Expanding the Canon

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Devon W. Carbado and Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 **U.C.L.A. Law. Rev.** 1543 (2011).

In most criminal procedure classes, Supreme Court cases focusing on immigration policing get short shrift. Perhaps not coincidentally, much of the academic literature – including the literature analyzing the role of race in policing – is also insufficiently attentive to relevant cases involving immigration policing. In *Undocumented Criminal Procedure*, Devon W. Carbado and Cheryl I. Harris remind us of three important cases involving immigration policing, and highlight the ways in which these cases have structured the jurisprudential framework governing the role of race in "ordinary policing." Their efforts could not have come at a better time.

In December 2011, Assistant Attorney General Thomas E. Perez of the Civil Rights Division of the Department of Justice wrote a letter to Bill Montgomery, the County Attorney for Maricopa County, summarizing the results of a prolonged investigation of the Maricopa County Sheriff's Office (MCSO). The Department found "reasonable cause to believe that MCSO engages in a pattern or practice of unconstitutional policing." The letter continues:

> Specifically, we find that MCSO, through the actions of its deputies, supervisory staff, and command staff, engages in racial profiling of Latinos; unlawfully stops, detains, and arrests Latinos; and unlawfully retaliates against individuals who complain about or criticize MCSO's policies or practices….

That same month, the Civil Rights Division issued findings of similar misconduct by the East Haven police. Deputy Assistant Attorney General Roy L. Austin Jr. stated: that the Department had found that:

> [T]he East Haven Police Department engages in discriminatory policing against Latinos including: targeting Latinos for discriminatory traffic enforcement; treating Latino drivers more harshly than non-Latino drivers after traffic stops; and intentionally and woefully failing to design and implement internal systems of control that would identify, track, and prevent such misconduct. The pattern or practice of discriminatory policing that we observed is deeply rooted in the Police Department's culture and substantially interferes with the ability of the Department to deliver services to the entire East Haven community.

The findings of these two investigations are deeply troubling. Why is this happening?

One of the driving forces behind the present wave of racial profiling in law enforcement is immigration enforcement. Over the past decade, the federal government has rapidly expanded its immigration enforcement efforts. At the same time, state and local governments have begun to engage in immigration enforcement efforts in ways that have fundamentally transformed the nature of sub-federal law enforcement. Sub-federal involvement in immigration enforcement has increased in a number of ways, including: through cooperation with the federal government pursuant to formal 287(g) agreements; through state and local participation (sometimes voluntarily and sometimes under pressure from the federal government) in the Secure Communities program; through sub-federal enforcement of constitutionally dubious state and local immigration laws; and through state and local agencies' *ultra vires* enforcement of federal immigration law in reliance on an erroneous notion of state and local "inherent authority" to do so.

Scholars who have focused attention upon the intersection of criminal procedure and immigration enforcement have

written about the many ways in which the existing criminal procedural jurisprudence gives a green light to racial profiling in immigration enforcement and beyond.[1] The rising tide of immigration enforcement gives new social significance to this underlying jurisprudential reality. The practical effect of longstanding judicial tolerance for racial profiling in immigration enforcement is that enforcement agencies – both federal and state – encounter little judicial resistance to their practices of profiling. Indeed, the heated rhetoric of the immigration debate apparently has driven some officials to the conclusion that it is their duty to aggressively police immigration even when the discriminatory policing practices aimed at Latinos is an obvious byproduct of their methods. Hence, we arrive at situations like those the Justice Department uncovered in Maricopa County and East Haven. I am certain these communities are not alone.

Under current circumstances, criminal procedure teachers must be ready to introduce their students to the legal landscape that surrounds immigration policing. For the criminal procedure teacher who has not previously focused their students' attention on the problem of racial profiling in this context, Devon Carbado and Cheryl Harris' *Undocumented Criminal Procedure* provides a good place to start. In this article, Carbado and Harris argue that three Supreme Court cases that sanction racial profiling in immigration enforcement – *United States v. Brignoni-Ponce*, *INS v. Delgado* and *United States v. Martinez-Fuerte* – should be included in criminal procedure classes and should be central to ongoing discussions about the role of race in criminal procedure. These three cases, which they collectively label the "undocumented" criminal procedure cases "belong in the interior, rather than at the border, of constitutional criminal procedure debates about racial profiling." (p. 1543).

In the article, they pair the three "undocumented" decisions with cases that have been central to contemporary discussions on race in criminal procedure. Part I of the article pairs *INS v. Delgado* with *Florida v. Bostick*. The *Bostick* decision, in which Justice O'Connor, writing for the Court, declined to label the suspicionless questioning of a bus passenger a "seizure" for Fourth Amendment purposes, has been "roundly criticized" and "[m]uch of the criticism focuses on the way in which Justice O'Connor obscures the racial dimension of police interaction." (p. 1553). After all, it seems clear from the facts that Bostick's race was a critical factor in the police officer's decision to question him. Importantly, as the authors point out, the logic of this case is heavily influenced by the case of *INS v. Delgado*, decided seven years earlier and involving even more egregious facts. That case involved a workplace raid in which 20-30 armed INS agents entered the building in "paramilitary formation" and remained, questioning workers, for an hour or two. Just as O'Connor in *Bostick* posited that any lack of freedom the bus passenger might feel in leaving the bus was due to the nature of bus travel rather than the armed officers asking questions, Justice Rehnquist had reasoned in *Delgado* that if the Latino workers subject to an armed workplace raid did not feel free to leave it was "a function of their workplace, not the INS's actions." (p. 1561). The logic of *Delgado* paved the way for *Bostick*. And *Delgado*'s blindness to the racial dynamics of the situation foreshadowed O'Connor's race-free analysis of the racial implications of *Bostick*.

