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## Sniff and Search Border Militarization

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Yessenia Renee Medrano-Vossler\*

### I. INTRODUCTION: THE RISE OF THE BORDER PATROL UNDER THE FOURTH AMENDMENT AND THE 100-MILE BORDER ZONE RULE

While driving on the Tohono O’odham Indian Reservation in Arizona, 50 miles north of the US-Mexico border, Ms. Ernestine Josemaria, a Tohono O’odham member and US citizen, was stopped by Border Patrol.<sup>1</sup> An agent approached the passenger side of her vehicle and began yelling at Ms. Josemaria, demanding her identification and reason for speeding, even though Ms. Josemaria had not been speeding.<sup>2</sup> After Ms. Josemaria asked whether the Tribal Police should be involved, the agent yelled and demanded that Ms. Josemaria get out of the vehicle.<sup>3</sup> After she refused, the agent accused Ms. Josemaria of being a “known smuggler” and called for back up.<sup>4</sup> Four more agents arrived; one unbuckled her seat belt, and the agents pulled at her arms and legs until Ms. Josemaria exited the vehicle.<sup>5</sup> The agents searched Ms. Josemaria’s truck despite her objections.<sup>6</sup> Then, the agents called for a drug-dog and made Ms. Josemaria wait for

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<sup>1</sup> Letter from James Lyall, Staff Att’y, AM. C.L. UNION, to Charles K. Edwards, Deputy Inspector Gen., Dep’t of Homeland Sec., 4 (Oct. 9, 2013),

<http://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Roving%20Patrols%20Oct%209%202013.pdf> [hereinafter Letter 1 from James Lyall].

<sup>2</sup> *Id.* at 5.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

approximately one hour for the drug-dog to arrive.<sup>7</sup> Neither the agents nor the drug-dog found any contraband.<sup>8</sup> Ms. Josemaria’s testimony is one of many stories where the Border Patrol’s use of a drug-dog unlawfully prolonged an apparent suspicionless stop, violating Ms. Josemaria’s Fourth Amendment rights.<sup>9</sup>

The emphasis of often unsympathetic facts in Fourth Amendment cases that we hear about rather than the unlawful government conduct that led to the stop or search, often rationalizes the many court decisions chipping away at the protections under the Fourth Amendment of the US Constitution.<sup>10</sup> In border communities,<sup>11</sup> despite sympathetic facts, local law

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<sup>7</sup> *Id.* Border Patrol agents use drug-dogs at immigration checkpoints to detect concealed humans, narcotics, and other contraband. *Canine Program*, U.S. CUSTOMS & BORDER PROTECTION, <http://www.cbp.gov/border-security/along-us-borders/canine-program> (last visited Mar. 5, 2016).

<sup>8</sup> Letter 1 from James Lyall, *supra* note 1, at 5.

<sup>9</sup> *See generally Record of Abuse*, AM. C.L. UNION 2–3 (Oct. 2015), [http://www.acluaz.org/Record\\_of\\_Abuse](http://www.acluaz.org/Record_of_Abuse) (documenting numerous general complaints against Customs and Border Protection along the Arizona-Mexico border including several false drug-dog alerts. These complaints do not appear to have resulted in any disciplinary action against the agency. This report was compiled from information received through a Freedom of Information Act filed by the ACLU in April 2014) [hereinafter *Record of Abuse*].

<sup>10</sup> For example, Justice Brennan’s dissent in *Florida v. Riley* noted that “[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people,” and nowhere is this observation more apt than in the area of the Fourth Amendment, whose words have necessarily been given meaning largely through decisions suppressing evidence of criminal activity.” *Florida v. Riley*, 488 U.S. 445, 463–64 (1989) (Brennan J., dissent) (quoting *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter J., dissent)).

<sup>11</sup> In this article, “border communities” refers to the land and people within the Border Patrol’s jurisdiction as defined by US federal laws and regulations. That is, the 100-mile border zone along the perimeter of the United States, Puerto Rico, Hawai’i, and Alaska. Additionally, when I refer to the border, I am referring to the commonly known international border lines that were arbitrarily constructed years ago as a way to mark territorial expansion, designed to exclude indigenous populations and future immigrants. *See generally* 8 U.S.C. § 1357(a)(3) (1952) (providing the border patrol with the authority to conduct warrantless searches of vehicles within a “reasonable distance” of the border, and private property except for homes within twenty-five miles of the border); *see also* 8 C.F.R. § 287.1 (a)(2) (2014) (defining “reasonable distance” of the border as

enforcement and the US Border Patrol's ("Border Patrol") ability to trample individuals' (citizens' and non-citizens') civil rights with impunity is ever expanding.<sup>12</sup>

In the summer of 2014, I interned in my hometown of Tucson, Arizona, at a non-profit legal organization focusing on civil rights in the border region. One of my tasks was conducting intake with individuals whose rights had been violated by the Border Patrol, local law enforcement, or both. One of the numerous types of abuses I heard of was prolonged detention at immigration checkpoints due to the use of drug-dogs. Individuals I spoke with reported that, similar to Ms. Josemaria's experience, when passing through immigration checkpoints or being stopped by Border Patrol agents, they were not usually asked about their immigration status (the primary purpose of immigration checkpoints)<sup>13</sup> and instead were detained, searched, and harassed due to alleged drug-dog "alerts."

Documentation of drug-dog alerts is limited due to lack of reporting, from the Border Patrol as well as border residents and travelers.<sup>14</sup>

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"100 air miles from any external boundary"); *The Constitution in the 100-Mile Border Zone*, AM. C.L. UNION, [www.aclu.org/constitution-100-mile-border-zone](http://www.aclu.org/constitution-100-mile-border-zone) (last visited Mar. 5, 2016); *Record of Abuse*, *supra* note 9.

<sup>12</sup> The US Border Patrol is "the mobile, uniformed law enforcement arm of U.S. Customs and Border Protection within the Department of Homeland Security responsible for securing U.S. borders[.]" *Along U.S. Borders*, U.S. CUSTOMS & BORDER PROTECTION, <http://www.cbp.gov/border-security/along-us-borders> (last visited Mar. 5, 2016).

<sup>13</sup> *United States v. Martinez-Fuerte*, 428 U.S. 543, 559–62 (1976).

<sup>14</sup> For example, only after filing a FOIA request in 2014 and suing CBP was the ACLU able to retrieve over one hundred complaints against the Border Patrol that had never been shared with the public. Additionally, the information received from that FOIA request is incomplete and only documents two checkpoints in Arizona. "For example, from Fiscal Year 2012 through Fiscal Year 2013, DHS oversight agencies reported just three complaints involving alleged Fourth Amendment violations, nationwide. Yet government records produced to the ACLU reveal that at least 81 such complaints originated in Tucson and Yuma Sectors alone during the same period (with at least 38 more through just part of FY 2014)." *See Record of Abuse*, *supra* note 9, at 2.

Nonetheless, suspicionless detention and searches of border travelers and residents by law enforcement and drug-dogs is common, and often leads to traumatic and invasive experiences and destruction of property with no accountability on the part of the Border Patrol.<sup>15</sup> Furthermore, search and seizure standards at or near the border (and in general) are at times unclear, both to the general public and to the Border Patrol.<sup>16</sup> This means many individuals are unaware of their rights when traveling through the border zone, and the Border Patrol is free to perpetuate lawless enforcement tactics.

The Border Patrol's primary goal at interior immigration checkpoints has become narcotics enforcement—a general law enforcement priority outside of the Border Patrol's expertise and one explicitly prohibited by the Supreme Court<sup>17</sup>—rather than immigration enforcement.<sup>18</sup> This priority

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<sup>15</sup> See Letter from James Lyall, Staff Att'y, AM. C.L. UNION, to Charles K. Edwards, Deputy Inspector Gen., Dep't of Homeland Sec., 4 (Jan. 15, 2014), <http://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Checkpoints%20%202014%2001%2015.pdf> [hereinafter Letter 2 from James Lyall] (citing twelve incidents where US citizens indicated that they were searched due to a drug-dog's false alert and held for varying lengths of time).

<sup>16</sup> For example, different immigration stops require different levels of suspicion, and the evolving Fourth Amendment standards make the law ambiguous and inaccessible to many border residents and travelers. Additionally, reports indicate that Border Patrol tells drivers and passengers that the Border Patrol does not need any suspicion to stop or search a vehicle, which deters individuals from asserting their rights in the face of unlawful law enforcement conduct. The Border Patrol operates with very little oversight, and the laws regarding reasonable or unreasonable Border Patrol tactics are constantly changing among the circuits and subject to agreements with local law enforcement.

<sup>17</sup> See *City of Indianapolis v. Edmond*, 531 U.S. 32, 41–42 (2000).

<sup>18</sup> In discussing the holding in *United State v. Martinez-Fuerte*, 428 U.S. 543 (1976), Circuit Judge Kozinski's dissent in *United States v. Soyland*, 3 F.3d 1312 (1993), went on to say that these immigration checkpoints have also yielded a high interdiction of drugs, pointing to several suppression cases since 1992 stemming from border checkpoints. While noting that this coincidence may be “an accident,” Judge Kozinski noted that “it may be much more: There's reason to suspect the agents working these checkpoints are looking for more than [undocumented immigrants]. If that is true, it subverts the rationale of *Martinez-Fuerte* and turns a legitimate administrative search into a massive violation

shift has resulted in a rash of civil rights violations around the US border, including unlawful searches and seizures stemming from misuse of drug-dogs and drug-dog error.<sup>19</sup> Greater transparency and oversight of the Border Patrol's drugs-dogs and reconsideration of the use of drug-dogs in uncontrolled settings like checkpoints, where their accuracy and reliability is greatly diminished, is needed.<sup>20</sup> Removing drug-dogs from the 100-mile border zone will help reduce the unchecked civil rights violations by the Border Patrol.<sup>21</sup>

*A. Drug-Dogs Should Not Be Allowed at Interior Immigration Checkpoints because they Empower the Border Patrol to Overstep their Lawful Purpose*

Available documented border civil rights violations often involve the Border Patrol's use of drug-dogs, and their elimination could help to curb those violations. The American Civil Liberties Union (ACLU) has pointed out that interior immigration checkpoints and Border Patrol operations allow Border Patrol agents excessive power over border residents and travelers with little oversight or accountability.<sup>22</sup> Additionally, drug-dogs can be unreliable due to dog and/or handler error or bias, leads to unlawful detentions.<sup>23</sup> Lastly, drug-dog searches lead to property damage,

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of the Fourth Amendment." *United States v. Soyland*, 3 F.3d 1312, 1316 (9th Cir.1993) (Kozinski, J., dissenting).

