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CHAPTER
FIVE



Kevin R. Johnson

*The Case For African American and Latina/o
Cooperation in Challenging Race Profiling
in Law Enforcement*

The formal and informal targeting of African Americans, Latina/os, and other racial minorities for police stops on account of race, known popularly as race profiling, has grabbed national attention. Race-based enforcement of the United States immigration laws, which grew in importance as the U.S. government escalated efforts to deport undocumented immigrants in the 1990s, has just begun to gain public awareness. The two law enforcement practices share a common thread—both use race as a signal of potential unlawful conduct or status.

African Americans and Latina/os share mutual concerns with governmental reliance on race in the enforcement of the criminal and immigration laws. Both suffer civil rights deprivations resulting from the use of statistical probabilities by law enforcement officers. Overlapping interests create the potential for intellectual linkages and political alliances designed to remove the taint of race from law enforcement. More generally, the criminal justice system in the United

States, which skews enforcement, prosecution, and imprisonment toward young African American and Latina/o males, represents a legitimate target for concerted action. The common need and goal of reforming law enforcement creates the potential for far-reaching alliances.

Eliminating racial bias from law enforcement through multiracial coalitions – like all diverse alliances – will no doubt prove to be an arduous project, marked by setbacks as well as breakthroughs. Formidable barriers exist to the building of political coalitions between and among African Americans and Latina/os, as well as other minority communities. Importantly, the various groups may perceive themselves as having competing interests. Nonetheless, political realities dictate that alliances are essential to the quest for racial justice in the United States.

Part I of this Article sketches the legal problems with race profiling in criminal and border enforcement, showing how both forms adversely impact Latina/os and African Americans. Part II studies the common interests of Latina/os and African Americans in eliminating race-based law enforcement. Part III analyzes the efficacy of coalitions to remedy the racism at the core of law enforcement in the United States. The Article concludes that, difficult as it may be, collective action is essential to bring about much-needed racial reform in law enforcement.

I. RACE PROFILING IN LAW ENFORCEMENT

Race profiling in both criminal and immigration law enforcement adversely affects African Americans, Latina/os, and other racial groups. Unfortunately, misconceptions and stereotypes result in law enforcement's excessive reliance on physical appearance as a proxy for legal wrongdoing. Intellectually and practically, race profiling in criminal law differs little in kind and substance from that employed in immigration enforcement. The reliance on race has proven difficult to eliminate from law enforcement. As history suggests, once race-based enforcement taints one aspect of law enforcement, it almost inevitably

infects other areas. Consequently, the most durable solution is to seek to remove race root and branch from all forms of law enforcement.

A. Criminal Law Enforcement

Few dispute that African American men are routinely stopped by police for “driving while Black.” This practice is the tip of the proverbial iceberg of discrimination against the African American community in this nation’s criminal justice system. Similarly, police officers stop Latina/os for “driving while brown.” As African Americans have been targets of law enforcement, police departments in urban metropolises like Chicago, Los Angeles, and New York City, for many years have focused the criminal justice machinery on Latina/os.

Few deny the concrete harms of race profiling. When criminal investigation focuses on African Americans and Latina/os, more members of these groups will be arrested and convicted of crimes, thereby contributing to disparate incarceration rates. Importantly, race profiles punish, embarrass, and humiliate innocent people, whose skin color is used as a proxy for criminal conduct. Unfortunately, profiling, as part of a long history of discriminatory law enforcement, fosters a deep cynicism among racial minorities about the criminal justice system. Fearing the police, they may not cooperate in the reporting and investigation of criminal activity. Ultimately, the targeting of African Americans and Latina/os for police stops increases the likelihood that they will suffer police brutality.

Besides African Americans and Latina/os, Asian Americans at times are affected by racial profiling. The Wen Ho Lee case, in which an Asian American scientist was jailed on trumped up espionage charges, is a well-known example. Police in some localities also employ gang profiles to target Asian American youth.

