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# RACIAL PROFILING: "DRIVING WHILE MEXICAN" AND AFFIRMATIVE ACTION†

*Victor C. Romero**

This Essay will focus on "racial profiling" not just in the way many people think about the term—that is, with respect to stopping motorists for traffic violations based solely on their race, so-called "Driving While Mexican" or "Driving While Black"—but also in the context of "affirmative action"—namely, using race as a factor in employment and educational decisions. More broadly, then, I want us to think of "racial profiling" as simply "the use of race to develop an understanding of an individual," which moves us slightly away from more pejorative notions of the phrase that have seeped into the national consciousness.[1]

My thesis is as follows: When discussing "racial profiling" in the context of "Driving While Mexican/Black"[2] or "affirmative action,"[3]

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1. *See, e.g.*, *infra* note 2 (discussing "racial profiling" in the context of automobile stops).

2. This term snidely refers to automobile searches and stops by Immigration and Naturalization Service ("INS") agents of Black- and Latino/a-looking individuals solely on the basis of their Black or Brown skin. *See* Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement: Why Stops for "Driving While Brown" Undermine the Ideal of Full Membership and Equal Citizenship* (unpublished manuscript on file with author); *see also* Jim Yardley, *Some Texans Say Border Patrol Singles Out Too Many Blameless Hispanics*, N.Y. TIMES, Jan. 26, 2000, at A17 ("'Why were you stopped?' asks the local joke. The answer: 'Driving while Mexican.'").

Legal literature is replete with discussions of this phenomenon in the context of traffic stops of African Americans for "Driving While Black." *See, e.g.*, David A. Harris, *When Success Breeds Attack: The Coming Backlash Against Racial Profiling Studies*, 6 MICH. J. RACE & L. (forthcoming 2001); David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999); Jennifer A. Larrabee, *"DWB (Driving While Black)" and Equal Protection: The Realities of an Unconstitutional Police Practice*, 6 J.L. & POL'Y 291 (1997–98); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999).

3. While "affirmative action" programs providing minority preferences in employment and education have come under considerable attack in recent years, some scholars

many "conservative" and "liberal" commentators must make clear distinctions between whether race *is* a relevant concern, on the one hand, and whether race *should be* a relevant concern on the other. Oftentimes, pundits on the left and right merge the two concepts, causing confusion and prompting charges of hypocrisy from the opposite camp.[4]

Let us consider two analytical alternatives to the conservative and liberal camps: First, looking at the opinions of former Justice Lewis Powell in *United States v. Brignoni-Ponce*[5] and *Regents of the University of California v. Bakke*,[6] we can discern a "pragmatic"[7] or "centrist" approach to race—that is, the understanding that race matters in the context of automobile stops[8] and university admissions,[9] and, therefore, that race *should* be a legitimate factor to consider in both situations.[10] A

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argue for their continuation because minorities still do not compete on a "level playing field" with Whites. *See, e.g.*, Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1045 (arguing that affirmative action remedies are still necessary in the 1990s because conditions for minorities are still much worse than for Whites in American society); *see also* Lundy R. Langston, *Affirmative Action, A Look at South Africa and the United States: A Question of Pigmentation or Leveling the Playing Field?*, 13 AM. U. INT'L L. REV. 333, 348–49 (1997) (describing the "level playing field" metaphor: "President Lyndon B. Johnson actually used the term 'affirmative action' and utilized a sports metaphor to illustrate the need to level the playing field. 'Racism raised high hurdles and made it impossible for otherwise equal runners to compete. Thus, when [Blacks] passed the baton to the next generation, they did so running with less speed, having covered a shorter distance, and having less stamina than they would have in a non-racist society.'" (internal citation omitted).

4. *See infra* text accompanying notes 17–27.

5. 422 U.S. 873 (1975).

6. 438 U.S. 265 (1978).

7. Justice Powell has often been described as a "pragmatist" who sided exclusively with neither the liberal nor the conservative justices on the Court. *See, e.g.*, Craig Evan Klafter, *Justice Lewis F. Powell, Jr.: A Pragmatic Relativist*, 8 B.U. PUB. INT. L.J. 1 (1998).