<sup>19</sup> See generally *Customs and Border Protection's 100-Mile Rule*, AM. C.L. UNION 2 [https://www.aclu.org/sites/default/files/assets/13\\_08\\_01\\_aclu\\_100\\_mile\\_cbp\\_zone\\_final.pdf](https://www.aclu.org/sites/default/files/assets/13_08_01_aclu_100_mile_cbp_zone_final.pdf) (last visited Mar. 5, 2016) (providing summaries of civil rights violations committed nationally at both northern and southern borders).

<sup>20</sup> See *Record of Abuse*, *supra* note 9, at 2–3.

<sup>21</sup> See, e.g., *id.* at n.50, n.52 (citing support for the inaccuracy of drug-dogs). For example, when a drug-dog inaccurately alerts, either because of drug-dog error or handler misconduct, a border patrol agent automatically has probable cause to search the individual's vehicle, thus unconstitutionally prolonging the vehicle stop.

<sup>22</sup> See generally Letter 2 from James Lyall, *supra* note 15, at 4 (documenting twelve instances of unlawful conduct at border checkpoints and requesting immediate review and investigation by the Department of Homeland Security).

<sup>23</sup> *Id.* at 5–8, 10–11, 13–16.

intimidation, and traumatizing experiences.<sup>24</sup> Thus, removal of drug-dogs from interior border checkpoints could limit prolonged seizures and baseless searches resulting in an overall decrease in abuses at the border.

While ultimately Border Patrol's authority should be scaled back drastically, this article focuses on challenging the use of drug-dogs at immigration checkpoints within the 100-mile border zone as a step towards decreasing civil rights violations.

*B. Limited Civil Rights Based on Proximity to International Borders Should be a Cause for National Concern and Action*

A drug-dog alert in both the local law enforcement and the border enforcement contexts is sufficient to establish the probable cause needed to search a vehicle without a warrant or the driver's consent.<sup>25</sup> While internal immigration checkpoints (immigration checkpoints existing within the interior of the United States) are lawful for immigration enforcement purposes,<sup>26</sup> in practice, that purpose is often a pretext for the checkpoint's secondary focus on drug regulation and general law enforcement—resulting in frequent civil rights violations.<sup>27</sup>

US Customs and Border Protection (CBP), “one of the world’s largest law enforcement organizations,”<sup>28</sup> includes as a component agency the US Border Patrol.<sup>29</sup> CBP’s primary and secondary purposes are “terrorist detection and apprehension” and “detection and seizure of controlled

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<sup>24</sup> *Id.* at 10–11.

<sup>25</sup> *See Illinois v. Caballes*, 543 U.S. 405 (2005).

<sup>26</sup> *United States v. Martinez-Fuerte*, 428 U.S. 543, 559–62. (1976).

<sup>27</sup> *City of Indianapolis v. Edmond*, 531 U.S. 31, 47–48 (2000); *see also Record of Abuse*, *supra* note 9, at 11, n. 50, n. 52.

<sup>28</sup> *About CBP*, U.S. CUSTOMS & BORDER PATROL, <http://www.cbp.gov/about> (last visited Feb. 24, 2016).

<sup>29</sup> *Along U.S. Borders*, U.S. CUSTOMS & BORDER PATROL, <http://www.cbp.gov/border-security/along-us-borders> (last visited Feb. 24, 2016).

substances,”<sup>30</sup> respectively. While its purposes remain largely undefined, its secondary purpose delegates wide discretion to the Border Patrol to engage in general law enforcement power rather than its primary purpose of immigration enforcement and apprehension.<sup>31</sup>

Several sets of data illustrate how the Border Patrol has taken advantage of its general law enforcement power. For example, in the ACLU’s report, “Record of Abuse,” the ACLU indicates that 2013 CBP arrest statistics demonstrate that,

Tucson Sector checkpoint apprehensions accounted for only 0.67 percent of the sector’s total apprehensions. In calendar year 2013, nine out of 23 Tucson sector checkpoints produced zero arrests of ‘deportable subjects.’ The same year, Yuma Sector checkpoint arrests of U.S. citizens exceeded those of non-citizens by a factor of nearly eight[.] One checkpoint in Yuma Sector, located 75 miles from the border, reported only *one* non-citizen apprehension in *three years*, while producing multiple civil rights complaints during the same period.<sup>32</sup>

Similarly, apprehension and narcotics seizure data available on CBP’s website indicates that apprehensions in the Border Sectors<sup>33</sup> dramatically

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<sup>30</sup> *Canine Program*, U.S. CUSTOMS & BORDER PATROL, <http://www.cbp.gov/border-security/along-us-borders/canine-program> (last visited Feb. 24, 2016).

<sup>31</sup> *Martinez-Fuerte*, 428 U.S. at 559–62.

<sup>32</sup> *Record of Abuse*, *supra* note 9, at 3; see also Andrew Becker, *Four of Five Border Patrol Drug Busts Involve U.S. Citizens, Records Show*, CTR. FOR INVESTIGATIVE REPORTING (Mar. 26, 2013), <http://cironline.org/reports/four-five-border-patrol-drug-busts-involve-us-citizens-records-show-4312> (emphasis added).

<sup>33</sup> “Sector” refers to regions the Border Patrol has divided up for its enforcement activities. There are twenty sectors nationwide. The Southwest Border Sectors include nine cities along the southwest—Big Bend (formerly Marfa), Del Rio, El Centro, El Paso, Laredo, Rio Grande Valley (formerly McAllen), San Diego, Tucson, and Yuma. The Southwest Border Sectors has consistently been the most staffed region, reporting 18,156 agents in the region in fiscal year 2014, compared to the Northern Border Sectors (Blaine, Buffalo, Detroit, Grand Forks, Havre, Houlton, Spokane, and Swanton) reporting 2,093 agents, and the Coastal Border Sectors (Miami, New Orleans, and Ramey) reporting 215 agents. While the number has fluctuated drastically over the past decade, the Southwest Border Sectors has also consistently reported the highest number of apprehensions and



decreased from fiscal year 2005 (1,089,092 reported apprehensions) through fiscal year 2011 (340,252 reported apprehensions).<sup>34</sup> Meanwhile, in its 2012 and 2013 “Summar[ies] of Performance and Financial Information,” CBP reported that the amount of “illegal narcotics seized” has remained at “2.8 million pounds.”<sup>35</sup> This number has shifted (this number is up 0.1 million pounds from 2010 but down 0.3 from 2011).<sup>36</sup> Available data supports the notion that regardless of migration patterns, the Border Patrol’s priorities at immigration checkpoints prioritize narcotics regulation.

Below is an overview of the relevant Fourth Amendment law and the source and authority of the 100-mile border zone rule, sometimes referred

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drug seizures. See *Sector Profile-Fiscal Year 2014*, U.S. CUSTOMS & BORDER PATROL, <http://www.cbp.gov/sites/default/files/documents/USBP%20Stats%20FY2014%20sector%20profile.pdf> (last visited Mar. 5, 2016).

<sup>34</sup> *Southwest Border Sectors: Total Illegal Alien Apprehensions by Fiscal Year*, U. S. BORDER PATROL, <http://www.cbp.gov/sites/default/files/documents/U.S.%20Border%20Patrol%20Fiscal%20Year%20Apprehension%20Statistics%201960-2013.pdf> (last visited Nov. 3, 2014); *Total Illegal Alien Apprehensions by Month*, U. S. BORDER PATROL, [http://www.cbp.gov/sites/default/files/documents/BP%20Total%20Monthly%20Apps%20by%20Sector%20and%20Area%2C%20FY2000-FY2014\\_0.pdf](http://www.cbp.gov/sites/default/files/documents/BP%20Total%20Monthly%20Apps%20by%20Sector%20and%20Area%2C%20FY2000-FY2014_0.pdf) (last visited April 19, 2015) (reporting CBP apprehension statistics from fiscal years 1960 through 2013. In 2006, CBP reported 1,071,972 apprehensions, whereas in 2013, 414,397 were reported along the Southwest. While apprehensions reportedly began increasing again in 2012, the increase has been slower, reporting 486,651 total apprehensions across the sectors in fiscal year 2014).

<sup>35</sup> *Summary of Performance and Financial Information*, U.S. CUSTOMS & BORDER PATROL 2, <http://www.cbp.gov/sites/default/files/documents/FY2013%20Summary%20of%20Performance%20and%20Financial%20Information%20-%20FINAL%20%28panels%29%20%20%20.pdf> (last visited Feb. 25, 2016).

<sup>36</sup> This number “represents narcotics held by [Customs and Border Protection] until disposal or destruction,” and includes all border checkpoints. U.S. CUSTOMS & BORDER PATROL, [http://www.cbp.gov/sites/default/files/documents/FY%202013%20Final%20PAR\\_0.pdf](http://www.cbp.gov/sites/default/files/documents/FY%202013%20Final%20PAR_0.pdf) (last visited Feb. 25, 2016); see also *Summary of Performance and Financial Information*, U.S. CUSTOMS & BORDER PATROL, [http://www.cbp.gov/sites/default/files/documents/summary\\_2010\\_3.pdf](http://www.cbp.gov/sites/default/files/documents/summary_2010_3.pdf) (last visited Feb. 25, 2016).

to as the “Constitution-Free Zone” due to the culture of impunity.<sup>37</sup> This section provides an overview of different types of immigration checkpoints and the reasoning and authority behind those checkpoints. The CBP Canine Program and its purported effectiveness in contributing to border security in general, an overview of drug-dog related abuses within the 100-mile border zone as documented by the ACLU’s Border Litigation Project is also summarized below, and arguments and policies for and against the use of drug-dogs at interior checkpoints are summarized below. Lastly, this article proposes ways in which eliminating drug-dogs from interior checkpoints would help limit Fourth Amendment search and seizure violations in border communities.

## II. OVERVIEW OF THE 100-MILE BORDER ZONE: NOT A “CONSTITUTION FREE ZONE”

While the federal government and case law have severely limited our civil rights depending on proximity to the US borders,<sup>38</sup> these limitations do not justify the culture of impunity that the Border Patrol operates under. This section provides an overview of the Fourth Amendment law and the 100-mile border zone rule, and explanations of how these laws diminish our civil rights. It also provides a summary of common types of immigration checkpoints and other interior operations within the 100-mile border zone including roving patrol stops, and temporary and fixed checkpoints, and how drug-dogs are used at immigration checkpoints.

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<sup>37</sup> *The Constitution in the 100-Mile Border Zone*, AM. C.L. UNION, [www.aclu.org/constitution-100-mile-border-zone](http://www.aclu.org/constitution-100-mile-border-zone) (last visited Mar. 5, 2016).

