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The Fourth Amendment and the INS: An Update on Locating the Undocumented and a Discussion on Judicial Avoidance of Race-Based Investigative Targeting in Constitutional Analysis

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The Fourth Amendment and the INS: An Update on Locating the Undocumented and a Discussion on Judicial Avoidance of Race-Based Investigative Targeting in Constitutional Analysis

HENRY G. WATKINS*

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The author wishes to dedicate this article to his mother, Ethel Watkins, for her support; to his wife, Harriet Tucker Watkins, for her inspiration; and to all who strive to apply fairly the often confusing immigration laws to the human beings affected.

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I. INTRODUCTION

The recent evolution of case law construing how the fourth amendment applies to suspected illegal aliens has been significant. Against the backdrop of an increasingly serious illegal immigration problem, the restrictions on the activities of law enforcement agencies seeking to address this problem have been somewhat lessened.

The interplay of the fourth amendment with the enforcement of immigration laws presents sensitive and often unspoken concerns about the validity of using race as a primary factor in approaching, detaining, or arresting suspects. These same concerns are often raised in the criminal law enforcement context. Courts have effectively lessened the focus on racial aspects of law enforcement efforts

by, among other things, expanding the concept of consensual encounters; that is, the courts may avoid implicating the fourth amendment in a large number of cases by presuming that most law enforcement contacts are voluntary encounters with the targets of the inquiry freely answering questions or consenting to a search. Where this approach is taken, it is legally unnecessary to determine whether race played an undue part in the encounter, even if it leads to a seizure. However, this legal expedient of engaging in the fiction of consent where minorities are predominantly the targets of such encounters could lead to an erosion of trust in, and cooperation with, law enforcement by minority group members.

Although important protections against unwelcome governmental intrusions remain under the Constitution, the targets of law enforcement investigations, at least as concerns street crime, seldom know what their rights are.

In addition, fairly recent case law has resulted in significant "clarifications" as to when a "seizure" occurs. As this article discusses, the point at which a seizure occurs is often crucial in assessing whether the fourth amendment has been observed and whether the Exclusionary Rule will be invoked to bar admission of statements or other evidence. As a result, the courts may be providing people less protection from governmental intrusion by simply reevaluating when a seizure has occurred. Finally, although it has been generally assumed that the fourth amendment protects all within the United States from unreasonable searches and seizures, language in a recent Supreme Court decision¹ has called this proposition into question. That case involved a challenge to evidence uncovered in a search of the defendant's residence in Mexico. The defendant was a Mexican national, and after a search was undertaken of the defendant's residence in Mexico by United States agents in cooperation with Mexican authorities, the defendant was forcibly brought to the United States for trial.² While the precise issue before the Court involved the applicability of the fourth amendment to extra-territorial searches, Chief Justice Rehnquist, writing for the majority, stated in dictum that the Court had not squarely ruled on whether illegal aliens enjoy the protections of the fourth amendment. He noted that the Court's decision in *INS v. Lopez-Mendoza*³ did not dictate that the fourth amendment protected such persons; it merely assumed

1. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056 (1990).

2. *Id.* at 1059.

3. 468 U.S. 1032 (1984).

that the fourth amendment applied.⁴ Two justices of the five-member majority were careful to disassociate themselves from this dictum. Justice Kennedy, in a concurring opinion, disagreed with the majority's assertion that the term "the people" in the fourth amendment was limited to those with a voluntary attachment to the United States.⁵ Further, Justice Kennedy stated that if the search in question "had occurred in a residence within the United States, I have little doubt that the full protections of the fourth amendment would apply."⁶ Also, Justice Stevens gently chided the "sweeping" language of the majority.⁷ Justice Brennan, in dissent, further criticized this dictum.⁸

An analysis of these and other leading cases is of particular importance to both the enforcers of the immigration laws and the targets of that enforcement. Some general principles can be distilled from recent cases regarding fourth amendment restrictions on efforts to detect and deport undocumented aliens. This article identifies and discusses the various legal theories currently being used to avoid consideration of arbitrary law enforcement methods, especially the targeting of racial minorities as suspects.

It has been widely debated in journalistic and legal circles whether the perceived lessening of fourth amendment protections is warranted to address so-called public exigencies. This debate is nowhere more spirited than in the battle against illegal immigration.

4. *Verdugo-Urquidez*, 110 S. Ct. at 1064-65.

5. *Id.* at 1067 (Kennedy, J., concurring).

6. *Id.* at 1067-68 (Kennedy, J., concurring).

7. *Id.* at 1068. Justice Stevens also stated, "Nor is comment on illegal aliens' entitlement to the protections of the fourth amendment necessary to resolve this case." *Id.* at 1068 n.1 (Stevens, J., concurring).

8. [T]he Court implicitly suggests that the fourth amendment may not protect illegal aliens in the United States. Numerous lower courts, however, have held that illegal aliens in the United States are protected by the fourth amendment, and not a single lower court has held to the contrary. *Id.* at 1070 n.6 (Brennan, J., dissenting) (citations omitted).

While Chief Justice Rehnquist's dictum may signal his openness to consider the question of undocumented aliens' fourth amendment protections, his statements clearly carry no weight as law or precedent. Further, under the facts at issue, there was no question that the defendant was an alien with no voluntary ties to the United States. Justice Rehnquist implies that it may be an open question whether in cases where alienage is not in dispute, the alien can thereafter claim the Amendment's protections. But, in most cases, the privacy interests of United States citizens would be implicated in the effort to determine who may or may not be legally in this country. Thus, the Chief Justice's dictum is of even more limited import.

II. EXEMPTIONS FROM FOURTH AMENDMENT PROHIBITION AGAINST "UNREASONABLE SEARCHES AND SEIZURES"

A. Stops and Interrogations at International Border or Its "Functional Equivalent" Are Not Covered by the Fourth Amendment

The United States Supreme Court has long recognized that this country has an inherent right to protect its borders. Thus, searches at the international border are not "embraced within the prohibition of the [fourth] amendment."⁹ The Court has explained that:

Border searches, then, from before the adoption of the fourth amendment, have been considered to be "reasonable" by the single fact that the person or item in question had entered into our country from outside. There has never been any additional requirement that the reasonableness of a border search depended on the existence of probable cause. This longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless "reasonable" has a history as old as the fourth amendment itself.¹⁰

The Government's broad power to conduct searches and seizures at the international border is premised, *inter alia*, on Congress' authority under the Constitution "[t]o regulate Commerce with foreign Nations."¹¹ The Supreme Court has sanctioned a detention that exceeded sixteen hours at the border of a person whom the Government suspected of smuggling contraband in her alimentary canal.¹² It was noted that this went beyond a routine search, but the Court upheld the legality of the detention.

We hold that the detention of a traveler at the border, beyond the scope of a routine search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal.¹³

Given that the Government's power of search and detention is greatest at the border, and that the nation is experiencing a crisis of drug smuggling, the Court found that the traveler's diminished expecta-

9. *United States v. Ramsey*, 431 U.S. 606, 622 (1977)(quoting *Carroll v. United States*, 267 U.S. 132, 150 (1925)).

10. *United States v. Ramsey*, 431 U.S. at 619.

11. U.S. Const. art. I, § 8, cl. 3. *United States v. Montoya De Hernandez*, 473 U.S. 531 (1985) (invokes this provision of the Constitution as the Government's authority to conduct border searches).

12. *United States v. Montoya De Hernandez*, 473 U.S. at 541.

13. *Id.* The Court declined, however, to address whether aliens have lesser constitutional protections at the border and what level of suspicion is required for nonroutine border searches, such as strip, body-cavity, or involuntary X-ray searches. *Id.* at 541 n.4.

tion of privacy at the border was not unduly impinged.¹⁴

Although the detention took place more than sixteen hours before the Government sought a warrant, and although the woman was held incommunicado, the Court held that the procedures were not unconstitutional.¹⁵ The Court reasoned that the woman, who was detained pending a bowel movement so that her feces could be examined for drugs, could have submitted to an X-ray and avoided the rather prolonged detention.¹⁶ The Court stressed the Government's broad power to protect the nation from entrants who may bring a harmful condition, e.g., communicable diseases, or items of contraband.¹⁷

With regard to searches of persons seeking to enter this country, the governing statute reads as follows:

Any officer or employee of the [Immigration and Naturalization] Service authorized and designated under regulations prescribed by the Attorney General, whether individually or as one of a class, shall have power to conduct a search, without warrant, of the person, and of the personal effects in the possession of any person seeking admission to the United States, concerning whom such officer or employee may have reasonable cause to suspect that grounds exist for exclusion from the United States under this Chapter which would be disclosed by such search.¹⁸

The pertinent regulation provides that:

Any immigration officer is hereby authorized to exercise anywhere in the United States all the powers conferred by section 287 of the Act.¹⁹

Thus, in enforcing the immigration laws, Service officers are empowered to search, without warrant, persons (and their personal effects) seeking to enter this country if there is "reasonable cause to suspect" that such persons are excludable²⁰ and that a search would disclose evidence relating thereto. For the reasons set forth above, persons attempting to enter the United States may not rely on the fourth amendment to object to searches.

The same reasoning that authorizes border searches without probable cause authorizes such searches at "functional equivalents" of the border. The Supreme Court first used this phrase in 1973.²¹ In dictum, the Court noted that the broad search authority at the international border might be extended to similar situations:

14. *Id.* at 538-40.

15. *Id.* at 535, 544.

16. *Id.* at 543.

17. *Id.* at 544.

18. 8 U.S.C. § 1357(c) (1982).

19. 8 C.F.R. § 287.1(c) (1991).

20. 8 U.S.C. § 1182(a) (1982) (lists 33 classes of aliens excludable from admission to the United States.) It is not uncommon for INS officers to search the person and property of certain nonimmigrant visitors for evidence that the person intends to remain indefinitely in this country. Letters concerning employment or living arrangements may be probative of whether one is intending immigration with appropriate documents.

21. *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

[S]earches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, might be functional equivalents of border searches. For another example, a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search.²²

Lower courts were left with the responsibility of defining what constituted a "functional equivalent" of the border.

The Fifth Circuit Court of Appeals, in an expansive and thorough decision, offered a reconsidered analysis of what constitutes a functional border equivalent.²³ The court reversed its prior decisions which held that a particular fixed checkpoint fourteen miles from the Mexican border was a functional border equivalent at which plenary searches could be conducted without regard to the fourth amendment.²⁴ The checkpoint, operated by the U.S. Border Patrol, was established to check vehicle occupants for citizenship and immigration status.²⁵ The court admitted that its earlier decisions confused the functional equivalency concept with reasonableness under the fourth amendment.

[T]his circuit's designation "functional equivalent of the border" has been founded on the fourth amendment's "rule of reason," in light of the "staggering" problem of aliens entering the United States illegally, and with the impossibility of stemming this illegal tide by patrolling the full length of the nation's expansive southern border with Mexico cited as justification for searches away from the border. However, contrary to the "exigent circumstances" analysis of our cases, the constitutionality of searches conducted at a border equivalent does not depend on a fourth amendment analysis. . . . The constitutional basis for searches at border checkpoints is fundamentally different from the basis for "stops" at checkpoints in the interior of the United States. Our cases have erred in confusing the two.²⁶

In issuing its new definition, the court stated that to constitute a functional border equivalent:

[T]he government must demonstrate with "reasonable certainty" that the traffic passing through the checkpoint is "international" in character. In practical terms, this test means that border equivalent checkpoints intercept no more than a negligible number of domestic travelers.²⁷

Under this test, the checkpoint in question was determined not to be a functional border equivalent. As a consequence, a search of the

22. *Id.* at 272-73.

23. *United States v. Jackson*, 825 F.2d 853 (5th Cir. 1987) (en banc), *cert. denied*, 484 U.S. 1011, 1019 (1988).

24. *Id.* at 854.

25. *Id.* at 855-56.

26. *Id.* at 857-58.

27. *Id.* at 860 (citations omitted).

vehicles passing through the checkpoint may not be made absent probable cause or consent. However, as discussed below, certain restrictions on vehicular movement through fixed checkpoints may be made without probable cause or reasonable suspicion.

B. Consensual Encounters with Law Enforcement Officers Versus Seizures Within the Meaning of the Fourth Amendment

In *Terry v. Ohio*,²⁸ the Court articulated two important principles. First, not all contacts between law enforcement officers and the general public constitute seizures within the meaning of the fourth amendment.²⁹ Second, some seizures that involve relatively modest intrusions on an individual's freedom (brief detention for questioning) require only a reasonable suspicion rather than probable cause. We are here concerned with the first of these principles. The stated rule is that a "seizure" occurs only when an officer, by force or show of authority, restrains the liberty of an individual. Despite this standard, it is not always easy to determine when one's liberty is restrained.

The Supreme Court has indicated that it will employ a weighty presumption that encounters between individuals and law enforcement officers are consensual and accordingly do not implicate the fourth amendment. In *INS v. Delgado*,³⁰ the Court disagreed with the court of appeals, which held that Immigration and Naturalization Service agents had displayed their authority in such a manner that a reasonable person would not have felt that he or she was free to leave.³¹ The Supreme Court ruled that when INS agents checked factories for illegal aliens, they did not effect a detention or seizure under the fourth amendment by questioning factory workers about their right to be in the United States.³² In January and September of 1977, the INS, armed with warrants, conducted a "factory survey" of the work force at Southern California Davis Pleating Company, searching for illegal aliens.³³ Although no particular aliens were named, the warrants were issued on a showing of probable cause that numerous illegal aliens were employed at the company.³⁴ A third factory survey was conducted with the employer's consent in October 1977 at Mr. Pleat, another garment factory.³⁵ The Court described the actions of the INS officers as follows:

28. 392 U.S. 1 (1968).

29. *Id.* at 16.

30. 466 U.S. 210 (1984).

31. *Id.* at 217.

32. *Id.* at 218.

33. *Id.* at 212.

34. *Id.*

35. *Id.*

At the beginning of the surveys several agents positioned themselves near the buildings' exits, while other agents dispersed throughout the factory to question most, but not all, employees at their work stations. The agents displayed badges, carried walkie-talkies, and were armed, although at no point during any of the surveys was a weapon ever drawn. Moving systematically through the factory, the agents approached employees and, after identifying themselves, asked them from one to three questions relating to their citizenship. If the employee gave a credible reply that he was a United States citizen, the questioning ended, and the agent moved on to another employee. If the employee gave an unsatisfactory response or admitted that he was an alien, the employee was asked to produce his immigration papers. During the survey, employees continued with their work and were free to walk around within the factory.³⁶

Respondents, two United States citizens and two permanent resident aliens, challenged the constitutionality of the factory surveys and sought declaratory and injunctive relief.³⁷ They argued that the surveys violated their fourth amendment right to be free from unreasonable searches or seizures, as well as the equal protection guarantees of the due process clause of the fifth amendment.³⁸ The district court ruled that respondents had no reasonable expectation of privacy at their work places, and, as a result, they did not have standing to challenge INS entry pursuant to a warrant or owner's consent.³⁹ The court further found that each of the respondents was asked a question or questions by an INS agent during one of the factory surveys.⁴⁰ Applying the rule of *Terry v. Ohio*, the court concluded that law enforcement officers may ask questions of anyone and that none of the respondents had been detained under the fourth amendment during the factory surveys, either when they were questioned or otherwise.⁴¹ Accordingly, the court granted summary judgment in favor of the INS, implicitly concluding that since respondents' fourth amendment rights were not violated, neither were their rights under the fifth amendment.⁴² However, the court of appeals reversed, holding that the entire work force was seized for the one-to two-hour duration of each survey because the stationing of agents at the building's doors showed that "a reasonable worker 'would have believed that he was not free to leave.'"⁴³ The court ruled that questioning individual respondents violated the fourth amendment

36. *Id.* at 212-13.

37. *Id.* at 213.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 213-14.

42. *Id.* at 214.

43. *Id.* (quoting *United States v. Anderson*, 663 F.2d 934, 939 (9th Cir. 1981)).

because there was no reasonable suspicion or probable cause as to any of them.⁴⁴ In this connection, the court held that reasonable suspicion or probable cause to believe that a number of illegal aliens were working at a particular factory was insufficient to justify questioning any individual employee.⁴⁵

The Supreme Court reversed. The Court began its analysis by stating that “the fourth amendment does not proscribe all contact between the police and citizens, but is designed ‘to prevent arbitrary and oppressive interference by law enforcement officials with the privacy and personal security of individuals.’ ”⁴⁶

Quoting from *Terry v. Ohio*,⁴⁷ the Court stated that “[o]nly when the officer, by means of physical force or show of authority, has restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.”⁴⁸ The Court further noted that “an initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment, ‘if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.’ ”⁴⁹

The Court then indicated that an interrogation relating to one’s identity or a request for identification by a law enforcement officer does not, by itself, constitute a fourth amendment seizure. However, the Court cited *Brown v. Texas*⁵⁰ for the proposition that a person has the right to refuse to cooperate with law enforcement officers and that if this right is exercised, the officers must have a reasonable suspicion of misconduct to detain the person to determine identity or for any other purpose.⁵¹

From these principles, the Court found that the conduct of the INS officers “should have given respondents no reason to believe that they would be detained if they gave truthful answers to the questions put to them or if they simply refused to answer.”⁵²

44. *INS v. Delgado*, 466 U.S. at 214.

45. *Id.*

46. *Id.* at 215 (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976)).

47. 392 U.S. at 19, n.16 (1968).

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

49. *Id.* (quoting *United States v. Mendenhall*, 446 U.S. 544, 549 (1980)).

50. 443 U.S. 47 (1979).

51. *Delgado*, 466 U.S. at 216.

52. *Id.* at 218. In addressing the fact that other persons, seeking to flee or evade the agents, were detained, the Court stated that the respondents could litigate only what happened to them. *Id.* at 220-21. The Court, however, carefully avoided discussion of the relevancy of these other events to whether a reasonable person witnessing them would have believed she was free to simply walk away or to decline to answer. Justice Brennan’s dissent criticizes the majority’s “fanciful” approach of considering each interrogation in isolation. *Id.* at 229-30 (Brennan, J., dissenting). In *United States v. Levetan*, 729 F. Supp. 891 (D.D.C. 1990) (per Flannery), the court in concluding that a reasonable per-

The Court described the factory surveys as follows:

The record indicates that when these surveys were initiated, the employees were about their ordinary business, operating machinery and performing other job assignments. While the surveys caused some disruption, including the efforts of some workers to hide, the record also indicates that workers were not prevented by the agents from moving about the factories.

Respondents argue, however, that the stationing of agents near the factory doors showed the INS's intent to prevent people from leaving. But there is nothing in the record indicating that this is what the agents at the doors actually did. The obvious purpose of the agents' presence at the factory doors was to insure that all persons in the factories were questioned. The record indicates that the INS agents' conduct in this case consisted simply of questioning employees and arresting those they had probable cause to believe were unlawfully present in the factory.⁵³

Based on these facts, the Court concluded that the questioning of each respondent by INS agents was merely a brief consensual encounter.⁵⁴ The Court acknowledged that persons other than the respondents who sought to flee or evade the agents may have been detained for questioning.⁵⁵ However, the Court noted that the respondents did not do so and were not detained.⁵⁶ Thus, the Court concluded that respondents could litigate only what happened to them, and that their encounters with the agents were "classic consensual encounters rather than fourth amendment seizures."⁵⁷

son would have felt he was not free to walk away from a police encounter, noted that one factor in its decision was that the police advised the individual that others were being questioned. The court stated, "A reasonable person is unlikely to believe that he alone can walk away from police when he is one of a group of persons being questioned." *Id.* at 901. This conclusion seems all the more reasonable when others evading questioning are forcibly detained.

53. *Delgado*, 466 U.S. at 218. The Court stated that positioning agents at the factory doors did not indicate that the agents intended to prevent people from leaving. Rather, the agents' purpose was to "insure that all persons in the factories were questioned." *Id.* However, if the questioning depended upon the voluntary cooperation of the workers, it would have appeared more consistent with voluntariness if an announcement were made inviting persons to talk with the agents instead of placing agents at the exits. Also, the fact that some employees tried to hide strongly suggests that they did not believe that they had the right to refuse to answer questions with impunity.

54. *Id.* at 219.

55. *Id.* at 220.

56. *Id.* at 220-21.

57. *Id.* at 221. While the Court did not directly address the question, it has been recognized that flight or attempted evasion of uniformed immigration officers by one with whom a consensual encounter is attempted provides reasonable suspicion to justify a brief detention for questioning or investigation. *Lee v. INS*, 590 F.2d 497, 502 (3d Cir. 1979); *Au Yi Lau v. INS*, 445 F.2d 217, 223, 225 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 864 (1971); *See also* *Marquez v. Kiley*, 436 F. Supp. 100, 114 (S.D.N.Y. 1977) (the court cited *Au Yi Lau* for this principle). *Wong Sun v. United States*, 371 U.S. 471, 482-83 (1963) (before flight can show guilty knowledge there must be clear and sufficient identification of the law enforcement officer's office or mission). But in *Delgado*, the Court

Thus, *Delgado* explicates the rule of *Terry v. Ohio*.⁵⁸ It reaffirms the principle that an individual is “seized” if a reasonable person would not have felt free to disregard the questioning and walk away. This belief may be premised on either “physical force or a show of authority.”⁵⁹ However, the Court has made clear in *Delgado* that it will not easily find a show of authority so great as to overcome the presumption that “most citizens will [voluntarily] respond to a police request.”⁶⁰ The Court concluded that the respondents had no reason to believe that they could not, with impunity, “simply refuse to an-

stated the rule of *Brown v. Texas*, 443 U.S. 47 (1979), that “absent some reasonable suspicion of misconduct, the detention of [a person] to determine his identity violated [his] right to be free from an unreasonable seizure.” *Delgado*, 466 U.S. at 216.

58. The general rule for forcible *Terry* stops of suspected undocumented aliens was stated in *Au Yi Lau v. INS*, 445 F.2d 217 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 864 (1971). The court observed that because forcible detentions are “far greater intrusions upon personal privacy than . . . nonforcible approaches, and since aliens in this country are sheltered by the Fourth Amendment in common with citizens,” constitutional principles applicable in similar detentions in other law enforcement contexts govern. *Delgado*, 466 U.S. at 223. Thus, it was held that immigration officers may make “forcible detentions of a temporary nature for the purposes of interrogation under circumstances creating a reasonable suspicion; not arising to the level of probable cause to arrest, that the individual so detained is illegally in this country.” *Id.* However, such determinations must be made on a case-by-case basis. *Id.*

59. *Terry v. Ohio*, 392 U.S. at 19 n.16.

60. 466 U.S. at 216. Justice Brennan, joined by Justice Marshall, dissented from the majority’s conclusion that a reasonable person would not, under the circumstances of the factory surveys, have felt free to disregard the questioning and walk away. Justice Brennan strongly criticized the majority’s decision on this point as reflecting a “studied air of unreality” and as being achieved through “a considerable feat of legerdemain.” *Id.* at 226 (Brennan, J., dissenting).

Other jurists have criticized the majority’s reasoning. *See, e.g., People v. Lopez*, 212 Cal. App. 3d 289, 260 Cal. Rptr. 641 (Cal. Ct. App. 1989), review denied by California Supreme Court on October 12, 1989, *cert. denied*, 110 S. Ct. 1122 (1990). In *Lopez*, the California Court of Appeal grudgingly reversed the trial judge’s ruling that Lopez had been seized. The court stated:

If undocumented aliens would believe themselves free to go despite an immigration official’s request for identification, a notion difficult for us to accept, Lopez could hardly have felt different. He at least should have been able to count on a winning suppression motion had he refused to produce identification or attempted to depart and been searched as a result. Under the rule currently in effect, however, his cooperation with the officers was his downfall.

Id. at 293, 260 Cal. Rptr. at 644. Judge Crosby, who wrote the opinion for the California court, then went on to more strongly express his views in a concurring opinion. He stated:

The instincts of the trial judge were absolutely correct. In the real world, this defendant could not possibly have felt himself free to walk away when his identification was requested, and it is almost laughable to think the officers would have let him do so. (Citations omitted). Nevertheless, a solid majority of the United States Supreme Court is of the view that ordinary citizens and even undocumented aliens confronted by immigration officials would be aware that they could merely saunter off when asked to identify themselves and produce confirming documents. (*INS v. Delgado* (1984) (citation omitted)). The same majority also believes law enforcement agents would allow them to do so, another highly dubious proposition. (Citations omitted.)

Id. at 294, 260 Cal. Rptr. at 644 (Crosby, J., concurring).

swer.”⁶¹ Further, the Court indicated that “interrogation relating to one’s identity or a request for identification by the police does not, by itself, constitute a fourth amendment seizure.”⁶²

The INS, apparently seeking to see how far the courts would go in finding encounters with law enforcement officers to be “consensual,” pressed the “consensual encounter” concept and was challenged in *LaDuke v. Nelson*.⁶³ In this case the INS appealed, among other things, the district court’s ruling that the INS had effected a seizure of occupants of migrant farm housing. The court affirmed the district court’s factual findings that uniformed Service officers approached or surrounded residences with emergency vehicles with flashing lights, awakened the occupants, and stationed officers at all doors and windows. Residents who exited the housing were apprehended, detained, and interrogated.⁶⁴ Further, the record showed incidents of forcible intrusion, either physically or with flashlights, into the housing units.⁶⁵ The court noted that one agent testified that his “customary procedure” for obtaining consent was to grasp the belt of a person. Another agent awakened a woman sleeping in her bedroom and pulled the covers off her to determine if she was alone.⁶⁶ The court in *LaDuke* had no problem concluding that a seizure of the housing units had been made, noting that, unlike *Delgado*, this incident occurred at homes and not the workplace, and there was no warrant, unlike the facts in *Delgado*.⁶⁷

The teaching of *Delgado* is that immigration officers may approach, question, ask for identification, and engage in other “consensual encounters” with persons in public places or in places the officers are authorized to be. There is no requirement that persons questioned be told that “they are free not to respond.”⁶⁸ In fact, persons so questioned are free not to respond or listen to the officers. Furthermore, the exercise of this right cannot serve to justify even a brief seizure.

61. *Delgado*, 466 U.S. at 218.

62. *Id.* at 216.

63. *LaDuke v. Nelson*, 762 F.2d 1318 (9th Cir. 1985), *modified on other grounds*, 796 F.2d 309 (9th Cir. 1986).

64. *LaDuke*, 762 F.2d at 1327.

65. *Id.* at 1327-28.

66. *Id.* at 1328 n.13.

67. It is, however, interesting that the INS read *Delgado* so expansively as to argue that the encounters were consensual.

68. *Delgado*, 466 U.S. at 216.

i. *Vehicle Stop Usually Does Not Involve a Consensual Encounter*

It is important to note that *Delgado* involved a situation where the subjects of the officers' questions were approached on foot in a public area, where the officers had a right to be. By contrast, vehicle stops, with the exceptions noted below, do not involve consensual encounters. Such stops, at a border, its functional equivalent, or at fixed checkpoints away from the border,⁶⁹ constitute a significant intrusion on movement,⁷⁰ and thus require a "reasonable suspicion based on specific articulable facts" that the vehicle's occupants are illegal aliens.⁷¹ Hispanic appearance and presence in an area where illegal aliens frequently travel are not enough to justify a stop to interrogate the occupants of a vehicle.⁷² Further, as discussed below, vague assertions of expertise in identifying vehicles containing illegal aliens will not suffice. Instead, as noted by *Nicacio v. United States*, there must be "specific articulable facts" to justify the stop.⁷³ In this connection, the court, citing numerous cases, ruled that the failure of vehicle occupants to make eye contact with INS officers is insufficient; it is not indicative of illegal alienage.⁷⁴

ii. *Stopping Vehicles and Questioning Occupants: The Procedure of Roving Border Patrol Operations Seeking to Detect Undocumented Aliens*

*Nicacio v. United States*⁷⁵ held that "[s]tops of persons traveling in automobiles are 'seizures' within the meaning of the fourth amendment."⁷⁶ The court stated that to justify a vehicle stop, "Immigration agents on a roving patrol may stop a vehicle only when they have a reasonable suspicion based on specific and articulable facts that the vehicle contains aliens who may be illegally in this country."⁷⁷ Further, reasonable suspicion must be based on objective

69. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (authorizes limited intrusions on movement at fixed checkpoints).

