UNDOCUMENTED CRIMINAL PROCEDURE

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For more than two decades, criminal procedure scholars have debated what role, if any, race should play in the context of policing. Although a significant part of this debate has focused on racial profiling, or the practice of employing race as basis for suspicion, criminal procedure scholars have paid little attention to the fact that the U.S. Supreme Court has sanctioned this practice in a number of cases at the intersection of immigration law and criminal procedure. Notwithstanding that these cases raise similar questions to those at the heart of legal and policy debates about racial profiling, they are largely overlooked in the criminal procedure scholarship on race and policing. We refer to these cases as the undocumented cases. While there are a number of doctrinal and conceptual reasons that explain their marginalization, none of these reasons are satisfying given the importance of the undocumented cases to debates about race, racial profiling, and the Fourth Amendment. The undocumented cases import a pernicious aspect of immigration exceptionalism into Fourth Amendment doctrine—namely, that the government can legitimately employ race when it is enforcing immigration laws. In so doing, the cases constitutionalize racial profiling against Latinos and unduly expand governmental power and discretion beyond the borders of immigration enforcement. This weakens the Fourth Amendment and enables racial profiling in the context of ordinary police investigations.

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INTRODUCTION 1545
I. RACE AND THE "FREE TO LEAVE" TEST 1552
A. The Documented Case: *Florida v. Bostick* 1553
B. The Undocumented Case: *INS v. Delgado* 1556
1. Seizing Latino Individuals 1557
2. Seizing the Latino Workforce 1560
C. The Documented and the Undocumented: A Comparative Analysis of *Bostick* and *Delgado* 1562
II. RACE AND REASONABLE SUSPICION 1565
A. The Documented Case: *Terry v. Ohio* 1565
B. The Undocumented Case: *United States v. Brignoni-Ponce* 1568
C. The Documented and the Undocumented: A Comparative Analysis of *Terry* and *Brignoni-Ponce* 1570
1. Eviscerating the Fourth Amendment 1570
2. Facilitating Racial Profiling 1573
3. Marginalizing the Harms of Racial Profiling 1576
III. RACE, TRAFFIC STOPS, AND CHECKPOINTS 1578
A. The Documented Case: *Whren v. United States* 1578
B. The Undocumented Case: *United States v. Martinez-Fuerte* 1581
C. The Documented and the Undocumented: A Comparative Analysis of *Whren* and *Martinez-Fuerte* (and *Brignoni-Ponce*) 1583
1. Comparing Pretext 1583
2. Comparing Doctrine 1586
IV. RACE AND THE LACUNA: WHY RACIAL PROFILING IN IMMIGRATION ENFORCEMENT IS INVISIBLE 1588
A. Conceptual Barriers 1590
1. Framing Racial Profiling: Latinos on the Borders 1590
2. Undocumented Latino Racial Identity 1593
3. Documenting the Logic of Racial Profiling 1597
B. Doctrinal Barriers 1602
1. Questioning the Plenary Power Doctrine: Immigration Exceptionalism 1602
2. Questioning *Brignoni-Ponce*'s Precedential Value 1605
3. Questioning the Doctrinal Categories: Regulatory and Administrative "Investigations" 1608
CONCLUSION 1611
APPENDIX I: COUNTING THE UNDOCUMENTED CASES: THE SCHOLARLY LITERATURE 1612
APPENDIX II: COUNTING CASES IN CASEBOOKS 1614

INTRODUCTION

The criminalization of immigration violations and the imposition of immigration sanctions for criminal violations have produced a vexed set of procedural, constitutional, and policy issues.[1] Underlying much of the debate is the generalization (a reasonable one with which we agree) that citizenship affords a set of procedural and constitutional protections in immigration and criminal law enforcement contexts that are unavailable to noncitizens.[2] For example, subsequent to arrest, citizens but not noncitizens are typically eligible for release on bail, while noncitizens but not citizens may be vulnerable to deportation.[3] These and other post-arrest differences highlight the fiction of what Ingrid Eagly calls "doctrinal equality" or the erroneous notion that "noncitizen defendants occupy the same playing field as other defendants in the federal criminal system."[4]

However, before the arrest, during the investigatory stages of the criminal or immigration process in which law enforcement officials detain, question, and search suspects, the dichotomy between the citizen and noncitizen is, at least in some contexts, decidedly less clear. In particular, the line between citizen and noncitizen is mediated by and bears the racial imprint of a particular historical feature of U.S. immigration law—the government's explicit employment of race as a proxy for citizenship.[5] In the context of contemporary immigration

1. *See, e.g.*, Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010).

2. *See generally id.*

3. *Id.* at 1356. With respect to bail, noncitizens are often unable to obtain bail, "not because of the formal criminal bail rules, but instead because [of] . . . immigration detainer[s]." *Id.* at 1302.

4. *Id.* at 1286.

5. *See* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998); Juan F. Perea, *Introduction* to IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan F. Perea ed., 1997). Early rules regarding naturalization—that is, who could become a citizen—were defined in explicitly racial terms. The Naturalization Act of 1790 restricted citizenship to white persons, and this restriction remained in place until 1952. *See* IAN HANEY LÓPEZ, WHITE BY LAW 1 (2d ed. 2006); Devon W. Carbado, *Yellow by Law*, 97 CALIF. L. REV. 633 (2009). Blacks were also juridically excluded from citizenship, as affirmed by the Supreme Court in the *Dred Scott* decision. *See* Dred Scott v. Sandford, 60 U.S. 393 (1856). This exclusion was ultimately overturned by the Fourteenth Amendment, which conferred citizenship on all those born in the United States. U.S. CONST. amend. XIV. While the present immigration legal regime does not codify racial exclusions per se as it previously did, contemporary immigration law still permits and legitimates race-based decisionmaking. As Gabriel Chin has pointed out, federal courts have ruled that Congress can discriminate on the basis of race in deciding who to admit or to deport. Chin, *supra*, at 3–4. Notwithstanding the provisions of the Immigration and Nationality Act that prohibited racial discrimination, the Illegal Immigration Reform and Immigration Responsibility Act of 1996 allows the State Department to rely on race among other factors in establishing visa application and procedures. *Id.* at 9. The purported justification for these racially discriminatory practices is that Congress is said to have plenary, and thus nearly unfettered,

enforcement, and with respect to Latinos, this proxy function of race blurs the boundary between citizen and noncitizen and further conflates noncitizenship and undocumented status. To make the point concrete, the simple "fact" of apparent Latino ancestry renders a person presumptively an undocumented noncitizen—or, to invoke the unfortunate quasi–term of art, an "illegal alien."[6]

This does not mean that immigration officials and law enforcement personnel actually believe that most or all Latinos are undocumented. The point is that because Latino identity is deemed relevant to the question of whether a person is undocumented, all Latinos live under a condition of presumed illegality.[7] They pose a danger not because their conduct is illegal but

power over immigration. *Id.* at 5–9. While the focus of our intervention here is on federal immigration enforcement, one could also assess the prominent role race and racialized rhetoric have played in numerous state and local immigration initiatives. *See, e.g.*, Raquel Aldana, *On Rights, Federal Citizenship, and the "Alien,"* 46 WASHBURN L.J. 263, 306–07 (2007); Raquel Aldana & Sylvia R. Lazos Vargas, *"Aliens" in Our Midst Post-9/11: Legislating Outsiderness Within the Borders*, 38 U.C. DAVIS L. REV. 1683, 1701–02 (2005); Kevin R. Johnson, *It's the Economy, Stupid: The Hijacking of the Debate Over Immigration Reform by Monsters, Ghost, and Goblins (Or the War on Drugs, War on Terror, Narcoterrorists, Etc.)*, 13 CHAP. L. REV. 583, 610–11 (2010).

6. As we explain in Part IV *infra*, there is an ideological dimension to the association between Latino identity and "illegality." *See also* KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS (2004); Jennifer Chacón, *Citizenship and Family: Revisiting* Dred Scott, 27 WASH. U. J.L. & POL'Y 45, 64 (2008). While the undocumented status is not per se a crime, it is effectively treated as a crime in that there is little difference between the probable cause needed to establish undocumented status and the probable cause needed to establish, for example, the crime of illegal entry. As the court in *Gonzales v. City of Peoria* stated, "Although the lack of documentation or other admission of illegal presence may be some indication of illegal entry, it does not, without more, provide probable cause of the criminal violation of illegal entry." 722 F.2d 468, 476–77 (9th Cir. 1983). However, since failing to carry documentation of immigration status is a misdemeanor under 8 U.S.C. § 1304, officers can obtain probable cause to arrest suspects easily by asking whether they have documentation. *See* United States v. Vasquez-Ortiz, 344 F. App'x 551 (11th Cir. 2009) (finding that an officer had probable cause to arrest a suspect in a case in which the suspect admitted El Salvadoran origin and failed to produce documentation); United States v. Alvarado-Bermudez, 499 F. Supp. 1070 (E.D.N.Y. 1980) (finding that an officer had probable cause to arrest a suspect who claimed to be Puerto Rican but produced an unsigned birth certificate and did not know common Puerto Rican phrases). Incident to that arrest, an officer may then check the suspect's immigration records; if the suspect's record does not show a legal entry, the officer has probable cause to arrest the suspect for illegal entry (and likely sufficient evidence to convict). *See* United States v. Quintana, 623 F.3d 1237 (8th Cir. 2010) (finding probable cause in a case involving a suspect whose name, entry, and immigration status did not turn up on a preliminary record check when the officer checked during a traffic stop); United States v. Tarango-Hinojos, 791 F.2d 1174 (5th Cir. 1986) (finding probable cause to arrest a suspect who was arrested for failing to produce documentation and was later convicted of illegal reentry); United States v. Cuevas-Robledos, No. 05-CR-248-BR, 2006 WL 2902097 (D. Or. Oct. 5, 2006) (stating that an officer had probable cause to arrest a suspect who failed to produce documentation and was later convicted of illegal reentry). *But see* Mountain High Knitting, Inc. v. Reno, 51 F.3d 216 (9th Cir. 1995) (holding that officers may not arrest suspects for failing to carry documentation solely as a pretext to investigate immigration status).

7. *See* Nicholas De Genova & Ana Y. Ramos-Zayas, *Latino Rehearsals: Racialization and the Politics of Citizenship Between Mexicans and Puerto Ricans in Chicago*, J. LATIN AM. ANTHROPOLOGY,

because of their purported status—they *are* illegal.[8] As such, they are increasingly vulnerable to being searched and seized. In this way, searches and seizures do more than their ordinary or "interior" investigatory work; they perform extraordinary or "border" work as well,[9] effectively enacting interior immigration checkpoints at which Latino subjects must prove their American belonging.[10]

Fourth Amendment jurisprudence plays a critical role in constructing this problem. The doctrine facilitates both the idea that Latinos are presumptively undocumented (the racial profile)[11] and the practice of detaining Latinos

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June 2003, at 18, 21 (noting that "[t]he figure of the 'illegal alien' itself has emerged as a mass-mediated sociopolitical category that is always-already saturated with racialized difference, and likewise serves as a constitutive feature of the specific way that 'Mexicans' in general came to be racialized in the United States, regardless of their immigration status or even U.S. citizenship"); *cf.* United States v. Zapata-Ibarra, 223 F.3d 281, 284 (5th Cir. 2000) (Wiener, J., dissenting) (discussing the extent to which roving practices at issue in the case mostly burden "law-abiding citizens" "entirely within their constitutional rights" simply because they appear to be of Mexican ancestry), *cert. denied*, 531 U.S. 972 (2000).

8. Importantly, this racial presumption is part of a broader mechanism of racialization and is connected to but distinct from the way in which Asians and people perceived to be Arab or Muslim are racialized. Asians also are presumptively not "Americans," not because of "illegality" per se, but rather because they are perceived as permanently foreign and unassimilable. *See* Neal Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689 (2000); *see also* Leti Volpp, *"Obnoxious to Their Very Nature": Asian Americans and Constitutional Citizenship*, 8 ASIAN L.J. 71, 82 (2001). With respect to Arabs/Muslims, the presumption of foreignness also obtains, but vis-à-vis particular concerns about terrorism and national security. *See, e.g.*, Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002); Bernard E. Harcourt, *Muslim Profiles Post 9/11: Is Racial Profiling an Effective Counterterrorist Measure and Does It Violate the Right to Be Free From Discrimination?* (Univ. of Chi. Law Sch. John M. Olin Law & Economics Working Paper No. 288, 2006), *available at* http://www.law.uchicago.edu/files/files/286.pdf; *see also* Asli Ü. Bâli, *Changes in Immigration Law and Practice After September 11: A Practitioner's Perspective*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 161 (2003).

9. For an indication of the extraordinary authority the government has to perform searches at the border, see, for example, *United States v. Ramey*, 431 U.S. 606, 616 (1977) (noting that "searches made at the border, pursuant to the long-standing right of the sovereign to protect itself . . ., are reasonable simply by virtue of the fact that they occur at the border"). With respect to seizures, see *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985) (permitting strip searches at the border without either probable cause or a warrant).

10. *See* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 173 (2006); MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 131–32 (2004); Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CALIF. L. REV. 1395 (1997); Kevin R. Johnson, *Fear of an "Alien Nation": Race, Immigration, and Immigrants*, 7 STAN. L. & POL'Y REV. 111 (1996); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1038 (2010) [hereinafter Johnson, *Racial Profiling*]; Sarah Paoletti, *Making Visible the Invisible: Strategies for Responding to Globalization's Impact on Immigrant Workers in the United States*, 13 IND. J. GLOBAL LEGAL STUD. 105, 131–32 (2006); Gloria Sandrino-Glasser, *Los Confudidos: De-Conflating Latinos/as' Race and Ethnicity*, 19 CHICANO-LATINO L. REV. 69, 150 (1998).

11. *See* Gotanda, *supra* note 8, at 1691 ("First there is a profile, a particular characterization or social stereotype and second, that profile is linked to the raced individual's racial category.").

because of that presumption (racial profiling).[12] Yet, for the most part, criminal procedure scholars have not engaged this racial dynamic.[13] They have raised concerns about whether racial profiling creates the crime of "Driving While Black,"[14] about the legitimacy and efficacy of the practice,[15] about whether it imposes a "racial tax"[16] and about whether racial profiling is systemic or derives instead from the actions of a few wayward police officers—the proverbial "bad apples."[17] But, largely absent from these debates is the fact that law enforcement personnel routinely employ Latino racial identity as a basis for

12. Borrowing from the End Racial Profiling Act, which has been introduced eight times since 2001 but never passed into law, we define racial profiling as "the practice of a law enforcement agent or agency relying, to any degree, on race . . . in selecting which individual to subject to routine or spontaneous investigatory activities." *See* End Racial Profiling Act of 2007, S. 2481, 110th Cong. This definition would prohibit governmental reliance on a presumed association between members of a racial group, on the one hand, and crime or particular unlawful behavior (for example, immigration violation), on the other. Yet this is precisely the reliance that is at the heart of the racial profile of Latinos as "illegal aliens." *See also* Settlement Agreement at 8, Arnold v. Ariz. Dep't of Pub. Safety, No. CV-01-1463-PHX-LOA (D. Ariz. July 31, 2006) (defining racial profiling as "the reliance on race, skin color, and/or ethnicity as an indication of criminality, reasonable suspicion, or probable cause, except when part of a description of a suspect, and said description is timely, reliable and geographically relevant"). For a slightly different formulation, see R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075 (2001) ("[A] racial profile associates members of particular racial groups with particular crimes, based on a reasonable and genuine belief in actual statistical differences in crime rates or patterns of criminal involvement among groups.").

13. There are some notable exceptions. *See, e.g.*, DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999); DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK (2002) (including a chapter on racial profiling of other minority communities); RANDALL KENNEDY, *Race, Law and Suspicion: Using Race as a Proxy for Dangerousness*, *in* RACE, CRIME AND THE LAW 136–67 (1997); Bernard Harcourt, United States v. Brignoni-Ponce *and* United States v. Martinez-Fuerte: *The Road to Racial Profiling*, *in* CRIMINAL PROCEDURE STORIES 315 (Carol Steiker ed., 2006); David A. Harris, *Using Race or Ethnicity as a Factor in Assessing the Reasonableness of Fourth Amendment Activity: Description, Yes; Prediction, No*, 73 MISS. L.J. 423, 438–32 (2003).

14. *See, e.g.*, David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999); *see also* Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1030–31 (2002); Katheryn K. Russell, *"Driving While Black": Corollary Phenomena and Collateral Consequences*, 40 B.C. L. REV. 717 (1999); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271; Donald Tomaskovic-Devey, Marcinda Mason & Matthew Zingraff, *Looking for the Driving While Black Phenomena: Conceptualizing Racial Bias Processes and Their Associated Distributions*, 7 POLICE Q. 3 (2004); David A. Harris, *Driving While Black: Racial Profiling on Our Nation's Highways*, ACLU MAG. (1999) [hereinafter Harris, *Driving While Black*]; *see also* discussion *infra* Part IV.

15. *See* sources cited *supra* note 14; *see also* KENNEDY, *supra* note 13; R. Richard Banks, *Racial Profiling and Antiterrorism Efforts*, 89 CORNELL L. REV. 1201, 1208 (2004).

16. *See* KENNEDY, *supra* note 13, at 159; *see also* JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 13–14 (1997) (suggesting that stereotyping imposes a "Black Tax" on African Americans).

17. *See also* Harris, *Driving While Black*, *supra* note 14.

determining whether a person is undocumented or "illegal." In a series of cases—*United States v. Brignoni-Ponce*,[18] *INS v. Delgado*,[19] and *United States v. Martinez-Fuerte*[20]—the Supreme Court has sanctioned this practice. While none of these cases explicitly endorse racial profiling per se, each facilitates the practice of utilizing the "appearance of Mexican ancestry" as an investigatory tool.[21] We refer to the cases as the "undocumented cases"[22] because they are marginalized in and mostly omitted from criminal procedure scholarship and casebook discussions about race and the Fourth Amendment.[23] Instead, criminal procedure scholars more frequently engage three other cases to discuss racial profiling: *Terry v. Ohio*,[24] *Whren v. United States*,[25] and *Florida v. Bostick*.[26] We refer to these cases, cumulatively, as the documented cases because they reside within the interior of the criminal procedure literature.

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18. 422 U.S. 873 (1975).

19. 466 U.S. 210 (1984).

20. 428 U.S. 543 (1976).

21. We discuss the implications of how *Brignoni-Ponce* has been questioned and yet is still relied upon *infra* in Part IV.

22. The foregoing cases are not the only cases at the intersection of criminal procedure and immigration enforcements. Others include, but are not limited to, *Muehler v. Mena*, 544 U.S. 93 (2005) (holding that the questioning of Mena about her immigration status during the context of a detention did not violate the Fourth Amendment.); *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985) (involving strip and other invasive searches at the border); *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (holding that the exclusionary rule does not apply to deportation proceedings). We focus on *Delgado*, *Brignoni-Ponce*, and *Martinez-Fuerte* because they most directly present the racial profiling problems we seek to engage.

23. While we do not purport to offer a comprehensive empirical evaluation, we provide considerable evidence of the lacuna we describe. The basis for our assertion here is an examination of the secondary legal literature on racial profiling and on the Fourth Amendment as well as criminal procedure casebooks. Both the issue of racial profiling in immigration enforcement as well as what we have called the undocumented cases have remained marginalized in the literature. In Appendix I, we examine how the issue of racial profiling has been treated in the criminal procedure literature and quantify how often the undocumented cases appeared in connection with the terms race, racial profiling, and racial discrimination compared with the number of references to the documented cases in conjunction with the same terms. With respect to the subjects of race, racial profiling, and racial discrimination, the documented cases are engaged to a significantly greater extent than the undocumented cases.

We surveyed five leading criminal procedure casebooks (those adopted by at least ten American law schools) to ascertain the extent to which the undocumented cases (*Delgado*, *Brignoni-Ponce*, and *Martinez-Fuerte*) appear in them as compared with the engagement of the documented cases (*Bostick*, *Terry*, and *Whren*). The results are reported in Appendix II. Here, too, we observe that the undocumented cases are engaged less than the documented cases.

This is not a qualitative assessment, but the relatively less prominent space accorded to the undocumented cases suggests that it is reasonable to think that these cases are also less substantively engaged.

24. 392 U.S. 1 (1968).

25. 517 U.S. 806 (1996).

26. 501 U.S. 429 (1991).

In advancing this argument, we do not mean to suggest that no criminal procedure scholar has engaged *Brignoni-Ponce*, *INS v. Delgado*, or *Martinez-Fuerte*.[27] Our claim is that few criminal procedure scholars invoke these cases as a basis for their racial critiques of Fourth Amendment doctrine. This Article explains why more of them should do so.

First, the undocumented cases show clearly how Fourth Amendment doctrine enables and legitimizes racial profiling against Latinos. Second, the cases bring to the fore two pretext problems that criminal procedure scholars have largely ignored: (1) the employment of immigration violations as a pretext for investigating state criminal law, and (2) the employment of criminal law violations as a pretext for enforcing immigration law.[28] The undocumented cases reveal the ease with which law enforcement officials can engage in either forms of pretextual conduct.

Third, the undocumented cases import a pernicious aspect of immigration exceptionalism into criminal procedure: namely, that the government can legitimately target on the basis of race when it is enforcing immigration laws.[29] As distinct from other legal arenas where race-based decisionmaking is subject to heightened judicial review,[30] from the inception of federal immigration law, the Supreme Court has deemed race an appropriate criterion for determining admission to and exclusion from the United States under the long-criticized but still robust plenary power of the federal government to regulate immigration.[31] The undocumented cases extend and legitimize this racial logic.[32]

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27. See *supra* note 13 for examples of criminal procedure scholars who have engaged these cases. For example, Bernard Harcourt's *The Road to Racial Profiling* is particularly clear about the foundational importance of *Brignoni-Ponce* and *Martinez-Fuerte* in endorsing racial profiling and in explaining why "race is treated so differently in [law enforcement context] than in other areas such as employment and or education." Harcourt, *supra* note 13, at 316–17.

28. *See* Eagly, *supra* note 1, at 1340–41 (discussing how immigration law can expand traditional law enforcement power).

