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Harry M. Caldwell, Seizures of the Fourth Kind: Changing the Rules, 33 Clev. St. L. Rev. 323 (1984-1985)

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COMMENT

SEIZURES OF THE FOURTH KIND: CHANGING THE RULES

HARRY M. CALDWELL*

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I. INTRODUCTION

In *Terry v. Ohio*, Chief Justice Earl Warren stated that “[n]o judicial opinion can comprehend the protean variety of the street encounter.”¹ Contacts between police and citizens run the gamut from innocuous exchanges to full-blown custodial arrests. While a large percentage of police-citizen encounters may be classified readily as falling within the protections of the fourth amendment,² a number of them are difficult to categorize.³ Since the decision in *Terry*, the U.S. Supreme Court has been grappling with the issue of when such encounters do, in fact, mandate fourth amendment protection.⁴

The Court’s most recent pronouncement in this area, *Immigration and Naturalization Service v. Delgado*,⁵ involved an Immigration and Naturalization Service (INS) factory sweep and the ensuing encounter between immigration officials and plant employees. In this significant and controversial opinion, the Court found that the *Delgado* encounter did not

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¹ 392 U.S. 1 (1968).

² This is especially true in a situation resembling a traditional arrest. See *Dunaway v. New York*, 442 U.S. 200 (1979)(petitioner taken into custody and subjected to interrogation).

³ Given the diversity of encounters between police officers and citizens, the Supreme Court has been cautious in defining the limits imposed on these encounters by the fourth amendment. *INS v. Delgado*, ___ U.S. ___, 104 S. Ct. 1758, 1762 (1984).

⁴ See text accompanying notes 32-33.

⁵ ___ U.S. ___, 104 S. Ct. 1758 (1984).

amount to a seizure and, therefore, did not merit fourth amendment protection, despite uncontroverted facts tending to establish the opposite result under pre-*Delgado* law.⁶

The opinion of the Court suggests that *Delgado* is merely an application of existing law to the factory survey scenario. However, the case may be viewed as a significant departure from *Terry*⁷ and its progeny, one that, in fact, creates a new standard for characterizing police-citizen encounters. This Article will review *Terry* and its aftermath vis-a-vis the police-citizen "encounter." It will then discuss the impact of the decision and the direction of the Court in the wake of *Delgado*.

II. BACKGROUND

An examination of the Supreme Court's position over the sixteen years after the *Terry* decision provides some clarity as to the character of police-citizen encounters. The decisions rendered by the Court generally fall into three categories, each describing a different type of encounter between state officials and citizens. The most easily identifiable and restrictive of these confrontations is the arrest, which unquestionably falls within the fourth amendment prohibition against unreasonable seizures. The second category, the detention or "stop," was first recognized in *Terry* as less restrictive than an arrest, but nonetheless a seizure, thereby invoking the protection of the fourth amendment.⁸ The third and most loosely defined category, encompassing all other encounters between citizens and police that do not rise to the level of a seizure, falls outside of the protection of the amendment.⁹

By extending the protection of the fourth amendment to non-arrest situations, the *Terry* court acknowledged the existence of a variety of situations that necessitate allowing police briefly to stop and detain an individual for questioning.¹⁰ The Court, although distinguishing this stop or detention from an arrest, clearly held that both types of encounters are fourth amendment seizures.¹¹

Generally, the Court has acknowledged that the full panoply of encounters between police and citizens should not be embraced within the limits imposed by the fourth amendment: "The fourth amendment does

⁶ *Id.* at ___, 104 S. Ct. at 1759.

⁷ 392 U.S. 1 (1968).

⁸ The rationale is that any seizure "is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be taken lightly." *Id.* at 17.

⁹ This third category may well have developed through the Court's reluctance in *Terry* itself to immunize vast segments of police conduct in street encounters from constitutional challenge. See WHITEBREAD, *CRIMINAL PROCEDURE* 175-75 (3d ed. 1980).

¹⁰ 392 U.S. at 20.

¹¹ The Court rejected the notion that the fourth amendment does not come into play as a limitation upon police conduct. *Id.* at 19.

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."¹² Nevertheless, significant questions remain as to the parameters of those encounters characterized and protected as seizures, as opposed to mere unprotected encounters.¹³

In the wake of *Terry*, the Supreme Court has rendered several decisions providing some instruction for distinguishing one type of encounter from another.¹⁴ Prior to review of those decisions, however, it is necessary to set forth the factual scenario of *Delgado* in order to give the subsequent discussion of that decision a concrete context for evaluation and comparison.

III. *I.N.S. v. Delgado*

Delgado involved a specialized fact situation¹⁵ that the Court found was not a seizure and, therefore, fell outside of the protection of the fourth amendment.¹⁶ In *Delgado*, INS agents, acting pursuant to search warrants,¹⁷ conducted a "survey" of the work force at Southern California Davis Pleating Company (Davis Pleating) to apprehend suspected illegal aliens.¹⁸ The warrants had been issued upon a showing of probable

¹² — U.S. at —, 104 S. Ct. at 1762 (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976)).

¹³ See *supra* note 3.

