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IS THERE A "MEXICAN EXCEPTION" TO THE FOURTH AMENDMENT?

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PROLOGUE

An earlier version of the Essay was presented at the Sixth Annual LatCrit conference, which was held at the Conference Center at the University of Florida. As a long-term resident of California who had never visited Florida, I looked forward to the LatCrit Conference. Unfortunately, I registered late for the Conference and the Conference Center was full when I sought to make my reservation and I was forced to look for a motel near the campus.

Because I was on a tight budget and unfamiliar with Gainesville, I drove to several inexpensive motels near the campus. After encountering several "no vacancy" signs, I was heartened to see a vacancy sign at a Ramada Inn Express near the highway. After checking the rate at the front desk, the attendant invited me to check out the rooms in a wooded area in the rear of the motel, which was somewhat removed from the highway. When I drove to the back of the motel, I noticed that one of the rooms was open. I decided to check out the room and to inquire about the noise from the highway. When I walked up to the open door of the room I spotted a "thirty-something" blonde haired man dressed in Dockers and a golf shirt who appeared to be inspecting the room. Assuming the man was the motel manager, I approached to ask whether I could peek at the room. I also wanted to inquire about the noise from the highway. The man looked startled, froze, and was unresponsive. After looking me over for an instant,

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the man said "no English" in an accent that sounded like Russian or a Slavic language. I then realized that he was not the manager but a person in charge of cleaning the room. I apologized and asked in Spanish, "habla español"? He shook his head and pointed me toward the main office.

I stayed at the motel for several nights and quickly realized that all of the staff that performed the housecleaning and maintenance at the motel were young Eastern European men, who were clearly recent immigrants and most likely undocumented. I was shocked because I had never seen White men performing the low paying, minimum wage jobs that Latinas and Black women normally assumed.

I related the incident in the introduction to my presentation on "The Mexican Exception to the Fourth Amendment." I used the example to show how race matters in questions of immigration and to discuss how race affects one's status as an undocumented alien. The laborers at the hotel were apparently recently arrived undocumented Eastern European men who were temporarily working in low status, low paying jobs that are normally reserved for undocumented Latinos, especially women, and poor Blacks. Like recent Latino immigrants, these men lacked English-language skills and immigration papers, but they were afforded certain privileges by virtue of their race and gender. Because they were phenotypically indistinguishable from other White men, their undocumented status became relatively transparent. I, for example, assumed that the man that I encountered was the manager of the hotel and I would have no such assumption of a Latina or black motel employee.

This experience is consistent with Cheryl Harris' discussion of the concept of "Whiteness as Property" and Kimberlé Crenshaw's concepts of intersectionality, and the idea of "White Transparency."[1] In an insightful essay, Harris relates the story of her maternal grandmother who was able to "pass" and gain employment at a major retail store in Chicago's central business district in the 1930s because of "her fair skin, straight hair, and aquiline features."[2] Harris argues that in the United States, Whiteness is property in that it confers legal rights.[3] Historically, Whiteness not only defined the legal status of a person as slave or free but White identity also "conferred tangible and economically valuable benefits, and it was jealously guarded as a valued possession, allowed only to those who met a strict standard of proof."[4] Crenshaw further explores the intersectionality

1. *See generally* Cheryl I. Harris, *Whiteness as Property, in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995) [hereinafter CRITICAL RACE THEORY].

2. *Id.* at 276-302.

3. *Id.* at 280-84.

4. *Id.* at 280.

of race and gender, which is manifested through White transparancy.[5] In the dominant society and in antidiscrimination law, women are presumed to be White and people of color are presumed to be men.[6] She suggests that the concept of intersectionality be used to better understand the unique subordination of women of color.[7]

I. INTRODUCTION

The Fourth Amendment to the United States Constitution provides that,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and 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.[8]

The Amendment is applicable to the states through the Fourteenth Amendment, and it governs conduct of federal and state governmental agents.[9]

Though the Amendment does not categorically prohibit warrantless searches, it ostensibly protects the people from "unreasonable" searches and seizures. The Supreme Court has, through various decisions, reaffirmed that warrantless searches are not only suspect but are presumed to be unreasonable.[10] A "cardinal principle" of Fourth Amendment law is that "searches conducted outside the judicial process, without prior approval by judge or magistrate are per se unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions."[11]

In reality, however, the per se rule has not been closely observed. Since *Terry v. Ohio*,[12] the Court has carved out a number of exceptions, so that there is justifiable concern that the exceptions may have swallowed up the rule. In a concurring opinion in *California v. Acevedo*,[13] Justice Scalia commented that though by the 1960s it appeared that the warrant requirement had won out theoretically, the victory was illusory because the

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5. Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, in* CRITICAL RACE THEORY, *supra* note 1.