29. This is not to say that all three cases do so in precisely the same way. While *Brignoni-Ponce* and *Martinez-Fuerte* explicitly sanction the use of race as a basis for further investigatory intrusions, *Delgado* sanctions an Immigration and Naturalization Service (INS) factory sweep and the questioning of Latino workers by both obscuring the racial dimensions of the encounter and situating it beyond the reach of the Fourth Amendment. *See infra* Part I.

30. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (holding that all racial classifications trigger strict scrutiny).

31. On the historical effects of the plenary doctrine, see Hiroshi Motomura, *Immigration After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550–59 (1990); *see also* JOHNSON, *supra* note 6, at 46–47; Chin, *supra* note 5, at 5–9. That doctrine basically asserts that federal power over immigration is absolute and thus not subject to meaningful judicial scrutiny. The issue of immigration exceptionalism is discussed further *infra* in Part IV.B.1.

32. As Bernard Harcourt observes, two of these cases—*Brignoni-Ponce* and *Martinez-Fuerte*—"are the first, and, to this date, the only United States Supreme Court decisions to expressly approve the use

A final reason why criminal procedure scholars should pay more attention to the *Delgado*, *Brignoni-Ponce*, and *Martinez-Fuerte* trilogy is that the impact of these cases on Fourth Amendment doctrine transcends the borders of immigration enforcement. The undocumented cases have shaped the development of Fourth Amendment jurisprudence more generally by both unduly expanding governmental power and facilitating racial profiling.[33] They are thus significant to criminal procedure as a whole, not only to the intersection of criminal procedure and immigration.

To develop our argument that the undocumented cases belong in the interior, rather than at the border, of constitutional criminal procedure debates about racial profiling, we link *Delgado*, *Brignoni-Ponce*, and *Martinez-Fuerte* to the three documented cases *Bostick*, *Terry*, and *Whren*. In Part I, we focus on *Florida v. Bostick* and *INS v. Delgado*. Both cases required the U.S. Supreme Court to decide whether a particular governmental activity constitutes a seizure. Whereas criminal procedure scholars invoke *Bostick* to discuss race and the Fourth Amendment, they rarely use *Delgado* to do so. This inattention to *Delgado* obscures not only the conceptual foundation that the case laid for *Bostick* but also how immigration enforcement intersects with the seizure analysis to both restrict the reach of the Fourth Amendment and enable racial profiling.

Part II shifts the discussion to *Brignoni-Ponce* and *Terry v. Ohio*. Scholars have decried the ways in which *Terry* (and its progeny) both eviscerates the Fourth Amendment and facilitates racial profiling by permitting police officers to stop and frisk suspects upon an evidentiary showing that is less than probable cause—what courts now refer to as "reasonable suspicion"—that the suspect is armed and dangerous. This Part argues that *Brignoni-Ponce* makes matters worse by further eroding Fourth Amendment protections and by expressly authorizing racial profiling.[34] Part III pairs *Whren v. United States* with

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of race or ethnicity as a factor in the decision to stop and investigate an individual." Harcourt, *supra* note 13, at 317; *see also* Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137, 1166–68 (2008) (discussing the ways in which interior immigration enforcement undermines Fourth Amendment privacy values).

33. Our argument here is analogous to a broader argument Ingrid Eagly makes about the interaction between the criminal and immigration systems. *See* Eagly, *supra* note 1, at 1284 ("[T]he rights, procedures, and systems traditionally associated with the criminal system have themselves been affected by the interaction with the civil system of immigration.").

34. *Brignoni-Ponce* helps to illustrate why the *Terry* regime is practically imperfect. *But see* Stephen A. Saltzburg, Terry v. Ohio*: A Practically Perfect Doctrine*, 72 ST. JOHN'S L. REV. 911 (1998).

United States v. Martinez-Fuerte.[35] Here, we analogize the Supreme Court's approach to traffic stops to the Court's treatment of immigration checkpoint stops. Under current doctrine, racial profiling does not violate the Fourth Amendment in either instance.

In forging a nexus between the documented and the undocumented cases in the manner we describe above, our hope is to break down the doctrinal and conceptual barriers that have largely kept the undocumented cases from receiving the kind of critical scrutiny they warrant. Part IV examines these barriers: They range from how racial profiling has been understood and framed, to how Latinos have been racialized, to how immigration law has doctrinally developed as exceptional, to how Fourth Amendment taxonomies cabin certain searches and seizures as regulatory and administrative and thus not subject to ordinary Fourth Amendment requirements. We contend that none of the explanations either alone or collectively justify the underexamination of the undocumented cases in the criminal procedure literature. Indeed, this Article argues that a more robust understanding of how race has shaped, and continues to shape, Fourth Amendment law requires that we bring these cases from the borders of race and the Fourth Amendment scholarship to the interior.

I. RACE AND THE "FREE TO LEAVE" TEST

The threshold question in Fourth Amendment law is whether a particular governmental activity constitutes a seizure. The Fourth Amendment prohibits *unreasonable* seizures, not seizures per se;[36] to the extent that the governmental conduct does not rise to the level of a seizure, the reasonableness inquiry is moot.[37] But how do we know when the government crosses the seizure line? What precisely constitutes a seizure? *Florida v. Bostick*[38] and *INS v. Delgado*[39] are

35. We should be clear to point out that there are lots of other ways in which one might pair the cases. One could, for example, suggest that the coupling of *Whren* with *Martinez-Fuerte* is curious. To the extent that we are interested in thinking comparatively about the space *Martinez-Fuerte* occupies in the criminal procedure canon, would it not make more sense to pair that case with cases like *Delaware v. Prouse*, 440 U.S. 648 (1979) (involving a driver's license checkpoint), or *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990) (involving a drunk driving checkpoint)? As a formal doctrinal matter, the answer is yes. But our primary project in this Article is to identify the cases that criminal procedure scholars regularly employ to ground their racial critiques of Fourth Amendment law and to compare those cases to *Martinez-Fuerte*, *Brignoni-Ponce*, and *Delgado*. Perhaps not surprisingly, scholars employ neither *Sitz* nor *Prouse* to racially critique the Fourth Amendment. In this respect, it would make little sense to treat either of these opinions as a documented case.

36. U.S. CONST. amend. IV.

37. *Id.*

38. 501 U.S. 429.

39. 466 U.S. 210 (1984).

both important cases on this doctrinal point.[40] Because only the former (the documented case) found its way into the core of criminal procedure, we have a limited understanding of how race, immigration enforcement, and the seizure doctrine intersect.

A. The Documented Case: *Florida v. Bostick*

In *Bostick*, two armed Broward County Sheriff officers boarded a Greyhound bus at Fort Lauderdale, Florida. The bus had made a temporary stop on its way from Miami to Atlanta. When the officers entered the bus, the bus driver exited, closing the door behind him. The officers then approached Terrance Bostick, who was asleep in the back of the bus, without any reason to believe that he had done anything wrong. After asking Bostick to show them his ticket and identification, the officers explained that they were narcotics agents and asked for Bostick's permission to search his luggage.[41] The officers conducted the search, which yielded approximately one pound of cocaine.[42] The officers arrested Bostick, who was subsequently charged with trafficking in narcotics.[43]

The central issue the case presented is whether Bostick was seized. The officers had no objective reason to believe that Bostick had engaged in criminal wrongdoing, thus any such seizure would have been unreasonable and in violation of the Fourth Amendment. Writing for the Court, Justice O'Connor did not specifically decide this issue. According to Justice O'Connor, because the officers did not "convey a message that compliance with their request . . . [was] required,"[44] the "facts leave some doubt" as to whether Bostick was seized.[45] In this way, Justice O'Connor implicitly suggested that the encounter was consensual and thus beyond the reach of the Fourth Amendment. She remanded the case because, she argued, the Florida Supreme Court applied the wrong doctrinal framework.

Scholars have roundly criticized *Bostick*'s seizure analysis. Much of the criticism focuses on the ways in which Justice O'Connor obscures the racial dimensions of police interactions. For example, Justice O'Connor does not

40. Part I draws from Carbado, *supra* note 14.

41. There is conflict as to whether the officer informed Bostick that he had the right to refuse consent to the search and whether Bostick exercised that right. However, both of these issues were resolved in favor of the state.

42. *Bostick*, 501 U.S. at 432.

43. *Id.*

44. *Id.* at 437.

45. *Id.* at 432.

consider that the police are more likely to question people who are stereotyped as criminals than those who are not so stereotyped.[46] To the extent that police officers can approach an individual, without any reason to believe that that person committed a crime, ask for identification, and seek permission to search their persons or effects, police officers have virtually unbridled discretion to stop and question suspects based on stereotypes. In *Bostick*, for example, the officers were not constitutionally required to explain why they selected Bostick for questioning. Indeed, they conceded that they had no reason to believe that he had done anything wrong.[47]

Scholars also critique Justice O'Connor for failing to mention that Bostick is Black and that the officers are white. The elision of these facts colorblinds the encounter and conveys the idea—at least implicitly—that in the context of policing, race does not matter. Yet, race can shape (a) an officer's decision to interact with a person, (b) how the officer does so (the more criminally suspect an officer perceives a person to be, the more extensive the police engagement), and (c) how the suspect responds to and experiences the encounter. The more vulnerable the suspect perceives himself to be, the more likely that suspect is to cooperate with the police by, for example, consenting to searches to which he might otherwise say no.[48] The suspect could believe that compromising his rights in this way would negate the stereotype that he is a criminal.[49]

None of the foregoing racial dynamics are captured in *Bostick*. This is surprising given that, in his dissent, Justice Marshall invited an engagement of race, albeit somewhat obliquely, observing that "the basis of the decision to single out particular passengers during a suspicionless sweep is less likely to be *inarticulable* than *unspeakable*."[50] Moreover, the issue of race was squarely raised in the briefs. The American Civil Liberties Union's brief, for example,

46. *See, e.g.*, I. Bennett Capers, *On Justitia, Race, Gender, & Blindness*, 12 MICH. J. RACE & L. 203, 218 (2006); I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 12–19 (2011); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 339 (1998); William R. O'Shields, *The Exodus of Minorities' Fourth Amendment Rights Into Oblivion:* Florida v. Bostick *and the Merits of Adopting a Per Se Rule Against Random Suspicionless Bus Searches in the Minority Community*, 77 IOWA L. REV. 1875, 1889 (1992); Brendan J. Lyons, *Harsh, Unwarranted Tactics? Outcry Over Sheriff's Department Search Methods*, TIMES UNION (Albany, N.Y.), Mar. 2, 2008, at D1.

47. *Bostick*, 501 U.S. at 431.

48. *See* Carbado, *supra* note 14, at 1018–20 (discussing the incentive system for people who perceive that they are subject to negative stereotypes about criminality, and explaining how this system encourages these individuals to give up their right to prove that they are not criminals).

49. *See id.* (discussing stereotype negation strategies in the context of policing).

50. *Bostick*, 501 U.S. at 441 n.1 (Marshall, J., dissenting).

noted that "the facts of the reported bus interdiction cases indicate [that] the defendants all appear to be Black or Hispanic."[51] And as Tracey Maclin observes:

> Even the Americans for Effective Law Enforcement, an organization that prior to *Bostick* had filed 86 amicus briefs in the Court supporting law enforcement interests, argued that drug interdiction raids on buses violated the Fourth Amendment and alluded to the discriminatory impact that these confrontations had on minority citizens.[52]

Justice O'Connor's analysis focuses almost entirely on the fact that the officers were seemingly not overly aggressive in their engagement with Bostick. They simply "walked up to Bostick . . . , asked him a few questions, and asked if they could search his bags."[53] At no point during the encounter "did the officers threaten Bostick with a gun."[54] While "one officer carried a zipper pouch containing a pistol . . . , the gun was [n]ever removed from its pouch, pointed at Bostick, or otherwise used in a threatening manner."[55] Because Justice O'Connor looks for, but does not find, evidence of police overreaching, or any indication that the officers harbored hostility towards Bostick, she suggests that the encounter was consensual. Thus, even to the extent that Bostick felt seized, the officers are not to be blamed. They did nothing wrong. Therefore, their conduct does not trigger the Fourth Amendment.[56]

In implicitly situating the encounter between Bostick and the police officers beyond the purview of the Fourth Amendment, Justice O'Connor indicates that the seizure analysis takes "into account *all* the circumstances surrounding the encounter."[57] According to Justice O'Connor, the Florida Supreme Court did not apply this standard. It adopted instead a per se approach—that police questioning of suspects on buses are per se seizures.[58]

Whether or not Justice O'Connor accurately characterizes the Florida Supreme Court opinion,[59] her own analysis reflects a per se approach—that race is per se irrelevant to the seizure analysis. While Justice O'Connor does not explicitly say as much, race is nowhere to be found in her opinion. As

51. *See* Brief for ACLU et al. as Amici Curiae Supporting Respondents at 8 n.19, *Bostick*, 501 U.S. 429 (No. 89-1717).

52. Maclin, *supra* note 46, at 339 n.28.

53. *Bostick*, 501 U.S. at 437.

54. *Id.* at 432.

55. *Id.*

56. Again, Justice O'Connor does not actually decide the seizure question, but it is clear that she does not believe that Bostick was seized.

57. *Id.* at 439.

58. *Id.* at 433.

59. Justice Marshall contests this reading of the Florida Supreme Court's opinion. *Id.* at 445 (Marshall, J., dissenting).

Albert Alschuler notes in a related context, the language of the Fourth Amendment "requires a court to consider in one package all circumstances tending to make a seizure unreasonable. These circumstances include the imposition of differential burdens on the basis of race."[60] David Sklansky similarly argues that:

> The "touchstone of the Fourth Amendment," the Court keeps repeating, "is reasonableness," and reasonableness must be assessed under "all of the circumstances." Like many clichés, this one is worth heeding. What is most troubling about the recent vehicle stop decisions are "all of the circumstances"—including the continuing and destructive role of race in American policing . . . —that the Supreme Court overlooked.[61]

This is the point we are making about Justice O'Connor's totality of the circumstances test: It does not take race into account.[62] Indeed, her opinion excludes "all of the circumstances" about race. Justice O'Connor treats Bostick's encounter with the police as though it were occurring in what Anthony Thompson refers to as a "raceless world."[63] Why she would do so is the question we now take up. *INS v. Delgado* provides a partial answer.[64]

B. The Undocumented Case: *INS v. Delgado*

Decided in 1984, seven years before *Bostick*, *Delgado* is some ways an even more troubling case. Indeed, as we show below, *Delgado* helped to make *Bostick* possible. Its marginalization of Latinos' racial vulnerability to immigration enforcement helped to enable *Bostick*'s marginalization of African Americans' racial vulnerability to drug enforcement.[65]

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60. Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 194.

61. Sklansky, *supra* note 14, at 329.

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> Assume that all illegal immigrants residing in a particular area are Latinos but that most Latinos in this ethnically diverse area are lawful residents of the United States. In other words, all offenders are Latinos, but all Latinos are not offenders. In this area, concentrating law enforcement activity on Latinos would burden or tax the members of this group at a higher rate than their share of the area's population but not at a higher rate than their rate of offending . . . .

Alschuler, *supra* note 60, at 236.

63. Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 962 (1999).

64. While the procedural posture of *Delgado* and *Bostick* are different (*Bostick* involved a motion to suppress evidence, and *Delgado* involved an action for declaratory and injunctive relief), the cases presented the same doctrinal question: What constitutes a seizure?

65. Some scholars would say that *Delgado* forces an engagement of criminal procedure beyond the Black/white paradigm. The standard citation is to Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal" Science of American Racial Thought*, 10 LA RAZA L.J. 127, 133 (1998). Note that

The Supreme Court in *INS v. Delgado* adjudicated the constitutionality of three so-called "factory sweeps"—the Immigration and Naturalization Service (INS) practice of entering workplaces, with the employer's consent or with the authorization of a "general" warrant,[66] to question workers about their immigration status.[67] Like bus sweeps, these surveys were conducted without individualized suspicion. That is, in none of the surveys did the INS have reason to believe that any particular worker was undocumented.[68] As in *Bostick*, the Court had to decide whether the law enforcement's activity constituted a seizure. Answering that question in the affirmative would render the INS's conduct an unreasonable seizure, since it was not supported by individualized suspicion and it was unclear whether the general warrants employed were legitimate.

With respect to the seizure analysis, the Supreme Court, per Justice Rehnquist, asked two questions: (1) whether the individual workers whom the INS questioned were seized, and (2) whether the INS's conduct effectuated a seizure of the entire workforce. His answer to each compounded Latinos' exposure to law enforcement surveillance, expanded law enforcement power and discretion, and facilitated racial profiling beyond the context of immigration enforcement.

1. Seizing Latino Individuals

Justice Rehnquist had little difficulty concluding that the individuals the INS questioned were not seized. For one thing, the interactions were brief.[69] For another, the INS merely "asked one or two questions."[70] Moreover, the questions that the INS asked, which focused on place of birth, citizenship status, and proof of residency, were "not particularly intrusive."[71] According to Justice Rehnquist, the INS's conduct "could hardly result in a reasonable fear

scholarship on the Black/white paradigm is not entirely of one accord. *See* Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283, 1307 (2002) (critiquing the problematic ways in which the Black/white paradigm discourse has been framed).

66. The warrants in these cases can be characterized as "general" in the sense that they "were issued on a showing of probable cause by the INS that numerous illegal aliens were employed at Davis Pleating, although neither of the search warrants identified any particular illegal aliens by name." INS v. Delgado, 466 U.S. 210, 212 (1984).

67. *See* Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside of Law*, 59 DUKE L.J. 1723, 1747–49 (2011) (discussing how workplace raids affect employee rights).

68. *Delgado*, 466 U.S. at 212.

69. *Id.* at 219.

70. *Id.* at 220.

71. *Id.* at 219–20.

that respondents were not free to continue working or to move about in the factory."[72] Thus, he concluded, the workers were not seized.

Justice Rehnquist's account sanitizes the episode, which involved between twenty and thirty INS agents. These agents wore their INS badges, carried handcuffs—and they were armed.[73] Some of the agents guarded the exits; others moved systematically through the factory, row by row, "in para-military formation."[74] The entire episode lasted between one and two hours. At no time during any of this did the agents inform the workers that they were free to leave.[75] Presumably, the workers inferred just the opposite, especially since the INS arrested several of the workers who attempted to exit the factory.[76] Indeed, as one worker explained, "They see you leaving and they think I'm guilty."[77] Against this backdrop, Justice Brennan is right to suggest in dissent that Justice Rehnquist's analysis is "striking . . . [in] its studied air of unreality."[78] According to Justice Brennan, Justice Rehnquist's conclusion that the individuals whom the INS questioned were not seized is "rooted . . . in fantasy."[79]

But why would Justice Rehnquist engage in this fantasy? After all, he had a relatively easy doctrinal out under the reasoning of *United States v. Martinez-Fuerte*,[80] an undocumented case we discuss more fully in Part III. That case involved an immigration checkpoint stop at which U.S. Border Patrol officers check the immigration status of the occupants of cars driving through. The Court assumed that checkpoint stops were seizures. The question was whether such seizures needed to be supported by reasonable suspicion. The Court answered the question in the negative, reasoning that "[w]hile the need to make routine checkpoint stops is great, the consequent intrusion on Fourth Amendment interests is quite limited."[81]

Justice Rehnquist could easily have made a similar argument in *Delgado*—namely, that while the workers whom the INS questioned were seized, the INS's conduct was constitutionally legitimate because the need to regulate immigration is great and the intrusion on the workers is limited. This is precisely how Justice Powell, who authored *Martinez-Fuerte*, reasoned in his *Delgado*

72. *Id.* at 220–21.
73. Brief for the Respondents at 4, *Delgado*, 466 U.S. 210 (No. 82-1271).
74. *Id.*
75. *Delgado*, 466 U.S. at 217.
76. Brief for the Respondents, *supra* note 73, at 18.
77. *Id.* at 20 (testimony of one of the workers).
78. *Delgado*, 466 U.S. at 226 (Brennan, J., dissenting).
79. *Id.* at 229.
80. 428 U.S. 543 (1976).
81. *Id.* at 557.

concurrence.[82] Moreover, the government had advanced this very argument on appeal.[83]

Why would Justice Rehnquist take another doctrinal path? Because Rehnquist's reasoning was sparse, it is hard to say. Perhaps he was concerned that a conclusion that the INS's conduct amounted to a seizure would narrow the investigative space police officers would have to operate outside of the immigration context. Perhaps he understood that *Delgado's* holding would travel to cases like *Bostick*. Whatever Justice Rehnquist was thinking, under his approach, factory surveys of the sort the *Delgado* case presents do not trigger the Fourth Amendment. One can infer from this that Justice Rehnquist believes that factory surveys are an efficient, effective, and minimally intrusive mechanism for sorting out Latinos who are "illegal aliens" from those who are lawfully in the country.

Significantly, at no point in Justice Rehnquist's opinion does he engage race, notwithstanding that race figured prominently in Delgado's brief. According to Delgado:

> [I]nnocuous conduct does not become suspect merely because the person observed is nonwhite. Yet that is precisely what occurs during these raids. Every Latin [sic] is suspected of being an undocumented alien due to his or her race. Members of a distinct minority characterized by immutable traits are singled out because they are suspected to be illegal aliens. As a result, innocent members of the class suffer an impairment of their privacy (a loss not suffered by members of the white or Black community) because the standard applied fails to distinguish in any meaningful way between the guilty and the innocent.[84]

There are at least four racial dimensions to Delgado's claim that "[e]very Latin is suspected of being an undocumented alien due to his or her race."

First, the existence of that racial suspicion increases the likelihood that the government will racially profile Latinos. Second, because Latinos are aware of both the profile and the government's explicit utilization of it, they are likely to feel seized in the context of interactions with immigration officials. That is,

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82. *See Delgado*, 466 U.S. at 221–22 (Powell, J., concurring).