¹⁴ See, e.g., *Florida v. Royer*, 460 U.S. 491 (1984); *United States v. Mendenhall*, 446 U.S. 544 (1980); *Brown v. Texas*, 443 U.S. 47 (1979); *Sibron v. New York*, 392 U.S. 40 (1968).

¹⁵ This was a request for injunctive relief to prohibit "factory surveys" or raids to discover illegal aliens.

¹⁶ — U.S. at —, 104 S. Ct. at 1759.

¹⁷ The INS receives information, sometimes from anonymous sources, that a particular factory may be employing illegal aliens. The INS then will either request consent from the factory owner to enter and search for illegal aliens or obtain a search warrant if consent is refused. GEO. U.L. CENTER IMM. L. REP. 29-30 (Fall 1983).

¹⁸ Factory survey raids may not be the irreplaceable tool that the INS claims they are. One study emphasized that "it is both more humane and cost effective to deter people from entering the United States than it is to locate and remove them from the interior." U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: FINAL REPORT AND RECOMMENDATIONS OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY TO THE CONGRESS AND THE PRESIDENT OF THE UNITED STATES 47 (1981). A study done by the Commission estimated that Border Patrol operations cost \$43.38 per illegal alien apprehended as opposed to \$73.55 per alien expelled as a result of INS operations in the interior. NORTH, ENFORCING THE IMMIGRATION LAW: A REVIEW OF THE OPTIONS 16-17 (1980). The study also indicates that the "INS has traditionally allocated a relatively slight portion of its resources to interior enforcement." *Id.* at 53. The INS in its PRELIMINARY REPORT ON PROJECT JOBS (1983), suggested that those raids opened up few jobs for documented workers while imposing significant costs on taxpayers, workers and employees. The INS arrested 5,440 aliens in nine metropolitan areas, and claimed the project was a success since "the jobs referred represent \$50.6 million in annual wages." *Id.* at 1. However, the raids cost more than \$1 million in direct INS expenditures as well as unestimated losses caused by workplace disruption. Brief

cause¹⁹ that numerous illegal aliens were employed at Davis Pleating, although none were specifically named. The INS conducted two "surveys" at Davis Pleating, one in January of 1977 and another in October of 1977. A third survey was conducted at Mr. Pleat, another garment factory, with the employer's consent.²⁰ Justice Rehnquist, writing for the majority, found that the "survey" encounter between a government agent and a private individual did not warrant the level of protection mandated by a seizure.²¹

The manner in which the INS conducted all three of these "surveys" was essentially the same. Immediately upon the arrival of INS officials at each site, several agents positioned themselves at the building's exits, while other agents questioned employees at their work stations. The INS agents were armed, carried walkie-talkies and displayed their badges. They questioned most, but not all, of the employees.²²

The agents moved systematically throughout the factory; they approached employees, identified themselves, and then asked questions concerning the employee's citizenship. If the employee gave a "satisfactory" response, the agents moved on; if the employee gave an "unsatisfactory" response or admitted that he was an alien, the employee was then asked to produce his immigration papers. During the survey, all employees including the four named respondents²³ continued with their work and were

of the Mexican American Legal Defense & Education Fund, Inc. and the American Jewish Committee as Amicus Curiae at 21, *INS v. Delgado*, ___ U.S. ___, 104 S. Ct. 1758 (1984) [hereinafter cited as *Amicus Brief*].

¹⁹ Probable cause for the search warrant was based on depositions and affidavits of INS agents, who conceded that they reached the conclusion that illegal aliens were employed at a factory by looking largely to the racial or ethnic characteristics of the work force. In addition, testimony was obtained from three Latin American women arrested on their way to work at Davis Pleating. However, none of the women identified any alien by name or gave any support to their conclusion that illegal aliens were being employed at the factory. See *Amicus Brief*, supra note 18, at 3.

²⁰ ___ U.S. at ___, 104 S. Ct. at 1760.

²¹ *Id.* at ___, 104 S. Ct. at 1742.

²² Some agents describe the selective process as one involving the use of factors which may indicate that a person is an alien. Such factors include: clothing; appearance; coloring; demeanor; language; accent; and a variety of subjective factors. GEO. U.L. CENTER IMM. L. REP. 49 (Fall 1983).

Experts in the area of Latin American immigration testified that they were unaware of any differences between legal immigrants or naturalized citizens of Latin ancestry and undocumented aliens with respect to skin color, eye color, hair color, height or other physical characteristics since in southern California and most of the southwest large percentages of the citizenry are, or appear to be, of Hispanic ancestry and many speak Spanish as their native tongue. Neither appearance nor the presence of an "accent" is sufficient to justify a belief that an individual is an illegal alien. *Amicus Brief*, supra note 18, at 5.

