same concerns about the children's education and linguistic levels as in the *Consent* section are also at issue here.¹⁸⁶ Because the officers and the children are operating from tremendously different educative positions, the burden to prove voluntariness should undoubtedly be more stringent when officers who lack reasonable suspicion.¹⁸⁷

In the aforementioned scenarios, it would seem to be completely outside the pale to consider these children to be on equal footing in their interactions with immigration law enforcement agents. As previously discussed, these children have been placed in a coercive situation where they no longer feel they have the legal right to walk away, thus immigration law enforcement agents' conduct raise serious questions as to whether these children have voluntarily consented to the investigation. As *LaDuke* noted, "[i]f a[n] [immigrant] has been already seized, his consent to the seizure is meaningless."¹⁸⁸ Therefore, the information these children gave to immigration law enforcement agents should not be able to be used against them. Consent after being coerced into doing so is not valid consent, and any information gained through this process is unconstitutionally gained. In sum, because of consent issues, the strikingly overbroad scope of investigation, and the inherent inequities between parties should create such a high burden for proving voluntariness that begs the question questionable when, if ever, a law enforcement officer can satisfy their burden without a warrant.

These egregious scenarios demonstrate two points. First, there is an absence of reasonable suspicion when these Latino students are stopped for questioning. Second, because of the government's high burden for proving that children are not illegally seized, the immigration law enforcement stops are not being conducted properly in schools. Considering the difficulty in

¹⁸⁶ *Supra* section IV. B. 3.

¹⁸⁷ *Supra* note 170.

¹⁸⁸ *Id.*

properly enforcing the law in and around schools, the only way to ensure that immigration law is being enforced properly in and around schools is to prevent all enforcement unless the law enforcement officer possesses a warrant.

V. Equal Protection

An equal protection approach may also be another avenue for Latinos to challenge race-based immigration enforcement in schools. In *Montero-Camargo*, the court used Equal Protection principles to invalidate using race as a consideration in determining individualized suspicion for a vehicular immigration stop, because reliance on overbroad racial profiles based on membership of a particular class serve no probative value.¹⁸⁹ *Montero-Camargo*'s Equal Protection considerations offer a compelling framework in the school context because race-based immigration stops in schools carry the same risk of harms to Latino children. This section will explain how the potential plaintiff could prove that law enforcement officers acted with discriminatory intent in enforcing facially neutral immigration laws, and how these practices have a discriminatory impact on Latinos of all immigration status, including U.S. citizens.

Further, this section will articulate how the discriminatory purpose test is satisfied in at least one of two ways. First, considering the current composition of the United States Supreme Court, it should recognize that *Brignoni-Ponce*, in as far as it is still recognized as good law, it is *evidence in itself* of intentional use of facially neutral law for discriminatory purposes.¹⁹⁰ By viewing the contemporary judiciary's approach to *any and all* racialized laws, there is legal precedent to make *Brignoni-Ponce*'s discriminatory purpose conclusive. Thus, this implementation of the facially neutral law should be treated as facially discriminatory.

¹⁸⁹ *Supra* note 117.

¹⁹⁰ Johnson, *Case Against Race Profiling* at 719-721 (describing how the Supreme Court's emphatic assertions of the notion that the Constitution is color-blind would seemingly not tolerate *any classification of people* based on race).

Alternatively, disparate purpose can be shown through the history of immigration law itself. The United States' torrid history of exclusion and, at times, explicit focus on deporting people of color is in itself evidence of discriminatory intent because the history of mistreatment has become the institutional norm in immigration enforcement. Viewing racialized immigration law enforcement through this may explain why mainstream society and the judiciary does not recognize discriminatory intent when immigration officials enforce facially neutral laws with a discriminatory purpose. Since the intentional and discriminatory mistreatment of immigrants of color is so embedded in the country's collective conscious, it is difficult to separate a discriminatory purpose from the status quo.¹⁹¹

Next, this section will describe the discriminatory impact race-based immigration enforcement has on the victimized racial groups. Race-based immigration enforcement creates a barrier to belonging in America, which ultimately creates unequal citizenship among the targeted groups.¹⁹² At least three major harms result from unequal citizenship. One, the targeted group never feels fully integrated into society and suffers the stigma of being a proverbial outsider in America. Two, the idea of never belonging to America or of being "American" leads to feelings of self-hate, and thus creates intra-group conflicts.¹⁹³ Three, by preventing Latinos from being truly equal citizens, it encourages mistrust of government institutions.¹⁹⁴ Ultimately, these

¹⁹¹ See generally Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F. L. Rev. 307, 323-324 (Discussing how both institutional and unconscious racism affected the evolution of U.S. immigration law).

¹⁹² Yxta Maya Murray, *The Latino-American Crisis of Citizenship*, U.C. Davis L. Rev. 503, 505 (1998) (citing ideas from Professor Kenneth Karst's book *Belonging to America: Equal Citizenship and the Constitution*. "Equal citizenship 'centers on' inclusion and belonging."). From here on *The Latino-American Crisis of Citizenship*

¹⁹³ *Id.* at 559 (describing how intra-group relations are affected because "groups which are under siege may replicate patterns of exclusion in self-defense.").

¹⁹⁴ Johnson, *Case Against Race Profiling* at 716 ("Race profiling in immigration enforcement also foments distrust of government and discourages lawful permanent residents from Mexico from

feelings of illegitimacy towards government have a cyclical effect that prevents people of color from ever having the ability to fully integrate into American society.¹⁹⁵

Finally, this section will articulate how race-based immigration enforcement harms are experienced in the school context and how it has a more pernicious effect on child development than in any other American institution. Because of the pivotal role schools play in shaping the lives of the youth in America, the harms inflicted by experiencing race-based immigration enforcement in the institution undoubtedly exacerbate the damage to child development.

A. Discriminatory Purpose

In 1976, the Supreme Court handed down *Washington v. Davis*, a decision that has been the death knell of countless civil rights suits. This decision set forth a nearly insurmountable standard for plaintiffs to meet when challenging facially neutral laws that have a discriminatory impact on a protected class. The Court held that it would be insufficient to merely show discriminatory impact -which is a different standard than the one set forth under Title VII of the Civil Rights Act- but the law also needed to be enforced with intent to discriminate.¹⁹⁶ In further

fully embracing an American national identity.”); see also, *The Latino-American Crisis of Citizenship* at 559 (describing how a government that does not work to ensure the interests of, and even derogates people of color, creates skepticism in the social contract between individual and the government.)