<sup>38</sup> For example, see *U.S. v. Martinez-Fuerte*, Justice Brennan’s dissenting opinion emphasized that the Court’s decision to permit suspicionless immigration checkpoint stops along the border served to continue the “evisceration of the Fourth Amendment protections against unreasonable searches and seizures[.]” and “virtually emptie[d] the Amendment of its reasonableness requirement[.]” *United States v. Martinez-Fuerte*, 428 U.S. 543, 567–68 (1976) (Brennan, J., dissenting); see also *Illinois v. Caballes*, 543 U.S. 405, 408 (2005) (pointing to the lack of privacy right in possessing unlawful substances).

*A. There is No Drug Exception in the Fourth Amendment's Protection Against Unlawful Searches and Seizures*<sup>39</sup>

The Fourth Amendment protects against unreasonable seizures.<sup>40</sup> A seizure includes even a brief detention or stop by a government official.<sup>41</sup> In assessing the “reasonableness of the seizure,” the court balances “the public interest [against] the individual’s right to personal security free from arbitrary interference by law officers.”<sup>42</sup> For example, in *City of Indianapolis v. Edmond*, the Supreme Court made it clear that the Fourth Amendment prohibited against suspicionless checkpoints to interdict drugs.<sup>43</sup> Conversely, the Court has held that the public interest in deterring unlawful immigration justifies the operation of suspicionless immigration checkpoints within the 100-mile border zone.<sup>44</sup>

The Fourth Amendment also protects against unreasonable searches by requiring a warrant or consent in most cases.<sup>45</sup> Courts have maintained that at a minimum, a search requires consent *or* probable cause, where

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<sup>39</sup> *Skinner v. Railway Labor Executive Association*, 489 U.S. 602, 641 (1980) (Marshall, J., dissenting).

<sup>40</sup> The Fourth Amendment of the U.S. Constitution states, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV.

<sup>41</sup> *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) (citing *Davis v. Mississippi*, 394 U.S. 721 (1969)).

<sup>42</sup> *Brignoni-Ponce*, 422 U.S. at 878 (citing *Terry v. Ohio*, 392 U.S. 1, 20-21).

<sup>43</sup> *City of Indianapolis v. Edmond*, 531 U.S. 31, 47-48 (2000).

<sup>44</sup> *See generally* *United States v. Martinez-Fuerte*, 428 U.S. 543, 559-60 (1976) (describing why suspicionless routing immigration checkpoints are less intrusive to the public than roving patrol stops); *Brignoni-Ponce*, 422 U.S. at 878-80 (clarifying that the reasonableness of Fourth Amendment seizures is measured by the “balance between the public interest and the individual’s right to personal security free from arbitrary interference by law enforcement”); *United States v. Machuca-Barrera*, 261 F.3d 425, 431 (5th Cir. 2001) (stating that “checkpoints with the primary purpose of identifying [undocumented] immigrants are constitutional, and checkpoints with the primary purpose of interdicting illegal drugs are not”).

<sup>45</sup> U.S. CONST. amend. IV; *United States v. Almeida-Sanchez*, 413 U.S. 266, 270 (1973).

“reasonably trustworthy” facts and circumstances known to law enforcement are sufficient to lead a reasonable person to believe that “an offense has been or is being committed.”<sup>46</sup> Furthermore, suspicionless Border Patrol checkpoint stops in the 100-mile border zone are not supposed to permit free range to law enforcement to conduct searches; at minimum, probable cause must exist for an interior search.<sup>47</sup> Thus, while the Border Patrol can set up checkpoints to stop drivers in the border region without any level of suspicion, the scope of inquiry is limited to brief questioning for immigration purposes absent suspicion.<sup>48</sup> Border Patrol agents often exceed this scope.

*B. The 100-mile Border Zone Rule Grants too Much Authority to the Border Patrol and Stems from Outdated Regulations*

The boundaries of the 100-mile border zone derive from 8 U.S.C. §1357 (powers of immigration officers and employees).<sup>49</sup> 8 U.S.C. §1357 was adopted by the US Department of Justice in 1953, during a time when less than 1,100 Border Patrol agents patrolled our borders.<sup>50</sup> In 1957, the US Government defined 8 U.S.C. §1357(a)(3)’s “reasonable distance” language as “100 air miles from any external boundary of the United States.”<sup>51</sup> In his majority opinion in *Almeida-Sanchez v. United States* in 1973, Justice Stewart pointed out that no justification for such a broad search power exists other than the “reasonable distance” language of the

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<sup>46</sup> See *Brinegar v. U.S.*, 338 U.S. 160, 175 (1949) (quoting *Carroll v. United States* 267 U.S. 132, 162 (1925)).

<sup>47</sup> *Almeida-Sanchez*, 413 U.S. at 269 (citing *Carroll v. United States*, 267 U.S. 132, 153 (1925)).

<sup>48</sup> *City of Indianapolis v. Edmond*, 531 U.S. 31, 47–48 (2000); *Machuca-Barrera*, 261 F.3d at 431 (citing *Edmond*, 531 U.S. at 41).

<sup>49</sup> *Almeida-Sanchez*, 413 U.S. at 268 (citing 8 U.S.C. § 1357(a)(3) (2006)).

<sup>50</sup> 8 U.S.C.A. § 1357 (1952); *The Constitution in the 100-Mile Border Zone* AM. C.L. UNION, <https://www.aclu.org/immigrants-rights/constitution-100-mile-border-zone> (last visited Mar. 16, 2016).

<sup>51</sup> 8 C.F.R. § 287.1 (a)(2) (2014) (emphasis added).

statute.<sup>52</sup> Revisiting the scope of this statute is a necessity now more than ever because today, over 21,000 Border Patrol agents patrol our borders nationwide,<sup>53</sup> and two-thirds of the United State's population (approximately 200 million people) reside within the Border Patrol's 100-mile jurisdiction.<sup>54</sup> Despite the dramatic increase in militarization of the border, the 100-mile border zone regulation has remained static, while case law and US policy continue to expand the authority of the Border Patrol and limit civil rights within border communities.<sup>55</sup>

*C. Know Your Rights: An Overview of Lawful Searches and Seizures within the 100-Mile Border Zone*

While all persons entering the United States, including US citizens, are subject to examination and search by CBP officers, this article focuses on checkpoints existing within the 100-mile border zone, not including international ports of entry.<sup>56</sup> However, the authority permitting routine border searches at international borders extends to temporary or fixed immigration checkpoints within the interior of the United States.<sup>57</sup>

This section explains the legal basis for the following Border Patrol operations—checkpoints, temporary checkpoints, roving patrol stops—and the laws around drug-dogs at checkpoints. This section concludes by providing additional examples of how courts have functioned to erase the restrictions on operating checkpoints for general law enforcement purposes.

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<sup>52</sup> *Almeida-Sanchez v. U.S.*, 413 at 268 (quoting 8 U.S.C. § 1357(a)(3) (2006)) (emphasis added).

<sup>53</sup> *The Constitution in the 100-Mile Border Zone*, AM. C.L. UNION, <https://www.aclu.org/immigrants-rights/constitution-100-mile-border-zone> (last visited Mar. 16, 2016).

<sup>54</sup> *Id.*

<sup>55</sup> See 8 U.S.C. § 1357(a)(3) (1952) & 8 C.F.R. § 287.1 (a)(2) (2014).

<sup>56</sup> 8 U.S.C. §1357(c) (1952).

<sup>57</sup> *Almeida-Sanchez*, 413 U.S. at 272–73.

### 1. Permanent/Temporary Internal Immigration Checkpoints

Permanent and temporary internal immigration checkpoints are structures along roadways within the 100-mile border zone.<sup>58</sup> These checkpoints derive their authority from the Supreme Court's decision in *United States v. Martinez-Fuerte*,<sup>59</sup> which held that routine "stops for brief questioning" at immigration checkpoints are justified under the Fourth Amendment, regardless of individualized suspicion.<sup>60</sup> The Court in *Martinez-Fuerte* noted that "one's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence."<sup>61</sup> The Ninth Circuit has upheld the use of temporary checkpoints because of (1) the checkpoint's primary purpose of immigration enforcement; (2) the lack of officer discretion in the placement and operation of the checkpoint; (3) the "checkpoint's visibility, appearance, and the presence of numerous [officers] in uniform;" and (4) the minimal intrusion of the stop.<sup>62</sup>

Some permanent and temporary checkpoints also have the capacity to refer vehicles to secondary inspection and Border Patrol agents may do so

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<sup>58</sup> While sometimes referred to the "functional equivalent" of international border checkpoints, this title is misleading because there are distinct legal differences between the two types of checkpoints, including the fact that individual rights are less restricted at internal permanent checkpoints. For example, at international border checkpoints, customs officials are authorized to conduct warrantless searches of individuals if the official has reasonable cause to suspect the individual should not be admitted into the United States, whereas Border Patrol agents are required to obtain consent or probable cause to justify detention exceeding the routine questioning at permanent and temporary interior immigration checkpoints. *See* 8 U.S.C. § 1357(c)(2012); *see also* *United States v. Martinez-Fuerte*, 428 U.S. 543, 566–67 (1976).

<sup>59</sup> 428 U.S. 543 (1976).

<sup>60</sup> *Id.* at 566. The Court reasoned that the stops were less invasive than roving patrol seizures (discussed below), the impact on traffic was minimal (for example, due to the location and structure of the checkpoint, motorists are less likely to be taken by surprise), and the operation of the checkpoints "involve less discretionary enforcement activity" decreasing the potential for abuse by inspecting officers. *Id.* at 559.

<sup>61</sup> *Id.* at 561.

<sup>62</sup> *United States v. Hernandez*, 739 F.2d 484, 487 (9th Cir.1984).

based on “less than reasonable suspicion.”<sup>63</sup> According to the Court in *Martinez-Fuerte*, referral to secondary inspection is justified even if “made largely on the basis of apparent Mexican ancestry[.]”<sup>64</sup> Similar to the justification behind permanent or temporary checkpoints, the Court reasoned that referral to secondary inspection was not overly stigmatizing or intrusive, as alleged by the defendant, if the sole purpose was consistent with conducting brief questioning regarding immigration status.<sup>65</sup> Consent or probable cause is required in order to justify any detention beyond the routine immigration stop or search.<sup>66</sup>

According to the ACLU, the last time the Border Patrol disclosed immigration checkpoint information was in fiscal year 2008, where they reported operating 128 checkpoints nationwide.<sup>67</sup> That number has likely increased, as *The Arizona Republic* reported that CBP operated approximately 170 checkpoints nationwide in February 2014.<sup>68</sup> While CBP has reportedly refused to specify the location and number of operating immigration checkpoints, based on research conducted by *The Arizona Republic*, the Border Patrol likely has the ability to operate up to 200 checkpoints.<sup>69</sup>

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<sup>63</sup> *Martinez-Fuerte*, 428 U.S. at 563.

<sup>64</sup> *See id.* at 563–67 (stating that “even if it be assumed that [secondary] referrals are made largely on the basis of apparent Mexican ancestry, [the Court] perceive[d] no constitutional violation”).

