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COMMENTS

BORDERING ON DISCRIMINATION: EFFECTS OF IMMIGRATION POLICIES/LEGISLATION ON INDIGENOUS PEOPLES IN THE UNITED STATES AND MEXICO

*Sara Daly**

I. Introduction

Border security and state immigration legislation are issues that many Americans love to hate. By and large, there is little debate about the need for national security measures at the borders. However, when it comes to the implementation of policies that actually attempt border security and immigration enforcement, the end results risk stifling the freedom of certain members of the culturally diverse Southwest. States have taken immigration enforcement measures upon themselves, in initiatives such as Alabama House Bill 56, Arizona Senate Bill 1070, and Georgia House Bill 87.¹ The policies encompassed in recent legislation leave ample room for racial profiling by state police officers, exposing large groups of people to law enforcement practices such as “stop-and-identify.”² Included in that swath of the population, especially in the Southwest, are Indigenous populations who are subjected to inquiry about the citizenship status of their members.³

Identification laws and policies often operate at the expense of indigenous groups, some of which actually exist on both sides of the U.S. border.⁴ The ability of those groups to cross the border relatively unhindered to access the other portions of their lands and community are gravely affected by immigration issues, as well as practices at the border. This difficulty is a reality for one such indigenous group, the Yaqui. As a Yaqui tribe member explained,

We've been here since time immemorial in crossing the border.
Right now Indigenous people are treated like Mexicans. We're

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1. H.B. 56, 2011 Leg., Reg. Sess. (Ala. 2011); S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010); H.B. 87, 151st Gen. Assemb. (Ga. 2011).

2. *See generally id.*

3. *See In Hostile Terrain: Human Rights Violations in Immigration Enforcement in the US Southwest*, AMNESTY INT'L USA, 27 (Mar. 14, 2012), http://www.amnestyusa.org/sites/default/files/ai_inhostileterrain_final031412.pdf [hereinafter *Hostile Terrain*].

4. *Id.* at 30.

not Mexicans, we're Indigenous. They should come up with a system to recognize Indigenous people from Mexico with relatives on this side of the border so that they can be given a visa without any problems.⁵

II. Roadmap

In this Comment I will examine the effects that immigration and border policies have on Indigenous populations and include a thorough examination of the newest initiative for resolving immigration and indigenous conflicts. "Enhanced Tribal Identification Cards" ("ETCs") are a newer form of ID that include a radio frequency identification ("RFID") microchip readable by border security technology, as part of the larger Western Hemisphere Travel Initiative ("WHTI"), to attempt to solve the complications presented at the border for Indigenous populations.⁶ In my analysis I will examine the (1) historical indigenous access to international cultural sites and lands; (2) international standards for human rights of indigenous groups; (3) national immigration reform initiatives and their effect on indigenous border-crossing rights; (4) state participation in immigration enforcement; and (5) the ETC initiative, its requirements, and barriers to success. I will focus largely on the American Southwest because of the heightened need for better access to indigenous resources across the border in a largely anti-immigration environment. I will explain that more diligent cooperation of U.S. immigration enforcement with indigenous populations is needed to ensure that their rights are not violated.

III. A Brief Look at the Problem

The trend in some state legislation is to authorize law enforcement to target populations that appear to be of Hispanic descent for questioning about immigration status, creating a hostile environment.⁷ Amnesty International recently published an extensive article suggesting that immigration laws and policies extensively affect indigenous groups.⁸

5. *Id.* at 29 (emphasis added) (quoting Telephone Interview with Jose Matus, Indigenous Alliance Without Borders (May 10, 2011)).

6. In altering the type of identification asked of citizens of countries in the western hemisphere to a more stringent identification standard, the WHTI required these citizens, who previously were only required to supply documents such as a birth certificate and driver's license, to supply passports and passport cards. *See* 8 C.F.R. § 212.1 (2014).

7. *Hostile Terrain*, *supra* note 3, at 45.

8. *Id.*

One tribal nation that appears several times in the article, the Tohono O’odham, has over 28,000 citizens in Mexico and Arizona and issues tribal ID cards to its citizens on both sides of the border.⁹ *Hostile Terrain* highlights some of the worst-case outcomes of policies implementing border security. In 2001, for example, A.B., a Tohono O’odham nation member, had a run-in with border security that effectively deprived him of rights to enter the United States, although he could legally do so as a tribal member.¹⁰ A.B. was born in Mexico on tribal land, and worked near the border in the United States, crossing frequently with his tribal ID card.¹¹

In 2001, he was crossing in Sonoyta, State of Sonora, Mexico, with his Tribal ID as he had done on previous occasions, when the Border Patrol agents asked where he was from, he nervously said he was born in the USA. He told Amnesty International researchers that he didn’t consider this a lie as he belonged to the Tohono O’odham Nation that stretches across the US border into Mexico. The CBP agents at the Border Patrol asked him to get out of the car, handcuffed him, and took him to the station. The CBP agents at the Border Patrol station told him he was Mexican and called him “pendejo” (a vulgar insult in Spanish). . . . He was scared and felt he was being treated as a criminal, “So I signed an order of deportation and they threw me out at about 3am in Sonoyta.”¹²

He later crossed back into the United States, and has not left Tohono O’odham lands for ten years for fear of getting caught and sent back across the border because of the prior deportation order.¹³ Although he feels he has a right to be on tribal land in either country, the border agents’ pressure on suspected undocumented migrants convinced him to sign a deportation order, thereby depriving him of the right to freely move across his national tribal lands on both sides of the border and the non-tribal lands of the United States.¹⁴

9. *Id.* at 29-30; Alice Lipowicz, *DHS Approves Enhanced Tribal ID Cards*, THE BUS. OF FED. TECH. (Nov. 4, 2009), <http://fcw.com/articles/2009/11/04/dhs-approves-enhanced-tribal-id-cards.aspx>.

10. *Hostile Terrain*, *supra* note 3, at 26 (citing Interview with A.B., Tohono O’odham Citizen (Apr. 27, 2011)).

11. *Id.*

12. *Id.*

13. *Id.* at 27.

14. *Id.* at 26-27.

A.B.'s deportation despite belonging to a tribe with lands in both countries highlights one of several problems that have developed from bad policy or bad enforcement. The problems that plague border security include a high amount of discretion with U.S. border officials; a general lack of training with regard to indigenous groups, languages, and forms of ID; racial profiling and discrimination; and long detentions.¹⁵ The interest that the U.S. government has in protecting its border is high, as is the motivation of Border Patrol agents to apprehend undocumented migrants. However, the lack of oversight and training of immigration agents "has resulted in a failure to prevent and address discriminatory profiling, and has fostered a culture of impunity that perpetuates profiling of immigrants and communities of color"¹⁶ State law enforcement may be falling into the same patterns, with recent immigration bills designed to aggressively investigate citizenship status.¹⁷ The results of immigration laws and policies include high arrest rates and denied access to tribal lands for members in border regions.¹⁸

Amnesty International concluded that the operation of current border policies constitutes a number of human rights violations,¹⁹ including violations of the rights of indigenous peoples:

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.
2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.²⁰

Hostile Terrain also includes several suggested policy changes that would bring the United States closer to compliance with UNDRIP.²¹ Near the top

15. *Id.* at 41, 45, 49, 74.

16. *Id.* at 45.

17. *See infra* Part VI.

18. *Hostile Terrain*, *supra* note 3, at 42.

19. *Id.* at 72.

20. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295, at 13 (Sept. 13, 2007) [hereinafter UNDRIP].