To comply with the Constitution, police officers ordinarily must have individualized reasonable suspicion of criminal conduct before

conducting an investigatory police stop. (*United States v. Sokolow*, 490 U.S. 1, 7 (1989); *Terry v. Ohio*, 392 U.S. 1, 27 (1968)). Race profiles, based on alleged group propensities, generally violate the law. Unfortunately, the courts have not been particularly effective in removing race and racism from criminal law enforcement. The Supreme Court has repeatedly failed to recognize the racial context of criminal law enforcement or the racially-disparate implications of its decisions. Police departments across the country also have proven to be resistant to reform. Consequently, investigations and reports of race profiling continue.

B. *Immigration Enforcement*

Judicially-sanctioned race profiling is central to the United States government's enforcement of the immigration laws. In *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975), the Supreme Court stated that “[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor,” to the Border Patrol in making an immigration stop. Given this encouragement, Border Patrol officers routinely admit that a person’s “Hispanic appearance” contributed to the decision to question a person. Over the years, plaintiffs in lawsuits have regularly alleged that the Border Patrol relies almost exclusively on race in immigration enforcement.

Like race profiling in criminal law enforcement, race-based immigration enforcement fails at a number of levels. Dignitary harms to Latina/os lawfully in the United States, including embarrassment, humiliation, and other attacks on their membership in U.S. society, result from the unjustified interrogation of their citizenship status. The vast majority (roughly 90 percent) of the Latina/os in the United States are lawful immigrants or citizens, thereby making Latina/o ancestry not a particularly good indicia of undocumented status. That the Border Patrol targets persons of “Hispanic appearance” almost invariably contributes to the fact that *close to ninety percent* of all removals are of Mexican and Latin American citizens, even though they constitute slightly more than one-half of the total undocumented population in

the United States. Finally, race-based immigration enforcement may well contribute to well-documented Border Patrol abuse of persons of Mexican ancestry.

Importantly, race-based border enforcement adversely impacts racial minorities other than Latina/os. A U.S. General Accounting Office study of searches by U.S. Customs Service officers showed that Black women entering the country were more likely to be subject to intrusive searches than any other group; “Black women who were U.S. citizens . . . were 9 times more likely than White women who were U.S. citizens to be x-rayed after being frisked or patted down But on the basis of x-ray results, Black women who were U.S. citizens were less than half as likely to be found carrying contraband as White women who were U.S. citizens.” (U.S. Gen. Accounting Office, U.S. Customs Service: Better Targeting of Airline Passengers for Personal Searches Could Produce Better Results 2 (2000)). In one lawsuit, customs inspectors subjected an African American woman, a U.S. citizen, returning from Nigeria who complained about the treatment of a Nigerian citizen by inspectors, to a full pat down and strip search, and many other intrusive procedures, including examination of her rectal and vaginal cavities, in an unsuccessful hunt for drugs. (*Brent v. United States*, 66 F. Supp. 2d 1287 (S.D. Fla. 1999), *aff’d sub nom.*, *Brent v. Ashley*, 247 F.3d 1294 (11th Cir. 2001)). Incidents of discrimination in customs searches at ports of entry are regularly reported.

In addition, persons of African ancestry who arrive at airports often are presumed to be entering the country unlawfully. In *Orhorhaghe v. INS*, 38 F.3d 488, 498 (9th Cir. 1994), the court of appeals found that the INS was wrong to investigate a person’s immigration status based on his possession of a “Nigerian-sounding name,” which the court reasoned might serve as a proxy for race. Such abuses fit into a larger pattern of exclusion of immigrants of African ancestry from the United States. The pattern of race policing at the border reflects reliance on stereotypes about persons of African ancestry as lawbreakers, the same preconceptions that contributes to race profiling in domestic criminal law enforcement.