8. *Brignoni-Ponce*, 422 U.S. at 886–87.

9. *Bakke*, 438 U.S. at 296 n.36.

10. At least one other commentator has noted in the Fourth Amendment and Equal Protection contexts the "relevance of race" parallel that I draw here. *See* David A. Strauss, *Affirmative Action and the Public Interest*, 1995 SUP. CT. REV. 1, 9 n.38:

> The one clear instance of the Supreme Court's allowing race (or national origin) to be used as a basis for classifying people (since *Brown*) is . . . *Brignoni-Ponce*. . . . *Brignoni-Ponce* ruled that law enforcement officers may use Mexican-American ancestry as a 'relevant factor' . . . in determining whether there is reasonable suspicion that a person is an undocumented alien. The result in *Brignoni-Ponce* is consistent with the discussion in the text in the sense that the Court did not consider any Equal Protection issue in *Brignoni-Ponce* and so did not apply strict scrutiny. But it seems reasonably clear that *Brignoni-Ponce* represents a category of cases in which the courts would allow race or national origin to be used as a basis for classification—for example, if police officers seeking a suspect concentrate on individuals whose race matches the description given by a

second—and I submit, preferable—approach is the one espoused by Critical Race Theorists who would agree with Powell that race is relevant in both the automobile stop and university admissions, but that, as a policy matter, race should not play a role in traffic stops, though it should in affirmative action because of the power differential that exists between the majority and minority races in American society.

First, let us explore the issue of racial profiling in the motoring context, and more specifically, the issue of "Driving While Mexican." A *New York Times* article describes the plight of federal judge Filemon Vela, who was stopped by a Border Patrol agent along the Texas-Mexico line, mistaking him for an undocumented immigrant[11] or a drug smuggler.[12] As Gilberto Hinojosa, a county judge who has had similar troubles, sadly noted, "It feels like an occupied territory. . . . It does not feel like we're in the United States of America." "'Why were you stopped?' asks the local joke. The answer: 'Driving while Mexican.'"[13]

The Immigration and Naturalization Service defends its policy by stating that these unfortunate mistakes are "rare because agents are trained to distinguish undocumented immigrants from legal residents. Rather than casting a wide net . . . agents follow specific profiles to identify suspects."[14] They are quick to add that their good work has resulted in dramatically fewer arrests of undocumented immigrants than in previous years—25,053 in the last fiscal year, down from 66,135 in

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witness. Thus the prohibition on the use of racial generalizations is not as absolute as the cases suggest. But whatever accounts for the (presumed) willingness to allow the use of racial criteria in cases like this—perhaps the perceived importance of the interests on the other side, perhaps a sense that the underlying generalization is less likely to be the result of prejudice, perhaps the belief that the use of relatively unarticulated generalizations of this kind is less stigmatizing to minority groups—the Supreme Court shows no inclination to apply a means-ends version of strict scrutiny to racial classifications generally.

11. I prefer the terms "noncitizen" to "alien" and "undocumented immigrant" to "illegal alien" because of the pejorative connotations attached to the word "alien." However, I favor the term "alienage jurisprudence" rather than "citizenship jurisprudence" because the former captures the dehumanizing nature of such categorizations. *See, e.g.*, Victor C. Romero, *The Domestic Fourth Amendment Rights of Undocumented Immigrants: On* Guiterrez *and the Tort Law-Immigration Law Parallel*, 35 HARV. C.R.-C.L. L. REV. 57 (2000); Victor C. Romero, *Equal Protection Held Hostage: Ransoming the Constitutionality of the Hostage Taking Act*, 91 NW. U. L. REV. 573, 573 n.4 (1997); *see also* Kevin R. Johnson, *"Aliens" and the U.S. Immigration Law: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 268 (1996–97) (discussing "how the term alien masks the privilege of citizenship and helps to justify the status quo").

12. *See* Yardley, *supra* note 2.