21. *Hostile Terrain*, *supra* note 3, at 73-76 (suggesting halting all U.S. Customs and Border Patrol practices and policies until further review, which would be impractical and unpopular in a country with border security as a high priority. Other suggestions, however,

of the list is the need for a way to uniformly recognize tribal IDs or passports, and to generally ensure that “immigration laws, policies, and practices respect the rights of Indigenous peoples”²²

IV. Historical Indigenous Access to International Cultural Sites and Lands

A. Impermeable Borders in the Southwest

The American Southwest is culturally shaped by its territorial history—changing hands between tribes, the Spanish, Mexico, Texas, and the United States until the boundary was finally settled in 1853.²³ In 1810, Mexico gained its independence from Spain, and began to change the dynamics of what is now the American Southwest by redacting some of the protections that it had extended to indigenous peoples as part of agreements with the Spanish crown.²⁴ Texas declared its independence from Mexico in 1836, and then declared that its boundaries extended to the Rio Grande, rather than the Rio Nueces as Mexico had insisted.²⁵ The United States voted to annex the Texas Republic in 1845, sparking a war with Mexico involving the same border dispute.²⁶ “[B]oth Mexico and the U.S. claimed the area between Nueces and Rio Grande rivers,” until the end of the war and Treaty of Guadalupe Hidalgo.²⁷ The treaty provided for a payment to Mexico for \$15 million in exchange for an incredibly large swath of land.²⁸ The treaty included provisions for the preservation of civil rights of people then living in the ceded territory, saying,:

Mexicans who, in the territories aforesaid, shall not preserve the character of the citizens of the Mexican Republic, conformably

such as the push to recognize and train personnel on tribal IDs, seem to bear less of a burden on national security with a high return for indigenous groups.).

22. *Id.* at 73.

23. *See* Treaty of La Mesilla, U.S.-Mex., Dec. 30, 1853, 10 Stat. 1031.

24. Courtney E. Ozer, Note, *Make it Right: The Case for Granting Tohono O’odham Nation Members U.S. Citizenship*, 16 GEO. IMMIGR. L.J. 705, 706-07 (2002).

25. PAUL GANSTER & DAVID E. LOREY, *THE U.S.-MEXICAN BORDER INTO THE TWENTY-FIRST CENTURY* 26-29 (2d ed. 2007); Ozer, *supra* note 24, at 707 (quoting Library of Congress, *Western Expansion & Reform (1829-1859)*, AM.’S STORY FROM AM.’S LIBR., http://www.americaslibrary.gov/jb/reform/jb_reform_subj.html (last visited July 7, 2014) [hereinafter *Western Expansion*]).

26. GANSTER & LOREY, *supra* note 25, at 29.

27. Ozer, *supra* note 24, at 707 (quoting *Western Expansion*, *supra* note 25).

28. *See* Treaty of Guadalupe Hidalgo, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922. Accounts range between one-third to just over one-half of Mexico’s territory by the end of the Gadsden Purchase. GANSTER & LOREY, *supra* note 25, at 30; Ozer, *supra* note 24, at 707.

with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time . . . to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution; and in the mean time, shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.²⁹

While the treaty did not expressly mention Indigenous peoples, the term “Mexicans” can be interpreted as including them because of the rights Indigenous people enjoyed in Mexico at the time the treaty was signed.³⁰ Indigenous people, therefore, were generally afforded civil rights and the right to exercise religion, as were the estimated 300,000 Mexican nationals who eventually became United States citizens.³¹

Despite the Treaty of Guadalupe Hidalgo, disputes between the United States and Mexico over the international border continued to be problematic until the Gadsden Purchase, which resolved conflicts over the border of El Paso, TX.³² “The [Gadsden] Purchase . . . reaffirmed Article IX of the Treaty of Guadalupe Hidalgo” and gave the United States 30,000 square miles of land for ten million dollars to Mexico.³³ The treaty also drew a border through the Tohono O’odham territory, leaving part of the territory in the United States and a part in Mexico.³⁴ They were not the only tribe affected by the Gadsden Purchase: the Cocopah, Pascua Yaqui, Kickapoo, and Kumeyaay are also split across the U.S.-Mexico Border as the border stands today.³⁵

For years after the Treaty of Guadalupe Hidalgo and the Gadsden Purchase were completed, the border in the south was largely unpatrolled and the indigenous populations did not see much in the way of restricted freedoms.³⁶ Without a border security initiative as controlling as today’s, groups such as the Tohono O’odham had the ability to cross relatively

29. Ozer, *supra* note 24, at 707 (quoting Treaty of Guadalupe Hidalgo, *supra* note 28, at art. 9).

30. *See id.* at 708.

31. GANSTER & LOREY, *supra* note 25, at 30.

32. *Id.* at 29-30.

33. Ozer, *supra* note 24, at 708; *see also* Leah Castella, Note, *The United States Border: A Barrier to Cultural Survival*, 5 TEX. F. ON C.L. & C.R. 191, 204 (2000).

34. Ozer, *supra* note 24, at 708.

35. Castella, *supra* note 33, at 206; Ozer *supra* note 24, at 722.

36. Ozer, *supra* note 24, at 708.

unchecked between the United States and Mexico on their own land and elsewhere.³⁷

The Indian Reorganization Act, passed in 1934, was the next major change in the operation of U.S.-Indian relations, as it provided for the organization and federal recognition of tribes.³⁸ The Tohono O'odham nation was first recognized by the federal government following

a census conducted on both sides of the border in which the United States affirmed the Nation's definition of membership based on O'odham blood. . . . In the years following formal recognition, Nation members born on the south side of the boundary were treated no differently than members born in the north. Members born on the Mexico side worked in the federal government, served in the military, and went to war. Yet, they were not guaranteed U.S. citizenship.³⁹

B. Separate Kickapoo History

The Kickapoo have carved out an exception for themselves among the regulations generally governing tribal access to borders through lobbying.⁴⁰ The tribe itself has a unique history:

The Texas Band of Kickapoo originally migrated from Algonquin territory in New York. On their journey south, they moved through Wisconsin, Illinois, Kansas, Oklahoma, and Texas constantly resisting any attempt to convert to Christianity. Finally, in the late 1800's they migrated to Nacimiento, Mexico to avoid [w]hite settlers and reservations. In the early 1980's, the Texas Band of Kickapoo moved back to Texas, though they still preserved land of religious significance in Mexico.

At the same time, the U.S. Congress passed legislation that gave them membership in a recognized Indian tribe and preserved their right to freely cross the border to visit their religious sites in Nacimiento. This legislation recognized that, [a]lthough many of the members of the band meet the

37. *Id.*

38. *Id.*

39. *Id.* at 709 (citing *IT IS NOT OUR FAULT: THE CASE FOR AMENDING PRESENT NATIONALITY LAW TO MAKE ALL MEMBERS OF THE TOHONO O'ODHAM NATION UNITED STATES CITIZENS, NOW AND FOREVER* 12, 13 (Guadalupe Castillo & Margo Cowan eds., 2001)).

40. *See* Castilla, *supra* note 33, at 205.

requirement for U.S. Citizenship, some of them cannot prove it . . . [and] declared that members of the Texas Band of Kickapoo should be granted the right to pass and re-pass the borders of the United States. The legislation further permits Kickapoo tribal leaders to issue I.D. cards to members of the Kickapoo band, which jointly serve as a border-crossing card.⁴¹

Known as the “Kickapoo exception,” the legislative special permission seemed for years to be the ideal solution for specific Native American border-crossing issues.⁴² This system bears some resemblance to the ETC system that is gaining ground now and will likely aid indigenous groups in crossing the border with ease, discussed more fully *infra*.⁴³ However, the Kickapoo exception seems to remain the simplest solution to the problem that all other indigenous groups face at the border.