At the border, the law permits race profiling, just as it does in immigration law enforcement. Indeed, the Supreme Court has held that the U.S. government has free reign to conduct warrantless searches without probable cause at ports of entry. As the Court explained, “[s]ince the founding of our Republic, Congress has granted the Executive *plenary authority* to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country.” (United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985) (citations omitted) (emphasis added)). As one court emphasized in rejecting the challenge of a lawful U.S. immigrant from Nigeria to a search, the “contention that a border search is not routine [and thus subject to the requirement that a border officer have reasonable suspicion of wrongdoing] if motivated by ethnicity of a person *is groundless.*” (United States v. Ojebode, 957 F.2d 1218, 1223 (5th Cir. 1992) (emphasis added), *cert. denied*, 507 U.S. 923 (1993)).

Racial profiles in immigration enforcement affect other groups as well. The United States government has harshly treated persons of Arab ancestry, classified as suspected terrorists, in the name of fighting terrorism. Based on stereotypes of Arabs as terrorists, Congress enacted harsh immigration laws, which the Attorney General has enforced with vigor. Arab immigrants, and at times citizens, have suffered the full legal consequences. Similarly, persons of Asian ancestry have suffered from race-based immigration enforcement. In one case, a court ruled that the “appearance of being oriental” combined with other factors justified continued observation by an Immigration & Naturalization Service (INS) officer. (Cheung Tin Wong v. INS, 468 F.2d 1123, 1127 (D.C. Cir. 1972)). The Board of Immigration Appeals stated that “Oriental appearance, combined with the past history of illegal alien employment at that particular restaurant, and [an] anonymous tip” justified INS questioning of restaurant workers about their immigration status. (Matter of King and Yang, 16 I. & N. Dec. 502, 504-05 (BIA 1978)). Exemplified by the infamous Japanese internment during World War II, (Korematsu v. United States, 323 U.S. 214 (1944)), Asian Americans, whatever their immigration status, long have been

classified as foreigners, which makes them of presumptively suspect immigration status.

II . SIMILAR HARMS, COMMON CONCERNS, AND THE RELATIONSHIP BETWEEN DIFFERENT FORMS OF RACE-BASED LAW ENFORCEMENT

Similar harms to African Americans and Latina/os flow from the influence of race in the enforcement of the criminal and immigration laws. Importantly, race-based law enforcement is part of a larger series of institutions and cultural practices that relegate racial minorities to a caste-like, second class citizenship. Both African Americans and Latina/os have suffered serious limitations on their citizenship rights, often finding those rights manipulated through law. The only way that both groups can move toward full membership is by “de-racing” law enforcement.

Common concerns suggest the need for political coalitions generally challenging the use of race in law enforcement. The operation of the criminal justice system deeply shapes the lives of African Americans and Latina/os in the United States. These groups, both overrepresented in our jails and prisons, must work together politically to eradicate the endemic racism in the criminal justice system. Past successful multiracial coalitions suggest the possibility of future ones.

African Americans and Latina/os disproportionately suffer harms from race profiling in criminal law enforcement. Discrimination against Blacks and Browns in the criminal justice system are deeply interrelated. Not coincidentally, many lawsuits challenging race profiling by police departments claim that African Americans and Latina/os suffer discrimination due to profiling. Similarly, race-based border enforcement not only adversely affects Latina/os, but injures persons of African and Asian ancestry. Given the similar injuries caused by the influence of race on law enforcement, minorities have common interests in removing race from the enforcement calculus.

Because of the disparate racial impacts of the operation of the law, criminal law and immigration law scholarship have taken similar intellectual trajectories. As in the criminal law, attention is now being paid to the racial consequences of immigration law and its enforcement. Indeed, the use of race in both criminal law and immigration enforcement is interchangeable; intellectually, they are difficult to distinguish.