83. Brief for the Petitioners at 16, *Delgado*, 466 U.S. 210 (No. 82-1271) ("Even if the stationing of agents at factory exists is in some technical sense a 'seizure' of the entire work force, that seizure is nevertheless 'reasonable' under the Fourth Amendment. . . . [T]he governmental interests that support the practice of stationing agents at factory exits during a survey substantially outweigh the minimal intrusion, if any, that this practice entails on employees' Fourth Amendment interests. By focusing on businesses that employ significant numbers of illegal aliens, factory surveys are by far the most effective means of apprehending illegal aliens who have eluded the Border Patrol.").

84. Brief for the Respondents, *supra* note 73, at 43.

if Latinos know that the government can employ race as a basis of suspicion they likely will not "feel free to leave" an encounter that is predicated upon that suspicion. Third, because Latinos are likely to feel seized, and because this sense of constraint will derive at least in part from the perception that they were racially profiled, Latinos are not likely to assert their rights (even assuming they know them). They could reasonably conclude that doing so would confirm, rather than dispel, an officer's suspicion that they are undocumented. And, fourth, immigration officers have an incentive to exploit the foregoing vulnerabilities. If these officers know that they can use race as a basis for suspicion, if they know that factory surveys are not seizures, and if they understand that Latinos are likely to be worried about being misidentified as undocumented, there is an incentive for those officials to indiscriminately target Latinos for questioning and take advantage of their sense of racial vulnerability.[85]

The preceding concerns do not figure in Justice Rehnquist's analysis. Nor did he perceive the encounter between the workers and the INS to be otherwise intrusive. From Justice Rehnquist's perspective, the workers in the case were required to do nothing more than answer a few questions about their immigration status and to "produce their alien registration papers."[86] They "*should have* understood that the INS agents at the exits were positioned to stop *only illegal aliens* from leaving."[87] The workers who were not "illegal aliens" should not have been worried. The fact that some were does not mean they were seized.

2. Seizing the Latino Workforce

In addition to reasoning that the individual workers whom the INS questioned were not seized, Justice Rehnquist also held that the workplace as a

85. Historically, U.S. immigration authorities have not attached much significance to the difficulty of distinguishing between those lawfully and unlawfully present. *See* Ruben J. Garcia, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118, 119 (1995) ("By 1946 [after the large influx of Mexican workers that came to the U.S. in the Bracero contract-labor program], it became impossible to separate Mexican Americans from deportable Mexicans. Thus, in 1954, over one million people were deported under 'Operation Wetback.' Many United States citizens were mistakenly 'repatriated' to Mexico, including individuals who looked Mexican but had never been to that country."). Such indiscriminate treatment of a racial minority recalls the U.S. military's justification for the internment of all Americans of Japanese ancestry in the western U.S. during World War II. The military argued, and the Supreme Court agreed, that a broad internment was necessary because "it was impossible to bring about an immediate segregation of the disloyal from the loyal . . . ." Korematsu v. United States, 323 U.S. 214, 219 (1944).

86. Brief for the Petitioners, *supra* note 83, at 24 ("At most, respondents were asked one or two questions about their immigration status and, where appropriate, were asked to produce their alien registration papers.").

87. *Id.* at 23 (emphasis added).

whole was not seized. His conclusion in this respect marginalized concerns about race and paved the way for Justice O'Connor's colorblind seizure analysis in *Bostick*.

In arguing that the workplace was not seized, Justice Rehnquist first noted that not all personal interactions with the police implicate the Fourth Amendment.[88] He then maintained that the mere questioning of individuals does not constitute a seizure.[89] Thus, he argued, the fact that the questioning occurred in the workplace does not necessarily trigger the Fourth Amendment. Elaborating on this last point, Justice Rehnquist reasoned that "[o]rdinarily, when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers."[90] In other words, assuming the employees in *Delgado* felt constrained, that sense of constraint was a function of their workplace responsibilities and not the INS's actions.[91] This reasoning obscures the decision law enforcement officials make to exploit people's sense of confinement (as factory workers) and focuses instead on the decision individuals make to restrict their own freedom of movement (by working in factories).

According to Tracey Maclin, this analytical approach is tantamount to "blam[ing] the victim."[92] The burden is placed not "on the government to show justification for the intrusion . . . [but] on the citizen to challenge government authority."[93] This "blame the victim" approach is problematic in another more fundamental sense: It discounts the ways in which law enforcement's presence alters how people experience social spaces. When, for example, the INS officials in *Delgado* entered the factory, they transformed that already confining space into a more coercive environment: an INS raid.[94]

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88. *Delgado*, 466 U.S. at 215.

89. *Id.* at 216.

90. *Id.* at 218.

91. *Id.* In its brief, the government advanced a similar argument:

> Preliminarily, we note that it is only in a theoretical sense that the work force here, or in any typical factory survey, can be characterized as having a "freedom to leave" that is restrained by the appearance of the INS. The factory surveys in this case were conducted entirely during normal working hours. At such times the employees presumably were obligated to their employer to be present at their work stations performing their employment duties; accordingly, quite apart from the appearance of the INS agents, the employees were not "free to leave" the factory in any real sense.

Brief for the Petitioners, *supra* note 83, at 22–23.

92. Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1305 (1990).

93. *Id.* at 1306.

94. It is also important to note that at urban work sites such as the facilities raided in *Delgado*, as opposed to farming or ranching operations, there is a greater likelihood that citizens and legal residents

C. The Documented and the Undocumented: A Comparative Analysis of *Bostick* and *Delgado*

Rehnquist's argument in *Delgado* significantly shaped Justice O'Connor's analysis in *Bostick* and helps to explain her marginalization of race. The suspicionless factory sweep that the Court legitimized in *Delgado* created precedent for the suspicionless bus sweep that the Court legitimized in *Bostick*.

Central to Justice O'Connor's implicit suggestion that Bostick was not seized was her argument that, to the extent that "Bostick's movements were 'confined' . . . this was the natural result of his decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive."[95] "Like the workers in [*Delgado*], Bostick's freedom of movement was restricted by a factor independent of police conduct—*i.e.*, by his being a passenger on a bus."[96] Under this analysis, the bus is to Bostick what the workplace is to the employees in *Delgado*—a space that, with or without police presence, is confining. This obscures the fact that when the officers in *Bostick* entered the Greyhound bus, they transformed that already confining space into a more coercive environment: a bus sweep.[97]

Justice O'Connor's reliance on *Delgado* in *Bostick* helps to explain her elision of race. More specifically, Justice O'Connor's claim about absence of police culpability with respect to Bostick's sense of constraint (the bus, not the police officers, produced Bostick's experience of confinement)—can also be employed to advance an argument about racial vulnerability. The argument would be that if indeed race made the encounter between Bostick and the police more coercive than it otherwise would have been, the police officers did not cause that coercion. At no time were the officers overtly *racially* hostile towards Bostick. Thus, even assuming Bostick felt a sense of *racial* constraint, that "says nothing about whether or not [the officers'] conduct . . . was [*racially*] coercive."[98] The police officers can't be blamed for Bostick's race any more than they can be blamed for the fact that he was on a bus. They found Bostick

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work alongside illegal aliens. *See* EDWIN HARWOOD, IN LIBERTY'S SHADOW: ILLEGAL ALIENS AND IMMIGRATION LAW ENFORCEMENT 101–09 (1986). Asian immigrants also make up a substantial percentage of the labor force at factories subject to INS raids. In 1995, federal and state authorities raided a garment factory in El Monte, California, where seventy-two Thai nationals were forced to work eighteen-hour days, seven days a week. The facility was surrounded by barbed wire to prevent escapes. *See* Editorial, *Slavery's Long Gone? Don't Bet on It*, L.A. TIMES, Aug. 4, 1995, at B8.

95. Florida v. Bostick, 501 U.S. 429, 436 (1991).

96. *Id.*

97. *See also* O'Shields, *supra* note 46, at 1899 n.211.

98. *Bostick*, 501 U.S. at 436.

in both of those conditions.[99] Nor can the officers be blamed for the fact that they are white, an identity they just happened to have. Finally, neither officer should be held responsible for historical racial tensions between the Black community and the police that the officers did not themselves create. In short, the conceptual approach that Justice O'Connor borrows from *Delgado* to minimize the spatial constraint of being on a bus in her seizure analysis could explain why she does not directly engage race.

The reasoning in *Delgado* also paved the way for Justice O'Connor's weakening of the standard the Court historically applied to determine whether a particular governmental activity constituted a seizure. This weakening of the seizure analysis increases the space law enforcement officials have to practice racial profiling.

Prior to *Bostick*, the test for a seizure was "whether a reasonable person would have believed that he was not free to leave."[100] Justice O'Connor modified that formulation so that the test became: whether a reasonable person feels free to leave *or otherwise terminate the encounter*. Justice O'Connor employed the "otherwise terminate the encounter" language to suggest that, even if Bostick did not feel free literally to leave the bus, he should have felt free to disengage or ignore the officers, just as the Latino workers should have felt free to go about their work and ignore the INS. The effect of this articulated shift in the doctrine is to minimize the extent to which spatial constraints inform the seizure analysis. To the extent that individuals feel spatially constrained, the burden is on them either to exit the confining space or to "terminate the encounter" by disengaging or ignoring the officer. In this respect, *Delgado*'s presence in *Bostick* is troubling not only because it shaped how Justice O'Connor applied the seizure doctrine, but also because *Delgado* shaped the doctrine itself. Drawing explicitly on *Delgado*, Justice O'Connor modified the seizure analysis to make bus sweeps of the sort Bostick experienced a Fourth Amendment safe haven for law enforcement. As a result of *Bostick*, with no evidence of wrongdoing, the police can racially target bus passengers for criminal investigation.

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99. *Cf*. COLE, *supra* note 13, at 19 (suggesting that the *Bostick* Court discounts the coercive nature of bus encounters in part because "[t]he police officer did not make him [Bostick] get on the bus[, but] merely found him there").

100. United States v. Mendenhall, 446 U.S. 544 (1980). While only two members of the Court adopted this test in *Mendenhall*, a four-justice plurality adopted the *Mendenhall* formulation in *Florida v. Royer*, as did Justice Blackmun in dissent. Further, other members of the Court did not challenge the standard. *See also* Michigan v. Chesternut, 486 U.S. 567, 573 (1988) (affirming the "free to leave" test).

* * *

As we have shown, *Delgado* is an important criminal procedure case. The case demonstrates how Fourth Amendment law intersects with immigration enforcement not only to racialize Latinos as foreigners but also to broaden the scope of law enforcement authority more generally.[101] That is to say, the doctrinal work that *Delgado* performs is not limited to immigration enforcement. As our discussion of *Bostick* attests, *Delgado* affects ordinarily law enforcement practices as well, broadening police discretion and limiting the reach of the Fourth Amendment.

Perhaps not surprisingly, *Bostick* is not the only Supreme Court case in which *Delgado* has a juridical presence. In *Michigan v. Chesternut*,[102] the Court drew on *Delgado* to conclude that a suspect had not been seized when a police officer drove alongside the a suspect who had started to run upon observing the police car; in *United States v. Drayton*,[103] the Court invoked *Delgado* for the proposition that "[w]hile most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response"[104]; and in *Hiibel v. Sixth Judicial District*,[105] the Court relied on *Delgado* to legitimize a Nevada's "stop and identify" statute. Under this statute, if an officer has reasonable suspicion to believe that a suspect committed a crime, the suspect is required to identify himself upon the officer's request that he do so. Should the suspect refuse to comply, the officer may arrest him. To be clear, in none of the preceding cases was *Delgado* necessary for the outcome the Court ultimately reached. Our point is that in each case, *Delgado* helped to create a doctrinal field, outside of the immigration enforcement context, in which the Court could expand law enforcement power and discretion and restrict the reach of

101. The concept of racialization comes from Michael Omi and Howard Winant's work on race and racial formation. As they explain, racial formation is the process by which social, political, and economic forces determine the existence, content, importance, and social meanings of racial categories. This process is not only ideological and representational, but it is also distributional. *See* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 1 (2d ed. 1994). Thus, for example, *Korematsu v. United States* is a site of racialization. In that case, the category "Japanese" signifies something more than national origin or citizenship; but the Court racializes "Japanese" so that the category is associated with disloyalty and unassimilability. That racial association or racial meaning, in turn, produces a distributional consequence—internment. *See* Korematsu v. United States, 323 U.S. 214, 219 (1944).

102. 486 U.S. 567.

103. 536 U.S. 194 (2002).

104. *Id.* at 205.

105. 542 U.S. 177 (2004).

the Fourth Amendment. As scholars argue, these are precisely the doctrinal conditions—the expansion of law enforcement power and discretion and a restriction on the reach of the Fourth Amendment—that enable racial profiling. Yet, *Delgado*'s role in producing them remains largely undocumented in the criminal procedure scholarship on race and the Fourth Amendment.

II. RACE AND REASONABLE SUSPICION

United States v. Brignoni-Ponce[106] is another undocumented case whose significance to Fourth Amendment jurisprudence and racial profiling criminal procedure scholars have yet to fully articulate. To illustrate the importance of *Brignoni-Ponce*, we link the opinion to the earlier case of *Terry v. Ohio*,[107] which many scholars argue both erodes Fourth Amendment protections and facilitates racial profiling. This part demonstrates the ways in which *Brignoni-Ponce* makes matters worse.

A. The Documented Case: *Terry v. Ohio*

Terry v. Ohio adjudicated the constitutionality of two investigatory techniques that are now an integral part of law enforcement practices—the "stop" and the "frisk." The former involves the detention of a suspect for questioning; the latter involves a "pat down" to ascertain whether the suspect is armed with weapons. By the mid-1960s, police officers were increasingly employing both practices, particularly in the course of policing America's inner cities. A number of forces converged to deliver the question of whether stops and frisks were constitutional at the door of the Supreme Court. First, African Americans began to challenge both practices as mechanisms police officers employed to racially harass the Black community. For example, civil rights leader Bayard Rustin argued that "[n]o police are going to stop and frisk well-dressed bankers on Wall Street—but they don't hesitate to stop well-dressed Negro businessmen in Harlem and go through their attaché cases."[108]

106. 422 U.S. 873 (1975).

107. 392 U.S. 1 (1968).

108. Tracey Maclin, Terry v. Ohio*'s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1280 (1998). The President's Commission on Law Enforcement and Administration of Justice also found:

> In many communities, field interrogations [pursuant to stops and frisks] are a major source of friction between the police and minority groups. Many minority group leaders strongly contend that field interrogations are predominantly conducted in slum communities, that they are used indiscriminately, and that they are conducted in an abusive and unfriendly manner.

Terry, 392 U.S. at 14 n.11.

Second, a few lower courts had begun expressly to engage the constitutionality of stops and frisks,[109] making both practices a matter of judicial concern. Third, state legislatures were weighing in on the legitimacy of these techniques as well. "New York took the lead among the states by enacting a statute that affirmatively authorized such police activity."[110] Finally, roughly a year before the *Terry* decision, President Johnson's Commission on Law Enforcement and Administration of Justice issued a recommendation to the states that they delineate the precise scope of police authority to engage in stops and frisks.[111] Against the backdrop of these developments, it is not surprising that the Supreme Court would ultimately have its say.

The Court had to answer two specific questions. First, the Court had to address the Fourth Amendments threshold inquiry: Is a stop a "seizure" and is a frisk a "search"? Second, if a stop is a seizure and a frisk is a search, when are stops and frisks reasonable? In other words, what prior justification do officers need to perform either? Probable cause? A warrant? Something else? What?

The facts that gave rise to the case stemmed from the investigatory work of Officer McFadden, a thirty-year veteran of the Cleveland Police Department. McFadden observed two men in a downtown shopping area in the middle of the afternoon peer into the window of a business "roughly 24 times" and confer with a third man upon "each completion of the route."[112] McFadden concluded that the men were planning a daytime robbery; thus he approached the three men, identified himself as a policeman, and inquired as to their names.[113] According to McFadden, Terry "mumbled something," after which McFadden frisked him.[114] That frisk uncovered a gun.[115] McFadden then frisked the other two men, finding a gun on one of them and nothing on the other.[116] McFadden then arrested the three men.[117] The government subsequently charged Terry with carrying a concealed weapon.[118]

Via a pretrial motion, Terry sought to suppress the evidence of the gun. His argument was that stops are seizures and frisks are searches. As such, both

109. John Q. Barrett, Terry v. Ohio: *The Fourth Amendment Reasonableness of Police Stops and Frisks Based on Less Than Probable Cause*, *in* CRIMINAL PROCEDURE STORIES 295, 300 (Carol S. Steiker ed., 2006).
110. *Id.*
111. *Id.*
112. *Terry*, 392 U.S. at 23.
113. *Id.* at 28.
114. *Id.* at 7.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*

activities needed to be supported by probable cause, an evidentiary standard the government could not meet, Terry argued. The government, for its part, argued that neither stops nor frisks trigger the Fourth Amendment. The former is not a seizure and the latter is not a search. Therefore, police officers are free to utilize both practices without a showing of probable cause—indeed, without any evidentiary showing at all. At the trial court level, the government's argument carried the day. Unsuccessful in his efforts to reverse his conviction on appeal, Terry sought Supreme Court review. The Court agreed to hear the case and Chief Justice Warren wrote the majority opinion.

An important starting point for understanding Chief Justice Warren's ruling is that his opinion addresses the constitutionality of frisks, not stops per se. Under Chief Justice Warren's adjudication of the case, Officer McFadden stopping of Terry was incidental to performing the frisk. Thus, the critical issue was: What evidentiary standard must the government meet to justify frisking a suspect? Or, to frame the matter the way Chief Justice Warren does: "[I]s [it] always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest?"[119] Chief Justice Warren expressly refused to engage the question of what evidentiary standard was necessary for the government to perform a stop *without* a frisk. As we explain more fully later, this point is crucial to appreciating how *Brignoni-Ponce* expands the doctrinal foundation the *Terry* opinion sets. For now, it is enough to understand that Chief Justice Warren focused his attention on the prior justification the government needs to justify the utilization of a frisk.

To engage this issue, the Chief Justice performed a balancing analysis. More particularly, he weighed the government's interest in efficient and effective law enforcement against individuals' interests in liberty and sense of security from frisks. According to Chief Justice Warren, the government has a strong "general interest" in "effective crime prevention and detection."[120] Moreover, "[w]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest."[121] Understood in this way, the government's interest with respect to the frisk is not simply crime prevention and detection. It is the safety of the officer and of the whole community.[122]

119. *Id.* at 15.
120. *Id.* at 22.
121. *Id.* at 24.
122. Chief Justice Warren described the public safety interest thusly:

> We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure

On the liberty/sense of security side of the scale, Chief Justice Warren maintained that the government's suggestion that a frisk is a "petty indignity"[123] is "simply fantastic."[124] Rather, according to the Chief Justice, frisks are "severe" and constitute "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment."[125] This is so even when the officer only performs "a limited search of the outer clothing for weapons."[126] At the same time, Chief Justice Warren reasoned, frisks are limited in scope (in the sense that they may only be employed to search for weapons and not for general evidence of criminal wrong doing); moreover, they are likely to be brief in duration. This balancing of interests led the Court, as Paul Butler puts it, to "split the baby."[127] The Court concluded that, even where an officer does not have probable cause, "there must be narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual."[128]

While Chief Justice Warren did not articulate the precise contours of this "reason to believe" standard, he made clear that the standard is lower than probable cause but higher than a surmise. That is to say, an officer's decision to execute a frisk cannot be based on an "inchoate and unparticularized suspicion or 'hunch.'"[129] The decision must be based on "'specific and articulable' facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[130]

B. The Undocumented Case: *United States v. Brignoni-Ponce*

Seven years after *Terry v. Ohio*, *Brignoni-Ponce* decided the constitutionality of a roving patrol stop.[131] Specifically, two Border Patrol officers stopped a car to investigate the immigration status of the occupants based solely on the fact

> himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him.

Id. at 23.

123. *Id.* at 17.
124. *Id.* at 16.
125. *Id.*
126. *Id.* at 24.
127. Paul Butler, "*A Long Step Down the Totalitarian Path*"*: Justice Douglas's Great Dissent in* Terry v. Ohio, 79 MISS. L.J. 9, 22 (2009).
128. *Terry*, 392 U.S. at 27.
129. *Id.*
130. *Id.* at 21.
131. United States v. Brignoni-Ponce, 422 U.S. 873, 874 (1975).

that they "appeared to be of Mexican descent."[132] Unlike in *Terry*, there was no question in *Brignoni-Ponce* that roving patrol stops were seizures for purposes of the Fourth Amendment. Less clear was the level of suspicion that the Border Patrol officers needed to make these stops. To answer that question, the Court, like in *Terry*, balanced the government interest—in this case, in regulating immigration—against "the individual's right to personal security free from arbitrary interference by law officers."[133] With respect to the government's interests, the Court reasoned that:

> The Government makes a convincing demonstration that the public interest demands effective measures to prevent the illegal entry of aliens at the Mexican border. Estimates of the number of illegal immigrants in the United States vary widely. A conservative estimate in 1972 produced a figure of about one million, but the INS now suggests there may be as many as 10 or 12 million aliens illegally in the country. Whatever the number, these aliens create significant economic and social problems . . . .[134]

The Court went on to describe the difficulties of policing a border that is "almost 2000 miles long"[135] and observed that the government's immigration enforcement mechanisms were appropriately tailored to deal with those difficulties.[136]

As for the individual liberties side of the scale, the Court reasoned that stops pursuant to roving patrols constituted a "modest" intrusion.[137] More particularly, the Court agreed with the government that roving patrols stops are relatively brief and require people to do little more than produce evidence indicating that they are in the United States legally.[138] Weighing the government's and the individual's interest thusly, the Court concluded that roving patrol stops "may be justified on facts that do not amount to probable cause."[139] In this way, the Court legitimized an investigatory activity that is clearly within the purview of the Fourth Amendment upon a governmental showing of reasonable suspicion, not probable cause.