C. Race as a Barrier at the Canadian Border

The legal situation of indigenous groups along the U.S.–Canadian border differs from those along the U.S.–Mexico for two main reasons. First, the rights of the indigenous groups in the region are more solidly grounded legally because of the language of the Jay Treaty and subsequent legislation.⁴⁴ Second, the U.S.–Canada border has a milder political climate than the highly patrolled, and often deadly, atmosphere at the U.S.–Mexico border.⁴⁵ However, even the improved legal climate for tribes located along the U.S.–Canada does not erase the problems embedded in immigration requirements for these Indigenous groups.⁴⁶

The border drawn by the Paris Peace Treaty of 1783 between the United States and Britain runs through the tribal lands of the Micmac, Maliseet, Penobscot, Passamaquoddy, Mohawk, Iroquois, Sioux, and Blackfeet, and is nearly twice the length of the U.S.–Mexico border.⁴⁷ Unlike the general non-enforcement policy at the U.S.–Mexico border after the border was created, the policy at the U.S.–Canada border affirmatively sought to ensure free passage of the indigenous to tribal lands on either side of the border.

41. *Id.* (citations omitted) (internal quotation marks omitted) (citing Texas Band of Kickapoo Indians Act, 25 U.S.C. § 1300b-13(d) (2012)).

42. Castella, *supra* note 33, at 205.

44. *See* discussion *infra* Part VII.

44. Ozer, *supra* note 24, at 711-12.

45. Castella, *supra* note 33, at 201.

46. *See* Paul Spruhan, *The Canadian Indian Free Passage Right: The Last Stronghold of Explicit Race Restriction in United States Immigration Law*, 85 N.D. L. REV. 301 (2009).

47. Castella, *supra* note 33, at 196.

The Treaty of Amity, Commerce and Navigation, or the “Jay Treaty” of 1794, was entered into to resolve remaining border disputes between the United States and Britain, including a fear that Indian populations would be used to assist either side in a violent dispute resolution.⁴⁸ Incidentally, the Jay Treaty also ensured the right of Indigenous peoples to pass across the border unhindered.⁴⁹ Article III of the Treaty recognized the border line drawn through several groups, allowing them to “pass and repass” the boundary lines.⁵⁰ Although the Jay Treaty was abrogated by the War of 1812 and the Treaty of Ghent,⁵¹ many similar provisions of the “free passage right” were put into effect by later legislation.⁵²

Blood quantum, and therefore race, is significant for the “free passage” legislation, which requires that Canadian-born American Indians possess “at least 50 percent of blood of the American Indian race” in order to exercise the right to pass freely into the United States.⁵³ Although one scholar has called Canadian blood quantum requirements “the last explicit racial restriction in American immigration law,”⁵⁴ the Canadian border is no more racially charged than the Mexican border.

V. UN Declaration on Indigenous Rights

After a long push for the recognition of indigenous rights worldwide, the United Nations adopted the Declaration on the Rights of Indigenous Peoples and officially recognized the rights of tribes to maintain cultural ties across international borders to their families, cultural touchstones, and religious heritage.⁵⁵ Article 36 of the Declaration specifically outlines the right of Indigenous peoples to maintain contacts with their own tribes,

48. Marcia Yablon-Zug, *Gone but Not Forgotten: The Strange Afterlife of the Jay Treaty’s Indian Free Passage Right*, 33 QUEENS L.J. 565, 571 (2008).

49. *Id.* at 569.

50. *Id.* at 571.

51. Gloria Valencia-Weber & Antoinette Sedillo Lopez, *Stories in Mexico and the United States About the Border: The Rhetoric and the Realities*, 5 INTERCULTURAL HUM. RTS. L. REV. 241, 289 n.205 (2010) (citing *Karnuth v. United States*, 279 U.S. 231 (1929)); see also Yablon-Zug, *supra* note 48, at 575-76; Bryan Nickels, *Native American Free Passage Rights Under the 1794 Jay Treaty: Survival Under United States Statutory Law and Canadian Common Law*, 24 B.C. INT’L & COMP. L. REV. 313, 316-17 (2001).

52. Spruhan, *supra* note 46, at 314 (citing Act of June 27, 1952, ch. 477, 66 Stat. 234 (codified as amended at 8 U.S.C. § 1359 (2012))).

53. Castella, *supra* note 33, at 197 (citing 8 U.S.C. § 1359 (2012)).

54. Spruhan, *supra* note 46, at 303.

55. See UNDRIP, *supra* note 20.

membership, and heritage across borders, and mentions state obligations to work with tribes to that end.⁵⁶

The UN Declaration is not binding on the United States to ensure compliance with provisions protected indigenous, but as former UN Special Rapporteur S. James Anaya stated, the effect of the Declaration is to establish

an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law. . . . The principles and rights affirmed in the Declaration constitute or add to the normative frameworks for the activities of United Nations human rights institutions, mechanisms and specialized agencies as they relate to indigenous peoples. The Declaration, even in its draft form, has formed the basis for legislation in individual countries, such as the Indigenous People's Rights Act in the Philippines, and it has inspired constitutional and statutory reforms in various states of Latin America.⁵⁷

So, while not binding, the UN Declaration is a reliable baseline standard against which the United States should measure its own laws and regulations. Immigration laws are no exception, and should be scrutinized for more than effectiveness for national security. State and federal law enforcement policies need to be examined for their effects on communities near the borders.

56. *Id.* at 16.

57. Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 VAND. J. TRANSNAT'L L. 1141, 1162 (2008) (citing Human Rights Council, *Rep. of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, U.N. Doc. A/HRC/9/9, at 85, 88 (Aug. 11, 2008)); An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds Therefor, and for Other Purposes, Rep. Act No. 8371, § 2(a)-(f) (1997) (Phil.), available at http://www.grain.org/brl_files/philippines-ipra-1999-en.pdf; see also Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 74-89 (1999).

VI. Immigration Reform & Enforcement

A. National Immigration Reform

Immigration in the United States has followed a narrowing trend, from “no restriction to extremely narrow qualitative restrictions to additional qualitative restrictions, and later to more extensive qualitative restrictions, including ethnic ones, and eventually to quantitative restrictions.”⁵⁸ The regulations as they exist today are a result of restrictions imposed layer by layer, as the United States grew and developed simultaneous needs to restrict population influx and monitor state security.⁵⁹ The first major immigration reform, the Immigration and Nationality Act, or the McCarren-Walter Act, was enacted in 1952,⁶⁰ and it consolidated other immigration provisions while setting forth quotas and requirements for entry and nationalization. The McCarren-Walter Act also laid the groundwork for procedures still used today, including: “preferences for persons with certain skills or relatives . . . grounds of exclusion . . . the duplicitous procedure of visa issuance and inspection upon entry . . . grounds of deportation, and . . . the deportation procedure and for relief from deportation under limited circumstances.”⁶¹ Immigration policy has since been modified drastically by the Immigration Act of 1990 and again by the Homeland Security Act of 2002.⁶² Immigration was previously controlled by the Immigration and Naturalization Service (“INS”), but a national desire for heightened border security⁶³ spurred the creation of the Department of Homeland Security (“DHS”) and constituent agencies.⁶⁴

Immigration and Customs Enforcement (“ICE”) and Customs and Border Protection (“CBP”) are the two divisions of the Department of Homeland Security that oversee immigration in the United States.⁶⁵ At the

58. RICHARD D. STEEL, *STEEL ON IMMIGRATION LAW* § 1:1 (2013 ed.).

59. *Id.*

60. McCarren-Walter Act, ch. 477, 66 Stat. 163 (June 27, 1952) (codified as amended at 8 U.S.C. § 1101 (2012)).

61. STEEL, *supra* note 58, § 1:2.

62. *Id.* § 1:3; Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

63. The terrorist attacks of September 11, 2001 led to drastic reconsideration of national security on several fronts, including borders, airports, privacy, and investigations. *See Judging the Impact: A Post-9-11 America*, NPR (July 16, 2004), http://www.npr.org/911hearings/security_measures.html.