²³ Three of the respondents were employed at Davis Pleating. Delgado was asked where he was from, and when he replied "Mayaguez, Puerto Rico," the agent left. Respondent Correa was asked where she had been, and when she answered "Huntington Park," the agent walked away. Respondent Labontes was tapped on the shoulder and asked in Spanish:

free to move around within the factory.²⁴ During the course of one of the three factory "surveys," however, one respondent described an incident in which an INS agent stationed at an exit attempted unsuccessfully to prevent a worker from leaving.²⁵ Justice Rehnquist described this encounter as an isolated ambiguous incident which failed to show that the INS procedures constituted a "seizure."²⁶

In reviewing past "seizure" decisions of the Court, Justice Rehnquist found that a detention under the fourth amendment has not occurred in an encounter between the police and a citizen unless the circumstances of the encounter are so "intimidating as to demonstrate that a reasonable person would have believed that he was not free to leave if he had not responded."²⁷ It was this standard that Justice Rehnquist and the majority used to evaluate the *Delgado* factory surveys.

After applying this standard, the Court concluded that the *Delgado* encounter was not so intimidating that a reasonable person would have believed that he was not free to leave; therefore, no seizure occurred.²⁸ Justice Rehnquist reasoned: "When people are at work their freedom to move about has been meaningfully restricted, not by the actions of the law enforcement officials, but by the workers' voluntary obligation to their employers."²⁹ Since the workers were free to continue working and to move about the factory, the manner in which the surveys were conducted did not result in a reasonable fear by the workers that they were not free to leave.³⁰ The majority characterized the questioning of each respondent as nothing more than a "brief encounter"³¹ that did not amount to a fourth amendment seizure.

Keeping in mind the factual scenario and holding of *Delgado*, an examination of the Court's previous efforts in this area is essential in order to render an effective evaluation and ultimate judgment of the *Delgado*

"[w]here are your papers." She responded that she had them and showed them to the agents without any further request. At Mr. Pleat, respondent Miramontes was questioned about her citizenship enroute from an office to her worksite. When she replied that she was a resident alien and produced her work permit at the agents request, the agent left. — U.S. at —, 104 S. Ct. at 1764.

²⁴ Several agents carried handcuffs and used them to detain those apparently suspected of being illegal aliens. The operation unfolded with surprise and resulted in sustained disruption of the working environment. *Garment Workers v. Sureck*, 681 F.2d 624 (9th Cir. 1982)(lower court ruling on *Delgado*). This disruption included the attempt by some workers to hide. *Id.* at 627. Respondents *Delgado* and *Labante* both left the building during the survey; neither stated in their depositions that they were prevented from leaving, restrained in any way, or even questioned. *Id.*

²⁵ — U.S. at —, 104 S. Ct. at 1764 n.6.

²⁶ *Id.*

²⁷ *Id.* at —, 104 S. Ct. at 1763.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at —, 104 S. Ct. at 1764.

decision.

IV. *Terry v. Ohio* AND ITS PROGENY

The concept of a seizure, including an encounter other than an arrest, was first promulgated in *Terry v. Ohio*.³² *Terry* involved an encounter between Officer McFadden, an experienced police detective, and two individuals including the defendant that the detective suspected were about to commit a robbery. The detective approached the men, identified himself as a police officer, and asked for their names. When the men "mumbled something" in response, Officer McFadden grabbed Terry, spun him around, and patted down the outside of his clothing. He felt a pistol and, being unable to remove it, ordered the men into a nearby store where he removed Terry's overcoat and patted down the other man, finding a gun. The detective had no probable cause to arrest the individuals,³³ however, "[i]n this case there can be no question that Officer McFadden seized [the] petitioner."³⁴ Chief Justice Warren stated that "whenever a police officer arrests an individual and restrains his freedom to walk away, he has seized that person."³⁵ The Chief Justice concluded, however, that this type of police action is necessary as a result of the traditional diversity of encounters between citizens and police, some of which may lead to dangerous situations.³⁶ To determine whether an officer's actions are reasonable, the governmental interest which justifies the official intrusion must be balanced against the constitutional rights of the individual.³⁷

By characterizing the *Terry* police-citizen encounter as a seizure, the Warren Court defined seizure as a restraint on an individual's freedom to walk away from the police. Although this fundamental concept of *Terry* remains intact, the Court has continued to refine it in cases such as *Brown v. Texas*,³⁸ *United States v. Mendenhall*³⁹ and *Florida v. Royer*.⁴⁰

In *Brown*, police in a patrol car spotted the appellant and another individual in an alley. One officer got out and asked the appellant to identify himself and explain what he was doing in the alley. The other man was neither questioned nor detained. The officers did not suspect the appel-

³² 392 U.S. 1 (1968).

³³ "But we deal here with an entire rubric of police conduct - necessarily swift action predicated upon the on-the-spot observations of the officer on the beat - which historically has not been, and as a practical matter could not be, subjected to the warrant procedure." *Id.* at 20.

³⁴ *Id.* at 19.

³⁵ *Id.* at 16.

³⁶ *Id.* at 30.

³⁷ *Id.* at 21. Governmental interests include crime prevention and officer safety. See also *Camara v. Municipal Court*, 380 U.S. 523, 534-35 (1967).

³⁸ 443 U.S. 47 (1979).

³⁹ 443 U.S. 544 (1980).