70. As one judge succinctly explained: "Vehicle stops . . . always involve an involuntary detention and are much more serious intrusions than street interrogations." *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062, 1076 (7th Cir. 1976) (Tone, J., dissenting).

71. *Nicacio v. INS*, 797 F.2d 700, 702 (9th Cir. 1985).

72. *Id.* at 703. This rule was clearly established in *United States v. Cortez*, 449 U.S. 411, 417 (1981), and *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975). See also *Ramirez v. Webb*, 599 F. Supp. 1278 (D.C. Mich. 1984), *aff'd*, 787 F.2d 592 (6th Cir. 1986) (vehicle stops implicate the fourth amendment and require more than Hispanic appearance of vehicle's occupants).

73. *Nicacio*, 797 F.2d 700, 705 (9th Cir. 1986).

74. *Id.* at 704.

75. 797 F.2d 700 (9th Cir. 1986).

76. *Id.* at 702 (9th Cir. 1986) (citations omitted).

77. *Id.* (citing, among others, *Brignoni-Ponce*, 422 U.S. 873, 884 (1975)).

“articulable facts, together with rational inferences from those facts.”⁷⁸ The facts cited in seeking to support a reasonable suspicion must distinguish characteristics of aliens illegally in this country from citizens and aliens legally here. That is, a forcible detention may be made only when there is “a reasonable suspicion based on specific and articulable facts that the vehicle contains aliens who may be illegally in this country.”⁷⁹ While an agent’s experience may be pertinent in assessing whether reasonable suspicion exists, hunches and intuition will not suffice. Rather, reasonable suspicion must be premised upon articulable facts, measured against an objective reasonable person standard as opposed to the subjective impressions of a particular officer.⁸⁰

In *United States v. Brignoni-Ponce*,⁸¹ the Court ruled that the U.S. Border Patrol requires a reasonable suspicion to stop vehicles in areas near the Mexican border to question the occupants about their citizenship and immigration status. Recognizing that there is a strong public interest in meeting the problem of illegal immigration, the Court stated that a modest intrusion of stopping a vehicle near the border to ask its occupants whether they were legally in the country did not require a finding of probable cause. Instead, the Court balanced the public interest in apprehending aliens illegally in this country against individual privacy interests and found, “when an officer’s observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion.”⁸² The officer may question the vehicle’s occupants about “their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause.”⁸³

The Court then summarized some of the factors upon which a reasonable suspicion has been found. For example, particular types of vehicles, traffic patterns, and evasive action of vehicle occupants have been sufficient to support reasonable suspicion.⁸⁴ However, in

78. *Nicacio*, 797 F.2d at 705.

79. *Id.* at 702 (citations omitted).

80. *Id.* at 702-03. *See also* *United States v. Kerr*, 817 F.2d 1384, 1387 (9th Cir. 1987) (fourth amendment stop based on hunches alone will not withstand constitutional scrutiny).

81. 422 U.S. 873 (1975).

82. *Id.* at 881.

83. *Id.* at 881-82.

84. *Id.* at 884-85.

each case, the totality of the particular circumstances has to be considered.⁸⁵ The Court ruled that appearance of Mexican descent may be a factor in the reasonable suspicion requirement, but that this factor standing alone was an insufficient basis to stop a vehicle.⁸⁶ *Nacacio v. INS*⁸⁷ states that *Brignoni-Ponce* and its progeny make clear that Hispanic appearance and presence in an area where illegal aliens frequently travel are insufficient to justify a stop to interrogate a vehicle's occupants.⁸⁸

One case offering a thorough analysis of whether an investigatory vehicle stop in a border area was supported by a "founded suspicion" is *United States v. Cortez*.⁸⁹ In this case, the Border Patrol had engaged in a solid and well-reasoned investigation. They had tied together various facts and inferences to show it was reasonable to make the limited stop. A review of this case may offer some insight into what a Court will view as sufficient suspicion to make an investigatory vehicle stop.

C. *Some Lower Courts Have Sought to Narrowly Interpret What Constitutes a Consensual Encounter*

The pervasive drug problem in this country has prompted some law enforcement agencies to randomly approach persons on board public transportation or in other places and, after advising them of the area's problem with drugs, ask questions of the person, including consent to search the person and his or her belongings.⁹⁰ These surveys have been described as "inconvenient, intrusive, and intimidating."⁹¹

Because of the intrusiveness of these sweeps, many lower courts have attempted to call these police encounters non-consensual and thus bar their use under the fourth amendment.⁹² For example, in *United States v. Winston*,⁹³ the district court ruled that the approach

85. *Id.* at 885 n.10.

86. *Id.* at 886-87.

87. 797 F.2d 700 (9th Cir. 1986).

88. *Id.* at 703. *See also* Ramirez v. Webb, 599 F. Supp. 1278, 1282 (W.D. Mich. 1984), *aff'd*, 787 F.2d 592 (6th Cir. 1986) (Hispanic appearance insufficient to stop vehicle for investigation).

89. 449 U.S. 411 (1981).

90. *See* Florida v. Bostick, 111 S. Ct. 2382, 2389-90 (1991) (Marshall, J., dissenting) (describes how this police procedure works and cites numerous cases that have dealt with such sweeps).

91. *Id.* at 2390 (Marshall, J., dissenting).

92. *Id.* at 2390-91 (Marshall, J., dissenting) (highlights lower court decisions which have ruled that these sweeps violated the fourth amendment). The dissent stated that "[r]emarkably the courts located at the heart of the 'drug war' [the lower courts] have been the most adamant in condemning this technique." *Id.* at 2390 (Marshall, J., dissenting).

93. 892 F.2d 112 (D.C. Cir. 1989).

drug enforcement team members used constituted such a show of authority that a reasonable person would not feel free to leave. The court of appeals, however, reversed. The court of appeals acknowledged that the "assumption that ordinary citizens actually believe they are free to walk away from police officers" has been criticized as "artificial."⁹⁴ The court responded, however, that:

The well-established test . . . is not whether a person interviewed by the police would find himself psychologically compelled to cooperate with an officer's requests, but whether such a person would reasonably conclude, as a consequence of the officer's show of authority and other relevant circumstances, that he was not at liberty to leave.⁹⁵

The court stressed that throughout the encounter, the officer "used a polite and conversational tone of voice" and "made no physical contact" prior to defendant's arrest.⁹⁶

Nevertheless, lower courts continue to find that seizures occur because of the show of authority by government agents. Some seize upon the slightest distinction to avoid higher court precedent. This seems to indicate a basic disagreement with *INS v. Delgado*.⁹⁷ These courts evidently feel uneasy with an operation where law enforcement officers approach passengers aboard public transportation,

94. *Id.* at 118.

95. *Id.*

96. *Id.* at 114, 117.

97. See, e.g., *United States v. Montilla*, No. Cr-89-142C (W.D.N.Y. Mar. 22, 1990) (agents held defendants' identification when requesting permission to search, and agents, rather than defendant, opened bag); *United States v. Felder*, 732 F. Supp. 204 (D.D.C. 1990) (search on bus where one officer stood at door of bus while others approached passengers, blocking defendant in confined space in his seat, and subjecting persons refusing "consent" to further scrutiny at later stops); *United States v. Levetan*, 729 F. Supp. 891 (D.D.C. 1990) (officers held defendant's train ticket while search conducted, suggested they were searching others on train and that they might hold train until search complete).

In *United States v. Lewis*, 921 F.2d 1294 (D.C. Cir. 1990), the court reversed two district court rulings which concluded that a seizure occurred where law enforcement officers boarded a commercial bus at an intermediate stop and asked cooperation of passengers in the "war on drugs" by consenting to a search of their persons and baggage. The lower court had obvious difficulty with the entire procedure. *United States v. Cothran*, 729 F. Supp. 153 (D.D.C. 1990) (seizure occurred because officer blocked defendant from exiting confined bus seat, and a refusal to "consent" resulted in further scrutiny at other stops), *rev'd*, 921 F.2d 1294 (D.C. Cir. 1990); *United States v. Lewis*, 728 F. Supp. 784 (D.D.C. 1990) (seizure occurred because defendant blocked in narrow bus seat, questioned and patted down in public after giving his "consent" despite officer's claim of no suspicion whatsoever of criminal activity), *rev'd*, 921 F.2d 1294 (D.C. Cir. 1990). The court of appeals ruled that the confines of a narrow bus necessarily restrict the freedom of movement of passengers being questioned. It concluded that a seizure does not occur, despite the limiting confines of a bus, unless the particular facts suggest that a passenger would feel that he must cooperate fully, or he would not be let alone.

question them about criminal activity, and request their “consent” to search their persons and possessions. Such persons are somewhat of a captive audience by being in the confined area of public transportation and may feel less freedom to refuse cooperation because the law enforcement officers typically obtain the cooperation of the driver—an authority figure on public transportation.

One court commented on such a program as follows:

The evidence in this case has evoked images of other days, under other flags, when no man traveled his nation’s roads or railways without fear of unwarranted interruption, by individuals who had temporary power in the Government. The specter of American citizens being asked, by Badge-wielding police for identification, travel papers — in short a *raison d’être* — is foreign to any fair reading of the Constitution, and its guarantee of human liberties. This is not Hitler’s Berlin, nor Stalin’s Moscow, nor is it white supremacist South Africa. . . .⁸⁸

Some courts are further troubled that the “random” targeting of suspects, in “consensual” and other encounters, actually focuses on the less powerful, including racial minorities.⁸⁹ However, the cases which involve racial targeting for investigative purposes address such challenges only where a seizure has taken place. For example, in

98. *United States v. Lewis*, 728 F. Supp. 784, 790 (D.D.C. 1990), (quoting *State v. Kerwick*, 512 So.2d 347 (Fla. 4th Dist. Ct. App. 1987). The lower court in *Bostick v. Florida*, 554 So.2d 1153, 1158 (1989), quoted this same language in striking down the kind of bus “inspections” at issue in *Lewis*.

The Supreme Court in *Bostick* ruled that the practice of boarding a bus and asking for consent to search was not *per se* so coercive as to invalidate consensual searches and remanded for a determination whether the particular facts surrounding the encounter suggested whether a reasonable person would have believed he was not free to decline the officer’s requests. 111 S. Ct. at 2389.

99. The court in *United States v. Laymon*, 730 F. Supp. 332 (D. Colo. 1990), after an evidentiary hearing, ruled that pretextual traffic stops and subsequent efforts to obtain consent to search were racially based. The court found a “pattern, practice and habit of racist law enforcement.” *Id.* at 337.

Judge Weinstein, dissenting in *United States v. Patrick*, 899 F.2d 169, 172 (2d Cir. 1990), stated:

[H]ad defendant [a permanent resident Jamaican] been a citizen of the middle class (instead of a member of three minority classes by virtue of socioeconomic status, color and alienage), the good people who guard our borders would not have so encroached on his freedom, and this case would never have arisen.

Judge Weinstein went on to cite authorities that conclude that the decision to approach or detain a suspect often turns on impermissible considerations of the suspect’s race. *Id.* at 173 (Weinstein, J., dissenting).

Also, in *United States v. Lewis*, 728 F. Supp. 784 (D.D.C. 1990), *rev’d*, 921 F.2d 1294 (D.C. Cir. 1990), the lower court pointedly noted that the police’s “random” questioning of a young Black man resulted in absolutely no suspicion of illegal activity, and yet the officer persisted and asked if he would “submit to a body search.” *Id.* at 787; *see also id.* at 790.

In a front page story, a major newspaper reported that the war on drugs has focused on Blacks and the Black community, despite the fact that experts say that whites sell most of the cocaine and account for 80% of its users. L.A. TIMES, Apr. 22, 1990 at 1, col. 1. The article states that many, and even some involved in law enforcement, are “warning that constitutional protections against unwarranted stops, searches, seizures and harassment have been all but suspended,” in minority communities. *Id.*

Florida v. Bostick,¹⁰⁰ the Court found that the practice of law enforcement officers, without reasonable suspicion, boarding public buses and asking passengers for consent to search their persons and belongings did not necessarily violate the fourth amendment. However, the majority did not address whether the practice would be legal if the requests for consent targeted racial minorities. Justice Marshall in dissent, joined by Justices Blackmun and Stevens, expressed doubt that the bus sweeps were random. He pointed out that evidence in other cases involving this practice suggested that Blacks were more likely to be approached and questioned than others.¹⁰¹ Thus, he concluded that the basis of the decision to single out particular passengers during such a sweep "is less likely to be inarticulable than unspeakable."¹⁰²

The dissent also challenged the majority's view that a reasonable person might feel free to refuse an armed officer's request for consent to search when the officer was standing over the person in the cramped confines of a bus. Justice Marshall states:

I have no objection to the manner in which the majority frames the test for determining whether a suspicionless bus sweep amounts to a fourth amendment "seizure." I agree that the appropriate question is whether a passenger who is approached during such a sweep "would feel free to decline the officers' requests or otherwise terminate the encounter." What I cannot understand is how the majority can possibly suggest an affirmative answer to this question.¹⁰³

This is the same concern that the dissent expressed in *INS v. Delgado*.¹⁰⁴ That is, whether the average person would feel free to disregard a police officer's questions or requests. This issue is at the heart of the disagreement between the majority and the minority in *Delgado* and *Bostick*. It reflects a basic difference over how the Justices believe the public perceives and feels about the police.

In one high-profile case, baseball Hall of Fame member Joe Morgan was approached by a Los Angeles police officer in the Los Angeles International Airport and questioned about narcotics.¹⁰⁵ Joe Morgan is black. The officer did not have reasonable suspicion that Morgan was involved in criminal activity, yet the officer wrestled Morgan to the floor and ignominiously arrested and handcuffed him. Morgan won a \$540,000 lawsuit against the officer and the City

100. *Florida v. Bostick*, 111 S. Ct. 2382 (1991).

101. *Bostick*, 111 S. Ct. at 2390 n.1 (Marshall, J., dissenting).

102. *Id.*

103. *Id.* at 2391 (citation omitted).

104. 466 U.S. 210 (1984).

105. L.A. TIMES, Feb. 15, 1991, part B, at col.2.

of Los Angeles.¹⁰⁶ Likewise, *Buffkins v. City of Omaha*¹⁰⁷ involved a black woman who sued the City of Omaha and two Omaha police officers for illegally arresting her primarily because of her race. The court of appeals reversed the trial court's dismissal of the action and remanded for trial. In these cases, the subjects of the encounters expressed indignation at being questioned about criminal activity and did not acquiesce to the extent that their conduct could be labeled voluntary. These two cases wound up in court. However, one must ask the question: how many persons are approached daily and questioned about possible criminal activity solely because of their race? Many people simply submit to questioning and to searches so that they may more quickly go on their way. Unfortunately, there is no record of the number of such "consenting" individuals. Furthermore, these cases call into question the premise of the Supreme Court, that where there is no reasonable suspicion the person is free to simply walk away.

Because the Court's reasonable person in the "whether a reasonable person would feel free to decline to cooperate" test is one who feels very little coercion during police encounters, it would be interesting to determine empirically whether the average person believes she is free to refuse to cooperate with the police. Further, if the data proved that the Supreme Court's assumptions were wrong, it would be interesting to see whether the Court would adjust its view of what a reasonable person would believe.

D. Refusal to Cooperate with a "Consensual" Encounter

In *Delgado*, the Court embraced the rule articulated by the plurality in *Florida v. Royer*,¹⁰⁸ that a consensual encounter with law enforcement officers does not oblige the person being questioned to submit to interrogation, and that no inference of suspicious conduct may be drawn from a refusal to cooperate.¹⁰⁹ In *Florida v. Royer*, the plurality stated:

The person approached . . . need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.¹¹⁰

106. *Id.*

107. 922 F.2d 465 (8th Cir. 1990).

108. 460 U.S. 491, 501 (1983).

109. 466 U.S. 210, 215 (1984).

110. *Royer*, 460 U.S. at 497-98. In *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062 (7th Cir. 1976), *modified*, 548 F.2d 715 (7th Cir. 1977), the court stated that it recognized the right of INS agents to engage individuals on the street in "casual conversations." *Id.* at 1070-71 n. 10. However, the court stated, "We disagree with the Government when it claims that INS agents may ask questions and under threat of detention

Likewise, in *Brown v. Texas*,¹¹¹ the Court held that absent reasonable suspicion of criminal activity, law enforcement officers have no right to compel an individual to give his or her name and address, even where a state statute purports to make such refusal a crime if the stop is lawful.¹¹² Thus, the fact that a person does not answer questions posed by law enforcement officers cannot be viewed as suspicious conduct which would justify even a brief detention. Accordingly, it seems clear that absent reasonable suspicion, an individual may not be forcibly detained for questioning or any other purpose.

However, as Justice Marshall stated in dissent in *Florida v. Bostick*,¹¹³ few will know that they have a right to refuse to answer such questions and thus this "right" will often go unexercised.¹¹⁴

*i. Law Enforcement Personnel and Government
Employees Have Refused Consent for Fourth
Amendment Intrusions*

Among those who are aware of and who have exercised their right to refuse to cooperate with a request for consent to search are law enforcement officers and government employees. For example, in *Kirkpatrick v. City of Los Angeles*,¹¹⁵ a suspect who had been arrested claimed that the arresting officers stole money from him. The suspect initially claimed that \$600 had been stolen but later changed this amount to \$60. When the supervising officer sought to question the accused officers about the charge, they refused to say anything. Despite this fact, the accused officers were strip searched. The accused officers challenged the validity of the searches. The court noted that the government has a strong interest in the integrity of its police force, but that the officers have privacy interests as well.¹¹⁶

compel answers about the individual's right to be in this country." *Id.* The Court reasoned that "it would render meaningless the individual's right to walk away . . . if that refusal were to be then used as grounds to justify detaining the individual." *Id.*

In *Florida v. Bostick*, 111 S. Ct. 2382 (1991), the Court expressly stated that persons have the right to refuse to answer a policeperson's questions without having the refusal used against him. However, Justice Marshall, in dissent, complained that one unadvised of his rights and otherwise unversed in constitutional law has no reason to know that the police cannot hold his refusal to cooperate against him. *Florida v. Bostick*, 111 S.Ct. at 2393.

111. 443 U.S. 47 (1979).

112. *Id.* at 53.

113. 111 S. Ct. 2382 (1991).

114. *See supra* note 110.

115. 803 F.2d 485 (9th Cir. 1986).

116. *Id.* at 488.

The court, balancing these two interests, ruled that it was appropriate to conduct a strip search of police officers where there is "reasonable suspicion" to do so.¹¹⁷ That is, the person responsible for the search must be aware of specific articulable facts and inferences therefrom which reasonably warrant a suspicion that contraband or other evidence of corruption will be found.¹¹⁸ The court found that no reasonable suspicion existed and that it would be improper to require that the officers be subjected to a strip search.

In a series of lawsuits, federal employees are challenging the federal government's policy of subjecting them to compulsory random urinalysis drug testing as an unreasonable search and seizure. Though this issue will likely be resolved by the United States Supreme Court, the plaintiffs have met with considerable preliminary success.¹¹⁹

E. Where a Consensual Encounter is Attempted, Flight, Furtiveness, or Other Factors May Support Reasonable Suspicion to Detain

The Court in *INS v. Delgado* acknowledged that persons at or around the factories who attempted to evade the agents may have been detained for questioning.¹²⁰ Flight or evasion by one with whom a consensual encounter is attempted, alone or in combination with other factors, has been held to constitute reasonable suspicion to justify a brief detention for questioning.¹²¹ If the subject refuses to an-

117. *Id.* at 490. The court stated in *United States v. Kerr*, 817 F.2d 1384, 1387 (9th Cir. 1987), that every fourth amendment analysis "is a balancing between two competing concerns—society's interest in effective law enforcement and the individual's privacy and liberty interest." Thus, the analysis does not change when the privacy and liberty interests at stake are those of a law enforcement officer.

118. *Id.*

119. *See, e.g.*, *Harmon v. Meese*, 690 F. Supp. 65 (D.D.C. 1988) (granting an injunction against the government's implementation of the challenged procedures without a reasonable suspicion of drug use). *See also* *Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987); *National Federation of Federal Employees v. Weinberger*, 818 F.2d 935 (D.C. Cir. 1987). *See also* *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (nonconsensual drug testing of public employees is a search, despite the fact that the results of the test could not be used in criminal proceedings without the employees' consent). The Court ruled that such warrantless searches were permitted for Custom Service employees involved in front-line drug interdiction because the government has a "compelling interest" in ensuring that such personnel are physically fit and have unimpeachable integrity and judgment. *Id.* at 668. This five to four decision is notable for, among other things, Justice Scalia's strong dissent in defecting from the Court's other conservative members. *Id.* at 680 (Scalia, J., dissenting).

Also, the Supreme Court has ruled that a public employer's search of an employee's desk and files requires reasonable grounds to suspect the search will turn up evidence that the employee is guilty of work-related misconduct. *O'Connor v. Ortega*, 474 U.S. 1048 (1987).

120. 466 U.S. 210, 220 (1984).

121. *See, e.g.*, *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975), stating in dictum that "erratic driving or obvious attempts to evade officers can support a reason-

swer questions, in some circumstances it may be reasonable to continue the detention pending a brief investigation to discover whether there is independent evidence that he may be involved in a violation of law.

However, *INS v. Delgado* also recognized that targets of consensual immigration check encounters may, with impunity, simply refuse to answer and walk away.¹²² In *International Molders' and Allied Workers' Local Union No. 164 v. Nelson*,¹²³ the court, citing *Delgado*, noted that a refusal to answer questions, without an attempt to flee or evade agents, cannot justify a detention or seizure.¹²⁴ Accordingly, to go beyond a mere consensual encounter there must be "some minimal level of objective justification to validate the detention or seizure."¹²⁵ Thus, it is clear that exercising the right to walk away cannot be equated with flight or evasion or it would render the right meaningless.¹²⁶

When an immigration officer is in uniform and clearly engaged in the effort to detect and apprehend persons illegally in this country, it seems reasonable to conclude that flight or attempted evasion may be an indication that the individual is illegally in the United States.¹²⁷ But care must be exercised so as not to loosely construe

able suspicion." See *United States v. Larios-Montes*, 500 F.2d 941 (9th Cir. 1974); *Duprez v. United States*, 435 F.2d 1276 (9th Cir. 1970). See also, *United States v. Medina-Gasca*, 739 F.2d 1451, 1453 (9th Cir. 1984) (two heavily laden vans, traveling in tandem on a known smuggling route, whose occupants "dispersed" from a roadside stop when an officer approached on foot, supported reasonable suspicion). See also *Au Yi Lau v. INS*, 445 F.2d 217, 223 n.9 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 864 (1971).

However, evidently out of concern that the INS may try to create a reasonable suspicion on which to base a forcible stop by prompting flight by targets of its scrutiny, one court has issued a preliminary injunction barring the INS from conducting itself in a manner that deliberately provokes flight by workers. *International Molders' and Allied Workers' Local No. 164 v. Nelson*, 643 F. Supp. 884 (N.D. Cal. 1986), *aff'd in pertinent part*, 799 F.2d 547, 554 (9th Cir. 1986). See also *Wong Sun v. United States*, 371 U.S. 471, 484 (1963), where the Court stated that after a law enforcement officer seeking entry into Wong Sun's building aroused his suspicions by falsely claiming to be a customer, Wong Sun's flight from the unidentified officer did not support an inference of guilty knowledge because to conclude otherwise would transform "ambiguous conduct which the arresting officers themselves have provoked" into probable cause.

122. 466 U.S. at 218.

123. 799 F.2d 547 (9th Cir. 1986).

124. *Id.* at 553.

125. *Id.*

126. "[I]t would render meaningless the individual's right to walk away . . . if that refusal were to be then used as grounds to justify detaining the individual." *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062, 1070-71 n.10 (7th Cir. 1976).

127. See *California v. Hodari D.*, 111 S. Ct. 1547, 1549 n.1 (1991) and *Wong Sun v. United States*, 371 U.S. 471 (1963). However, even assuming that flight constituted strong evidence of illegal alienage, if the subject refused to answer any questions and the

what conduct constitutes attempted evasion. The court in *Nacacio v. INS*¹²⁸ stressed that failure of vehicle occupants to make eye contact with immigration officers does not justify a stop of the vehicle.¹²⁹ Thus, for a detention or arrest on the basis of attempted evasion to withstand a court challenge, the evasion must be clear, significant and weighed with other pertinent facts.¹³⁰

immigration officers had no independent evidence of the person's status, it would be virtually impossible to assert a ground of deportability under the law. *See* 8 U.S.C. § 1251(a) (1982), which lists the 19 grounds of deportability. The first paragraph in every order to show cause is the allegation that the respondent is not a "citizen or national of the United States." (For definition of "national" see 8 U.S.C. §§ 1101(a)(22) and (29) and § 1408 (1982).) The second paragraph is the allegation that the respondent is a native and citizen of a specified country or countries. The third paragraph typically states how and when the respondent entered the United States. The succeeding paragraphs then assert facts to support a particular ground of deportability. However, without facts no ground of deportability can be alleged. Thus, the fact that a person fled from immigration officials may provide a basis to detain, and even arrest. But, without more information deportability cannot be proved.

In deportation proceedings, foreign birth raises a presumption of alienage that one must rebut by showing the time, manner and place of entry, or suffer the conclusion that he or she is illegally in this country. 8 U.S.C. § 1361 (1982). Thus, foreign birth may provide a basis to detain or arrest an alien without papers to show he or she is legally in the country. *See, e.g., Ramon-Sepulveda v. INS*, 743 F.2d 1307, 1308 (9th Cir. 1984). 128. 797 F.2d 700 (9th Cir. 1986).

129. The fact that persons appeared to be Hispanic, wore work clothes, drove older cars, had a "lean and hungry look," failed to look officers in the eye, and had "dirty, unkept appearance" did not support reasonable suspicion that they were illegal aliens so as to warrant motor vehicle stops. *Id. See also United States v. Lamas*, 608 F.2d 547, 549-50 (5th Cir. 1979) (avoiding eye contact does not support reasonable suspicion); *United States v. Munoz*, 604 F.2d 1160, 1161 (9th Cir. 1979) (vehicles traveling in tandem with drivers of Hispanic appearance and failure of occupants to look at agents is not reasonable suspicion); *United States v. Lopez*, 564 F.2d 710, 712 (5th Cir. 1977) (failure to make eye contact may be the rule rather than the exception). But even those courts that have been willing to consider avoidance of eye contact as a factor supportive of reasonable suspicion give it relatively little weight. *See, e.g., United States v. Nikzad*, 739 F.2d 1431, 1433 (9th Cir. 1984) (avoidance of eye contact is somewhat probative where individual stared at officers and after noticing they were looking at him began to shuffle and fidget); *United States v. Vasquez-Cazares*, 563 F.2d 1329, 1330 (9th Cir. 1977) (*per curiam*) (avoidance of eye contact is somewhat probative when a marked police car is directly in line of vision; this and anonymous tip that suspect was smuggling aliens supported reasonable suspicion).