6. *Id.* at 103-22.

7. *Id.*

8. U.S. CONST. amend. IV.

9. U.S. CONST. amends. IV, XIV.

10. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967).

11. *Id.* at 357.

12. 392 U.S. 1 (1968).

13. 500 U.S. 565 (1991).

warrant requirement "had become so riddled with exceptions that it was basically unrecognizable."[14] Scalia added that one commentator had catalogued almost twenty exceptions, such as automobile, border, and exigent circumstance searches, as well as any searches incident to arrests.[15]

In this Essay, I examine whether there is also a "Mexican exception" to the Fourth Amendment. While there is clearly a Border exception to the Fourth Amendment, warrantless searches and seizures of persons who are "Mexican looking" are commonplace and extend well beyond the limits of the Border. After examining relevant case law and judicial opinions, I conclude that there is considerable support for the view that with regard to suspected alienage status, there is a *de facto,* unwritten Mexican exception to the Fourth Amendment. A related question examined is whether non-resident aliens have sufficient connection to the United States to be considered one of "the people."

II. TENSION BETWEEN NATIONAL SOVEREIGNTY AND FOURTH AMENDMENT PROTECTIONS

In 1990, the Supreme Court held that the Fourth Amendment does not apply to the search and seizure by United States agents of property owned by a nonresident alien and located in a foreign country.[16] Respondent Rene Martin Verdugo-Urquidez, a citizen and resident of Mexico, was a suspected leader of a large and violent organization and a narcotics smuggler.[17] Mexican officials, after consulting with U.S. marshals, apprehended Respondent and took him to the Border Patrol station located in Calexico, California.[18] United States marshals subsequently arrested Verdugo-Urquidez and transported him to a correctional center in San Diego, where he awaited his trial.[19]

Following the arrest, DEA agents, working in cooperation with Mexican authorities, carried out a warrantless search of Verdugo-Urquidez's properties in Mexicali and San Felipe, Mexico, seizing documents believed to implicate Respondent in drug trafficking, including a tally sheet which the government alleged reflected the quantities of marijuana smuggled into the United States.[20]

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14. *Id.* at 581-82 (Scalia, J., concurring).

15. *Id.* at 582 (Scalia, J., concurring) (quoting Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473-74 (footnote omitted)) (quotation marks omitted) (final alteration in original).

16. United States v. Verdugo-Urquidez, 494 U.S. 259, 274 (1990).

17. *Id.* at 262.

18. *Id.*

19. *Id.*

20. *Id.* at 262-63.

The district court granted his motion to suppress the evidence seized subsequent to the searches and concluded that the agents had failed to justify searching his residence absent a search warrant. A divided panel of the court of appeals affirmed."[21] While recognizing that an American search warrant would have no legal validity in Mexico, the court of appeals concluded that a warrant would have "substantial constitutional value in this country," in that it would reflect an independent judgment by a magistrate that there was probable cause and it would have defined the scope of the search.[22]

The Supreme Court reversed.[23] Writing for the majority, Chief Justice Rehnquist noted that historical evidence shows that the intent of the Fourth Amendment was to protect the public from arbitrary governmental action. "It was never suggested that the provision was intended to restrain the actions of the federal government against aliens outside of the United States territory."[24] He added that there is no indication that the Framers intended to extend Fourth Amendment protections to activities of the United States aimed at aliens who were on foreign soil or in international waters.[25]

The Chief Justice further maintained that "the people" was somehow a "term of art" which "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[26] Although Verdugo-Urquidez was lawfully present in the United States, though brought in against his will, the Court determined that he lacked sufficient connection with the United States to be considered one of "the people."[27]

The Rehnquist majority added that there was no indication that the Framers intended the Fourth Amendment to serve as a restraint on actions by the Federal government against aliens outside the United States or in international waters.[28] In fact, in 1798, just seven years after the amendment was ratified, Congress passed an act to "protect the Commerce of the United States," which authorized the President of the United States to "instruct the commanders of the public armed vessels which are, or which shall be employed in the service of the United States, to subdue,