⁴⁰ ___ U.S. ___, 103 S. Ct. 1319 (1983).

lant of any specific misconduct. Yet, when the appellant refused to identify himself, he was arrested under a Texas law⁴¹ which makes it a crime for a person to refuse to give his name and address to an officer "who has lawfully stopped him and requested the information."⁴²

The Court held that when the officers detained the appellant for the purpose of identification, he was seized for purposes of the fourth amendment.⁴³ Therefore, the Court concluded that mere detention for the purpose of identification may, in fact, constitute a seizure; this holds true even in the absence of specific questioning designed to further a criminal investigation.

In *Mendenhall*, as the respondent arrived at the Detroit Metropolitan Airport from Los Angeles, she was watched by two plain clothes agents of the Drug Enforcement Administration (DEA). After observing the respondent's conduct, which was characteristic of persons unlawfully carrying narcotics,⁴⁴ the agents approached her, identified themselves as federal agents, and asked to see her identification and airline ticket. The respondent, Mendenhall, produced her driver's license which listed a different name from her airline ticket. When asked why the ticket bore a different name, she replied that she just felt like using that name.⁴⁵ In

⁴¹ TEX. PENAL CODE ANN. § 38.02(a) (Vernon 1974).

⁴² 443 U.S. at 550.

⁴³ Commentators have noted that in 1978 the Court began to vindicate fourth and fifth amendment exclusionary rule claims with some regularity. Six such claims were upheld in that year: *Brown v. Texas*, 443 U.S. 47 (1979); *Arkansas v. Sanders*, 442 U.S. 753 (1979) (warrant required prior to search of luggage seized from lawfully stopped auto); *Torres v. Puerto Rico*, 442 U.S. 465 (1979); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979); *Delaware v. Prouse*, 440 U.S. 648 (1979) and *New Jersey v. Portash*, 440 U.S. 450 (1979). See Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436 (1980). The government's victory percentage in criminal cases declined from 79% in the 1975 term to 59% in the 1976 term. *Id.* at 448 n.68.

⁴⁴ Respondent fit the "drug courier profile," an abstract of characteristics typical of persons carrying illicit drugs. Seidman, *supra* note 43, at 547 n.1. Evidently, DEA officers infer a desire to avoid detection from a traveller being the last to disembark. *Mendenhall*, 446 U.S. at 547 n.1. A similar inference has been made if the passenger is the first to deplane. See J. CHOPER, Y. KAMISAR & L. TRIBE, *THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1979-1980* 137-39 (1981). In discussing *Mendenhall*, Choper contrasts DEA reliance on Mendenhall's position as the last to disembark with another prosecutor's reliance on a defendant's position as the first, remarking that "it would not surprise me if one of these days, the government argues that a certain defendant met the profile because when the passengers deplaned they were exactly in the middle of the line - to avoid attracting attention, of course." *Id.* at 138 (cited in Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 219 n.27 (1983)).

For additional commentary on drug courier profiles, see Comment, *Criminal Profiles After United States v. Mendenhall: How Well Founded A Suspicion?*, 1981 UTAH L. REV. 557; Note, *Drug Courier Profile Stops and the Fourth Amendment: Is the Supreme Court's Case of Confusion In Its Terminal Stage?*, 15 SUFFOLK U.L. REV. 217 (1981); Note, *Drug Trafficking at Airports - The Judicial Response*, 36 U. MIAMI L. REV. 91 (1981).

⁴⁵ 446 U.S. at 548.

response to further questioning, the respondent indicated that she had only been in Florida for two days. When one of the agents specifically identified himself as a federal narcotics agent, Mendenhall, according to the agents' testimony, "became quite shaken, extremely nervous. She had a hard time speaking."⁴⁶ After returning the airline ticket and driver's license, the agent asked the respondent if she would accompany him to the airport DEA office for further questioning. She did so and later consented to a search, during which narcotics were discovered.⁴⁷

After reviewing its decisions in *Terry* and *Sibron v. New York*,⁴⁸ in which it approved of a search of the defendant because his "deliberately furtive actions and fright at sight of law officer were proper factors" in their decision to arrest,⁴⁹ the Court held that Mendenhall had not been seized by the two DEA agents.⁵⁰ The Court reiterated the principle that not every encounter between a police officer and a citizen is an intrusion requiring objective justification and the protection of the fourth amendment.⁵¹ The Court found that Mendenhall was free to walk away from the questioning despite the fact that the police initiated the contact, that it constituted more than a few questions, and that the detainee experienced objective discomfort. "As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification."⁵² The Court also emphasized the *Terry* rationale that "characterizing every street encounter between a citizen and the police as a seizure, while not enhancing any interest served by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices."⁵³

Despite and yet perhaps because of its holding in this difficult decision, the *Mendenhall* Court felt motivated to identify the circumstances that would transform a mere encounter into a protected seizure. These include: the threatening presence of several officers; the display of a weapon by an officer; some manner of physical contact with the person by an officer; and the use of language or tone of voice indicating that compliance with the officer's request might be compelled.⁵⁴

The Court concluded that the mere fact that an officer identified him-

⁴⁶ *Id.*

⁴⁷ *Id.* at 549.

⁴⁸ 392 U.S. 40 (1968).

⁴⁹ *Id.* at 66-67.

⁵⁰ 446 U.S. at 555.

