

Found in the USA

By Juan Rocha

The debate in Arizona over Arizona Revised Statute (A.R.S.), § 11-1051(B)—titled Support Our Law Enforcement and Safe Neighborhoods Act—(S. 1070) is about many issues: illegal immigration, national security, federalism, the American dream. But at the epicenter of the debate is the simple question: Does the law legally sanction racial profiling? Opponents of the law say “yes.” The law, according to them, gives police officers a license to stop anyone with brown skin and question the person about his or her immigration status. Simply put, opponents of S. 1070 argue that the law is unconstitutional because it allows law enforcement officers to stop brown people simply for looking Hispanic. Proponents of the law, on the other hand, say this is all simplistic nonsense. They direct opponents to look at the language of the law, which, proponents say, clearly prohibits police officers from considering race when developing reasonable suspicion. Accordingly, any fear that Sammy Sosa will be stopped on the streets of Phoenix only because of the color of his skin is unfounded. Of course, those who support S. 1070 are confident that the law is constitutional.¹

The truth is that neither argument is correct. Even though opponents claim that law enforcement officers are prohibited from stopping a person based solely on his or her race, federal courts have held that race can be a factor in developing reasonable suspicion when determining whether a person is in the country illegally. Arguably, proponents of the law knew about this allowance because, despite assurances from them that the law prohibits police officers from taking race into the reasonable suspicion calculus, S. 1070 actually says officers are precluded from taking race into account “except to the extent permitted by the United States or Arizona Constitution.” Even so, determining a person’s immigration status is often established not by reasonable suspicion on the part of federal agents, but from consensual encounters they have with a person. Even without laws like S. 1070, law enforcement officers can ask a person about his or her immigration status during a consensual encounter. From such an encounter, police can develop reasonable suspicion that a person is unlawfully present in the United States and later present the person for federal prosecution or initiate deportation proceedings, or both. The current debate over whether police need reasonable suspicion to question a person about his or her immigration status does not take any of this into account.

This essay does not take a position on whether S. 1070 is constitutional or unconstitutional. Rather, it is an explanatory essay about how federal courts have addressed many of the issues raised by S. 1070—namely,



Fourth Amendment seizures and the extent to which race is allowed to be taken into account in developing reasonable suspicion to enforce immigration laws. If this section of S. 1070 goes into effect, state courts will likely look to federal case law to interpret the law. Undoubtedly, federal courts will also look to their own case law, if called upon, to interpret the statute.

Federal Criminal Law Regarding Aliens

As background, there is a federal analogue to S. 1070: Title 8 U.S.C. § 1326(a), which makes it a felony offense for any alien to reenter or be found in the United States without the consent of the U.S. attorney general after deportation. A person convicted of this offense faces a maximum sentence of two years in prison and a fine of \$250,000. If the person was previously deported after having been convicted of a felony offense, in state or federal court, the prior felony offense is then used as a sentencing enhancement, and the maximum term of imprisonment increases to 10 years. If the prior offense is considered an “aggravated” felony, the person’s maximum sentence swells to 20 years in prison. Some variation of this law has been in the federal penal code since 1952.

In addition to the felony offense, federal law also makes it a misdemeanor offense, under Title 8 U.S.C. § 1325(a), for any alien to illegally enter the United States at a time or place other than a place designated as a port of entry. A person convicted of this offense faces a maximum prison sentence of six months and a fine of \$5,000. If, however, the person was previously convicted of violating § 1325(a), the U.S. attorney can charge the subsequent § 1325(a)

offense as a felony, and the maximum penalty would then be increased to two years in prison.

Arizona lawmakers borrowed from the federal law, to some extent, and made it a state crime to be “unlawfully present” in the country.

Determining Immigration Status Based on a Consensual Encounter

Before explaining the extent to which race may be used to develop reasonable suspicion, it is important to analyze how police officers can determine a person’s immigration status from, among other things, information collected during a consensual encounter, which, incidentally, does not trigger constitutional safeguards.

