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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.

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 enforcement, and with respect to Latinos, this proxy function of race blurs the boundary between citizen and noncitizen and further conflates non-citizenship 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]

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)[8] and the practice of detaining Latinos because of that presumption (racial profiling).[9] Yet, for the most part, criminal procedure scholars have not engaged this racial dynamic.[10] They have raised concerns about whether racial profiling creates the crime of "Driving While Black," about the legitimacy and efficacy of the practice, about whether it imposes a "racial tax"[11] and about whether racial profiling is systemic or derives instead from the actions of a few wayward police officers—the proverbial "bad apples."[12] But, largely absent from these debates is the fact that law enforcement personnel routinely employ Latino racial identity as a basis for determining whether a person is undocumented or "illegal."

In a series of cases—*United States v. Brignoni-Ponce*,[13] *INS v. Delgado*,[14] and *United States v. Martinez-Fuerte*[15]—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. We refer to the cases as the "undocumented cases" because they are marginalized in and mostly omitted from criminal procedure scholarship and casebook discussions about race and the Fourth Amendment.[16] Instead, criminal procedure scholars more frequently engage three other cases to discuss racial profiling: *Terry v. Ohio*,[17] *Whren v. United States*,[18] and *Florida v. Bostick*.[19] We refer to these cases, cumulatively, as the documented cases because they reside within the interior of the criminal procedure literature.

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*. Our claim is that few criminal procedure scholars invoke these cases as a basis for their racial critiques of Fourth Amendment doctrine.

In the full article upon which this essay is based, we offer a number of reasons why criminal procedure scholars should pay close attention to the undocumented cases. For one thing, these cases broaden our understanding of pretextual seizures by, for example, illustrating the extent to which the government can employ traffic stops as a pretext for enforcing immigration laws. For another, they highlight the importation of 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. Still a third reason scholars should engage 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 and shapes the development of Fourth Amendment jurisprudence more generally by both unduly expanding governmental power and facilitating racial profiling.

We will not, in this redacted version of the article, elaborate upon these arguments. Our aim is to focus on why the undocumented cases are marginalized in the criminal procedure canon. The reasons range from how scholars and policymakers frame racial profiling, to how law and social practices racialize Latinos, 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 under-examination of the undocumented cases in the criminal procedure literature.

I. EXPLAINING UNDOCUMENTATION: CONCEPTUAL BARRIERS THAT MAKE RACIAL PROFILING IN IMMIGRATION ENFORCEMENT CASES INVISIBLE

a. Framing Racial Profiling: Latinos on the Borders

One explanation for the marginalization of the undocumented cases in the criminal procedure scholarship relates to the dominant way in which scholars and policy makers have framed racial profiling. According to some scholars, profiling has its origins in the development of criminal profiles developed in the context of airline hijackings.[20] In the 1970s, this practice subsequently evolved into the creation and use of drug-courier profiles, particularly at airports.[21] 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.[22] However, the extension of investigatory authority to areas outside the border provoked a set of legal challenges to the authority of the U.S. Border Patrol and its practices with regard to immigration enforcement.[23]

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.[24]

This was the context out of which *Brignoni-Ponce* arose in 1975.[25] 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 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, titled "Selective Targeting in Law Enforcement,"[26] 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.[27]

Table 1. 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.

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 1,300. 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.[28] 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 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.[29] 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 border.[30] Simultaneously, Arab/Muslim and Middle Eastern communities were also subjected to racialized suspicion and racial profiling on grounds of national security.[31] Yet legal scholarship on racial profiling focused more on the issue as a Black concern. Apart from several notable exceptions,[32] 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.[33] While Latinos and other racial groups (particularly Muslims, Arabs, Middle Easterners, and South Asians after September 11, 2001) appeared in significant respects over time, the literature tended to reflect and reinforce the notion that racial profiling was a Black experience.

b. 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 race—has historical origins and prior juridical manifestations.[34] Indeed, the "off-white" framing has surfaced in 20th 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.[35] 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.[36] 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,[37] the incorporation of a group largely perceived as racially inferior posed a vexing issue.[38] 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."[39]

Yet, while Mexican Americans were legally classified as white, they were socially perceived as nonwhite and in some regions were subjected to severe social segregation.[40] 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.[41] 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*,[42] 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,"[43] he claimed that he was white and thus eligible for U.S. citizenship.[44] The court conceded that Rodriguez was not white in appearance nor would an anthropologist classify him as white.[45] Yet the judge ruled that Rodriguez was "white enough" because of laws that had effectively treated Mexicans as white.[46] 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 assertion that Mexican Americans were white.[47] The landmark case of *Westminster School District v. Mendez*[48] 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."[49] 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*,[50] the landmark civil rights case that was decided the same year as *Brown v. Board of Education*.[51] 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.'"[52]

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.[53] The Supreme Court rejected this argument, finding that there was sufficient evidence "to prove that persons of Mexican descent constitute a separate class ..., distinct from 'whites.'"[54] 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*,[55] 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.[56] *Perez* was a major civil rights victory and thus formed an important template for *Loving v. Virginia*,[57] where 20 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.

c. 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 consideration of race as one of several factors in making that assessment.[58] This maps onto a longstanding debate about what racial profiling actually means.[59] 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 *any* reliance on race—even reliance on race as one of several factors.[60] 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.