64. STEEL, *supra* note 58, § 1:3.

65. 8 C.F.R. §§ 287.1, 287.5 (2014).

border, CBP is manned by Border Patrol, a federal police force.⁶⁶ Within the United States, ICE controls and uses a variety of agents and contracts with state law enforcement agencies to accomplish its goals.⁶⁷ In recent years, the intense political and social controversy over immigration law has limited Congress's ability to enact statutory changes to the Immigration and Nationality Act. This has caused some states to address embark on their own immigration reform, especially in the area of enforcement.⁶⁸ This is evident in the recently disputed Alabama House Bill 56, Arizona Senate Bill 1070, and Georgia House Bill 87.

The Department of Homeland Security and the Department of State created the Western Hemisphere Travel Initiative ("WHTI"), after recommendations from the 9/11 Commission.⁶⁹ WHTI also satisfies a Congressional mandate requiring some documentation for people coming into the United States "who were previously exempt [from having documentation], including citizens of the United States, Canada[,] and Bermuda."⁷⁰ WHTI essentially creates passport requirements across borders in the Western Hemisphere, and strengthens the infrastructure to support an integrated tribal ID system.⁷¹ It is the impetus for the creation of the Enhanced Tribal ID, and could eventually, with diligent training and leadership, lead to universally recognized IDs for all federally recognized tribe members.⁷²

B. Federal Immigration Enforcement

The United States has a significant interest in border security and in verifying the immigration status of people within its borders, but the lengths to which the federal and state governments can go to protect and enforce those interests are a continued source of debate. Racial profiling is a major problem⁷³ that was addressed in *United States v. Brignoni-Ponce*, in which

66. *Id.* For a concise explanation of the immigration enforcement hierarchy, see *Hostile Terrain*, *supra* note 3, at 14.

67. *Hostile Terrain*, *supra* note 3, at 14.

68. STEEL, *supra* note 58, § 1:3 (citing *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), *aff'd*, 131 S. Ct. 1968 (2011)).

69. Press Release, Dep't of Homeland Sec., Department of Homeland Security and Tohono O'odham Nation Announce Agreement to Develop Enhanced Tribal Card (Nov. 3, 2009), <http://www.dhs.gov/news/2009/11/03/departement-homeland-security-and-tohono-oodham-nation-announce-agreement-develop>.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Hostile Terrain*, *supra* note 3, at 33.

an automobile full of undocumented migrants was apprehended by a roving patrol unit purely because the occupants looked to be of Mexican ancestry in an area where a high percentage of aliens illegally in the country were also Mexican descent.⁷⁴ The Court ruled that border patrol could, by statute, use racial profiling as a tool to determine if there was reasonable suspicion that the car occupants were undocumented without violating the Fourth Amendment.⁷⁵ “For the same reasons that the Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens.”⁷⁶ The Court also held that race, in and of itself, is not sufficient to establish reasonable suspicion for such a stop.⁷⁷ Part of the reasoning behind the Court’s decision is that “[l]arge numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens.”⁷⁸ Thus, because of *Brignoni-Ponce*, U.S. officials are allowed to use race as a factor to determine, in light of their experience, whether there is reasonable suspicion that people are undocumented.⁷⁹

C. State Immigration Enforcement

The *Brignoni-Ponce* decision, a green light to racial profiling in immigration cases, has had a growing impact on immigration enforcement. Some states have taken on very active roles in immigration enforcement, utilizing their own officers to investigate and apprehend people based on their citizenship status. Efficient as this may seem, it is a significant problem for indigenous people who match the profile of an undocumented alien, and thus are at risk for being pulled over and investigated. Of course, for many tribal members with recognized IDs, state practices could amount to nothing more than minor annoyances. But if even a small fraction of indigenous peoples are affected by the practices, as anecdotal evidence

74. *United States v. Brignoni-Ponce*, 422 U.S. 873, 875 (1975).

75. *Id.* at 881-82.

76. *Id.* at 884.

77. *Id.* at 882-83 (“[I]f we approved the Government’s position [that reasonable suspicion can be dispensed with for immigration issues], Border Patrol officers could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road, without any reason to suspect that they have violated any law.”).

78. *Id.* at 886.

79. *Id.* at 885-87.

suggests, a close examination of the nature of state and federal practices and the gaps left therein is necessary to determine when and how to resolve the problem.

1. The Reasonable Suspicion Standard and Racial Profiling

State activism in immigration enforcement presents a particular set of problems. For example, because the reasonable suspicion standard is couched in terms of an officer's experience and the totality of circumstances, it could lead to large disparities in enforcement actions take by individual officers.⁸⁰ While race alone cannot create reasonable suspicion, with some officers it may not take much more than "looking" undocumented, while others may have different knowledge or training that makes the situation seem innocuous.

A major concern raised by the *Hostile Terrain* report is that the reasonable suspicion standard will lead to discriminatory profiling because leaving the standard open to police discretion "fails to provide clear guidance as to how much weight law enforcement officials should give to such characteristics. As a result, it is often difficult to ensure in practice that law enforcement officials do not engage in discriminatory profiling."⁸¹ According to the report, "racial and ethnic profiling targeting Latinos and other communities of color living along the southwestern border, including Indigenous communities and US citizens, may have risen in recent years."⁸² There are anecdotal accounts to support the proposition that profiling is prevalent, such as a Department of Justice investigation proving that Maricopa County, a participant in an immigration enforcement program,⁸³ "had conducted discriminatory policing whereby Latino drivers were four to nine times more likely to be stopped than non-Latino drivers in similar situations."⁸⁴ This sort of targeted policing is likely not found in all areas near borders at the same extreme levels.⁸⁵ However, the fact of profiling is undeniable in immigration enforcement and does, despite being permissible under *Brignoni-Ponce*, cause significant problems for people who are not

80. *Hostile Terrain*, *supra* note 3, at 38.

81. *Id.*

82. *Id.* at 35.

83. Maricopa is a participant in a 287(g) program. *See* discussion *infra* pp. 32-35.

84. *Hostile Terrain*, *supra* note 3, at 40 (citing Letter from Thomas E. Perez, Assistant U.S. Att'y Gen., to Bill Montgomery, Maricopa Cnty. Att'y (Dec. 15, 2011), available at http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf).

85. Not all counties that are 287(g) participants have been investigated or monitored at the same level as Maricopa County, so the precise numbers for stops of various racial groups are not available for every county. *Hostile Terrain*, *supra* note 3, at 40.

undocumented migrants, including members of indigenous groups. The problem is finding a way to enforce the law even-handedly without damaging communities that have already been marginalized. And unfortunately, it does not appear this type of discrimination will be dissipating any time soon, as “[t]he increased risk of racial profiling follows the expansion of federal immigration enforcement measures and the blurring in practice of responsibilities between local/state and federal officials in the enforcement of immigration laws, especially in the context of increasing anti-immigrant legislation enacted by states.”⁸⁶

2. State Programs

States participate in immigration enforcement by agreement with the federal government in three main ways: the Section 287(g)⁸⁷ enforcement program, the Criminal Alien Program, and the Secure Communities Program.⁸⁸ States have an expanding role in immigration enforcement, and unfortunately also insufficient education regarding immigration issues to complement that role.⁸⁹

a) Section 287(g) Programs

Section 287(g) programs are on the decline but have until recently accounted for many deportations through state assistance to federal investigations.⁹⁰ The statute authorizes state officials to enforce federal immigration law, stating,

(1) Notwithstanding section 1342 of title 31, the Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of

86. *Id.* at 35. The article continues, “Despite the increased risk of racial profiling along the border, the authorities have failed to put in place an effective oversight mechanism to assess its prevalence” *Id.*

87. These programs are now codified at 8 U.S.C. § 1357(g) (2012), but they are still referenced widely as 287(g) programs.

88. *Hostile Terrain*, *supra* note 3, at 38-39.

89. *Id.* at 46.

90. *Id.* at 39.

the State or political subdivision and to the extent consistent with State and local law.