13. *Id.*

14. *Id.*

1997.[15] As Juan Lopez, a Border Patrol supervisor, stated when questioned about his experiences being stopped by fellow agents: "Do I get offended? . . . No, I don't. Those guys are doing their job."[16]

What accounts for these different reactions? The liberal perspective suggests that race is irrelevant—that each person should be treated as an individual and not as part of a group. As Joseph Carens has written in a different context: "People should be free to pursue their own projects . . . as long as this does not interfere with the legitimate claims of other individuals to do otherwise."[17] Thus, the liberal would contend, Judges Vela and Hinojosa should have been allowed to travel as non-Latinos do, free from harassing behavior on the part of the Border Patrol agents.

Conservatives like Dinesh D'Souza might describe such behavior by the Border Patrol officers as "rational racism." In *The End of Racism*,[18] D'Souza relates the story of Michelle Joo, an Asian American shopkeeper in Washington, D.C., who discriminates on the basis of race in deciding whether or not to let prospective patrons into her jewelry and cosmetics store.[19] "Young black men are kept out if they seem rowdy, Joo says."[20] This theory suggests that, in order to protect property, it is

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15. *See id.*

16. *Id.*

17. Joseph H. Carens, *Migration and Morality: A Liberal Egalitarian Perspective*, *in* BRIAN M. BARRY & ROBERT E. GOODIN, FREE MOVEMENT: ETHICAL ISSUES IN THE TRANSNATIONAL MIGRATION OF PEOPLE AND OF MONEY 25, 26 (1992).

18. DINESH D'SOUZA, THE END OF RACISM (1995).

19. *See id.* at 259.

20. *Id.* A similar calculus is performed by New York taxi drivers on the night shift in trying to determine which people would be safe to pick up. Sarah Kershaw, *Cabby's Shift Is a Night of Calculating Risks*, N.Y. TIMES, May 1, 2000, at A1, A24. Note the following report filed by a *New York Times* reporter riding with livery-cab driver Angel Miranda one early morning:

> 2:45 a.m. After picking up the Townsend Avenue fares—a woman and her three young children—Mr. Miranda drops them off at Gerard Avenue in the Concourse Village section. Another fare comes over the radio. 'St. Nicholas and 145th,' the dispatcher shouts: a corner in Harlem. No one responds. There are about 100 drivers cruising the streets on the overnight shift. If none of them press the button on their microphones indicating they want a fare, the dispatchers shout out the location again, up to five or six times. After the fifth broadcast of 'St. Nicholas and 145th,' the dispatcher clarifies things: 'Hispanic female.' Another driver quickly takes the call. Mr. Miranda acknowledges that the exchange appeared racist. Then he adds that although he uses the dispatchers' codes as a guide, when he picks up a passenger on the street, he goes by appearance, clothing, eye contact—'a vibe,' not race. During the night he will drive past several people hailing him, all young men of different races, explaining that they 'just didn't look right.'

rational to discriminate against racial groups; the allegedly high statistical correlation between race and crime make race relevant, contrary to what liberals might assert. As applied to the automobile stop context, the conservative would argue that using race as a factor is perfectly reasonable because race is relevant—many undocumented immigrants are Mexican[21] and therefore whether one looks Mexican is a rational criterion to consider in determining whether to inquire into a person's immigration status. Plus, picking up on Agent Lopez's sentiments, it is irrational for liberals to be offended when the Border Patrol is simply doing its job. For conservatives, race is relevant in the Border Patrol context to try to ferret out undocumented immigrants, many of whom are of Mexican appearance.

But let us consider the views of the liberal and conservative camps on a different issue: affirmative action in the context of university admissions. Affirmative action—the practice of considering race as a factor in university admissions—is currently under attack in Michigan[22] and Florida,[23] and it has been beaten down in Washington,[24]

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> Mr. Miranda says that Hispanic drivers are generally more comfortable with Hispanic passengers, though he adds that drivers at his service generally do not discriminate through racial stereotyping.
>
> In dangerous neighborhoods, he says, drivers simply avoid people who look threatening—and threatening people can be of any color.