¹⁹⁵ Kevin Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” + into the Heart of Darkness*, 73 Ind. L.J. 1111, 1127 (1998) (arguing that historically, ethnic groups like the Asians during the Chinese Exclusion case were criticized for not fully assimilating, yet the government prevented both naturalizing and equal citizenship. Therefore, fully assimilating was impossible.); From here on, *A “Magic Mirror*; also, Johnson, *Case Against Race Profiling* at 716 (articulating that distrust of the national government may contribute to low naturalization rates among Mexican nationals who are legal permanent residents.)

¹⁹⁶ Countless legal scholars have argued that the Court’s requirement of showing discriminatory purpose in an Equal Protection claim is nearly insurmountable, and is only successful in the most egregious cases. See Johnson, *Case Against Race Profiling* at 721; additionally Chauncey Smith, Note: *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework*, 36 Fordham Urb. L.J. 1009, 1022 (“Washington’s discriminatory intent requirement is problematic because it places “a very heavy, and often

refining the standard, the Court stated that "'discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."¹⁹⁷

Even viewing law enforcement officials' activities through a "Motive-Centered Equal Protection"¹⁹⁸ analysis, modern jurisprudence would indicate there is a need to invalidate race based immigration enforcement because the dicta permitting race to be used as a valid consideration in *Brignoni-Ponce* would surely show the requisite racial animus toward Latinos to prove this practice is not racially neutral and thus meet the discriminatory intent standard. Alternatively, if *Brignoni-Ponce* was not recognized as racial animus in itself, the decision should be viewed in the context of a long history of both facially discriminatory and intentionally discriminatory practices in enforcing racially neutral laws that have made discriminating against people of color in immigration law so commonplace that it is neither considered discriminatory nor purposeful.

1. *Brignoni-Ponce* Is Discriminatory Purpose

In *The Case Against Race Profiling in Immigration Enforcement*, Professor Kevin Johnson forcefully argues that modern Equal Protection jurisprudence demands that any racialized law, like affirmative action, must automatically receive strict scrutiny. Thus, any

impossible, burden of persuasion on [equal protection claimants]." Quoting Professor Charles Lawrence.)

¹⁹⁷ *McCleskey v. Kemp*, 481 U.S. 279, 298 (U.S. 1987) (quoting *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979)).

¹⁹⁸ Using a phrase from Smith, *Deconstructing the Pipeline*, referring to the standard set forth in *Davis*; *supra* note 196.

judicial holding that permits the consideration of race as a legitimate consideration in determining individual suspicion is irreconcilable with the current Court's approach to racialized laws.¹⁹⁹

Over the past twenty years, the Supreme Court has vehemently attacked racial classifications that benefit people of color by arguing that it is impossible to tell whether racial classifications and affirmative action benefit or burden people of color.²⁰⁰ Moreover, Justice Scalia emphatically proclaimed "[o]ur Constitution is colorblind, and neither knows nor tolerates classes among citizens"²⁰¹ and that any classification based on race carries the danger of stigmatic harm.²⁰² Because it is impossible to tell the difference between the beneficial and the benign, the Court's assertion that the Constitution does not recognize race, and the proclamation that all racialized laws carry the danger of stigmatic harm; any law that classifies people based on race must receive the highest level of scrutiny. Undoubtedly, using racialized considerations in the implementation of immigration law would fall under *any racial classification*, thus the Court must review race-based immigration law enforcement with the same veracity that it has attacked all other racialized laws. Insofar as "Hispanic appearance" is still a pertinent factor in determining individualized suspicion, there seems to be no way around the need to review *Brignoni-Ponce* under the most probing scrutiny.²⁰³

¹⁹⁹ See Johnson, *The Case Against Race Profiling*, Section VI. A.

²⁰⁰ *Adarand Constructors v. Peña*, 515 U.S. 200, 241 (U.S. 1995) ("So-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences." Quoting Justice Thomas, *concurrance*).

²⁰¹ *Supra* note 135 (quoting *J.A. Croson v. City of Richmond*, 488 U.S. 469, 493 (1989)).

²⁰² *Supra* note 135.

²⁰³ Johnson, *Case Against Race Profiling* at 720 ("Conventional Equal Protection jurisprudence would condemn the use of "Hispanic Appearance" as a factor in an immigration stop at least so

Professor Johnson also notes that, historically, both the Court and Congress have taken principled stances against the use of race profiling in categorical enforcement against a specific race in immigration laws and enforcement. Unlike the vast majority of immigration law, the Court has consistently held that the plenary power doctrine cannot be used to justify race-based immigration enforcement in this context.²⁰⁴ Even during the Chinese Exclusion era, in *Yick Wo* the Supreme Court held that enforcement of laws discriminating against any and all Chinese people was unconstitutional.²⁰⁵ Moreover, even in *Brignoni-Ponce*, the Court emphasized that the plenary power doctrine couldn't be used to trample the rights of undocumented people.²⁰⁶

Additionally, because “Hispanic appearance” is a trait shared by United States citizens, Latin American nationals, and citizens of other countries, Congress recognized Latino appearance as unequivocally too broad to be a nationality-based classification.²⁰⁷ According to both modern and historical jurisprudence, as well as Congressional recognition, there is seemingly no defense for using race as a factor in immigration enforcement. Therefore, there is no question race-based profiling should be regarded as enforcing facially neutral law with discriminatory intent.

2. Historical Race-Based Immigration Law Is Evidence of Discriminatory Purpose

Throughout United States history, immigration law has been regulated on racial lines. This section will address how the history of racial discrimination in immigration law has led to

long as a witness did not identify a person of “Hispanic appearance” as having violated the immigration laws”).

²⁰⁴ *Id.* at 721.