(2) An agreement under this subsection shall require that an officer or employee of a State or political subdivision of a State performing a function under the agreement shall have knowledge of, and adhere to, Federal law relating to the function, and shall contain a written certification that the officers or employees performing the function under the agreement have received adequate training regarding the enforcement of relevant Federal immigration laws.⁹¹

The failsafe included in the statute, that state officers performing immigration functions should have training and affirm as such, seems to be a good-faith offering by the federal government of a method for states to participate in the federal initiative in a well-trained and even-handed manner. A Fact Sheet issued by U.S. Immigration Customs & Enforcement (“ICE”) emphasizes the measures taken to ensure training and good policy, responding to an audit conducted over six months in 2009. According to the Fact Sheet, reforms to the 287(g) program included: prioritizing criminal alien arrests and detentions; requiring officers to maintain comprehensive data about arrests, detentions, and removals to ensure prioritization of criminal aliens; adding training (basic and refresher courses) and field supervisors; creating an Advisory Committee and a DHS Office of Civil Rights/Civil Liberties for pending 287(g) applications; and national training conferences for ICE field agents, 287(g) representatives, and other supervisors.⁹² These programs are extensive:

Currently, ICE has 287(g) agreements with 37 law enforcement agencies in 18 states. Since January 2006, the 287(g) program is credited with identifying more than 309,283 potentially removable aliens—mostly at local jails. ICE has trained and certified more than 1,300 state and local officers to enforce immigration law.⁹³

Additionally, ICE provides some training for multicultural communication and officially discourages discriminatory racial profiling,

91. 8 U.S.C. § 1357(g)(1)-(2) (2012).

92. *Fact Sheet: Updated Facts on ICE’s 287(g) Program*, ICE.GOV, <http://www.ice.gov/news/library/factsheets/287g-reform.htm> (last visited July 8, 2014) [hereinafter *Updated Facts*].

93. *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, ICE.GOV, <http://www.ice.gov/news/library/factsheets/287g.htm> (last visited July 8, 2014).

stating, “Racial profiling is simply not something that will be tolerated, and any indication of racial profiling will be treated with the utmost scrutiny and fully investigated. If any proof of racial profiling is uncovered, that specific officer or department could have their agreement . . . rescinded.”⁹⁴

In the litigation challenging state immigration initiatives, states have argued that they have an obligation to enforce federal law under 287(g) programs and the like and as such should be allowed to proactively enforce immigration policy where necessary.⁹⁵

b) Criminal Alien Programs (C.A.P.)

The Criminal Alien Program (“CAP”) is another category of state enforcement mechanism that screens inmates and detainees in prisons and jails for immigration violations, and transfers immigrants to ICE as necessary, regardless of ultimate convictions in the penal system.⁹⁶ A study conducted by Trevor Gardner II and Aarti Kohli at the Chief Justice Earl Warren Institute on Law and Social Policy⁹⁷ discussed the effect of one county’s enrollment in the CAP program by showing correlating arrest rates by demographic and offense level.⁹⁸ “The Warren Institute’s study of arrest data [found] strong evidence to support claims that Irving police engaged in racial profiling of Hispanics in order to filter them through the CAP screening system,” in part because “discretionary arrests of Hispanics for petty offenses—particularly minor traffic offenses—rose dramatically”

94. *Updated Facts*, *supra* note 92.

95. State’s argument in support of the Alabama House Bill 56, in defense of state participation in federal enforcement:

The enforcement of federal immigration law is another area in which Congress has invited state participation. The Alabama legislation, [House Bill] 56, implicates each of the two roles that the states perform. For example, [House Bill] 56 reflects Alabama’s residual sovereignty, as represented by its requirement under [section] 18 that every licensee possess his driver’s license while driving. And [House Bill] 56 also reflects cooperative federalism, by requiring under [section] twelve that state law enforcement officials verify immigration status where there is reasonable suspicion that the person is in the United States unlawfully.

Corrected Brief for State of Michigan et al. as Amici Curiae Supporting Defendants-Appellees at 5, *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012) (No. 11-14532-CC), 2012 WL 263051.

96. *Hostile Terrain*, *supra* note 3, at 39.

97. Trevor Gardner II & Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program*, UNIV. OF CAL., BERKELEY L. SCH. (Sept. 2009), http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf.

98. *See id.*; *see also Hostile Terrain*, *supra* note 3, at 43.

immediately after gaining around-the-clock access to ICE at the local jail.⁹⁹ The study, analyzing 2006 data, recommended several changes to ICE partnership programs to ensure that racial profiling was not an inherent part in immigration enforcement by local officers.¹⁰⁰

The ICE website clarifies that the purpose of the CAP program is to “identif[y] all criminal aliens in jails and prisons throughout the United States and initiate[] removal proceedings based on their perceived threat to the community.”¹⁰¹ Despite the priority for removal based on danger, the Warren Institute study suggested that simply having access to swift immigration enforcement may disproportionately increase discretionary arrests for minor offenses that are not real threats to the community. Additionally, information on CAP programs does not include any published developments about additional training or prohibited racial discrimination, as was present in reference to 287(g) programs.

3. *Secure Communities Programs*

Secure Communities Programs are controversial because of the high risk of racial profiling associated with the initiative to scan fingerprints of arrestees in state and local facilities, as well as the risk of deterring illegal victims from coming forward.¹⁰² For members of tribes that span the border, the risk of being stopped, interrogated, or caught without adequate paperwork is high and may even lead to them being permanently barred from entering the portions of their tribe’s land on the U.S. side of the border. This high instance of questioning and arrests was reflected in data compiled by the Arizona ACLU, showing that between 2006 and 2007 Native Americans were searched by law enforcement over three times as often as whites, and that African-Americans and Hispanics were searched over two and one-half times as often as whites.¹⁰³ Police encounters and inquiry are undeniably a part of reality for indigenous groups, especially near the border, because of visible ethnic similarities to Hispanics, geographical proximity to the border, and the role of police in aggressively enforcing immigration.

As involved as states have been in enforcement of federal immigration law already, recent state legislation affirmatively requiring immigration

99. Gardner & Kohli, *supra* note 97, at 1.

100. *Id.* at 2.

101. *Fact Sheet: Criminal Alien Program*, ICE.GOV (Mar. 29, 2011) <http://www.ice.gov/news/library/factsheets/cap.htm>.

102. *Hostile Terrain*, *supra* note 3, at 39.

103. *Id.*

enforcement adds to the need for education of law enforcement and also specific protection of tribes. Examples of recent state legislation include Alabama House Bill 56, Arizona Senate Bill 1070, and Georgia House Bill 87, all bills requiring state law enforcement to ask for proof of immigration status in certain situations.¹⁰⁴

D. State Legislation

The most recent piece of controversial state legislation regarding immigration enforcement was partially upheld in *Arizona v. United States*.¹⁰⁵ The inflammatory legislation involved provisions allowing for state law enforcement to ask for proof of immigration status upon reasonable suspicion that a person is not in the country legally.¹⁰⁶ Because immigration status can be so intimately tied with race and national origin (protected categories under the Fifth and Fourteenth Amendments), amicus briefs filed in the case against Senate Bill 1070 cautioned that upholding the legislation would promote, and almost command, racial profiling and discrimination in law enforcement.¹⁰⁷ Ultimately, the Court upheld section 2(B) of the bill, saying that piece of the legislation was not unconstitutional on its face.¹⁰⁸ An as-applied challenge down the road reach a different result, but based on current precedent, Arizona state officials may, and sometimes must, proactively investigate citizenship.¹⁰⁹

Georgia, Alabama, Utah, and other states also have aggressive legislation to enforce federal immigration laws as a part of local law enforcement policy,¹¹⁰ but the relative impact on specific indigenous groups with ties

104. H.B. 56, 2011 Leg., Reg. Sess. (Ala. 2011); S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010); H.B. 87, 151st Gen. Assemb. (Ga. 2011).