130. *See, e.g., Sibron v. New York*, 392 U.S. 40, 66-67 (1968). In *Sibron*, an off-duty police officer was home at his apartment when he heard noises at his door indicating someone seeking to force entry. Shortly afterwards the officer looked through his peephole and saw "two men tiptoeing out of the alcove toward the stairway." *Id.* at 48. He called the police, got dressed, armed himself with his service revolver, and again looked through the peephole. *Id.* at 48, 66-67. He saw the men still tiptoeing in the hall. The officer had never seen the men before. When he opened the door, the men ran down the stairs. The officer caught one of the men after chasing him down one or two flights of stairs. The man said he was visiting a girlfriend but refused to give her name claiming she was a married woman. A pat down of the man revealed burglar's tools; he was subsequently criminally convicted. *Id.* The Supreme Court affirmed the conviction, ruling that the pat-down search was reasonably made incident to a lawful arrest.

See also United States v. Medina-Gasca, 739 F.2d 1451 (9th Cir. 1984) (reasonable suspicion supported where two heavily laden vans had been traveling in tandem on a known smuggling route, and vehicle's occupants dispersed from a roadside stop when an

Furthermore, before flight or furtiveness can support reasonable suspicion, the law enforcement officer must be identifiable as such. In *Wong Sun v. United States*,¹³¹ a plain clothes federal agent went to James Wah Toy's laundry at 6:00 A.M. When Toy opened the door to inform the agent that the laundry was closed, the agent stated that he wanted to pickup his laundry. Toy said the business did not open until 8:00 A.M. and started to close the door. But the agent then took out his badge and stated that he was a federal agent. Toy slammed the door and ran down the hallway through the laundry to the living area where his wife and child were sleeping. The agent, along with others, broke the door down, followed Toy to his living quarters, and placed him under arrest. The issue arose of the appropriate inference to be drawn from Toy's "flight." The Court stated, "[W]hen an officer insufficiently or unclearly identifies his office or his mission, the occupant's flight from the door must be regarded as ambiguous conduct."¹³² Although the officer in *Wong Sun* did disclose that he was a narcotics officer, he misrepresented his mission at the outset by stating that he had come for laundry and dry cleaning. Furthermore, before Toy fled, the officer never adequately dispelled the misimpression engendered by his own ruse.¹³³

Toy's refusal to admit the officers and his flight down the hallway did not signify guilty knowledge any more than it displayed a natural desire to avoid an apparently unauthorized intrusion.¹³⁴ The Court stated that "[a] contrary holding here would mean that a vague suspicion could be transformed into probable cause for arrest by reason of ambiguous conduct which the arresting officers themselves provoked."¹³⁵

In discussing the probative value of flight as an indicator of guilt, the Court quoted from *Alberty v. United States*:¹³⁶

[I]t is not universally true that a man who is conscious that he has done a wrong, will pursue a certain course not in harmony with the conduct of a man who is conscious of having done an act which is innocent, right, and proper, since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law than "the

officer approached on foot).

131. 371 U.S. 471 (1963).

132. *Wong Sun v. United States*, 371 U.S. 471, 482 (1963).

133. *Id.* at 482-83. Cf. *Gouled v. United States*, 255 U.S. 298 (1921); *Gatewood v. United States*, 209 F.2d 789 (D.C. Cir. 1953).

134. *Wong Sun*, 371 U.S. at 483.

135. *Id.* at 484 (citation omitted).

136. 162 U.S. 499, 511 (1896).

wicked flee when no man pursueth, but the righteous are as bold as a lion."¹³⁷

In *Au Yi Lau v. INS*,¹³⁸ the court noted that it had earlier¹³⁹ sanctioned minimal privacy invasions occasioned by questioning persons "believed to be of alien origin." Underlying the rule were the rationales that the minimal invasion of voluntary questioning was justified by the special needs of immigration officials to make such interrogations and that the subject's cooperation was assumed.¹⁴⁰

In *Au Yi Lau*, the court ruled on two separate cases with one opinion. In both cases, the issue was whether immigration officers may *forcibly detain* for questioning one who is reasonably believed to be an alien.¹⁴¹ The court observed that because forcible detentions are "far greater intrusions upon personal privacy than the nonforcible approaches, and since aliens in this country are sheltered by the fourth amendment in common with citizens," constitutional principles applicable in similar detentions in other law enforcement contexts govern.¹⁴² Thus, it was held that immigration officers may make "forcible detentions of a temporary nature for the purposes of interrogation under circumstances creating a reasonable suspicion, not arising to the level of probable cause to arrest, that the individual so detained is illegally in this country."¹⁴³ However, such determinations must be made on a case-by-case basis.

In the first case considered by the court in *Au Yi Lau*, the court held that the attempted flight of workers from business premises upon arrival of immigration officers sufficed to create a reasonable suspicion of illegal alienage.¹⁴⁴ Accordingly, a temporary detention for interrogation was warranted.¹⁴⁵ The court went on to state:

[D]eliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of mens rea, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest.¹⁴⁶

137. *Wong Sung*, 371 U.S. at 483 n.10. Albery was a Black man born into slavery who later became a member of the Cherokee Indian Nation. The court also cited other decisions indicating flight does not necessarily prove guilty knowledge. *Id.* But see *California v. Hodari D.*, 111 S. Ct. 1547 2549 n.1 (1991).

138. 445 F.2d 217 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 864 (1971).

139. The earlier case referred to is *Yam Sang Kwai v. INS*, 411 F.2d 683 (1960), *cert. denied*, 396 U.S. 877 (1969).

140. *Au Yi Lau*, 445 F.2d at 222.

141. *Id.* at 223.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 223 n.10 (quoting from *Sibron v. New York*, 392 U.S. 40, 66-67 (1968)). The Court noted, "If flight can contribute so greatly to probable cause for arrest, it certainly has the capacity in appropriate circumstances to generate the lesser degree of reasonable suspicion requisite for an investigatory stop." *Id.* But as discussed

This language clearly is overbroad. For example, flight from or evasion of strangers could be the normal thing to do depending on the circumstances. One would have to consider, e.g., the appearance and manner of an approaching stranger, the place of approach (a deserted street or a bustling public place), time (night or day), etc. Further, to the extent this language is qualified by the requirement that the officer have specific knowledge connecting the suspect to evidence of crime, this will rarely be the case in an immigration context.

In the second case considered by the court in *Au Yi Lau*, two Chinese individuals were in a hospital waiting room. Upon seeing an immigration officer, they promptly got up and departed. Upon finishing his business about fifteen minutes later, the officer looked for the two individuals and saw them in the hospital parking lot. They hastily got in their car on seeing the officer and sought to lock their car and drive away. The officer reached in the car and took the keys after they were unable to respond to questions because of a language barrier. Several minutes later, a Chinese man happened by and was able to act as an interpreter. The men in the car answered that they had exceeded their shore leave.¹⁴⁷

The court acknowledged it was a close case, but nevertheless found that the actions here constituted an appropriate *Terry* stop. Stressing that the individuals were detained "minutes" rather than "hours," the court pointed out that the delay was occasioned by efforts to find a channel of communications.¹⁴⁸

The court went on:

Because of the language barrier, that stop proved longer here than would be necessary in the usual *Terry* criminal context. But different areas of law enforcement have different problems, and legal doctrine common to all must be of sufficient flexibility to accommodate these differences. We are not persuaded that this constituted "official oppression unrelieved by the quality of reasonableness central to the concept of the fourth amendment."¹⁴⁹

Likewise, in *Lee v. INS*,¹⁵⁰ where a Chinese man became nervous and attempted to walk away from an INS investigator who sought to question him, the court held that the "intermediate response" of asking him to stop and answer questions was appropriate.¹⁵¹ The court

above, the circumstances surrounding the flight in this case constituted compelling evidence of guilt.

147. *Id.* at 225.

148. *Id.*

149. *Id.*

150. 590 F.2d 497 (3d Cir. 1979).

151. *Id.* at 502.

stated that Lee made no further attempt to extricate himself from the conversation with the officer and was not “physically detained from doing so.”¹⁵² The court found that the officer’s “response to Lee’s attempt to extricate himself from the interrogation was reasonably related in scope to the justification he had for adopting that response.”¹⁵³

However, this unclear statement by the *Lee* court fails to explicate a satisfactory fourth amendment analysis. For example, it may be read as suggesting that a person may be penalized for exercising his or her right to refuse to cooperate. How many times must one attempt to walk away before she can expect no further intrusion? The facts show that it was highly unlikely that the officer had probable cause or reasonable suspicion. He saw two men walking across a parking lot toward an adjacent shopping center. A Chinese restaurant was in the shopping center; the officer knew from “prior experience” that illegal aliens had been hired there. The men caught his attention because they were speaking in Chinese and dressed in “white shirts, of the type normally worn by kitchen help in restaurants.”¹⁵⁴ These sparse facts would probably not support a reasonable suspicion to conclude that these particular men were illegally in the country. However, the facts of the case show that the INS officer did not speak to Lee first. It was during the officer’s brief conversation with Lee’s companion that Lee began to walk away.¹⁵⁵ Thus, it seems that Lee was not walking away from a conversation directly aimed at him. Rather, a reasonable construction of the facts would indicate that the officer merely was alerting Lee that he wished to speak with him also. At that point, Lee, in response to questions, indicated he was illegally in the United States.

In *Illinois Migrant Council v. Pilliod*,¹⁵⁶ the court recognized the right of INS agents to engage individuals on the street in “casual conversations.”¹⁵⁷ However, the court stated, “[W]e disagree with the Government when it claims that INS agents may ask questions and under threat of detention compel answers about the individual’s right to be in this country.”¹⁵⁸ The court reasoned that “it would render meaningless the individual’s right to walk away, as recognized by the dissent in *Terry v. Ohio*, if that refusal were to be then used as grounds to justify detaining the individual.”¹⁵⁹

152. *Id.*

153. *Id.*

154. *Id.* at 498.

155. *Id.*

156. 540 F.2d 1062 (7th Cir. 1976).

157. *Id.* at 1070 n.10.

158. *Id.*

159. *Id.* (citation omitted). See also *INS v. Degaldo*, 466 U.S. 210, 218 (1984) (recognized that a person approached for questioning by immigration officials may sim-

F. Nervousness, Without More, Will Usually Not Support Reasonable Suspicion

In *United States v. Ballard*,¹⁶⁰ the court ruled that there was no reasonable suspicion to detain a black male as fitting the general profile of a drug courier just because on deplaning at the airport he (1) appeared nervous, (2) walked at a brisk pace, (3) carried little baggage and (4) arrived from a known narcotic source city.¹⁶¹ The primary justification for the stop was the suspect's alleged nervousness and quick pace.¹⁶² In *United States v. Baptist*,¹⁶³ the court observed that "nervousness on the part of one stopped by a police officer is not at all unusual . . ."¹⁶⁴ The court rejected the claim that "founded suspicion" existed because the suspect was nervous, asked to go to the bathroom after he was detained, and placed his foot on papers that fell out of his pockets.

This points out one of the realities of police encounters with members of the public. It is not unusual for an individual approached by the police to have some apprehension that he has been targeted for some violation of law. Further, when a police car clings near a vehicle on the highway it is not at all uncommon for the driver to stiffen, quickly glance at the speedometer, and possibly slow down. If this nervous behavior could justify a stop, most drivers could be stopped whenever a police car unexpectedly pulls next to them or when their vehicle suddenly comes upon a previously unseen parked Highway Patrol car.

Another possible problem with allowing nervousness to be equated with reasonable suspicion is the evidentiary problem of determining whether the suspect actually appeared "nervous." If no articulation were required as to how alleged nervous action was manifested, and if those actions were not sufficiently significant to distinguish the suspect from the general population,¹⁶⁵ law enforcement officials would have virtually unbridled power to detain persons whenever they chose to do so.

ply walk away without having this act construed as evidence of illegal conduct or status).

160. 573 F.2d 913 (5th Cir. 1978).

161. *Id.* at 916.

162. *Id.*

163. 556 F. Supp. 284 (S.D.N.Y. 1982).

164. *Id.* at 289. *See also* *Buffins v. City of Omaha*, 922 F.2d 465 n.13 (8th Cir. 1990) (pertinent cases cited therein).

165. *See* *United States v. Ballard*, 573 F.2d 913, 916 (5th Cir. 1978) (holding that the facts that allegedly supported reasonable suspicion did "not in any significant way operate to distinguish Ballard from the general public").

III. FIXED CHECKPOINTS NEAR BORDER TO CHECK FOR UNDOCUMENTED ALIENS

In contrast with roving patrols, the Supreme Court has ruled that fixed-checkpoint vehicle stops do not require reasonable suspicion that the vehicles contain undocumented aliens. In *United States v. Martinez-Fuerte*,¹⁶⁶ the Court ruled that consistent with the fourth amendment "a vehicle may be stopped at a fixed checkpoint for brief questioning of its occupants even though there is no reason to believe the particular vehicle contains illegal aliens."¹⁶⁷

One of the checkpoints considered by the Court was the San Clemente, California, checkpoint on Interstate 5, between San Diego and Los Angeles. In describing the procedure employed there, the Court stated that vehicles are slowed or stopped, with most motorists being allowed to proceed without any oral inquiry or close visual examination. In a "relatively small number of cases," the agent will direct vehicles to a "secondary inspection area" where the occupants are asked about their citizenship and immigration status.¹⁶⁸ The government asserted that the average time of an investigation in the secondary inspection area is three to five minutes.¹⁶⁹ The agent referring the respondents' vehicles to secondary inspection in *Martinez-Fuerte* had no articulable suspicion of illegal activity or status.¹⁷⁰ However, on being referred to secondary inspection, Martinez-Fuerte's passengers admitted to being in the United States unlawfully. The court of appeals reversed the conviction, ruling that a fixed-checkpoint stop required reasonable suspicion based on articulable facts.

The Supreme Court balanced the public's interest in stemming the flow of illegal immigrants into this country against the privacy and security interests of motorists traversing the checkpoint. The Court acknowledged that the intrusion on uninterrupted passage through the checkpoint did implicate the fourth amendment.¹⁷¹ It stressed, however, that this intrusion was modest, involving "only a brief detention of travelers" during which "all that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States."¹⁷² To distinguish this case from the roving patrol in

166. 428 U.S. 543 (1976).

167. *Id.* at 545.

168. *Id.* at 546.

169. *Id.* at 546-47.

170. *Id.* at 547.

171. *Id.* at 557.

172. *Id.* at 558 (quoting from *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975)).

Brignoni-Ponce,¹⁷³ the Court reasoned that “the subjective intrusion—the generating of concern or even fright on the part of lawful travelers—is appreciably less in the case of a checkpoint stop.”¹⁷⁴ Also, the Court stated that fixed checkpoints did not carry the same unbridled discretion that officers in the field possess, who “could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road”¹⁷⁵ The Court offered other reasons in an effort to demonstrate that fixed checkpoint stops were less intrusive and gave border patrol agents less discretion than roving patrols.¹⁷⁶

In regard to the practice of referring vehicles to secondary inspection, the Court stated:

We further believe that it is constitutional to refer motorists selectively to the secondary inspection area at the San Clemente checkpoint on the basis of criteria that would not sustain a roving-patrol stop. Thus, even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation.¹⁷⁷

In concluding its opinion, the Court again stressed that the warrantless fixed-checkpoint stops were consistent with the Constitution, primarily because of the limited scope of those stops.

The principal protection of fourth amendment rights at checkpoints lies in appropriate limitations on the scope of the stop. See *Terry v. Ohio*, 392 U.S., at 24-27; *United States v. Brignoni-Ponce*, 422 U.S., at 881-82. We have held that checkpoint searches are constitutional only if justified by consent or probable cause to search. *United States v. Ortiz*, 422 U.S. 891 (1975). And our holding today is limited to the type of stops described in this opinion. “[A]ny further detention . . . must be based on consent or probable cause.” *United States v. Brignoni-Ponce*, *supra*, at 882.¹⁷⁸

The Court also made it clear that the decision was limited to fixed-checkpoint stops, as opposed to temporary-checkpoint stops.¹⁷⁹

The dissent¹⁸⁰ strongly criticized the failure to require that checkpoint stops be supported by reasonable suspicion based on articulable

173. 422 U.S. 873 (1975). See *supra* text accompanying notes 81-86.

174. *Martinez-Fuerte*, 428 U.S. at 558.

175. *Id.* at 559 (quoting from *Brignoni-Ponce*, 422 U.S. at 882-83).

176. *Martinez-Fuerte*, 428 U.S. at 559.

177. *Id.* at 563 (footnote and citation omitted). The Court declined to explain why apparent Mexican appearance alone could be the basis for a further fourth amendment intrusion. It is disturbing that the Court so cavalierly sanctioned a law enforcement procedure premised primarily along racial lines. The checkpoint, it must be remembered, is not at the border. It should also be noted that the area in which the checkpoint in question is operated is populated by a large Hispanic population. *Id.*

178. *Id.* at 566-67.

179. *Id.* at 566 n.19.

180. Justice Brennan, joined by Justice Marshall, dissented. *Id.* at 567 (Brennan, J., dissenting).

facts. One danger perceived by the dissent is that persons of Mexican ancestry would be singled out for these investigative stops.

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.¹⁸¹

Further, the dissent assailed the majority's holding that referral to secondary inspection could be based "largely" on Mexican ancestry, as being inconsistent with *Brignoni-Ponce*, and on the principle "[t]hat law in this country should tolerate use of one's ancestry as probative of possible criminal conduct is repugnant under any circumstances."¹⁸²

Some questions remain after the checkpoint cases. For example, assume that a vehicle is directed to secondary inspection for no particular reason, and the occupants state that they are legally in the United States. If the border patrol officer is suspicious but has no articulable evidence that they are in the country illegally, how long may he detain them to investigate? What kind of investigation would warrant further detention? If the investigation yields no helpful evidence, may the individuals be detained further in hopes that they will make damaging admissions? What if the occupants simply refuse to answer the officer's questions or provide identification? What if such a refusal is premised on the right against self-incrimination?¹⁸³ Does this, standing alone, justify continued detention? If so, at what point must the individuals be released?

IV. TERRY INVESTIGATIVE STOPS

A. Refusal to Answer Questions Voluntarily at a Fixed Checkpoint or After a Stop Based on Reasonable Suspicion

There must be a distinction drawn between a refusal to provide identification and a refusal to answer questions concerning alleged suspicious conduct. The term "identification" is here used to mean the suspect's name and address where he or she can be located if

181. *Martinez-Fuerte*, 488 U.S. at 572. Indeed, Hispanic persons legally in this country have complained that they feel unfairly singled out at immigration checkpoints in the United States, while foreign persons of European background are generally not even questioned. See, e.g., Reza, *Immigration Agents' Actions Beg a Question*, L.A. TIMES, Apr. 24, 1988, part 2, at 2, col. 3; and, Epstein, *Hispanics: Under the suspicious eye of border agents*, CHRISTIAN SCI. MONITOR, Apr. 14, 1988, at 16.

182. *Martinez-Fuerte*, 428 U.S. at 571 n.1.

183. Entering this country without inspection is a criminal offense. 8 U.S.C. § 1325 (1982 & Supp. 1991). Thus, questions relating thereto need not be answered on self-incrimination grounds. See Watkins, *Streamlining Deportation Proceedings: Self-Incrimination, Immunity From Prosecution and the Duty to Testify in a Deportation Context*, 22 SAN DIEGO L. REV. 1075 (1985).

subsequently discovered facts lead back to the suspect.¹⁸⁴

It is well established that the mere refusal to answer questions concerning alleged suspicious conduct suggesting possible criminal activity cannot serve to elevate reasonable suspicion to probable cause. In *Terry v. Ohio*,¹⁸⁵ Justice White, in a concurring opinion, believed it was necessary to address a matter not specifically discussed by the majority. He opined that one properly stopped for investigative questioning is free to refuse to answer without fear that such a refusal will furnish a basis for an arrest.

Also, although the Court puts the matter aside in the context of this case, I think an additional word is in order concerning the matter of interrogation during an investigative stop. There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. *Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation.*¹⁸⁶

This issue was again raised in *Kolender v. Lawson*.¹⁸⁷ That case involved a California statute which required persons who loiter or wander on the streets to provide "credible and reliable" identification and to account for their presence when requested by a peace officer under circumstances that would justify a stop under the standards of *Terry v. Ohio*. The district court found that the statute was overbroad because "a person who is stopped on less than probable cause cannot be punished for failing to identify himself."¹⁸⁸ The court of appeals affirmed on this issue, holding that the statute was unconstitutional because it violated the fourth amendment's bar against unreasonable searches and seizures.¹⁸⁹ Also, the court of appeals ruled that the statute was void for vagueness.¹⁹⁰ Moreover, the court of appeals noted that fifth amendment self-incrimination issues were raised in requiring a suspect, on pain of criminal sanction, to account for his presence. But, the Supreme Court did not specifically rule on the fifth amendment issues because it concluded that its rul-

184. See *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

185. 392 U.S. 1 (1968).

186. *Id.* at 34 (emphasis added).

187. 461 U.S. 352 (1983).

188. *Id.* at 354.

189. *Lawson v. Kolender*, 658 F.2d 1362, 1369 (9th Cir. 1981).

190. *Id.* at 1370.

ing on the statute's vagueness made this unnecessary. The Court, per Justice O'Connor, ruled that the statute was impermissibly vague and did not directly address the fourth amendment question. The California statute requiring reasonable suspicion as a prerequisite to an investigatory stop ensures "neutral limitations on conduct of individual officers."¹⁹¹ However, the Court found fatally vague the lack of standards by which officers may determine whether a suspect has complied with the subsequent identification requirement:¹⁹² that is, what constitutes "credible and reliable" identification. Consequently, law enforcement officers had too much discretion to determine whether an arrest was appropriate. The Court condemned the fact that, without minimal guidelines for law enforcement officers, "[a]n individual whom police may think is suspicious but do not have probable cause to believe has committed a crime, is entitled to continue to walk the public streets 'only at the whim of any police officer' who happens to stop [him]."¹⁹³

In a concurring opinion, Justice Brennan agreed with the majority opinion but added that even if the statute had clear standards and could survive a vagueness challenge, it would be unconstitutional as violating the fourth amendment. After a discussion of *Terry v. Ohio* and its accommodation of law enforcement interests by recognizing that a brief investigatory detention could be justified on less than probable cause, Justice Brennan asserted that there was no justification for a further erosion of the privacy and security interests of the individual. He stated:

Terry encounters must be brief; the suspect must not be moved or asked to move more than a short distance; physical searches are permitted only to the extent necessary to protect the police officers involved during the encounter; and, most importantly, the suspect must be free to leave after a short time and to decline to answer the questions put to him.¹⁹⁴

Justice Brennan then quoted from Justice White's concurring opinion in *Terry* to the effect that the subject of an investigative stop premised on reasonable suspicion "is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation."¹⁹⁵ He continued:

Failure to observe these limitations converts a *Terry* encounter into the sort of detention that can be justified only by probable cause to believe that a crime has been committed. See *Florida v. Royer*, 460 U.S. at 501, (opinion of WHITE, J.); *id.*, at 509-511 (Brennan, J., concurring in result); *Duna-*

191. *Kolender v. Lawson*, 461 U.S. at 360-61 (quoting *Brown v. Texas*, 443 U.S. 47, 51 (1979)).

192. *Kolender*, 461 U.S. at 360-61.

193. *Id.* at 358 (quoting from *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965)).

194. *Kolender*, 461 U.S. at 365.

195. *Id.* (quoting from *Terry*, 392 U.S. 1, at 34).

way v. *New York* [442 U.S.] at 216.

In sum, under the fourth amendment, police officers with reasonable suspicion that an individual has committed or is about to commit a crime may detain that individual, using some force if necessary, for the purpose of asking investigative questions. They may ask their questions in a way calculated to obtain an answer. But they may not *compel* an answer, and they must allow the person to leave after a reasonably brief period of time unless the information they have acquired during the encounter has given them probable cause sufficient to justify an arrest.¹⁹⁶

Finally, Justice Brennan stated that a validation of the California statute would "make a mockery of the right enforced in *Brown v. Texas*, 443 U.S. 47 (1979), in which we held squarely that a State may not make it a crime to refuse to provide identification on demand in the absence of reasonable suspicion."¹⁹⁷

Justice White, joined by then Associate Justice Rehnquist, dissented on the grounds that the California statute was not unduly vague as to the conduct in question. The dissent maintained that the majority confused vagueness with overbreadth, and that if the statute was overbroad, it clearly encompassed the subject conduct, and the defendant could not complain about how it might be applied to others. However, the dissent stated that "if the statute on its face violates the fourth or fifth amendment—and I express no views about that question—the Court would be justified in striking it down."¹⁹⁸ Nevertheless, the dissent concluded by stating, "I would reverse the judgment of the Court of Appeals."¹⁹⁹

The Court, while not directly coming to grips with the issue, implicitly concluded that failure to cooperate with authorities after a *Terry* stop does not warrant continued detention beyond the time to conduct a reasonable investigation unless probable cause develops. Also, the court of appeals expressly so ruled, and the Supreme Court's decision did not overrule this holding. Moreover, there is no recognized authority for the proposition that refusal to answer questions concerning alleged suspicious conduct can, in itself, justify continued detention. A contrary conclusion would penalize the exercise of constitutional rights.

One court has reasoned that:

Routine citizenship checks at fixed checkpoints do not impose a degree of

196. *Kolender*, 461 U.S. at 365, 366.

197. *Id.* at 368.

198. *Id.* at 374.

199. *Id.* It appears odd that the dissent would reverse the court of appeals when the court of appeals affirmed the district court's opinion striking down the statute on fourth amendment grounds, and the dissent contends that it expresses no views whether the statute violates that amendment.

restraint associated with arrest because the detention is by nature brief and subject to the scrutiny of other travelers, the intrusion is limited in scope, advance notice obtains and visible signs of authority mitigate rather than enhance the perceived degree of restraint.²⁰⁰

The court was addressing whether an individual was “in custody” so as to require *Miranda*²⁰¹ warnings. Nevertheless, by this same reasoning the court would likely conclude that trappings of a fixed checkpoint call for some degree of cooperation from all passing through, and persons answering questions and consenting to searches could not successfully argue that a reasonable person would not have felt free to decline to cooperate. But, at the same time, there is no authority for the proposition that one who refuses to answer questions or provide identification may be detained indefinitely.

B. Whether a Suspect May Be Required to Provide Identification After a Terry Stop

As noted above, it seems clear that refusal to cooperate with law enforcement officers after a *Terry* stop does not justify a detention beyond that required for a brief investigation. However, there is some question whether one may, consistent with the Constitution, be required to provide identification after such a stop. As seen in *Lawson*,²⁰² some states have sought to make it a crime to refuse to provide identification and account for one’s presence in a particular place after a *Terry* stop. The Court of Appeals for the Ninth Circuit ruled the statute unconstitutionally vague, violative of the fourth amendment, and though not reaching the issue, the court expressed some concern whether the statute transgressed the fifth amendment’s protection against self-incrimination.²⁰³ The Supreme Court affirmed, finding the statute’s requirement that a suspect provide “credible and reliable” identification to be unduly vague.²⁰⁴ The Court stated that law enforcement officers, without adequate guidelines, may at their whim determine who will be allowed to walk the public streets.

Lawson shows that the Court, in reviewing statutes making it a crime to refuse to provide identification after a *Terry* stop, will (1) look closely at the reasonableness of the suspicion that prompted the

200. *United States v. Bengivenga*, 845 F.2d 593, 599 (5th Cir.) (en banc), cert. denied, 488 U.S. 924 (1988).

201. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

202. *Kolender v. Lawson*, 461 U.S. 352 (1983).

203. 658 F.2d at 1369-71.

204. *Kolender*, 461 U.S. at 360-61. The Supreme Court also noted that the statute implicated fifth amendment concerns, stating that while police may request persons to answer voluntarily questions concerning unsolved crimes, they have no right to compel such answers. 461 U.S. 352, 360 n.9 (citing *Davis v. Mississippi*, 394 U.S. 721, 727 n.6 (1969)).

stop in the first instance and (2) determine whether the identification requirements are clear and not unduly burdensome. In *Lawson*, the facts suggested that the suspicion which led to Lawson's stops was not reasonable. He was once stopped for walking at "a late hour" in a business area where some businesses were still open and asked for identification because burglaries had been committed by unknown persons in the general area.²⁰⁵ However, the Court was careful to note that it did not rule on whether one has a legitimate expectation of privacy in his or her identity after a valid *Terry* stop and whether one has a fifth amendment (self-incrimination) right not to identify himself or herself in connection with a criminal investigation.²⁰⁶

In an earlier case the Court reserved ruling on whether an individual could be "punished for refusing to identify himself in the context of a lawful investigat[ive] stop."²⁰⁷ This issue is somewhat different from that addressed by Justice White in *Terry*, where he opined that adverse inferences could not be drawn because an individual refused to answer questions. It appears from the context of Justice White's comments that he was referring to questions related to the suspicious circumstances that prompted the stop in the first instance and not requests for identification. Thus, it is not clear that Justice White intended to proscribe, in all circumstances, requiring identification after a *Terry* stop.

The Court in *Adams v. Williams*²⁰⁸ appeared to endorse, at least in some circumstances, "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momen-

205. *Kolender v. Lawson*, 461 U.S. 352, 354 n.2. The court of appeals had ruled that "the serious intrusion on personal security outweighs the mere possibility that identification may provide a link leading to arrest." *Lawson v. Kolender*, 658 F.2d at 1366-67.

206. However, the Court is unlikely to uphold such claims challenging carefully drafted statutes requiring identification in light of its language in *Hayes v. Florida*, 470 U.S. 811 (1985). See *infra* notes 218-19 and accompanying text.

207. *Brown v. Texas*, 443 U.S. 47, 53 n.3 (1979). However, the Court in *Adams v. Williams*, 407 U.S. 143 (1972), stated:

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. . . . *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 most reasonable in light of the facts known to the officer at the time.*

Id. at 145-46 (emphasis added). There was, however, no discussion of what action the officer could take if the suspect refused to identify herself.

208. 407 U.S. 143 (1972).

tarily while obtaining more information. . . .²⁰⁹ This language appears to support the arrest of one who refuses to identify herself after a *Terry* stop. However, the better view, consistent with fourth amendment principles, is that by this language the Court simply was indicating that where one chose not to identify herself after a *Terry* stop, she faced the reasonable alternative of continued detention pending a prompt investigation to determine if a criminal violation had occurred involving the subject. However, absent a carefully crafted statute requiring that the subject of a *Terry* stop identify himself or face arrest, the issue is not raised.²¹⁰ Thus, the subject must be released if probable cause to detain him does not develop after a reasonable period to investigate.

When there is no independent evidence of a possible or imminent crime, with some articulable reason for connecting an individual with that crime, it would seem that identity may not be required. Thus, where one is detained for suspicions that evaporate upon detention, the detainee's situation would appear to revert to that of the subject of a consensual encounter. Accordingly, there would be no duty to provide identification.

The Supreme Court has suggested it would uphold a simple and nonburdensome identification requirement where one is reasonably suspected of criminal activity and where identity would tend to confirm or refute those suspicions. In *Hayes v. Florida*,²¹¹ the issue was whether a person stopped on the basis of reasonable suspicion of criminal activity could be required to provide identifying information. The Court reversed the conviction below and suppressed fingerprints that tied Hayes to a crime. The Florida police had determined that Hayes was a principal suspect in a burglary-rape offense. The officers went to Hayes' home without a warrant to ask him to go to

209. *Id.* at 145-46.

210. One such statute that has been ruled consistent with constitutional principles is described in *State v. Ecker*, 311 So.2d 104, 107-09 (Fla.), *cert. denied*, 423 U.S. 1019 (1975). Quoting *Terry*, the court describing the statute in question stated, "[T]he police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' a finding that a breach of the peace is imminent or the public safety is threatened." *Id.* at 109. The court stated that where public safety is threatened there is no constitutional violation in requiring credible and reliable identification. *Id.* But the court agreed that an individual may not be required to "explain his presence and conduct" under pain of criminal penalty. *Id.* The court ruled that a conviction under Florida's loitering statute was warranted where the defendant was hiding in bushes on the property of a private dwelling at 1:20 A.M. He leaped over a fence and fled when an officer approached. His car had a stolen tag, and his claim that his car would not start was disproved when an officer started it. *Id.* at 110.

A simple trespass charge, however, would have obviated the need to resort to the loitering statute. Moreover, whether or not the defendant identified himself was of little consequence to whether he was guilty under the portion of the statute in question. Indeed, he could have identified himself and sought to explain his presence to exculpate himself. Even so, he could have been convicted of loitering.

211. 470 U.S. 811 (1985).

the police station to provide fingerprints. Hayes would not agree to being fingerprinted, but, after an officer stated he would be arrested if necessary to accomplish this, Hayes went to the station. There, his fingerprints were taken and found to match those found at the scene of the crime. The Florida state courts refused to suppress the fingerprints; Hayes was convicted and his conviction was affirmed on appeal in the state court system.

The United States Supreme Court found that because there was no probable cause for the arrest, no consent to travel to the police station, and no prior judicial authorization for detaining Hayes, the investigative detention at the station to fingerprint him violated his fourth amendment rights. The Court suppressed the fingerprints as the fruits of an illegal detention. Following the holding of *Davis v. Mississippi*,²¹² the Court ruled that taking the suspect to the police station against his will for fingerprinting exceeded the permissible limits of temporary seizures authorized by *Terry*.²¹³ The Court also pointed out that in *Dunaway v. New York*,²¹⁴ it had refused to extend *Terry* to authorize forcible investigative interrogations at the police stations on less than probable cause even though proper warnings under *Miranda v. Arizona*²¹⁵ had been given.²¹⁶

The Court in *Hayes v. Florida* further explained:

[O]ur view continues to be that the line is crossed when the police, without probable cause or a warrant, forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes. We adhere to the view that such seizures, at least where not under judicial supervision, are sufficiently like arrests to invoke the traditional rule that arrests may constitutionally be made only on probable cause.²¹⁷

Thus, the conviction was reversed.

However, in dictum, the Court added:

There is . . . support in our cases for the view that the fourth amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch.²¹⁸

212. 394 U.S. 721 (1969).

213. *Hayes*, 470 U.S. at 814.

214. 442 U.S. 200 (1979).

215. 384 U.S. 436 (1966).

216. *Hayes*, 470 U.S. at 815.

217. *Id.* at 816 (footnote omitted).

218. *Id.* at 817. In support of this proposition the Court cited *Adams v. Williams*, 407 U.S. 143, 146 (1972); *United States v. Hensley*, 469 U.S. 221, 229, 232, 234 (1985); *United States v. Place*, 462 U.S. 696 (1983); *United States v. Martinez-Fuerte*, 428 U.S.

Also, the Court was careful to add that fingerprinting does not involve probing of thoughts, etc., and “represents a much less serious intrusion upon personal security than other types of searches and detentions.”²¹⁹ Where identity is an essential part of an investigatory stop, the person may be required to provide identifying information. Thus, where fingerprints, blood, or other physical evidence is found at the scene of a crime, and there is reasonable suspicion to connect an individual with the crime, he may be required to provide identifying physical evidence. Also, in cases where a particular person is being sought under warrant or probable cause and police have reason to believe that the individual stopped may be that person, identification may be required before allowing him to proceed.

Justice Brennan, joined by Justice Marshall, concurred in the judgment, but criticized the majority for reaching out to render an advisory opinion on issues not involved in the case—i.e., fingerprinting in the field on the basis of reasonable suspicion. Among Justice Brennan’s complaints was that the Court gives no guidance on how much time would elapse before the individual would be free to go and whether the police could detain the individual until the fingerprints could be compared with others.²²⁰ We must be mindful that the dictum in *Hayes* was not a holding of the Court. Nevertheless, a majority of the members of the Court went out of their way to indicate what they would do if faced with the issue. Thus, at a minimum, the case offers a likely indicator as to how the Court would rule on the question.

The cases discussed above support the conclusion that one subjected to a *Terry* stop need not identify himself unless identity is an element of the investigation that prompted the initial stop. Since the purpose of an investigative stop is to detain the individual pending the investigation, even if the person declines to identify himself, if the investigation shows that the officer’s suspicions were unfounded the situation reverts to an essentially consensual encounter.

In sum, it seems that after *Lawson*, an individual generally has *no obligation to provide identification* or to otherwise cooperate with law enforcement officers in connection with a *Terry* stop. However, such an individual may be subjected to a more lengthy stop than may otherwise be necessary to allow an independent investigation to confirm that the suspicious individual was or was not engaged in illegal activity. Of course, if the individual provides credible identification and a serious crime is not involved, only a brief detention would

543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

219. *Hayes*, 470 U.S. at 814 (quoting from *Davis v. Mississippi*, 394 U.S. 721, 727).

220. *Hayes*, 470 U.S. at 819.

be justified because a follow-up investigation would be possible.²²¹

But, as discussed above, a refusal to answer questions surrounding a suspected crime cannot elevate reasonable suspicion to probable cause. Though, of course, probable cause may be dissipated where a suspect cooperates and provides credible exculpatory information.

C. Fixed Checkpoints: Limitations on the Power of the Government to Detain

*Lopez-Lopez v. Aran*²²² addressed the scope of INS authority to question and detain individuals at fixed checkpoints. The court found that the INS had established a fixed checkpoint at the San Juan, Puerto Rico, airport and that the analysis of *United States v. Martinez-Fuerte*²²³ should be applied.

In *Lopez-Lopez v. Aron*,²²⁴ the plaintiff challenged the authority of the INS to require, as a condition of boarding a commercial airliner from Puerto Rico to the United States, production of information or documents showing entitlement to reside in the United States. Plaintiff Lopez, a United States citizen residing in Puerto Rico, was experienced in immigration law. Prior to the incident that gave rise to the case, he was about to board a flight from San Juan to New York City when an INS inspector confiscated his ticket and asked about his citizenship. Instead of answering, Lopez presented a card with the inscription "Do you suspect I am an alien?" The INS inspector inspected others boarding the flight, momentarily leaving the encounter with Lopez. When Lopez asked if he would be allowed to board, the inspector returned the ticket, allowed Lopez to board, and stated that she could determine from Lopez' accent that he was Puerto Rican. Puerto Ricans are United States citizens and as such are entitled to freely enter the United States.

Later, on October 2, 1982, Lopez approached a departure gate to board a flight from Puerto Rico to Washington. Two uniformed INS inspectors, Aran and Figueroa, were positioned near the gate in front of the fixed security checkpoint conducting inspections of those seeking to board the flight. When Lopez passed them, Figueroa asked about Lopez' citizenship. Lopez smiled but did not reply. Instead, he walked past the agents and put his luggage on the conveyor belt at

221. But, as discussed above, mere identity is not suppressible even if illegally obtained. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039-40 (1984).

222. 844 F.2d 898 (1st Cir. 1988).

223. 428 U.S. 543 (1976). See *supra* text accompanying notes 166-67.

224. 844 F.2d 898 (1st Cir. 1988).

the security station. The inspectors followed Lopez and again asked about his citizenship. Refusing to respond verbally, Lopez presented a card identical to the one he previously presented when boarding the flight to New York City. A security guard stopped Lopez from passing the departure gate and returned his luggage.

Lopez brought suit in federal district court "challenging the validity of the stop, interrogation, and related procedures." Among other things, he sought an injunction to bar INS officials from questioning or detaining him when he travels between Puerto Rico and the United States mainland.

Prior to trial, the INS changed its inspection procedure so that the point of inspection (checkpoint) was established beyond the security station. Also, a podium was installed bearing the marking "United States Immigration" and an official U.S. Government seal. The agents conducted the inspections from behind the podium or close to it. The agents' operational instructions did not change; they were to examine every adult passenger and take possession of their ticket during questioning.

Lopez challenged the statute and regulation upon which the INS based the inspection procedure²²⁵ as unconstitutionally vague, unduly interfering with travel rights, and permitting searches and seizures violative of the fourth amendment. Further, Lopez argued that the regulation was promulgated without adequate statutory support, and that it was applied in a discriminatory manner. The district court rejected Lopez' arguments.

On review, the court of appeals asserted that Lopez' "most forceful challenge is based on the alleged violations of the fourth amendment and of the right to travel."²²⁶ The court stated that the analysis of Lopez' claim must begin with *United States v. Martinez-Fuerte*.²²⁷

The court next discussed cases which ruled that the fourth amendment is not violated where a law enforcement officer approaches individuals in a public place and questions them. But in such cases, absent reasonable suspicion, individuals may not be detained even momentarily for refusing to listen or cooperate. Further, refusal to listen or answer questions does not provide a basis to detain.²²⁸

As a final prelude to its analysis, the court referenced pertinent

225. The statute, 8 U.S.C. § 1182(d)(7) (1988), renders excludable from the United States aliens seeking to leave Puerto Rico to enter the continental United States. 8 C.F.R. § 235.5 (1991) states that persons seeking to board a flight from Puerto Rico to the continental United States must be determined admissible to this country. The regulation further provides that unless a determination of admissibility is made, "no . . . person shall be permitted to depart."

226. 844 F.2d at 902.

227. 428 U.S. 543 (1976). See *supra* text accompanying notes 166-67.

228. 844 F.2d at 904 (quoting from *Florida v. Royer*, 460 U.S. 491 (1983)).

portions of *INS v. Delgado*.²²⁹ The court noted that this case held, among other things, that interrogation relating to identity or a request for identification by the police does not, by itself, constitute a fourth amendment seizure. But, the court added that in *Delgado* it also held that if additional steps are taken to secure an answer in the face of a refusal to respond, the "fourth amendment imposes some minimal level of objective justification [as a prerequisite] to validate the detention or seizure."²³⁰

Addressing the cases referred to in its analysis, the court stated that it synthesized those cases to conclude:

Although the fourth amendment protects individuals irrespective of where they may be, not all brushes between a citizen and the sovereign call into play the jurisprudence of the Constitution. In the structured context of, say, an airline departure gate, the government's right to check citizenship, it seems to us, is stronger than its right to probe identity in completely fortuitous, random situations. Especially where the encounter is brief and noncoercive—that is, if the stop and interrogation involve no more than a modest intrusion—there need be no particularized suspicion.²³¹

The court then addressed the rule of *Brown v. Texas*,²³² that one may not be required to identify himself under pain of criminal penalty, absent reasonable suspicion of criminal activity.

The court concluded that the INS procedure can be bifurcated for analytic purposes. The first part of the procedure was viewed as the initial inspection, and questioning, followed by a stop for secondary inspection if the level of suspicion escalates. The secondary inspection of Lopez, the court stated, involved following him to ask again the questions regarding citizenship. This was a reasonable way of ensuring that the subject of the inspection heard the initial question. This part of the procedure the court deemed to be merely consensual. Although the requirement that individuals stop at the checkpoint or respond to questions in another part of the airport implicates the fourth amendment, the court held that this checkpoint procedure was authorized by *Martinez-Fuerte*.

However, in addressing the second part of the INS procedure, the taking of the subject's ticket to coerce a response to the interrogation, the court stated that "the Constitution cannot abide the INS's policy of seizing passengers' tickets as a matter of course, before completing an initial inspection and without the slightest articulable

229. 466 U.S. 216 (1984).

230. *Lopez-Lopez*, 844 F.2d at 904 (quoting *Delgado*, 466 U.S. at 216-17).

231. *Lopez-Lopez*, 844 F.2d at 904-05.

232. 443 U.S. 47 (1979).

suspicion that the ticketholder is an illegal alien.”²³³ The court continued, “Although the public interest in interception of illegal aliens warrants some limited intrusion . . . it does not justify arbitrary capture of a passenger’s ticket without any basis for assuming that he or she may be an illegal alien.”²³⁴ The court stated that “[i]n the absence of some hint that a passenger may not have valid legal status to travel to the United States mainland, the INS ticket seizure policy violates the fourth amendment.”²³⁵ However, the court stated that once a reasonable suspicion was formed, taking the person’s airline ticket pending further inquiry would seem appropriate.²³⁶

Addressing Lopez’ claim that his right to travel and fourth amendment rights had been violated by being barred from the flight to Washington, the court remanded the case to the district court for a determination whether the INS inspectors “had an objectively reasonable and articulable suspicion that Lopez was an illegal alien *at the time they prevented him from boarding his flight.*”²³⁷ However, the court’s statements on this question are not altogether clear. The court again cited *INS v. Delgado* and *Brown v. Texas* for the proposition that if a person refuses to answer a question relating to his identity and the police take additional steps to obtain an answer, the fourth amendment imposes some minimal level of objective justification to validate the detention. In a footnote, however, the court stated that at the fixed checkpoint at the departure gate, “once it is ascertained that the individual has heard and understood, but is willfully refusing to answer, there may well be sufficient justification to refuse passage pending further inspection.”²³⁸ This suggests that a coercive detention, undefined in scope, purpose or duration, may be warranted where one refuses to provide identification. However, the text accompanying the footnote in which this language appears states that a refusal to answer questions concerning identity does not support a detention or seizure.²³⁹ It is possible that by this language, the court meant that a subject could be detained for a brief period to attempt to ascertain some independent information regarding the

233. *Lopez-Lopez*, 844 F.2d at 908.

234. *Id.*

235. *Id.*

236. *Id.* at 908 n.14.

237. *Id.* at 909.

238. *Id.* at 909 n.15.

239. It is doubtful that the court is suggesting that though individuals may not be detained for refusing to answer questions, they may be refused passage through the checkpoint. This is because the court treated as interrelated Lopez’ fourth amendment claims and his right-to-travel argument. Of course, the right to travel could be completely frustrated if individuals could be turned back at a checkpoint as punishment for refusing to identify themselves. Moreover, a refusal to allow one to pass a checkpoint would constitute a significant intrusion on fourth amendment interests, and accordingly would require some reasonable and articulable justification.

subject's identity.

The court noted that one point of confusion was Lopez' passing the card and refusing to answer.

The evidence in the current record is conflicting about both the substance and timing of what transpired. The appellant's behavior, first refusing to answer a simple question and then passing a card with a goading message, was likely enough to arouse reasonable suspicions about his right to enter the mainland. On the other hand, there was evidence in the record suggesting that, under the circumstances, blocking Lopez's passage might have been unreasonable.²⁴⁰

Judge Torruella concurred in part and dissented in part. He concurred in the majority's view that seizure of the ticket was violative of the fourth amendment. However, he disagreed on whether the INS procedure could be bifurcated. Instead, he concluded that the procedure was inseparable and as such was violative of the fourth amendment.²⁴¹

Further, regarding the inspectors' bar of Lopez from the flight, Judge Torruella stated:

There can be no question that the INS harbored *no* reasonable suspicion that Lopez was an illegal alien. Had this suspicion existed we can take for granted that he would have been detained further. Instead, he was allowed to retrieve his baggage and leave. In not allowing Lopez to board after they obviously knew that he was not an illegal alien, the INS inspectors were manifestly harassing Lopez for objecting to the unconstitutional procedures which were being applied to him. Thus no question of qualified immunity is presented by these clearly illegal actions and the remand should be solely for a determination of the damages suffered by Lopez.²⁴²

Finally, Judge Torruella stated that despite the majority's correct statement of the law that one may not be detained merely for refusing to answer an agent's inquiry, it proceeded to misapply that standard by suggesting that Lopez' refusal to answer coupled with his passing the "goading message" might provide a minimal level of justification for detention. However, he noted that it is unlikely that presenting the card caused a higher level of suspicion than if he would have remained totally silent.

In *United States v. Rodriguez-Rosario*,²⁴³ the same panel that decided *Lopez-Lopez v. Aran*²⁴⁴ ruled that questioning at an INS checkpoint in a Puerto Rican airport is a consensual encounter. Thus, where answers voluntarily given to those questions give rise to

240. *Lopez-Lopez*, 844 F.2d at 909.

241. *Id.* at 911-12.

242. *Id.* at 915 (citation omitted).

243. 845 F.2d 27 (1st Cir. 1988).

244. 844 F.2d 898 (1st Cir. 1988).

reasonable suspicion or probable cause, further detention is warranted. The court rejected appellant's arguments concerning the constitutionality of the checkpoint, stating:

Appellant's stop and consensual interrogation must be judged against the same constitutional standards as are applicable to any stop and interrogation in the streets of our nation, the checkpoint setting being totally immaterial to such issues. Cf. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).²⁴⁵

Application of the Foregoing Principles in an Immigration Context:

1. An individual may, without penalty or adverse inference, refuse to cooperate or even listen to questions in a consensual encounter.
2. At a fixed checkpoint an individual may be stopped and forced to listen to questions, but there is no obligation to answer, and without reasonable suspicion to continue the detention for investigative purposes, the person should be allowed go on his way.²⁴⁶
3. If there is reasonable suspicion of illegal alienage or other violation of the immigration laws, but the suspect refuses to answer questions, probable cause must be independently established before the suspect may be detained beyond a reasonable time to investigate the officer's suspicions.
4. The foregoing principles regarding reasonable suspicion should apply as well to non-fixed checkpoint stops based on reasonable suspicion.
5. A request for documents that show a right to be in the United States exceeds a request for identification. Rather, it is a request for possibly incriminating information²⁴⁷ and is not information sought for the purposes contemplated in *Hayes v. Florida*.²⁴⁸

These principles have, in large measure, been addressed in the context of a "consensual" street encounter. As discussed above, the fact that one chooses not to answer questions or to provide identification does not justify detention. Otherwise, the encounter simply is not consensual. Of course, an individual's actions may give rise to suspicions that warrant a brief detention for further investigation.

However, differences do exist between consensual encounters and checkpoint stops. For example, the Supreme Court has authorized modest fourth amendment intrusions at checkpoints in order to request that vehicle occupants answer questions about their citizenship and immigration status and provide identification. It is clear that to the extent vehicle occupants have to listen to these questions and

245. *Rodriguez-Rosario*, 845 F.2d at 29.

246. However, at such checkpoints, arguably the INS may, pursuant to a delegation from state authorities, be empowered to check for driver's licenses, since each vehicle operator must have a license in possession when driving. But this authority still would not cover passengers.

247. *E.g.*, 8 U.S.C. §§ 1325 and 1326 (1988).

248. 470 U.S. 811 (1985). *See supra* text accompanying notes 211-19.

requests, these encounters are different than consensual encounters, where the courts have said the individual need not even listen to the officer.

Regardless of the differences, individuals stopped at a checkpoint are not required to provide information to the inquiring officers. As discussed above, Justice White, in a concurring opinion in *Terry v. Ohio*,²⁴⁹ opined that a refusal to cooperate with law enforcement officers does not form a basis for an arrest. But, in *Brignoni-Ponce*,²⁵⁰ the Court, in describing the limited nature of a *Terry* investigative stop, stated that "[a]ll that is required" of the subjects of the stop is "a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States."²⁵¹ The Court in *Martinez-Fuerte*²⁵² used this same language in describing the nature of the intrusion at a fixed checkpoint. Because of this language, one must ask: Are individuals "required" to answer questions and produce documents on demand, or was the Court simply explaining the limited nature of the stop and the questions posed? In light of the Supreme Court precedent discussed above, the answer has to be that if the individuals refuse to answer questions or provide documentation, they must be allowed to go on their way unless a brief investigation uncovers evidence to warrant further detention. The burden is not on an individual to show he is legally in this country. Instead, the burden is on the government to prove he is not.²⁵³

To show that a person is in this country illegally, the government must prove by clear, unequivocal and convincing evidence that the individual is not a citizen and has no right to be in the country.²⁵⁴ This burden is typically met by showing that the individual was born abroad. Such a showing shifts the burden to the individual to show he or she is in the country legally or suffer a finding of deportability.²⁵⁵

However, when the individual refuses to answer any questions and there is no independent way to prove alienage, at what point is the government obliged to allow the person to freely go? The Supreme

249. 392 U.S. 1, 34.

250. 422 U.S. 873 (1975). See *supra* text accompanying notes 81-83.

251. *Brignoni-Ponce*, 422 U.S. at 880.

252. 428 U.S. at 558.

253. However, experience has shown that many aliens illegally in the United States will admit this on being questioned by government agents.

254. 8 U.S.C. § 1251(a) (1988).

255. See 8 U.S.C. § 1361 (1988). See, e.g., *Ramon-Sepulveda v. INS*, 743 F.2d 1307, 1308 (9th Cir. 1984); *Tejeda-Mata v. INS*, 626 F.2d 721, 725 (9th Cir. 1980); *In re Carrillo*, 17 I & N Dec. 30, 32 (BIA 1979).

Court has stated that searches or detentions beyond the limited intrusions envisioned by fixed-checkpoint stops require probable cause.

D. Reasonable Scope of a Terry Stop

In addressing what action could be taken to investigate reasonable suspicion, courts have held that a reasonable suspicion of crime is *insufficient* to justify custodial interrogation even though the interrogation is investigative.²⁵⁶

Justice White, in the plurality opinion of *Florida v. Royer*,²⁵⁷ stated that *Brignoni-Ponce*²⁵⁸ authorized a temporary seizure “to verify or dispel the suspicion that the immigration laws were being violated, a governmental interest that was sufficient to warrant temporary detention for limited questioning.”²⁵⁹ But, citing *Dunaway v. New York*,²⁶⁰ the Court cautioned that, absent probable cause, police may not seek to verify their suspicions by means that approach the conditions of arrest.²⁶¹

In *United States v. Sharpe*,²⁶² the Court held that there is no bright-line test to determine the amount of time a *Terry* suspect may be detained for investigation. Specifically, the Court reversed the lower court’s determination that a twenty minute detention exceeded the scope of a *Terry* detention. It was noted that the brevity of a *Terry* stop is one important factor in determining whether the intrusion is justified. But, also to be considered are the law enforcement needs to be served by the stop and the time reasonably needed to effectuate those purposes.²⁶³ The Court stressed that there was no evidence that the officers had engaged in unnecessary delay or dilatory tactics to prolong the detention.²⁶⁴ Concluding, the Court stated:

In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.²⁶⁵

256. *Dunaway v. New York*, 442 U.S. 200, 211-12 (1979). See also *Hayes v. Florida*, 470 U.S. 811 (1985), *supra* at notes 211-17 and accompanying text.

257. 460 U.S. 491 (1983).

258. 422 U.S. 873 (1975). See *supra* text accompanying notes 81-83.

259. 460 U.S. at 498.

260. 442 U.S. 200 (1979).

261. 460 U.S. at 499.

262. 470 U.S. 675 (1985).

263. *Id.* at 685.

264. *Id.* at 687.

265. *Id.* at 686. In *United States v. Hensley*, 469 U.S. 221, 223 (1985), the Court held that the police may stop and briefly detain the subject of a “wanted flier” issued by a police officer while they attempt to find out whether an arrest warrant had been issued. Thus, the Court made clear that *Terry* is not limited to imminent crimes but applies as well to efforts to apprehend perpetrators of past crimes.