²⁰⁵ *Id.* (citing generally Thomas Wuil Joo, *New “Conspiracy Theory” of the Fourteenth Amendment: Nineteenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence*, 29 U.S.F. L. Rev. 353 (1995)).

²⁰⁶ *Id.* (quoting from *Brignoni-Ponce* 422 U.S. at 883-884, affirming that undocumented people cannot be stopped randomly and questioned about their immigration status, officers must still have reasonable suspicion for the stop).

²⁰⁷ *Id.* (Arguing race a nationality among Latinos are often conflated, where in fact, Latinos actually compromise numerous different national origins).

acting with discriminatory purpose as a norm in immigration enforcement. This explains why courts have only found immigration law enforcement officers to have acted with discriminatory intent in only the most egregious of cases.²⁰⁸ This subsection will discuss how three immigration policies: the Chinese Exclusion Era, Operation Wetback and *Brignoni-Ponce* contributed to racial discrimination in immigration enforcement becoming an institutional norm.²⁰⁹ These examples show how the history of racialized immigration enforcement has transformed from explicit Congressional policy, to enforcement strategy, to institutional norm.

a. The Chinese Exclusion Era

The Chinese Exclusion Era set the precedent for acceptable mistreatment of people of color in immigration law. Although the Chinese were initially welcomed, by the late 1860s, white workers in the Pacific began feeling threatened, and those feelings resulted in increased violence towards the newly arrived Chinese.²¹⁰ This mistreatment transformed into a movement that focused on maintaining “racial purity” and the preservation of “Western civilization.”²¹¹ Eventually, these feelings led to the first series of comprehensive immigration legislation, which restricted immigration based on race. In 1870, Congress barred the Chinese from being able to naturalize through the Nationality Act of 1790, because “of their undesirable qualities.”²¹² Subsequently, Congress passed the Chinese Exclusion Act, which effectively barred Chinese from

²⁰⁸ *Supra* discussions of *Murillo*, see also *Farm Labor Organizing Committee v. OH. St. Highway Patrol*, 308 F.3d. 523, 535 (6th Cir. 2002) (Denying summary judgment for Ohio State Highway Patrol (OSHP) because in over ninety percent of the OSHP officers’ immigration inquiries concerned Latino motorists); see also *Doe v. Vill. Of Mamaroneck*, 462 F. Supp. 2d 520, 547 (S.D.N.Y. 2006) (Holding that the City acted with discriminatory purpose when the City engaged in “aggressive ticketing” of day laborers, who were almost exclusively Latino, to rid the town of “day laborers”).

²⁰⁹ Hing, *Institutional Racism, ICE Raids, and Immigration Reform* at 324.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

admission to the United States and imposed harsh penalties for violators.²¹³ In the landmark cases *Chae Chan Ping v. U.S.* and *Fong Yue Ting .v U.S.*, the Supreme Court upheld the validity of Congress' actions, holding in the latter that "the right of a nation to expel or deport foreigners... is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."²¹⁴ In arriving at this decision, the Court failed to recognize the pernicious precedent it set by permitting Congress to create facially discriminatory laws that excluded immigrants on the basis of race. To illustrate this point, the Supreme Court denied a person of Chinese ancestry the opportunity to nationalize because he was neither white nor black.²¹⁵

These Congressional Acts, and the Supreme Court's subsequent support, set a dangerous precedent that not only enabled the government to deny immigrants of color constitutional protections when seeking entry or when trying to nationalize, but also made it permissible to trample on the ideals of the Equal Protection Clause by preventing immigrants of color from gaining equal footing in the United States once they are physically present.

b. Operation Wetback

Operation Wetback represents a shift from Congressional laws that exclude people of color to an enforcement strategy targeted at a particular racial group, and in the process, provided strong evidence that Latinos have always been viewed as outsiders and have never truly been accepted as Americans.²¹⁶ Building on familiar themes from the Chinese Exclusion Era,

²¹³ Johnson, A "*Magic Mirror*" at 1120-1121.

²¹⁴ *Id.* (quoting *Fong Yue Ting .v U.S.*, 149 U.S. 698, 707 (1893))

²¹⁵ *Id.* and at 1124 (Discussing Justice Harland's dissent in *Plessy*, where he noted the irony of the "separate but equal" doctrine applied to blacks, who were a part of the political process, but not Asians. He went on to argue this was proof of a racial hierarchy).

²¹⁶ Murray, *The Latino-American Crisis of Citizenship* at 518 (noting that Latinos have always been regarded as foreigners); see also, Kevin R. Johnson, "*Aliens*" and the *U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. Miami Inter-Am. L. Rev. 263, 264 (1997) (explaining that the use of the term "alien" to identify immigrants connotate that they

Mexicans were originally recruited to fill labor shortages in the southwest.²¹⁷ Eventually, the demands stemming from the United States' involvement in both World Wars prompted the active recruitment of Mexican laborers to fill the labor shortages.²¹⁸ The recruitment of Mexican workers during labor shortages gave way to the Bracero Program, which emphasized that Mexican workers would be recruited for “temporary and backbreaking work.”²¹⁹ Ultimately, this program perpetuated a number of stereotypes regarding Mexican workers' place in the United States - the workers were viewed as nothing more than a good, cheap source of labor, were never intended to be incorporated into the fabric of American society and, most importantly, these workers were dispensable.²²⁰ Continuing with the cycle of seeing foreign workers as merely tools of the expendable labor force, fear that Mexican workers were taking jobs and depressing wages gave way to Operation Wetback.²²¹

During this time period, the INS summarily deported all Latinos who could not prove United States citizenship.²²² This practice resulted in countless Mexican-Americans and legal Mexican immigrants being deported to Mexico.²²³ By the end of this initiative, the federal

are outsiders and less deserving of all rights and privileges enjoyed by citizens), from here on “*Aliens*” and the U.S. Immigration Laws; additionally, *Institutional Racism, ICE Raids, and Immigration Reform* at 325-326 (arguing that the immigration problem is synonymous with Mexican migration and that “illegal immigration has become synonymous with the issues surrounding the southwestern border of the United States).