Although we have a view as to how scholars and policymakers should conceptualize racial profiling,[61] our intervention transcends this dispute. Whether immigration officials 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.[62] 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.[63] 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.[64] The Border Patrol, created in the wake of the passage of the National Origins Act of 1924, was 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.[65]

The Border Patrol's eventual focus on the southern border[66] 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.[67] 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.[68]

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."[69] 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."[70] The institutionalization of the Border Patrol as a federal agency and the process by which it defined its priorities ensured 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."[71] This racial construction, along with the others we have described, ultimately played a critical role in shaping the law of racial profiling.[72]

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."[73]

II. DOCTRINAL BARRIERS TO UNDOCUMENTATION: THE PLENARY POWER DOCTRINE

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. These obstacles are discussed in the full version of this article. Below we discuss only the first doctrinal barrier to undocumentation, the plenary power doctrine.

Although the government has employed immigration law to racially exclude and subordinate nonwhite racial groups, courts have, for the most part, legitimated these practices because of the federal government's plenary power over immigration—a power that has been said to be absolute.[74] This doctrinal exemption has buttressed a form of immigration exceptionalism that justifies 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.[75] 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.[76] This was followed by the 1882 Chinese Exclusion Act, which explicitly excluded a racially defined class.[77] 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.[78]

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*,[79] 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.

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 perceived to pose "a great danger that . . . our country would be overrun by them."[81] 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*,[82] 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.[83] Despite many critiques[84] and even some erosion of plenary power,[85] 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.[86] 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. 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.

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 the undocumented cases. 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.

* This article is an abridged version of Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. Rev. 1543 (2011).

** For comments on or conversations about this article, many thanks to Paul Butler, Kimberlé Crenshaw, Angela Davis, Ingrid Eagly, Laura Gómez, and Hiroshi Motomura. As always, the Hugh & Hazel Darling Law Library at UCLA School of Law provided valuable research assistance, and we especially want to thank Amy Atchison, Director of Reference and Research Services, for her guidance and support. Our research assistants, Adhana Davis, Antonio Kizzie, Will Pilon, Kim Sanders and Alicia Virani, also provided tremendous help. We thank Brittany Goodnight for helping us redact our original article for this venue.

1. *See, e.g.*, Ingrid V. Eagly, *Prosecuting Immigration*, 104 Nw. U. L. Rev. 1281 (2010).
2. *See generally id*.
3. *Id*. at 1356.
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).
6. *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).
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, June 2003, at 18, 21.
8. *See* Neil Gotanda, *Comparative Racialization: Racial profiling and the Case of Wen Ho Lee,* 47 UCLA L. Rev. 1689, 1691 (2000).
9. 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." End Racial Profiling Act of 2007, S. 2481, 110th Cong.
10. There are some notable exceptions to which we cite in the full article.
11. *See* Randall Kennedy, *Race, Law, and Suspicion: Using Race as a Proxy for Dangerousness*, *in* Race, Crime and the Law 136-67, 159 (1997); *see also* Jody David Armour, Negrophobia and Reasonable Racism: The Hidden Costs of Being Black in America 13–14 (1997).
12. *See also* David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 Minn. L. Rev. 265 (1999).
13. 422 U.S. 873 (1975).
14. 466 U.S. 210 (1984).
15. 428 U.S. 543 (1976).
16. We surveyed five leading criminal procedure casebooks to ascertain the extent to which the undocumented cases appear in them as compared with the documented cases.

17. 392 U.S. 1 (1968).
18. 517 U.S. 806 (1996).
19. 501 U.S. 429 (1991).
20. *See* Bernard Harcourt, United States v. Brignoni-Ponce *and* United States v. Martinez-Fuerte: *The Road to Racial Profiling*, *in* Criminal Procedure Stories 315, 323-24 (Carol Steiker ed., 2006).
21. *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).
22. *See* Harcourt, *supra* note 20, at 324.
23. *Id*. at 324–25.
24. *Id*.
25. *Id*.
26. Greg Williams, *Selective Targeting in Law Enforcement*, Nat'l B. Ass'n Mag., Mar./Apr. 1996, at 18.
27. We note here the limitations of this approach, as we have not disaggregated the data to determine 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.
28. Rebecca Porter, *Skin Deep: Minorities Seek Relief From Racial Profiling*, 35 Trial 13 (1999).
29. Numerous cases arising out of the experiences of Black motorists were brought charging various law enforcement agencies with racial profiling. *See, e.g.*, Joint Application for Entry of Consent Decree, United States v. New Jersey, No. 99-5970 (D.N.J. Dec. 30, 1999).
30. Porter, *supra* note 28, at 15. Joseph Nevins, Operation Gatekeeper: The Rise of the "Illegal Alien" and the Making of the U.S.-Mexico Boundary 111 (2002).
31. *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); 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); 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.pdfhttp://www.law.uchicago.edu/files/files/286.pdf.
32. David A. Harris, Profiles in Injustice: Why Racial Profiling Cannot Work (2002); Harcourt, *supra* note 20. David Cole's earlier book also noted that Latinos near the border were heavily burdened by racially targeted enforcement. *See* David Cole, No Equal Justice: Race and Class in the American Criminal Justice System (1999).
33. *See, e.g.*, 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 (2003).