132. *Id.* at 875.
133. *Id.* at 878.
134. *Id.* at 879.
135. *Id.*
136. *Id.*
137. *Id.* at 880.
138. *Id.*
139. *Id.*

C. The Documented and the Undocumented: A Comparative Analysis of *Terry* and *Brignoni-Ponce*

Criminal procedure scholars have spilled much ink criticizing the *Terry* opinion and considerably less critiquing *Brignoni-Ponce*. The central argument they advance with respect to *Terry* is that by permitting police officers to conduct searches and seizures without probable cause, the Court (1) significantly undermined the Fourth Amendment's procedural protection against searches and seizures (the Fourth Amendment evisceration claim), (2) facilitated racial profiling in that the evidentiary "weakness" of the "reason to believe" standard gives police officers wide discretion in deciding which suspects to stop and frisk (the facilitation of racial profiling claim), and (3) failed to take into account the harms of race-based policing on the people who experience that abuse (the marginalization of racial harms claim). We describe these problems in turn and demonstrate how each is manifested in—and in some ways exacerbated by—*United States v. Brignoni-Ponce*.

1. Eviscerating the Fourth Amendment

The argument that *Terry* eviscerates, or, to put it the way Justice Douglas does in his *Terry* dissent, "water[s] down,"[140] the Fourth Amendment is rather straightforward: Permitting police officers to search on less than probable cause simultaneously expands police authority and diminishes our sense of privacy and security. As Paul Butler notes, in advancing this argument Justice Douglas "dropped the 't' bomb."[141] According to Justice Douglas, the balance the *Terry* Court struck effectively takes us "a long step down the totalitarian path," giving "the police greater power than a magistrate."[142] His broader argument was that *Terry* eviscerated the Fourth Amendment. Justice Douglas's argument about the evisceration of Fourth Amendment protections obtains even more forcefully with respect to *Brignoni-Ponce*. In at least three ways, *Brignoni-Ponce* makes matters worse.

First, the Court understates the costs of roving patrol stops. From the Court's perspective, they are "modest." In *Terry*, the Court offered a more robust account of the intrusion than that.[143] To be fair, most of the Court's

140. Terry v. Ohio, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting). For a thoughtful discussion of Justice Douglas's dissent, see Butler, *supra* note 127.

141. Butler, *supra* note 127, at 29.

142. *Terry*, 392 U.S. at 38 (Douglas, J., dissenting).

143. *See supra* Part II.A.

characterization of the individual liberties/personal security side of the balancing in *Terry* focused on the frisk, not the stop, and most people would agree that frisks are more intrusive than stops.[144] In this respect, we should not be surprised that *Terry*'s balancing of the costs is more sensitive to liberty and security interests than *Brignoni-Ponce*.

But what is striking about *Brignoni-Ponce*'s balancing of these interests is that it defers completely to the government's characterization, explicitly invoking the government's claim that "[a]ll that is required of the vehicle is a response to a brief question or two or possibly the production of a document evidencing a right to be in the United States."[145] The Court makes no attempt to describe how people subject to roving patrol stops actually experience them (which is precisely what the *Terry* Court at least attempted to do with respect to frisks, suggesting that people experience them as more than a "petty indignity"[146]). The end result is that the government's characterization of the interests at stake determined not only the law enforcement side of the balancing but the individual liberties/personal security side as well.

There is an even more significant way in which *Brignoni-Ponce* eviscerates the Fourth Amendment. The opinion expands the application of the reasonable suspicion standard to cover circumstances in which the officer does not have reasonable suspicion that the suspect is armed and dangerous. Recall that in *Terry* the Court was clear that it "decide[d] nothing today concerning the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation."[147] Put another way, while *Terry* implicated both a stop and a frisk in the sense that Terry was stopped before he was frisked, the case really turned on whether Officer McFadden had reasonable suspicion to worry about his safety. The Court concluded that he did, which made both the stop and the frisk constitutional. *Terry* expressly did not address whether, in the absence of a concern about a suspect being armed and dangerous, police officers can effectuate stops based on reasonable suspicion. *Brignoni-Ponce* made clear that they can.

144. While the Court challenges the idea that "a 'stop' and 'frisk' amount to a mere 'minor inconvenience or petty indignity,'" its more detailed analysis of why this is so mostly describes the intrusiveness of frisks. *Terry*, 392 U.S. at 16–17.

145. United States v. Brignoni-Ponce, 422 U.S. 873, 880 (1975).

146. *See* Sklansky, *supra* note 14, at 315–16 (suggesting that while one can dispute the extent to which the *Terry* Court protects against the invasive nature of stop and frisks, "at least the decision expressly recognized the problem of police harassment, [and] took note that the problem appeared particularly acute from the vantage point of black Americans").

147. *Terry*, 392 U.S. at 20.

We should be careful to note that *Brignoni-Ponce*'s ruling in this respect was aided by a Supreme Court decision that was decided one year earlier, *Adams v. Williams*.[148] In that case, a police officer who was "on car patrol duty in a high-crime area"[149] at 2:15 a.m. received a tip from an informant that a man carrying both a gun and narcotics was parked on the side of road nearby.[150] The officer approached the car and asked the man seated in the driver's seat, Williams, to exit. Williams rolled down the window, after which the officer reached inside the car and pulled a gun from Williams's waist.

Writing for the majority, Justice Rehnquist had this to say about the encounter:

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response.[151]

Justice Rehnquist then goes on to argue that "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the *status quo* momentarily while obtaining more information, may be more reasonable in light of the facts known to the officer at the time."[152] Justice Rehnquist thus reads *Terry* as authorizing precisely what the *Terry* Court refused to decide—the constitutional terms upon which police officers may perform investigatory detentions.

Justice Marshall, who joined the *Terry* opinion, dissented.[153] According to Justice Marshall, *Terry* "held that, if police officers want to stop and frisk, they must have specific facts from which they can reasonably infer that an individual is engaged in criminal activity *and is armed and dangerous*."[154] Marshall reasoned that there was no basis to conclude that Williams was dangerous because Connecticut law authorizes its residents to carry firearms, provided that they have a permit. The stop and frisk were therefore unconstitutional.

Justice Marshall's reading of *Terry* is exactly right. On the other hand, the parts of Justice Rehnquist's analysis that seem to permit reasonable suspicion-based investigative detentions under circumstances in which the officer is not

148. 407 U.S. 143 (1972).
149. *Id.* at 144.
150. *Id.*
151. *Id.* at 145.
152. *Id.* at 146.
153. *Id.* at 153 (Marshall, J., dissenting).
154. *Id.* at 158 (emphasis added).

concerned about his safety can be read as dicta. This is because Justice Rehnquist is careful to point out that the officer in this case "had ample reason to fear for his safety."[155] That is, like *Terry*, the officer in *Adams* had reasonable suspicion to believe that the suspect was armed and dangerous at the outset of the encounter. Thus, he was justified in effectuating both a stop and a frisk. Understood in this way, *Adams*, like *Terry*, is a case about reasonable suspicion vis-à-vis an armed and dangerous suspect. It is not a case about investigative detentions as such.

Brignoni-Ponce, however, does not implicate a safety concern. The case is about the constitutionality of an investigatory stop. One can argue that *Brignoni-Ponce* is thus a Supreme Court case whose outcome required the Court to conclude that the reasonable suspicion standard applies to stops.[156] As Charles Whitebread and Chris Slobogin observe, *Brignoni-Ponce* is "[t]he first major post-*Terry* decision to deal comprehensively with the reasonable suspicion standard."[157] In so doing, *Brignoni-Ponce* did not simply re-articulate the *Terry* doctrine; it expanded it.[158]

2. Facilitating Racial Profiling

In addition to arguing that the *Terry* opinion eviscerates the Fourth Amendment, scholars have argued that the case facilitates racial profiling. The notion is that, to the extent that reasonable suspicion is an easy evidentiary standard to meet, police officers can base their decision to stop and frisk suspects on stereotypes about criminality and dangerousness and offer race-neutral justification after the fact.

Consider the *Terry* opinion itself and, more specifically, Officer McFadden's testimony about his decision to investigate Terry and other men in his company. According to McFadden, he "didn't like their actions on Huron

155. *Id.* at 148 (majority opinion).

156. As stated previously, *Adams v. Williams* can be interpreted as a case in which the officer had a concern about his safety. In *Florida v. Royer*, Justice White, writing for the Court, also comments on how *Brignoni-Ponce* expands the *Terry* doctrine: "Although not expressly authorized in *Terry*, *United States v. Brignoni-Ponce* was unequivocal in saying that reasonable suspicion of criminal activity warrants a temporary seizure for the purpose of questioning limited to the purpose of the stop." Florida v. Royer, 460 U.S. 491, 498 (1983).

157. *See* CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 263 (2008).

158. In addition to making clear that the reasonable suspicion standard applies to investigative detentions, *Brignoni-Ponce* is the first case to apply the *Terry* regime to the stopping of an automobile.

Road, and I suspected them of casing a job, a stick-up."[159] McFadden went on to add that:

> Well, to be truthful with you, I didn't like them. I was just attracted to them, and I surmised that there was something going on when one of them left the other one and did the walking up, walk past the store and stopped and looked in and come back again. When he came back, then I observed the other man doing the same thing.[160]

Finally, McFadden indicated that one of the reasons he focused his attention on the men was that "they didn't look right to me at the time."[161]

Consider now that Officer McFadden is white and Terry and one of the other men are Black. Against that background, it is not unreasonable to conclude that Officer's McFadden's comments were racially inflected. To reach this conclusion would not be to say that Officer McFadden was bigoted (though that would not be a stretch given that the case arose in late 1960s) but simply to recognize that blackness has long functioned as a proxy for potential criminality and dangerousness. Dr. John Spiegel, the Director for the Lemberg Center for the Study of Violence, made precisely this point in a letter to the NAACP, which the NAACP excerpted in its amicus brief in the case. According to Spiegel, police interactions with "working class Negro youth . . . are often based on the concept of the Negro as savage, or animal, or some being outside of the human species."[162] Spiegel goes on to note that "[b]ecause of the police officer's conception of the Negro male, he frequently feels that most Negroes are dangerous and need to be dealt with as an enemy even in the absence of visible criminal behavior."[163] In short, it would not be unreasonable to conclude that Officer McFadden—at least implicitly—held some of the perceptions of African Americans about which Spiegel speaks.[164]

159. Brief for Petitioner at 6, Terry v. Ohio, 392 U.S. 1 (1968) (No. 67).

160. *Id.*

161. *Id.*

162. Brief for the NAACP Legal Defense & Educational Fund, Inc., as Amicus Curiae at 64, *Terry*, 392 U.S. 1 (No. 67); *see also* Phillip Atiba Goff & Jennifer Eberhardt, *Race and the Ape Image*, L.A. TIMES, Feb. 28, 2009, http://www.latimes.com/news/opinion/commentary/la-oe-goff28-009feb28,0,1418895.story (describing social psychology research conducted by the authors that demonstrated a continued connection between Black racial identity and apes in the subconscious minds of test subjects).

163. Brief for the NAACP Legal Defense & Educational Fund, Inc., as Amicus Curiae, *supra* note 162, at 64.

164. *See* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1506–14 (2005) (discussing the concept of implicit bias); *see also* Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (employing "unconscious bias" to discuss racial action that is not intentionally motivated); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (same).

Nor would it be unreasonable to conclude, as Tracey Maclin does, that Officer "McFadden's testimony was too vague and insubstantial to justify a search and seizure of Terry and his companions."[165] While McFadden's racially suggestive and vague account would have been insufficient to establish probable cause, it was enough to meet Chief Justice Warren's "reason to believe" standard. This is one sense in which the case facilitates racial profiling: By lowering the standard by which the government can perform frisks, the Court makes it relatively easy for police officers, wittingly or not, to act on race-based suspicions and elide that they are doing so ex post.

Brignoni-Ponce further facilitates racial profiling in two additional ways. First, as explained earlier, *Terry* required the government to articulate a concern for the safety of the officer or the community as a predicate to frisking suspects. Police who do not have this safety concern may not stop individuals to frisk them. *Brignoni-Ponce* permits the questioning of suspects whether or not they pose a threat to the officer or community. After *Brignoni-Ponce*, reasonable suspicion with respect to undocumented status or general criminality is enough to justify a stop.

Second, *Brignoni-Ponce* authorizes the express utilization of race as a basis for suspicion. In *Terry*, Officer McFadden could not have said that race was one of the reasons he found Terry and his companion to be suspicious and/or dangerous. Indeed, in defending Officer McFadden's conduct in the oral argument before the Supreme Court, the prosecutor claimed that that when McFadden, referring to Terry and the other two men, said that he "didn't like their looks,"[166] he was not commenting on their race. It had nothing to do with "pigmentation."[167] The prosecutor seemed invested in communicating this much to the Court, and, more particularly, to Justice Marshall, to whom the response was directed.

Under *Brignoni-Ponce*, Border Patrol agents are permitted to base their reasonable suspicion in part on "pigmentation." In other words, they need not conceal that they relied on race. According to the Court, "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor."[168] In this sense, whereas *Terry* created

165. Maclin, *supra* note 108, at 1301.

166. Officer McFadden actually said that he "didn't like them." Oral Argument at 7:18, *Terry*, 392 U.S. 1 (No. 67), *available at* http://www.oyez.org/cases/1960-1969/1967/1967_67.

167. *Id.* at 38:02.

168. United States v. Brignoni-Ponce, 422 U.S. 873, 886–87 (1975). The Court was clear to point out, however, that race could not be the only factor. In the context of concluding as much, the Court articulated a number of factors upon which border patrol agents can rely to form reasonable suspicion: (1) neighborhood characteristics; (2) proximity from the border; (3) traffic patterns; (4) the

investigatory space for de facto racial profiling, or the implicit reliance on race, *Brignoni-Ponce* expanded that space to include de jure racial profiling, or explicit reliance on race.

3. Marginalizing the Harms of Racial Profiling

A final criticism that scholars have leveled against *Terry* is that Chief Justice Warren's opinion is insensitive to the harms of racially selective policing. There are two clear indications of this. First, at no point does Chief Justice Warren mention the race of any of the participants. Recall that Terry is Black and that Officer McFadden is white. Like Justice O'Connor in *Bostick*, Chief Justice Warren excises these background racial facts from his opinion and colorblinds the encounter.

Second, as Frank Rudy Cooper observes, Chief Justice Warren insufficiently engages the extent to which the police can employ stops and frisks as racial harassment mechanisms.[169] This concern—that the police employ stops and frisks to harass African Americans—occupies considerable space in the NAACP's amicus brief.[170] But Chief Justice Warren does not fully grapple with the issue. On the one hand, he is clear that the judiciary should condemn and exclude the evidentiary fruits of "overbearing or harassing" police conduct.[171] On the other hand, the Chief Justice contends that "[t]he wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial."[172] Akhil Amar rehearses a version of this argument: "[I]f the police know you are innocent, and just want to hassle you (because of your race . . .) the exclusionary rule offers zero compensation or deterrence."[173]

Fair enough. But the argument ignores the relationship between racial harassment and racial suspicion. The very logic of racial profiling is that

agent's particular experience with the flow of immigration traffic; (5) information about specific border crossing; (6) the driver's behavior; (7) the character of the vehicle, including whether it seems overloaded with passengers; and (8) the characteristics of the occupants (mode of dress, haircut, etc., that might suggest that the occupants are not from the United States). *Id.* at 884–85.

169. *See* Frank Rudy Cooper, Terry*'s "Seesaw Effect*," 56 OKLA. L. REV. 833, 856 (2003).

170. Brief for the NAACP Legal Defense & Educational Fund, Inc., as Amicus Curiae, *supra* note 162.

171. *Terry*, 392 U.S. at 15; *see* Sklansky, *supra* note 14, at 315 n.211 (discussing this aspect of Chief Justice Warren's opinion).

172. *Terry*, 392 U.S. at 14; *see* Sklansky, *supra* note 14, at 315 n.211.

173. Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 AM. CRIM. L. REV. 1123, 1134 (1996).

stopping and frisking African Americans is "rational" because they are more likely than other groups to engage in criminal wrongdoing. This logic creates an incentive for police officers to harass African Americans in the absence of particularized suspicion to secure that evidence. In other words, racial harassment on the part of the police is not necessarily oppositional to an interest in the acquisition of evidence; it can be the very mechanism through which the police acquire evidence, particularly because they can easily deny that they relied on race after the fact. Chief Justice Warren insufficiently attends to this concern.

Brignoni-Ponce marginalizes racial profiling harms as well. In adjudicating the constitutionality of the roving patrol stop in that case, Justice Powell barely considers the harms racial profiling imposes on Latinos. This is somewhat surprising given Justice Powell's concerns about racial harms in the affirmative action context as evidenced in the *Regents of California v. Bakke*[174] he would write three years later. In that case, Justice Powell highlights a number of harms that he believes flow from racial classifications, including concerns about unfairness and racial stigmatization.[175] Yet these concerns do not shape Justice Powell's analysis in *Brignoni-Ponce*. As Randall Kennedy explains, "the Court pays little attention to the burdens imposed on innocent people by race-dependent policing."[176] The extent of Justice Powell's concern is manifested in his holding that exclusive reliance on race cannot give rise to reasonable suspicion.

* * *

Like *Terry*, *Brignoni-Ponce* is an important criminal procedure case. *Brignoni-Ponce* expressly permits immigration officials to employ race as a basis for suspicion of undocumented status and obscures the racial harms this imposes on Latinos. This, without more, argues for greater engagement of the case on the part of criminal procedure scholars.

But *Brignoni-Ponce* is troubling in another respect. The case transcends the borders of immigration enforcement. Like *INS v. Delgado*, *Brignoni-Ponce* affects ordinarily law enforcement practices as well. As we have discussed

174. 438 U.S. 265 (1978). As best we can tell, only one scholar has noted the irony of Justice Powell permitting the express utilization of race in the immigration context without subjecting that usage to strict scrutiny and his insistence on applying strict scrutiny in the affirmative action context. *See* Victor C. Romero, Essay, *Racial Profiling: 'Driving While Mexican' and Affirmative Action*, 6 MICH. J. RACE & L. 195 (2000).

175. *Bakke*, 438 U.S. at 298.

176. KENNEDY, *supra* note 13, at 160.

above, *Brignoni-Ponce* permits police officers to perform investigative detentions based on reasonable suspicion of general criminality. This broadens *Terry*'s holding, which permits those stops only upon reasonable suspicion that a suspect is armed and dangerous. Moreover, the Supreme Court has repeatedly cited to *Brignoni-Ponce* outside of the immigration context, making clear that the case is relevant generally to inquiries about the permissible scope of the *Terry* regime, and not simply to questions about immigration enforcement.[177]

III. RACE, TRAFFIC STOPS, AND CHECKPOINTS

A final pairing of cases that helps to reveal the marginalization of Latino experiences with racial profiling in Fourth Amendment jurisprudence is *Whren v. United States*[178] and *United States v. Martinez-Fuerte*.[179] The former involved a traffic stop, the latter an immigration checkpoint. We first describe *Whren*'s holding and illustrate the extent to which it facilitates racial profiling. We then turn to *Martinez-Fuerte*. Here, too, our aim is to highlight how the opinion legitimizes the government's use of race as basis for suspicion. We conclude by comparing *Martinez-Fuerte* and *Whren* with *Brignoni-Ponce* specifically to mark how the problem of race and the Fourth Amendment is continuous across three different dimensions of Fourth Amendment jurisprudence.

A. The Documented Case: *Whren v. United States*

In *Whren*, plainclothes officers became suspicious of an SUV, a Nissan Pathfinder, that had stopped at a stop sign in a "high drug area."[180] The officers explained that their suspicions were aroused because the occupants of the car were young, the car had a temporary license plate, and the driver seemed to be looking down into the lap of the passenger.[181] According to the officers, their suspicions intensified because the vehicle remained at the stop sign for an "unusually long time" and subsequently drove off in excess of the speed limit.[182]

177. *See* United States v. Place, 462 U.S. 696, 713 (1983); United States v. Villamonte-Marquez, 462 U.S. 579, 586–88 (1983); Florida v. Royer, 460 U.S. 491 (1983); Michigan v. Summers, 452 U.S. 692 (1981); United States v. Mendenhall, 446 U.S. 544 (1980); Delaware v. Prouse, 440 U.S. 648 (1979).

178. 517 U.S. 806 (1996).

179. 428 U.S. 543 (1976).

180. *Whren*, 517 U.S. at 808. For an excellent contextualization of the case, see Kevin R. Johnson, *The Song Remains the Same: The Story of* Whren v. United States, *in* RACE LAW STORIES (Rachel F. Moran & Devon W. Carbado eds., 2008).

181. *Whren*, 517 U.S. at 808.

182. *Id.*

The officers then followed the SUV and approached the vehicle when it stopped at a traffic light.[183] Upon doing so, one of the officers observed Whren, the passenger, holding two plastic bags of a white powdery substance.[184] Suspecting that the bags contained cocaine, the officers arrested both men.[185]

Whren argued that the police officers' conduct in the case violated his Fourth Amendment rights.[186] This argument was about both pretext and race: Although the officers, who were part of a vice squad, not traffic cops, had probable cause to believe that the driver had committed a traffic infraction, they did not have probable cause to believe that either the driver or Whren had done anything else wrong. Certainly, they had no basis to conclude that Whren was in possession of illegal narcotics.[187] This is the sense in which the stop was pretextual: The officers were interested in investigating a drug crime, not the traffic infraction. The stop, Whren argued, was racially motivated, because the officers' assumption that Whren and the driver, both Black, were drug dealers was based on their race.[188]

During the suppression hearing, Officer Sotto was expressly asked whether his "decision to stop the Pathfinder was because you believed that two young Black men in a Pathfinder with temporary tags were suspicious?" After a long pause, which Sotto attributed to the fact that he "wanted to really think" carefully about and "analyze the question," Sotto answered that race had not in fact influenced his decision to stop the car. The district court refused to suppress the evidence and convicted Whren on various federal drug charges.[189] The Court of Appeals affirmed, and Whren petitioned the Supreme Court for certiorari.[190]

Whren continued to push his race/pretext argument on appeal. His brief to Supreme Court puts the argument plainly: "The case arose because the sight of two young Black men in a Nissan Pathfinder with temporary tags, pausing at a stop sign in Southeast Washington, D.C., aroused the suspicions of plainclothes vice officers patrolling for narcotics . . . ."[191] The brief also referenced studies empirically demonstrating the disproportionate rates at which police officer stop African Americans for traffic infractions.[192]

183. *Id.*
184. *Id.* at 809.
185. *Id.*
186. *Id.*
187. *Id.* at 810.
188. *Id.*
189. *Id.* at 809.
190. *Id.*
191. Brief for the Petitioners at 2–3, *Whren*, 517 U.S. 806 (No. 95-5841).
192. *Id.* at 24–26.