²¹⁷Hing *Institutional Racism, ICE Raids, and Immigration Reform* at 326 (citing J. Martinez, *Mexican Emigration to the U.S. 1910-1930*, at 1 (1971) (unpublished dissertation, on file with UCLA Research Library); see also A “*Magic Mirror*” at 1136 (noting that historically Latinos have been used to ensure a disposable labor force in the southwest).

²¹⁸Hing, *Institutional Racism, ICE Raids, and Immigration Reform* at 326-327.

²¹⁹Murray, *The Latino-American Crisis of Citizenship* at 520.

²²⁰*Id.* citing “*Aliens*” and the U.S. Immigration Laws at 274 (describing the need for the U.S.’s need for a dispensable labor force).

²²¹*Supra* note 209.

²²²Johnson, A “*Magic Mirror*” at 1138.

²²³*Id.* at 1139.

government to located and removed over one million Mexican laborers.²²⁴ In some ways, Operation Wetback went further than the Chinese Exclusion Era because the INS investigated all Latinos in the Southwest solely because of the color of their skin. Undoubtedly, the federal government was emboldened by the past seventy or so years of immigration regulation.

Operation Wetback sent a strong message to all people of Mexican-decent- no matter your immigration status; you are never above suspicion of being illegal, even if you were born in the United States. Unlike the Chinese Exclusion Era, where the focus was concentrated on not admitting Asians and restricting liberties for legal immigrants, Operation Wetback targeted and removed American citizens based solely on the color of their skin. Additionally, because of the fact that American society never indented for Mexican workers to be permanently incorporated into American society made it seem logical to permit the INS investigates all persons of Mexican-ancestry, regardless of whether they were immigrants or citizens.

It is questionable whether persons of Mexican-ancestry were afforded any protection under the Due Process or the Equal Protection Clause, since the sole fact these people were of Mexican ancestry was sufficient to meet the burden of reasonable suspicion and removal. Either way, this practice typifies the notion of how expendable people should be treated.

c. *Brignoni-Ponce*

On its face *Brignoni-Ponce* might appear to be somewhat of a thaw in the hard-line stance of race-based immigration enforcement.²²⁵ While the Supreme Court held that it was

²²⁴ Hing, *Institutional Racism, ICE Raids, and Immigration Reform* at 327.

²²⁵ *Brignoni-Ponce*, 422 U.S. at 886 (“In this case the officers relied on a single factor to justify stopping respondent's car: the apparent Mexican ancestry of the occupants. We cannot conclude that this furnished reasonable grounds to believe that the three occupants were aliens . . . Even if they saw enough to think that the occupants were of Mexican descent, this factor alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country. Large numbers of native-born and

unconstitutional for Border Patrol agents to *solely* rely on race for reasonable suspicion in an immigration stop,²²⁶ it concluded that “Hispanic appearance” is a relevant factor in determining immigration status.²²⁷ Moreover, immigration officials are also permitted to consider characteristics like Mexican mode of dress and hairstyles.²²⁸

Arguably, the *Brignoni-Ponce* Court, while banning explicit racial discrimination, institutionalized the ability to discriminate on the basis of race.²²⁹ The same dangers for the *Brignoni-Ponce* exceptions to swallow the rule are present even under *Montero-Camargo*. As laudable as *Montero-Camargo* was, it explicitly upheld reliance on Mexican mode of dress and hairstyle “when applicable.”²³⁰ Absent further guidance, this dictum begs the question, *what is Mexican mode of hairstyle or address?* In practice, INS officers testified that in addition to Hispanic appearance, suspected undocumented immigrants had “a hungry look” and they were “dirty, unkempt” or wore “work clothing.”²³¹ Reliance on these factors is simply substituting working class characteristics as a proxy for “Mexican mode of dress.” Theoretically, under *Brignoni-Ponce* and *Montero-Camargo*, officers are permitted to rely on these stereotypes to suffice for individualized suspicion because a working class mode of dress is synonymous with a

naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens”).

²²⁶ *Id.*

²²⁷ *Id.* at 886-887.

²²⁸ *Id.* at 885.

²²⁹ Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, at 329-332 (see generally Supreme Court Blessings to Target Mexicans).

²³⁰ *Montero-Camargo* 208 F.3d. at 1134 (“[referring to Mexican mode or dress] [i]n reaching our holding, we do not reject the use of such factors as dress or haircut when they are relevant).

²³¹ Johnson, *Case Against Race Profiling* at 698.

Mexican mode of dress.²³² Reliance on these beliefs typifies the historical perception that Latinos have traditionally held in American society - that they are an alien underclass.²³³

At least one district court has recognized that one village's attempt to rid itself of "day laborers" was a thinly veiled attempt to rid itself of Mexicans.²³⁴ In contrast, by allowing immigration officials to rely on "Mexican dress and hairstyles," the Supreme Court set the burden of proof so low that it creates an end around to the prohibition on relying on "Mexican appearance." Although the Supreme Court forbid sole reliance on "Mexican appearance," it arguably gave immigration officials more power to discriminate because it allowed immigration officers to rely on socioeconomic proxies associated with racial stereotypes instead of forcing immigration officers to admit their discriminatory assumptions.

In all of the cases where race-based immigration enforcement occurred in schools, the police officers undoubtedly acted with racial animus towards the students they questioned. While some of these actions taken by law enforcement officials were explicit,²³⁵ other actions reflected law officers' underlying assumption that people of Mexican ancestry are not above the suspicion. Clearly, the Chandler Round-up and the Roswell incident would meet the discriminatory purpose standard. In Roswell, Officer Corn had a reputation for requesting that Latino students prove they are legally present in the country, and was even responsible for the deportation of another student before Ms. Acosta.²³⁶ Further, in defending his officer's actions, Roswell Police Chief Balderston typified this belief that persons of Mexican decent are never above the fray of suspicion by

²³² *Id.* at 700.

²³³ Johnson, A "*Magic Mirror*" at 1136-1140 see generally "The War on "Illegal Aliens" a/k/a Mexican Immigrants (noting that Mexican workers were never intended to be integrated into American society and were always intended to be seen as foreign workers).

²³⁴ Mamaroneck 462 F. Supp. 2d. at 546.

²³⁵ *Supra* section II. C. (the Chandler Roundup was a joint operation between Tucson Border Patrol where both groups conspired to target Latinos living in Chandler).