The Los Angeles Police Department (LAPD), which has a long history of violating the civil rights of Latinos/a and African Americans, offers a case study in the relationship between race-based criminal and immigration enforcement. During the Depression, the LAPD helped facilitate the forced repatriation – in the name of reducing the welfare rolls — of Mexican citizens and immigrants to Mexico. Later, during the infamous Zoot Suit riots in which white mobs attacked Mexican “gang” members during World War II, the LAPD declined to protect the minority crime victims. In 1992, the violence sparked by the legal vindication of police officers who brutalized Rodney King was followed by police abuse of African Americans and Latina/os, many of whom were rounded up by the LAPD and turned over to the INS for removal as part of the massive effort to quell the violence. Over the last few years, media attention has focused on the infamous LAPD Ramparts Division for its systematic violations of the civil rights of African American and Latina/o youth. Part of this unit’s unlawful strategy involved police cooperation with the INS, including street sweeps and arrests of Latina/os and turning over noncitizens who could not be subject to criminal prosecution due to the lack of evidence to the INS, all of which violated official departmental policy.

As this brief history of the LAPD suggests, local police often have assisted federal authorities in immigration enforcement, which has increased in recent years because Congress has moved toward giving local police greater authority in the enforcement of the immigration laws. Consider a few examples. Local police in Riverside County, California were videotaped beating two unarmed undocumented Mexican immigrants who tried to evade the Border Patrol. In a much-publicized effort to rid the community of undocumented immigrants,

local police in a Phoenix, Arizona suburb violated the constitutional rights of U.S. citizens and lawful immigrants of Mexican ancestry by stopping persons because of their skin color or their use of the Spanish language. One can expect civil rights violations when local authorities, who generally are not well-versed in the nuances of the immigration laws, seek to enforce those laws.

The racial focus of the “war on drugs” both in our cities and at our borders shows how criminal and border (customs and immigration) enforcement are deeply intertwined. Two notorious recent incidents of police brutality (Amadou Diallo, an immigrant from Guinea, and Abner Louima, a Haitian immigrant) involved immigrants of African ancestry. Police often use race profiles in traffic stops as a tool to uncover drugs, just as immigration and customs officers employ drug courier profiles at the border stops. The “War on Drugs” has distinctly racial impacts and results in the disproportionate incarceration of African Americans not in proportion to their drug use.

The detrimental use of race in law enforcement against different racial groups suggests the potential for coalitions between those groups designed to end the use of race in criminal and immigration enforcement. The use of race by governmental officials appears to be inextricably interrelated.

III. THE EFFICACY OF MULTIRACIAL COALITIONS IN CHALLENGING RACE PROFILING IN LAW ENFORCEMENT

African Americans and Latina/os suffer common harms from race profiling in law enforcement. Consequently, collective action is more than justified to eliminate race-based law enforcement. However, cooperation between the African American and Latina/o communities in the United States on issues small and large faces formidable barriers. If permitted, the various barriers could prevent much-needed cooperation by African Americans and Latina/os on matters of pressing common concern.

In seeking to remedy the racism in the criminal justice system, we must acknowledge and address the formidable impediments to interracial cooperation. Not infrequently, the relations between African Americans and Latina/os have been marred by stress, strain, and conflict. Perceived economic and political competition, due in no small part to the changing demographics caused by immigration, have helped fuel such tension.

As a purely historical matter, durable coalitions between African Americans and Latina/os have not proven to be easy. Even intellectual exchanges among minority scholars about the efficacy of the Black/White paradigm in civil rights scholarship have at times been hostile. Conflict can be seen in dialogues between influential African American and Latina/o intellectuals. On the pages of the *New York Times*, African American sociologist Orlando Patterson criticized the publicity surrounding the 2000 Census as suggesting that Whites would soon be a minority because, in his words, many Latina/os are “white in every social sense of this term”; Patterson proceeded to blame the media reports of the decline of the white population and Latina/o inclusion in affirmative action programs for the loss of support for efforts to remedy past discrimination, and questioned whether coalitions between African Americans and Latinos could benefit Blacks. (Orlando Patterson, *Race by the Numbers*, N.Y. TIMES, May 8, 2001, at A27). Although the contention that Latina/os are functionally “white” ignores a rich history of well-documented discrimination suffered by persons of Mexican ancestry in the Southwest, as well as the colonization of the Puerto Rican people, it is a recurring issue that finds some support in U.S. history.