<sup>65</sup> *Id.* at 560.

<sup>66</sup> *Id.* at 567.

<sup>67</sup> U.S. BORDER PATROL INTERIOR CHECKPOINTS: FREQUENTLY ASKED QUESTIONS, AM. C.L. UNION BORDER LITIGATION PROJECT 1 (Nov. 2014), <https://www.aclusandiego.org/wp-content/uploads/2014/11/Border-Patrol-Checkpoint-FAQs.pdf>.

<sup>68</sup> Bob Ortega, *Some in Town to Monitor Border Patrol Checkpoint*, AZ CENT. (Feb. 26, 2014), <http://www.azcentral.com/news/arizona/articles/20140225arizona-town-monitor-border-patrol-checkpoint.html>.

<sup>69</sup> *Id.*

## 2. Roving Patrol Stops

Unlike temporary or permanent immigration checkpoints that allow stops of motorists without any level of suspicion, Border Patrol agents must have at least *reasonable suspicion* that the vehicle contains individuals who could potentially be in the United States without lawful status in order to conduct a roving patrol stop.<sup>70</sup> Furthermore, absent consent or probable cause, the scope of the roving patrol stop must be limited to inquiry about the citizenship and immigration status of the driver and passengers, and to an explanation of “suspicious circumstances”;<sup>71</sup> no suspicionless search is permitted.

## 3. The Function of Drug-Dogs at Immigration Checkpoints

Drug-dogs are permitted at stops lawful at their inception as long as their use does not extend the stop beyond its permitted scope or absent additional suspicion.<sup>72</sup> In a recent Ninth Circuit Court of Appeals case, the court

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<sup>70</sup> In *Terry v. Ohio*, a reasonable suspicion was formed if the officer could “‘point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant’ a belief that his safety or that of others is in danger.” Similar to a *Terry* stop, the roving patrol “stop and inquiry must be ‘*reasonably related in scope*’” to the Border Patrol’s original reason for the stop. *United States v. Brignoni-Ponce*, 422 U.S. 873, 880–82 (1975) (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). The Court articulated the following factors to support a stop based on reasonable suspicion: “(1) characteristics of the area in which [Border Patrol agents] encountered the vehicle; (2) its proximity to the border; (3) the usual patterns of traffic on the particular road; (4) previous experience with alien traffic; (5) information about recent illegal border crossings in the area; (6) the driver’s behavior; (7) aspects of the vehicle itself; and (8) the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut.” *Id.* at 885. However, in *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 (9th Cir. 2000), the Ninth Circuit held generally that “Hispanic appearance” is not an “appropriate factor.”

<sup>71</sup> *Brignoni-Ponce*, 422 U.S. at 881–82.

<sup>72</sup> See *Rodriguez v. United States*, 135 S. Ct. 1609, 1612 (2015) (holding that a traffic stop prolonged for seven to eight minutes to allow a drug-dog to walk around the vehicle was unconstitutional); see also *Illinois v. Caballes*, 543 U.S. 405, 409 (2005); see also *United States v. Machuca-Barrera*, 261 F.3d 425 (5th Cir. 2001). The court in that case clarified that “while a drug-dog sniff is not a search, it is beyond the justifying scope of



vacated a conviction due to the invalidity of a drug-dog search and remanded to the district court to determine whether the “prosecutors [could] establish the reliability of the trained canine[.]”<sup>73</sup> In that case, the defendant alleged that the agent misguided the dog.<sup>74</sup> Poorly trained handlers can also be the source of drug-dog inaccuracies.<sup>75</sup>

Nevertheless, seizures extended “beyond the time reasonably required to complete” the original stop<sup>76</sup> are not uncommon in border regions. In some instances, like that of Ms. Josemaria’s,<sup>77</sup> the act of retrieving the drug-dog to conduct the routine sniff (the process of walking the dog around the vehicle) is not supported by the requisite suspicion, or the drug-dog “alert” itself is tainted.<sup>78</sup> Drug-dogs are used at Border Patrol checkpoints and during roving patrol stops, and often unlawfully prolong the detentions, and justify the conditions for Border Patrol agents to conduct an unlawful search.<sup>79</sup> In the process, liberty, privacy, and property rights of individuals’ subject to these searches are violated.

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an immigration stop. Thus, Border Patrol agents may only conduct a drug-dog sniff if it does not lengthen the stop or if they obtain consent.” *Id.* at 432 n.21.

<sup>73</sup> *Court Vacates Arizona Conviction for Invalid Search*, AZ CENT. (Aug. 8, 2013), <http://www.azcentral.com/news/arizona/free/20130808arizona-invalid-dog-search-case-ruling.html?odyssey=obinsite>.

<sup>74</sup> *Id.*

<sup>75</sup> Mark Derr, *With Dog Detectives, Mistakes Can Happen*, N.Y. TIMES (Dec. 24, 2002), <http://www.nytimes.com/2002/12/24/science/with-dog-detectives-mistakes-can-happen.html>.

<sup>76</sup> *Caballes*, 543 U.S. at 407 (citing *United States v. Jacobsen*, 466 U.S. 109, 124 (1984)).

<sup>77</sup> Letter 1 from James Lyall, *supra* note 1, at 4.

<sup>78</sup> These scenarios are not unheard of among communities militarized by law enforcement. For example, in Jay-Z’s rap single *99 Problems*, released while *Caballes* was pending before the Supreme Court, Jay-Z describes a scenario in which he is racially profiled and pulled over by a police officer, and after Jay-Z declines to provide consent for a search of his vehicle, the officer responds, “We’ll see how smart you are when the [canine] come.” JAY-Z, *99 PROBLEMS* (Roc-A-Fella Records, 2003).

<sup>79</sup> See generally *Record of Abuse*, *supra* note 9, at 2–3; Letter 2 from James Lyall, *supra* note 15, at 4–11 (describing several search and seizure incidents at an immigration checkpoint without any inquiry into the individual’s citizenship status).

### III. HOW UNCHECKED DRUG-DOG ALERTS CONTRIBUTE TO CIVIL RIGHTS VIOLATIONS IN THE 100-MILE BORDER ZONE

This section provides a brief overview of CBP's Canine Program, the standards that drug-dogs are held to at immigration checkpoints, and the effect on the community. It also provides documented incidents, like that of Ms. Josemaria, where drug-dog use further violated individual civil rights at immigration checkpoints.

#### A. An Overview of the Customs and Border Protection Canine Program

The CBP Canine Program was established in October 2009.<sup>80</sup> The Canine Program shares the same broad and ambiguous goals as CBP: "terrorist detection and apprehension" and "detection and seizure of controlled substances and other contraband."<sup>81</sup> Additionally, with over 1,500 canine teams, the CBP Canine Program (Canine Program) is the largest drug-dog enforcement unit in the nation.<sup>82</sup> The Canine Program trains dogs to identify drugs and people,<sup>83</sup> and includes programs and training courses such as, "Concealed Human and Narcotic Detection," "Search and Rescue," "Tracking/Trailing," "Special Response," "Canine Currency/Firearms Detection," and "Human Remains Detection/Cadaver."<sup>84</sup> Only limited information exists online about the details of the Canine Program.

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<sup>80</sup> *Canine Program History*, U.S. CUSTOMS & BORDER PROTECTION, <http://www.cbp.gov/border-security/along-us-borders/canine-program/history-3> (last visited June 5, 2016).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Fernanda Echevaria, *The Sniff Patrol: Border Patrol Dogs Find Drugs, Humans*, TUCSON CITIZEN (Aug. 11, 2008), [http://webcache.googleusercontent.com/search?q=cache:cj\\_ywM9fGE0J:tucsoncitizen.com/morgue/2008/08/11/93299-the-sniff-patrol-border-patrol-dogs-find-drugs-humans/+&cd=2&hl=en&ct=clnk&gl=us&client=firefox-a](http://webcache.googleusercontent.com/search?q=cache:cj_ywM9fGE0J:tucsoncitizen.com/morgue/2008/08/11/93299-the-sniff-patrol-border-patrol-dogs-find-drugs-humans/+&cd=2&hl=en&ct=clnk&gl=us&client=firefox-a).

<sup>84</sup> *Id.*

*B. The Deference to Drug-Dogs Supports the Culture of Impunity Surrounding the Border Patrol*

Courts generally regard drug-dogs as sufficient indicators of contraband and rarely question their reliability, which in effect grants more power to handlers, in this case Border Patrol agents. The Ninth Circuit has held that once an individual has cleared the initial immigration inspection at a checkpoint, an agent cannot extend the length of the detention beyond the immigration scope to complete a drug-dog sniff absent a showing of “articulable suspicion or a minimal showing of suspicion.”<sup>85</sup> In other circuits, courts minimize the need for drug-dog accuracy in search and seizure procedures, which in turn may lead to extended stops that may or may not be based on suspicion. For example, the Fifth Circuit confusingly held that “a showing of a dog’s reliability is not required if probable cause is developed on site as a result of a dog sniff of a vehicle,” perpetuating the reasoning that the fruits of the search outweigh the legality of the procedure.<sup>86</sup> Similarly, other circuits have adopted the sweeping idea that a drug-dog handler’s testimony under oath regarding the dog’s training and certification is sufficient to verify the drug-dog’s reliability.<sup>87</sup> In the Sixth Circuit, “production of a dog’s performance and training records is not

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<sup>85</sup> *United States v. Preciado-Robles*, 964 F.2d 882, 884 (9th Cir. 1992) (quoting *United States v. Taylor*, 934 F.2d 218, 221 (9th Cir. 1991)) (finding that the government’s showing that the driver became increasingly nervous during questioning was sufficient to establish the requisite suspicion).

<sup>86</sup> *United States v. Williams*, 69 F.3d 27, 28 (5th Cir. 1995).

<sup>87</sup> *See United States v. Stevenson*, 274 F. Supp. 2d 819, 819 (S.D. Tex. 2002); *see, e.g., United States v. Sundby*, 186 F.3d 873, 876 (8th Cir. 1999) (finding dog’s reliability established by affidavit only stating dog’s training and certification to detect contraband; detailed accounting of dog’s track record and education not required); *see also United States v. Outlaw*, 134 F.Supp.2d 807, 814 (W.D. Tex. 2001); *United States v. Diaz*, 25 F.3d 392, 395–96 (6th Cir. 1994) (finding that the dog’s training and reliability were established by the district court’s determination of the handler’s credible testimony as to the dog’s training, certification, and experience. “This court has indicated that testimony is sufficient to establish a dog’s reliability in order to support a valid sniff.”).

necessary to establish a dog's training and reliability."<sup>88</sup> The reliance on drug-dog capabilities and far-reaching extension of power to drug-dog handlers fosters the barriers to challenging civil rights violations and immunizes the actions of the Border Patrol.