²³⁶ *Supra* note 39.

stating, “[i]t’s not just people coming from Mexico, we have concerns about Middle Eastern men. If we don’t check (immigration status), if we turn our back, we’re doing our country a disservice.”²³⁷ This quote is indicative of the belief that Mexicans, no matter their immigration status, are at some level suspected of being illegally present in the U.S. Bladerston’s brazen attitude is reminiscent Operation Wetback and *Brignoni-Ponce*, as his statement makes it clear that membership in a certain ethnic group is, at least in some part, a legitimate basis for suspecting they are present without authorization.

Albuquerque law enforcement agencies’ actions display a more subtle reliance on non-racial factors as a proxy for illegal presence. In *Holding the Line*, Professor Michael Olivas explained how the APD would call immigration authorities whenever there was a need for translation services.²³⁸ It is unsettled whether the inability to speak English justifies reasonable suspicion;²³⁹ however, the fact that the APD would call Border Patrol for translation services exemplifies the assumption that the inability to speak English is synonymous with illegal presence. By relying on non-racial factors that are commonly associated with a person’s ethnic identity, but not necessarily indicative of illegal presence, the Albuquerque law enforcement officers are simply relying on the same “mode of dress” type indicators to serve as an end around for reliance on “Mexican appearance.”

The ultimate irony of both of these New Mexico race-based immigration scenarios is that neither of these agencies acted pursuant to a 287(g) agreement.²⁴⁰ By conducting immigration enforcement-type investigations without proper training, at the very least indicates the belief that

²³⁷ *Supra* note 56.

²³⁸ *Supra* note 182.

²³⁹ *Farm Labor Organizing Committee* 308 F.3d. at 533 (the court held there is potentially no reasonable suspicion for a person’s inability to speak English).

²⁴⁰ *Supra* note 18.

all Latinos are presumptively foreigners. Because all Latin Americans are foreigners, they are therefore entitled to less recognition under the Constitution and federal immigration laws. Clearly these beliefs are an institutional manifestation of the Chinese Exclusion Era and Operation Wetback.

In sum, it is clear that all of the law enforcement officers acted with either explicit discriminatory intent, or that the officers felt their actions were justified because acting with racial animus against immigrants of color was merely part of the historical norm and that these actions were consistent with the belief that people of Mexican ancestry are entitled to less rights under the law. No matter which version is true, acting with discriminatory intent has had pernicious affects on Latino students in their ability to pursue an education.

B. Discriminatory Impact: Effect on Educating Latinos

Before going any further, it is important to note that if a court does find that a statute is enforced in an intentionally discriminatory fashion, courts typically will also find a discriminatory impact.²⁴¹ However, in the event a court does not recognize this widely held principle, this section will review three harms that Latinos experience as a result of race-based immigration enforcement and how these harms are exacerbated by school-based enforcement. First, Latinos are stigmatized by race-based immigration enforcement, which adversely effects self-esteem and self-efficacy development. Second, Latino children develop a sense of “double-consciousness”²⁴² which leads to feelings of self-hate. These feelings of self-hate in turn affect intra-racial relationships. Third, race-based immigration enforcement calls into question the legitimacy

²⁴¹ *Mamaroneck*, 462 F. Supp. 2d. at 543 (“Once racially discriminatory intent infects the application of a neutral law or policy, the group that is singled out for discriminatory law or policy ... In effect, the law recognizes that a government that sets out to discriminate intentionally in its enforcement of some neutral law or policy will rarely if ever fail to achieve its purpose”).

²⁴² *Id.* at 569-570 (describing W.E. Dubois’ notion of “double-consciousness”).

Latinos feel towards governmental institutions. By reinforcing Latinos' unequal place in American society, it causes them to question the validity of a government that subjugates them to a subordinate role in society. When race-based immigration enforcement occurs in schools, it powerfully reinforces the historical belief that Latino children are not, nor were they intended to be incorporated within the fabric of greater American society.

1. Stigmatization Is a Barrier to Education

Immigration scholars and courts have documented the harms that racial groups experience because of race-based immigration enforcement. Principally, the affected racial and ethnic groups are reminded that they enjoy fewer constitutional protections compared to their white counterparts.²⁴³ Because the affected groups are not on equal constitutional footing, it is only natural for the affected group members to develop a sense of inferiority when assessing their role within greater American society.²⁴⁴ Additionally, Professor Johnson argues that all members of the targeted racial group feel the stigma of inferiority.²⁴⁵ Understandably, this sense of inferiority

²⁴³ *Montero-Camargo*, 208 F.3d. at 1135 (“Stops based on race or ethnic appearance send the underlying message to all... citizens that those who are not white are judged by the color of their skin alone. Such stops send a clear message that those who are not white enjoy a lesser degree of constitutional protection”).

²⁴⁴ Murray, *The Latino-American Crisis of Citizenship* at 572 (articulating the harms associated with branding Latinos as “inferior” or “illegal”).

²⁴⁵ Johnson, A “*Magic Mirror*” at 1159-1153 (stating that “[t]hese minority groups implicitly understand the link between racial exclusions and their place in the racial hierarchy in the United States.” In support of this statement, he points out a number of scholars and politicians who recognized that race-based immigration enforcement is truly a reflection of how the United States feels about that racial/ethnic group. Gerald Rosberg stated: “When Congress declares that aliens of Chinese or Irish or Polish origin are excludable on the grounds of ancestry alone, it fixes a badge of opprobrium on citizens of the same ancestry.” Also, President Eisenhower vetoed the national origins quota system because, “[i]t was thought that people of West European origin made better citizens than Rumanians or Yugoslavs or Ukrainians or Hungarians or Balts or Austrians. Such a concept ... violates the great political doctrine of the Declaration of Independence at ‘all men are created equal’”).

stems from the belief that these ethnic groups are “foreigners” in America.²⁴⁶ Subsequently, survival is predicated upon proving belonging. At least one immigration scholar notes, that constantly having to prove belonging precludes Latinos from the ability to fully participate in society.²⁴⁷ Denying full participation creates a “crisis of citizenship,”²⁴⁸ which has *Brown* type ramifications on Latinos.²⁴⁹

Through its reliance on psychological evidence, the *Brown* Court emphatically stated that the segregation of African-American and white children stigmatizes African-American children, which tends to affect the student’s educational and mental development.²⁵⁰ The Court’s reliance on psychological evidence was not misplaced: nearly the entire academic community, then and now, warns against the deleterious effects on the development of self-esteem, self-efficacy, and the overall mental health of children of color who experience racism.²⁵¹ To provide evidence that these harms are not isolated to a single generation, at least one commentator has articulated

²⁴⁶ Johnson, A “*Magic Mirror*” at 1152 (pointing out that animosity towards racial immigrant groups is not solely limited to immigrants); *see also*, Johnson, *Case Against Race Profiling* at 725 (“Race profiling in immigration enforcement is therefore based on and further reinforces the perception that persons of Latin American ancestry, citizens and noncitizens alike, are ‘foreigners.’”).