When Governor Jan Brewer signed S. 1070 into law on April 23, 2010, the law allowed police officers to inquire about the immigration status of a person after “any lawful contact.” Due to concerns that the language might be found unconstitutional on the basis that it would lead to racial profiling, S. 1070 was later amended to say that a police officer can inquire about the legal status of a person only after “any lawful stop, detention, or arrest,” if the officer has reasonable suspicion to believe the person “is an alien and is unlawfully present in the United States.” A.R.S. § 11-1051(B). In other words, a police officer could question a person about his or her immigration status if the officer has reasonable suspicion to believe the person is present in the United States unlawfully, but only after detaining the person for having committed an offense or for having been suspected of committing an offense, besides being in the country illegally. Effectively, the change in language made it a secondary offense to be unlawfully present in the United States.²

Whether the statute says “lawful contact” or “lawful stop,” however, may not make much, if any, practical difference. For instance, in federal criminal immigration cases, many of the contacts between law enforcement and civilians are considered consensual encounters. Because a consensual encounter is not a stop, officers don’t need reasonable suspicion to engage in one. Incidentally, information gathered from such encounters can be used in developing reasonable suspicion and lead to detaining or arresting a person. And since consensual encounters don’t trigger constitutional scrutiny, any admissions the person makes to the officer can be used against him or her at a later immigration or criminal proceeding. Indeed, the U.S. Supreme Court has repeatedly held that there “is nothing in the Constitution, which prevents a policeman from addressing questions to anyone on the streets.” *Terry v. Ohio*, 392 U.S. 1, 34 (1968). Police officers “do not violate the Fourth Amendment by merely approaching an individual on the street ... by asking him if he is willing to answer some questions.” *Florida v. Royer*, 460 U.S. 491, 497 (1983). In fact, police officers do not have a constitutional duty to inform a person that he or she is free to decline to cooperate with their questioning and walk away, because any answers the person provides are to be considered voluntary. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). The Supreme Court has acknowledged that such

“police questioning is an effective tool to enforce criminal laws.” *Id.* at 554.

So when does a consensual encounter become a stop (or “seizure”) for purposes of the Fourth Amendment? The Supreme Court says that a consensual encounter becomes a seizure “only when in view of all the circumstances surrounding the incident a reasonable person would have believed that he was not free to leave” or “would [not] feel free to decline the officers’ requests or otherwise terminate the encounter.” *Florida v. Bostick*, 501 U.S. 429, 435–436 (1991). This means that a police officer can determine whether someone is “unlawfully present” in the United States simply by asking the person.

In Yuma, Ariz., where I worked for more than two years representing persons charged with violating 8 U.S.C. § 1326(a), consensual encounters often constituted the way U.S. Border Patrol agents determined a person’s immigration status. Many of the incident reports filed by the police that I reviewed revealed that agents were able to establish probable cause based on answers given during a consensual encounter. Since there was no evidence of coercion or involuntary response, my clients’ statements were used as evidence to prove illegal status, alienage, and illegal entry (and later used administratively to deport him). A recent federal case, *Martinez-Medina v. Holder*, 2010 WL 3169420 (9th Cir. Aug. 12, 2010), illustrates this state of affairs in the context of immigration and shows how federal courts apply these legal principles to seemingly benign situations between local law enforcement and civilians.

Ladislao Martinez and his son, Oscar Martinez, along with three other family members, were on their way to visit family members in the state of Oregon, when their car began to overheat. The family pulled off the highway and stopped at a nearby gas station for water to cool the engine. While they were parked, a deputy sheriff who had arrived at the gas station approached the two men and asked them about their travel plans. Since Ladislao did not speak English, his son translated for him. The deputy then asked them for their identification, which they showed him. He then asked the two men “Do you have green cards?” They both said no. (The immigration judge found that the officer meant “Are you here legally or illegally.” *Id.* at *2.) Based on their answer, the deputy told them “they could not leave and that he was going to call ‘Immigration.’” (Later, a second deputy sheriff arrived to assist the deputy.) *Id.* at *1. About two hours later, a U.S. Immigration and Customs Enforcement (ICE) agent arrived, and he, too, asked the two men if they had green cards. From the police report, it is unclear whether they responded to the agent’s question. Regardless, without asking them any other questions, the ICE agent took the two men into custody, processed them, and initiated deportation proceedings. (Interestingly, the deputy sheriff never issued any tickets or citations.) The two men were subsequently removed from the country (though not criminally prosecuted under federal law). While their immigration case was pending, the men appealed their case to the Ninth Circuit. In their appeal, they argued that the deputy sheriff lacked probable cause to believe they were

unlawfully present in the United States. As such, they asked the court to exclude any statements they had made to the deputy sheriff as a result of the illegal seizure.