The Court in *INS v. Delgado* acknowledged that persons at or around the factories who attempted to flee or evade the agents may have been detained for questioning.²⁶⁶ Flight or evasion by one with whom a consensual encounter is attempted, alone or in combination with other factors, has been held to constitute reasonable suspicion to justify a brief detention for questioning.²⁶⁷ If the subject refuses to answer questions, in some circumstances it may be reasonable to continue the detention pending a brief investigation to discover whether there is independent evidence the person may be involved in a violation of law.

But in an immigration context, without the cooperation of the suspect or others who know his or her nationality, in most cases it will be difficult, if possible at all, for the government to carry its burden of clear, convincing, and unequivocal evidence that the suspect is an alien illegally in this country.²⁶⁸ As discussed below, this burden is typically met by showing that the individual was born abroad.

Thus, law enforcement officers may not arbitrarily exercise their considerable powers of detention and arrest. The exercise of such powers must be supported by specific articulable facts available to the officers prior to the detention or arrest.²⁶⁹

The seminal case of *Terry v. Ohio* acknowledged that one concern of an unbridled right of law enforcement officers to detain and interrogate individuals was that minority group members would be singled out and unduly harassed, causing friction between the minority community and law enforcement.²⁷⁰ This concern in the enforcement of the immigration laws is heightened since racial minorities, especially Hispanic appearing individuals, will be the primary targets of

266. 466 U.S. at 220.

267. See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975) (stating in dictum that erratic driving or obvious attempts to evade officers can support a reasonable suspicion). See also *United States v. Medina-Gasca*, 739 F.2d 1451, 1453 (9th Cir. 1984) (two heavily laden vans, traveling in tandem on a known smuggling route, passengers of which dispersed from a roadside stop when an officer approached in a marked patrol unit, supported a finding of reasonable suspicion); *Au Yi Lau v. INS*, 445 F.2d 217, 223 n.10 (D.C. Cir. 1971), cert. denied 404 U.S. 864 (1971).

However, at least one court has expressed concern that INS may try to create a reasonable suspicion on which to base a forcible stop by prompting the targets of its scrutiny to flee. This court issued a preliminary injunction barring INS from conducting itself in a manner that deliberately provokes flight by workers. *International Molders' and Allied Workers' Local Union No. 164 v. Nelson*, 643 F. Supp. 884, 903-04 (N.D. Cal. 1986), *aff'd in pertinent part*, 799 F.2d 547, 554 (9th Cir. 1986).

268. See 8 U.S.C. § 1251(a)(1970 & Supp. 1991).

269. See, e.g., *Nicacio v. INS*, 797 F.2d 700, 701, 706 (9th Cir. 1985).

270. 392 U.S. 1, 14 n.11.

such enforcement.

V. SUPPRESSION OF EVIDENCE IN DEPORTATION PROCEEDINGS

The Supreme Court in *INS v. Lopez-Mendoza*²⁷¹ ruled, with certain exceptions, that the Exclusionary Rule did not apply to civil deportation proceedings. The Court, however, stated that its ruling did not encompass “egregious violations of fourth amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.”²⁷² In *Lopez-Mendoza*, two separate fact situations were addressed. One respondent, Adan Lopez-Mendoza, was arrested in 1976 by INS agents at his place of work, a transmission repair shop in San Mateo, California. The INS agents, in response to a tip, arrived at Lopez-Mendoza’s work location shortly before 8:00 A.M. They did not have warrants to search the premises or to arrest anyone there. The owner of the shop, in the language of the Court, “firmly refused to allow the agents to interview his employees during working hours.”²⁷³ However, while one agent talked to the owner, another agent entered the shop and questioned Lopez-Mendoza, who gave his name and stated that he was from Mexico with no close family ties in the United States.²⁷⁴ The agent then arrested him. Later, at INS offices, Lopez-Mendoza admitted he was born in Mexico, was still a citizen of Mexico, and had entered the United States without inspection by immigration authorities. On the basis of his statements, the agents prepared a “Record of Deportable Alien”²⁷⁵ and an affidavit which Lopez-Mendoza executed, admitting his Mexican nationality and his illegal entry into this country.²⁷⁶

At the deportation hearing before an immigration judge, Lopez-Mendoza’s counsel moved to terminate the proceeding on the ground that Lopez-Mendoza had been arrested illegally. The judge ruled that the legality of the arrest was not relevant to the deportation proceeding and declined to rule on the legality of the arrest. The Record of Deportable Alien and the affidavit were received into evidence without objection from Lopez-Mendoza. From this evidence the immigration judge found Lopez-Mendoza deportable and gave him the option of departing the country voluntarily.²⁷⁷

271. 468 U.S. 1032 (1984).

272. *Id.* at 1050-51.

273. *Id.* at 1035.

274. *Id.*

275. *Id.* This report is known as Form I-213 and sets forth biographical and immigration information of the respondent, which is the basis of the INS’ charge that the person is illegally in the country.

276. *Lopez-Mendoza*, 468 U.S. at 1035.

277. *Id.* at 1035-36.

On appeal to the Board of Immigration Appeals (BIA), the immigration judge's ruling was upheld on the grounds that an illegal arrest has no bearing on a subsequent deportation proceeding. Also, the BIA pointed out that Lopez-Mendoza had not objected to the admission of the documents that showed he was deportable.²⁷⁸ Further, the BIA stated that the Exclusionary Rule is not intended to redress the injury to the privacy of the search victim and that the BIA had previously concluded that the Exclusionary Rule did not apply in deportation matters to deter unlawful INS conduct. The court of appeals vacated the deportation order and remanded for a determination whether Lopez-Mendoza's fourth amendment rights had been violated when he was arrested.²⁷⁹

In the second case considered by the Court, respondent Sandoval-Sanchez was arrested in 1977 at his job, a potato processing plant in Paco, Washington. INS Agent Bower and other officers, with the permission of the plant's personnel manager, questioned employees to determine if any were undocumented aliens. During a change in shift, officers stationed themselves at the exits while Bower and a uniformed Border Patrol agent entered the plant. Bower and the uniformed agent eventually stood by the main entrance of the plant and looked for passing employees who averted their heads, avoided eye contact, or tried to hide themselves in a group. Those individuals were addressed with innocuous questions in English. Those who could not respond in English and who otherwise aroused Agent Bower's suspicions were questioned in Spanish as to their right to be in the United States.²⁸⁰

Sandoval-Sanchez was in a line of workers entering the plant. He stated that he did not realize that immigration officers were checking people entering the plant, but he did see a uniformed man who appeared to be a police officer standing at the plant entrance. Bower testified that while he was not positive, he probably questioned Sandoval-Sanchez at the plant. The employee Bower thought he remembered as Sandoval-Sanchez had been "very evasive," averted his head, turned around and walked away when he saw Bower. Bower was certain that no one was questioned about their status unless their actions had given the agents reason to believe that they were an undocumented alien. Thirty-seven employees, including Sandoval-Sanchez, were briefly detained at the plant and then taken to

278. I.e., the Form I-213 and the affidavit. *Lopez-Mendoza*, 468 U.S. at 1036.

279. *Id.*

280. *Id.* at 1036-37.

the county jail. Sandoval-Sanchez exercised his right to a deportation hearing and was questioned further. Bower recorded Sandoval-Sanchez's admission of illegal entry. Sandoval-Sanchez claimed that he was not aware that he had a right to remain silent.²⁸¹

At his deportation hearing, Sandoval-Sanchez contended that the evidence offered by the INS should be suppressed as the fruit of an unlawful arrest. The immigration judge rejected the claim that there had been an unlawful arrest but ruled in the alternative that the legality of the arrest was not relevant to the deportation hearing. The immigration judge, on the basis of the written record, found Sandoval-Sanchez deportable and granted him voluntary departure. The BIA dismissed the alien's appeal, concluding that the circumstances of the arrest did not affect the voluntariness of his recorded admission and declined to invoke the Exclusionary Rule.²⁸²

On appeal, the court of appeal reversed the BIA's decision, finding that Sandoval-Sanchez's detention by the immigration officers violated the fourth amendment, that the statements he made were a product of that detention, and that the Exclusionary Rule barred their use in a deportation hearing. However, the Supreme Court reversed. Using the analysis of *United States v. Janis*,²⁸³ the Court concluded that, in deportation proceedings, the Exclusionary Rule's value in deterring illegal searches and seizures was outweighed by the societal costs of applying the Rule. In sum, the Court ruled that the deterrent value of the Exclusionary Rule in deportation proceedings was insufficient to warrant its application because:

- 1) The person and identity of the respondent are not suppressible, even assuming an illegal arrest, and "when evidence not derived directly from the arrest is sufficient" to uphold deportation, then deportation is still possible.²⁸⁴
- 2) Few aliens arrested request deportation hearings, and even fewer challenge the circumstances of their arrest. Thus, the arresting of-

281. *Id.* at 1037.

282. *Id.* at 1038.

283. 428 U.S. 433 (1976).

284. *Lopez-Mendoza*, 468 U.S. at 1043. The Court also stated:

The "body" or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred. *See Gerstein v. Pugh*, 420 U.S. 103, 119 (1975); *Frisbie v. Collins*, 342 U.S. 519, 522 (1952); *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 158 (1923).

Id. at 1039-40. And the Court went on to state that:

[R]egardless of how the arrest is effected, deportation will still be possible when *evidence not derived directly from the arrest is sufficient to support deportation*. . . . Since the person and identity of the respondent are not themselves suppressible . . . the INS must prove only alienage, and that will sometimes be possible using *evidence gathered independently of, or sufficiently attenuated from, the original arrest*.

Id. at 1043 (emphasis added) (citations omitted).

ficer is "most unlikely to shape his conduct in anticipation of the exclusion of evidence at a formal deportation hearing."²⁸⁵

3) Perhaps most importantly, the INS has its own comprehensive scheme for deterring fourth amendment violations by its officers. For example, INS regulations prohibit arrest "unless there is an admission of illegal alienage or other strong evidence thereof."²⁸⁶

4) The INS is a single agency under central federal control and engaged in repetitive operations, making declaratory relief against violations of fourth amendment rights a possible remedy.²⁸⁷

Additionally, the Court offered the following reasons to show that societal costs outweigh the benefits of applying the Exclusionary Rule in deportation matters:

1) An undocumented alien's mere presence in the United States constitutes a continuing violation of the laws that require an alien to register his or her presence with proper authorities.²⁸⁸ The Exclusionary Rule does not sanction continuing violations of law.²⁸⁹

2) Deportation hearings are streamlined to handle large numbers of cases. Applying the Exclusionary Rule would slow the system because neither the immigration judges nor the attorneys practicing before them "are likely to be well versed in the intricacies of fourth amendment law."²⁹⁰ In this connection, there was a reference to the possible invocation of fourth amendment claims as a dilatory tactic to gain delay of an alien's deportation.²⁹¹

3) Because of the great numbers of aliens arrested each year it would be burdensome to require immigration officers to "compile elaborate, contemporaneous, written reports detailing the circumstances of every arrest."²⁹²

4) Application of the rule could result in the suppression of large

285. *Id.* at 1044.

286. *Id.* at 1044-45.

287. *Id.* at 1045.

288. 8 U.S.C. §§ 1302, 1306 (1920 & Supp. 1991) (imposes requirements on certain aliens to register).

289. *Lopez-Mendoza*, 468 U.S. at 1046.

290. *Id.* at 1048. It is ironic that given the Court's reservations concerning the ability of immigration judges to address the intricacies of fourth amendment law, such judges will still be obliged to interpret the fourth amendment. To determine whether an egregious fourth amendment violation has occurred, it is first necessary to determine whether that amendment has been violated at all. Then there must be distinctions drawn between nonegregious and egregious violations. In any event, the simple rule of *Arguelles-Vasquez*, discussed *infra*, would avoid the "intricacies of fourth amendment law" and would not perplex practitioners or immigration judges.

291. *Lopez-Mendoza*, 468 U.S. at 1048.

292. *Id.* at 1049.

amounts of lawfully obtained information because INS arrests occur in crowded and confused circumstances. Further, a requirement that INS agents record precisely the circumstances of each arrest would preclude mass arrests of “ascertainably illegal aliens, and even when the arrests can be and are conducted in full compliance with all fourth amendment requirements.”²⁹³

It warrants mention that Justice White’s dissent offers some of the most cogent and persuasive reasoning to counter the arguments offered by the majority.²⁹⁴ However, since *Lopez-Mendoza* is now the law of the land, the pertinent inquiry is how that decision should be interpreted. Examined here is what searches or seizures fall within the “egregious” conduct exception mentioned in *Lopez-Mendoza* and therefore may yet be subject to suppression in a deportation hearing.

The Court stated that the inapplicability of the exclusionary rule in deportation proceedings did not address “egregious violations of fourth amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.”²⁹⁵ In a footnote, the Court stated:

We note that subsequent to its decision in *Matter of Sandoval*, 17 I. & N. Dec. 70 (1979), the BIA held that evidence will be excluded if the circumstances surrounding a particular arrest and interrogation would render use of the evidence obtained thereby “fundamentally unfair” and in violation of due process requirements of the Fifth Amendment.²⁹⁶

Finally, the Court cautioned that its view of the value of the Exclusionary Rule “might change, if there developed good reason to believe that fourth amendment violations by INS officers were widespread.”²⁹⁷ Thus, if the INS systematically violates the fourth amendment, it is possible that the Court will find that the Exclusion-

293. *Id.* at 1049-50.

294. *Lopez-Mendoza* was a 5 to 4 decision with Justices Brennan, White, Marshall and Stevens dissenting. Of the five justices in the majority, two have been replaced by Justices Scalia and Kennedy. If either of these justices agrees with the minority reasoning the result could change, making the Exclusionary Rule fully applicable in deportation proceedings. While it is impossible to predict how the new justices will rule, many will speculate based on the justices’ lower court decisions. For example, see then-judge Kennedy’s dissent in *United States v. Penn*, 647 F.2d 876 (9th Cir. 1980), stating:

The rigidities of the Exclusionary Rule, and the occasional frustration caused by its enforcement, should not obscure the fact that determinations of fourth amendment reasonableness must be made independently of the question whether exclusion of the evidence is undesirable for other reasons.

Id. at 888 (Kennedy, J., dissenting).

295. *Lopez-Mendoza*, 468 U.S. at 1050-51 (footnote omitted).

296. *Id.* at 1051, n.5 (citations omitted). This part of the decision did not enjoy a majority. The majority opinion, per Justice O’Connor, was joined by Justices Burger, Blackmun, Powell, and Rehnquist. However, Chief Justice Burger declined to join in the part of the decision containing the above quoted language. Nevertheless, it seems clear that the dissenters, who would give the Exclusionary Rule full effect in deportation proceedings, would apply this limited exclusionary rule.

297. *Id.* at 1050.

ary Rule should apply in deportation proceedings as it does in criminal proceedings.

A. Application of the Exclusionary Rule in Deportation Proceedings: Terminations of Deportation Proceedings for Inadmissible or Insufficient Evidence

Where an illegal search or seizure is alleged, the respondent may seek to suppress admissions of the evidence so obtained. If the motion to suppress is denied, the contested evidence, which presumably shows foreign alienage, will be admitted into evidence. If, however, the motion is granted and the government has no independent evidence of alienage, the proceeding will be terminated.²⁹⁸ For example, the Board of Immigration Appeals has barred an admission of foreign alienage on the grounds that it was obtained involuntarily.²⁹⁹ The respondent made the statements after his requests to talk to his attorney were repeatedly denied and after being held in custody for a significant period. The Board found that inasmuch as the statements were involuntarily given, due process barred their admission. Further, because the involuntary statements were "the sole evidence supporting the finding of deportability" the immigration judge's deportability finding was reversed and the proceedings ordered terminated.³⁰⁰

B. Circumstances Where Evidence Has Been Ruled Excludable

i. Nighttime Warrantless Entry into Respondent's Residence

In *In re Ramira-Cordova*,³⁰¹ the disputed evidence was obtained in an illegal nighttime warrantless entry into the respondent's residence.³⁰² The occupants were threatened with physical harm, pushed about and rudely treated. As a result, the occupants made statements to the officers. The immigration officers seized certain documents which presumedly related to the respondents' alienage, al-

298. See *In re Garcia*, 17 I & N Dec. 319 (BIA 1980).

299. *Id.*

300. *Id.* at 321.

301. No. A21 095-659 (BIA Feb. 21, 1980). See *infra* notes 349-57 and accompanying text.

302. *O'Rourke v. City of Norman*, 875 F.2d 1465 (10th Cir. 1989) (outlines the history of this country's aversion to nighttime searches of residences, even under authority of a search warrant).

though the BIA did not specify the nature or contents of the documents.³⁰³ The immigration judge admitted the statements and other evidence resulting from the search. The BIA suppressed the seized evidence and terminated the proceeding against respondents because there was no other evidence or testimony establishing deportability.

Futhermore, where deportation proceedings are terminated after evidence is suppressed, the INS may not be able to reopen deportation proceedings to present other evidence of deportability if that evidence was reasonably available at the time of the initial hearing. In *Ramon-Sepulveda v. INS*,³⁰⁴ the INS brought a deportation action against Ramon-Sepulveda in May of 1978. At the time of his apprehension, Ramon-Sepulveda told the immigration officers that his name was Corona-Covarrubias. However, at his initial deportation hearing he identified himself by both names but his attorney admitted that his true name was Jose Ramon-Sepulveda. The immigration judge granted Ramon-Sepulveda's request for a continuance. The deportation hearing reconvened six weeks later in July of 1978. At the July proceeding, the respondent invoked the privilege against self-incrimination and refused to testify. The INS then sought to introduce a Form I-213 (Record of Deportable Alien) which purportedly related to the respondent. Ramon-Sepulveda's attorney objected to the document, claiming lack of foundation. The INS withdrew the proffered document and did not seek a continuance to develop its case in light of respondent's refusal to testify. Rather, it urged the judge to find respondent deportable.³⁰⁵ Ramon-Sepulveda's attorney moved to terminate the proceedings because alienage had not been proved. The immigration judge terminated the proceedings because the Service had not met its burden of proving deportability.

303. *Ramira-Cordova*, No. A21 095-659 at 2.

304. 743 F.2d 1307 (9th Cir. 1984).

305. The court suggested that the Service could have requested a continuance at the reconvened hearing when the respondent refused to testify. *Id.* at 1308 and 1310. However, a continuance would seem to have been unwarranted. *In re Sibrun*, 18 I&N Dec. 354 (BIA 1983), held that a continuance should be granted only on a showing that the lack of preparation occurred despite a diligent good faith effort to be ready to proceed, and a showing that any additional evidence to be obtained is "probative, noncumulative, and significantly favorable" to the party seeking the continuance. *Id.* at 356. The burden of proving deportability is on the Service. It is doubtful that the Service can reasonably assume a respondent will not invoke his privilege against self-incrimination, or that he will testify consistent with the facts the Service believes to be true. Absent some representation by the respondent or his attorney that deportability will not be contested it seems reasonable to expect the Service to be fully prepared to present its case at the time of the final hearing or seek a continuance prior to that time.

The same is true of a respondent seeking relief in lieu of deportation. It seems unreasonable that a respondent, who has the burden of showing he is entitled to such relief, would seek a continuance because he assumed the Service would not contest alleged facts supporting that relief. Such a practice by either respondents or the Service is not justified under *Sibrun* and would result in a tremendous waste of the immigration court's time.

Seven months later, the INS moved to reopen deportation to introduce respondent's birth certificate showing that he was born in Mexico. After the deportation proceeding was terminated, an INS investigator went to Ramon-Sepulveda's neighborhood and located a neighbor who told the investigator that Ramon-Sepulveda was born in Mexico. The INS then obtained what it believed was Ramon-Sepulveda's birth certificate and sought to reopen deportation proceedings claiming the birth certificate was material evidence that was unavailable at the deportation hearing. The immigration judge reopened to allow the INS to show deportability. The BIA affirmed. The court reversed, holding that the rules governing motions to reopen which require new and material evidence not reasonably available or discoverable at the original hearing³⁰⁶ apply equally to the INS as to respondents. The birth certificate, the court found, was reasonably available at the first hearing. The INS simply did not think it would be necessary, and indeed, did not even commence its investigation until after the deportation hearing.

This case has interesting implications. Foremost is the result that a respondent, though illegally in the country, will be allowed to remain because the INS, by not obtaining reasonably available evidence, failed to meet its burden of showing deportability.³⁰⁷ The case is somewhat ironic in that the INS apparently did not recognize that the regulations concerning reopening applied to the INS as well as to

306. See 8 C.F.R. §§ 3.2, 242.22 (1990).

307. However, this is not to say that Ramon-Sepulveda may not have deportation proceedings initiated against him on the basis of evidence that may develop after the initial hearing. For example, if he later admits to being an alien illegally in the United States, the Service might seek to reopen deportation proceedings, arguing that this persuasive evidence was not available at the first hearing. Also, if he commits a deportable offense he is not immune from deportation. Thus, Ramon-Sepulveda is not automatically entitled to remain in the United States.

But the Service could not simply seek to avoid its burden to reopen deportation proceedings by commencing a "new" deportation proceeding against Ramon-Sepulveda, any more than an applicant seeking relief in lieu of deportation could continue to refile previously denied applications without regard to the reopening provisions. First, the reopening provisions apply to the Service as well as to respondents or other affected parties. 8 C.F.R. §§ 3.2, 242.22 (1990). Second, the regulations provide that in certain circumstances cancellation of an order to show cause, or dismissal of deportation proceedings, may be "without prejudice to the alien or the Service." 8 C.F.R. § 242.7(b) (1990). Implicit in this regulation is the premise that other dismissals or terminations are with prejudice. See *Ramon-Sepulveda v. INS*, 824 F.2d 749 (9th Cir. 1987).

It has long been recognized that there is no applicable statute of limitation affecting deportation proceedings. See, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952). However, under the *Ramon-Sepulveda* rule, respondents enjoy some degree of protection from repeated actions seeking their deportation.

respondents.³⁰⁸

In a subsequent proceeding, the INS again sought to initiate a new deportation proceeding on the basis of the same birth certificate that had been rejected previously.³⁰⁹ The court found that the earlier decision was *res judicata* and that the Service could not litigate it again.³¹⁰

*ii. Stops Based Solely on Hispanic Appearance:
Analysis of Arguelles-Vasquez v. INS*

On April 19, 1988, the Ninth Circuit Court of Appeals, en banc, vacated a three-judge panel's earlier *Arguelles-Vasquez* opinion.³¹¹ In a brief order, the court noted that proceedings had earlier been stayed in this case pending disposition of the alien's application for legalization under the Immigration Reform and Control Act of 1986. The court, in its April 19, 1988, order stated that the alien had been granted the first stage of legalization³¹² and was awaiting the time when he could apply for permanent residency. In light of these developments, the petition for review was voluntarily dismissed. The court noted that if the petitioner again became deportable under the order of deportation at issue, he could refile his petition for review, which would be assigned to a three-judge panel in the normal manner.³¹³

The court's action calls into question what effect, if any, its earlier vacated decision will have. It has often been stated that a decision that has been vacated lacks precedential value.³¹⁴ Although panel decisions often appear in published reporters even though they have been vacated, the mere fact of publication does not confer precedential value on such opinions.³¹⁵ Instead, vacated opinions may be cited for precedential effect only when they have been validated by the court, such as when an en banc court refers to and adopts by refer-

308. However, the regulations make it clear that the "Commissioner or any other duly authorized officer of the Service" is bound by the reopening requirements. 8 C.F.R. §§ 3.2, 242.22 (1990).

309. *Ramon-Sepulveda v. INS*, 824 F.2d 749 (9th Cir. 1987) (per curiam).

310. *Id.* at 750. In *Ramon-Sepulveda v. INS*, 863 F.2d 1458 (9th Cir. 1988), the court awarded attorney's fees to Ramon-Sepulveda for having to defend against the government's renewed attempts to deport him. In this case, the court offers more reasons why the new deportation charge, based on the same evidence that had been rejected in the motion to reopen, was insupportable.

311. *Arguelles-Vasquez v. INS*, 786 F.2d 1433 (9th Cir. 1986), vacated in 844 F.2d 700 (9th Cir. 1988).

312. See 8 U.S.C. § 1255a(a) (Supp. 1991).

313. Thus, it was ordered that "[t]he three-judge panel's opinion, reported at 786 F.2d 1433 (9th Cir. 1986) is vacated." *Arguelles-Vasquez*, 844 F.2d at 701.

314. *Alvarado v. Bd. of T. of Montgomery Com. College*, 848 F.2d 457 (4th Cir. 1988); see also *Gutierrez v. Mun. Ct. of S.E. Judicial Dist.*, 838 F.2d 1031 (9th Cir. 1988).

315. *Alvarado*, 848 F.2d 457 (4th Cir. 1988).

ence a previously published but vacated panel opinion for purposes of convenience and economy of expression.³¹⁶

The basic authority for the effect of a vacated decision is *County of Los Angeles v. Davis*.³¹⁷ In that case, as in *Arguelles-Vasquez v. INS*, the issues involved had become moot. The majority of the Court, speaking through Mr. Justice Brennan, stated that "[o]f necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect. . . ."³¹⁸ However, in dissent, Mr. Justice Powell, joined by Chief Justice Burger, complained that the majority had avoided the underlying issues in the case. The dissent stated, "The Court's disposition today will leave the decision of the court of appeals on the merits as the most pertinent statement of the governing law, even if that decision is not directly binding."³¹⁹ The dissent went on to state that vacating a decision prevents it from being the law of the case.³²⁰ But the dissent worried that "the expressions of the court below on the merits, if not reversed, will continue to have precedential weight and, until contrary authority is decided, is likely to be viewed as persuasive authority if not the governing law" of the circuit.³²¹

The dissenting opinion's claim that a vacated decision will continue to have precedential weight is inaccurate. However, the dissent's view that a decision that is vacated on grounds other than the merits (such as mootness) is likely to be viewed as persuasive seems obvious beyond doubt. First, at least a majority of a three-judge panel embraced the legal position articulated in their decision. Thus, absent some significant intervening developments, e.g., contrary higher court decision or legislation, it is reasonable to assume that these judges will decide the issue the same way when confronted with it in the future. Further, presumably the vacated decision was based on analysis and reasoning. The elimination of the decision as precedent does not prevent a repetition of the decision's analysis and reasoning. Accordingly, few would pretend that a decision vacated on grounds other than the merits did not exist, and few would not refer to or repeat its reasoning if the issue were again raised before the same court. Thus, to this extent, the dissent in *Davis* merely states the obvious.

316. *Id.*

317. 440 U.S. 625 (1979).

318. *Id.* at 634 n.6 (citation omitted).

319. *Id.* at 646 (footnote omitted).

320. *Id.* n.10.

321. *Id.*

In *Arguelles-Vasquez*,³²² the court ruled that an illegal seizure of a person based solely on Hispanic appearance is an egregious fourth amendment violation which requires suppression of evidence obtained as fruits of an unlawful seizure. Arguelles-Vasquez' car was stopped by a Border Patrol officer near Camarillo, California, north of Los Angeles. He was traveling from his job to his home. The officer questioned him about his right to be in the United States. Arguelles-Vasquez presented to the officer a Notice of Approval of Second Preference Visa Petition. While the officer examined the document, Arguelles was detained in a Border Patrol vehicle. The officer determined that the document did not confer an immediate right to be in the country. Arguelles was then arrested and taken to a Border Patrol office where he stated that he was a citizen of Mexico and that he had entered the United States in December of 1979 without being inspected by an immigration officer. The interrogating officer wrote this information on a Form I-213 (Record of Deportable Alien). Deportation proceedings were commenced by the INS. At his deportation hearing, Arguelles-Vasquez moved to suppress his statements, claiming they were obtained as a result of an unlawful seizure based solely on his Hispanic appearance. He requested an opportunity to cross-examine the arresting Border Patrol officer to prove this was the sole basis for the stop. The immigration judge denied the request, denied the motion to suppress, and concluded that the information provided by the alien after the stop established deportability. The BIA affirmed. Although the BIA assumed *arguendo* an illegal arrest, it found no egregious violation of the alien's constitutional rights warranting exclusion of the evidence obtained.