*C. Documented Instances Drug-Dogs Causing or Contributing to Civil Rights Violations Within the 100-Mile Border Zone*

The geographic area and communities subject to suspicionless stops and questioning by Border Patrol, and the discretion afforded to Border Patrol agents, creates greater potential for abuse. The ACLU gathered the following examples of unlawful searches and seizures at various immigration checkpoints where drug-dogs were involved along the southwest border: (1) drug-dogs were used to extend searches despite the lack of reasonable suspicion required in roving patrol stops; (2) drug-dogs were used at immigration checkpoints to extend searches purely for possession of drugs; and (3) drug-dogs were used at immigration checkpoints to prolong searches beyond the limited scope of immigration questioning.<sup>89</sup>

Border Patrol has used drug-dogs to unlawfully extend *roving patrol stops* despite the lack of reasonable suspicion required to justify the seizure in the first place. For example, on October 9, 2013, the ACLU filed an administrative complaint with the Department of Homeland Security requesting investigation of various unlawful roving patrol stops by Border Patrol conducted in southern Arizona.<sup>90</sup> In one incident, Bryan Barrow, a US citizen and resident of Oregon, was returning from a hike when he found a park ranger peering into his vehicle.<sup>91</sup> Even though Mr. Barrow

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<sup>88</sup> *Stevenson*, 274 F.Supp.2d at 822.

<sup>89</sup> *Record of Abuse*, *supra* note 9, at 2.

<sup>90</sup> See Letter 1 from James Lyall, *supra* note 1, at 1.

<sup>91</sup> *Id.* at 6.

cooperated with the ranger, the ranger interrogated Mr. Barrow regarding whether there was marijuana in the vehicle and called in additional rangers for assistance.<sup>92</sup> Eventually, a Border Patrol agent with a drug-dog arrived and began inspecting the vehicle.<sup>93</sup> Mr. Barrow was never asked for permission to search his vehicle, and he objected to the search.<sup>94</sup> The dog never visibly alerted to the vehicle, but the agent alleged that the drug-dog was “set off,” thus permitting the agent to initiate the search.<sup>95</sup> The dog caused significant damage to Mr. Barrow’s vehicle, totaling close to \$700 worth of damage; however, when Mr. Barrow’s insurance company submitted for reimbursement, the Border Patrol denied the claim.<sup>96</sup> With the dog search, the total detention lasted approximately four hours, and the Border Patrol found no drugs.<sup>97</sup> This case demonstrates an instance where the Border Patrol used a drug-dog to conduct general law enforcement duties beyond the scope of the Border Patrol: there was no inquiry or suspicion related to Mr. Barrow’s immigration status and thus no need to contact the Border Patrol, and no drug-dog “alert” was observed by Mr. Barrow. The Department of Homeland Security has failed to investigate these complaints.<sup>98</sup>

In a second administrative complaint against the Department of Homeland Security on January 15, 2014, the ACLU sought investigation into abuses at *interior immigration checkpoints* by Border Patrol.<sup>99</sup> In that complaint, *nine out of the twelve* documented incidents involved drug-dogs,

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<sup>92</sup> *Id.* at 6–7.

<sup>93</sup> *Id.* at 7.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> E-mail from James Lyall, Staff Attorney, ACLU of Arizona, to Yessenia Medrano (Mar. 24, 2015) (on file with author).

<sup>99</sup> Letter 1 from James Lyall, *supra* note 1.

and in *eight of the nine incidents*, the drug-dog either falsely alerted or the Border Patrol agent appeared to direct the drug-dog to alert.<sup>100</sup>

In some incidents listed in the January 2014 complaint, Border Patrol agents used dogs to prolong detention or to conduct searches for evidence of criminal law violations without ever inquiring into individuals' citizenship or immigration status. During a December 18, 2013, incident at the well-known Arivaca temporary checkpoint in Amado, Arizona, occupants in a vehicle passing through the checkpoint were referred to secondary inspection for no apparent reason.<sup>101</sup> A Border Patrol agent unlawfully prolonged their detention by making them wait until a drug-dog arrived to conduct a search because the occupants declined to consent to a search.<sup>102</sup> The individuals were detained for 30 minutes, and they were never asked about their citizenship status.<sup>103</sup>

In another incident, a family was passing through an immigration checkpoint east of the Tohono O'odham Reservation in Arizona on August 19, 2013.<sup>104</sup> The family was immediately directed to secondary inspection without any questions regarding citizenship or any other explanation besides an alleged drug-dog alert.<sup>105</sup> However, no drug-dog was nearby when the agent claimed that there was an "alert."<sup>106</sup>

One woman reported two incidents where she was detained due to false drug-dog alerts while passing through the same checkpoint in Tombstone, Arizona, that led to no findings of contraband.<sup>107</sup> First, on November 8, 2012, she was detained for 45 minutes due to an alleged drug-dog "alert."<sup>108</sup>

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<sup>100</sup> *Id.* at 9–11 (emphasis added).

<sup>101</sup> *Id.* at 4–5.

<sup>102</sup> *Id.* at 4–5.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 8.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 10.

<sup>108</sup> *Id.* at 10.

Then, on January 1, 2013, she was referred to secondary inspection after an agent walked a drug-dog around her vehicle, tapped on the trunk of her vehicle, and said there was a “hit.”<sup>109</sup> The woman’s father is a retired sheriff’s deputy who has extensive experience with police dogs and stated that he had witnessed improper handling of the dogs at that checkpoint, and suspects his daughter was racially profiled due to her possible “Latina” appearance.<sup>110</sup>

Lastly, one man was referred to secondary inspection on three different occasions at checkpoints in Arizona due to alleged dog “alerts.”<sup>111</sup> On the first occasion, on December 21, 2012, he was directed to a secondary inspection based on alleged drug-dog “alert,” and the dog was allowed to search the inside of his vehicle despite his objections, destroying some business papers in the process.<sup>112</sup> On the second occasion on December 28, 2012, he was directed to secondary inspection due to an alleged drug-dog “alert,” and he was detained for ten minutes.<sup>113</sup> On the third occasion on October 24, 2012, he was directed to secondary inspection due to a drug-dog “alert,” and while in secondary inspection, the agent continued to command the dog to “hit” but nothing was found.<sup>114</sup> These instances demonstrate the power of inaccurate “alerts” to infringe on individuals’ persons, property, and privacy, as well as abuse of authority by Border Patrol agents through the use of drug-dogs.

Furthermore, in some cases, drug-dogs were used to prolong a search even though the agents had completed their immigration search, and no apparent additional requisite suspicion existed. In an incident on December 2, 2013, involving the Arivaca checkpoint, an individual was referred to

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<sup>109</sup> *Id.* at 10.

<sup>110</sup> *Id.* at 10 n.20.

<sup>111</sup> *Id.* at 10–11.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

secondary inspection after the Border Patrol agent had verified his citizenship status.<sup>115</sup> At secondary inspection, the Border Patrol agent directed the individual to exit the vehicle and directed a drug-dog inside the vehicle.<sup>116</sup> When the driver of the vehicle objected to the search, the agent cursed at him; the individual was detained for 30 minutes.<sup>117</sup>

In another incident on November 29, 2013, at a checkpoint between California and Arizona, after confirming their US Citizenship, two individuals were referred to secondary inspection where they were again asked about their citizenship status.<sup>118</sup> The individuals were asked to exit the vehicle for no apparent reason, and an agent arrived with a drug-dog and circled the vehicle.<sup>119</sup> Despite the fact that the drug-dog alerted to the vehicle next door, the agent said the dog hit their car and Border Patrol needed to conduct a search of the vehicle.<sup>120</sup> When the individuals objected, they were taken to holding cells where they were detained for 45 minutes before being released.<sup>121</sup> Department of Homeland Security has not responded to this complaint filed in January 2014.<sup>122</sup>

#### IV. ABUSES AT IMMIGRATION CHECKPOINTS AND OUTDATED 100-MILE BORDER ZONE JURISPRUDENCE CALLS FOR THE ELIMINATION OF DRUG-DOGS AT IMMIGRATION CHECKPOINTS

Courts, policy makers, and citizens continue to allow an increased deference to the Border Patrol in the interest of national security.<sup>123</sup> CBP

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<sup>115</sup> *Id.* at 6.

<sup>116</sup> *Id.* at 7.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 8.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> E-mail from James Lyall, *supra* note 98.

<sup>123</sup> *See generally* U.S. CUSTOMS & BORDER PATROL, VISION AND STRATEGY 2020 (2015), <http://www.cbp.gov/sites/default/files/documents/CBP-Vision-Strategy-2020.pdf> (emphasizing the range of work and tactics of CBP to protect national security).



and the Canine Program's broad and ambiguous goal of "terrorist detection and apprehension" provide the Border Patrol with little guidance and accountability.<sup>124</sup> However, the cost of securing our borders is not without civil rights violations. Even if a drug-dog alert is sufficient to establish probable cause to search, it does not justify the fact that the liberty of many border residents and travelers is rendered nonexistent when they are detained for lengthy periods as a result of a false drug-dog alert. In some documented roving patrol cases discussed earlier, the requisite reasonable suspicion justifying the initial stop conducted by the Border Patrol is lacking, making the subsequent drug-dog "alert" and search, whether based on probable cause or not, unlawful.<sup>125</sup> In other roving patrol instances, detentions are unjustly prolonged beyond the permissible scope because individuals are forced to wait for a drug-dog to arrive to conduct a search.<sup>126</sup>

As discussed, cases have been documented where the Border Patrol has used drug-dogs to allege "alerts" that end up being false.<sup>127</sup> Additionally, false alerts can "result from conscious and unconscious signals from the handler, essentially causing the canine to suspect contraband."<sup>128</sup> An agent is unable to determine whether the dog is alerting to drugs or humans, thus making it easier for Border Patrol to veil their primary narcotics interdiction

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<sup>124</sup> *Canine Program History*, U.S. CUSTOMS & BORDER PROTECTION, <http://www.cbp.gov/border-security/along-us-borders/canine-program/history-3> (last visited June 5, 2016).

<sup>125</sup> Letter 1 from James Lyall, *supra* note 1, at 6.

<sup>126</sup> *See Id.* at 6–10.

<sup>127</sup> *See* Jorge G. Aristotelidis, *Trained Canines at the U.S.-Mexico Border Region: A Review of Current Fifth Circuit Law and a Call for Change*, 5 SCHOLAR 227, 239 (2003); *see also Know Your Rights with Border Patrol*, AM. C.L. UNION, <http://www.acluaz.org/sites/default/files/documents/ACLU%20Border%20Rights%20ENGLISH.pdf> (last visited Nov. 29, 2014).