The Ninth Circuit found that the initial encounter between the deputy sheriff and the two men “did not violate the Fourth Amendment because it was consensual.” *Id.* at *3. The court applied the rules regarding consensual encounters and explained that nothing about the deputy’s questioning (such as their travel plans or his request for identification) transformed the encounter into a seizure. In fact, the court concluded that a “reasonable person would have felt free to walk away from the deputy sheriff or free to refuse to answer his question and, thus, terminate the encounter.” Since the encounter was lawful, the deputy did not need reasonable suspicion to ask the men about their immigration status. *Id.* (citing *Muebler v. Mena*, 544 U.S. 93, 101 (2005) (holding that officers did not need reasonable suspicion to ask an individual her name, place of birth, or immigration status)). The encounter became a seizure, said the court, when the deputy told the two men that they could not leave the gas station and that he was going to call “Immigration.” It was only at this moment, said the court, that the “Fourth Amendment scrutiny was triggered.”

Similarly, in *U.S. v. Elizondo-Hernandez*, 130 Fed. Appx. 846 (9th Cir. 2005) (unpublished), the Ninth Circuit held that the encounter between a U.S. Border Patrol agent and the petitioner, Elizondo-Hernandez, was also consensual. In that case, a Border Patrol agent had received a call from an anonymous person about a group of “aliens” near a fire station. The agent went to the location and saw three men standing by the door. He identified himself as Border Patrol agent and questioned the men about their citizenship status. All three men admitted to being citizens of Mexico and in the United States illegally. Based on Elizondo-Hernandez’s answers, the agent arrested him, and, later, the U.S. attorney charged him with three counts of violating 8 U.S.C. § 1325(a). *Id.* at 847. On appeal, Elizondo-Hernandez contended that the encounter “was an investigatory seizure under the Fourth Amendment and was not supported by reasonable suspicion.” *Id.* The Ninth Circuit disagreed, concluding that the agent’s failure to obtain consent did not, by itself, amount to a Fourth Amendment seizure and neither did the agent’s questioning regarding his immigration status. *Id.* at 848. Needless to say, the court sustained the convictions.

Though there are doctrinal differences between “lawful contact” and a “lawful stop,” the change in language—in addition to designating S. 1070 as a secondary offense—is likely to have little practical impact. Police officers can engage in consensual encounters with civilians, and based on information obtained during this meeting, the police can develop reasonable suspicion or probable cause that a crime has been committed or that the person is in the United States illegally. Cases like *Elizondo-Hernandez* and *Martinez-Medina* are just a few examples of rulings in which federal courts have set a high bar before considering such encounters to be seizures. It’s plausible to assume, then, that Arizona state courts will do the same.

Another issue the petitioners in the aforementioned cases raised was the issue of race. They argued that the police officer and the Border Patrol agent stopped and questioned them simply because of their Hispanic race. See *U.S. v. Martinez-Medina*, 2010 WL 31649420 at *6. Let’s now visit the issue of race and reasonable suspicion.

The Use of Race in Developing Reasonable Suspicion

Assuming that the encounter is not consensual, police officers are required to have reasonable suspicion before they can question someone. The next question then becomes: Can police take race into account in developing reasonable suspicion?

Under S. 1070, a law enforcement officer may inquire into a person’s immigration status after “any lawful stop, detention, or arrest,” if “reasonable suspicion exists that the person is an alien and unlawfully present in the United States.” See A.R.S. § 11-1051(B). In developing reasonable suspicion, S. 1070 says that a law enforcement officer “may not consider race, color or national origin ... except to the extent permitted by the United States or Arizona Constitution.” *Id.* The last part of this sentence suggests that federal law permits law enforcement officers to take race into account in developing reasonable suspicion when determining if the person is in the country illegally. Indeed, 35 years ago, the U.S. Supreme Court held that race is one factor that law enforcement officers can use to develop reasonable suspicion to figure out if the person is in the country illegally.

In *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the Supreme Court was presented with the following question: Can the U.S. Border Patrol stop a vehicle and question the occupants of the vehicle to determine their immigration status when the only ground for suspicion is that the occupants appear to be of Mexican ancestry? In that case, Border Patrol agents had been parked at the side of a highway and used their vehicle’s headlights to “illuminate passing cars.” *Id.* at 875. During one of these illuminations, agents noticed a vehicle with three occupants who appeared to be of Mexican descent and thus pursued it. The agents stopped the vehicle, questioned the occupants about their immigration status, and learned that all three of them were in the country illegally. At an evidentiary hearing, the agents admitted that the only reason they stopped the vehicle was because the occupants appeared to be of Mexican descent.