The court in *Arguelles-Vasquez*, quoting from *Lopez-Mendoza*, noted that the Supreme Court left open the question of whether exclusion of evidence was appropriate if the evidence were obtained by "egregious violations of fourth amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained."³²³

The court then pointed out that it had implicitly rejected the notion that the Exclusionary Rule would be applied only when the challenged conduct undermined the probative value of the illegally obtained evidence. The court noted that the Supreme Court in *Lopez-Mendoza* cited *Rochin v. California*³²⁴ as support for the proposition that evidence obtained by an egregious violation of individual liberties may be excluded from civil proceedings.³²⁵ In *Rochin*, officers directed a doctor to induce Rochin to vomit in order to ob-

322. 786 F.2d 1433 (9th Cir. 1986).

323. *Id.* at 1434 (quoting from *Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984)).

324. 342 U.S. 165 (1952).

325. *See Lopez-Mendoza*, 468 U.S. 1032, 1050-51.

tain drug capsules from his stomach. These capsules were deemed inadmissible though they were highly probative evidence of Rochin's possession of contraband.³²⁶ Also, the court in *Arguelles-Vasquez* stated that the value of the Exclusionary Rule as a deterrent to official misconduct would be very limited if there were a requirement that the probative value of the evidence obtained was impaired.³²⁷

Further, the Ninth Circuit in *Arguelles-Vasquez* remarked that *Lopez-Mendoza* had cited *In re Toro*³²⁸ for the principle that the BIA would exclude illegally obtained evidence if the use of such evidence would be "fundamentally unfair" and in violation of due process requirements of the fifth amendment.³²⁹ In *In re Toro* the facts were somewhat similar to those in *Arguelles-Vasquez*. In *Toro*, it was alleged that:

[T]he respondent was stopped just after she stepped off a bus in downtown Los Angeles, while she was wearing ordinary street clothes. . . [A] Service [INS] automobile pulled up next to the respondent, an officer got out of the car, and asked the respondent for identification. There was no apparent reason for speaking to the respondent other than "her obvious Latin appearance." He proceeded to identify himself as a Service officer, and indicated that he did not know the respondent's name and was not looking for her specifically. He allegedly asked to see the respondent's purse, opened it, removed a Social Security card and pay stub, then put the respondent in his car. It was alleged that the officers then proceeded down the street, stopped and questioned two other women of Latin appearance, and also placed them in the car. The women were then taken to Immigration Service offices, where they were fingerprinted and again questioned, and where the information contained in the Form I-213 [Record of Deportable Alien] was obtained.³³⁰

At her deportation hearing, the respondent asked to call the INS officer who placed her in custody so that he could corroborate her version of the facts.³³¹ However, the immigration judge, after discovering that the arresting officer was not available to testify that day, ruled that his presence was not necessary because no illegality surrounding her arrest had been shown.³³² Thus, he admitted the I-213 in evidence.

As noted above, the alien argued that she had been stopped by INS agents solely because of her Hispanic appearance in violation of her fourth amendment rights and that evidence obtained as a result

326. *Rochin*, 342 U.S. at 166.

327. *Vasquez*, 786 F.2d at 1434 n.2.

328. 17 I & N Dec. 340 (BIA 1980).

329. *Lopez-Mendoza*, 468 U.S. at 1051.

330. 17 I & N Dec. at 341.

331. *Id.*

332. *Id.* at 341-42.

of the stop should consequently be suppressed.³³³ The BIA acknowledged that although it had concluded previously that the Exclusionary Rule did not apply in deportation proceedings,

with or without a voluntariness issue [whether statements were voluntary or coerced], cases may arise in which the manner of seizing evidence is so egregious that to rely on it would offend the fifth amendment's due process requirement of fundamental fairness.³³⁴

The BIA in *In re Toro* concluded that the evidence obtained from the stop did not violate the fundamental fairness rule because the stop was made before the Supreme Court's decision in *United States v. Brignoni-Ponce*,³³⁵ which ruled that except at the border or its functional equivalent officers could not justify a stop of suspected aliens solely on the basis that they appeared to be of Mexican descent. The Board went on to state that "it has now been held that persons may not be stopped and questioned on the street by immigration officers absent a reasonable suspicion that they are aliens."³³⁶

However, the BIA held that because the stop was made under then-existing Service policy, in apparent good faith and prior to the *Brignoni-Ponce* decision, and because there was no evidence of involuntariness, "we do not find that the admission into evidence of the Form I-213 [Record of Deportable Alien—which contained information provided by the alien after the stop] was fundamentally unfair."³³⁷ Accordingly, the Board asserts implicitly that a detention based solely on Hispanic appearance, after *Brignoni-Ponce*, is fundamentally unfair.

333. *Id.* at 341.

334. *Id.* at 343 (citation omitted).

335. 422 U.S. 873 (1975).

336. *In re Toro*, 17 I & N Dec. at 342 (citations omitted). Needless to say, the Board's broad language concerning stopping and questioning persons on the street is inapplicable to the extent that a consensual encounter is involved. See *supra* notes 46-48 and accompanying text.

337. *In re Toro*, 17 I & N Dec. at 344. However, in concluding that there was no evidence of involuntariness, the Board fails to discuss the implications of the Service officer searching the respondent's purse and taking from it a Social Security card and a pay stub, after asking "to see" the purse.

Also, the Board fails to discuss the implications of respondent's being placed in the Service vehicle and taken to a Service office where she gave information that was set forth in the I-213. The facts of the case do not indicate that, prior to questioning respondent at the Service office, there was any evidence of illegal alienage. If this is what occurred, it seems beyond reasonable argument that taking the respondent to the office and questioning her was not in the nature of a consensual encounter. Thus, any statements the respondent ultimately made would have to be viewed with great suspicion on the issue of whether they were voluntary.

Moreover, assuming that there was no evidence of illegal alienage prior to the interrogation at the Service office, there was no discussion whether the Service's actions of searching her purse, placing her in the Service car, and taking her to the Service office for interrogation were consistent with fundamental fairness. Rather, the Board only discussed the fact that the respondent was approached on the street for no other reason than her Hispanic appearance.

The court in *Arguelles-Vasquez* further noted that in *Nicacio v. INS*,³³⁸ it was stated that "Hispanic-looking appearance and presence in an area where illegal aliens frequently travel are not enough to justify a stop to interrogate the occupants of a vehicle."³³⁹ The court ruled that the immigration judge erred by refusing to permit *Arguelles-Vasquez* to cross-examine the arresting Border Patrol officer in support of his unlawful seizure claim, and the court remanded the case to the BIA for further proceedings consistent with the court's opinion.

Judge Canby dissented. He stated that in *Lopez-Mendoza*³⁴⁰ the Court had before it a case in which an INS officer, without a warrant, brushed by an objecting shop owner and interviewed and arrested an employee in the shop. Under these facts, Judge Canby asserted that the INS officer should have known that he was violating the fourth amendment but the evidence he obtained was not excluded. Thus, Judge Canby suggested that the stop of *Arguelles-Vasquez* was not any more egregious than the accosting and questioning involved in *Lopez-Mendoza*.³⁴¹

Judge Canby next stated that he did not read *Lopez-Mendoza*³⁴² as authorizing the courts to impose an exclusionary rule in deportation matters. Instead, he suggested that the Court merely observed that the BIA itself will exclude evidence in appropriate cases.

Finally, Judge Canby expressed support for the majority's goal of deterring the INS from stopping persons solely because of their Hispanic appearance but stated that after *Lopez-Mendoza*³⁴³ the injunctive relief granted in *Nicacio v. INS*,³⁴⁴ rather than application of the Exclusionary Rule, was the proper remedy. Judge Canby did not, however, discuss the fact that one reason the Supreme Court declined to apply the traditional Exclusionary Rule in deportation proceedings was because the government represented that it had rules and procedures barring the admission in deportation proceedings of fundamentally unfair evidence. Further, one of the reasons for not strictly applying the Exclusionary Rule is the variety of factors that a law enforcement officer must consider. A good faith determination of reasonable suspicion or probable cause may in hindsight be insup-

338. 768 F.2d 1133 (9th Cir. 1985).

339. *Id.* at 1137.

340. 468 U.S. 1032.

341. *Id.*

342. *Id.*

343. *Id.*

344. 768 F.2d at 1140.

portable. However, where there is a simple standard, i.e., no stops solely because of Hispanic appearance, it may be easy enough to apply. If there are additional legitimate factors warranting the stop, this takes the case out of the holding of *Arguelles-Vasquez*.

Also, Judge Canby did not indicate why an injunction would be necessary against what would constitute clearly illegal conduct. Neither did he indicate whether he would invoke the Exclusionary Rule where government officials violated a court injunction. Presumably the Rule would be invoked to meet a violation that is clear and simple on its face. In such cases, an injunction adds little to a person's duty to obey the law. An injunction is most appropriate where there is a dispute over what the law requires.

Further, in *Lopez-Mendoza* one must ask whether there was even a seizure for purposes of the fourth amendment. As noted, in *Arguelles-Vasquez* Judge Canby stated that the seizure in that case was less intrusive than the stop in *Lopez-Mendoza*.³⁴⁵ Judge Canby characterized the situation in *Lopez-Mendoza* as one where an INS officer, without a warrant, brushed by an objecting shop owner and interviewed and arrested an employee in the shop. However, the Supreme Court's statement of the facts leading to Lopez-Mendoza's arrest does not suggest that the actions of the immigration officer were so intrusive. The Court stated that:

The proprietor of the shop firmly refused to allow the agents to interview his employees during working hours. Nevertheless, while one agent engaged the proprietor in conversation another entered the shop and approached Lopez-Mendoza. In response to the agent's questioning, Lopez-Mendoza gave his name and indicated that he was from Mexico with no close family ties in the United States.³⁴⁶

The Court suggests that the actions of the immigration officer were devious and furtive in that they circumvented the wishes of the shop owner. However, while there may be some question as to the propriety of the immigration officer's disregarding the wishes of the owner, it is doubtful that the questioning of Lopez-Mendoza even amounted to a seizure for purposes of the fourth amendment. Further, accepting that the officer disregarded the wishes of the shop owner, it is doubtful that the privacy interests of Lopez-Mendoza were violated. Also, Lopez-Mendoza lacked standing to assert the privacy interests of the shop owner.³⁴⁷

345. Justice Brennan, dissenting in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), seems to capture one of the underlying premises in *Arguelles-Vasquez*. He stated, "That law in this country should tolerate use of one's ancestry as probative of possible criminal conduct is repugnant under any circumstances." *Martinez-Fuerte*, 428 U.S. at 572 (Brennan, J., dissenting).

346. *Lopez-Mendoza*, 468 U.S. at 1035.

347. See *infra* notes 387-96 and accompanying text (discussion on standing).

iii. *Evidence Excludable in Deportation Proceedings
Where It Is Obtained by Egregious Conduct*

The BIA has held that evidence that does not comport with fundamental fairness will not be admissible in deportation proceedings.³⁴⁸ Where the government engages in egregious conduct to obtain evidence of alienage or deportability, the Board has stated that fundamental fairness, as required by the fifth amendment's due process clause, bars the use of that evidence in deportation proceedings. *In re Ramira-Cordova*,³⁴⁹ though not officially a reported case, has particular significance in this area. The Supreme Court in *Lopez-Mendoza* cited *Ramira-Cordova* as an example that the Department of Justice has a policy of excluding illegally obtained evidence from deportation proceedings.³⁵⁰ In *In re Ramira-Cordova*, the disputed evidence was obtained in the following manner:

[F]our or five armed immigration officers without either a warrant or adequate reason appeared at the respondents' dwelling at 4:00 A.M., pounded on their door, roused them from their sleep, entered once the door was opened without invitation, questioned the occupants and threatened one who declined to speak with physical harm, pushed one occupant aside who was standing in the doorway to his bedroom, and then searched the entire apartment.³⁵¹

The immigration officers took statements and seized certain documents which probably related to the respondents' alienage. But the Board did not mention what the documents showed.³⁵² Thus, it was not clear from the language of the BIA's decision exactly what evidence was admitted. However, the BIA did state that there "was no other evidence or testimony establishing deportability" apart from that obtained as a result of the illegal search.³⁵³ The BIA then noted that involuntary statements have been ruled inadmissible as being in violation of the due process clause.³⁵⁴ Significantly, the BIA went on

348. See *In re Toro*, 17 I & N Dec. 340 (BIA 1980); *In re Ramirez-Sanchez*, 17 I & N Dec. 503 (BIA 1980).

349. No. A21 095 659 (BIA Feb. 21, 1980).

350. 468 U.S. at 1051 n.5.

351. *Ramira-Cordova*, No. A21 095 659 at 4-5.

352. *Id.* at 2. The Board stated that "[o]n this record, the immigration judge admitted the evidence resulting from the search." Because the judge admitted the fruit of the search, it is reasonable to infer that the documents showed or tended to show alienage.

353. *Id.*

354. This rule is set forth in, e.g., *Navia-Duran v. INS*, 568 F.2d 803, 810-11 (1st Cir. 1977); *Bong Youn Choy v. Barber*, 279 F.2d 642, 646 (9th Cir. 1960).

It has been held that when the critical inquiry as to voluntariness focuses on the techniques of interrogation used, rather than the alien's state of mind, the immigration

to state:

Moreover, with or without a voluntariness issue, cases may arise in which the manner of seizing evidence is so egregious that to rely on it would offend the fifth amendment's due process requirement of fundamental fairness. We find this to be such a case.³⁵⁵

The BIA ordered the proceedings terminated because "the sole evidence establishing the respondents' deportability" was that "resulting from the search of the respondents' apartment."³⁵⁶ In this connection, it should be noted that at the deportation hearing the respondents invoked their fifth amendment privilege against self-incrimination and declined to testify concerning the charge of deportability.³⁵⁷

It is important that one of the basic reasons the Court in *Lopez-Mendoza* declined to apply the Exclusionary Rule in deportation proceedings is because it relied on the government's application of its own exclusionary principle. Therefore, the underpinning of *Lopez-Mendoza* may not, consistent with the reasoning of that decision, be withdrawn or substantially modified so as to eviscerate the effectiveness of the protective procedures upon which the Court relied.

As discussed in *Arguelles-Vasquez*, suppression of evidence obtained through egregious means does not require that its probative value be diminished. Undoubtedly, some methods of obtaining evidence seriously undermine the reliability of the evidence. For example, confessions extracted through beatings, extreme intimidation or other forms of coercion are unreliable because the subject of such treatment might "admit" to things that are not true simply to extricate himself from a hostile and perhaps dangerous situation. However, even where the reliability of evidence is not subject to dispute, the method of obtaining the evidence might warrant its exclusion.³⁵⁸ Also, *Arguelles-Vasquez* pointed out that *Lopez-Mendoza* cited *Rochin* as a situation warranting suppression of evidence. The evidence obtained in *Rochin* was highly probative. Further, the Board has stated that one basis for excluding evidence is because "the manner of seizing [it was] so egregious."³⁵⁹

judge's and the Board's voluntariness determinations are reviewed *de novo*. See *Miller v. Fenton*, 474 U.S. 104, 110-12 (1985); *United States v. McConney*, 728 F.2d 1195, 1200-05 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984). Cf. *United States v. Fouche*, 776 F.2d 1398, 1404 (9th Cir. 1985) (when voluntariness determination depends on "essentially factual" state of mind inquiry, court reviews for clear error).

In making voluntariness determinations, courts examine the "totality of the circumstances." *Fikes v. Alabama*, 352 U.S. 191, 197 (1957).

355. *Ramira-Cordova*, No. A21 095 659 at 4 (footnote omitted). This language is identical to that used in *In re Toro*, 17 I & N Dec. 340, 343 (BIA 1980).

356. *Ramira-Cordova*, No. A21 095 659 at 5.

357. *Id.* at 1.

358. See *In re Ramira-Cordova*, No. A21 095 659 (BIA Feb. 21, 1980).

359. *Id.* It seems implicit that the documents seized in the nighttime warrantless

Thus, a limited Exclusionary Rule appears to be applicable in deportation proceedings. Where the probative value of evidence is not disputed, and where exclusion is premised on the manner in which it was seized, the "prime purpose [of exclusion] is to deter future unlawful police conduct."³⁶⁰ It therefore appears that the Court in *Lopez-Mendoza* concluded that the deterrent value of excluding evidence obtained through nonegregious fourth amendment violations did not outweigh the societal costs. On the other hand, the deterrent value of disallowing evidence obtained through egregious means was deemed to be of sufficient importance to apply the Exclusionary Rule.

iv. Agency Must Comply with Its Own Rules

The Supreme Court in *Lopez-Mendoza* stated that perhaps the most important reason it found the Exclusionary Rule inapplicable in deportation proceedings was because the Justice Department has its own enforcement mechanism for deterring fourth amendment violations by its officers. Included in this mechanism, the Court noted, is a policy requiring that evidence seized through intentionally unlawful conduct be excluded from the proceeding for which it was obtained.³⁶¹ Also, Justice Department regulations "require that no one be detained without reasonable suspicion of illegal alienage, and that no one be arrested unless there is an admission of illegal alienage or other strong evidence thereof."³⁶² The Court also noted that new immigration officers receive "instruction and examination in fourth amendment law, and others receive periodic refresher courses in law."³⁶³ Because immigration officers are instructed in these fairly straightforward regulations, where a detention or arrest is clearly

entry in this case proved or indicated alienage. There was no question raised of the probative value of the documents. Indeed, where documents or other physical evidence are seized in a nighttime entry of one's residence, the probative value of such evidence is likely heightened because the possession of the evidence is more closely tied to the occupants. This is unlike statements given under such circumstances which may be subject to claim of unreliability because of, e.g., coercion. Moreover, as discussed in *O'Rourke v. The City of Norman*, 875 F.2d 1465 (10th Cir. 1989) and the authorities therein cited, this country's historical aversion to nighttime searches of a residence is reflected in the fourth amendment's heightened protection against, and condemnation of, official intrusion into the sanctity of the home during night hours. There is no requirement that the probative value of evidence secured during any such search be questionable. *Id.* at 1473.

360. *Lopez-Mendoza*, 468 U.S. at 1041 (quoting *United States v. Janis*, 428 U.S. 433, 446 (1976)).

361. *Lopez-Mendoza*, 468 U.S. at 1045.

362. *Id.*

363. *Id.*

contrary to the regulations, this may support an inference that evidence thus obtained was through intentionally unlawful conduct and should be excluded.³⁶⁴ In *Adamson v. Commissioner*,³⁶⁵ the court assessed the applicability of the Exclusionary Rule in a civil tax proceeding. While finding no bad faith in that case, the court opined that “a bad faith violation of an individual’s fourth amendment rights requires application of the exclusionary sanction in a civil tax proceeding.”³⁶⁶ The court acknowledged *Lopez-Mendoza*’s egregious conduct rule³⁶⁷ and stated, “[W]hen evidence is obtained by deliberate violation of the fourth amendment, or by conduct a reasonable officer should know is in violation of the Constitution, the probative value of that evidence cannot outweigh the need for a judicial sanction.”³⁶⁸ This rule should apply all the more where the violation is of a rule that is clear and easy to apply; for example, a policy that foreign appearance standing alone is not an adequate reason to effect a seizure. Further, adherence to this rule is one of the stated reasons the Court declined to apply the Exclusionary Rule in deportation proceedings.

Agencies must comply with their own regulations.³⁶⁹ Moreover, the Service’s violation of a regulation designed to protect aliens can invalidate deportation proceedings.³⁷⁰ The Supreme Court in *United States v. Caceres*³⁷¹ stated that “[a] court’s duty to enforce an agency regulation is most evident when compliance with the regulation is mandated by the Constitution or federal law.”³⁷² Of course, the regulation prohibiting detentions or seizures solely on Hispanic appearance is based on a constitutional interpretation. It was also

364. But see *Matter of Toro*, 17 I & N Dec. 341-44 at 344 (BIA 1980), which found that a vehicle stop based solely on the driver’s Latin appearance did not contravene fundamental fairness because the stop was made in good faith in accordance with pre-*Brignoni-Ponce* INS policy.

Judge Pregerson dissenting in *Cervantes-Cuevas v. INS*, 797 F.2d 707, 712 (9th Cir. 1985), stated that *Adamson v. Commissioner*, 745 F.2d 541, 544-45 (9th Cir. 1984), recognized that a police officer’s bad faith violation of fourth amendment rights could constitute an egregious violation within the meaning of *Lopez-Mendoza*, warranting exclusion of evidence in a civil tax proceeding. He also observed that the Court suggested that bad faith would be found if a reasonably competent officer would have believed the search to be illegal. *Cervantes-Cuevas*, 797 F.2d at 712 (Pregerson, J., dissenting).

365. 745 F.2d 541 (9th Cir. 1984).

366. *Id.* at 545.

367. *Id.*

368. *Id.*

369. *Ramon-Sepulveda v. INS*, 743 F.2d 1307, 1310 (9th Cir. 1984).

370. *Id.* at 1310. The case is of particular significance given the fact that the Supreme Court in *Lopez-Mendoza* stated that the Service was bound by regulations requiring “that no one be detained without reasonable suspicion of illegal alienage, and that no one be arrested unless there is an admission of illegal alienage or other strong evidence thereof.” *Lopez-Mendoza*, 468 U.S. at 1045. See also *United States v. Calderon-Medina*, 591 F.2d 529, 531 (9th Cir. 1979).

371. 440 U.S. 741 (1979).

372. *Id.* at 749 (citing *Bridges v. Wixon*, 326 U.S. 135, 152-53 (1945)).

stated, "[T]his Court held invalid a deportation ordered on the basis of statements which did not comply with the Immigration Service's rules requiring signatures and oaths finding that the rules were designed 'to afford [the alien] due process of law' by providing 'safeguards against essentially unfair procedures.'"³⁷³ The Court cited *United States ex rel. Bilokumsky v. Tod*³⁷⁴ for the proposition that the "Court assumed that 'one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated . . . pursuant to law.'"³⁷⁵ For this reason also, where immigration officers violate their own regulations there is a basis to exclude evidence thus obtained from deportation proceedings.

However, prior to *Arguelles-Vasquez*, the courts were most tolerant in accepting evidence obtained in violation of an alien's fourth amendment rights if there was no evident force, coercion or duress. For example, in two cases decided before *Arguelles-Vasquez*, the courts did not even acknowledge the applicability of the fruit of the poisonous tree doctrine for aliens subjected to an illegal arrest, and the courts briefly discussed the issue of the effect that an illegal detention and arrest would have on deportation proceedings.³⁷⁶ In *Cervantes-Cuevas*, the subject's car was stopped at approximately the time when Border Patrol agents were checking places where undocumented aliens were likely to congregate. The subject slowed his car to ten miles per hour at a point where a Border Patrol vehicle had pulled over a pick-up truck and, on passing this point, speeded up to about forty-five miles per hour. He was stopped by the Border Patrol and asked to show documents proving he was in the United States legally. Cervantes handed the agent a government form reflecting "Notice of Appearance of Attorney" in immigration proceedings. Cervantes was then arrested. Later, Cervantes admitted he originally entered the United States from Mexico without inspection. These statements were included in the Form I-213, Record of Deportable Alien.

In a motion to suppress, Cervantes moved to exclude his statements contending that his detention, arrest and subsequent interrogation were unlawful. However, the immigration judge admitted the Form I-213, and found him deportable. The court found it signifi-

373. *Caceres*, 440 U.S. at 749 (quoting *Bridges v. Wixon*, 326 U.S. 135, 152-53 (1945)).

374. 263 U.S. 149, 155 (1923).

375. *Caceres*, 440 U.S. at 749 n.12 (quoting *Bilokumsky*, 263 U.S. at 155).

376. *Cervantes-Cuevas v. INS*, 797 F.2d 707 (9th Cir. 1985); *Benitez-Mendez v. INS*, 760 F.2d 907 (9th Cir. 1985), *modified*, 748 F.2d 539 (9th Cir. 1984).

cant that Cervantes did not claim before the immigration judge that "the agent's conduct was 'egregious' or that his statements were coerced, made under duress, or were otherwise involuntary."³⁷⁷ The court noted that the Board, in dismissing Cervantes' appeal, found that there were sufficient articulable facts to support a reasonable suspicion that he was an undocumented alien prior to his detention.³⁷⁸ However, even assuming reasonable suspicion, particularly troubling is the failure by the Board and the court to discuss how probable cause to arrest was established by Cervantes' offering a document indicating that he was represented by counsel for immigration purposes. Surely, one may not conclude, consistent with the Constitution, that only the guilty have lawyers.³⁷⁹ Neither was there any discussion of whether the statements given by Cervantes well after his arrest were the fruit of the poisonous tree. Instead, in a quite unsatisfactory analysis, the court stated that even assuming an illegal arrest, the information obtained as a result of the arrest was admissible at a subsequent deportation hearing.

The Court then summarily dispensed with Cervantes' argument that the evidence against him was obtained through egregious conduct:

Petitioner offers no authority for the novel proposition that the mere failure to articulate specific facts to justify a detention is "egregious" conduct requiring suppression of evidence in a civil deportation proceeding. . . .

In the absence of some proof casting doubt on the probative value of voluntary statements following an illegal detention, evidence that the arrest was unlawful does not affect the admissibility of an undocumented alien's statements.³⁸⁰

Judge Pregerson dissented, stating that he would find egregious conduct. As he later articulated in *Arguelles-Vasquez*, he stated that a close reading of *Lopez-Mendoza* showed that the probative value of illegally obtained evidence did not have to be undermined to be suppressed.³⁸¹ Also, he noted that in *Adamson v. Commissioner*,³⁸² the court suggested that an officer's bad faith violation of fourth amendment rights constitutes egregious conduct. But Judge Pregerson did not discuss whether it constituted egregious conduct for a law enforcement officer to arrest a Hispanic appearing male because he

377. *Cervantes-Cuevas*, 797 F.2d at 708. Of course, because the hearing before the immigration judge occurred prior to the *Lopez-Mendoza* decision, Cervantes' attorney had no reason to utter the precise words "egregious conduct."

378. *Cervantes-Cuevas*, 797 F.2d at 709.

379. In *Wong Sun v. United States*, 371 U.S. 471 (1963), the Court cautioned against allowing "a vague suspicion [to] be transformed into probable cause for arrest by reason of ambiguous conduct which the arresting officers themselves have provoked." *Id.* at 484.

380. *Cervantes-Cuevas*, 797 F.2d at 710-11.

381. *Id.* at 713.

382. 745 F.2d 541 (9th Cir. 1984).

presented a document showing he was represented by counsel for immigration purposes.