²⁴⁷ David K. Chan, Note: *INS Factory Raids as Nondetentive Seizures*, 95 *Yale* 767, 773 (1986)).

²⁴⁸ Murray, *The Latino-American Crisis of Citizenship* at 570-571.

²⁴⁹ Johnson, A “*Magic Mirror*” at 1151 (noting that Latinos may very well suffer the same stigmatic harms that will never be undone as was the Court’s concern in *Brown v. Board of Education*).

²⁵⁰ *Brown* 347 U.S. at 494

²⁵¹ Robert M. Sellers, Cleopatra H. Caldwell, Karen H. Schmeelk-Cone; Marc A. Zimmerman, *Racial Identity, Racial Discrimination, Perceived Stress, and Psychological Stress Among African America Young Adults*, *J. of Health and Social Behavior*, vol. 43 (September) 302, 304 (2003) (the authors note the expansive body of research that has linked experiencing discrimination to poor mental health among African-American children); Kimberly J. Freedman, Note: *Parents Involved in Community Schools v. Seattle School Dist. No. 1: A Return to a Separate and Unequal Society*, 63 *U. Miami L. Rev.* 685, 693 (2009) (noting the resegregation of schools will likely have the same affects on children of color’s sense of inferiority and motivation to learn. This will be exhibited in less growth in three particular areas, the psychological development of self-esteem, self-efficacy, and the formulation of prejudicial attitudes). From here on *A Return to a Separate and Unequal Society*.

children of color were beginning to experience the reemergence of *Brown*-type harms because of the Supreme Court's continued dismantling the landmark case over the past twenty years.²⁵²

Students who are victims of resegregation suffer from feelings of being forgotten by mainstream American society.²⁵³ Likewise, race-based immigration enforcement leads to feelings among Latino children that they are perpetual outsiders.²⁵⁴ In both cases, the feeling of exclusion has pernicious effects on the development of these children's self-esteem. Ultimately, this poor self-concept contributes to poor academic performance, lower graduation rates, and decreased college attendance.²⁵⁵ Furthermore, Latinos have the largest dropout rate among ethnic groups in the United States²⁵⁶ and in some parts of the country, more Latinos drop out of school than graduate.²⁵⁷ The combination of psychological data and contemporary Latino school performance indicators suggests that racial discrimination creates a barrier to the acquisition of an education.

In addition to its harmful effects on self-esteem development, discrimination in schools tends to damage children of color's self-efficacy.²⁵⁸ Self-efficacy is described as a child's "beliefs concerning his or her ability to perform the behaviors needed to achieve desired

²⁵² Freedman, *A Return to a Separate and Unequal Society*, at 690-692 (discussing the general deterioration of the positive impact *Brown* had on children of color through the Court's weakening of the decision over the past twenty years).

²⁵³ Freedman, *A Return to a Separate and Unequal Society* at 694 (referring to Amy Stuart Wells & Erica Frankenberg, *The Public Schools and the Challenge of the Supreme Court's Integration Decision*, 89 Phi Delta Kappan 178, 179 (2007)).

²⁵⁴ *Supra* note 246.

²⁵⁵ *Id.* (citing Wells & Frankenberg; Brief of 553 Social Scientists as Amici Curiae in Support of Respondents at 12, *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007); and NAACP Legal Def. & Educ. Fund, Inc. et. al., *Looking to the Future: Voluntary K-12 School Integration*, 12, 16 (2005)).

²⁵⁶ Lopez, *Immigration: Reflections on Educating Latino and Latina Undocumented Children: Beyond Plyler v. Doe*, at 1379 (noting that Latino students have a dropout rate of 28%, where African-American students have a 13% and whites have a 7% dropout rate).

²⁵⁷ Jennifer Radcliffe, Dropout Crisis In L.A.; Situation Much Worse Than Reported, Harvard Study Shows, *The Daily News of Los Angeles- Valley Edition*, N1 (March 24, 2005) (noting that 71% of students in LAUSD are Latino, yet only 39% of Latinos graduate in four years).

²⁵⁸ Freedman, *A Return to a Separate and Unequal Society* at 696.

outcome.”²⁵⁹ Kimberly Freedman also notes, “[p]sychological research has consistently demonstrated that high levels of prejudice, stereotypes, and discrimination, which are all exacerbated in the context of school and societal segregation, yield adverse cognitive, behavioral, and motivational consequences for minority group members.”²⁶⁰ The combination of a higher concentration of Latinos²⁶¹ and the threat of race-based immigration enforcement appears to have a synergistic effect on Latino students’ self-efficacy.

Both historical jurisprudence and psychological research indicate that children who are stigmatized from discrimination ultimately show lower levels of self-efficacy and self-esteem, which impede school success. Therefore, the stigmatic harms Latino children suffer because of race-based immigration enforcement likely impede the development self-esteem and self-efficacy, causing these children to suffer from a badge of inferiority. Consequently, this badge of inferiority likely contributes greatly to the achievement gap in education, as well as the students’ general inability to contribute in society to one’s potential.