In that case, the Supreme Court held that a stop based solely on race was unconstitutional. *Id.* at 882. Nevertheless, Justice Lewis Powell, writing for a unanimous court, acknowledged there was a governmental interest in stopping illegal immigration. In a statement that echoes many of the same sentiments raised by today’s policy-makers and political pundits, Justice Powell wrote: “Whatever the number [of illegal aliens], these aliens create significant economic and social problems, competing with citizens and legal residents aliens for jobs, and generating extra demand for social services.” *Id.* at 879. Balancing the government’s interest in preventing the flow of illegal immigration with a Hispanic person’s Fourth Amendment right to be protected against unreasonable

searches and seizures, Justice Powell concluded that several factors could be taken into account in deciding whether there was reasonable suspicion to stop a vehicle and question its occupants; this included, among other factors, the characteristics of the area, its proximity to the border, and recent illegal border crossings in the area. *Id.* at 885. When it came to the agent's statement that the occupants appeared to be of Mexican ancestry, Justice Powell wrote that this can be a "high enough" factor, "but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens." *Id.* at 886. In addition to race, the Court held that "mode of dress and haircut" and "their inability to speak English" were all relevant factors in establishing reasonable suspicion that the person is an illegal alien. *Id.*; see also *U.S. v. Ortiz*, 422 U.S. 891, 897 (1975).

More recently, however, the Ninth Circuit Court of Appeals has modified the Supreme Court's *Brignoni-Ponce* holding. In *United States v. Montero-Camargo*, 208 F.3d 1122, 1131 (9th Cir. 2000), the Ninth Circuit held that, in areas heavily populated by Hispanics, an individual's apparent Hispanic ethnicity is *not* a relevant factor in the reasonable suspicion calculus, because it is of little probative value; as such, a more particularized or individualized suspicion was required for an investigatory stop. In other words, race can never be used in developing reasonable suspicion in areas heavily populated by Hispanics because of its low probative value. Applying the *Montero-Camargo* decision to S. 1070, however, would produce bizarre results. For instance, in Tucson, Ariz., which has a large Hispanic population, race could never be a factor in developing reasonable suspicion. Yet in other cities in Arizona, like Scottsdale or Paradise Valley—both of which have a small Hispanic population—race could be a factor in determining reasonable suspicion. Ironically, this rule would have the unintended consequence of leading to racial profiling in those cities, because anyone whose skin is not white could be considered out of place and thus subject to more scrutiny than a person with white skin. The other question left unanswered under the *Montero-Camargo* rubric is: What is the magic number before a region or area is considered heavily populated by Hispanics and therefore its police officers are precluded from considering race when establishing the reasonable suspicion calculus? Whatever legal weight *Montero-Camargo* may have, its holding will likely influence the way courts will interpret S. 1070 and, obviously, affect how state prosecutors and police agencies will enforce the law.

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clamoring to enter the country. The paucity of visas available to entry-level workers encourages the workers to enter the United States without permission. Expanding the number of visas available to entry-level workers would allow the government to focus its efforts on identifying those who enter the country and to enforce the laws against criminals instead of well-intentioned aliens who are coming to strengthen America and provide help to their family abroad. **TFL**

Removing the Language

Opponents of S. 1070—including the federal government—have raised many issues challenging the constitutionality of the law. As a consequence, it will be some time before we learn whether S. 1070 passes constitutional muster. The Supreme Court, however, has already decided that race can be a factor in developing reasonable suspicion to determine if the person is in the country illegally. Nonetheless, if Arizona lawmakers want to ensure that police can never take race into account in their reasonable suspicion calculus—at least legally—they can remove the clause in S. 1070 that says police can take race into account to the extent permitted by the U.S. Constitution. Practically speaking, however, there will always be encounters between police and civilians that are consensual. **TFL**



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Endnotes

¹On July 28, 2010, U.S. District Judge Susan Bolton ordered a preliminary injunction preventing several sections of S. 1070 from going into effect, which included section 2, the topic of this article. Arizona immediately appealed her order. The Ninth Circuit Court of Appeals will hear oral argument on Nov. 1, 2010.

²Arizona State Representative John Kavanagh wrote that the new language prevents racial profiling, because police officers are prohibited from considering "race, color, or national origin" in their reasonable suspicion calculus. See John Kavanagh, *Let's Set the Record Straight on New Law*, THE ARIZONA REPUBLIC (May 8, 2010), available at www.azcentral.com/arizonarepublic/opinions/articles/2010/05/08/20100508kavanagh08.html.

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