In *Benitez-Mendez v. INS*,³⁸³ the court addressed the detention of a man working in a farmer's fields with others. On the approach of immigration officers, the others fled, but Benitez-Mendez remained where he was. On being asked if he had papers to live in this country, he responded that he did and they were in his car, parked nearby. He was then placed in an officer's car until his papers could be checked. The court acknowledged that he was forcibly detained at that point and that there was not reasonable suspicion to detain him. Indeed, the court stated that "INS investigators may not detain workers for citizenship status questioning unless . . . [they] 'are able to articulate objective facts providing them with a reasonable suspicion that each questioned person, so detained, is an alien illegally in this country.'"³⁸⁴ After his detention, Benitez-Mendez gave statements, which were placed in an I-213, showing he was deportable. Nevertheless, the court concluded that "even though . . . petitioner's arrest violated the fourth amendment, the information obtained as the result of the arrest (petitioner's statements on Form I-213) was admissible at his deportation hearing."³⁸⁵ Again, there was no discussion of whether the conduct was egregious or whether the statements were the fruit of a poisonous tree. However, the court had not yet fashioned the rule of *Arguelles-Vasquez*, and was still seeking to interpret and apply the "egregious conduct" language of *Lopez-Mendoza*. Indeed, the author of both *Benitez-Mendez* and *Arguelles-Vasquez* was Judge Pregerson. Judge Pregerson, in his dissent in *Cervantes-Cuevas*, began to construct the reasoning he used in *Arguelles-Vasquez*.

Thus, while there are clear differences between these opinions, they are differences in maturation of analysis. Because *Arguelles-Vasquez* has been vacated for reasons above stated, it has yet to be seen how the majority of the members of the Ninth Circuit will approach the "egregious conduct" issue.³⁸⁶

383. 760 F.2d 907 (9th Cir. 1985).

384. *Id.* at 909 (citations omitted).

385. *Id.* at 910.

386. It should be stressed that the Exclusionary Rule will not generally be applied in deportation proceedings where the respondent alleges a fourth amendment violation by state or local law enforcement officers who subsequently transfer custody of respondent to federal immigration authorities. The Court ruled in *United States v. Janis*, 428 U.S. 433 (1976), that the deterrent purposes underlying that rule would not be served by suppressing, from a federal administrative proceeding, evidence illegally seized in good faith by a state law enforcement officer. *Id.* at 434. But, the *Janis* rule may not be

C. Evidence May Be Admissible Regardless of Fourth Amendment Violation

i. Where One Has No Standing to Challenge Fourth Amendment Intrusion, Fruits of Intrusion Are Not Suppressible by that Person

The concept of standing is important in determining whether fourth amendment violations will be remedied. If one has no standing to claim a fourth amendment violation, it of course follows that no egregious violation may be claimed by him or her. It has long been established that as a general rule workers without a proprietary or possessory interest in their job premises cannot object to a search and seizure on those premises.³⁸⁷

In *Rakas v. Illinois*,³⁸⁸ the Court clarified the overbroad language of *Jones v. United States*,³⁸⁹ which had stated that anyone legitimately on premises where a search or seizure occurs has standing to challenge the search or seizure. The Court in *Rakas v. Illinois* stated that the question of standing in search and seizure cases is more properly posed as the substantive question of whether the proponent of the motion to suppress has had his own fourth amendment rights infringed by the search and seizure that he seeks to challenge.³⁹⁰ The Court suggested that where an employee has no possessory or proprietary interest in premises, he has no legitimate expectation of privacy.³⁹¹

Subsequent to *Rakas v. Illinois*, courts have held that in determining an employee's fourth amendment rights respecting searches or seizures at the employee's place of employment, several factors must be weighed. These factors include whether the employee challenging the search or seizure has an ownership interest in the premises, whether he has a possessory interest in the place searched (e.g., a desk to which the employee has exclusive access), whether he has a right to exclude others from the place, whether he has exhibited a subjective expectation that the place would remain free from government intrusion, whether he took precautions to maintain his privacy,

applied where there is evidence of an agreement or arrangement between federal immigration authorities and state or local law enforcement agencies on locating and apprehending suspected undocumented aliens. The Court in *Janis* emphasized that there was not agreement or participation between the two sovereigns. *Id.* at 455 n.31.

387. *United States v. Conoscento*, 63 F.2d 811 (2d Cir. 1933), *cert. denied*, 290 U.S. 642 (1933); *United States v. Muscarelle*, 63 F.2d 806 (2d Cir. 1933), *cert. denied*, 290 U.S. 642 (1933); *Kelly v. United States*, 61 F.2d 843 (8th Cir. 1932) (analyzed at 86 A.L.R. 338); *United States v. Crushata*, 59 F.2d 1007 (2d Cir. 1932); *Wida v. United States*, 52 F.2d 424 (8th Cir. 1931).

388. 439 U.S. 128 (1978), *reh'g denied*, 439 U.S. 1122 (1979).

389. 362 U.S. 257 (1960).

390. *Rakas*, 439 U.S. at 140.

391. *Id.* at 148.

and whether he was legitimately on the premises.³⁹²

In *Martinez v. Nygaard*,³⁹³ in the context of an INS "factory survey," the court ruled that employees had no standing to challenge a warrant authorizing the INS to enter the factory. Citing *Rakas v. Illinois*,³⁹⁴ the court stated that to establish standing to challenge the search warrant, the employees must show that the warrant violated their personal rights not just those of the factory owners or managers. That is, the employees were required to show that they had a legitimate expectation of privacy in the areas searched or the things seized.³⁹⁵ Accordingly, the court ruled that since the INS officers had a right to be in the factory, questioning or detaining the employees had to be justified under the rules governing consensual encounters, *Terry* stops, or probable cause, depending on the nature of the encounter.³⁹⁶

In *Lopez-Mendoza*, though the facts are not fully set forth in the Court's decision, there was no suggestion of an intrusion into any area in which the employee had a legitimate expectation of privacy. Further, the immigration officer simply approached Lopez-Mendoza and asked him several questions. There was no search of a desk or other area in which Lopez-Mendoza had exclusive possession. Accordingly, unless some interest of Lopez-Mendoza was invaded that was not articulated by the Court, it would appear that the rule of *INS v. Delgado* would apply to the encounter. Thus, Judge Canby's assertion that the intrusion in *Lopez-Mendoza* was more intrusive than that in *Arguelles* simply is not supportable.

392. *United States v. Haydel*, 649 F.2d 1152 (5th Cir. 1981), *cert. denied*, 455 U.S. 1022 (1982). *See also* *United States v. Torch*, 609 F.2d 1088 (4th Cir. 1979) (listing factors to determine whether employee had legitimate expectation of privacy in employer's warehouse from which evidence was seized), *cert. denied*, 446 U.S. 957 (1980); *United States v. Williams*, 617 F.2d 1063 (5th Cir. 1980) (mere crew member can have no privacy interest in the hold of a cargo vessel); *United States v. Briones-Garza*, 680 F.2d 417 (5th Cir. 1982) (defendant has no standing to challenge search of "drop house" used to harbor illegal aliens where he has no legitimate property or possessory interest in the premises), *cert. denied*, 459 U.S. 916 (1982). *See also* *United States v. Pitt*, 717 F.2d 1334 (11th Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984); *United States v. Bell*, 651 F.2d 1255 (8th Cir. 1981).

393. 820 F.2d 1024 (9th Cir. 1987).

394. *Rakas*, 439 U.S. at 133-34.

395. *Nygaard*, 820 F.2d at 1027.

396. *Id.* at 1028-29.

ii. *Evidence Independent of an Illegal Search or Seizure*

a. *Fruit of the Poisonous Tree: Attenuation of Taint of Illegal Search or Seizure*

In *Lopez-Mendoza*, the Court reiterated the rule that “[t]he ‘body’ or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred.³⁹⁷ The Court proceeded to note that:

[R]egardless of how the arrest is effected, deportation will still be possible when *evidence not derived directly from the arrest is sufficient to support deportation*. . . . Since the person and identity of the respondent are not themselves suppressible . . . the INS must prove only alienage, and that will sometimes be possible using *evidence gathered independently of, or sufficiently attenuated from, the original arrest*.³⁹⁸

The Supreme Court in *Wong Sun v. United States*³⁹⁹ stated that for evidence not to be excludable following an illegal search or seizure, that evidence must be “so attenuated . . . as to dissipate the taint” of the fourth amendment intrusion.⁴⁰⁰

There is no question that physical items seized pursuant to an unreasonable search or seizure are suppressible. Further, there is no question that statements obtained from a suspect in violation of his fourth amendment rights are suppressible. There are, of course, exceptions to these general rules. For example, if evidence uncovered during the course of an illegal search would have been inevitably discovered, it will be admitted so as not to put the police in a worse position than they would have been in absent the illegal conduct.⁴⁰¹ Also, where evidence is obtained pursuant to a facially valid warrant that law enforcement officers execute in good faith, and with objective reasonable reliance, the deterrent value of excluding the evidence because the warrant is later determined defective is scant and is outweighed by the societal interests at stake.⁴⁰²

In *United States v. Ceccolini*,⁴⁰³ the Court stated that although the testimony of a live witness discovered through a fourth amendment violation may be excluded, because the cost of excluding live-

397. 468 U.S. at 1039-40 (footnotes omitted).

398. *Id.* at 1043 (emphasis added) (citations omitted).

399. 371 U.S. 471 (1963).

400. *Id.* at 487, 491 (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1930)).

401. *Nix v. Williams*, 467 U.S. 431 (1984).

402. *United States v. Leon*, 468 U.S. 897 (1984).

403. 435 U.S. 268 (1978). The case renounced the rule of *Wong Sun*—that there is no principled difference between exclusion of physical and verbal evidence—but also rejected the government’s position favoring a per se rule that live witness testimony is not suppressible, even if the witness was located as the result of an illegal search or seizure.

witness testimony often will be very great, "a closer, more direct link between the illegality and that kind of testimony is required" in order for the court to exclude the testimony.⁴⁰⁴ The Court reasoned that a willing live witness might have come forward on his own, and in that regard the situation is unlike one involving an inanimate object.⁴⁰⁵ In *United States v. Hooton*,⁴⁰⁶ the court listed the *Ceccolini* factors to determine whether the witness testimony was sufficiently attenuated to be permitted. That is: 1) the stated willingness of the witness to testify; 2) the role played by illegally seized evidence in gaining the witness' cooperation; 3) the proximity between the illegal behavior, the witness' decision to cooperate and the actual testimony at trial; and 4) the police motivation in conducting the search.

Some cases have addressed whether testimony of illegal aliens should be suppressed following an illegal search. For example, in *United States v. Rubalcava-Montoya*,⁴⁰⁷ the court considered an illegal search at the San Clemente, California, checkpoint. A car, later found to have five undocumented aliens hidden in the trunk, arrived at the checkpoint. Rubalcava was one of the aliens in the trunk. The presence of the aliens was detected through an illegal search. At trial on charges of conspiracy to transport illegal aliens and transportation of aliens illegally in this country, three of the aliens found in the trunk testified that Rubalcava had arranged for their illegal entry and that the registered owner of the car was involved in the illegal enterprise as well. The three aliens also testified that a Mr. Ventura was driving the car when the aliens were found in the trunk. However, after the aliens testified, Mr. Ventura took the stand and testified against his codefendants.

The government argued that the testimony of the witnesses was voluntary and thus sufficiently attenuated from the illegal search that it could not be considered an illegal fruit of that search. The

404. *Id.* at 278.

405. This rule modified the principle of *Wong Sun v. United States*, 371 U.S. 471, 486 (1963), that there is no distinction in the application of the Exclusionary Rule as regards physical or verbal evidence. *But see* *United States v. Finucan*, 708 F.2d 838 (1st Cir. 1983) (held that the *Ceccolini* rule is inapplicable where the person discovered by the illegal search provides physical evidence rather than testimony).

406. 662 F.2d 628 (9th Cir. 1981), *cert. denied* 455 U.S. 1004. The court ruled that the witness was not the fruit of an illegal execution of a search warrant because the purpose of the search was to find stolen guns and not evidence relating to the charge in question. The court rejected the claim that *Ceccolini* applies only to citizen witnesses who testify out of civic duty.

407. 597 F.2d 140 (9th Cir. 1978) (per Kennedy, now Associate United States Supreme Court Justice).

court disagreed, noting that a key element of the *Ceccolini* analysis is whether the testimony is the product of the witness' independent act of will, neither coerced nor induced by the consequences of the illegal search. The court went on to state,

Nothing in the record of the case before us indicates that in the time between the search and the trial the witnesses made an independent decision to come forward to testify to rehabilitate themselves or to assist the trier of fact in arriving at the truth of the case, or for any other reason. The illegal aliens who testified against appellants not only were discovered as a direct result of the illegal search but were implicated thereby in illegal activity. The record does not show the substance or extent of any conversations or negotiations between the government and the witnesses, and thus the government has not rebutted the logical inference on these facts that the incriminating "evidence" discovered in the course of the illegal search was used to persuade these witnesses to testify.⁴⁰⁸

The court also distinguished *Ceccolini* on the ground that unlike that case, the witnesses would not have been discovered independently of the illegal search.⁴⁰⁹ With regard to the testimony of the codefendant, the court ruled that his testimony was prompted because things were going badly at trial, which suggested a direct link between the illegal search and his testimony.⁴¹⁰

In another case, decided before *Ceccolini*, but employing a similar analysis, the court suppressed the testimony of aliens discovered in an illegal search.⁴¹¹ Immigration officers, armed with a defective search warrant, entered a New York restaurant searching for persons believed to be undocumented aliens. The owners of the restaurant were indicted for harboring and concealing aliens.⁴¹² They moved to exclude from their trial evidence of the presence of the aliens obtained as a result of the search and the testimony of the aliens themselves, because the warrant failed to state probable cause to search.⁴¹³ The trial court granted the motion and the government appealed.

The government argued that the testimony of the arrested aliens about their relationship with the restaurant owners should not be excluded because their "voluntary" decision to testify broke the connection between the illegal search and the testimony.⁴¹⁴ The Court rejected this argument:

[T]here is a close connection between the initial illegal search and the testimony which the government seeks to use at trial. The purpose of the search, as described in the warrant, was to seize the illegal aliens; it is these same

408. *Id.* at 143.

409. *Id.* at 143-44.

410. *Id.* at 143.

411. *United States v. Karathanos*, 531 F.2d 26 (2d Cir. 1976), *cert. denied*, 428 U.S. 910 (1976).

412. *See* 8 U.S.C. § 1324(3) (1972).

413. *Karathanos*, 531 F.2d at 29.

414. *Id.* at 34.

aliens who are now the government's prospective witnesses. Once the aliens were arrested, the INS agents had obtained considerable leverage over them, since it was within the government's discretion to prosecute and deport them, or to allow them to leave the United States voluntarily.⁴¹⁵

Further, the government conceded that it had prompted the aliens' testimony by allowing them to depart voluntarily without prosecution. Given these facts, the court concluded, "[W]e think their decisions to testify cannot accurately be characterized as intervening 'act[s] of free will' of sufficient independence 'to purge the primary taint of the unlawful invasion.'"⁴¹⁶ Additionally, the court stated that the aliens' testimony was a foreseeable fruit of the illegal search and, unless suppressed, "might help induce similar future searches without probable cause in the hope that they would uncover aliens who could be similarly prompted to testify."⁴¹⁷ Thus, the suppression order was affirmed.

In *United States v. Ortega-Serrano*,⁴¹⁸ the defendant was charged with knowingly transporting undocumented aliens. The defendant claimed that the stop of his vehicle was not based on reasonable suspicion and moved to suppress the testimony of his alien passengers and his own statements. The motion was denied and the defendant was convicted. The court of appeals agreed with the defendant and reversed and remanded. Because no attenuation argument was made, however, the case suggests that the Government did not believe it could prevail on an attenuation theory.⁴¹⁹

b. Subsequent Voluntary Admission of Alienage

If a respondent voluntarily admits at his deportation hearing that he is an alien illegally in this country, his admission renders academic any challenge to the circumstances surrounding his arrest or any evidence obtained through an illegal search or seizure.⁴²⁰ Like-

415. *Id.* at 35.

416. *Id.* (citation omitted).

417. *Id.*

418. 788 F.2d 299 (5th Cir. 1986).

419. See also *United States v. Ramirez-Sandoval*, 872 F.2d 1392 (9th Cir. 1989) (court barred testimony of undocumented aliens discovered through an illegal search where there was no evidence that the aliens would have come forward of their own accord to testify against the defendants); *United States v. Scios*, 590 F.2d 956 (D.C. Cir. 1978) (en banc) (testimony given solely to avoid being jailed for contempt not sufficiently an act of free will to purge the primary taint).

Furthermore, *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), sustained the suppression of testimony of undocumented aliens found in the defendant's car pursuant to an illegal search.

420. *Magallanes-Damian v. INS*, 783 F.2d 931 (9th Cir. 1986); *Young v. INS*,

wise, an alien's illegal arrest or detention is irrelevant if his attorney admits deportability at the subsequent deportation hearing.⁴²¹ In *Avila-Gallegos v. INS*,⁴²² the court first cited numerous cases for the proposition that even assuming an illegal arrest had been made, and assuming the "body" of a respondent were obtained illegally, this does not make the deportation proceedings the fruit of the poisonous tree.⁴²³ The court then found that the respondent admitted facts to support the charge of deportability in his testimony at his deportation hearing. The court concluded that this rendered academic, for purposes of the issue of deportability, whether he had been illegally arrested.⁴²⁴ A like ruling was made in *Guzman-Flores v. INS*,⁴²⁵ where the respondents argued on appeal that their presence at the deportation proceeding was illegally obtained and should be suppressed as the fruit of the poisonous tree. The court rejected this argument on the basis of the above discussed rule that a respondent's body is not suppressible as a fruit of the poisonous tree. The order deporting respondents was upheld since they admitted deportability at their deportation hearing. These admissions were deemed to be independent of any illegally seized evidence.⁴²⁶

c. Documents Obtained Independently of Illegal Search or Seizure

Where evidence of deportability is discovered by way of an illegal search or seizure, the government is free to use evidence independent of the search or seizure to prove deportability. In *Hoonsilapa v. INS*,⁴²⁷ the court assumed *arguendo* that INS officers conducted an illegal search of an alien's home and discovered his identity. Later deportation proceedings were brought against the alien. At this proceeding, a visa petition that had been filed by the alien's wife on his behalf was introduced to prove alienage. The court noted that the

759 F.2d 450 (5th Cir. 1985); *Rodriguez-Gonzalez v. INS*, 640 F.2d 1139 (9th Cir. 1981).

421. *Magallanes-Damian*, 783 F.2d 931; *Young*, 759 F.2d 450. However, in these cases, the court looked to whether the attorney's admission constituted ineffective assistance of counsel. The courts have been reluctant to find ineffective assistance of counsel in such circumstances and are inclined to rule that an attorney's admission of deportability is a "tactical" choice that will not be second guessed because it backfired.

422. 525 F.2d 666 (2d Cir. 1975).

423. *Id.* at 667.

424. *Id.*

425. 496 F.2d 1245 (7th Cir. 1974).

426. *See also Men Deng Chang v. Jiugni*, 669 F.2d 275, 279 (5th Cir. 1982) (even assuming illegal arrest, subsequent voluntary admission establishes deportability since alien himself is not "suppressible fruit"); *Medina-Sandoval v. INS*, 524 F.2d 658, 659 (9th Cir. 1975) (voluntary admission at deportation hearing admissible despite unlawful stop); *Cuevas-Ortega v. INS*, 588 F.2d 1274, 1278 n.9 (9th Cir. 1979) (voluntary admission at immigration office admissible even after illegal arrest).

427. 575 F.2d 735 (9th Cir. 1978).

visa petition was submitted by the alien's wife as a "voluntary act" following the alleged illegal search and rejected arguments that it was the fruit of the poisonous tree.⁴²⁸ The court went on to state that the "mere fact that fourth amendment illegality directs attention to a particular suspect does not require exclusion of evidence subsequently unearthed from independent sources."⁴²⁹ Accordingly, it was ruled that "there is no sanction to be applied when an illegal arrest only leads to discovery of the man's identity and that merely leads to the official file."⁴³⁰ In *Huerta-Cabrera v. INS*,⁴³¹ the court found that any taint of an illegal arrest was attenuated by the presentation at the deportation hearing of other documents obtained independently of the arrest, showing the alien had previously been deported and had not obtained permission to reenter.⁴³²

d. Obtaining Birth Certificate That Shows Foreign Birth

In some cases where a suspected Mexican citizen contests deportability, the Service will execute a Form G-302, "Request for Record Check in Mexico." This request provides to the appropriate Service officer in Mexico certain biographical information concerning the respondent. The Service officer then seeks to locate the respondent's birth certificate and baptismal records. If such records are located, they will show birth in a foreign country and support a finding of alienage. Once alienage is established, the alien has the burden of showing time, manner and place of entry into the United States. If the alien cannot provide this information, it will be presumed he is in the United States in violation of law.⁴³³ Such a procedure appears to meet any problems raised in connection with a declination to testify on the basis of the privilege against self-incrimination and will generally serve to establish a prima facie case of deportability. However, there are serious questions whether this procedure of obtaining a foreign birth certificate is legally permissible where a respondent's arrest is accomplished by egregious circumstances violative of his fourth amendment rights. In *Lopez-Men-*

428. *Id.* at 738.

429. *Id.*

430. *Id.*

431. 466 F.2d 759 (7th Cir. 1972) (per curiam).

432. *Id.* at 761-62.

433. 8 U.S.C. § 1101 (1991). See generally, Watkins, *The Ninth Circuit Versus the Board of Immigration Appeals: Conflicts Over Burden of Proof on Section 291 Deportation — Burden, Burden, Who's Got the Burden?*, 1 GEO. IMMIGR. L.J. 5 (Fall 1985).

doza,⁴³⁴ the Court pointed out that the BIA will exclude evidence if the "circumstances surrounding a particular arrest and interrogation would render use of the evidence obtained thereby fundamentally unfair and in violation of due process requirements of the fifth amendment."⁴³⁵

However, such a rule would be ineffective if it could be circumvented by allowing deportability to be established with proof of alienage that is not truly independent of the illegal search or seizure. If an arrest and interrogation were violative of due process and "fundamentally unfair," introduction of a birth certificate to prove illegal alienage would render this protective rule an illusion. To take an extreme example, a respondent could, without reasonable suspicion, exigent circumstances or any other justification, have his door kicked down in the middle of the night, be pulled from his bed, and have a "confession" extracted by force. To say that the evidence derived from the illegal search and seizure is inadmissible is a statement devoid of substance if the respondent's identity and other biographical information could be used to secure a birth certificate to establish alienage.

The "Request for Record Check in Mexico" requires more than the identity of the respondent. It requires date and place of birth, names of the respondent's parents and grandparents, and other biographical information. Indeed, the respondent can invoke the privilege against self-incrimination with respect to inquiries about his place of birth and his family in Mexico because foreign birth establishes a link in the chain to establish the criminal offense of entry without inspection.⁴³⁶ The Board in *In re Santos*⁴³⁷ indicated that if a respondent makes incriminating admissions concerning his status in this country after his right to counsel is denied, this is prejudicial error warranting suppression of the statements. However, the Board held that if the statements are not incriminating and are otherwise admissible, the respondent suffers no prejudice by making nonincriminating statements concerning his immigration status, since he has a duty to testify truthfully concerning such matters in any event. A respondent's place of birth, country of citizenship, etc., may constitute links in the chain to establish criminal offenses, e.g., entry without inspection.⁴³⁸ The Board has indicated that evidence so obtained is suppressible.

434. 468 U.S. 1032 (1984). See also *supra* notes 348-50 and accompanying text.

435. *Id.* at 1051 n.5 (citations omitted).

436. 8 U.S.C. § 1325 (1991) (makes it a crime to enter this country without inspection). In *Ramon-Sepulveda v. INS*, 743 F.2d 1307, 1308 (1984), the respondent invoked his privilege against self-incrimination and refused to testify concerning his place of birth, among other things.

437. 19 I & N Dec. 105 (1984).

438. *Lopez-Mendoza*, 468 U.S. 1032 (1984).

Thus, apart from identity, biographical information should be suppressible if obtained by fundamentally unfair means. Without this information, it would be unlikely that a foreign birth certificate relating to the respondent could be obtained. Also, it is not fair to conclude that a foreign birth certificate obtained on the basis of evidence obtained by egregious means is sufficiently "attenuated" from the illegal search or seizure so as to be admissible.

Moreover, even if a respondent is granted immunity from prosecution, there is authority to justify his refusal to testify where his presence has been obtained by egregious conduct. That is, the foregoing cases clearly hold that witness testimony is suppressible if not attenuated from the taint of an illegal search or seizure. Thus, it seems to follow necessarily that the target of the proceedings similarly may withhold testimony on fourth amendment grounds. There is no need to invoke the fifth amendment's protection against self-incrimination, and accordingly a grant of immunity from prosecution does not carry a duty to testify.

There are safeguards to protect against individuals of "foreign appearance" being hauled before the immigration courts without evidence of deportability and being deported if they refuse to testify. As noted above, the fourth amendment as well as the fifth amendment may justify the refusal to testify in such proceedings. If there is no evidence to detain an individual or compel his appearance at a deportation hearing, a habeas corpus or injunctive action would appear available to prevent proceedings against him.⁴³⁹

If the individual refuses to answer any questions and the immigration officers have no independent evidence of immigration status, it would be virtually impossible to assert a ground of deportability under the law.⁴⁴⁰ The standard first paragraph in every order to show cause is the allegation that the respondent is not a "citizen or

439. The general habeas corpus statute, 28 U.S.C. § 2241 (1991), vests jurisdiction in federal district courts to consider habeas corpus petitions challenging detention incident to deportation proceedings. *United States ex rel. Mezei v. Shaughnessy*, 195 F.2d 964 (2d Cir. 1952), *rev'd on other grounds sub nom.*, 345 U.S. 206, 215 (1953); *Bertrand v. Sava*, 684 F.2d 204 (2d Cir. 1982). However, Congress, at 8 U.S.C. § 1252, limited habeas corpus review of immigration detentions to cases involving "a conclusive showing . . . that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability." But, this habeas preemption provision does not apply where a detention is in violation of law. *United States ex rel. Martinez-Angosto v. Mason*, 344 F.2d 673, 680 (2d Cir. 1965).

440. See 8 U.S.C. § 1251(a) (1991) (lists the 19 grounds of deportability).

national of the United States.”⁴⁴¹ The standard second paragraph is the allegation that the respondent is a native and citizen of a specified country or countries. The third paragraph typically states how and when the respondent entered the United States. The succeeding paragraphs then assert facts to support a particular ground of deportability. However, without pertinent facts, no ground of deportability can be alleged.⁴⁴² Thus, an individual detained without evidence of deportability could resort to the habeas corpus remedy discussed above.

Further, in almost all cases, the evidence used in deportation proceedings to prove deportability is obtained from the subject of the deportation proceedings. In some cases injunctions have issued to bar certain contacts with persons in particular situations. Indeed, the Supreme Court in *Lopez-Mendoza* noted that because INS is a “single agency, under central federal control, and engaged in operations of broad scope but highly repetitive character,” declaratory relief against the agency offers a means for challenging INS institutional practices.⁴⁴³

Further, the efficacy of any illegal INS information gathering techniques would be negligible if members of the public (especially those engaged in actions of questionable legality) were advised that, absent a search or arrest warrant or other legal compulsion, they are under no duty to cooperate with law enforcement officers. The Court, in *INS v. Delgado*, concluded that no seizure occurred under the facts of that case because it adopted a strong presumption that persons questioned by law enforcement officers will respond voluntarily. Because it is presumed that persons so questioned will respond voluntarily, there is no requirement that they be told “they are free not

441. The term “national” is defined at 8 U.S.C. §§ 1101(a)(22), 1408.

442. This author has opined, and holds to the view, that a party’s failure to respond to questions that he has a duty to answer justifies an adverse inference which may support a finding of deportability. See Watkins, *Streamlining Deportation Proceedings*, *supra* note 183. Of course, implicit in such a position is the requirement that the Service have some evidence that supports the charge of deportation. The Supreme Court in *Lopez-Mendoza*, 468 U.S. 1032 (1984), stressed that INS regulations and policy prohibit detention absent a reasonable suspicion of illegal alienage, and prohibit arrest unless there is an admission of illegal alienage or other strong evidence thereof. *Id.* at 1044-45. If these regulations are complied with, the inference drawn from a wrongful refusal to testify along with the other evidence could provide the requisite “clear, convincing, and unequivocal evidence” to support a deportation order.