105. 132 S. Ct. 2492 (2012).

106. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

107. See, e.g., Brief for National Council of La Raza et al. as Amici Curiae Supporting Respondents, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182), 2012 WL 1044367; Brief for the Leadership Conference on Civil & Human Rights et al. as Amici Curiae Supporting Respondent, *Arizona*, 132 S. Ct. 2492 (No. 11-182), 2012 WL 1054501; Brief for the American Civil Liberties Union et al. as Amici Curiae Supporting Respondent, *Arizona*, 132 S. Ct. 2492 (No. 11-182), 2012 WL 1044371.

108. *Arizona*, 132 S. Ct. at 2510. Because the challenge was a facial challenge to the legislation, the Court was unable to find it unconstitutional. However, an as-applied challenge could, if statistics for arrests continue in the same vein as Amnesty International arrest statistics in some counties suggests, stand a chance of a different result. See *Hostile Terrain*, *supra* note 3, at 39, for arrest statistics for White, Black, Latino, and Native populations in Arizona jurisdictions.

109. *Arizona*, 132 S. Ct. at 2510.

110. *Hostile Terrain*, *supra* note 3, at 45.

across borders is curtailed for these states because of location. Alabama's House Bill 56 was signed into law in 2011 and remains a source of political tension because of its often-discriminatory effect.¹¹¹ The Civil Rights Division of the Department of Justice ("DOJ") issued a letter to an area affected by the Alabama law, emphasizing that the Division

is closely monitoring the impact of H.B. 56 in a number of areas to ensure compliance with applicable civil rights laws, including to ensure that law enforcement agencies are not implementing the law in a manner that has the purpose or effect of discriminating against the Latino or any other community.¹¹²

The statement by the DOJ reflects the suspicion that some regions are toeing the line between legitimate enforcement of state and national interests and discriminatory racial profiling.

Utah's legislation, House Bill 497, was also opposed by the DOJ in part because

[t]he law's mandates on law enforcement could lead to harassment and detention of foreign visitors and legal immigrants who are in the process of having their immigration status reviewed in federal proceedings and whom the federal government has permitted to stay in this country while such proceedings are pending.¹¹³

The law, similar to Arizona's, gives law enforcement discretion to ask about citizenship status during minor offenses and traffic (*Terry*) stops.¹¹⁴ The effects of the law, while not entirely apparent because of its recent passage, may include unintended effects, such as long delays and

111. H.B. 56, 2011 Leg., Reg. Sess. (Ala. 2011); *see also* Letter from Thomas E. Perez, Assistant U.S. Att'y Gen., to Sheriff D.T. Marshall, Montgomery Cnty. Sheriff's Off. (Dec. 2, 2011) [hereinafter Perez Letter], *available at* http://www.justice.gov/crt/about/spl/documents/AlabamaHB56Ltr_12-2-11.pdf.

112. Perez Letter, *supra* note 111, at 1.

113. Press Release, Dep't of Just. Off. of Pub. Aff., Department of Justice Challenges Utah's Immigration Law (Nov. 22, 2011), *available at* <http://www.justice.gov/opa/pr/2011/November/11-ag-1526.html>.

114. *Utah Immigration Law Ruling Delayed by Federal Judge*, HUFFINGTON POST (Feb. 17, 2012, 6:09 PM), http://www.huffingtonpost.com/2012/02/17/utah-immigration-law-ruling_n_1285702.html.

discriminatory enforcement by state law enforcement.¹¹⁵ The Utah ACLU's preliminary report into the bill reflected concerns that

if a person does not have the identification necessary to create a presumption of lawful presence, the verification of status is not a simple and quick process. . . . The clear danger is that police will rely on unconstitutional factors, such as race, ethnicity, national origin, and English-speaking ability, for immigration enforcement. The purported limitation on the use of race and ethnicity is a fig leaf, designed to cover the plain fact that apart from appearance it's hard to imagine any legitimate reason a police officer would have to investigate someone's citizenship or immigration status.¹¹⁶

Georgia's legislation to the same effect, House Bill 87 or the "Illegal Immigration Reform and Enforcement Act of 2011," was partially invalidated in August 2012 on preemption grounds, but still calls for investigation into the immigration status of criminal suspects when they have probable cause to believe the person has committed a crime but the suspect fails to supply an enumerated form of identification.¹¹⁷ The Georgia version of a stop-and-ID statute is indeed mild, and does seem geared toward catching only those who are undocumented and engaged in criminal activity.¹¹⁸ This sort of law seems to be a more neutral embodiment of an identification law. It does not, however, fully solve the predicament an indigenous person may face if caught in the curious position of trying to explain citizenship if they do not have one of the enumerated forms of identification.

The full impact of such immigration statutes is unknown at the writing of this article. However, it is certain that any bad effects stemming from racial profiling envelop a larger portion of the resident population than just undocumented migrants from Mexico.¹¹⁹

115. See *Preliminary Analysis of HB 497 "Utah Illegal Immigration Enforcement Act"*, ACLU, (Mar. 10, 2011) http://elpasotimes.typepad.com/files/utah_hb497_-aclu_prelim_analysis.pdf.

116. *Id.* at 2-3.

117. H.B. 87, 151st Gen. Assemb. (Ga. 2011), available at <http://www.legis.ga.gov/Legislation/20112012/116631.pdf>.

118. *Id.* Other portions of the statute are less narrow, intending to track the immigration status of undocumented parents and severely punish those who interact with "illegal immigrants" in business contracts or transportation.

119. *Hostile Terrain*, *supra* note 3, at 31-32.

However, there still remain questions regarding profiling, access to recognized identification, language training, and cultural awareness that are largely unanswered. If, as with the Tohono O'odham, there are high incidences of traffic stops, arrests, and inquiries about immigration status, but no way to prove citizenship immediately or easily, groups may still be disproportionately subjected to long detentions, mistreatment, and profiling. The development of enforcement practices over time will make it clear whether and how state immigration reform actually affects tribes.

VII. Identification and Enhanced Tribal Identification Cards

The U.S. government reached out to federally recognized tribes as a part of the Western Hemisphere Travel Initiative to implement "Enhanced Tribal Identification Cards" ("ETCs"), a newer form of ID that includes an RFID chip readable by border security technology and several significant technological capabilities.¹²⁰ The process involved working with each tribe to develop and implement a way to create and distribute the ETCs, which would be recognized at U.S. borders.¹²¹ Of the recognized tribes, five have implemented the ETCs: the Tohono O'Odham (Arizona), the Pascua Yaqui (Arizona), the Seneca (New York), the Kootenai (Idaho), and the Coquille (Oregon).¹²² The Department of Homeland Security is continuing to reach out to the remaining federally recognized tribes to implement ETCs where wanted.¹²³

Participating tribes project a generally positive outlook for the new forms of identification, as a way to compromise between the ease of tribe members to cross the international border and as a way to protect their own lands from the dangers the CBP claims need protecting against along the length of the border: drug trafficking, terrorism, and illegal border crossing.¹²⁴ The reaction is surprisingly positive considering the Western

120. See Lipowicz, *supra* note 9.

121. See *id.*

122. Lailani Upham, *Breaking Down Barriers at Border Crossings*, CHAR-KOOSTA NEWS (Feb. 2, 2012), http://www.charkoosta.com/2012/2012_02_02/Breaking_down_barriers_at_border_crossings.html.