<sup>128</sup> *See* Aristotelidis, *supra* note 127, at 239; *see also Know Your Rights with Border Patrol*, AM. C.L. UNION, <http://www.acluaz.org/sites/default/files/documents/ACLU%20Border%20Rights%20ENGLISH.pdf> (last visited Nov. 29, 2014); *see also* Lisa Lit et al., *Handler Beliefs Affect Scent Detection Dog Outcomes*, 14 ANIMAL COGNITION, 387, 387–394 (2011).

priority, because a drug-dog only has one physical “alert.”<sup>129</sup> Due to the potential for false drug-dog alerts and ability of handlers to abuse their power and manipulate an “alert,” a drug-dog “alert” should not be sufficient to establish probable cause to search.

*A. Arguments For and Against the Canine Program*

The political and social climate in the United States, as well as the continued “War on Drugs” and “War on Terror,” may provide policy makers and courts with sufficient support for the Canine Program.<sup>130</sup> Detection and seizure of controlled substances and other contraband<sup>131</sup> is a goal of the program, and based on available data, the program has been successful in interdicting unlawful narcotics in the US. For example,

from April 2006 through June 2007, US Customs and Border Protection had procured 322 untrained canines . . . while only 3.85% of the Office of Border Patrol’s 13,905 agents were canine handlers, they were credited with 60% of narcotic apprehensions and 40% of all other apprehensions in [fiscal year] 2007.<sup>132</sup>

More recently, in fiscal year 2013, “CBP Canine Teams were responsible for apprehending 55,604 [undocumented immigrants], and seizing 403,478 pounds of narcotics.”<sup>133</sup>

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<sup>129</sup> Motion to Reconsider Court’s Tentative Ruling Upholding Stop and Referral to Secondary Inspection without Reasonable Suspicion, *State of Arizona v. David Frederick Wakeling*, No. S1400CR2007-00316, (Ariz. Sup. Ct. Apr. 8, 2008), at 5, [http://www.k9consultantsofamerica.com/training\\_information/yuma1.pdf](http://www.k9consultantsofamerica.com/training_information/yuma1.pdf).

<sup>130</sup> Jim Giermanski, *DHS, Drug Interdiction and Common Sense*, CSO ONLINE (Apr. 3, 2009), <http://www.csoonline.com/article/2123915/compliance/dhs--druginterdiction-and-common-sense.html>.

<sup>131</sup> *Id.*

<sup>132</sup> U.S. DEP’T OF HOMELAND SEC., A REVIEW OF U.S. CUSTOMS & BORDER PROTECTION’S PROCUREMENT OF UNTRAINED CANINES 1 (Apr. 2008), [https://www.oig.dhs.gov/assets/Mgmt/OIG\\_08-46\\_Apr08.pdf](https://www.oig.dhs.gov/assets/Mgmt/OIG_08-46_Apr08.pdf).

<sup>133</sup> While not specific, this statistic likely includes canines at all immigrant checkpoints. *Performance and Accountability Report: Fiscal Year 2013*, U.S. CUSTOMS & BORDER

However, aside from CBP's ever-increasing budget and the cost associated with running the Canine Program,<sup>134</sup> communities appear to be pushing away from the War on Drugs through legislative reforms.<sup>135</sup> For example, 18 states have passed forms of legislation decriminalizing marijuana,<sup>136</sup> the primary drug seized at border checkpoints.<sup>137</sup> If marijuana use continues to be decriminalized, this could further decrease the narcotics smuggling in the southern border region and lessen the need for drug-dogs under the national security rationale. Additionally, the fact that drug-dogs only have one "alert"<sup>138</sup> is relevant to whether marijuana use is legal because drug-dogs cannot distinguish between the type of drug an individual is carrying, thus increasing the potential for drug-dog error. To address this issue, some local police departments have removed drug-dogs from their police work to eliminate the possibility of conducting an illegal search.<sup>139</sup> Furthermore, because the Border Patrol does not publicly disclose its statistics on individual checkpoints, the amount and types of narcotics seized at various checkpoints are unknown to the public, even though that

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PROTECTION 19 (2013),

[http://www.cbp.gov/sites/default/files/documents/FY%202013%20Final%20PAR\\_0.pdf](http://www.cbp.gov/sites/default/files/documents/FY%202013%20Final%20PAR_0.pdf).

<sup>134</sup> Motion to Reconsider, *supra* note 129, at 5.

<sup>135</sup> *State Marijuana Laws Map*, GOVERNING,

<http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html> (last visited Mar. 5, 2016).

<sup>136</sup> Alaska, California, Colorado, Connecticut, District of Columbia, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New York, North Carolina, Ohio, Oregon, Rhode Island, and Vermont. *See* NORML, <http://norml.org/states> (last visited Mar. 22, 2015).

<sup>137</sup> SECTOR PROFILE-FISCAL YEAR 2014, U.S. BORDER PATROL (2014),

<http://www.cbp.gov/sites/default/files/documents/USBP%20Stats%20FY2014%20sector%20profile.pdf>.

<sup>138</sup> Motion to Reconsider, *supra* note 129, at 5.

<sup>139</sup> Everton Bailey Jr., *Marijuana Sniffing Dogs on Way*, OREGON LIVE (Jan. 31, 2015), [http://www.oregonlive.com/pacific-northwest-news/index.ssf/2015/01/marijuana-sniffing\\_dogs\\_on\\_way.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2015/01/marijuana-sniffing_dogs_on_way.html).

information could assist in determining which temporary and permanent checkpoints are actually “necessary.”<sup>140</sup>

Moreover, the statute governing the 100-mile border zone rule and the Fourth Amendment jurisprudence granting wide search and seizure discretion to the Border Patrol are outdated. As the ACLU points out, the statute authorizing Border Patrol to conduct immigration checkpoints throughout border communities was enacted at a time when there were only 1,000 Border Patrol agents; 21,000 agents patrol our borders today.<sup>141</sup> Fourth Amendment precedent is often focused on the act committed rather than the private and public interests at stake and fails to take into account the impact that those decisions will have on the general public as a result.

Allowing Border Patrol agents to use drug-dogs to initiate and conduct searches and seizures is a grant of additional law enforcement power that the Border Patrol is unequipped and untrained to take on, in part because of the unreliability of drug-dogs. For example, in Mr. Barrow’s incident documented in the October 23, 2013, ACLU administrative complaint, park rangers alerted Border Patrol to a situation where no immigration inquiry (or criminal) was apparently at issue.<sup>142</sup> This is just one example demonstrating the increasing reliance on Border Patrol to execute general law enforcement tasks that are outside of their primary function.

Courts have emphasized that drug-dogs are more likely to be reliable due to training, and the sniff does not implicate the privacy concerns involved in a search.<sup>143</sup> Some have argued that dogs are better at identifying a particular

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<sup>140</sup> See Ted Robbins, *In Arizona, Citizens Keep Close Eye on Immigration Checkpoint*, NPR (Mar. 29, 2014), <http://www.npr.org/2014/03/29/296297733/in-arizona-citizens-keep-close-eye-on-immigration-checkpoint>.

<sup>141</sup> *Know Your Rights: The Government’s 100-Mile “Border Zone,”* AM. C.L. UNION, <https://www.aclu.org/know-your-rights-governments-100-mile-border-zone-map> (last visited Mar. 5, 2016).

<sup>142</sup> Letter 1 from James Lyall, *supra* note 1, at 6–7.

<sup>143</sup> See *Illinois v. Caballes*, 543 U.S. 405, 409 (2005); see also *United States v. Place*, 462 U.S. 696, 707 (1983) (stating that a “sniff discloses only the presence or absence of

odor than current technology.<sup>144</sup> Some might also argue that, while drugs may be inaccurate at times, they do not possess the same biases humans or their handlers do.<sup>145</sup>

However, dogs falsely alert due to individual error. For example, in an article from 2008, the coordinator for the K-9 unit in the Tucson, Arizona, Border Patrol sector said that, “checkpoints are the most difficult environment for dogs to work in because of the distractions.”<sup>146</sup> At one of the busiest checkpoints where at least one dog is on duty all day, “there’s wind, distracting odors, agents working around them, other dogs and, of course, the 1,500 vehicles that drive by every hour[.]”<sup>147</sup> Additionally, working in dry and hot climates such as the Southwest can dry out the mucus in the dog’s nose, thus interfering with their accuracy rate.<sup>148</sup> Dogs enjoy being rewarded and may provide false alerts for the rewards.<sup>149</sup> The Border Patrol has data indicating false alerts by drug-dogs.<sup>150</sup>

Additionally, while *Illinois v. Caballes* held that a drug-dog sniff at a stop was acceptable as long as the sniff was within the scope of the stop, it

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narcotics . . . the information obtained is limited,” which “also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods”).

<sup>144</sup> Mark Derr, *With Dog Detectives, Mistakes Can Happen*, N.Y. TIMES (Dec. 24, 2002), <http://www.nytimes.com/2002/12/24/science/with-dog-detectives-mistakes-can-happen.html>.

<sup>145</sup> See *U.S. v. Stevenson*, 274 F.Supp.2d 824 (S.D. Tex. 2002) (stating that “the use of canine inspections cannot be underestimated in today’s diverse society, when all of us—and particularly those involved in law enforcement—are concerned about ethnic profiling . . . canines provide a means of crime detection that is neutral as to race, ethnicity, gender, age, nationality and other sensitive variables”).

<sup>146</sup> Fernanda Echavarri, *Sniff Patrol: Border Patrol Dogs Find Drugs, Humans*, TUCSON CITIZEN (Aug. 11, 2008), [http://webcache.googleusercontent.com/search?q=cache:cj\\_ywM9fGE0J:tucsoncitizen.com/morgue/2008/08/11/93299-the-sniff-patrol-border-patrol-dogs-find-drugs-humans/+&cd=2&hl=en&ct=clnk&gl=us&client=firefox-a](http://webcache.googleusercontent.com/search?q=cache:cj_ywM9fGE0J:tucsoncitizen.com/morgue/2008/08/11/93299-the-sniff-patrol-border-patrol-dogs-find-drugs-humans/+&cd=2&hl=en&ct=clnk&gl=us&client=firefox-a).

<sup>147</sup> *Id.*

<sup>148</sup> Derr, *supra* note 144.

<sup>149</sup> *Id.*

<sup>150</sup> Echavarri, *supra* note 146.

is unclear where the scope of the stop ends or whether a dog is unreasonably prolonging the stop due to the lack of finality from the courts or regulations defining “reasonable time.”<sup>151</sup> Along those lines, allowing a dog to search too long in one area may increase errors.<sup>152</sup> While mixed research exists on whether drug-dogs carry biases towards race or ethnicity, their handlers who are ultimately in control may carry those biases.<sup>153</sup> Also, the fact that courts tend to defer to the drug-dog’s handler to assess “reliability” of a drug-dog alert further serves to blur the lines of individual rights and protections.<sup>154</sup> Thus, keeping a dog stationed in an area or with a handler who tends to be more suspicious of people who appear to be Latinx<sup>155</sup> may pass that bias on to the dogs.