⁵¹ *Id.* at 554.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

self does not, by itself, convert an encounter into a seizure.⁵⁶ Using the criteria set forth in *Mendenhall* to gauge such an encounter, it is unclear, although there was more than one officer, whether the DEA agents presented a threatening presence; there were no weapons displayed and the agents did not touch the defendant. It would appear from the facts presented in *Mendenhall* that the agents used a tone of voice compelling compliance by the detainee. However, to gauge such a nebulous and subjective indicator as the tone of speech, or the precise language used, provides little meaningful guidance.

Despite the vagueness of the circumstances and standards set forth in *Mendenhall*, this decision does not constitute the first real attempt by the Court to give meaningful guidance to this area. The *Mendenhall* Court adopted the fairly general holdings of *Terry* and *Brown* and began the process of particularizing the kinds of actions that transform an unprotected encounter into a fourth amendment seizure.

The Court further attempted to refine the parameters of a seizure in *Florida v. Royer*.⁵⁶ The decision of the Court was consistent with *Brown* and *Mendenhall* in the respect that asking for and examining Royer's driver's license, in and of itself, was not sufficient to turn the encounter into a seizure. However, the situation in *Royer* escalated into a full-blown seizure when the officers identified themselves as narcotics agents, told Royer he was suspected of transporting narcotics, and asked him to accompany them to the police room while retaining his airline ticket and driver's license. The police did not indicate to Royer that he was free to leave.⁵⁷ Justice White, writing for the majority, found that these circumstances amounted to a sufficient showing of official authority; a reasonable person under the circumstances would have believed that he was not free to leave. As a result, Royer had been seized for the purposes of the fourth amendment.⁵⁸

A comparison of *Royer* and *Mendenhall* highlights the nebulous and subjective parameters by which a seizure is characterized. In both cases, more than one agent confronted the respective subjects and asked for identification. Subsequent to inconclusive questioning, both subjects were "asked" to accompany the agents for further questioning; neither subject was advised of his right to walk away. Despite the apparently consistent fact patterns, the Court found that Royer was seized and *Mendenhall* was not.

Only a year after *Royer*, the *Delgado* Court, working with these vague and deficient standards was confronted with the complex and critical fact

⁵⁶ *Id.* at 555. The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions and may go on his way. *Florida v. Royer*, 460 U.S. 491 (citing *Terry*, 392 U.S. at 32-3 (Harlan, J., concurring)).

⁵⁶ 460 U.S. 491 (1983).

⁵⁷ *Id.* at 502.

⁵⁸ *Id.* at 501 (citing *Mendenhall*, 446 U.S. at 554).

pattern of the factory surveys.⁵⁹

V. *Delgado*: CHANGING THE RULES

Despite *Delgado*'s ultimate holding, an appreciation of the law of *Terry*, *Mendenhall* and *Royer* should lead to the conclusion that the factory workers had been seized. The presence of uniformed officers with weapons in the factory and armed agents stationed at the exits can certainly be characterized as threatening.⁶⁰ Although the only indication of any physical contact by an officer was an innocuous tap on the shoulder,⁶¹ one of the respondents described an incident during which an agent physically blocked an exit and a worker pushed him aside.⁶² Moreover, while there was no indication of any overt threats, it can be inferred that an agent's persistent questioning would only terminate when satisfactory answers were received. While these circumstances alone appear to distinguish *Delgado* from *Terry*, *Mendenhall* and *Royer*, other significant differences were present in *Delgado* that reinforced the conclusion of seizure.

The first distinction was the presence of "guards" at the exits. Justice Rehnquist asserted that the purpose of this procedure was "to insure that all persons in the factory were questioned, not to detain the workers inside."⁶³ Despite this appraisal, the placement of agents at the exits adds a strong indication of compulsory questioning, indeed, it appears that the questioned workers were not free to leave. While it may be argued that the detainees in both *Mendenhall* and *Royer* could choose to walk away, it appears clear that the detainees in *Delgado* had no such choice.

Another distinction concerns the nature of the questions asked by the INS officials. Justice Rehnquist discussed whether questioning an individual about his identification would constitute a seizure:

Although we have yet to rule directly on whether mere question-

⁵⁹ During the course of the first survey at Davis Pleating, 78 illegal aliens were arrested out of a work force of approximately 300. The second survey nine months later resulted in the arrest of 39 illegal aliens out of about 200 employees. The survey at Mr. Pleat resulted in the arrest of 45 illegal aliens out of about 90 employees. — U.S. at ___, 104 S. Ct. at 1766 n.3.

⁶⁰ *Id.* at ___, 104 S. Ct. at 1759.

⁶¹ Respondent Labontes was tapped on the shoulder and asked in Spanish, "Where are your papers?" Labontes responded that she had her papers and without any further request from the INS agents, showed the papers to the agents, who then left. *Id.* at ___, 104 S. Ct. at 1764.

⁶² *Id.* at ___, 104 S. Ct. at 1764 n.6.