The Supreme Court rejected Whren's arguments. According to the Court, ulterior motives including but not limited to race cannot "invalidat[e] objectively justifiable behavior under the Fourth Amendment."[193] In other words, because the police officers had a legitimate basis for stopping the car (probable cause to believe that the driver committed a traffic infraction), their subjective intentions were irrelevant for Fourth Amendment purposes, whether or not those intentions reflected racial bias.[194]

The Court reasoned, moreover, that to the extent that Whren sought to advance a constitutional argument about racially selective policing, the Fourteenth Amendment, and not the Fourth, was the appropriate constitutional rubric for doing so.[195] Whren had argued that the Fourteenth Amendment was an inadequate vehicle for dealing with racial profiling because "[a]ny individual motorist . . . might have a 'gut instinct' that his race played a role in his stop, but would be hard pressed" to prove it.[196] This evidentiary difficulty derives from the Fourteenth Amendment's requirement of discriminatory intent, a standard that scholars universally criticize.[197] Rather than engaging this problem of proof, the Court focused on another: the difficulties of proving subjective motivations. According to the Court, this difficulty makes a pretext standard unworkable.

Scholars have roundly criticized *Whren* on the ground that it creates a constitutional safe haven for at least one form of racial profiling. Under *Whren*, so long as police officers have probable cause to stop a vehicle, they can racially select which vehicles to stop based on the race of the occupants. The permissibility of this racial selection, scholars have argued, creates a specific identity crime: "Driving While Black." Under *Whren*, police officers may, consistent with the Fourth Amendment, employ probable cause pretextually to act on racial suspicions about criminality.[198]

193. *Whren*, 517 U.S. at 812. The Court reasoned that "the constitutional basis for objecting to intentionally discriminatory application of law is the Equal Protection Clause, not the Fourth Amendment." *Id.* at 813.

194. *Id.* at 812.

195. *Id.* at 813.

196. Reply Brief for the Petitioners at 9, *Whren*, 517 U.S. 806 (No. 95-5841).

197. The relevant standard is *Washington v. Davis*'s requirement of discriminatory intent, a standard that scholars have almost universally condemned. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Barbara J. Flagg, *"Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993); Lawrence, *supra* note 164.

198. Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War*, 47 VILL. L. REV. 851, 872 (2002); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997); Mark M. Dobson, *Criminal Law Symposium: The Police, Pretextual Investigatory Activity, and*

B. The Undocumented Case: *United States v. Martinez-Fuerte*

The racial profiling *Martinez-Fuerte* legitimizes is even more salient. The case creates an even bigger constitutional haven for racial profiling than *Whren*. Decided twenty years before *Whren*, *Martinez-Fuerte* involved the constitutionality of traffic stops conducted pursuant to fixed immigration checkpoints.[199] These checkpoints require vehicles to slow down or stop. Border patrol officers then either wave the vehicle through or question the occupants of the vehicle about their immigration status.[200] Officers also refer some vehicles to a secondary inspection area for additional questioning.[201] There was no question in *Martinez-Fuerte* that immigration checkpoint stops seize people. The issue was what level of suspicion the government needed to justify these seizures. The Court's answer broadened immigration enforcement authority and further constitutionalized racial profiling.

Writing for the Court, Justice Powell reasoned that the checkpoint stop need not be supported by any level of suspicion at all—neither probable cause nor reasonable suspicion.[202] This ruling applied both to the initial slowdown or stop and the referral to the secondary area. Justice Powell reached this conclusion by rehearsing the balancing analysis he performed in *Brignoni-Ponce* only one year earlier. However, while in *Brignoni-Ponce*, Justice Powell maintained that roving patrols required reasonable suspicion, in *Martinez-Fuerte* he ruled that not even that much is required. What explains the difference?

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the Fourth Amendment: What Hath Whren *Wrought?*, 9 ST. THOMAS L. REV. 707 (1997); Brian T. Fitzpatrick, *"Suitable Targets?" Parallels and Connections Between "Hate" Crimes and "Driving While Black,"* 6 MICH. J. RACE & L. 209 (2001); Craig M. Glantz, *Supreme Court Review: Could This Be the End of Fourth Amendment Protections for Motorists?*, 87 J. CRIM. L. & CRIMINOLOGY 864 (1997); Johnson, *supra* note 180; Sherri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988); Maclin, *supra* note 46; Kirk Miller, *Race, Driving, and Police Organization: Modeling Moving and Nonmoving Traffic Stops With Citizen Self-Reports of Driving Practices*, 37 J. CRIM. JUST. 564–75 (2009); Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409 (2000).

199. United States v. Martinez-Fuerte, 428 U.S. 543 (1976). The checkpoint funnels highway traffic into two lanes where a

> "point" agent standing between the two lanes of traffic visually screens all northbound vehicles, which the checkpoint brings to a virtual, if not a complete, halt. Most motorists are allowed to resume their progress without any oral inquiry or close visual examination. In a relatively small number of cases the 'point' agent will conclude that further inquiry is in order. He directs these cars to a secondary inspection area, where their occupants are asked about their citizenship and immigration status.

Id. at 546.

200. *Id.*

201. *Id.*

202. *Id.* at 562.

Part of the answer, as Albert Alschuler observes, is that "[t]he Court described the relevant governmental interest in macro terms . . . [but] described the relevant individual interests in micro terms . . . ."[203] According to Justice Powell, requiring reasonable suspicion for checkpoint stops would be impractical "because the flow of traffic tends to be too heavy to allow the particularized study of a given car."[204] Further, "the need to make routine checkpoint stops is great,"[205] which weighs heavily in the government's favor. With respect to individual liberty, Justice Powell argued, the intrusion is "appreciably less" than the intrusion roving patrols produce.[206] These differences, Powell explained, justify applying an even lower standard than the reasonable suspicion standard he articulated in *Brignoni-Ponce*—which is to say, no level of suspicion at all. The end result is that unlike the traffic stops in *Whren* that required probable cause and the roving patrol stops in *Brignoni-Ponce* that required reasonable suspicion, fixed immigration checkpoints require no justification at all.

But what if immigration officials employ race to decide whether to stop motorist or to refer particular motorists to the secondary inspection area? Does that create a Fourth Amendment problem? No. Justice Powell "dropped two footnotes" to explain why.[207] In one, Powell maintained that, as an empirical matter, Border Patrol agents do not in fact rely solely on race when they enforce immigration laws.[208] In another, Powell argued that "even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation."[209] According to Powell, "[t]o the extent that the Border Patrol relies on apparent Mexican ancestry at this checkpoint . . . that reliance is clearly relevant to the law enforcement need to be served."[210]

As in *Brignoni-Ponce*, there is no mention of strict scrutiny or equal protection analysis more generally.[211] Underwriting the Court's opinion is the

203. Alschuler, *supra* note 60, at 175.
204. *Martinez-Fuerte*, 428 U.S. at 557.
205. *Id.*
206. *Id.* at 558.
207. Harcourt, *supra* note 13, at 334.
208. *Martinez-Fuerte*, 428 U.S. at 563 n.16.
209. *Id.* at 563. According to the Court, "different considerations" would apply to a case at the Canadian border in which a border patrol agent employed Mexican ancestry as a factor in deciding whether to refer a person to the secondary area. *Id.* at 564 n.17.
210. *Id.* at 564 n.17.
211. Perhaps, as Albert Alschuler suggests, the puzzle is solved by reading the case narrowly to be "merely a decision about constitutional pleading[; t]he defendant failed to say 'equal protection,' and if only he had invoked the proper constitutional provision, he might have won." Alschuler, *supra* note 60, at 177. Alschuler is himself not at all sure about this explanation, noting that "[m]any courts, however,

notion that because of the limited nature of the intrusion and the fact that "no particularized reason need exist to justify it, . . . it follows that Border Patrol officers must have wide discretion" in deciding what motorist to direct to the secondary area.[212] To put Justice Powell's point another way, because no level of suspicion is required to justify checkpoint stops, and because race is relevant to immigration enforcement, Border Patrol agents can employ apparent Mexican ancestry as the basis for suspicion. As Bernard Harcourt explains, "[b]y requiring no standard whatsoever, the Court was giving the Border Patrol free rein to profile all persons of Mexican ancestry . . . ."[213] This is tantamount to abandoning the reasonableness standard of the Fourth Amendment altogether.[214]

C. The Documented and the Undocumented: A Comparative Analysis of *Whren* and *Martinez-Fuerte* (and *Brignoni-Ponce*)

There are some similarities and differences between *Whren* and *Brignoni-Ponce* with respect to how race figures in both opinions. Below, we compare the two cases, focusing first on pretext and then on the specific racial profiling problems the cases present. In performing the latter comparison, we include *Brignoni-Ponce* in the analysis both because the case created an important (racial) foundation for *Martinez-Fuerte* and because it illustrates how the Fourth Amendment enables and sanctions racial profiling across different areas of jurisprudence.

1. Comparing Pretext

Unlike in *Whren*, in neither *Brignoni-Ponce* nor *Martinez-Fuerte* does the Court engage the problem of pretext. But what if local police or immigration officials employ immigration enforcement as a pretext for investigating general criminal conduct?[215] Assume that the police department has executed a 287(g) agreement with federal government in which the government authorizes the

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have refused to subject the use of racial classifications by law enforcement officers to strict scrutiny even when the litigants have invoked the Equal Protection Clause." *Id.* at 178.

212. *Martinez-Fuerte*, 428 U.S. at 564.

213. Harcourt, *supra* note 13, at 336.

214. *Id.* at 335–36.

215. William McDonald, *Crime and Illegal Immigration: Emerging Local, State, and Federal Partnerships*, NAT'L INST. JUST. J. 2–10 (1997); Peter Spiro, *Learning to Live With Immigration Federalism*, 29 CONN. L. REV. 1627 (1997); Jill Keblawi, Comment, *Immigration Arrests by Local Police: Inherent Authority or Inherently Preempted?*, 53 CATH. U. L. REV. 817 (2004).

department to enforce immigration law.[216] Does the preceding pretext problem raise a constitutional concern? More specifically, what if in *Martinez-Fuerte* Border Patrol officers had slowed down cars, brought them to stop, or referred them to the secondary area as a pretext to investigating general criminal conduct? Or, what if Border Patrol officers had employed roving patrol stops, like the stop in *Brignoni-Ponce*, to do the same? Ingrid Eagly describes the incentives for police officers to engage in this form of pretextual investigations this way:

> Civil immigration law invites opportunities to arrest, interrogate, and detain without the need to comply with criminal law requirements. Thus, no longer do law enforcement powers expand from civil to criminal. Instead, in immigration law, law enforcement powers expand in the opposite direction: from criminal to civil.
>
> The role reversal shifts the standard set of incentives. Police need not rely on the criminal law if they can arrest, detain, and search with their immigration powers. Furthermore, because the police can access law enforcement with fewer procedural constraints on the immigration side without invoking their criminal powers, they may be incentivized to proceed as immigration enforcers rather than criminal enforcers.[217]

There are a number of dynamics implicated in the possibility of law enforcement officers employing immigration enforcement as pretext to investigate general criminality. Consider these: (1) An officer stops and investigates a Latino based on the racial profile that that person is undocumented; (2) assuming that the officer is persuaded that the Latino is a citizen or legal resident, he might still believe that the Latino is a criminal (based on stereotypes about Latino criminality) and, under the guise of enforcing immigration laws,

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216. *ACLU of Nevada's Fight Against Local Police Enforcing Federal Immigration Laws*, ACLU, http://www.aclunv.org/category/issue/immigration/287g (last visited July 10, 2011) ("287(g) is an agreement that local law enforcement agencies enter with U.S. Immigration and Customs Enforcement (ICE) where the local law enforcement agencies enforce federal immigration laws. The agreement is named after the authorizing section of the U.S. Immigration and Nationality Act."). As of October 2010, sixty-nine law enforcement agencies in twenty-four states had 287(g) agreements with ICE and had certified over 1240 local officers to enforce immigration laws. *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration & Nationality Act*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, http://www.ice.gov/ news/library/factsheets/287g.htm (last visited July 10, 2011). This problem could also derive from Secure Community Agreements, through which local law enforcement agencies share information with ICE to identify deportable aliens. *Secure Communities: Get the Facts*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/get-the-facts.htm (last visited July 10, 2011). Finally, the general authority that local police has to enforce immigration crime also creates space for this pretext problem. *See* Gonzales v. City of Peoria, 722 F.2d 468 (9th Cir. 1983) (holding that local police may enforce federal criminal immigration law).

217. Eagly, *supra* note 1, at 1339.

continue to detain the Latino to confirm or dispel that race-based suspicion; and (3) the Latino has an incentive to compromise his privacy and "waive" his constitutional rights (by, for example, consenting to searches and answering questions) to prove that he is neither an "illegal alien" nor a criminal.

There is reason to believe that the Court would be troubled by all of the hypotheticals we set out above. Unlike in *Whren*, in none of them does the government have probable cause. More fundamentally, the examples present instances in which the government seeks to employ the relaxed standards for administrative/regulatory searches and seizures as a basis to pursue criminal investigations. In the context of adjudicating the constitutionality of inventory searches, the Supreme Court has made clear that the government may not employ such searches as a pretext for investigating general criminality.[218] Presumably, this logic would apply with respect to immigration enforcement—that it may not be employed as a pretext for investigating general criminality.

While courts would likely be sympathetic to the pretext scenarios we posit above, there are at least two hurdles to suspects litigating such claims. One is the problem of proof. How would one prove that law enforcement officials employed immigration enforcement as a pretext for investigating some other crime? The other problem is that immigration law has increasingly become a "third space"—that is, a domain that is neither purely administrative nor purely criminal.[219] It is constituted by features of both. Thus, for example, local police could employ the enforcement of federal immigration crime (such as the crime of illegal reentry) as a pretext for investigating other criminal conduct (for example, the crime of drug distribution or possession). This pretext problem begins to look a lot more like *Whren* (one crime being used as a pretext to investigate some other crime) than the inventory search pretext problem (an administrative procedure being used as a pretext to investigate a crime).[220]

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218. *See* South Dakota v. Opperman, 428 U.S. 364 (1976) (finding no suggestion that inventory searches were pretextual).

219. *See generally* Eagly, *supra* note 1 (discussing the ways in which immigration enforcement resides at the intersection of the criminal and civil systems).

220. *United States v. Oscar-Torres*, 507 F.3d 224 (4th Cir. 2007), is somewhat on point. There, police officers posed as immigration officials and illegally arrested Torres. They fingerprinted him at the station house and discovered his prior immigration record. There was no question that the arrest was illegal. The issue was the admissibility of the record. The Court of Appeal concluded that the evidence was admissible if it was acquired pursuant to an interest in pursuing civil deportation or

There is another pretext problem at the intersection of criminal law and immigration enforcement about which criminal procedure scholars should be concerned: local law enforcement employing criminal investigations to enforce immigration law. Neither *Brignoni-Ponce* nor *Martinez-Fuerte* raises this concern. But again with 287(g) agreements, this problem becomes quite real. An officer could, for example, (a) stop a person based on a traffic infraction; (b) use that stop to investigate immigration violations; and (c) expressly employ race as a basis for determining both whether the person is undocumented[221] and whether the person entered the country illegally.[222] A Latino stopped under these circumstances has an incentive to compromise his privacy and "waive" his constitutional rights (by, for example, consenting to searches and answering questions) to prove that he is neither an "illegal alien" nor an "illegal entrant."[223] None of the above would seem to run afoul of *Whren*.

2. Comparing Doctrine

The table below attempts to capture the differences among *Whren*, *Brignoni-Ponce*, and *Martinez-Fuerte* with respect to how racial profiling figures in each opinion.

incidental to procedures for processing suspected undocumented people. For a thoughtful discussion of this case, see Eagly, *supra* note 1, at 1340.

221. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 887 (1975) (holding that "Mexican appearance" is a relevant factor in determining reasonable suspicion).

222. *See* United States v. Casimiro-Benitez, 533 F.2d 1121, 1123 (9th Cir. 1976) (considering that the defendant "appeared to be of Mexican descent" in deciding that a border patrol agent had probable cause to arrest for an improper entry); United States v. Rebon-Delgado, 467 F.2d 11 (9th Cir. 1972) (noting that the defendant "was dark complected [sic]" in deciding a probable cause challenge).

223. Many suspected of immigration crimes do in fact give officers probable cause by answering questions. *See, e.g.*, United States v. Tinoco-Fajardo, 131 F. App'x 231, 233 (11th Cir. 2005) (suspect's admission to "being in the United States illegally" gave officers probable cause to arrest him); United States v. Santana-Garcia, 264 F.3d 1188, 1193 (10th Cir. 2001) (suspects answered "no" when asked if they were "legal" and permitted officers to search their car); United States v. Moya-Matute, 735 F. Supp. 2d 1306, 1338 (D.N.M. 2008) (suspect's admission that he was a native of Honduras and did not have immigration papers gave officers probable cause to arrest him); *see also* Juan Rocha, *Immigration Law: Found in the USA*, 57 FED. LAW. 30 (2010) ("Many of the incident reports filed by the police that I reviewed [while representing persons charged with illegal reentry] revealed that agents were able to establish probable cause based on answers given during a consensual encounter.").

TABLE 1. Comparative Racial Profiling: *Whren*, *Brignoni-Ponce*, and *Martinez-Fuerte*

Case	***Individualized Suspicion Standard***	***Race as a Basis for Satisfying the Evidentiary Standard***	***Race as a Basis to Choose Whom to Stop***
Whren (Traffic Stop)	Probable Cause	NO	YES (as a PC Plus Factor)
Brignoni-Ponce (Roving Patrol Stop)	Reasonable Suspicion	YES (One Factor Among Many)	PROBABLY (as a RS Plus Factor)
Martinez-Fuerte (Checkpoint Stop)	NO Individualized Suspicion	N/A	YES

Moving from left to right, Table 1 maps three issues. First, what individualized standard does the government need to meet to justify each of the seizures? Second, can race be a factor in satisfying that evidentiary standard? And third, assuming the evidentiary standard is met, can race otherwise operate as a basis for effectuating the three types of stops by informing an officer's decision of which motorist to stop?

With respect to *Whren*, that is, to traffic stops, the police will need probable cause to justify the stop. Ordinarily, race will be an impermissible basis upon which to establish probable cause.[224] However, if the police legitimately acquire probable cause, employing race to decide which cars to stop does not violate the Fourth Amendment. In other words, race can operate as a probable cause–plus factor.

Brignoni-Ponce, the roving patrol case, requires reasonable suspicion. Race can be *a* (but not *the*) factor in establishing that evidentiary standard. Can race otherwise operate as a basis for a roving patrol stop? Presumably yes. To understand why, imagine that a Border Patrol agent has reasonable suspicion to believe that the occupants in two cars are undocumented. Car A contains people the officers perceive to be from Eastern Europe. Car B contains people the officers perceive to be from Mexico. Stipulate that, based on race, the officers stops Car B. Would that create a Fourth Amendment problem? Under

224. One exception that comes readily to mind is a case in which the officer suspicion is based in part on a suspect description that includes race. Suspect descriptions can be a basis upon which the government establishes probable cause. *See* Banks, *supra* note 12.

the logic of *Whren*, the answer likely is no. If race can operate as a probable cause plus factor, presumably it can operate a reasonable suspicion plus factor as well.

The final case, *Martinez-Fuerte*, involving a checkpoint, requires no individualized suspicion at all. Because individualized suspicion is not required, there is no need to ask whether race can be the basis for an evidentiary standard. There is no evidentiary standard that the government must meet. The relevant question is whether race can otherwise function as a basis for the stop, the answer to which is "yes."

The table helps to illustrate that, while the Court enables racial profiling across each of the three cases, *Martinez-Fuerte*'s legitimation of racial profiling is arguably worse than the other two. In *Martinez-Fuerte*, the Fourth Amendment has virtually no regulatory force.[225]

* * *

Parts I, II and III have argued that *Delgado*, *Brignoni-Ponce* and *Martinez-Fuerte* should be more meaningfully integrated into the criminal procedure literature on race, racial profiling, and the Fourth Amendment. Cumulatively, these cases illustrate the implicit and explicit ways in which the Supreme Court has enabled and sanctioned the government's use of race as an immigration enforcement mechanism against Latinos. We have also argued that the impact of *Delgado* and *Brignoni-Ponce* in particular transcends immigration enforcement. These cases have shaped the development of Fourth Amendment doctrine more generally, expanding police power and discretion in ways that facilitate racial profiling outside of the immigration context. And yet none of the three cases figure prominently in the criminal procedure literature. Part IV explains this lacuna.

IV. RACE AND THE LACUNA: WHY RACIAL PROFILING IN IMMIGRATION ENFORCEMENT IS INVISIBLE

Several significant conceptual and doctrinal frameworks have contributed to both the naturalization of racial profiling in immigration enforcement and the

225. As Justice Brennan explains in his dissent:

> Every American citizen of Mexican ancestry, and every Mexican alien lawfully in this country, must know after today's decision that he travels the fixed checkpoint highways at the risk of being subjected not only to a stop, but also to detention and interrogation, both prolonged and to an extent far more than for non-Mexican appearing motorists.

United States v. Martinez-Fuerte, 428 U.S. 543, 572 (1976) (Brennan, J., dissenting).

limited critical engagement of the practice in criminal procedure scholarship.[226] We do not contend that our assessment here is complete or exhausts the causes of the lacuna we have previously described. Rather, we offer this analysis of how certain prominent factors obscure the importance of the undocumented cases to criminal procedure.