*Id.*

21. Of the estimated five million undocumented immigrants residing in the United States in October 1996, an estimated 2.7 million, or 54%, were from Mexico. Immigration and Naturalization Service, *Statistics on Illegal Resident Population*, *at* http://www.ins.usdoj.gov/text/aboutins/statistics/illegalalien/index.htm (last visited Feb. 12, 2000). However, as Kevin Johnson notes, "as of October 1996, over forty percent of the undocumented persons had entered the country legally but overstayed their visas. Visa overstays are generally unaffected by heightened border enforcement focused on unlawful entry." Johnson, *supra* note 2, at 40–41.

22. Grutter v. Bollinger, No. 97-CV-75928-DT, 2001 WL 293196 (E.D. Mich. 2001) (finding law school's affirmative action policy unconstitutional), *stay granted*, Grutter v. Bollinger, No. 01-1447, 2001 WL 327822 (6th Cir. 2001); Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000) (upholding University's affirmative action policy). For a fascinating insider's look at the Michigan litigation, see 5 MICH. J. RACE & L. 241–459 (1999) (containing expert reports submitted in *Gratz* and *Grutter*).

23. Florida Governor Jeb Bush introduced his program, "One Florida," designed to end affirmative action in the state. *See* Peter T. Kilborn, *Jeb Bush Roils Florida on Affirmative Action*, N.Y. TIMES, Feb. 4, 2000, at A1, A23. The program is patterned after a similar one implemented in Texas, his brother's home state. *See id.*

24. In November 1998 Washington voters approved Initiative 200 which, like California's Proposition 209, bans the consideration of race and gender by state institutions. *See, e.g.*, Editorial, *I–200 Sets Washington on Uncertain Course*, NEWS TRIB. TACOMA, Nov. 5, 1998, at A10; V. Dion Haynes, *Affirmative Action Foes Cheer Gains:*

Texas,[25] and California[26] in recent years.

Interestingly, the liberal and conservative observers switch positions on the relevance of race in affirmative action. The liberal defends preferences as a way to "level the playing field" given the inequality of opportunity among the groups. Race is relevant in the affirmative action context, the liberal posits, because, for one thing, standardized tests are racially biased against minority groups, thereby requiring corrective action on the part of the university to disregard discrepancies in scores between certain majority and minority groups.[27]

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*Backers See Growing Support for Initiatives Banning Preferences*, CHI. TRIB., Nov. 23, 1998, at 6; Robert H. Kelley, *The Washington Civil Rights Initiative: The Need for a Meaningful Dialogue*, 34 GONZ. L. REV. 81 (1998–99). In addition, like the University of Michigan and the University of Michigan Law School, the University of Washington School of Law has recently been the target of an anti-affirmative action lawsuit. Both of these actions are being funded by the Center for Individual Rights, a non-profit litigation boutique that also filed the *Hopwood* case in Texas. *See, e.g.*, Adam Cohen, *The Next Great Battle Over Affirmative Action*, TIME, Nov. 10, 1997, at 50 (describing lawsuit filed challenging University of Michigan's admissions policies); Terry Carter, *On a Roll(back)*, A.B.A. J., Feb. 1998, at 54–58 (describing involvement of the Center for Individual Rights in anti-affirmative action lawsuits).

25. Perhaps the most infamous anti-affirmative action case of recent memory, *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996), stands for the proposition that race may not be used as a factor in law school admissions in the Fifth Circuit, of which Texas is a part. 78 F.3d at 935.

26. California's Proposition 209, which eliminated the consideration of race and gender in education and employment decisions, has been the subject of much scholarly commentary. *See, e.g.*, Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187 (1997); Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335 (1997); *1997 Symposium on Race and the Law*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1 (1997); Symposium, *The Meanings of Merit: Affirmative Action and the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 921 (1996).

Once a bastion of liberal politics, California recently approved yet another anti-civil rights statute, Proposition 22, which states: "Only marriage between a man and a woman is valid or recognized in California." *See, e.g.*, V. Dion Haynes, *California Vote Going Against Gay Marriages*, CHI. TRIB., Mar. 8, 2000, at 16; Associated Press, *California Passes Ban on Gay Marriages*, CLEVELAND PLAIN DEALER, Mar. 8, 2000, at 12A; *see also* Evelyn Nieves, *Bid to Thwart Gay Marriage Roils California*, N.Y. TIMES, Feb. 25, 2000, at A1, A11.