123. *Id.*

124. See Off. of the Press Sec'y, Department of Homeland Security and Tohono O'odham Nation Announce Agreement to Develop Enhanced Tribal Card (Nov. 3, 2009) [hereinafter Tohono O'odham Agreement to Develop ETC], available at <http://www.dhs.gov/news/2009/11/03/departament-homeland-security-and-tohono-oodham-nation-announce-agreement-develop>; Off. of the Press Sec'y, Department of Homeland Security and Seneca Nation of Indians Announce Agreement to Develop Enhanced Tribal Card (Sept. 10, 2009), available at

Hemisphere Travel Initiative (“WHTI”) heightened security and restricted the forms of identification that were previously sufficient to cross the border, causing many problems for those without sufficient identification.¹²⁵ After June 1, 2009, when WHTI went into effect, Native Americans were permitted to cross the border using tribal documents with an attached photo, and thereafter were required to have either an ETC or other approved identification form (U.S. passport, passport card, enhanced driver’s license, trusted traveler program identification, etc.).¹²⁶

Not all tribes have collaborated with the DHS to develop the accepted forms of identification, and of the thirty groups said to have been working with the agency, only five have begun issuing the ETCs thus far. Of those five, two in particular, the Tohono O’odham and the Pascua Yaqui, both tribes on the U.S.-Mexico Border, are the most likely to see positive changes in border encounters from the new identification form in coming years. Time will tell.

A. ETCs for the Tohono O’odham

The Tohono O’odham people occupy the second largest reservation in the United States,¹²⁷ and have nearly as large of a base of advocates hoping to resolve issues at the border. In 2001, about 7000 tribal members were Mexican-born, born outside of hospitals, or otherwise without proof of being born within the United States.¹²⁸ Large membership combined with the WHTI documentation requirements could deny a great portion of the population border access without a new program. But this is less of a risk with the advent of Enhanced Tribal IDs because the program provides some ability for tribal leadership to control access to borderlands instead of the federal government solely controlling border access. At the announcement that ETCs would be issued after Tohono O’odham and DHS collaboration, the tribe’s chairperson, Ned Norris, Jr., stated,

This agreement is of tremendous importance to the Tohono O’odham Nation and is an excellent example of how positive government-to-

<http://www.dhs.gov/news/2009/09/10/department-seneca-nation-develop-enhanced-tribal-card>; Off. of the Press Sec’y, Department of Homeland Security and the Pascua Yaqui Tribe Announce a Historic Enhanced Tribal Card (July 30, 2010) [hereinafter Pascua Yaqui Historic Enhanced Tribal Card], available at <http://www.dhs.gov/news/2010/07/30/department-homeland-security-and-pascua-yaqui-tribe-announce-historic-enhanced>.

125. See *WHTI Program Background*, U.S. CUSTOMS & BORDER PROT., <http://www.cbp.gov/travel/us-citizens/whti-program-background> (last visited July 8, 2014).

126. See Tohono O’odham Agreement to Develop ETC, *supra* note 124.

127. Ozer, *supra* note 24, at 705.

128. *Id.* at 706.

government relations can benefit the greater good. Secretary Napolitano, Acting Commissioner Ahern, CBP and the Tohono O'odham Legislative Council deserve a great deal of credit for their diligence in developing this momentous agreement. . . . The Tohono O'odham Nation is committed to doing its part by working with federal authorities to protect the U.S. homeland.¹²⁹

B. ETCs for the Pascua Yaqui

The Pascua Yaqui span across Sonora, Mexico, with a membership of 30,000, and cross into Texas, Arizona, and southern California to tribal lands and other towns for errands regularly. Until the advent of the ETC, heightened immigration scrutiny and possible multicultural misunderstandings created a sometimes-tenuous relationship with Border Patrol:

[A]ccording to reports, none of the Border Patrol agents stationed at the ports of entry speak Yaqui, while most Yaquis who live in Mexico speak little to no Spanish or English. Local police officers who interact with Yaquis travelling near the border have also frequently failed to recognize their Indigenous status.¹³⁰

The CBP agents' inability to recognize different cultures, especially in areas where indigenous populations and crossings should be a regular occurrence, as well as cultural insensitivity and racial profiling, create tension between border law enforcement and indigenous people trying to maintain connections within their own populations.

The Pascua Yaqui were the first tribe to work with DHS to develop and issue ETCs.¹³¹ The press release by DHS quoted Chairman Peter Yucupicio, reflecting an incredibly positive outlook on the program, in sharp contrast to other anecdotes about tribe member encounters with Border Patrol agents¹³²: "This program strengthens an already great relationship with DHS keeping our Nation's security at mind. The Pascua Yaqui Tribe hopes that such a program will enhance the facilitation of ceremonial, family and business travel for our Yaqui members."¹³³

129. Tohono O'odham Agreement to Develop ETC, *supra* note 124 (internal quotation marks omitted).

130. *Hostile Terrain*, *supra* note 3, at 29.

131. Pascua Yaqui Historic Enhanced Tribal Card, *supra* note 124.

132. *Hostile Terrain*, *supra* note 3, at 30-31.

133. Pascua Yaqui Historic Enhanced Tribal Card, *supra* note 124.

C. Obstacles for the Enhanced Tribal ID

Despite government implementation of ETCs, several obstacles stand in the way of accessibility for indigenous citizens with rights across borders. Unless training is provided and checked for federal and state employees who are under directives to check for immigration status, the likelihood those indigenous groups will stop being subjected to undue hardship while trying to cross borders into their tribal lands is not guaranteed. Additionally, until the United States creates a sturdy and fair policy to ensure that tribes straddling the U.S.-Mexico border (including the Pascua Yaqui (Arizona), the Kickapoo (Texas), the Kumeyaay (California) and the Tohono O'odham (Arizona))¹³⁴ are afforded full access to their tribal lands, there will be a continued human rights violations and violations of the UN Declaration on the Rights of Indigenous People.

D. Sovereignty, Membership, and Access to ETCs

Only federally recognized tribes can be issued ETCs.¹³⁵ Unlike the Texas Band of Kickapoo, “another Tribe along the border, the Coahuiltecan Tribe in Texas, has been unable to obtain similar rights because it does not have federal recognition.”¹³⁶ Citizens of tribes without federal recognition need a valid passport to cross the border.¹³⁷ And for those without proper documentation, such as a birth certificate, access is barred. There is also a sentiment that even having to apply for documentation outside of their tribe, federally recognized or not, is a deprivation of their access to tribal lands because access is restricted and controlled by an entity besides their own tribe. Amnesty International’s interview with Antonio Diaz of the Texas Indigenous Council revealed that sentiment: “If we want to visit Mexico for our sacred lands, you need a passport, but there are bars to getting one. We are still connected to the lands I have to ask for permits, which means they have taken that right [to travel to sacred lands] away.”¹³⁸

134. Ozer, *supra* note 24, at 722.

135. See *Did You Know... CBP Works With Tribal Governments to Modernize Travel Documents?*, CBP.GOV, http://www.cbp.gov/xp/cgov/about/history/did_you_know/modernize.xml (last visited July 8, 2014). Thus, “[t]ribes that do not hold federally recognized Tribal status can face particular difficulties in acquiring ID documents.” *Hostile Terrain*, *supra* note 3, at 28.

136. *Hostile Terrain*, *supra* note 3, at 28.

137. See *WHTI Program Background*, *supra* note 125.

138. *Hostile Terrain*, *supra* note 3, at 28 (alteration in original) (quoting Interview with Antonio Diaz, Texas Indigenous Council (Apr. 14, 2011)).