At least three conceptual frames have contributed to the underexamination of the undocumented cases.[227] First, racial profiling has largely been framed as a Black problem. Second, Latino identity has occupied a curiously ambivalent position in which Latinos are formally classified as white but socially constructed as nonwhite. This projection of Latinos as whites—as an ethnic rather than a racial group—has made their experience with racial profiling less legible as a racial practice. Third, the undocumented cases might not fairly be subject to the critique that they authorize racial profiling. The argument would be that *Brignoni-Ponce* as the foundational case does not authorize racial profiling—relying solely on race as a basis for suspicion—but authorizes the consideration of race as a factor—a practice that is empirically justifiable.

There are at least three doctrinal frameworks that have also facilitated the marginalization of the undocumented cases and the issue of racial profiling in immigration enforcement. First, the plenary power doctrine—the notion that the federal government's power over immigration is absolute and not subject to ordinary constraints—has historically permitted the government to expressly employ race in the context of enforcing immigration laws. This doctrinally buttresses a kind of immigration exceptionalism, cabining off immigration-related disputes like those reflected in undocumented cases from more robust contestation by criminal procedure scholars. Second, the undocumented cases might not occupy significant space within criminal procedure scholarship because current reassessments of *Brignoni-Ponce* in particular suggest that the deployment of racial profiling in immigration enforcement is no longer clearly legally sanctioned and thus the case has diminished precedential value. Finally, the absence of the undocumented cases from the criminal procedure canon could be a logical consequence of the fact that they fall in a category of regulatory or administrative searches that are not subject to broader Fourth Amendment constraints.

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226. By delineating some of these barriers as conceptual and others as doctrinal, we are not articulating the distinction as a hard line. Obviously, doctrinal rules are predicated upon and have implications for how one conceives of a particular practice or social reality, just as concepts or social constructions have implications for and are reflected in doctrinal rules. Our point is to highlight how, in this context, frameworks that have strong conceptual or doctrinal dimensions have obscured the significance of the undocumented cases to criminal procedure.

227. By conceptual, we mean to refer to how an issue, group, or practice is constructed or framed.

We offer the preceding explanations not because we think they justify the marginalization of the undocumented cases in the criminal procedure literature on race and racial profiling, but rather because the explanations contextualize that marginalization. Indeed, as we argue below, none of the above explanations, either singly or collectively, provide a persuasive justification for the undocumented position *Delgado*, *Brignoni-Ponce*, and *Martinez-Fuerte* occupy in the criminal procedure literature.

A. Conceptual Barriers

1. Framing Racial Profiling: Latinos on the Borders

According to some scholars, profiling has its origins in the development of criminal profiles developed in the context of airline hijackings.[228] In the 1970s, this practice subsequently evolved into the creation and use of drug-courier profiles, particularly at airports.[229] At the border, the reliance on race, and at times race alone, as a basis for stopping and investigating travelers was a common practice, and indeed law enforcement operated with relatively few constraints as searches were permitted without warrants or probable cause.[230] However, the extension of investigatory authority to areas outside the border provoked a set of legal challenges to the authority of the Border Patrol and its practices with regard to immigration enforcement.[231] Policymakers, activists, academics, and lawyers, among others, debated whether immigration officials could employ race (and the focus was on Mexican ancestry) as an immigration enforcement mechanism. At the same time, they debated what evidentiary standard—probable cause, reasonable suspicion, something else?—would govern immigration enforcement activities in the interior.[232]

This was the context out of which *Brignoni-Ponce* arose in 1975.[233] Yet, ironically, racial profiling was initially framed in criminal procedure scholarship as a problem affecting Blacks, not Latinos. Indeed, the very term racial profiling was initially employed to describe the reliance on racial stereotypes as

228. *See* Harcourt, *supra* note 13, at 323–24.

229. *See* Charles Becton, *The Drug Courier Profile: 'All Seems Infected That Th' Infected Spy, as All Looks Yellow to the Jaundic'd Eye*,' 65 N.C. L. REV. 417, 426, 433–34 (1987). Not infrequently, Latino racial identity or national origin associated with certain Latin American countries has been invoked as a factor to be considered.

230. *See* Harcourt, *supra* note 13, at 324.

231. *Id.* at 324–25.

232. *Id.*

233. *Id.*

indicia of criminality primarily vis-à-vis African Americans. The first time "racial profiling" appeared in a law review or law journal was in an article written by Greg Williams, entitled "Selective Targeting in Law Enforcement"[234] that principally focused on Black drivers, although Latino drivers were briefly mentioned.

We tracked the trajectory of literature on racial profiling from 1996 when the term "racial profiling" first appeared, to 2010 by utilizing Westlaw databases. In five-year intervals we compared how the term "racial profiling" appeared in conjunction with "Black/African American," with "Latino/Hispanic/Mexican," and with "Arab/Muslim/Middle Eastern/South Asian." The following table summarizes the results.[235]

TABLE 2. Frequency of Term "Racial Profiling" by Racial Category

		Racial Profiling	***Racial Profiling + Black/ African American***	***Racial Profiling + Latino/ Hispanic/ Mexican***	***Racial Profiling + Arab/Muslim/ Middle Eastern/ South Asian***
Date of First Appearance		1996	1996	1996	1999
Number of Articles With Terms in	1995–1999	65	40	15	1
	2000–2004	1298	600	293	260
	2005–2009	1301	466	253	245
	2010	206	69	42	27
Total Frequency*		2870	1175	603	533

* This is the total number of references to race and racial profiling. Included here are references to these terms in conjunction with the specific racial groups mentioned as well as general references to race and racial profiling in which no specific racial group was discussed.

234. Greg Williams, *Selective Targeting in Law Enforcement*, NAT'L B. ASS'N MAG., Mar./Apr. 1996, at 18.

235. We note here the limitations of this approach, as we have not disaggregated the data to determine if there is overlap between the categories—that is, whether an article that mentions racial profiling and Blacks also engages racial profiling and Latinos. Thus, the total frequency may not accurately reflect the actual number of articles. Nor have we engaged this analysis from a qualitative perspective—that is, whether the articles do more than mention Latino profiling as distinct from substantively engaging the issue.

As the table reflects, after the initial period ending in 1999, there was a sharp increase in the number of references to racial profiling from 2000 to 2004—from 65 to almost 1300. In this interval, Blacks were mentioned with the greatest frequency—600 times, while Latino/Hispanic/Mexican and Arab/Muslim/Middle Eastern/South Asian were mentioned 293 and 260 times respectively. It is also worth noting that the frequency for Latino/Hispanic/Mexican and Arab/Muslim/Middle Eastern/South Asian in this period is roughly the same, though the latter group did not appear until 1999.[236] The subsequent period—from 2005 to 2009—and 2010 show the same pattern: Blacks appear more often in conjunction with the term "racial profiling" than Latinos who appear about as often as Arab/Muslim/Middle Eastern/South Asian. Undoubtedly the events of September 11, 2001 and the intensified focus on Muslims and people of Arab, Middle Eastern, and/or South Asian descent based on the presumption that they pose potential threats to national security help explain the prevalence of these references after 2001. Even as criminal procedure scholarship and analysis of racial profiling clearly increased significantly and incorporated references to other groups, Blacks still appeared to be the major focus whether as measured by overall reference to all racial groups or to total times the term appeared.

This is not to say that the focus on how racial profiling impacted Black people and communities was incorrect or inappropriate. To the contrary, Blacks in general and Black motorists in particular were clearly subjected to racially targeted policing practices, some of which were undoubtedly produced by reliance on race-based suspicion.[237] Rather, our point is simply that Latinos were also routinely subjected to racial profiling as part of the effort to combat what was cast as an immigration crisis produced by Mexicans flooding over the

236. Rebecca Porter, *Skin Deep: Minorities Seek Relief From Racial Profiling*, 35 TRIAL 13 (1999).

237. Over the past two decades, numerous cases arising out of the experiences of Black motorists were brought charging various law enforcement agencies with racial profiling, some of them leading to consent decrees banning the practice. *See, e.g.*, Joint Application for Entry of Consent Decree, United States v. New Jersey, No. 99-5970 (D.N.J. Dec. 30, 1999) (consent decree banning racial profiling by New Jersey State Police in case brought by the U.S. Department of Justice); Consent Decree, Wilkins v. Md. State Police, No. CCB-93-468 (D. Md. 1993) (consent decree prohibiting racial profiling in case brought by the NAACP and the ACLU against the Maryland State Police); *see also* Michael Fletcher, *Driven to Extremes: Black Men Take Steps to Avoid Police Stops*, WASH. POST, Mar. 29, 1996, at A1 (delineating racial profiling as the experience of Black men); Harris, *Driving While Black*, *supra* note 14 (describing racial profiling through the experience of Black motorists); Frank Newport, *Racial Profiling Is Seen as Widespread, Particularly Among Young Black Men*, Gallup Poll Service, Dec. 9, 1999 (reporting that 77 percent of Blacks and 56 percent of whites believed racial profiling of Black men to be widespread).

borders.[238] Simultaneously, Arab/Muslim and Middle Eastern communities were also subjected to racialized suspicion and racial profiling on grounds of national security.[239] Yet legal scholarship on racial profiling focused more on the issue as a Black concern. Apart from several notable exceptions,[240] the criminal procedure literature did not convey the message that racial profiling operated in powerful and pernicious ways across communities and was equally salient for Latinos.

From the outset the paradigmatic case was framed as a traffic stop involving a Black motorist. "Driving While Black" was invoked to articulate a complaint about the use of race as a basis for determining whether a particular driver should be stopped.[241] While over time Latinos and other racial groups appeared (particularly Muslims, Arabs, Middle Easterners, and South Asians after September 11, 2001), in significant respects the literature tended to reflect and reinforce the notion that racial profiling was a Black experience.

2. Undocumented Latino Racial Identity

In one respect the problem of the undocumented cases reflects a particular dimension of how Latinos are racially constructed. The erasure or omission of Latinos derives from how they are racialized: Latinos are formally and legally white but socially regarded as nonwhite and inferior. This in-between racial status—"off-white" as Laura Gómez has called it—complicates and often obscures Latino experiences as distinctly racial. This ambivalent racial position of Latinos—sometimes an ethnic group, at other times distinctly a nonwhite

238. Porter, *supra* note 236, at 15. The perception of an immigration crisis has not been a constant feature of the political landscape. As one scholar has observed, "[The] preoccupation with 'illegal' immigrants and boundary enforcement—at least in a sustained manner with widespread popular support—is of relatively recent origin. The national platform of the Republican Party, for example, did not mention immigration enforcement for the first time until 1980." JOSEPH NEVINS, OPERATION GATEKEEPER: THE RISE OF THE "ILLEGAL ALIEN" AND THE MAKING OF THE U.S.-MEXICO BOUNDARY 111 (2002).

239. *See* Muneer I. Ahmad, *A Rage Shared by All: Post–September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259 (2004); Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002); Bâli, *supra* note 8; Harcourt, *supra* note 8.

240. HARRIS, *supra* note 13 (including a vignette involving a Latino federal judge who is regularly stopped by the Border Patrol, as well as a chapter entitled, "It's Not Just Driving While Black: How Profiling Affects Latinos, Asians, and Arabs," and an analysis of the use of "Mexican appearance" in criminal immigration enforcement); Harcourt, *supra* note 13 (addressing *Brignoni-Ponce* and *Martinez-Fuerte* and the use of racial profiles in immigration enforcement as critical to the broader deployment of the practice). David Cole's earlier book also noted that Latinos near the border were heavily burdened by racially targeted enforcement. *See* COLE, *supra* note 13.

241. *See, e.g.*, Harris, *supra* note 13.

race—has historical origins and prior juridical manifestations.[242] Indeed, the "off-white" framing has surfaced in twentieth century equality struggles waged by Latinos and persists in contemporary understandings of Latino identity. Even now, the liminal racial position Latinos occupy can sometimes erase their racial experiences or make it difficult to understand those experiences in racial terms. Put another way, Latino racial identity is itself furtive or undocumented.

Against the notion of Latinos as an ethnic group, the historical record reveals a complex and conflicted pattern of racialization. As Gómez has explained, the origins of Latino racialization lie not in immigration and border policing, as these were largely not major concerns until the 1930s and 1940s.[243] Rather the construction of Latino identity is tied specifically to a history of imperialism and conquest in which the United States sought to expand its territory and influence. To begin, the presence of Mexicans in the United States was largely a consequence of the movement of a border rather than the movement of people. The delineation of the border was the result of the U.S.–Mexican war. Launched in the 1840s, this war was justified by assertions of Manifest Destiny and racialized conceptions of national hierarchy that presumed both Anglo-Saxon superiority and nonwhite inferiority.[244] Even the debate over the wisdom of the war and the expansion of the United States into Mexico was deeply influenced by race. The acquisition of the massive Mexican Cession posed both an unprecedented opportunity and a dilemma: What would be the status of the Mexicans living on the acquired land? At a time when citizenship was legally restricted to whites,[245] the incorporation of a group largely perceived as racially inferior posed a vexing issue.[246] Ultimately, under the Treaty of Guadalupe Hidalgo ending the war in 1848, over 100,000 Mexicans were incorporated into the polity as territorial citizens, and thus were de facto "white."[247]

Yet, while Mexican Americans were legally classified as white, they were socially perceived as nonwhite and in some regions were subjected to severe

242. This section draws on the work of LAURA GÓMEZ, MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE (2007).

243. *See* GEORGE J. SANCHEZ, BECOMING MEXICAN AMERICAN: ETHNICITY, CULTURE, AND IDENTITY IN CHICANO LOS ANGELES, 1900–1945, at 38–62 (1995).

244. *See* GÓMEZ, *supra* note 242, at 3–4.

245. Shortly after ratification of the Constitution, the first Congress adopted the Naturalization Act of 1790, restricting naturalization to "free white persons." This restriction remained in effect until 1870 when the restriction was amended to permit "aliens of African nativity and . . . persons of African descent." MOTOMURA, *supra* note 10, at 73. Racial restrictions on other nonwhites remained until 1952. *Id.* at 75.

246. GÓMEZ, *supra* note 242, at 17–18, 41–45.

247. *Id.* at 1, 83–85.

social segregation.[248] Mexican identity was thus distinctly racial, albeit ambiguously positioned below whites and above other nonwhites. In contrast to rules of hypodescent under which any drop of Black blood rendered one Black, a reverse one-drop rule co-evolved in which any drop of Spanish blood made one white, at least in a formalistic sense.[249] Both rules of racial assignment served as technologies of racial subordination, particularly conferring on early Mexican Americans an incentive to assert their whiteness in order to differentiate and racially distance themselves from Indians and Blacks.

To illustrate the ambivalent, off-white status of Mexicans, consider the naturalization petition of *In re Rodriguez*,[250] decided by a federal judge in Texas in 1897. While the petitioner Ricardo Rodriguez was apparently phenotypically Mexican, was not literate in English (though he testified in English), and averred that he was "pure-blooded Mexican,"[251] he claimed that he was white and thus eligible for U.S. citizenship.[252] The court conceded that Rodriguez was not white in appearance nor would an anthropologist classify him as white.[253] Yet the judge ruled that Rodriguez was "white enough" because of laws that had effectively treated Mexicans as white.[254] These included in particular the 1848 Treaty of Guadalupe Hidalgo under which Mexicans living in the Cession were collectively naturalized as citizens of the newly acquired territories. The conflict among whites over whether Mexicans were "white enough" was certainly not definitively resolved by this case. Rather, the dispute reflected the contingent and contested nature of Mexican claims to whiteness.

The legacy of this early history is that the racial dimensions of Latino identity are largely obscured. This difficulty has manifested itself even in the context of efforts to dismantle Jim Crow practices against Mexican Americans. Reflecting the orientation of the first Mexican American civil rights organization, the League of United Latin American Citizens (LULAC), early civil rights advocacy on behalf of Mexican Americans was often framed around the

248. As Gómez illustrated, this perception of Mexican Americans as "off-white" or less than fully white obtained even in New Mexico where Mexican men enjoyed a certain range of political rights (jury service, voting, and holding office in the territorial legislature). *Id.* at 83–90. Both in law and popular discourse, Mexicans were constructed as "greasers," racially inferior, stereotyped as inherently lazy, backward, and unfit for self-government. *Id.* at 62; *see also* IAN HANEY LÓPEZ, RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE (2003) (discussing patterns of social and legal discrimination against Latinos).

249. GÓMEZ, *supra* note 242, at 142–43.

250. 81 F. 337 (W.D. Tex. 1897).

251. GÓMEZ, *supra* note 242, at 140.

252. *Id.* at 139–41.

253. *Id.* at 140–41.

254. *Id.* at 141.

assertion that Mexican Americans were white.[255] The landmark case of *Westminster School District v. Mendez*[256] decided in 1947 is illustrative. The United States Ninth Circuit Court of Appeals ruled that the segregation of Mexican descendant school children in the absence of a state law authorizing the segregation of Mexicans amounted to a denial of equal protection. Notably, while California law did authorize the segregation of children "belonging to one or another of the great races of mankind"—read by the court as Caucasoid, Mongoloid, and Negro—and allowed for segregation of Indians, "Asiatics," and Blacks, state law did not authorize segregation "*within* one of the great races."[257] To the extent then that Mexican Americans were racially identified as whites, they could not be segregated from other whites.

The off-white status of Mexican-Americans figured significantly in *Hernandez v. Texas*,[258] the landmark civil rights case that was decided the same year as *Brown v. Board of Education*.[259] The U.S. Supreme Court held that the systematic exclusion of Mexican Americans from jury duty in a Texas county with significant Mexican American population violated the Fourteenth Amendment. The record established that no Mexican American had served on a jury in 25 years and that even in the courthouse where the case was tried, men's bathrooms were segregated and marked, "Colored Men and 'Hombres Aqui.'"[260]

Yet neither the parties nor the Court contended that the discrimination involved was race-based. Indeed, the government early on attempted to defend against the charge of discrimination on the grounds that the Latino challengers were white and thus could not establish that they were the victims of racial discrimination at the hands of other whites.[261] The Supreme Court rejected this argument, finding that there was sufficient evidence "to prove that persons

255. *See* Neil Foley, *Over the Rainbow:* Hernandez v. Texas, Brown v. Board of Education, *and* Black v. Brown, 25 CHICANO–LATINO L. REV. 139, 140–41 (2005) (noting that "[t]he Mexican American generation had two decades of success in litigating against school desegregation in the courts before 1954, and in all these cases the court acknowledged, whether implicitly or explicitly, the membership of Mexicans in the Caucasian race").

256. 161 F.2d 774 (9th Cir. 1947).

257. *Id.* at 780 (emphasis added).

258. 347 U.S. 475 (1954).

259. 347 U.S. 483 (1954).

260. *Hernandez*, 347 U.S. at 480.

261. This argument was accepted by the Texas appellate court, which had rejected the assertion that Hernandez's rights had been violated: "Mexicans are white people . . . . The grand jury that indicted the appellant, and the petit jury that tried him being composed of members of his race, it cannot be said in the absence of proof of actual discrimination that appellant had been discriminated against." Hernandez v. State, 251 S.W.2d 531, 536 (Tex. Crim. App. 1952), *rev'd*, *Hernandez*, 347 U.S. 475.

of Mexican descent constitute a separate class . . . ., distinct from 'whites.'"[262] Nevertheless, the court did not hold that this "separate class" constituted a distinct racial group, though their subordinate status was key to the Court's ruling. The ambivalence surrounding Latino racial identity permeated both the way the case was argued and ultimately decided.

Similarly *Perez v. Sharp*,[263] a state constitutional challenge to California's antimiscegenation statute, rested upon the off-white status of Mexicans. The litigation was grounded in the fact that Andrea Perez, a Mexican American woman, was legally classified as white and thus was prohibited from marrying her African American partner. Ruling in favor of Perez, the California Supreme Court rejected the ban on interracial marriage because the state's objective—to preserve racial purity—was inherently impermissible.[264] *Perez* was a major civil rights victory and thus formed an important template for *Loving v. Virginia*,[265] where twenty years later, the Supreme Court struck down similar antimiscegenation laws as unconstitutional under the Fourteenth Amendment. Yet, in the context of the litigation, Latinos were represented in this civil rights dispute as formally white.

All of this is to suggest that the erasure of Latinos as a race has a long juridical history facilitated by their formal classification as white. Conceiving of Latinos as whites—as an ethnic rather than a racial group—has made their experience with racial profiling less legible as a racial practice. Thus, it is perhaps unsurprising that this elision impacts how Latinos are (not) seen in the context of racial profiling debates and the criminal procedure issues racial profiling implicates.

3. Documenting the Logic of Racial Profiling

One reason why the undocumented cases are marginalized in the criminal procedure debates about racial profiling is that one can view the cases as not in fact authorizing racial profiling, but rather legitimizing the reliance on race when relevant and efficient in enforcing immigration law. Recall that *Brignoni-Ponce* specifically condemns the reliance on racial identity as the sole basis for establishing reasonable suspicion of immigration violations, but permits

262. *Hernandez*, 347 U.S. at 479. As the Court noted, community attitudes established that there were marked differences for "Mexicans," who were largely excluded from businesses and civic affairs and previously were assigned to racially segregated elementary schools. *Id.*

263. 198 P.2d 17 (Cal. 1948).

264. *Id.* at 29.

265. 388 U.S. 1 (1967).

consideration of race as one of several factors in making that assessment.[266] This maps onto a longstanding debate about what racial profiling actually means.[267] One view holds that racial profiling refers to the use of race as the *sole* factor in making a decision to investigate, while the other view holds that it includes *an*y reliance on race—even reliance on race as one of several factors.[268] On the former view (profiling means relying on race alone) arguably the undocumented cases do not authorize the practice of racial profiling and therefore ought not to be critiqued on that basis. Racial profiling is conceptually defined to exclude what the undocumented cases actually authorize.