2 Self-Hate as a Barrier to Intra-Group Relationships

*“The Mexicans don’t like us because they think we are too American, and the Americans don’t like us because they think we are too Mexican.”*²⁶²

Professor Murray brilliantly captured the notion of race-based immigration laws causing a crisis of citizenship through her case study of the Oscar De La Hoya – Julio Cesar Chavez boxing

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ Lopez, *Immigration: Reflections on Educating Latino and Latina Undocumented Children: Beyond Plyler v. Doe*, at 1379 (noting that in 2000 44% of the people of color enrolled in public schools were Latino).

²⁶² Quote by Abraham Quintanilla in the movie *Selena*.

match.²⁶³ Murray concluded that De La Hoya's struggles typify the notion that Latin Americans are perceived as *the invaders and community destroyers* of their own community. Despite sharing the same desire as Latinos to rid the community of those who wish to subjugate them, Latin Americans are viewed as simply too similar to the invaders to be trusted.²⁶⁴ Professor Murray compared this experience to W.E. Dubois' description of double-consciousness:

“Sense that is always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity. One ever feels his two-ness, an American, a Negro; two souls, two thoughts, two unrecognized strivings; two ideals in one dark body whose dogged strength keeps it from being torn asunder.”²⁶⁵

Seemingly, any modicum of success that was not achieved through exclusively Mexican means would tend to mark Mexican-Americans on the wrong side of the hyphen and they would be too much like the conquerors to be trusted as *one of us*.

Ironically, the reality is that many victims of race-based immigration enforcement wish to abandon vestiges of their native culture. In the school context, these assimilative actions are not caused by a desire to spurn one's native culture, but are survival techniques designed to help the

²⁶³ Murray, *The Latino-American Crisis of Citizenship*, see generally; III. Pugilists, Flags, and the Fight Over What It Means to Be Mexican: A Case Study in the Crisis of Citizenship. Oscar De La Hoya was an up and coming Mexican-American boxer who was a gold-medal winning boxer from East L.A. He fought Julio Cesar Chavez, who was a mythological Mexican boxer who rose from poverty to become a world champion boxer. He would often say that when he fought he believed he was defending Mexico. Chavez also embodied the Mexican “fighter” boxing style; he would take three punches to deliver one crushing blow. Boxing analysts felt he was truly the embodiment of Mexico in the boxing world. Professor Murray used the De La Hoya fight to explain the idea of a hyphenated existence: although De La Hoya was of Mexican ancestry, who always made it a point to pay homage to both his Mexican and his American heritage, though his own people never embraced him, not even in his hometown of Los Angeles.

²⁶⁴ *Id.* at 569.

²⁶⁵ *Id.* (quoting *The Souls of Black Folk*, 3 (1940)).

individual remain above suspicion.²⁶⁶ It is no surprise that some Latino Americans to develop animosity toward Latino immigrants because Latino immigrants do not accept them as their own. This intergroup animosity seems eerily reminiscent of Kenneth Clark's doll test, where he concluded the negative feelings the African-American children exhibited towards dolls of their color were a result of "discrimination, prejudice, and segregation [that] had a negative impact on African-American children."²⁶⁷

In some cases, the animosity towards undocumented children extends further than resentment.²⁶⁸ Numerous education and sociology scholars have reported that undocumented children commonly face threats, intimidation, and violence directed towards them by *Latino* and other students of color.²⁶⁹ Violence in schools directed towards undocumented Latinos speaks volumes about the intra-racial conflict between the two groups. Undoubtedly, these actions indicate the extremes some Latin-American students will go to prove to mainstream America that they are unlike their undocumented counterparts. If schools are the society's great assimilative tool, one must ask what lessons Latino children are being taught when they become victims of immigration enforcement in schools? It seems that the answer is that Latino children are destined to fight a lifelong emotional and - in some cases - physical conflict for which there is no catharsis.

²⁶⁶ *Supra* note 78 (noting that after the two girls from Frye Elementary were questioned by Chandler police officers, they developed avoidance behaviors as a defense mechanism to prevent triggering whatever characteristic or event that caused Q's daughters to be questioned).

²⁶⁷ Freedman, *A Return to a Separate and Unequal Society* at 688 (discussing Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality*, 353-357 (1976)).

²⁶⁸ Reynaldo Contreras, *The Impact of Immigration Policy on Education Reform: Implications for the New Millennium*, *Education and Urban Society*, Vol. 34, No. 2, 134, 149 (2002).

²⁶⁹ *Id.*

This internal conflict, however, will always perpetuate feelings of inferiority that ultimately deny Latinos educational opportunities, just as it did for African-Americans pre- *Brown*.²⁷⁰

3. Distrust of Governmental Institutions

It is hardly a contentious assertion to say that when a government acts in a discriminatorily towards a certain group of people, that group develops a deep sense of distrust and suspicion towards that group, causing the government to lose its validity among the community.²⁷¹ Other legal scholars have taken this concept further to assert that racialized immigration laws cause people of color to believe that the state is not acting in their people's best interest. And when the government does not follow through with its portion of the social contract, there is less motivation for people of color to fulfill their obligations to the government.²⁷² So how is this notion translated into the school context?

Horace Mann believed increasing educational opportunities would decrease poverty and socialize children with proper values for American society.²⁷³ These hopes and aspirations seem to have been incorporated into popular perception of the role schools should play for children in America.²⁷⁴ Perhaps just as importantly, courts have consistently recognized the benefits and

²⁷⁰ *Brown* 347 U.S. at 494

²⁷¹ Johnson, *Case Against Race Profiling* at 176 (noting that race-based law enforcement leads to cynicism of the criminal justice system in communities of color. Professor Johnson cites numerous studies that support this assertion; Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 So. Cal. L. Rev. 1219 (2000) (analyzing survey results of a study of African-American perceptions of criminal law enforcement); Erik Luna, *Transparent Policing*, 85 Iowa L Rev. 1107, 1118-1119 (2000) (noting that minority distrust of police officers leads to less willingness to cooperate with law enforcement officers)).

²⁷² Murray, *The Latino-American Crisis of Citizenship* at 572.

²⁷³ *Supra* note 70.