21. *Id.* at 263 (citing United States v. Verdugo-Urquidez, 856 F.2d 1214 (9th Cir. 1988)).
22. *Id.* at 263-64 (quoting *Verdugo-Uriquidez*, 856 F.2d at 1230) (quotation marks omitted).
23. *Id.* at 275.
24. *Id.* at 266.
25. *Id.* at 267.
26. *Id.* at 265.
27. *See id.* at 271.
28. *Id.* at 266-67.

seize and take any armed French vessel, which shall be found within the jurisdictional limits of the United States, or elsewhere, on the high seas."[29]

The Court also noted that the global view of the Constitution taken by the court of appeals was contrary to the decision in the *Insular Cases*, which established that not every constitutional protection applies to governmental activity, even in areas where the United States has sovereign power.[30] The Sixth Amendment right to jury trial, for example, was found to not be applicable in Puerto Rico,[31] nor in the Philippines.[32] In distinguishing *Verdugo-Urquidez* from *INS v. Lopez-Mendoza*,[33] where a majority of the Justices assumed that the Fourth Amendment applied to illegal aliens in the United States,[34] the Court noted that the question decided in *Lopez-Mendoza* was whether the exclusionary rule should be extended to civil deportation proceedings, not whether Fourth Amendment protections are extended to illegal aliens in this country.[35] Even assuming that illegal aliens are entitled to Fourth Amendment protections, the Court felt the situation of illegals is different from that of Verdugo-Urquidez in that he had no "voluntary connection" with this country that would qualify him as one of the people.[36]

In *Lopez-Mendoza*, Respondent, Adan Lopez-Mendoza, a citizen of Mexico, was arrested in 1976 by INS agents while working at a transmission repair shop in San Mateo, California.[37] The proprietor of the shop refused to let agents interview his employees during work hours, but as one agent engaged the proprietor, another went to the back of the shop and started questioning Lopez-Mendoza.[38] When questioned, Respondent provided his name, said he was from Mexico and had "no close family ties in the United States."[39] The agent then placed him under arrest and took him to INS's offices.[40] After additional questioning, Lopez-Mendoza admitted that he was a citizen of Mexico and that he had entered the United States without inspection.[41] The agents prepared a "Record of

29. *Id.* at 267 (quoting An Act Further to Protect the Commerce of the United States, ch. 68, § 1, 1 Stat. 578 (1798)) (quotation marks omitted).

30. *Id.* at 268.

31. Balzac v. Puerto Rico, 258 U.S. 298, 304-05, 313 (1922).

32. Dorr v. United States, 195 U.S. 138, 149 (1904).

33. 468 U.S. 1032 (1984).

34. *See id.* at 1034.

35. *Verdugo-Urquidez*, 494 U.S. at 272.

36. *Id.* at 273.

37. *Lopez-Mendoza*, 468 U.S. at 1035. The Court also decided a companion case involving another Mexican national, Elias Sandoval-Sanchez. *Id.* at 1034-35.

38. *Id.* at 1035.

39. *Id.*

40. *Id.*

41. *Id.*

Deportable Alien" (Form I-213), and an affidavit executed by Respondent where he admitted his illegal entry into the United States.[42]

During the hearing before an Immigration Judge, Lopez-Mendoza moved to terminate the proceedings, arguing that he had been arrested illegally.[43] The Judge held that the legality of the arrest was not relevant in a deportation proceeding and found Lopez-Mendoza deportable, affording the option of voluntary departure.[44] The appeal was dismissed by the Board of Immigration Appeals (BIA).[45] But the court of appeals vacated the order of deportation and remanded the case in order to determine whether his Fourth Amendment constitutional rights were infringed at the time of his arrest.[46]

In a majority opinion authored by Justice O'Connor, the Court reversed the court of appeals, holding that credible evidence gathered in connection with peaceful arrests by INS officers does not have to be suppressed in an INS civil deportation hearing.[47] Applying the *Janis* balancing test, the Court concluded that the benefits of excluding reliable evidence from a deportation proceeding would not outweigh the social costs.[48] The Court believed, in other words, that the deterrent value of applying the exclusionary rule in deportation proceedings would not exceed the social costs that would be incurred by its application.[49]

Several factors would reduce the deterrent value of the exclusionary rule in a civil deportation proceeding.[50] First, even if the exclusionary rule were to apply, deportation would be possible because evidence not obtained directly from the arrest would be used to justify deportation.[51] Thus, the only things for the Government to establish are identity and alienage, and then the burden shifts to the Respondent to prove the time, location, and mode of entry.[52]