The claim that the undocumented cases do not legitimize racial profiling also rests on an empirical argument that relying on race as one of several factors in enforcing immigration law is not racist but is using a relevant fact that makes law enforcement more efficient. If one is aware that most undocumented immigrants are Latino,[269] then that would not justify targeting all Latinos, nor would it mean that Latino racial identity would be irrelevant. From this view,

266. United States v. Brignoni-Ponce, 422 U.S. 873, 887 (1975).

267. Indeed, the asserted emergence of a consensus against racial profiling prior to the 9/11 attacks largely rested upon differing conceptions about what racial profiling entailed. Thus, when President Clinton, George Bush, and John Ashcroft all denounced racial profiling, as well as 81 percent of the American public, in a 1999 Gallup poll, it is likely the case that people had different understandings of the practice. *See* Randall Kennedy, *Suspect Policy*, NEW REPUBLIC, Sept. 13, 1999, at 30 (reporting that President Clinton declared racial profiling to be "morally indefensible"). President Bush called the practice wrong in an address to Congress. *See* President Bush, Address to the Joint Session of Congress, *reprinted in* 147 CONG. REC. H433 (Feb. 27, 2001). Ashcroft declared racial profiling to be "unconstitutional." Thomas B. Edsall, *Black Caucus, Ashcroft Have Tense Meeting: Attorney General Cites "Candid Exchange" and Stresses Agreement on Profiling*, WASH. POST, Mar. 1, 2001, at A6. The Gallup Poll was conducted Sept. 24, 1999–Nov. 16, 1999, Public Opinion Online.

268. *See* Harcourt, *supra* note 13, at 317 n.6, 317–18 (noting the competing definitions of racial profiling). These differences are reflected also in legislation, litigation, and public discourse: Some jurisdictions define the term narrowly to include investigatory practices based solely on race, while others prohibit any consideration of race. *Compare, e.g.*, MD. CODE ANN., TRANSP. § 25-113 (Michie Supp. 2001) (barring use of race as sole justification for a traffic stop), *and* R.I. GEN. LAWS § 31-21.1-2 (2000) (similar definition), *with* Consent Decree, Wilkins v. Md. State Police, *supra* note 237, § 2.1 (in consent decree prohibiting racial profiling, defining policy of consent decree prohibiting racial profiling to bar troopers from "rely[ing] on an individual's race or ethnicity as a factory in determining whether to stop, question, search or arrest an individual"), *and Constitutional Issues*, TUSCON POLICE DEP'T (revised July 29, 2010), http://tpdinternet.tucsonaz.gov/general_orders/2200CONSTITUTIONAL%20ISSUES.pdf (prohibiting any use of race except as part of a suspect description). For consideration of this debate over meaning, see Katheryn K. Russell, *Racial Profiling: A Status Report of the Legal, Legislative, and Empirical Literature*, 3 RUTGERS RACE & L. REV. 61, 65–68 (2001).

269. Most recent available evidence from government sources reflects that as of 2009, roughly 62 percent of all undocumented immigrants in the United States are from Mexico. *See* MICHAEL HOEFER ET AL., OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., ESTIMATES OF UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2009 (2010). Another 12 percent are from Central American countries. *Id.*

law enforcement officials are not interested in discriminating against Latinos; rather, they are interested in arresting people who violate immigration law, the majority of whom happen to be Latinos. The fact that the majority of the investigations and ultimate arrests are of Latinos is only a function of differential rates of offending, not racialized police tactics.[270] If probabilities are always a part of developing a basis for investigatory action,[271] then this racial probability is just one fact to be considered. As one court put it, while racial associations with particular criminal behavior may be controversial, "facts are not to be ignored simply because they are unpleasant."[272]

Importantly, the claim that it is appropriate to use Latino racial identity as one factor in deciding whether there is a basis for further investigation of immigration violations is not restricted to defenders of racial profiling. Even some critics of racial profiling have contended that in immigration enforcement, there is a compelling logic to using Latino racial identity as a factor in deciding who should be the focus of investigatory attention.[273] In the scholarly and public policy literature this efficiency-based argument about racial profiling has been robustly debated, along with the related assertion that it is unfair to characterize as "racist" all uses of race in initiating further investigatory action.[274]

Although we have a view on both the definitional[275] and empirical issues,[276] our point here transcends this dispute. Whether immigration officials

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270. *See* Chet K.W. Pager, *Lies, Damned Lies, Statistics and Racial Profiling*, 13 KAN. J.L. & PUB. POL'Y 515, 519–21 (2003) (arguing that the disparity studies supporting racial profiling claims have failed to tend to the issue of baselines and whether there are racial differences in the underlying rate of offending).

271. *Id.* at 527 (contending that police investigation is "almost always based on suspicion developed through probabilistic interpretation of innocent factors").

272. United States v. Weaver, 966 F.2d 391, 394 n.2 (8th Cir. 1992).

273. As Albert Alschuler puts it, using race in this context is justifiable, not simply because it is more likely that any offender will be Latino, but also because it helps law enforcement decide who warrants less attention. Alschuler, *supra* note 60, at 237–38.

274. *Compare* Pager, *supra* note 270 (arguing that disparity studies in this area have failed to include important controls, such as baseline offending rates, comparison with hit rates, or the percentage of searches yielding results), *with* David Harris, *When Success Breeds Attack: The Coming Backlash Against Racial Profiling Studies*, 6 MICH. J. RACE & L. 237 (2001) (cataloguing the critiques of statistical studies, and noting how the asserted concerns over the need for more data are mobilized to reject the idea that racial profiling is a problem). For articulations of the efficiency claim, see Kennedy, *supra* note 267 (citing police arguments that "racial profiling is a sensible, statistically based tool that enables them to focus their energies efficiently for the purpose of providing protection against crime to law-abiding folk" and that it "lowers the cost of obtaining and processing information").

275. We adopt the definition that encompasses all uses of race, as the utilization of other factors does not erase the fact that a racial profile—that association between racial identity and the suspicion of some illegal behavior—is still present. *See supra* note 12.

276. We think that there is more than adequate evidence of racial bias in policing practices. Only if one assumed that law enforcement agencies stand outside of and are immune to broader U.S.

employ race as the sole factor or one of several in establishing reasonable suspicion, they are racially constructing all Latinos as presumptively "illegal"—which is to say, these race-conscious practices participate in constructing the racial category itself.[277] There are several ways to understand this. First, the association between Mexican or Latino racial identity and "illegality" is in part based on conflating the fact that most undocumented people are from Mexico with the erroneous assumption that most Latinos are undocumented.[278] This conflation effectively constructs all Latinos as presumptively undocumented. Second, so long as Latino identity is deemed a relevant factor in determining whether a person is undocumented, all Latinos live under a cloud of this suspicion. The racial category per se is suspicious. Third, the very reason many people are comfortable drawing a racial association between perceived Latino ancestry and "illegal" status is that the racial construction of Latino identity arises from and is bound up with particular narratives about illegality and immigration that are rooted in the past and are now deeply embedded in public discourse and in law. A brief history of immigration enforcement at the border helps to make this plain.

According to historian Kelly Lytle Hernández, Mexican racial identity is specifically rooted in the history of the U.S. Border Patrol, the principal agency charged with enforcing immigration law.[279] The Border Patrol, created in the wake of the passage of the National Origins Act of 1924, installed a new federal agency with a broad but ill-defined mandate that left much of its agenda and priorities to be defined through debates between competing social and political forces.[280]

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racial dynamics would one contend that race makes no impact in policing practices. The processes and structures through which racial difference is articulated are complex and varied so that there is still much to be studied, documented, and theorized about the group and individual dynamics that produce racial effects.

277. *See* De Genova & Ramos-Zayas, *supra* note 7 (discussing racial construction of Latinos as "illegals"). The strength of the presumption may vary across contexts or be more or less prevalent under particular conditions, but it remains the logic upon which race is deemed relevant.

278. *See* Garcia, *supra* note 85; Johnson, *Racial Profiling*, *supra* note 10, at 1038 & n.196 ("'Illegal alien' profiles usually rest at least in part on the stereotype that Latino/as are 'foreigners' of suspect immigration status."). In actuality, most Latinos are citizens or legal resident aliens. *See The American Community—Hispanic: 2004*, U.S. CENSUS BUREAU, at 11 (2007), *available at* http://www.census.gov/prod/2007pubs/ acs-03.pdf ("Nearly three-quarters of Hispanics were U.S. citizens, either through birth (about 61 percent) or naturalization (about 11 percent).").

279. KELLY LYTLE HERNÁNDEZ, MIGRA! A HISTORY OF THE U.S. BORDER PATROL 9 (2010). The U.S. Border Patrol became the Office of Border Patrol in 2003 when it became part of the U.S. Customs and Border Protection, a component of the newly created Department of Homeland Security. *Border Patrol History*, CBP.GOV, http://www.cbp.gov/xp/cgov/border_security/border_patrol/border_ patrol_ ohs/history.xml (last visited July 12, 2011).

280. LYTLE HERNÁNDEZ, *supra* note 279, at 32–36.

The Border Patrol's eventual focus on the southern border[281] and the targeting of Mexican immigrant workers beyond the border proper was produced by contestations among nativists, southwestern agribusinessmen seeking a reliable labor force, the Mexican government's pursuit of emigration control, and, importantly, the interests of the Border Patrol agents themselves. The latter, as landless members of the working class, were able to create and fulfill a critical role in the borderlands by policing the area's principal workforce.[282] However, the men of the Border Patrol were not simply engaged in serving the interests of business elites. As members of the white working class who had been most vehemently opposed to Mexican immigration, they sought to assert authority, achieve power, and in effect buttress their claims to whiteness through their work.[283]

The enforcement of immigration law in the borderlands called upon law enforcement to delineate between the "legal" and "illegal," and in the context of the highly racialized dynamics of the southwest, that line was specifically "mexicanized."[284] Indeed, the primary target of immigration enforcement could be described by Border Patrol agents with some specificity as "Mexican male, about 5'5" to 5'8"; dark brown hair; brown eyes; dark complexion; wearing huaraches . . . and so on."[285] The institutionalization of the Border Patrol as a federal agency and the process by which it defined its priorities insured that illegal immigration had a specific racial face. It was a crucible through which "persons guilty of the act of illegal immigration [were transformed] into persons living with the condition of being illegal."[286] This racial construction, along

281. This focus continues today. The vast majority of Border Patrol agents—over 90 percent—are stationed at the southwest border. Kristin Connor, *Updating* Brignoni-Ponce*: A Critical Analysis of Race-Based Immigration Enforcement*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 567, 586 (2008). This may seem logical, but, in point of fact, almost half—45 percent—of undocumented immigrants are already in the United States when they go into undocumented status, mostly by overstaying their visas. The majority of this population is non-Latino. *Id.* at 587.

282. LYTLE HERNÁNDEZ, *supra* note 279, at 44.

283. *Id.* at 41–42.

284. As Lytle Hernández puts it:

> The Border Patrol's narrow focus upon policing unsanctioned Mexican immigration . . . drew a very particular color line around the political condition of illegality. Border Patrol practice, in other words, imported the borderlands' deeply rooted racial divides arising from conquest and capitalist economic development into the making of U.S. immigration law enforcement and, in turn, transformed the legal/illegal divide into a problem of race.

Id. at 222.

285. *Id.* at 10.

286. *Id.* at 9.

with the others we have described, ultimately played a critical role in shaping the law of racial profiling.[287]

In this respect, the problem with *Brignoni-Ponce* and the other undocumented cases is not simply that they reflect a faulty empiricism; whether most Latinos are in fact undocumented (they are not) or whether most undocumented people are Latino (they are) is really not the point. The point is that Latino racial identity has been and is presently defined through the trope of illegality such that the racial profile of "illegal alien" is central to their cognizability as a racial group. The undocumented cases reflect and further reinforce this racial recognition, encoding Latino racial identity writ large as a mark of "illegality."[288]

B. Doctrinal Barriers

In addition to the conceptual barriers outlined above, there are three doctrinal obstacles to the full consideration of the implications of the undocumented cases for core debates about race, policing, and criminal procedure: (1) the plenary power doctrine, (2) the perceived prudential value of *Brignoni-Ponce*, and (3) the regulatory or administrative context of the undocumented cases.

1. Questioning the Plenary Power Doctrine: Immigration Exceptionalism

Although the government has employed immigration law to racially exclude and subordinate nonwhite racial groups, for the most part courts have legitimated these practices because of the federal government's plenary power over immigration—a power that has been said to be absolute.[289] This doctrinal exemption has buttressed a form of immigration exceptionalism that justifies

287. The Border Patrol offered statistics in *Brignoni-Ponce* asserting that 85 percent of the persons arrested for illegal entry were people of Mexican origin. United States v. Brignoni-Ponce, 422 U.S. 873, 879 (1975). The Supreme Court relied upon and interpreted these statistics to mean that "85% of the aliens illegally in the country are from Mexico," assuming, without more, that the arrest statistics accurately reflected the rate of offending. *Id.* Most significantly, in moving to the assertion that Mexican appearance could be a factor in assessing the likelihood of illegal immigration status, the Court legally converted the statistics into the profile of the illegal immigrant. Subsequent decisions like *Martinez-Fuerte* further reinscribed this racial profile.

288. JOHNSON, *supra* note 6, at 48–49 (noting that racialized immigration policies against noncitizens racially stigmatize domestic minorities and reinforce the logic of racial subordination, as the dominant view of the group is that it is homogenous and, thus, the distinctions within the group with regard to immigration status are not visible).

289. *See* Chin, *supra* note 5, at 5.

taking even explicitly racial practices, like the use of racial profiles, outside the reach of judicial intervention.

Historically, immigration law has been a site where policymakers, along with the courts, have expressly employed race as a mechanism in determining admission, exclusion and belonging, and relied on a well-documented history of racist logics to do so. The genesis of this tradition lies in racist opposition to Chinese immigration that was initially welcomed but later vehemently resisted.[290] The Page Act of 1875 marked the beginning of federal immigration regulation and specifically excluded racially marked categories of persons—Chinese prostitutes and "coolie" labor.[291] This was followed by the 1882 Chinese Exclusion Act, which explicitly excluded a racially defined class.[292] Racial hierarchy and the quest for racial homogeneity subsequently shaped the national origins quota system which permitted more immigrants from Western Europe than from Southern or Eastern Europe, Africa, Asia, or Central America.[293]

These racialized practices were naturalized in law and largely treated as justifiable assertions of governmental authority under the doctrine of plenary power. In *Chae Chan Ping v. United States*,[294] the Court ruled that Congress had the power to exclude immigrants of a particular race—here the Chinese—and that this was not subject to judicial review even though the statute contravened lawfully executed treaties between China and the United States and even though Chae held a valid certificate of residency. According to the Court the enactment of the Chinese Exclusion Act that took effect a week before Chae's attempt to reenter was within the government's power to exclude aliens as a necessary aspect of national sovereignty.[295]

Race was central to the Court's reasoning as the plenary power to protect sovereignty was deemed crucial to protect against a foreign race—a group that "remained strangers in the land," who could not assimilate and thus were

290. *See id.* (describing the racial origins of immigration law in which Congress authorized and the Supreme Court affirmed the exclusion of the Chinese on the basis of race); *see also* IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (10th ed. 2006) (examining the racial prerequisite cases in which naturalization was restricted to whites); Carbado, *supra* note 5.

291. *See* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641 (2004); John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 ASIAN L.J. 55, 96–97 (1996).

292. Torok, *supra* note 291, at 96.

293. *See* Gabriel Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 279 (1996). For a more detailed description of the national origins system, see MOTOMURA, *supra* note 10, at 126–30.

294. 130 U.S. 581 (1889).

295. *Id.* at 609.

perceived to pose "a great danger that . . . our country would be overrun by them."[296] Shortly thereafter, this power to exclude was deemed to extend to authorize the deportation of aliens already residing in the United States. In *Fong Yue Ting v. United States*,[297] the Court upheld the Chinese Exclusion Act of 1892, ruling explicitly that the power to regulate immigration and to expel could be exercised on racial grounds.

The plenary power doctrine, then, emerged in a racial context and developed as an explicitly racialized body of law. At the same time, as scholars like Gabriel Chin and Hiroshi Motomura have argued, the doctrine has rendered racialized immigration enforcement remarkably resistant to civil rights intervention.[298] Despite many critiques[299] and even some erosion of plenary power,[300] constitutional principles of equal protection and due process are erratically applied to noncitizens even in the contemporary sphere because of the continued vitality of the plenary power doctrine.[301] While the explicit racial rhetoric of the Chinese Exclusion cases is no longer invoked, what persists is the underlying logic of the cases that linked the notion of unfettered power to define the terms of admission and exclusion to issues of national sovereignty. As Motomura explains, the cases articulated a framework of immigration as contract in which the government is seen to "grant[ ] to immigrants an entry permit or license that the government could revoke at will."[302] This race-neutral notion of "immigration as contract" gives ongoing force and legitimacy to the

296. *Id.* at 595.

297. 149 U.S. 698 (1893).

298. *See* Chin, *supra* note 5, at 18.

299. *See* JOHNSON, *supra* note 6, at 46 (noting that "[a]cademic attacks on the plenary power doctrine, coming from many different angles, are legion").

300. *See* Zadvydas v. Davis, 533 U.S. 678, 678, 695 (2001) (holding that the government could not indefinitely detain deportable noncitizens who were formerly permanent residents and that the plenary power doctrine is "subject to important constitutional limitations"); MOTOMURA, *supra* note 10, at 102–05 (describing the evolution of the procedural exception to the plenary power doctrine that requires the government to observe minimal due process, even deferring to congressional and executive authority to set terms of admission and deportation); *id.* at 105–08 (describing a case rejecting the government's claim that Congress's plenary power over immigration could justify deporting noncitizens for protected First Amendment activity).

301. *See* Chin, *supra* note 5, at 3–4 (noting that in immigration law, racial classifications are permitted and that "[district and Circuit] courts have said not only that aliens may be excluded or deported on the basis of race without strict scrutiny, but also that such racial classifications are lawful per se"); *id.* at 9 (noting Congress's enactment of statute that allows the State Department to discriminate on the basis of race, religion, sex, or other factors in processing visa applications); Janel Thamkul, *The Plenary Power–Shaped Hole in the Core Constitutional Law Curriculum: Exclusion, Unequal Protection, and American National Identity*, 96 CALIF. L. REV. 553, 558, 575–78 (2008) (describing how constitutional standards, such as strict scrutiny in the context of due process and equal protection claims, are inconsistently applied to immigration).

302. MOTOMURA, *supra* note 10, at 29–30.

plenary power doctrine, notwithstanding its explicitly racist origins and ongoing racially discriminatory impact.[303]

This is arguably both a cause and a consequence of Latino racial invisibility. Put another way, to the extent that immigration is deemed to be an arena in which the plenary power doctrine effectively forecloses claims of discriminatory enforcement, the terrain in which Latino racial identity is often defined—immigration enforcement—stands outside of the traditional constraints on and critiques of the use of race in domestic law enforcement. This is the sense in which immigration exceptionalism obscures the significance of the undocumented cases and the issue of racial profiling in immigration enforcement.

2. Questioning *Brignoni-Ponce*'s Precedential Value

In explaining why the undocumented cases are marginalized in the criminal procedure literature one might look to whether these cases and *Brignoni-Ponce* in particular have significant precedential value. The case was decided in 1975, and certainly much has changed since then. The demographic shifts and the underlying premises of the case have come under critical review in both legal commentary and in contemporary decisions. The principal holding of *Brignoni-Ponce* was that a roving Border Patrol agent could not stop a driver based solely on the basis that he was of Mexican ancestry, as that fact standing alone did not establish reasonable suspicion of a violation of immigration law.[304] However, "Mexican appearance" was deemed to be a relevant factor because of "the likelihood that any given person of Mexican ancestry is an alien is high enough" to support the inference.[305]

This specific claim in *Brignoni-Ponce* has come under significant criticism. While the Court relied on statistics on the number of persons of Mexican origin in the border states who were registered aliens (between 8.5 percent and 20 percent), there was no clear evidence supporting the conclusion that persons of Mexican ancestry were likely undocumented, and indeed there are reasons to question the accuracy of the claim.[306]

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303. *Id.*

304. United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

305. *Id.* at 887.

306. *Id.* at 886 n.12 (citing 1970 statistics from the Census and INS). On the issue of accuracy, see Connor, *supra* note 281, at 575 n.45 (noting the lack of evidence supporting the claim, and pointing out that 1980 Census figures suggested that only one-eighth of the Latino population in the region was undocumented).

Moreover, if there was little in 1975 when *Brignoni-Ponce* was decided to support the association between Latino identity and undocumented status, there is even less now. This indeed was the basis of the Ninth Circuit's decision in *United States v. Montero-Camargo*,[307] which criticized *Brignoni-Ponce* on precisely this basis and declined to follow it. The Ninth Circuit reasoned that the demographic information relied upon in *Brignoni-Ponce* was outdated and noted that "the likelihood that in an area in which the majority—or even a substantial part of the population is Hispanic [like the majority Latino community of El Centro, California], any given person of Hispanic ancestry is in fact an alien, let alone an illegal alien, is not high enough to make Hispanic appearance a relevant factor in the reasonable suspicion calculus."[308] Put another way, if a majority of people in a given area share a common characteristic, then that characteristic has little or no probative value in providing particularized and objective information upon which to form reasonable suspicion.[309] The court then specifically rejected the inference that *Brignoni-Ponce* authorized.

This reluctance to rely in predominantly Latino areas on Latino racial identity as a relevant factor linking to suspicion has appeared in Fifth Circuit opinions as well.[310] Other cases have de-emphasized the relevance or significance of racial identity in determining whether to conduct further investigation,[311] noting that Hispanic appearance is not only relatively common but also not a marker of criminal conduct.[312] Decisions in the Second Circuit have also specifically questioned the association between race and reasonable suspicion in *Brignoni-Ponce*, characterizing it as dictum.[313] Perhaps criminal

307. 208 F.3d 1122 (9th Cir. 2000).

308. *Id.* at 1131.

309. *Id.*

310. *See, e.g.*, United States v. Chavez-Villareal, 3 F.3d 124, 127 (5th Cir. 1993); United States v. Orona-Sanchez, 648 F.2d 1039, 1042 (5th Cir. 1981); United States v. Rubio-Hernandez, 39 F. Supp. 2d 808, 836 (W.D. Tex. 1998); United States v. Zertuche-Tobias, 953 F. Supp. 803, 821 (S.D. Tex. 1996). These cases have tended to accord little probative value to Latino racial identity where a substantial proportion of the population is Latino.