²⁷⁴ Lowell C. Rose and Alec M. Gallup, *The 32nd Annual Phi Delta Kappa/Gallup Poll of the Public's Attitudes Toward the Public Schools*, Phi Delta Kappan, 47 (2006) (Americans ranked goals they had for schools among the top seven stated goals we (in no particular order); 1. Dispel

necessity of a public education system. Chief Justice Warren echoed the social utility of education in *Brown*:

Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.²⁷⁵

Justice Brennan also observed in *Plyler* that the school system is of “supreme importance” and “public schools... [are]... a most vital civil instruction for the preservation of a democratic system of government.”²⁷⁶ Additionally, Justice Brennan eloquently pointed out that the denial of an education to an isolated group of children runs counter to the goals of the Equal Protection Clause.²⁷⁷ After all, the Fourteenth Amendment was instituted to *prevent* the government from creating unreasonable obstacles to the advancement of these people based on merit.²⁷⁸ Instituting barriers to an education will likely foreclose the sole means these children of color have for advancement in the U.S.²⁷⁹

Murillo also recognized an essential role schools play in the community: “Bowie High School provides an oasis of safety and freedom for the students and staff who reside within the School District...[the continued harassment]...by El Paso Border Patrol is both an invasion of

inequities in education among certain schools and certain groups, 2. Promote cultural unity among all Americans, and 3. Improve social conditions for people).

²⁷⁵ *Brown*, 347 U.S. at 493.

²⁷⁶ *Plyler*, 457 U.S. at 221-222.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

their civil rights and the oasis.”²⁸⁰ In all of the instances where race-based immigration enforcement occurred, members of the school community noted that the community’s collective trust had been betrayed.²⁸¹

School safety is important not only because it is essential to academic achievement,²⁸² but also because in many cases, schools have been the sole institution where immigrants and people of color have been able to develop trusting relationships with the government. Without any of these relationships, people of color are unlikely to utilize government services, even in cases of emergency.²⁸³

So what message does race-based immigration enforcement in schools send to the effected groups? By creating an atmosphere of fear and instability, law enforcement agencies are creating a barrier to education as recognized in *Murillo* and in *INS Factory Raids*.²⁸⁴ Constant concern about being discovered or of having to prove belonging precludes equal participation in the nation’s most important institution. Undoubtedly, these are barriers to advancement inexplicably

²⁸⁰ *Murillo*, 809 F. Supp. at 495.

²⁸¹ *Supra* Roswell discussion (noting the sense of betrayal Latino students and families felt by the immigration enforcement at Roswell High School); *supra* Chandler discussion (after Q’s children were confronted by Chandler Police officers, they sought to avoid attending school).

²⁸² *Murillo*, 809 F. Supp. at 498 (“public interest is served when students and their teachers are free from undue interference from law enforcement officers”).

²⁸³ Erik Luna, *The New Data: Over-Representation Of Minorities In the Criminal Justice System Article: Race, Crime, and Institutional Design*, 66 Law & Contemp. Prob. 183, 187 (2003) (noting that African-American’s mistrust police officers contributes to a reluctance to participate in the criminal justice system); arguably, this fear is intensified in immigrant communities; *see* Sharona Hoffman, *Preparing For Disaster: Protecting The Most Vulnerable In Emergencies*, 42 U.C. Davis L. Rev. 1491, 1506-1507 (2009) (noting that undocumented people that were victims of the Gulf Hurricanes often did not utilize emergency services because of a fear of being prosecuted); *see also* Peter L. Reich, *Jurisprudential Tradition and Undocumented Alien Entitlements*, 6 GEO. IMMIGR. L.J. 1, 4 (Mar. 1992) (noting that undocumented immigrants attempt to avoid necessary medical care and other public assistance due to fear government officials).

²⁸⁴ *Supra* notes 140 and 270.

run counter to Brennan’s interpretation of the purpose of the Equal Protection Clause.²⁸⁵ Instead of using the education system to break down barriers of exclusion and give insulated minorities the tools they need for social advancement, law enforcement officers are simply recreating the patterns of exclusion and disillusion that reinforce the message that all Latinos, regardless of immigration status, are alien peoples.²⁸⁶

The culmination of this racial animus displayed towards Latinos sends a clear message: because of the color of their skin, Latinos enjoy fewer constitutional protections.²⁸⁷ Race-based immigration law enforcement is tremendously harmful because this type of enforcement “strikes at the heart of one’s equal claim to actual equal membership in society.”²⁸⁸ Ultimately, these perceptions of unequal membership and fewer constitutional rights lead Latinos to believe that despite possessing lawful immigration status, they do not belong in American society. If a sense of belonging is the heart of what it means to be a citizen,²⁸⁹ the emotional, psychological, and at times, physical exclusion from equal access to schools sends a strong message to Latino children in regards to their place in society.

VI. Conclusion

Plyler represents a fundamental recognition that undocumented children are victims of circumstances beyond their control and it would be summarily unjust to foreclose these children’s futures because of their parents’ decisions. Although *Plyler* cannot be used to defend against this

²⁸⁵ *Supra* note 278.

²⁸⁶ *Supra* note 216.

²⁸⁷ *Supra* note 243.

²⁸⁸ Johnson, *Case Against Race Profiling* at 724 (quoting David K. Chan, Note: *INS Factory Raids as Nondetentive Seizures*, 95 *Yale* 767, 773 (1986)).

²⁸⁹ Murray, *The Latino-American Crisis of Citizenship* at 505 (citing Kenneth Karst, *Belonging in America: Equal Citizenship and the Constitution* 3-4 (1989)).

new barrier to educating undocumented children, its recognition of the destructive nature of immigration enforcement in schools is still present. In many ways, this new attack on undocumented children's access to education is worse because it inflicts harms on all Latino children, regardless of immigration status. The factual scenarios in this paper indicate that by all quantifiable measures, these children have been unconstitutionally searched and seized by immigration enforcement in schools and ultimately, this barrier creates an additional challenge to the acquisition of an education for Latinos of every immigration status. Additionally, racialized immigration enforcement in schools not only serves as a barrier to education, but also reinforces the notion that all Latinos are "aliens" in America. Operating in this manner discourages Latino academic achievement and full participation in society. Because of the gravity of these harms, ICE and local law enforcement agencies should be prohibited from inquiring about a student's immigration status, while in or around schools unless the officers possess a warrant.