⁶³ *Id.* at ___, 104 S. Ct. at 1763. The United States Civil Rights Commission found: "Testimony received by the Commission indicates that INS area control operations do cause confusion and pandemonium among all factory employees, thereby disrupting the factor's operations and decreasing production." — U.S. at ___, 104 S. Ct. at 1774 n.7. (quoting UNITED STATES COMMISSION ON CIVIL RIGHTS, *THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION 90-91* (1980)).

ing of an individual by a police official, without more, can amount to a seizure under the Fourth Amendment, our recent decision in *Royer* . . . plainly implies that interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure.⁶⁴

Justice Rehnquist, however, failed to distinguish questions relating to identity from inquiries relating to citizenship. Questions relating to identity, such as those involved in *Mendenhall* and *Royer*, are clearly preliminary to the primary purpose of the questioning officer or agents — whether the detainee was involved with narcotic activity. By contrast, the initial questions posed in *Delgado* involved questions concerned with citizenship rather than questions related to identity. Nonetheless, Justice Rehnquist made no distinction on this point. Questions relating to citizenship in the factory “survey” situation go to the heart of the matter; the agents were attempting to apprehend illegal aliens, and their exclusive focus was citizenship or lack thereof. The questions posed in *Delgado* did not constitute mere preliminary interrogation, but rather involved the central concern and responsibility of the interrogating officers. Nonetheless, Justice Rehnquist made no distinction on this point.

A third and critical distinction is the failure of Justice Rehnquist to consider the totality of the environment in which the INS inquiries were made.⁶⁵ Justice Rehnquist concentrated on the content of the questions asked rather than on the coercive environment. He emphasized the fact that the workers appeared to be free to walk around and continue working⁶⁶ and apparently disregarded the fact that armed agents were blocking the exits⁶⁷ and that a worker was prevented from leaving by an INS agent until he pushed the agent aside.⁶⁸ Justice Rehnquist labeled this latter incident “ambiguous and isolated”⁶⁹ despite the fact that, in *Mendenhall*, a person prevented from leaving was found to have been seized.⁷⁰

Despite these seemingly persuasive factors in support of a finding of seizure, the *Delgado* Court found that a seizure had not occurred. Instead, the Court concluded that the circumstances of this factory survey

⁶⁴ ___ U.S. at ___, 104 S. Ct. at 1762.

⁶⁵ The totality analysis must accommodate two competing concerns: the legitimate need for such searches and the equally important requirement of assuring the absence of coercion. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1972).

⁶⁶ ___ U.S. at ___, 104 S. Ct. at 1763.

⁶⁷ In Petitioners brief, this issue was addressed. “Indeed, in *Zepeda v. INS*, 708 F.2d 355, 363 (9th Cir. 1983), *petition for reh'g filed*, the Court of Appeals specifically stated that its holding in this case that an INS factory survey constitutes a seizure of the work force rested on the fact that agents are stationed at the doors during the survey.” *Brief for Petitioner* at 24 n.15, *Delgado*, ___ U.S. at ___, 104 S. Ct. at 1758.

⁶⁸ *Id.* at ___, 104 S. Ct. at 1764 n.6.

⁶⁹ *Id.*

⁷⁰ The seizure in *Mendenhall* was determined to be proper. 446 U.S. at 558.

were not so intimidating that a reasonable person would have felt that he was not free to walk away. Given the previously reviewed holdings, as well as the circumstances determined to constitute a seizure as set forth in *Mendenhall*, *Delgado* is a difficult case to reconcile with its predecessors.

VI. A DISGUISED IMMIGRATION CASE?

Had the *Delgado* Court employed the rationale of *Michigan v. Summers*, which held that a search warrant carried with it a limited authority to detain the occupants of the premises,⁷¹ or opted for the perspective of Justice Powell in his concurrence that *Delgado* was actually an immigration case,⁷² perhaps the holding would not fly in the fact of the sound application of principle expressed in *Delgado's* predecessors. As suggested by Justice Powell in his concurring opinion, *Delgado* could have decided in the same manner as the immigration cases, *United States v. Brignoni-Ponce*⁷³ and *United States v. Martinez-Fuerte*.⁷⁴

In *United States v. Brignoni-Ponce*,⁷⁵ the Court disallowed the border

⁷¹ 452 U.S. 692 (1981). The facts of *Summers* are as follows:

As Detroit police officers were about to execute a warrant to search a house for narcotics, they encountered respondent descending the front steps. They requested his assistance in gaining entry and detained him while they search[ed] the premises. After finding narcotics in the basement and ascertaining that respondent owned the house, the police arrested him, searched his person, and found in his coat pocket an envelope containing 8.5 grams of heroin.

Id. at 693.

The Court held that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted. Although the facts of *Summers* involved a resistance, while *Delgado* involved a factory workplace, the Court could have chosen to extend the *Summers* rationale rather than evade the requirements of *Terry*. However, in *Ybarra v. Illinois*, 444 U.S. 85 (1979), the Court declined to extend *Terry* to allow the search of a person without particularized suspicion. In *Ybarra*, a patron of a bar who was the subject of a search warrant, along with the bartender, was searched during the execution of the warrant without reason to believe that he had committed or was committing any criminal offense. Moreover, he had made no gestures indicating he was attempting to conceal contraband or said anything which might have lead police to become suspicious. *Id.* at 91. The Court held that the fourth amendment requires that officers have a particularized suspicion to make the search of a person reasonable. *Id.* at 92.