27.

> In the realm of law school admissions, for instance, the Law School Admissions Test ("LSAT") is one very important measure of a prospective law student's merit. But we know two things about the LSAT: First, while the data are inconclusive about its ability to predict one's first-year performance in law school, the LSAT does not predict whether the candidate will be a good attorney; second, and more importantly, one study shows that white students, *regardless of their socioeconomic background*, perform better on the LSAT than African-, Asian-, Latino-, and Native-

The conservative, on the other hand, argues that race is irrelevant in admissions because only individual merit matters. Nothing prevents the high-achieving minority student from effectively competing with the White student except for the former's failure to perform as well on the only measure that can help adequately assess candidates from different educational backgrounds—the standardized test. In the conservative's view, race is irrelevant because it is difficult to argue that a poor White student who performs better on the LSAT than a rich Black student should be denied admission because the latter was denied a level playing field.[28] Generalized race statistics cannot be relevant in assessing one individual's performance against another's.

Notice what has happened here. The liberal asserts the irrelevance of race in the automobile stop context for the same reason that the conservative pans affirmative action: race is not an accurate predictor in evaluating a particular individual; put another way, "racial profiling" does not work. Yet, both groups adopt a different perspective when arguing for race relevance: race is relevant in "Driving While Mexican" cases, the conservative claims, because, while respectable individuals such as judges Vela and Hinojosa might unfortunately (but rarely) be targeted, they are part of a larger group that contains non-respectable individuals (drug smugglers and undocumented immigrants) who should properly be targets of law enforcement. Analogously, the liberal contends that rich Black individuals who might not be the most worthy recipients of affirmative action preferences nonetheless belong to a class whose members are disproportionately disadvantaged by university admissions processes and standards.

Who is right? Is race relevant in only one context but not the other? Both our hypothetical conservative and liberal should take a cue from former Justice Lewis Powell's writings in the automobile stop and affirmative action contexts, and admit and make clear that race is relevant in both situations.

First, let us examine Justice Powell's opinion in the original "Driving While Mexican" case: *Brignoni-Ponce*. In that case, Border Patrol officers stopped the respondent's car solely on the ground that he appeared to be

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> Americans of any socioeconomic background except for upper income Asian Americans.

Victor C. Romero, *Broadening Our World: Citizens and Immigrants of Color in America*, 27 CAP. U. L. REV. 13, 21 (1998) (citations omitted).

28. "Scholars assail [race-based] preferences as divisive, stigmatizing, and harmful to 'innocent victims.'" Chapin Cimino, Comment, *Class-Based Preferences in Affirmative Action Programs After* Miller v. Johnson*: A Race-Neutral Option, or Subterfuge?*, 64 U. CHI. L. REV. 1289, 1289 (1997).

Mexican.[29] In invalidating that practice, the majority, speaking through Justice Powell, stated:

> We cannot conclude that [their apparent Mexican ancestry] furnished reasonable grounds [for the officers] to believe that the three occupants were aliens. . . . The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a *relevant factor*, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.[30]

Then, in *Bakke*, Powell voted to invalidate the University of California Davis Medical School's affirmative action program, but not before agreeing with four other justices that "race may be taken into account as a factor in an admissions program . . . ."[31] Powell justified his position: "No one denies the regrettable fact that there has been societal discrimination in this country against various racial and ethnic groups."[32] He was unwilling, however, to find that the Medical School had a substantial interest in completely barring Allan Bakke, a White man, from competing with other candidates of minority background by reserving certain admissions slots for applicants of color only.[33]

In both *Brignoni-Ponce* and *Bakke*, Justice Powell makes clear that race is a relevant factor in automobile stops along the border as well as in university admissions, something that is often left out of the popular discourse between left and right. This makes practical sense—along the border, a large number of Mexicans enter the country without proper documentation, and therefore, an individual's Mexican ancestry is relevant; likewise, people of color have suffered racial discrimination in this country in the form of barriers to education, and therefore, one's race is a relevant factor in determining whether one has suffered such discrimination.