34. This section draws on the work of Laura Gómez, Manifest Destinies: The Making of the Mexican American Race (2007).
35. *See* George J. Sanchez, Becoming Mexican American: Ethnicity, Culture, and Identity in Chicano Los Angeles, 1900–1945, at 38–62 (1995).
36. *See* Gómez, *supra* note 34, at 3–4.
37. 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." Hiroshi Motomura, Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States 173 (2006). Racial restrictions on other nonwhites remained until 1952. *Id.* at 75.
38. Gómez, *supra* note 34, at 17–18, 41–45.
39. *Id.* at 1, 83–85.
40. 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. *See also* Ian Haney López, Racism on Trial: The Chicano Fight for Justice (2003).
41. Gómez, *supra* note 34, at 142–43.
42. 81 F. 337 (W.D. Tex. 1897).
43. Gómez, *supra* note 34, at 140.
44. *Id.* at 139–41.
45. *Id.* at 140–41.
46. *Id.* at 141.
47. *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).
48. 161 F.2d 774 (9th Cir. 1947).
49. *Id.* at 780 (emphasis added).
50. 347 U.S. 475 (1954).
51. 347 U.S. 483 (1954).
52. *Hernandez*, 347 U.S. at 480.
53. 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 . . . .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.
54. *Hernandez*, 347 U.S. at 479.
55. 198 P.2d 17 (Cal. 1948).
56. *Id.* at 29.
57. 388 U.S. 1 (1967).
58. United States v. Brignoni-Ponce, 422 U.S. 873, 887 (1975).

59. 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.
60. *See* Harcourt, *supra* note 20, at 317 n.6, 317–18. Some jurisdictions define the term narrowly to include investigatory practices based solely on race, while others prohibit any consideration of race. *Compare* MD. CODE ANN., TRANSP. § 25-113 (Michie Supp. 2001), *and* R.I. GEN. LAWS § 31-21.1-2 (2000), *with* Consent Decree, Wilkins v. Md. State Police, No. CCB-93-468 § 2.1 (D. Md. 1993) (consent decree prohibiting racial profiling in case brought by the NAACP and the ACLU against the Maryland State Police), *and Constitutional Issues*, TUSCON POLICE DEP'T (revised July 29, 2010), http://tpdinternet.tucsonaz.gov/general_orders/2200CONSTITUTIONAL%20 ISSUES.pdf. 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).
61. 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.
62. *See* De Genova & Ramos-Zayas, *supra* note 7.
63. *See* Ruben J. Garcia, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118, 119 (1995); 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 & n.196 (2010). 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.
64. KELLY LYTLE HERNÁNDEZ, MIGRA! A HISTORY OF THE U.S. BORDER PATROL 9 (2010); *see also 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).
65. LYTLE HERNÁNDEZ, *supra* note 64, at 32–36.
66. *See* 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). 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.
67. LYTLE HERNÁNDEZ, *supra* note 64, at 44.
68. *Id.* at 41–42.
69. 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.

70. *Id*. at 10.
71. *Id*. at 9.
72. 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).
73. Johnson, *supra* note 6, at 48–49.
74. *See* Chin, *supra* note 5, at 5.
75. *See id.; see also* Ian Haney López, White by Law: The Legal Construction of Race (10th ed. 2006); Devon W. Carbado, *Yellow by Law*, 97 Calif. L. Rev. 633 (2009).
76. *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).
77. Torok, *supra* note 76, at 96.
78. *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 37, at 126–30.
79. 130 U.S. 581 (1889).
80. *Id*. at 609.
81. *Id*. at 595.
82. 149 U.S. 698 (1893).
83. *See* Chin, *supra* note 5, at 18.
84. *See* Johnson, *supra* note 6, at 46.
85. *See* Zadvydas v. Davis, 533 U.S. 678, 678, 695 (2001); Motomura, *supra* note 37, at 102–08.
86. *See* Chin, *supra* note 5, at 3–4, 9; 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).