Questioning the Border Patrol agents’ actions, filing complaints with Border Patrol, and pursuing legal remedies are costly and inaccessible. For example, while researching the CBP complaint process, I submitted a standard test complaint on November 21, 2014, online with the US CBP Information Center.<sup>156</sup> I did not hear back until *June 8, 2015*, when I was sent the following response:

Your question was forwarded to the complaints team on June 05, 2015 for review. We regret the delay in receiving your email from the “Ask a Question” queue. Due to the length of time

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<sup>151</sup> Mike Riggs, *How Long Can a Cop Keep You After a Traffic Stop? No One’s Sure*, CITYLAB (Feb. 5, 2014), <http://www.citylab.com/commute/2014/02/how-long-can-cop-keep-you-pulled-over-after-traffic-stop-no-ones-sure/8293/>.

<sup>152</sup> Derr, *supra* note 144.

<sup>153</sup> See generally *Record of Abuse*, *supra* note 9, at 2; see also Lisa Lit et al., *supra* note 128, at 387–94.

<sup>154</sup> Jorge G. Aristotelidis, *Trained Canines at the U.S. – Mexico Border Region: A Review of Current Fifth Circuit Law and a Call for Change*, 5 THE SCHOLAR 236 (2003).

<sup>155</sup> The “x” represents gender neutrality and includes individuals who do not identify within the gender binary.

<sup>156</sup> E-mail from Officer Balero, CBP INFO Center, to Yessenia Medrano (June 8, 2015) (on file with the author).

it has been since you emailed; we are unsure if you still require a response. However, if you do, please write us back.<sup>157</sup>

In my experience speaking with border residents in the Southwest and Washington State, aggressive actions by Border Patrol agents have deterred individuals from questioning the Border Patrol agents' actions and motives, thus instilling a culture of fear among border residents and travelers. Some data, if documented, such as the amount of drugs interdicted or apprehensions at each specific checkpoint, may be available through Freedom of Information Act (FOIA) requests and lawsuits. However, those methods usually take time, may be costly, and are inaccessible due to other barriers.<sup>158</sup> Moreover, even if FOIA requests were filed, no guarantee exists that all of the information would be provided due to the lack of reporting conducted by CBP and the interest of the government to redact certain information.<sup>159</sup>

However, in Arivaca, Arizona, where a temporary immigration checkpoint has been operating for seven years on a road that does not lead to the border,<sup>160</sup> the community has taken monitoring of the checkpoint into their own hands and has documented unlawful detentions and racial discrimination, among other data.<sup>161</sup> With the demonstrated lack of accountability and culture of impunity, there is little incentive to file complaints online due to fear of immigration enforcement, among other consequences.<sup>162</sup>

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<sup>157</sup> *Id.*

<sup>158</sup> Such as, lack of access to resources and lack of knowledge of individual rights within the border zone.

<sup>159</sup> See generally *Record of Abuse*, *supra* note 9, at 4, 11. CBP refused to turn over all info and most of it was redacted.

<sup>160</sup> Ted Robbins, *In Arizona, Citizens Keep Close Eye on Immigration Checkpoint*, NPR (Mar. 29, 2014, 4:36 PM), <http://www.npr.org/2014/03/29/296297733/in-arizona-citizens-keep-close-eye-on-immigration-checkpoint>.

<sup>161</sup> *Id.*

<sup>162</sup> Daniel E. Martínez et al., *No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse*, AM. IMMIGR. COUNS. (May 4, 2014),

Furthermore, there are limited free or low-cost legal services in many border communities,<sup>163</sup> thus legal services organizations must be strategic in the battles they choose to pursue. A canine search of a vehicle can cause property damage and be a completely traumatizing experience, especially to particularly vulnerable populations such as small children, people with disabilities, and people with allergies.<sup>164</sup> Yet, the damages available may not be worth the trouble of filing a legal complaint.<sup>165</sup> Government resources should be allotted to helping border residents pursue those monetary damages even if they are minimal to provide some accountability to the victims of border patrol abuses; justice is not always defined by the amount of money that will be won. What may seem like a small amount of money to remedy violations of civil rights is relative, and this sort of cost-benefit analysis demonstrates how we continue to marginalize members of our communities due to economic status.

#### V. WAYS THE GOVERNMENT, THE COURTS, LEGAL ADVOCATES, AND COMMUNITY MEMBERS CAN TAKE ACTION TO DECREASE CIVIL RIGHTS ABUSES IN BORDER REGIONS

In order to deter abuses and reacquire border community rights, I recommend that either CBP or Congress eliminate the use of drug-dogs at interior immigration checkpoints. Removing drug-dogs would help deter inaccurate and unlawful searches and seizures by the Border Patrol, and possibly place greater demand on CBP to properly train Border Patrol

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<http://www.immigrationpolicy.org/special-reports/no-action-taken-lack-cbp-accountability-responding-complaints-abuse>.

<sup>163</sup> *Directory of Pro Bono Programs*, AM. BAR ASS'N, <https://apps.americanbar.org/legalservices/probono/directory.html#> (last visited Mar. 5, 2016).

<sup>164</sup> *See Record of Abuse*, *supra* note 9, at 2, 5, 23.

<sup>165</sup> Radley Balko, *Federal Appeals Court: Drug dog That's Barely More Accurate than a Coin Flip is Good Enough*, WASH. POST (Aug. 4, 2015), <https://www.washingtonpost.com/news/the-watch/wp/2015/08/04/federal-appeals-court-drug-dog-thats-barely-more-accurate-than-a-coin-flip-is-good-enough/>.



agents on the law if they are unable to be as reliant on drug-dogs. The following programs could be implemented to help limit civil rights abuses at the border:

- (1) Customs and Border Protection can voluntarily end the Canine Program within the 100-mile border zone;
- (2) Courts can shift their focus towards decisions that protect civil rights, rather than diminishing them, by recognizing the US population's decreased desire to criminalize drugs and the reality of the immensely intrusive nature of drug-dog sniffs and searches;
- (3) Congress can pass a law prohibiting the use of drug-dogs at interior immigration checkpoints;
- (4) The US Government can redefine what "a reasonable distance" from the border means under 8 U.S.C. § 1357(a)(3) to scale the 100-mile border zone regulations back and limit the Border Patrol's authority;
- (5) The US Government can increase funding to legal advocates primarily in border communities to focus on border civil rights issues; and
- (6) Community members can continue organizing checkpoint monitoring systems to document the Border Patrol's activities and pressure the Border Patrol to comply with the law at immigration checkpoints.

First, CBP could voluntarily eliminate the Canine Program at internal immigration checkpoints to align more with the primary permissible source of authority governing immigration checkpoints—immigration enforcement. However, this solution is highly unlikely, given CBP's goals, boasting apprehension and unlawful drug interdiction data, and their annually increasing budget.<sup>166</sup> In the alternative, CBP can take steps to

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<sup>166</sup> See generally FY 2015 BUDGET AND PERFORMANCE SUMMARY (July 2014), [https://www.whitehouse.gov/sites/default/files/ondcp/about-content/fy2015\\_summary.pdf](https://www.whitehouse.gov/sites/default/files/ondcp/about-content/fy2015_summary.pdf) (highlighting CBP's budget increases and performance).

accurately report activities occurring at checkpoints and be more transparent about that data. For example, CBP can start by disclosing the total number and location of interior permanent and temporary immigration checkpoints, including the number of staff and drug-dogs at each checkpoint, and the hours of operation. As of 2014, CBP failed to report the total number of checkpoints operating within the 100-mile border zone, only acknowledging 35 permanent checkpoints while maintaining the capacity for 200.<sup>167</sup> Legal services organizations have had to resort to costly and time-consuming litigation to collect other basic information.<sup>168</sup> A culture of transparency among the Border Patrol could help foster a culture of trust among residents in border communities.

Second, courts can play a more active role in restoring the civil rights of the Fourth Amendment that they have consistently whittled down throughout case law. No drug exception exists in the Fourth Amendment's protection against unreasonable searches and seizures.<sup>169</sup> Yet courts have continued to embrace a lower regard for civil rights closer to the border—the Supreme Court went as far as authorizing to use of perceived “Hispanic” race or ethnicity to determine whether reasonable suspicion exists for the Border Patrol to conduct a roving patrol stop.<sup>170</sup>

While, dissents from precedential Fourth Amendment cases provide an extensive summary and critique on how the US Supreme Court has advocated for the government in the War on Drugs and now the War on

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<sup>167</sup> *Patrol Checkpoints Stir Public Backlash*, USA TODAY (June 7, 2014), <http://www.usatoday.com/story/news/nation/2014/06/07/border-patrol-checkpoints-stir-public-backlash/10113693/>.

<sup>168</sup> *See, e.g.*, Press Release, Am. Civil Liberties Union of Ariz., Residents of Arivaca, Ariz. Sue Border Patrol Over Right to Protest Checkpoint Operations (Nov. 20, 2014), <http://www.acluaz.org/issues/press-releases/2014-11/4961>.

<sup>169</sup> *City of Indianapolis v. Edmond*, 531 U.S. 31, 47–48 (2000).

<sup>170</sup> *See United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975); *but see United States v. Montero-Camargo*, 208 F.3d 1122, 1132 (9th Cir. 2000) (holding that in the Ninth Circuit, Hispanic appearance is an impermissible factor to rely on to develop a reasonable suspicion to conduct a stop).

Terror,<sup>171</sup> state courts and state legislators have greater flexibility to be more protective of individual rights and states. Community members should organize to advocate for greater rights under state constitutions. For example, while the US Supreme Court held that pretext stops were acceptable in *Whren v. United States*, the Washington State Supreme Court in *State v. Ladson* held that pretext stops violated Article I, Section 7 of the Washington State Constitution.<sup>172</sup> State courts and legislators can empower the community by creating law that protects individual rights rather than justifying the intrusions of rights by federal agents.

States and circuit courts set different standards that govern the rights of individuals in those jurisdictions against Border Patrol, which may contribute to the misinformation both on the part of residents and the Border Patrol about individual rights in those regions. Border communities could benefit from case law that provides clearer, but more protective, laws. As Justice Jackson stated in his dissenting opinion in *Brinegar v. United States*,

These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.<sup>173</sup>

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<sup>171</sup> See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543, 567–78 (1976) (Brennan, J., dissenting) (providing an extensive list of cases through from 1975–1976 whose holdings continuously weakened “Fourth Amendment protections against unreasonable searches and seizures”).

<sup>172</sup> *Whren v. United States*, 517 U.S. 806 (1996); *State v. Ladson*, 979 P.2d 833 (Wash. 1999).