In *Delgado*, the INS was acting pursuant to valid search warrants, and the employees were certainly closely associated with the subject of the warrants. It might have been better for the Court to leave the boundaries of what constitutes a seizure as established by *Terry* and its progeny intact and to extend *Summers* to include a person's place of employment.

⁷² — U.S. at —, 104 S. Ct. at 1765-67. (Powell, J., concurring). For an insightful commentary addressing the employment of race as an element in establishing probable cause in searches for illegal aliens, see Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 (1983).

⁷³ 428 U.S. 543 (1976).

⁷⁴ 422 U.S. 873 (1975).

⁷⁵ *Id.* In *Brignoni-Ponce*, two officers observing traffic from a patrol car parked at the side of the highway near San Clemente, an area near the Mexican border, pursued respon-

patrol's practice of stopping vehicles by a roving patrol in an area near the border when the only grounds for suspicion were that the occupants appeared to be of Mexican ancestry.⁷⁶ The Court balanced the public's interest against the individual's right to personal security free from arbitrary interference by law officers.⁷⁷ The Court acknowledged the significant public interest in having effective measures to prevent the illegal entry of aliens at the Mexican border;⁷⁸ however, to protect the individual's rights and liberty, a "reasonable suspicion" must exist in order to allow the minimal intrusion of a brief stop.⁷⁹

One year later, in *Martinez-Fuerte*, the Court found that the practice of stopping automobiles for brief questioning at permanent traffic checkpoints away from the Mexican border was consistent with the fourth amendment, and under these circumstances, there is no need for a warrant.⁸⁰ This case extended the ability of police to investigate and act in an

dent's car and stopped it, saying later that their only reason for doing so was that its three occupants appeared to be of Mexican descent. The officers questioned the occupants about their citizenship, learned that the passengers had entered the country illegally, and then arrested all three. *Id.* at 874-75.

⁷⁶ This extends the court's holding in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (holding that officers need a warrant or probable cause to search vehicles by the use of roving patrols at points removed from the border).

⁷⁷ 422 U.S. at 878.

⁷⁸ The Court cites the estimate of one million illegal aliens made by the Commissioner of the INS for the Immigration and Nationality Subcommittee of the House Judiciary Committee in 1972 and the significantly higher figure cited by the INS itself in its 1974 annual report of ten to twelve million. *Id.* at 878 n.4. The number is now significantly higher. The Court also acknowledges the difficulty in policing an international border almost 2,000 miles long, when many aliens cross the border on foot miles away from patrolled areas. *Id.* at 879.

⁷⁹ *Id.* at 881. The stop and inquiry must be "reasonably related in scope to the justification for their initiation." *Terry*, 392 U.S. at 29. The officer must be aware of specific articulable facts that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country. Such factors may include proximity to the border, traffic patterns on a particular road, and previous experience with alien traffic. 422 U.S. at 884-85. The mere fact that the occupants of a car appear to be of Mexican ancestry is not sufficient. *Id.* at 886.

⁸⁰ 429 U.S. at 559. In *Martinez-Fuerte*, the validity of a permanent immigration checkpoint on Interstate 5 near San Clemente, California was questioned. Interstate 5 is the principle highway between San Diego and Los Angeles and the checkpoint is 66 miles north of the Mexican border. The checkpoint was described as follows:

Approximately one mile south of the checkpoint is a large black on yellow sign with flashing yellow lights over the highway stating "ALL VEHICLES, STOP AHEAD, 1 MILE." Three quarters of a mile further north are two black on yellow signs suspended over the highway with flashing lights stating "WATCH FOR BRAKE LIGHTS." At the check-point, which is also the location of a State of California weighing station, are two large signs with flashing red lights suspended over the highway which state "STOP HERE - U.S. OFFICERS." Placed on the highway are a number of orange traffic cones funneling traffic into two lanes where a Border Patrol agent in full dress uniform, standing behind a white on red STOP sign checks traffic. Blocking traffic in the unused lanes are official U.S. Border Patrol vehicles with flashing red lights. In addition, there is a permanent

immigration situation without removing any of the protections provided by *Terry*.⁸¹

The Court again performed a balancing test between the interests of the individual and those of public policy.⁸² The Court felt that the predictability of the checkpoints protects the expectation of privacy that an individual has on the highway, and the fact that the field officers may stop only those cars passing the checkpoint leaves less room for possible harassment by officers with unbridled authority.⁸³ Justice Powell would have preferred to resolve *Delgado* using the *Martinez-Fuerte* rationale that permits a stop at a fixed checkpoint away from the border.⁸⁴

Justice Powell's concurrence asserts that *Delgado* could have been decided along the lines of *Martinez-Fuerte*. Justice Powell referred to the government's interest in using factory surveys as a means of controlling the illegal alien problem.⁸⁵ He explained that the government's interest is

building which houses the Border Patrol office and temporary detention facilities. There are also floodlights for nighttime operation.

Id. at 545-46.