Nor are the barriers to coalitions simply intellectual ones. At the grass roots level, racism toward African Americans unquestionably exists in the Latina/o community. Nonblack minorities may differentiate themselves from Blacks. In turn, African Americans are not immune from nativist, anti-Latina/o sentiment. Nativism is a continuing problem among certain segments of the African American community. Such animosity works against broad-based coalitions between African Americans and Latina/os, even when the leadership reaches agreement.

Moreover, fault lines exist on substantive issues. Importantly, African Americans often have been concerned about the negative impacts of immigration on their community and less concerned than Latina/os with immigration enforcement as a civil rights issue. Many poor and working class African Americans have felt in competition with Latina/o immigrants for low skilled jobs and have seen some industries move from having predominately Black to Latina/o work forces. Some claim that employers prefer hiring undocumented Latina/os over domestic African Americans. The rivalry between blacks and Latinos/as is fueled by many factors, including the perception that Latinos/as are racially mobile group and African Americans are not. Such sentiments tend to foster African American support for immigration restrictions and heightened immigration enforcement.

Despite race and class differences, African Americans and Latina/os must recognize their common interests in removing race from law enforcement, immigration as well as criminal. Perhaps more so with respect to law enforcement than other civil rights issues, African Americans and Latina/os share common interests in extracting race from the justice system. By working together, they might best be able to improve and reform the system for the benefit for their respective communities. Political realities show the need for coalitions. The Bureau of the Census projects that, by 2050, Hispanics will constitute nearly twenty-five percent of the U.S. population. (U.S. Bureau of the Census, Current Population Reports – Population Projections of the United States by Age, Sex, Race, and Hispanic Origin: 1995 to 2050, at 13 (1996) (Table J)). African Americans need Latina/os growing political numbers and the Latina/o community, which includes immigrants who cannot vote and a citizen population that at least until recently has a low voter turnout record, will require the assistance of the mobilized African American community. Both need the moral and political force of the other to challenge the devastating impact that law enforcement has on their communities. If either balks, neither stands to secure meaningful change of the status quo.

The classic prisoners dilemma offers useful insights about the potential for African American/Latina/o coalition. For example, Latina/os may see themselves as the beneficiaries of the profiling of Blacks by police while African Americans may believe that they benefit by race profiling of Latina/os in immigration enforcement. Once race is let out of the proverbial genie's bottle, however, it is difficult to limit where and when it will be considered by law enforcement authorities. The impacts on both African Americans and Latina/os in criminal and immigration enforcement reveals how law enforcement uses race against both groups in an indiscriminate fashion. If they do not cooperate, both will suffer.

Political coalitions between diverse communities are complex and often fragile. Building such alliances require significant time and effort. By necessity, such coalitions will be most feasible on narrow issues. Rather than engage in the difficult task of coalition building, the easy way out would be for minority groups to pursue independent agendas without regard to other minority groups. As Richard Delgado posed the question, will African Americans and Latina/os “be able to work together toward mutual goals – or [will] the current factionalism and distrust continue into the future, with the various minority groups competing for crumbs while majoritarian rule continue unabated?” (Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181, 1200 (1997) (footnote omitted)).

In considering strategic alliances Latina/o and African American leaders must consider the means of seeking to bring about meaningful social change. Both legal and political mechanisms may be used to challenge the use of race in law enforcement. Litigation may offer certain benefits, although it has its limits. Political action has the potential to bring about more drastic reforms and to create a means of enforcing the law. The use of race in law enforcement may prove to be a powerful organizing issue among minority communities, as well as sympathetic whites, especially in a time when color-blindness dominates the political landscape.

African Americans, Latina/os, and other racial minorities share common interests in eliminating race profiling from all — criminal and immigration — law enforcement. Race-based law enforcement damages all communities of color, immigrants and citizens alike, at our borders and in our cities. It is defeatist to contend that such coalitions are too complex to understand, too difficult to construct, and too amorphous in their goals. Despite the formidable challenges posed by multiracial coalitions, such alliances must be pursued and fostered in the fight for social justice by those truly committed to that goal.



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