Now, I readily admit that I might have left nuance out of the arguments posited by the right and left as I described them above. It is very possible that both sides assume the relevance of race in both automobile stops and affirmative action, but then only dispute the necessity of considering race in each context. However, I think the rhetoric often drowns

29. United States v. Brignoni-Ponce, 422 U.S. 873, 874–75 (1975).

30. *Id.* at 886–87 (emphasis added).

31. Regents of the Univ. of California v. Bakke, 438 U.S. 265, 296 n.36 (1978).

32. *Id.*

33. *See id.* at 319–20.

out the distinction,[34] and it is an important one to make, as I will explore as I return to Justice Powell's *Brignoni-Ponce* and *Bakke* opinions.

While I prefer the approach critical race scholars might take over his, Justice Powell's decisions in *Brignoni-Ponce* and *Bakke* clearly state race's relevance up front in both the automobile stop and affirmative action context, which is an improvement over the stock conservative and liberal stories. However, his decision not to explore the weight to accord that relevance is troublesome. Ever a pragmatist, Powell acknowledged implicitly in both *Brignoni-Ponce* and *Bakke* that we live in a racially conscious society and that, in certain circumstances, race issues play a role in our decision-making. Thus, Powell found it reasonable that INS agents would use race as a factor in determining whether to question a suspected border crosser because of the high correlation between apparent Mexican appearance and undocumented status. Similarly, he was willing to have universities look at one's racial background to determine one's eligibility for college admission given the historical burdens placed on persons of color in the area of educational opportunity.

However, Powell did not take the next step and ask himself whether it was desirable to perpetuate the relevance of race by making it a factor in both automobile stops and affirmative action. Put another way, Powell saw that there existed in society an empirical relationship between race and border patrol stops, on the one hand, and between race and college eligibility, on the other, without asking whether society *should*, as a normative matter, encourage "racial profiling" in both contexts. Is it good to stop motorists at the border partly on the basis of race? Does society benefit from having affirmative action programs that consider race as a factor in university admissions? Perhaps by affirming racial relevance in both *Brignoni-Ponce* and *Bakke*, Powell implicitly answered "yes" to both

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34. An example of this lack of nuance and reliance on empty rhetoric comes from the failure of both the left and right to heed *all* the words of the Rev. Dr. Martin Luther King, Jr. Some conservatives contend that King would have campaigned against affirmative action, citing his famous "content of their character" speech. But King also wrote: "Negroes have proceeded from a premise that equality means what it says . . . but most whites in America, including many persons of good will, proceed from a premise that equality is a loose expression for improvement. White America is not even psychologically organized to close the gap—essentially it seeks only to make it less painful and less obvious but in most respects to retain it. Most of the abrasions between negroes and white liberals arise from this fact." William Raspberry, *Dream On*, WASH. POST, Feb. 28, 2000, at A15.

On the other hand, some liberals have seen racial preferences as an entitlement without considering personal responsibility. To this issue, King also spoke, "calling on the victims of isolation and deprivation to improve their personal standards—the 'content of their character'—even though it was their skin, not their character, that produced the problems in the first place. What was needed, he said in a little-remembered phrase, is 'a rhythmic alternation between attacking the causes and healing the effects.'" *Id.* (noting failure of some to read King in proper context).

questions, but since each was decided in a different constitutional context, one can only speculate as to why.