A "point" agent stands between the two lanes of traffic usually screening all northbound vehicles which the checkpoint brings to a virtual halt. In a small number of cases, the agent will determine that further inquiry is in order, and he will direct these vehicles to a secondary inspection area where their occupants all asked about their citizenship and immigration status. The average length of this secondary inspection is three to five minutes. The government admits that these secondary stops are not based on any articulable suspicion. *Id.* at 545-47.

⁸¹ The Court states that for many years it has been a national policy to limit immigration, as the number of aliens who wish to live and work in the United States is much larger than the number that can be comfortably accommodated. The flow of illegal aliens from Mexico, estimated to comprise approximately 85% of all illegal immigrants, poses formidable law enforcement problems. The Court acknowledges the ease with which an individual can enter the United States undetected. 428 U.S. at 551-52.

The Court cites the effectiveness of the fixed checkpoint in apprehending illegal aliens. At the San Clemente checkpoint during an eight-day period in 1974, approximately 146,000 vehicles passed through the checkpoint, 820 of which were referred to the secondary inspection area where Border Patrol agents found 725 deportable aliens in 171 vehicles. *Id.* at 554.

Justices Brennan and Marshall lodged a poignant dissent in *Martinez-Fuerte*. The two-pronged attack focused on the abandonment of the reasonable suspicion requirement and on the discrimination it would permit. "That law in this country should tolerate use of one's ancestry as probative of possible criminal conduct is repugnant under any circumstances." *Id.* at 572 n.1. This is seemingly in support of an equal protection argument raised in respondent's brief. Brief for Respondent at 43, *United States v. Brignoni-Ponce*, 428 U.S. 543 (1976).

⁸² 428 U.S. at 559.

⁸³ ___ U.S. at ___, 104 S. Ct. at 1766-67 and n.6.

⁸⁴ Justice Powell's concern is the fact that factory surveys account for one-half to three-quarters of the illegal aliens arrested away from the border in Los Angeles and the government's great interest in continuing the surveys. Justice Powell also points out that one of the main reasons that the illegal aliens come is to seek employment and that factory surveys strike directly at this cause.

⁸⁵ Justice Powell cites an affidavit by the INS assistant director in Los Angeles who reported that factory surveys account for one-half to three-quarters of the illegal aliens

great due to dimensions of the illegal alien problem in this country and the fact that one of the main reasons illegal aliens come to this country is to seek employment.⁸⁶ Factory surveys strike at this cause directly and diminish the incentive for illegal aliens to cross the border.⁸⁷ Justice Powell persuasively argued that the intrusion into the fourth amendment rights of the employees is no greater than the intrusion in *Martinez-Fuerte*.⁸⁸

If the *Delgado* Court had opted for this immigration rationale, the integrity of *Terry*, *Mendenhall* and *Royer* would not have been dealt such a great blow. Clearly given the different standards in immigration cases, the Court could have reached the same conclusion without violating the rules that it had created to define fourth amendment seizures.

VII. CONCLUSION

Delgado is a difficult case to categorize. Despite the insistence of Justice Rehnquist, *Delgado* does not merely apply existing "seizure" law to the factory "survey" scenario. The Court specifically rejected an immigration approach, one which appears to represent the most viable means of allowing these particular INS factory surveys. If *Delgado*, as Justice Rehnquist implicitly acknowledges, is a "seizure" case, it unequivocally represents a significant broadening of the permissible scope of an unprotected encounter to which the police may subject an individual. The guidelines carefully wrought since *Terry* now have been so vastly expanded that further reference to *Terry*, *Mendenhall* and *Royer* is only paying lip-service to history. The new standard is *Delgado* with its broad permissive police power. *Delgado* must be considered as further evidence

identified and arrested away from the border in Los Angeles. In that district alone, over 20,000 illegal aliens were arrested by factory surveys in one year. *Id.* at ___, 104 S. Ct. at 1766.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* Justice Powell, although acknowledging the surprise that the initial intrusion would cause employees, seems to believe that the surprise would be mitigated by the fact that the clear purpose of the raid (to apprehend illegal aliens) would be readily apparent to lawful employees and that this would allay their concern and fright. Justice Powell also notes that the expectation of privacy in one's workplace is similar to that in one's automobile and is greatly lowered from the expectation in one's residence. *Id.* at ___, 104 S. Ct. at 1767.

However, Justice Powell does not discuss the possible abuse of discretion inherent in factory surveys. In *Martinez-Fuerte*, this unfettered discretion was limited by the fact that officers could stop only those cars which passed through the fixed checkpoint. 428 U.S. at 559. In order to eliminate the possible abuse of discretion and to prevent harassment of a particular group of factories or people by the INS, it would be necessary to review the procedure whereby factories were chosen to undergo surveys. What would be needed to protect the interests of the individual is some routine administrative procedure which eliminated the possibility of abuse - some method analogous to the fixed checkpoint in *Martinez-Fuerte*.

of the trend or movement by the Supreme Court to expand the ability of police to react more effectively in “the often competitive enterprise of ferreting out crime.”⁸⁹ The shocking aspect of this trend is that the fourth amendment protections are being slowly chiseled away.

⁸⁹ *Johnson v. United States*, 333 U.S. 10, 14 (1948).