<sup>173</sup> *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

Courts need to change their reasonableness balancing analysis to account for (1) the US public's increasing interest in decriminalization of drugs,<sup>174</sup> and (2) the real intrusive and discriminatory nature of drug-dogs at immigration checkpoints.<sup>175</sup>

Third, Congress could pass a law prohibiting the use of drug-dogs at interior immigration checkpoints. As demonstrated by documented complaints, civil rights violations in border communities due to the use of drug-dogs exist, but do not receive the media coverage or national attention.<sup>176</sup> Furthermore, many documented civil rights violations suggest that the Border Patrol is abusing its power at immigration checkpoints to focus its efforts on unlawful drug interdiction.<sup>177</sup> Marijuana is the largest drug seized at border checkpoints,<sup>178</sup> yet it is a drug that is becoming more commonly accepted for medicinal and recreational purposes across the nation.<sup>179</sup> The increasing legalization of marijuana has even inspired some local police departments to remove drug-dogs from their police work to eliminate the possibility of an unlawful search.<sup>180</sup> These factors combined

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<sup>174</sup> See generally DRUG POLICE ALLIANCE, APPROACHES TO DECRIMINALIZING DRUG USE AND POSSESSION 3–4 (Feb. 10, 2016), [https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA\\_Fact\\_Sheet\\_Approaches\\_to\\_Decriminalization\\_Feb2015\\_1.pdf](https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA_Fact_Sheet_Approaches_to_Decriminalization_Feb2015_1.pdf); see also *Taking Control: Pathways to Drug Policies that Work*, GLOBAL COMM'N ON DRUG POLICY (Sept. 2014), <http://www.gcdpsummary2014.com/#foreword-from-the-chair>.

<sup>175</sup> See generally *Record of Abuse*, *supra* note 9, at 2–3.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 3; see also Andrew Becker, *Four of Five Border Patrol Drug Busts Involve U.S. Citizens, Records Show*, THE CTR. FOR INVESTIGATIVE REPORTING (Mar. 26, 2013), <http://cironline.org/reports/four-five-border-patrol-drug-busts-involve-us-citizens-records-show-4312>; *About CBP*, U.S. CUSTOMS & BORDER PATROL, <http://www.cbp.gov/about> (last visited Feb. 24, 2016).

<sup>178</sup> U.S. CUSTOMS & BORDER PROTECTION, PERFORMANCE AND ACCOUNTABILITY REPORT FISCAL YEAR 2014, 100–01 (2014), [http://www.cbp.gov/sites/default/files/documents/CBP\\_DHS\\_2014%20PAR\\_508C.PDF](http://www.cbp.gov/sites/default/files/documents/CBP_DHS_2014%20PAR_508C.PDF).

<sup>179</sup> See, e.g., Chris Boyette & Jacque Wilson, *It's 2015: Is Weed Legal in Your State?*, CNN (Jan. 7, 2015), <http://www.cnn.com/2015/01/07/us/recreational-marijuana-laws/>.

<sup>180</sup> Bailey, *supra* note 139.

should persuade elected officials that drug-dogs at immigration checkpoints are problematic and the elimination of their use within the 100-mile border zone would help prevent some border civil rights violations.

Because border regions are particularly affected by the use of drug-dogs at immigration checkpoints, elected officials in those areas could consider leading the way in a call to action on the civil rights abuses occurring in their communities. Northern border communities like those in Washington State may be likelier leaders in the reform on drug-dog use by the Border Patrol because of their generally progressive culture,<sup>181</sup> and greater amount of legal services they can devote to litigating issues with the Border Patrol.<sup>182</sup> Furthermore, Washington State has legalized the recreational and medicinal use of marijuana, and because the Border Patrol has expanded throughout the US since September 11, 2001, parts of Washington State within the 100-mile border zone are not immune to civil rights violations caused by drug-dogs and the Border Patrol.<sup>183</sup>

Fourth, the regulations authorizing the scope and breadth of the 100-mile border zone can be reexamined and narrowed. Again, the regulations establishing the 100-mile border zone were created in the 1950s, at a time when approximately 1,100 Border Patrol agents policed our borders; today, over 21,000 Border Patrol agents patrol the 100-mile border zone.<sup>184</sup> Today,

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<sup>181</sup> Peter Mountford, *Pacific Northwest: Bicycles, Bookshops, Weirdness & Coffee*, THE GUARDIAN (May 24, 2013), <http://www.theguardian.com/travel/2013/may/25/pacific-northwest-seattle-oregon-coffee>.

<sup>182</sup> See, e.g., *Settlement Reins in Border Patrol Stops on the Olympic Peninsula*, AM. C.L. UNION (Sept. 24, 2013), <https://aclu-wa.org/news/settlement-reins-border-patrol-stops-olympic-peninsula>.

<sup>183</sup> See generally FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY ET. AL., *TERROR IN TWILIGHT: BORDER PATROL INVOLVEMENT IN LOCAL POLICING* (Dec. 1, 2013), [http://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1019&context=korematsu\\_center](http://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1019&context=korematsu_center).

<sup>184</sup> 8 U.S.C.A. § 1357 (2006); 8 C.F.R. § 287.1 (a)(2); see also *The Constitution in the 100-Mile Border Zone*, AM. C.L. UNION, [www.aclu.org/constitution-100-mile-border-zone](http://www.aclu.org/constitution-100-mile-border-zone) (last visited Mar. 5, 2016).

approximately two-thirds of the US population lives within the jurisdiction of the Border Patrol.<sup>185</sup> The United States has gone through political and social change since the 1950s, and border communities have increased in size,<sup>186</sup> we are living in different times. Even if the government is not ready to eliminate drug-dogs from immigration checkpoints, we should at the very least seriously scale back the 100-mile border zone to prevent various civil rights abuses.<sup>187</sup>

Fifth, the US government should increase funding for legal services organizations to provide an equal and just opportunity to legally advocate for the civil rights of border communities. Legal resources in border communities with the greatest amount of Border Patrol agents are severely underfunded and understaffed. In a nation that values human rights, dignity, and autonomy, individuals who have suffered injustice at the hands of the Border Patrol should be heard, and the government should support the work of legal advocates and the rights of border communities.<sup>188</sup> Furthermore, if advocates receive more support from the government, they may be in a better position to help share knowledge, such as “know your rights” trainings, in their communities to prevent future abuses and support individuals in reporting past and ongoing abuses.

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<sup>185</sup> *Id.*; see also *Factsheet on Customs and Border Protection’s 100-Mile Zone*, AM. C.L. UNION, <http://www.aclu.org/technology-and-liberty/fact-sheet-us-constitution-free-zone> (last visited Mar. 5, 2016).

<sup>186</sup> *The Constitution in the 100-Mile Border Zone*, AM. C.L. UNION, [www.aclu.org/constitution-100-mile-border-zone](http://www.aclu.org/constitution-100-mile-border-zone) (last visited Mar. 5, 2016).

<sup>187</sup> The ACLU proposes that the 100-mile border zone allowing Border Patrol broad authority should be scaled back to 25-miles. *Custom and Border Protection’s (CBP’s) 100-Mile Rule*, AM. C.L. UNION, [https://www.aclu.org/sites/default/files/assets/13\\_08\\_01\\_aclu\\_100\\_mile\\_cbp\\_zone\\_final.pdf](https://www.aclu.org/sites/default/files/assets/13_08_01_aclu_100_mile_cbp_zone_final.pdf) (last visited Mar. 5, 2016).

<sup>188</sup> See, e.g., Steve O’Ban & Cyrus Habib, *Justice For All, Not Only For Those Who Can Afford It*, SEATTLE TIMES (Apr. 18, 2015), <http://www.seattletimes.com/opinion/protecting-the-legal-rights-of-the-poor/>.

Additionally, with more resources, advocates can focus on impact litigation around civil rights. The administrative complaint data produced by the ACLU is only a sample of Fourth Amendment violations occurring in border communities as a result of the use of drug-dogs. Additionally, the Department of Homeland Security has not taken action to investigate these abuses.<sup>189</sup> Legal advocates could consider filing a class action lawsuit on behalf of border residents subject to regular checkpoints and ongoing abuse in their communities.<sup>190</sup> Such litigation could be a vehicle for courts to uphold individual right under the Fourth Amendment.

Sixth, while time and resources are always barriers, border residents can borrow the community accountability model used at the Arivaca checkpoint to hold the Border Patrol in their communities accountable. As discussed above, community members in Arivaca began monitoring the Border Patrol checkpoint in their area after the Border Patrol was nonresponsive to their original complaints of traffic disruption, discrimination, harassment, and lack of transparency. Legal advocates should collaborate with community members to ensure that community members are equipped with the proper legal tools to advocate on their own behalf in case the Border Patrol is resistant, which it has been at Arivaca.<sup>191</sup>

## VI. CONCLUSION: DOGS ARE FRIENDS, NOT FEDERAL AGENTS

This article is limited to the elimination of drug-dogs at checkpoints within the 100-mile border zone. Legal professionals with power and privilege should all be contributing to a discussion on Fourth Amendment

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<sup>189</sup> E-mail from James Lyall, *supra* note 98.

<sup>190</sup> Bob Ortega, *Border Patrol Sued for Harassing at Arivaca Checkpoint*, AZCENTRAL (Nov. 26, 2014), <http://www.azcentral.com/story/news/politics/immigration/2014/11/20/border-patrol-aclu-lawsuit-arivaca-checkpoint-harassment/70021978/>.

<sup>191</sup> Ted Robbins, *In Arizona, Citizens Keep Close Eye on Immigration Checkpoint*, NPR (Mar. 29, 2014, 4:36 PM), <http://www.npr.org/2014/03/29/296297733/in-arizona-citizens-keep-close-eye-on-immigration-checkpoint>.

policy and its impact in border regions. We must be critical of the 100-mile border zone regulation, which is outdated and never underwent a formal administrative process, and our search and seizure laws, which in large part have been defined by the US government's interest in interdicting marijuana activities and supporting the "War on Drugs." Regardless of the motivation behind creating such sweeping regulations, these laws are overbroad and ambiguous. They pay little attention to the individuals residing in these communities, migration patterns, to the authority and lack of accountability of the Border Patrol, and to other factors such as the growing public acceptance towards legalizing federally illegal narcotics.<sup>192</sup>

Removing drug-dogs from interior checkpoints is one step towards preventing civil rights violations and demilitarizing the border. While the Court has carved out broad exceptions to allow the Border Patrol discretion in checkpoint searches, the Border Patrol should not view these exceptions as an unlimited grant of authority or an opportunity to trample civil rights. Furthermore, the government and courts should be more proactive about protecting the civil rights of the border communities. The government needs to take accountability for civil rights violations, and courts and legislatures need to listen to the affected communities.

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<sup>192</sup> See *Record of Abuse*, *supra* note 9, at 2.