Part II of the article pairs *Terry v. Ohio* with *United States v. Brignoni-Ponce*. The authors map out the racial dynamics that led to the frisk of Terry, and noting the Court's insensitivity both to the Black/white racial dynamics of the situation and to the impact its decision would have on future policing practices. They then explain how *Brignoni-Ponce* extends and expands the most troubling aspect of *Terry*. Specifically, while the *Terry* court focused on the appropriate standard for a frisk in cases where an officer sensed a danger to himself, it did not expressly decide the appropriate standard for making the initial stop. Seven years later, the *Brignoni-Ponce* decision did so – and it did so by concluding that a brief stop by the INS of a car on the basis of the driver's "Mexican appearance" in a situation that posed no danger to the officer is "reasonable" for Fourth Amendment purposes. "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….," (p.1577), thereby making clear its applicability for law enforcement outside of immigration enforcement.

Part III of the article pairs *Whren v. United States* with the much older *Martinez-Fuerte* case. Scholars of criminal procedure are quite familiar with the *Whren* case, in which the court upheld a racially motivated stop of a Black driver by police officers looking for drugs on the ground that the initial stop was objectively reasonable because the officers had probable cause to stop the driver for a traffic violation. As the authors note, "[s]cholars 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." (p.1580). But, as the authors note, "[t]he racial profiling *Martinez-Fuerte* legitimizes is even more salient" and "creates an even bigger constitutional safe haven for racial profiling than Whren." (p.1581). In *Martinez-Fuerte*, the Court legitimated immigration checkpoint seizures – referrals to secondary inspections at fixed interior immigration checkpoints – that were performed without any individualized suspicion. The court expressly reasoned that no Fourth Amendment problem would arise even if these stops were made on the basis of the race of the driver or passenger. Justice Powell dismissed the concern of profiling by noting that, as an empirical matter, the Border Patrol did not rely solely on race, and that "even if it be assumed that such referrals [to secondary inspection] are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation….[R]eliance [on apparent Mexican ancestry] is clearly relevant to the law enforcement need to be served." (*Martinez-Fuerte*, quoted at p. 1582). The authors conclude that the logic of *Martinez-Fuerte* is "tantamount to abandoning the reasonableness standard of the Fourth Amendment altogether." (p.1583).

In the remainder of the article, the authors posit various reasons for the relative invisibility of the three "undocumented" cases and dismiss the rationale that renders them marginal to the canon. This section provides interesting food for thought on questions of how cases become canonical, and how the subsequent framing of the discussion can render wrongs to some groups – in this case, the racial profiling of Latinos – disturbingly invisible.

Of course, the three decisions highlighted by Carbado and Harris are merely a starting point for understanding the depth of the problem of profiling Latinos both in and out of the immigration enforcement context. The effects of these cases are compounded by the Supreme Court's decision in *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) in which the Court concluded that the exclusionary rule did not apply in deportation proceedings, by Department of Justice guidelines that sanction reliance on race as a factor in federal immigration and in national security policing while forbidding it elsewhere, as well as by numerous other procedural shortcomings encountered by noncitizens both in administrative removal proceedings and in criminal proceedings.[2] Immigration scholars have long been contemplating all of these issues, and the article could perhaps do more to acknowledge this literature. But for the criminal procedure teacher, Carbado and Harris' highly readable article provides a clear explanation as to how three important immigration-related cases fit within the surrounding criminal procedural landscape. It succeeds in explaining why a coherent effort to study the Fourth Amendment must pay heed to these decisions. And, if heard, their call may help prod more professors and students to think more about one of the most interesting law enforcement issues of our time.

1. See, e.g., Jennifer M. Chacón, *The Expansion of Border Exceptionalism*, 38 **Fordham Urb. L. J**. 129 (2010); Jennifer M. Chacón, *A Diversion of Attention?: Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 **Duke L. J.** 1563 (2010); G. Jack Chin, et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 **Geo. Immigr. L. J.** 47, 65-72 (2010); Kevin R. Johnson, *How Racial Profiling 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 (2010); Kevin R. Johnson, *Racial Profiling After September 11: The Department of Justice's 2003 Guidelines,* 50 **Loyola L. Rev.** 57 (2004); Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration* Enforcement, 41 **U.C. Davis L. Rev.** 1147 (2008), Huyen Pham, *When Immigration Borders Move*, 61 **Fla. L. Rev.** 1115, 1149-1163 (2009). [?]

2. Chacón, *A Diversion of Attention*, *supra*, at 1623-33; Chacón, *Border Exceptionalism*, *supra*, at 162-63. [?]

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