This is where Critical Race Theory (CRT) might be able to fill the normative gap created by Powell. CRT offers three insights that I will highlight in this discussion: First, CRT posits that "racism is normal, not aberrant, in American society."[35] Thus, while formal, *de jure* equality now exists among the races, true *de facto* equality does not. Second, CRT starts from the premise that "a culture constructs social reality in ways that promote its own self-interest (or that of elite groups),"[36] and so CRT scholars or "race crits" "set out to construct a different reality."[37] And third, as developed by Professor Derrick Bell, CRT subscribes to the "interest-convergence" theory—that is, "that white elites will tolerate or encourage racial advances for blacks [and other people of color] only when they also promote white self-interest."[38]

Let us examine how these themes play out in the "Driving While Mexican" and "Affirmative Action" contexts. It is important at the outset to remember and acknowledge that both CRT scholars and Powell agree that race is relevant. What CRT adds, however, is an explanation as to when race *should* be relevant. Race crits would distinguish between the use of racial profiling in the automobile stop and affirmative action contexts based on the existing racial dynamic in society. Because the White elite holds political and economic power in society, CRT would question whether the use of race in a particular context perpetuates racial oppression of minorities or curtails it.[39]

CRT would therefore disfavor the use of race in the automobile stop but likely approve it in the affirmative action context. The whole idea of the "Driving While Mexican" scenario perpetuates the oppression of racial minorities by buying in to a derogatory stereotype (i.e., Mexicans as "illegal aliens").[40] Powell's decision to allow the use of race as a factor in *Brignoni-Ponce* reflects the relevance of race but perpetuates the continuation of racial oppression through the reinforcement of a stereotype and harassment of a marginalized ethnic group. Moreover, another adverse effect of having race be a permissible factor in immigration enforcement is

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35. CRITICAL RACE THEORY: THE CUTTING EDGE xiv (Richard Delgado ed., 1995).

36. *Id.*

37. *Id.*

38. *Id.*; *see also* Derrick A. Bell, Jr., Brown v. Bd. of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

39. *See supra* notes 35–38 and accompanying text.

40. *See, e.g.*, Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1545–46 (1995) ("The stereotypical 'illegal alien,' the term that replaced 'wetback,' is a Mexican who has snuck into the United States in the dark of night. The image in the minds of many is that of a poor, brown, unskilled young male.").

that race becomes the *only* factor in automobile border stops. As Kevin Johnson notes, the INS's own statistics reveal that close to 90% of removals are of Mexicans and Latin Americans, even though they comprise only about half of the total undocumented immigrant population in the United States.[41] In contrast, affirmative action programs uplift the status of minorities by affording them *de facto* opportunity in view of the statistical disparities in performance on so-called "merit" tests,[42] and therefore, race crits would distinguish and applaud Powell's opinion in *Bakke* to permit the consideration of race in university admissions programs.

Thus, CRT goes one step further than Justice Powell in adding nuance and context to the "racial profiling" debates of the left and right. While Powell adds one layer of complexity by explicitly acknowledging the relevance of race in both the automobile stop and affirmative action cases, CRT adds another by providing a principled reason for determining whether race should be used in light of its relevance to the existing power dynamic in America.

Why did Powell fail to draw a normative distinction between the use of race in the two contexts? Race crits might posit that a man of White, upper-class privilege such as Justice Powell sadly might not have realized how allowing for the inclusion of race as a factor would perpetuate racial oppression against Latinos.[43] After all, his race was not the one that was being targeted at the border and would not be bettered by prohibiting reliance on race.

A better use of race would be to require border agents to stop every motorist, making race a factor for all by making it a factor for none.[44] Indeed, racial profiling at the border becomes even less justifiable in light

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41. *See* Johnson, *supra* note 2, at 48.

42. *See supra* note 3 (citing scholarly support for affirmative action programs); *see also* Romero, *supra* note 27, at 21–22.

43. Indeed, Justice Powell's failure to recognize the disparate impact of the death penalty on blacks in *McCleskey v. Kemp*, 481 U.S. 279 (1987), has been the fodder of much commentary. *See, e.g.*, John H. Blume, Theodore Eisenberg & Sheri Lynn Johnston, *Post-*McCleskey *Racial Discrimination Claims in Capital Cases*, 83 CORNELL L. REV. 1771 (1998); Randall L. Kennedy, McCleskey v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988). There are at least two other examples of Powell's spotty record in civil rights cases: First, prior to being appointed to the Supreme Court, Powell was a member of the board of the Richmond School District in the post-*Brown* era, during which time he failed to strongly advocate for desegregation in the Richmond schools, due perhaps to his belief that *Brown* was wrongly decided. *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 140–41 (1994). Second, and more recently, Powell provided the fifth and deciding vote in *Bowers v. Hardwick*, in which the Court decided that the right to homosexual sodomy was not fundamental under the due process clause. Bowers v. Hardwick, 478 U.S. 186 (1986).