The second factor is based on practical concerns.[53] In a typical year, an INS officer makes approximately 500 arrests of suspected illegal aliens, and less than three percent agree to voluntary departure.[54] Because most INS agents know that the lawfulness of the arrest is not likely to be

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42. *Id.*
43. *Id.*
44. *Id.* at 1035-36.
45. *Id.* at 1036.
46. *Id.*
47. *Id.* at 1051.
48. *Id.* at 1042.
49. *See id.* at 1042-43.
50. *Id.* at 1043.
51. *Id.*
52. *In re* Sandoval, 17 I. & N. Dec. 70, 79 (B.I.A. 1979).
53. *Lopez-Mendoza*, 468 U.S. at 1044.
54. *Id.*

challenged in a formal deportation hearing,[55] the exclusionary rule would have limited deterrent value.

The third factor offered by the Court is that the INS reportedly has "extensive training" on Fourth Amendment law for new immigration officers and a comprehensive scheme for protecting against Fourth Amendment violations.[56] Since most arrests not along the border involve workplace raids, the INS has developed rules restricting stop, interrogation, and arrest practices to protect individuals lawfully present at the inspected work place.[57]

Finally, the Court concluded in *Lopez-Mendoza* that the social costs would not outweigh the benefits of applying the exclusionary rule in deportation proceedings.[58] One cost ostensibly is that application of the exclusionary rule would entail having the Court "close its eyes" to ongoing violations of the law.[59] Justice O'Connor remarked:

> Presumably no one would argue that the exclusionary rule should be invoked to prevent an agency from ordering corrective action at a leaking hazardous waste dump if the evidence underlying the order had been improperly obtained, or to compel police to return contraband explosives or drugs to their owner if the contraband had been unlawfully seized.[60]

Paraphrasing Justice Cardozo's famous quote, Justice O'Connor concluded that "[t]he constable's blunder may allow the criminal to go free . . ., but he should not go free within our borders."[61]

In *INS v. Delgado*,[62] a case decided in the same term as *Lopez-Mendoza*, the Supreme Court held that "factory surveys" (raids) carried out by the INS were not seizures of the entire work force, and that questioning of individual workers by INS agents did not constitute an impermissible detention or seizure.[63] The decision rejected the Ninth Circuit Court of Appeals holding that "factory surveys" constituted "a seizure of the entire work force" and that the INS agents could not interogate individuals absent reasonable suspicion that the employee to be questioned was in the country illegally.[64]

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55. *Id.*
56. *See id.*
57. *Id.*
58. *Id.* at 1046, 1050.
59. *Id.* at 1046.
60. *Id.*
61. *Id.* at 1047 (footnote omitted).
62. 466 U.S. 210 (1984).
63. *Id.* at 212.
64. *Id.*

The agents had acted after obtaining two warrants after the INS showed probable cause that the Davis Pleating Plant in Southern California employed many illegal aliens, but neither search warrant contained the name of any illegal aliens.[65] During the survey, armed INS agents were stationed near the building exits, as other agents moved throughout the factory and questioned workers at their work areas.[66] The agents showed badges, had walkie-talkies, and carried arms, though they never drew their weapons.[67]

The Respondents in *Delgado,* four employees questioned in one of the three surveys who were legal residents of the United States,[68] maintained that the factory raids "violated their Fourth Amendment right to be free from unreasonable searches [and] seizures and the equal protection component of the Due Process Clause of the Fifth Amendment."[69]

In rejecting Respondents' Fourth and Fifth Amendment claims, the Court noted that the Fourth Amendment does not prohibit all contact between the police and citizens.[70] Relying on *Terry,* the Court noted that "not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only 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."[71] The standard that has evolved over time is that an initially consensual encounter can be transformed into a seizure or detention, "if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[72]

The critical issue before the Court, therefore, was whether, under similar circumstances, a reasonable person would have believed that he was free to leave.[73] In *Florida v. Royer,*[74] Drug Enforcement Administration (DEA) Agents approached the defendant at an airport and asked him for his airplane ticket and driver's license, which the agents then examined.[75] In a plurality opinion, a majority of the Court agreed that the request and examination of the documents were "permissible in

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65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 213 n.1. Respondents Herman Delgado and Ramona Correa worked at Davis Pleating and were permanent resident aliens. *Id.*

69. *Id.* at 213.