311. Some courts have formally affirmed the consideration of racial appearance under *Brignoni-Ponce* but simultaneously have given little weight to this factor. *See, e.g.*, United States v. Abdon-Limas, 780 F. Supp. 773 (D.N.M. 1991); United States v. Ramon, 86 F. Supp. 2d 665 (W.D. Tex. 2000). Others have cited *Brignoni-Ponce* for a list of relevant factors and have omitted race or appearance. *See* United States v. Hernandez-Lopez, 761 F. Supp. 2d 1172 (D.N.M. 2010).

312. *Abdon-Limas*, 780 F. Supp. at 778.

313. *See* Farag v. United States, 587 F. Supp. 2d 436, 463–64 (E.D.N.Y. 2008) (citing *Montero-Camargo* with approval, and noting that it would be particularly inappropriate to extend its statistical rationale to circumstances involving the seizure of persons of Arab ancestry at an airport where "the likelihood that any given airline passenger of Arab ethnicity is a terrorist is so negligible that Arab ethnicity has no probative value").

procedure scholars have read these cases and concluded that *Brignoni-Ponce* is of limited precedential value.

However, none of this skepticism regarding the reasoning in the case has yet marked its death knell. Indeed, even as the Ninth Circuit in *Montero-Camargo* severely criticized the reliance on race authorized by *Brignoni-Ponce*, in subsequent cases it has affirmed in principle that in certain circumstances, Latino appearance can be relevant.[314] Moreover, the Supreme Court has never questioned the authority of the case. This helps to explain why, despite some criticism of *Brignoni-Ponce*, the case continues to be cited for the proposition that race is a relevant factor in determining a person's immigration status.[315] Ironically, the U.S. Department of Justice guidelines on racial profiling, which seek to ban the practice, cite the case as a basis for instructing officers that they may consider race in making investigatory stops at the borders or in connection with national security.[316] While there has been much public repudiation of racial profiling, the government and the courts continue to rely on *Brignoni-Ponce* for the notion that the perceived race of an individual can be part of the determination of reasonable suspicion, or the otherwise applicable standard for the investigatory action in connection with immigration enforcement.

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314. *See* United States v. Manzo-Jurado, 457 F.3d 928 (9th Cir. 2006) (permitting consideration of "Mexican appearance" as a relevant factor during a stop in an area with relatively few Latinos, though finding the stop to be unlawful).

315. *See, e.g.*, United States v. Medina, 295 F. App'x 702 (5th Cir. 2008) (relying on *Brignoni-Ponce* factors, including appearance, and holding them appropriate in determining that a stop was supported by reasonable suspicion); *accord* United States v. Hernandez-Moya, 353 F. App'x 930 (5th Cir. 2009) (per curiam); United States v. Bautista-Silva, 567 F.3d 1266 (11th Cir. 2009); United States v. Montes, No. 96-50041, 1996 WL 713037 (9th Cir. Nov. 5, 1996) (upholding reliance on Mexican appearance as one factor to establish probable cause for warrantless arrest); United States v. Telles-Montenegro, No. 8:09-CR-502-T-17TGW, 2010 WL 737640 (M.D. Fla. Feb. 4, 2010); *Ramon*, 86 F. Supp. 2d 665 (affirming *Brignoni-Ponce*'s articulated factors that can be considered to include "characteristics of a person living in Mexico, such as mode of dress or haircut," while holding the roving patrol stop to be unlawful); *see also* United States v. Franzenberg, 739 F. Supp. 1414, 1417 n.1, 1419 (S.D. Cal. 1990) (analyzing lawfulness of immigration stop of Native American who "looked Hispanic"); Connor, *supra* note 281, at 596 (noting that, particularly post–9/11, lower courts have moved towards accepting explicit consideration of race). In some instances, courts have considered the competing arguments over relevance and sidestepped the specific question of whether race can permissibly be considered in determining reasonable suspicion by finding that, even when the officers had a mistaken belief that the defendants were of Middle Eastern background in connection with investigation of potential terrorist activity, the officers' subjective intentions could not invalidate further investigation justified by other valid and relevant circumstances. *See* United States v. Ramos, 591 F. Supp. 2d 93 (D. Mass. 2008).

316. U.S. DEP'T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES 9 (2003), *available at* http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf.

Notwithstanding some criticism of its premises, *Brignoni-Ponce* clearly has continued force.

3. Questioning the Doctrinal Categories: Regulatory and Administrative "Investigations"

A final reason why the undocumented cases do not figure prominently in the criminal procedure literature on race and the Fourth Amendment is that, as a formal doctrinal matter, these cases are "regulatory" or "administrative"—"special needs" cases—rather than "investigatory."[317] That is to say, the undocumented cases are not centrally about the enforcement of *criminal* laws.[318] To the extent that the racial profiling debate has centered on the ways in which *criminalization* is racialized, the documented cases do not easily fit into this frame.[319] Put another way, because, one could argue, the undocumented cases are not fundamentally about race and criminalization, one would not expect them to occupy significant space in the literature on racial profiling.

Another way to think about why the regulatory or administrative nature of the undocumented cases explains their marginalization in the racial profiling literature is that administrative searches and seizures are not subject to ordinary Fourth Amendment constraints. This is not to say that the Fourth Amendment does not apply to administrative or regulatory searches and seizures, but rather that the Amendment applies with considerably less force. As Charles Whitebread and Christopher Slobogin suggest, while the Supreme Court "has usually said that they [regulatory searches and seizures] implicate the Fourth Amendment . . . .[,] the Court has been willing to relax the typical

317. *See generally* Fabio Arcila, Jr., *Special Needs and Special Deference: Suspicionless Civil Searches in the Modern Regulatory State*, 56 ADMIN. L. REV. 1223 (2004); *see also* Seth M. Haines, *Rounding Up the Usual Suspects: The Rights of Arab Detainees in a Post–September 11 World*, 57 ARK. L. REV. 105, 121 (2004). In some ways, the notion that cases that deal with immigration enforcement in the interior of the country are regulatory or administrative but not investigatory is insufficiently nuanced. It might be more accurate to say that these cases occupy a space between regulatory searches and seizures on the one hand, and investigatory searches and seizures on the other.

318. *See* WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY KING, CRIMINAL PROCEDURE 237–38 (4th ed. 2004) (discussing *Brignoni-Ponce* and *Martinez-Fuerte* under the rubric of "inspections and regulatory searches"); *see also* WHITEBREAD & SLOBOGIN, *supra* note 157, at 326 (discussing *Brignoni-Ponce* and *Martinez-Fuerte* in their chapter on "regulatory inspections and searches").

319. *But see* Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control, and National Security*, 39 CONN. L. REV. 1827 (2007); Eagly, *supra* note 1; Teresa Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81 (2005); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

warrant and probable cause requirements in virtually all of the regulatory situations it has confronted."[320] The Court accomplishes this relaxation by way of a balancing analysis it first performed in *Camara v. Municipal Court*, a case involving residential inspection for health and safety.[321] While the Court did not, in that case, dispense entirely with the ordinary warrant requirement as a predicate to searching a home, it relaxed the standard considerably. Rather than having to demonstrate probable cause that a particular home presented a health and safety concern, the government could obtain a warrant by establishing that there was probable cause to believe that the area "as a whole" presented a health and safety concern.[322] The Court reached this conclusion by balancing the government's need to perform health and safety housing inspections against the intrusion these inspections effectuated on the person whose home the government sought to search.[323] Subsequent to *Camara*, the Supreme Court has applied this balancing analysis in a number of cases, the result of which has been the legitimatization of searches and seizures without either a warrant or a showing of probable cause.[324]

Because immigration enforcement cases are part of the Supreme Court's "special needs"/regulatory/administrative search and seizure jurisprudence, one sees in them as well a relaxation of ordinary Fourth Amendment protections. In *INS v. Delgado*, for example, in two of the factory raids, the INS employed a warrant analogous to the warrant at issue in *Camara* in the sense that the INS's warrant was not supported by probable cause to believe that any particular worker was undocumented (just as in *Camara*, the warrant was not supported by probable cause to believe that any particular house presented a health and safety concern). Moreover, in *Martinez-Fuerte*, the Court required no suspicion at all to conduct checkpoint seizures. The Court has been clear to point out, however, that the government may not without some level of suspicion,

320. WHITEBREAD & SLOBOGIN, *supra* note 157, at 315.
321. 387 U.S. 523 (1967).
322. *Id.* at 536.
323. *Id.* at 538–39.
324. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (permitting random drug testing of students who participate in extracurricular activities); Mich. Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (permitting warrantless and suspicionless drunk-driving checkpoint); Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602 (1989) (permitting warrantless and suspicionless drug testing of employees suspected of violating certain rules or who were involved in an accident); Griffin v. Wisconsin, 483 U.S. 868 (1987) (permitting search of a probationer's home based on reasonable suspicions); South Dakota v. Opperman, 428 U.S. 364 (1976) (permitting warrantless and suspicionless inventory searches of automobiles); Wyman v. James, 400 U.S. 304 (1971) (permitting warrantless visits to the homes of welfare recipients). *See generally* Arcila, Jr., *supra* note 317.

employ checkpoints to investigate general criminal wrongdoing.[325] The Court has refused, in other words, to relax the ordinary Fourth Amendment constraints when the government employs suspicionless checkpoint seizures as a crime enforcement mechanism.

The fact that the undocumented cases are subject to relaxed Fourth Amendment standards could explain why criminal procedure scholars have paid less attention to these cases. The notion would be that the undocumented cases are less about the Supreme Court being insensitive to concerns about race and more about the balance the Court strikes when the governmental activity is primarily regulatory or administrative in nature.[326] As Joshua Dressler and Alan Michaels explain, "the line between a traditional criminal investigation and a search and seizure designed primarily to serve non-criminal law enforcement goals, is thin and, quite arguably, arbitrary. Yet it is also a line of considerable constitutional significance."[327] Criminal procedure scholars might have concluded that this "line of considerable constitutional significance" is doing more work in the undocumented cases than is race. Under this view, the racial effects of these cases is a negative externality of another more structural problem—the Court's treatment of administrative and regulatory searches and seizures.

We should be clear that in emphasizing the regulatory nature of the undocumented cases we do not mean to justify their marginalization in the criminal procedure literature on racial profiling. As we have argued throughout, the undocumented cases are important to understanding the development of Fourth Amendment doctrine generally and the specific role race has played in that development.[328] That is to say, notwithstanding their noninvestigatory status in Fourth Amendment jurisprudence, the undocumented cases have shaped how courts interpret and apply the Fourth Amendment in investigatory contexts.[329]

But, even without this impact, the undocumented cases are deserving of engagement in their own right. They are a part of Fourth Amendment jurisprudence and they raise significant question about searches, seizures, and race.

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325. *See* City of Indianapolis v. Edmond, 531 U.S. 32 (2000) (holding that suspicionless seizures at a highway checkpoint whose primary purpose was drug interdiction violate the Fourth Amendment).

326. It bears mentioning that criminal procedure scholars do not tend to pay as much attention to the undocumented cases as to administrative cases. In this sense, these are cases that do not seem to be canonized in any part of Fourth Amendment jurisprudence.

327. JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE: INVESTIGATIONS 311 (4th ed. 2006).

328. *See supra* Parts I–III.

329. *See supra* Part II.

Thus, our understanding of the racial dimensions of Fourth Amendment law is decidedly incomplete to the extent that the undocumented cases are not part of the discourse. In this sense, the reason we highlight the fact that the undocumented cases are a part of the Fourth Amendment's "special needs" jurisprudence is not to endorse the limited space they occupy in the criminal procedure literature on race and the Fourth Amendment. We do so to take seriously the investigatory/noninvestigatory line the Supreme Court has drawn in Fourth Amendment law even as we contend that this does not justify the lack of more robust engagement by criminal procedure scholars.

CONCLUSION

Our point of departure for this Article was the observation that notwithstanding a rich literature on race, racial profiling, and the Fourth Amendment, criminal procedure scholars have largely ignored a set of cases that bear directly on this issue. We refer to these cases as the undocumented cases precisely because criminal procedure scholars largely do not acknowledge the racial work these cases perform in the doctrinal economy of Fourth Amendment jurisprudence.

The marginalization of the undocumented cases in the race and the Fourth Amendment literature obscures not only the explicit ways in which law enforcement officials employ race (Latino identity) as a basis for suspicion (undocumentation), but also the role the Supreme Court has played in legitimizing that practice. Exacerbating immigration exceptionalism, the idea that immigration enforcement is not subject to ordinary constitutional constraints, the Court has given immigration officials (and indirectly law enforcement) wide discretion in enforcing immigration law in the interior. The general failure to engage the undocumented cases glosses over these dynamics and facilitates the claim that existing immigration enforcement practices do not rely on race, compounding the difficulties Latinos already experience framing their social vulnerabilities in racial terms. Finally, because criminal procedure scholars have relegated the undocumented cases to the borders of scholarship on race, racial profiling, and the Fourth Amendment, they have not explicated the ways in which the undocumented cases unduly expand police authority not only in the immigration enforcement context, but also in the investigatory domain more broadly.

APPENDIX I: COUNTING THE UNDOCUMENTED CASES: THE SCHOLARLY LITERATURE

Recall that we have structured the Article by pairing documented cases with undocumented cases: *Florida v. Bostick*[330] with *INS v. Delgado*,[331] *Terry v. Ohio*[332] with *United States v. Brignoni-Ponce*,[333] and *Whren v. United States*[334] with *United States v. Martinez-Fuerte*.[335] Here we analyze these pairings with respect to the extent to which scholars employ the cases to discuss race, racial profiling, or racial discrimination.

To compare engagement in scholarly articles of the undocumented cases and the documented cases with reference to race, racial discrimination, and racial profiling, we performed searches on both Westlaw and HeinOnline. It was necessary to use both search engines because HeinOnline has the oldest articles available, while Westlaw generally dates back to only 1985. *Brignoni-Ponce*, *Martinez-Fuerte*, and *Delgado*, were all decided prior to 1985, so those were the only cases that we searched via both HeinOnline and Westlaw. The HeinOnline searches were conducted in the same fashion for each case, focusing specifically on articles before 1985. To the extent that we found articles on Westlaw prior to 1985, the HeinOnline search for that case was tailored to look before the earliest article available on Westlaw. For example, a search for "race" and "Brignoni-Ponce" in Westlaw returned an article from 1983. Thus, the supplemental search on HeinOnline was constrained to articles before 1983. We performed the three following Westlaw searches: (1) "racial profiling" "rac* profiling" /p "[case name]"; (2) Race /p "[case name]"; and (3) "rac*** discrimination" /p "[case name]". Our HeinOnline searches: (1) "racial profiling" and "[case name]"; (2) Race and "[case name]"; and (3) "race discrimination" or "racial discrimination" and "[case name]." We aggregated the results of these searches for each of the cases. All searches were last conducted on April 18, 2011. The table below sets forth the results.

330. 501 U.S. 429 (1991).
331. 466 U.S. 210 (1984).
332. 392 U.S. 1 (1968).
333. 422 U.S. 873 (1975).
334. 517 U.S. 806 (1996).
335. 428 U.S. 543 (1976).

TABLE 3. The Undocumented and the Documented Cases: Comparing Their Citations Regarding Race/Racial Profiling and Racial Discrimination

Cases	***Total Citations Re: Race/Racial Profiling/Racial Discrimination***
INS v. Delgado	23
Florida v. Bostick	120
U.S. v. Brignoni-Ponce	66
Terry v. Ohio	502
U.S. v. Martinez-Fuerte	96
Whren v. U.S.	213

The table reveals that, with respect to the subjects of race, racial profiling, and racial discrimination, the documented cases (*Bostick*, *Terry*, and *Whren*) are engaged to a greater extent that the undocumented cases (*Delgado*, *Brignoni-Ponce*, and *Martinez-Fuerte*) in law review articles. While we have not performed a careful qualitative examination, a cursory look suggests that the difference between the documented and the undocumented cases on the question of the extent to which scholars engage them to discuss race, racial profiling, or racial discrimination might be even starker. That is to say, scholars seem to give the documented cases more attention than the undocumented cases. The former are the basis for broader and more extended analysis than the latter. But, again, our conclusion in this respect is tentative. To repeat: We did not perform a systematic qualitative analysis.[336] Our broader point is that the numbers reflected in Table 3 do seem to suggest that, relative to the documented cases, the undocumented cases occupy a more limited space in the Fourth Amendment discourse on race and racial profiling.

336. As we have already indicated, there are several limitations to this approach. Note, for example, that the numbers for the documented cases could be inflated by race scholars who do not teach criminal procedure. A similar point can be made about the undocumented cases with respect to not only race scholars but also to scholars who teach immigration law.

APPENDIX II: COUNTING CASES IN CASEBOOKS

One way to ascertain the currency of the undocumented cases in constitutional criminal procedure is to examine the extent to which they appear in criminal procedure casebooks. Employing this methodology, we selected five casebooks, each of which has a meaningful market presence. While this is obviously a relatively small sample size, it is a window on the extent to which the undocumented cases are canonized, particularly because criminal procedure courses, like other constitutional law courses, tend not to vary greatly from institution to institution—or, for that matter, from course to course, at least not in terms of the cases professors typically teach.

We selected the following casebooks to perform our analysis:

- Erwin Chemerinsky and Laurie Levenson, *Criminal Procedure*
- Joshua Dressler and George Thomas, III, *Criminal Procedure, Principles and Perspectives*
- Yale Kamisar, Wayne R. LaFave, Jerold H. Israel, and Nancy King, *Modern Criminal Procedure: Cases, Comments and Questions*
- Stephen A. Saltzburg, *American Criminal Procedure: Cases and Commentary*
- Lloyd L. Weinreb, *Criminal Process: Cases, Comments, Questions*

Our goal was to determine whether the documented cases figure more prominently in these casebooks than the undocumented cases. We performed this inquiry by examining whether the documented cases are excerpted to a greater extent than the undocumented cases. We looked at all of the additions of these casebooks, counting a case as excerpted if it appeared in any edition. Our hypothesis was that the documented cases would be excerpted to a greater extent than the undocumented cases. Our findings bear this out, as shown below.[337]

337. We recognize that this is in no sense a complete indication of the extent to which criminal procedure scholars teach and make reference to the undocumented cases. For one thing, there are substantive ways to engage a case without excerpting the opinion. Repeated references to its facts or holding are another way in which casebook authors highlight the importance of cases. For another, many criminal procedure scholars supplement the casebooks they employ with additional cases. That is precisely what one of us (Carbado) does when he teaches the course. In this sense, criminal procedure syllabi would provide a more comprehensive picture of the degree to which criminal procedure scholars are teaching the undocumented cases—as well as the context in which they are doing so. Still, we do think that the picture of the casebooks we provide is an indication of the limited space the undocumented cases occupy in the canon. We should note that, in performing this analysis, we did not pay attention to whether the undocumented cases were excerpted to discuss regulatory/administrative searches and seizures or more generally Fourth Amendment search and seizure analysis. Recall that part of the

TABLE 4. The Cases in Casebooks

Cases	***Casebooks***	
	Excerpted	***At Least Cited/Referenced***
INS v. Delgado	0	3
Florida v. Bostick	3	5
U.S. v. Brignoni-Ponce	0	4
Terry v. Ohio	5	5
U.S. v. Martinez-Fuerte	0	5
Whren v. U.S.	5	5

Table 4 compares the frequency with which the documented and undocumented cases are referenced in the casebooks. For clarity of presentation, we have paired the cases as we have in the Article and bolded the documented case. As the table makes clear, the documented cases are almost universally excerpted while the undocumented cases are usually mentioned only in passing. All the documented cases are at least cited in every casebook; of the undocumented cases, only *Martinez-Fuerte* is cited in each casebook. Of the documented cases, only *Bostick* is not excerpted in each casebook; none of the undocumented cases is excerpted in any casebook. We delineate each casebook's treatment of the documented and undocumented cases more specifically below.

TABLE 5. Chemerinsky & Levenson

Cases	***Excerpted***	***Cited/Referenced***
INS v. Delgado	No	No
Florida v. Bostick	No	Yes
U.S. v. Brignoni-Ponce	No	Yes
Terry v. Ohio	Yes	N/A
U.S. v. Martinez-Fuerte	No	Yes
Whren v. U.S.	Yes	N/A

argument is that the undocumented cases have shaped Fourth Amendment jurisprudence more generally. In this sense, the problem is likely worse than we presented—that is, had we framed the inquiry in terms of whether the undocumented cases are excerpted or cited to discuss general Fourth Amendment searches and seizures, some of the yeses in the tables above (with respect to whether an undocumented case has been excerpted or cited) would likely be nos.

TABLE 6. Dressler & Thomas

Cases	*Excerpted*	*Cited/Referenced*
INS v. Delgado	No	No
Florida v. Bostick	Yes	N/A
U.S. v. Brignoni-Ponce	No	Yes
Terry v. Ohio	Yes	N/A
U.S. v. Martinez-Fuerte	No	Yes
Whren v. U.S.	Yes	N/A

TABLE 7. Kamisar, LaFave, Israel & King

Cases	*Excerpted*	*Cited/Referenced*
INS v. Delgado	No	Yes
Florida v. Bostick	Yes	N/A
U.S. v. Brignoni-Ponce	No	No
Terry v. Ohio	Yes	N/A
U.S. v. Martinez-Fuerte	No	Yes
Whren v. U.S.	Yes	N/A

TABLE 8. Saltzburg

Cases	*Excerpted*	*Cited/Referenced*
INS v. Delgado	No	Yes
Florida v. Bostick	No (But see *U.S. v. Drayton*—Yes)	Yes
U.S. v. Brignoni-Ponce	No	Yes
Terry v. Ohio	Yes	N/A
U.S. v. Martinez-Fuerte	No	Yes
Whren v. U.S.	Yes	N/A

TABLE 9. Weinreb

Cases	*Excerpted*	*Cited/Referenced*
INS v. Delgado	No	Yes
Florida v. Bostick	Yes	N/A
U.S. v. Brignoni-Ponce	No	Yes
Terry v. Ohio	Yes	N/A
U.S. v. Martinez-Fuerte	No	Yes
Whren v. U.S.	Yes	N/A