Thus, deportability could be established by this inference along with other evidence which would not ordinarily meet the exacting standard required to prove deportability, i.e., “clear, unequivocal and convincing evidence that the facts alleged as grounds for deportation are true.” 8 CFR § 242.14(a) (1990). See also *Woodby v. INS*, 385 U.S. 276 (1966).

Further, it is clear that an essential prerequisite to a charge of deportation is a set of facts which, if true, support a particular ground of deportability. See 8 CFR § 242.1(b) (1990).

443. See also, e.g., *Nicacio v. United States*, 797 F.2d 700 (9th Cir. 1985).

to respond."⁴⁴⁴ The clear import of the *Delgado* decision is that had the persons there questioned simply declined to respond to the questions asked of them, this would have been the end of the "consensual encounters." Then, if the officers had no evidence of illegal alienage, the employees could have simply gone about their business with no risk of detention or arrest for their refusal to cooperate with the INS officers.

But as noted above, flight or evasion of law enforcement officers may provide reasonable suspicion to detain the suspect for further questioning. However, even in such cases, if the suspect refuses to provide any information concerning his nationality or status, and if there is no independent evidence of alienage, it would be problematic to conclude that, especially when not in close proximity to the border, flight or evasion standing alone can suffice to justify an arrest. This is because, as the Supreme Court recognized in *Lopez-Mendoza*, INS regulations prohibit arrest "unless there is an admission of illegal alienage or other strong evidence thereof."⁴⁴⁵ Thus, the issue would be whether flight or evasion constitutes strong evidence of illegal alienage. It is extremely doubtful that it does. On one hand, it may be argued that there is no correlation or clear nexus between one's attempted flight or evasion and his being an undocumented alien. It is possible that, among other things, he sought to avoid law enforcement officers because he was nervous or fearful, because he had committed an offense unrelated to the immigration and naturalization laws or because a family member was an undocumented alien and he wished to avoid contact with immigration authorities for fear of exposure of that person's illegal status.

On the other hand, when an immigration officer is in uniform and clearly is recognized as being affiliated with the effort to detect and apprehend persons illegally in this country, it is arguable that flight or attempted evasion constitutes persuasive evidence that the individual is illegally in the United States, otherwise there would be no logical reason to attempt avoidance.⁴⁴⁶ If the latter position is ac-

444. *Delgado*, 466 U.S. at 216 (1984).

445. *Lopez-Mendoza*, 468 U.S. at 1044-45.

446. See *Wong Sun v. United States*, 371 U.S. 471 (1963). However, even assuming that flight constitutes strong evidence of illegal alienage, if the subject refused to answer any questions, and the immigration officers had no independent evidence of the person's status, it would be virtually impossible to assert a ground of deportability under the law. See 8 U.S.C. § 1251(a) (1991) (lists the 19 grounds of deportability). The standard first paragraph in every order to show cause is the allegation that the respondent is not a "citizen or national of the United States." (National is defined at 8 U.S.C. §§ 1101(a)(22), 1408.) The standard second paragraph is the allegation that the respon-

cepted, care must be exercised not to loosely construe what conduct constitutes attempted evasion. The court in *Nacacio v. INS*⁴⁴⁷ stressed that failure of vehicle occupants to make eye contact with immigration officers does not justify a stop of the vehicle. Thus, for a detention or arrest on the basis of attempted evasion to withstand a court challenge, the evasion must be clear and significant and weighed with other pertinent facts.

However, even assuming that flight constitutes strong evidence of illegal alienage, if the subject refuses to answer any questions, and the immigration officers have no independent evidence of his immigration status, it would be virtually impossible to assert a ground of deportability under the law.⁴⁴⁸ Thus, even assuming that a detention, and even arrest, would be supported by the fact that a person fled from immigration officials, without more information, deportability could not be proved.⁴⁴⁹

Of course, if the subject after a consensual interrogation, or a legal detention or arrest,⁴⁵⁰ voluntarily admits to facts showing he is an alien illegally in this country, a deportation charge can issue.⁴⁵¹ Furthermore, evidence of deportability may be obtained from official records, persons who know the respondent or others who have information concerning his immigration status.

dent is a native and citizen of a specified country or countries. The third paragraph typically states how and when the respondent entered the United States. The succeeding paragraphs then assert facts to support a particular ground of deportability. However, without facts, no ground of deportability can be alleged. Thus, the fact that a person fled from immigration officials may provide a basis to detain, and even arrest, but without more information it cannot establish deportability.

447. 797 F.2d 700, 704 (9th Cir. 1985).

448. See *supra* note 447.

449. *Id.* Further, inasmuch as deportation proceedings are not initiated against a respondent until a basis of deportability is alleged, the situation should never arise where the government seeks to deport a respondent solely on the ground that he fled when he saw approaching immigration officers. These facts argue strongly against the position that attempted flight or evasion constitutes "strong grounds."

450. The rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), holds that the fifth amendment's privilege against self-incrimination requires that prior to interrogation of one in the custody of law enforcement officers, he must be advised that he has a right to remain silent, that anything he says may be used against him in court, that he has a right to consult with a lawyer and to have the lawyer present during any interrogation, and that if he is indigent a lawyer will be appointed to represent him. Violation of this rule renders inadmissible for criminal prosecution statements a respondent may make. However, such warnings are not required for the admission of incriminating statements in deportation proceedings. *Tejeda-Mata v. INS*, 626 F.2d 721, 724 n. 3 (9th Cir. 1989); *Trias-Hernandez v. INS*, 528 F.2d 366, 369 n. 1 (9th Cir. 1975); *In re Sandoval*, 17 I & N Dec. 70, 76-77 (BIA 1979).

451. In this connection, evidence of birth in a foreign country places the burden on a respondent "to show the time, place, and manner of his entry into the United States . . . or be presumed to be in the United States in violation of law." 8 U.S.C. § 1361 (1982); *Ramon-Sepulveda*, 743 F.2d 1307, 1308, n.2 (9th Cir. 1984); *In re Ponco*, 15 I. & N. Dec. 120 (BIA 1974). See generally, *Watkin, Burden, Burden, Who's Got the Burden?*, *supra* note 433.

VI. WARRANTS AND UNDOCUMENTED ALIENS

In *Blackie's House of Beef, Inc. v. Castillo*,⁴⁵² the court began its analysis with the statement "[T]he applicability of the Warrant Clause of the Fourth Amendment to INS enforcement activities can no longer be doubted."⁴⁵³

An arrest warrant will rarely be issued for a suspected undocumented alien.⁴⁵⁴ Thus, only search warrants whose targets are undocumented aliens will be discussed here. In immigration cases, any warrant issued will, as a rule, be a search warrant to enter premises where suspected undocumented aliens work. Once officers are in a place they have a right to be, they are free to question anyone they encounter, as long as it is a consensual encounter. Because immigration officers will seldom have warrants seeking particular suspected aliens, the persons they encounter are free not to cooperate or answer questions.

The Supreme Court affirmed the longstanding rule that law enforcement officers may enter open fields without a warrant because no one could have a legitimate expectation of privacy in such places.⁴⁵⁵ The Congress, in light of this decision which found no constitutional privacy interest, enacted a statutory protection against immigration officers entering open fields without a warrant or consent of the owner for the purpose of searching for or interrogating suspected aliens about their right to be in the United States.⁴⁵⁶

452. 659 F.2d 1211 (D.C. Cir. 1981).

453. *Id.* at 1217. The warrant clause states, in pertinent part, that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

454. The author is aware of no reported case where an arrest warrant was issued on the ground that one was believed to be an undocumented alien.

455. *Oliver v. United States*, 466 U.S. 170 (1984). The Court reasoned as follows: "We conclude from the text of the fourth amendment and from the historical and contemporary understanding of its purposes, that an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers." *Id.* at 181.

456. 8 U.S.C. § 1357(d) (1991). This provision reads:

Notwithstanding any other provision of this section other than paragraph (3) of subsection (a), an officer or employee of the Service may not enter without the consent of the owner (or agent thereof) or a properly executed warrant onto the premises of a farm or other outdoor agricultural operation for the purpose of interrogating a person believed to be an alien as to the person's right to be or to remain in the United States.

Id. 8 U.S.C. § 1357(a)(3)(1982), provides, in part, that any authorized officer or employee of the INS is empowered, without warrant, within twenty-five miles from any "external boundary" of the United States "to have access to private lands, but not dwell-

The warrant clause requires that “every intrusion upon the privacy of an individual first be considered by a ‘neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.’”⁴⁵⁷ Further, the warrant should reflect careful and informed consideration by the magistrate and reasonably “advise the [subject] of the scope and objects of the search, beyond which limits the [officer] is not expected to proceed.”⁴⁵⁸

In *Blackie’s House of Beef*, the district court had declared a warrant invalid because it did not contain names or even physical descriptions of the allegedly deportable aliens but conferred blanket authority to “locate aliens in the United States without legal authority.”⁴⁵⁹ The district court ruled that the warrant wasn’t analogous to the routine inspection warrant involved in *Marshall v. Barlow’s, Inc.*⁴⁶⁰ because the nature of the two enforcement activities differed. The INS sought to enter Blackie’s, a Washington, D.C., restaurant suspected of hiring undocumented aliens, to search for a particular violation rather than to conduct a routine inspection of regulated industry premises. Thus, the district court held that the “neutral standards” principle of *Marshall v. Barlow’s* was inapplicable.⁴⁶¹

The Court of Appeals for the District of Columbia agreed with the district court’s analysis but ruled the district court did not go far enough. The INS search “was not analogous to a criminal investigation” because the detention and deportation of undocumented aliens is not criminal law enforcement activity.⁴⁶² The court stressed that “there are no sanctions of any kind, criminal or otherwise, imposed by law upon a knowing employer of illegal aliens. This warrant in particular was issued to aid the agency in the enforcement of its statutory mandate, not to aid police in the enforcement of criminal laws.”⁴⁶³ The court held that the district court failed to recognize “the unique aspects of an INS search” and thus erroneously concluded that Blackie’s fourth amendment rights were violated by the

ings for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States.” *Id.*

457. *Blackie’s House of Beef*, 659 F.2d 1212, 1217 (quoting from *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

458. *Blackie’s House of Beef*, 659 F.2d at 1217 (quoting *Marshall v. Barlow’s Inc.*, 436 U.S. 307, 323 (1978)).

459. *Blackie’s House of Beef*, 659 F.2d at 1217-18.

460. 436 U.S. 307 (1978) (indicated a lower standard of proof to obtain a warrant to conduct routine Occupation Health and Safety Administration inspections where consent to inspect could not be obtained).

461. *Blackie’s House of Beef*, 659 F.2d at 1218.

462. *Id.* at 1218.

463. But now it is unlawful to employ knowingly “unauthorized aliens.” 8 U.S.C.A. § 1324a (Supp. 1991). It is yet to be seen whether the court’s analysis would change in light of the civil and criminal penalties that may be imposed on an offending employer.

search warrant.⁴⁶⁴ In describing the unique aspects of the INS search, it was noted that Congress contemplated a vigorous enforcement program that might include INS entries onto private premises for purposes of questioning "any alien or person believed to be an alien" and of detaining aliens believed to be in this country illegally.⁴⁶⁵ An INS search is conducted pursuant to an administrative mandate and a warrant so issued may be evaluated under a different standard of probable cause than is applicable to criminal warrants.⁴⁶⁶ Also, it was ruled that the warrant was properly tailored both to protect the fourth amendment rights of Blackie's and to aid enforcement interests of the United States.⁴⁶⁷

The court of appeals noted that the warrant was styled an "Order for Entry on Premises to Search for Aliens in the United States Without Legal Authority." The court went on to note that probable cause to search does not require a detailed description of each alien.⁴⁶⁸

The court stated that had INS followed the more stringent requirements suggested by the district court, the result would have been the same—the questioning of those employees appearing to be aliens and found in nonpublic areas of the restaurant.⁴⁶⁹

It is unlikely, the court stated, that the INS could meet the standards of probable cause applicable in criminal cases, at least as formulated by the district court, except in the rare instance when an INS informer reports on one specific violator and supplies the description and name of that person.⁴⁷⁰ Instead, the typical situation precludes insistence upon "some quantum of individualized suspi-

464. *Blackie's House of Beef*, 659 F.2d at 1218. The warrant was issued under the authority of 8 U.S.C. §§ 1357 and 1103(a) (1982).

465. *Blackie's House of Beef*, 659 F.2d at 1218-19.

466. *Id.* at 1218-19, 1224.

467. *Id.* at 1218-19.

468. *Id.* at 1222. The court stated:

It is difficult to imagine any instance in which INS agents could satisfy the district court's requirements and obtain the names of each illegal alien employed in the nonpublic areas of a restaurant, or even physical descriptions any more particularized than those proffered to the magistrate in this instance. Since an illegal alien is essentially a fugitive outside the law, it is unlikely that his vital statistics will be on file anywhere in the United States or even that he will customarily use his real name, either in his contacts with the Government or with anyone else. Obviously he would never subject himself to more than the minimum of public scrutiny.

Id. at 1225.

469. *Id.*

470. *Id.*

cion" at least as to the persons sought.⁴⁷¹ Criminal probable cause is required only when the investigation changes from purely administrative to criminal in nature.⁴⁷²

Despite the INS operating under authority of a warrant in *Blackie's*, the court stressed that:

INS agents were empowered to enter Blackie's only for the purpose of questioning those employees whom the agents might reasonably suspect of being illegal aliens, on the basis of the information in the warrant and the standards set down for the questioning of suspected aliens in *Yam Sang Kwai v. INS*.⁴⁷³

In sum, the court ruled that the warrant was as descriptive as reasonably possible with respect to the persons sought, the place to be searched, and the time within which the search might take place.⁴⁷⁴

The *Blackie's House of Beef* case has been much discussed and applied in immigration enforcement cases. One case offering helpful explication on *Blackie's* is *International Molders' and Allied Workers' Local Union No. 164 v. INS*.⁴⁷⁵ Plaintiffs (a labor union, five employers and nine employees of Hispanic ancestry) sought a preliminary injunction to prohibit INS factory searches absent either voluntary employer consent, unprovoked exigent circumstances or a search warrant identifying specific persons suspected of being illegal aliens. The district court granted the preliminary injunction and denied an INS request for a stay pending appeal. The court of appeals, with modifications, affirmed the injunction. The court noted that the district court's finding of an "evident systematic policy and practice

471. *Id.* The district court, it was held, should have examined the warrant and supporting affidavits with an eye to whether the warrant satisfied the alternative requirement of *Delaware v. Prouse*, 440 U.S. 648, 654 (1979): that is, "sufficient specificity and reliability to prevent the exercise of unbridled discretion by law enforcement officials." *Blackie's House of Beef*, 659 F.2d at 1225.

472. *Id.* at 1225 n.16 (discussing *Michigan v. Tyler*, 436 U.S. 499 (1978)). For example, the difference between the kind of evidence required to make a fire inspection, and the kind of evidence needed to investigate a fire.

473. *Blackie's House of Beef*, 659 F.2d at 1226 (citing *Yam Sang Kwai v. INS*, 411 F.2d 687 (1969)). The court in *Au Yi Lau v. INS*, 445 F.2d 217 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 864 (1971), stated that the questioning referenced in *Yam Sang Kwai* assumes the cooperation of the person questioned. *Au Yi Lau*, 445 F.2d at 222, 223 n.8.

In *Au Yi Lau v. INS*, the issue was whether the INS could temporarily detain a suspected illegal alien for interrogation. The court ruled that under *Terry v. Ohio* standards for temporary detentions, i.e., where there exists reasonable suspicion the person is illegally in the United States, the INS may "make forcible detentions of a temporary nature." *Au Yi Lau*, 445 F.2d at 223.

474. *Blackie's House of Beef*, 659 F.2d at 1226. For descriptions of contents of affidavits see *id.* at 1215. As regards scope of search, no files or books could be searched, and no private property of Blackie's within the premises was searched. *Id.* at 1215-16. Further, it was held that the warrant did not leave impermissible discretion in the hands of INS agents with respect to persons sought to be questioned. Affidavits "suggested that numerous persons working in nonpublic areas of the restaurant were possibly illegal aliens, and gave credible reasons for the affiants' suspicions as well." *Id.* at 1226.

475. *International Molders'*, 799 F.2d 547 (9th Cir. 1986).

of fourth amendment violations" by the INS was supported by the record.⁴⁷⁶ While acknowledging that law enforcement agencies are entitled to the widest latitude in performing their duties, the court stated that INS has "no discretion with which to violate constitutional rights."⁴⁷⁷

As a threshold matter, the court noted that the district court had found that a typical warrant authorized not only entry into and search of premises but also seizures of persons "suspected of being aliens."⁴⁷⁸ This finding was "amply supported by the record," but the court did not have to address the issue because the "INS concede[d] that the warrants could properly authorize only entry into the workplace to question suspected aliens."⁴⁷⁹ Further, the Court stated that:

To the extent the warrants authorize INS to seize employees, the Supreme Court's holding in *Ybarra v. Illinois*, requires "probable cause *particularized with respect to that person*." "This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be."⁴⁸⁰

In addressing the level of evidence required to obtain a *Blackie's* warrant, the court commented that the district court did not require the INS to identify all suspected illegal aliens by name to obtain an entry warrant. Rather, it required INS through "the warrant *and its supporting affidavits*," to provide information of sufficient specificity to assure that finding such persons is "reasonably likely."⁴⁸¹ The court accepted *Blackie's* standard that "warrants and accompanying affidavits [that] narrow down the field of potentially vulnerable persons to those employees whom INS agents might reasonably believe to be aliens" satisfies the requirements of the fourth amendment even where the targeted persons are not identified by name.⁴⁸²

The court of appeals struck the district court's restriction against questioning suspects absent probable cause to believe that the sus-

476. *Id.* at 551.

477. *Id.* at 551-52 (quoting *LaDuke v. Nelson*, 762 F.2d 1318, 1325 (9th Cir. 1985), *amended on alternative grounds*, 796 F.2d 309 (9th Cir. 1986)).

478. *International Molders*, 799 F.2d at 552 n.5.

479. *Id.*

480. *Id.* (quoting *Ybarra v. Illinois*, 444 U.S. at 85, 91) (emphasis in original).

481. *International Molders*, 799 F.2d at 553.

482. *Id.* (quoting *Blackie's*, 659 F.2d at 1226). *See also International Molders*, 799 F.2d at 553 n.6. Using this standard, the court struck the specificity requirements of paragraphs two and three of the injunction issued by the district court for INS entry warrants. The paragraphs provided, *inter alia*, that to question suspects there must be probable cause that they are illegally in the country. *See id.* at 552 n.4.

pect is an undocumented alien.⁴⁸³ This is because non-detentive questioning does not implicate the fourth amendment.⁴⁸⁴

As regards detentions and arrests the court stated that “[a]n *arrest* requires probable cause to believe that the worker is an illegal alien, [citation omitted] and a worker may not be *detained* absent ‘reasonable suspicion of illegal alienage.’”⁴⁸⁵

The court went on to repeat the rule of *Delgado* that where a worker merely refuses to answer but does not attempt to flee or evade agents, any additional steps to restrict the worker’s ability to walk away must be supported by “some minimal level of objective justification to validate the detention or seizure.”⁴⁸⁶ However, the court agreed that the INS could not seek to “deliberately” provoke flight to justify a detention. The court upheld the requirement that the INS “must not arrive [at the work site] or conduct themselves in a manner that would foreseeably provoke flight by workers, or that would leave a reasonable person with the belief that he had no choice but to consent to the raid.”⁴⁸⁷

The Court summarized the principles of *Blackie’s House of Beef* and stated that *Blackie’s* authorized a hybrid standard of probable cause applicable to INS enforcement that was less stringent than required for criminal warrants.⁴⁸⁸ However, it was also stated that *Blackie’s* emphasized the need for “sufficient safeguards to assure that nothing impermissible would be left to the discretion of the INS agents.”⁴⁸⁹

VII. CONCLUSION

Minority group members—particularly people of color—are disproportionately targeted by law enforcement for interrogation and investigation where there is no reasonable suspicion that they have committed a crime. Implicit in this is the notion that minorities are more likely to commit crimes. Suspicionless racial targeting is not a new phenomenon. *Terry v. Ohio*⁴⁹⁰ noted that there was a concern that law enforcement officers, unbridled by articulable standards,

483. *Id.* at 553.

484. *Id.* (citing *Delgado*, 466 U.S. at 221). The court, however, added that “non-detentive questioning is permitted based solely on a reasonable suspicion that the person is an alien.” *Id.* See also *id.* at 554. However, despite this language, *Delgado* made clear that consensual encounters do not require even reasonable suspicion. Instead, as discussed above, reasonable suspicion is required for a forcible, temporary *Terry*-type detention.

485. *International Molders’*, 799 F.2d at 553 (citing *Benitez-Mendez v. INS*, 760 F.2d 907, 909 (9th Cir. 1983)).

486. *Id.* (quoting *Delgado*, 466 U.S. at 216-17).

487. *International Molders’*, 799 F.2d at 554.

488. *Id.* at 552.

489. *Id.* (quoting *Blackie’s*, 659 F.2d at 1226).

490. 392 U.S. 1, 14, 15 n.11 (1968).

would single out and unduly harass minority group members, causing friction between the minority community and law enforcement. This continues to be a real concern.

However, constitutional restrictions against arbitrary intrusions do not apply in certain circumstances. As discussed above, the protections of the fourth amendment do not apply at the international border or at its functional equivalents. Thus, at the border, officials may single out minority group members for intrusions not founded on any suspicion. Also, the Court has ruled that at fixed checkpoints immigration officers may impose a greater intrusion on Hispanic appearing individuals than on others by referring them to secondary inspection for closer interrogation and inspection. This intrusion may be based solely on racial appearance.

Further, the protections of the fourth amendment are not triggered until and unless a seizure has occurred. In restating the traditional standard that a person is seized if a reasonable person would not believe he was free to simply walk away with impunity, the Court has devised a "reasonable person" who is alien to most of us. This person, even though the target of an apparent criminal investigation, is disposed to cooperate with law enforcement officers. This reasonable person is so assured that he believes he can simply walk away from a police encounter without harm or repercussions. He knows his constitutional rights and is aware that he can end the encounter, at least in theory, by uttering words such as "I choose not to cooperate with you, and any further detention is against my will." The Court has adopted a test of a consensual encounter that makes it extremely difficult to show that a reasonable person would not feel free to walk away. The Supreme Court has expanded the concept of a "consensual encounter" so that there is effectively a presumption that an encounter is consensual. The dissent in *INS v. Delgado* assailed the majority's ruling as reflecting a "studied air of unreality" achieving its result by "a considerable feat of legerdemain."⁴⁹¹ As a California jurist stated:

In the real world this defendant could not possibly have felt himself free to walk away when his identification was requested, and it is almost laughable to think that the officers would have let him do so. Nevertheless, a solid majority of the United States Supreme Court is of the view that ordinary citizens and even undocumented aliens confronted by immigration officials would be aware that they could merely saunter off when asked to identify themselves and produce confirming documents. The same majority also believes law enforcement agents would allow them to do so, another highly

491. 466 U.S. 210, 226 (1984).

dubious proposition in my opinion.⁴⁹²

Because “consensual encounters” do not implicate the fourth amendment, law enforcement officers are not barred from arbitrarily targeting minorities for investigation and questioning. Because the Court has expanded the concept of what constitutes a consensual encounter, minorities are subject to a broader range of unbridled intrusive and offensive conduct by law enforcement officers.

The author submits that it is an insult to be singled out for inquiry or investigation on the basis of race, whether or not the encounter is labeled consensual. Despite the theoretical musings of the *Delgado* majority, in the real world most people who are approached by law enforcement officers and asked for identification or questioned about criminal conduct do not believe they are free to just walk away.

It is unclear whether the Court would adjust its reasonable person construct if scientific tests were conducted to demonstrate that the Court’s assumptions are in error. For example, monitors could be placed on buses on which drug task forces frequently board. Immediately after such a boarding, the monitors could interview those approached and ask whether they believed they were free to decline to cooperate. Or, actors playing policemen could board a bus and question unsuspecting passengers about criminal activity. The passengers could then be questioned about their perceptions of the encounter.

It is further submitted that racial targeting for “consensual” encounters carries the danger that the faith minorities have in even-handed law enforcement will be further eroded. This is ironic because race-based investigative stops and searches yield a small fraction of persons involved in criminal activity.⁴⁹³ This means that many innocent people are detained and questioned based on little more than hunches and “unspeakable”⁴⁹⁴ assumptions about race and crime. Where law enforcement officers are candid enough to admit that their decisions to detain are based largely on the person’s race, they run the risk of having the detention ruled illegal.⁴⁹⁵ Thus, law enforcement officers will claim that their decisions to approach and detain are based on the inarticulable rather than the unspeak-

492. *People v. Lopez*, 260 Cal. Rptr. 641, 644 (Cal. Ct. App. 1989) (Crosby, J., concurring) (rev. den. by Cal. Sup. Ct. (1989)), *cert. denied*, 110 S. Ct. 1122 (1990) (citations omitted).

493. *See, e.g.*, the dissent in *United States v. McKines*, 933 F.2d 1412, 1427 (8th Cir. 1991) (Magill, dissenting). *See also* the dissent in *United States v. Hooper*, 935 F.2d 484, 499 (2d Cir. 1991) (Pratt, dissenting) (pointing out that according to the officers’ own testimony they stopped 600 people in 1989, which resulted in only 10 arrests).

494. *See* Justice Marshall’s dissent in *Florida v. Bostick*, 111 S. Ct. 2382 (1991) (Marshall, J., dissenting), where he noted that officers who claim that their decisions to approach and detain certain persons were guided not so much by “inarticulable” hunches as by “unspeakable” notions of race. *Id.* at 2390 n.1 (Marshall, J., dissenting).

495. *See United States v. Taylor*, 917 F.2d 1402 (6th Cir. 1990).

able. But, whatever the claimed basis is for the detention, race-based stops in public areas are fairly obvious. Furthermore, just as the plaintiff in *Buffkins v. City of Omaha*⁴⁹⁶ objected to being singled out because she was Black, more minorities will begin to object to such stops.

In an immigration context, the better rule is to suppress evidence of alienage obtained as a result of seizures made solely on the basis of minority appearance. Such stops are now illegal under the government's own rules. Further, they offend a basic principle of this country—i.e., that persons will not be judged on race but on deeds.

Once minorities learn of their right to refuse to cooperate with law enforcement, greater numbers will just say no to requests for police cooperation. Thus, in addition to yielding scant results, racial targeting runs the real risk of heightening estrangement and hostility between law enforcement and minority communities, a warning sounded in *Terry* which has not yet been heeded by many law enforcement agencies.⁴⁹⁷

496. 922 F.2d 465 (8th Cir. 1990).

497. In this connection, the REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT, submitted to Mayor Tom Bradley on July 9, 1991, states:

Routine stops of young African-American and Latino males, seemingly without "probable cause" or "reasonable suspicion," may be part and parcel of the LAPD's aggressive style of policing. The practice, however, breeds resentment and hostility among those who are its targets. Moreover, the practice has created a feeling among many in Los Angeles' minority communities that certain parts of the City are closed to them or that being detained by the police is the price of traveling in those areas.

Id. at p. 77.