70. *Id.* at 215.

71. *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968)) (quotation marks omitted).

72. *Id.* (citing United States v. Mendenhall, 446 U.S. 544, 554 (1980)); *see also* Florida v. Royer, 460 U.S. 491, 502 (1983) (citing *Mendenhall,* 446 U.S. at 554).

73. *See Delgado,* 466 U.S. at 215.

74. 460 U.S. 491 (1983).

75. *Id.* at 493-94.

themselves."[76] In *Brown v. Texas*,[77] however, the Court held that the physical detention of Respondent without reasonable suspicion of misconduct violated his Fourth Amendment right to be free of unreasonable seizures.[78]

The *Delgado* Court noted that the fact that most people will respond positively to such a request does not negate its consensual nature,[79] "unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded . . . ."[80] Writing for the *Delgado* majority, Chief Justice Rehnquist noted that the way Respondents were questioned "could hardly result in a reasonable fear that [R]espondents were not free to continue working or to move about the factory."[81] The Court, therefore, held that these were classic consensual stops that are not constitutionally prohibited.[82]

In *United States v. Martinez-Fuerte*,[83] the Supreme Court held that Border Patrol stops at permanent checkpoints operated away from the international border are constitutional.[84] In rejecting Respondents' request to exclude evidence relating to the transportation of illegal aliens, the Court held that the operation of a fixed checkpoint need not be authorized in advance by a judicial warrant and that stops at "reasonably located checkpoints" may be made without any individualized suspicion that the particular vehicle contains illegal aliens.[85]

While recognizing that checkpoint stops are in fact Fourth Amendment seizures in balancing the public interest in the practice of routine stops to control the flow of illegal aliens with the limited intrusion on Fourth Amendment rights, the Court concluded that the government interest was greater than the interests of individual citizens.[86] The Court added 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

76. *Id.* at 501.
77. 443 U.S. 47 (1979).
78. *Id.* at 52.
79. *Delgado*, 466 U.S. at 216.
80. *Id.*
81. *Id.* at 220-21.
82. *Id.* at 221.
83. 428 U.S. 543 (1976).
84. *Id.* at 545.
85. *Id.* at 557, 562, 566.
86. *Id.* at 556, 560-61.

> largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation.[87]

The stop may intrude on person's right to "free passage without interruption" to a certain extent, but it entails only a limited detention of travelers, and does not involve searching vehicles or its occupants.[88]

In a dissenting opinion, Justice Brennan observed that the Court's decision effectively evicirates the Amendment's reasonableness requirement by holding that law enforcement officials can make "standardless" stops without violating the Fourth Amendment.[89]

III. ROVING PATROLS AND THE FOURTH AMENDMENT

The Border Patrol conducts three types of surveillance along inland roadways, all presumably designed to detect the illegal importation of aliens. Permanent checkpoints, as in *Martinez-Fuerte*, are maintained at key intersections[90] like the Temecula and San Clemente checkpoints in Southern California. Temporary checkpoints are also set from time to time at various locations.[91] In addition, the Border Patrol has roving patrols such as the one involved in the search of Petitioner's car in *Almeida-Sanchez v. United States*.[92]

In all three types of surveillance, it is argued that the conduct of the Border Patrol agents is constitutional where automobiles are detained and searched without a warrant, without probable cause that the automobile contains aliens, and even without probable cause to suspect that the cars made a border crossing.[93] The only justification for relaxing the constitutional protections afforded by the Fourth Amendment is provided by section 287(a)(3) of the Immigration and Nationality Act, 66 Stat. 233, 8 U.S.C. § 1357 (a)(3), which permits warrantless searches of vehicles "within a reasonable distance from any external boundary of the United States." The Attorney General's regulation, 8 CFR § 287.1, defines "reasonable distance" as being "within 100 air miles from any external boundary of the United States."[94]

The facts in *Almedia-Sanchez* were clear and were not disputed.[95] Petititioner, a Mexican citizen with a valid work permit, was convicted

87. *Id.* at 563 (footnote omitted).
88. *Id.* at 557-58 (citations omitted).
89. *Id.* at 568 (Brennan, J., dissenting).
90. Almeida-Sanchez v. United States, 413 U.S. 266, 268 (1973).
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 267.