E. Passport Access

Groups that do not have federal recognition are not eligible for ETCs.¹³⁹ Without that avenue for access the border, tribal citizens are left with only methods used by United States and Mexican citizens to obtain passports. Hospital births provide birth certificates and the necessary documentation to show U.S. citizenship, but immigration issues have complicated the ease with which people can obtain passports if birthed by midwives.¹⁴⁰ Investigations into fraudulent birth certificates sold by midwives along the U.S.-Mexico border resulted in denials and revocations of passports from several people near the border who were not born in hospitals.¹⁴¹ As Jaime Diez, an attorney in the area, told a CNN reporter, “Now all the midwives in the area are suspected of committing fraud.”¹⁴² The CNN article indicates that Diez’s office frequently encounters midwife cases in the area, ranging from people struggling to obtain passports from midwife documents to cases in which people have been apprehended at the border and their documents confiscated.¹⁴³ Some people who have provided documentation and affidavits from people present at their birth have been denied citizenship because the affidavits do not overcome the presumption that the documents are fraudulent.¹⁴⁴

Although midwifery has seen a decline in recent years with the increased availability of hospitals, home births are still encouraged by members of Indigenous groups as an important part of tradition.¹⁴⁵ Groups that are not federally recognized (several of which are in South Texas where birth certificate fraud is high¹⁴⁶) face an increased danger of being caught between borders while attempting to cross between the United States and Mexico. If midwife births are legitimate, but there is potentially no way to prove it to the satisfaction of DHS, then a sector of Indigenous people are at

139. *Hostile Terrain*, *supra* note 3, at 28.

140. Gustavo Valdes & Catherine E. Shoichet, *Midwife Birth Certificates Tied to Immigration Problems Along Texas Border*, CNN (June 5, 2012, 8:32 PM), <http://www.cnn.com/2012/06/05/us/texas-immigration-midwives> [hereinafter *Certificates*].

141. *Id.*; see also Spencer S. Hsu, *Midwife Delivery Can Lead to Passport Denial*, WASHINGTON POST (Sept. 9, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/08/AR2008090802623.html>.

142. *Certificates*, *supra* note 140.

143. *Id.*

144. *Id.*

145. Alice Skenandore, *Midwives & Native Tradition*, OFF OUR BACKS, vol. 36, no. 4, 2006, at 65.

146. *Certificates*, *supra* note 140.

risk of being under heightened scrutiny and denied documentation necessary to have a U.S. passport that will allow passage across the border.

F. Membership Restrictions

Each sovereign tribal nation determines its membership, not the federal government. However, the government can indirectly restrict the parameters of tribe-defined membership by only officially recognizing tribes that meet certain criteria for community participation and historical membership and involvement.¹⁴⁷ One commentator argues,

Federal law . . . creates a constraining and rewarding framework within which Indian nations must produce their citizenship requirements. . . . Although Indian nations clearly face federal incentives and pressures, the forces affecting these nations do not press them toward a single set of citizenship requirements. . . . How Indian nations filter and translate these pressures and forces of indirect control will depend on internal tribal considerations.¹⁴⁸

Resulting membership requirements vary, and include methods such as birthplace; lineal descendancy based on an earlier tribal role (e.g., a Dawes role); percentage of Indian descent across one tribe (blood quantum, for example); minimum Indian percentage across several tribes; “adoption or naturalization”; “no dual citizenship”; and “future citizenship criteria by tribal [law].”¹⁴⁹

The method of determining citizenship can have varied impacts on the ability of tribal members to gain tribal citizenship, and because the sovereign has incentives to determine citizenship in a way that is at least moderately exclusive to retain federal benefits, it can happen that members who would otherwise be members by adoption (through marriage, for example) are excluded if official membership is determined by blood

147. See Carole Goldberg, *Members only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 455 (2002). Goldberg argues,

Some federal laws seem to demand active involvement by tribal members in the tribe’s communal life in order for benefits to be dispensed to those members. Laws of this type may prompt tribes to require communal or cultural involvement as a condition of citizenship or even continued citizenship, either in addition to or in lieu of criteria based upon descent. For example, federal administrative and judicial criteria for federal acknowledgement and recognition heavily emphasize members’ participation in tribal cultural and political activities.

See *id.*

148. *Id.* at 458.

149. *Id.* at 467.

quantum instead.¹⁵⁰ In fact, some individuals who are “almost full-blooded . . . [but do] not have enough of one particular Indian tribe or Indigenous Nation” are denied citizenship, and thereby federal benefits, despite their heritage.¹⁵¹

The confining nature of federal recognition contributes to one of the overarching problems for those tribes that are split between borders and also raises several important questions. First, should tribal membership stop at the border for purposes of limiting citizenship of a tribal nation to only the part of the nation within the limits of the United States? If not, a tribe such as the Tohono O’odham could feasibly define membership in such a way so as to include the members on both sides of the border. And if a tribal citizen recognized by the nation does not physically reside in the U.S. portion of tribal territory, should federal benefits extend to that citizen? Should benefits only extend to the citizen if they also reside on the United States side? Should citizens be able to cross freely into other portions of the tribal land on either side of the border, as they were before the border was firmly in place? Or should tribal membership only extend to those members that are also U.S. citizens by virtue of being born on one side of the tribal land versus the other? The definition of membership speaks directly to these problems of access to cultural heritage across the border.

VIII. Commentary & Conclusion

There is a need to reconcile state and federal training to give consistency and accuracy to immigration enforcement for immigrants and indigenous groups (including language training and consistent IDs). The practical application of any remedy should be effected with a thoughtful (but swift) implementation of training that includes a tutorial on tribal IDs, old tribal identification methods, and a brief history of the border-straddling nations that would hopefully dispel some of the misperceptions about members of these nations. A specialized review of immigration statuses of members of those groups should be implemented to prevent family separation or further denial of access to tribal lands, religion, and culture for those individuals, such as A.B., who had the misfortune of confronting inadequately trained Border Patrol agents.

Federally unrecognized tribes are dually disadvantaged, being denied to access to tribal IDs as well as the ability to claim cross-border connections.

150. John Rockwell Snowden et al., *American Indian Sovereignty and Naturalization: It’s a Race Thing*, 80 NEB. L. REV. 171, 196 (2001).

151. *Id.*

Groups that are not federally recognized should be granted some means of gaining access to historical tribal lands across international borders. The methods of accomplishing this end, however, are much less clear than simply providing training to ICE, CBP, and state agents.

If Enhanced Tribal IDs prove successful, groups will need to ensure that citizens currently without sufficient papers are able to be grandfathered into the newer and more efficient system. Functioning and recognizable IDs will empower indigenous people by granting them access previously denied.

There are several overarching trends in immigration that reach indigenous groups. These issues are most tangible for tribes that are near or on the U.S.-Mexico border or the U.S.-Canada border, but are not limited to only those groups. Citizenship status is especially challenging for tribal members who are not also U.S. citizens. Recent state legislation, such as Arizona Senate Bill 1070, encourages state law enforcement officials to stay mindful of citizenship status by demanding or allowing individuals who are stopped to be asked if they are U.S. citizens. Dangers of racial profiling are present because profiling is permitted for evaluating a suspect's probable citizenship status. Finally, the requirements for federal recognition of tribes, tribal membership, and citizenship documentation often clash with the practical lives of Indigenous people in and around the United States.

The development of the Enhanced Tribal Identification Card initiative is a late move to provide tribes with an easy-to-recognize ID that will lower chances of its members being unnecessarily tied up at the border. These new IDs and effective training of Border Patrol agents should help with the immigration issues border tribes have been facing.

However, there are issues that have yet to be addressed. What can an ETC do for a member of a tribe that is not federally recognized? An ETC does not solve anything for the Coahuiltecan, an unrecognized tribe at the Texas border. What does it do for members who were delivered by midwives and do not have proper documentation? For federally recognized tribes, it is unclear whether a member without a birth certificate or other enumerated documentation would be able to obtain an ETC. As for members of unrecognized tribes, the members are without an ETC and maybe even without a U.S. passport.

Finally, the ETC does not solve the problem of racial targeting that affects Indigenous groups in the Southwest. A good identification card may prove citizenship quickly, but it does not prevent citizens from being profiled and stopped. Fair, non-discriminatory, and inclusive ways to allow indigenous groups to obtain internationally recognized tribal IDs are

needed. Further, the IDs need to be recognized at the state level as well to eliminate the unfair treatment of Indigenous people at the local level, especially in the light of the prevalent racial profiling that is suggested by stop/arrest statistics in Arizona.