44. The Court, in fact, approved the Border Patrol's use of stationary checkpoints against a Fourth Amendment challenge in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), another opinion by Justice Powell.

of a *New York Times* article from earlier this year suggesting that the INS does not even bother deporting undocumented immigrants anymore, only those who they discover later have criminal records.[45] The article reported that because of the booming United States economy and these undocumented immigrants' willingness to do work no United States workers will perform, the INS is concentrating its deportation efforts elsewhere.[46] If that is true, what then becomes the justification for using race as a factor to patrol the border if the INS cares not what happens as long as these "illegal aliens" find gainful employment, which is what motivates many to cross the border in the first place?[47]

I take solace in the Ninth Circuit's recent decision in *United States v. Montero-Camargo*,[48] in which the court sitting *en banc* appeared to set aside *Brignoni-Ponce* and held that the Border Patrol could not consider "Hispanic appearance" a factor in the context of an immigration stop in light of the changing demographics of southern California.[49] A race crit might view *Montero-Camargo* as an acknowledgment that, more often than not, "Mexican appearance" is but a stereotypical proxy for an undocumented immigrant rather than a logical criterion. In short, while "Mexican appearance" may be a factor in some cases, it should not be one because of its high irrelevance and its disproportionate impact on Latinos at the border, most of whom are legally in this country.

At least in the affirmative action context, Justice Powell correctly understood the reality of racial politics better than many today who champion the policy's demise. Powell realized that the equality of persons of color depended on true opportunity;[50] indeed, his concept of

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45. *See* Louis Uchitelle, *I.N.S. Is Looking The Other Way As Illegal Immigrants Fill Jobs: Enforcement Changes in Face of Labor Shortage*, N.Y. TIMES, Mar. 9, 2000, at A1, C16.

46. *See id.*

47. Positive attractions that "pull" undocumented immigrants into the United States include "economic opportunity, political freedom, personal safety, and family unification." STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 55 (2d ed. 1997). For a discussion on the economics of immigration, see, e.g., Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 U. PA. L. REV. 1147 (1997).

48. 208 F.3d 1122 (9th Cir. 2000) (en banc).

49. *See id.* at 1135; *see also* James Sterngold, *Appeals Court Voids Ethnic Profiling in Searches*, N.Y. TIMES, Apr. 13, 2000, at A16 ("In a strongly worded decision, [the Ninth Circuit] declared . . . that because of the growth in the Hispanic population [in the San Diego area], ethnicity was an irrelevant criterion for law officers to stop a person, unless there was other very specific information identifying the suspect.").

50. *See* Regents of Univ. of California v. Bakke, 438 U.S. 265, 306 n.43 (1978) ("To the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no preference at all.").

"diversity"[51] has been trumpeted by many universities both pre- and post-*Bakke*.[52] But in this post-*Hopwood*, post-Prop. 209, post-Initiative 200 world, Professor Bell's "interest-convergence" theory[53] strikes a chord: While the majority culture is willing to tolerate the continued burden on many Latinos of "looking Mexican" in the context of automobile stops at the border, it is unwilling to risk its members being burdened by the use of race as a factor in university admissions.

Regardless of one's view on the issue of racial profiling in automobile stops and affirmative action, I hope I have demonstrated why it is important to look beyond soundbite liberal and conservative views on the issue, and acknowledge, as Justice Powell did, that race matters. More importantly, however, we must take the next step and ask, as critical race theorists suggest, *should* race matter? An honest examination of the disparate distribution of power in American society provides a consistent approach for deciding when race should be a factor in government decision-making.

51. *See id.* at 311–12 ("[Diversity] is clearly a constitutionally permissible goal for an institution of higher education.").

52. *See id.* at 316–19 (implying that the Harvard admissions program is constitutionally permissible).

53. *See supra* note 38.