because he knowingly received, concealed, and facilitated the transportation of a large quantity of illegally imported marihuana in violation of 21 U.S.C. § 176a.[96] The only issue on appeal was whether the search of his automobile was unconstitutional under the Fourth Amendment such that under the rule of *Weeks v. United States*,[97] the marihuana should have been excluded.[98]

Border Patrol agents stopped Almeida-Sanchez on California Highway 78, twenty-five miles north of the border.[99] The highway runs East-West, north of Highway 80, and partly through an undeveloped area. Highway 78 never reaches the Mexican Border, nor did Almeida-Sanchez, who was some 100 air miles from the Border when he was stopped.[100]

Although the Court of Appeals for the Ninth Circuit acknowledged that the search of Almeida-Sanchez's vehicle was not a "border search," it upheld the search, based on section 287 (a) (3) of the Immigration and Nationality Act.[101] The Supreme Court held that the warrantless search of the Petitioner's automobile without probable cause or consent was a violation of the Fourth Amendment right to be free of "unreasonable searches and seizures."[102] The search could not be justified on the basis of special rules applicable to automobile searches because there was no probable cause.[103] Nor could the search be justified as an "administrative inspection," as the officers had no warrant or reason to think that Petitioner had crossed the border or committed an offense, and Petitioner did not consent to the search.[104] In the majority opinion, Justice Stewart noted that "[i]t is undenied that the Border Patrol had no search warrant, and that there was no probable cause . . . not even the 'reasonable suspicion' found sufficient for a street detention and weapons search in *Terry v. Ohio*, and *Adams v. Williams*."[105]

In *United States v. Ortiz*,[106] Border Patrol agents stopped Respondent's car at a checkpoint on Highway 5 in San Clemente, California, and conducted a routine search of the automobile.[107] The agents found three illegal aliens hiding in the trunk of the car, and Respondent was

96. *Id.*
97. 232 U.S. 383 (1914).
98. *Almeida-Sanchez*, 413 U.S. at 267 (emphasis in original) (citation omitted) (footnote added).
99. *Id.* at 267-68.
100. *Id.*
101. *Id.* at 268-69 (referring to 66 Stat. 233, 8 U.S.C. § 1357(a)(3) (2000)).
102. *Id.* at 273.
103. *Id.* at 269-70.
104. *Id.* at 270-72.
105. *Id.* at 268 (emphasis in original) (citations omitted).
106. 422 U.S. 891 (1975).
107. *Id.* at 891-92.

subsequently convicted of three counts of knowingly transporting illegal aliens.[108] The court of appeals reversed, and the Supreme Court affirmed, holding that Border Patrol agents may not search private vehicles without consent or probable cause at traffic checkpoints removed from the border.[109]

The San Clemente checkpoint is sixty-two air miles and sixty-six road miles north of the Mexican border and is located on the principal highway between San Diego and Los Angeles.[110] Over ten million vehicles pass the checkpoint yearly.[111] The San Clemente checkpoint has been 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 checkpoint, which is also the location of a State of California weighing station, are two large signs with flashing red lights suspended over the highway. These signs each state "STOP HERE—U.S. OFFICERS". [sic] 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 building which houses the Border Patrol office and temporary detention facilities. There are also floodlights for nighttime operation.[112]

Although the Border Patrol would like to keep the checkpoint in operation at all times, it is closed about one-third of the time either because of bad weather, heavy traffic, or a shortage of personnel.[113] "When the checkpoint is open, all northbound traffic is checked, and if an officer suspects that a vehicle is carrying aliens, the officer will stop the car and question the occupants about their citizenship.[114] If the officer remains suspicious, the officer will inspect portions of the vehicle.[115] The

108. *Id.* at 892.
109. *Id.* at 896-97.
110. United States v. Martinez-Fuerte, 514 F.2d 308, 312 (9th Cir. 1975).
111. *Id.*
112. United States v. Baca, 368 F. Supp. 398, 410-11 (S.D. Cal. 1973).
113. *Ortiz*, 422 U.S. at 893.
114. *Id.*
115. *Id.* at 893-94.

procedure is similar at other checkpoints, but at some, traffic is light enough that all vehicles can be stopped and more of the vehicles are routinely inspected.[116]

In *Ortiz*, the Government maintained that there were unique conditions which justified suspending the probable cause requirement at traffic checkpoints, despite the Court's prior holding in *Almeida-Sanchez*, and offered two reasons to distinguish traffic checkpoints and roving patrols.[117] First, the Government argued, at a traffic checkpoint, the officer exercised less discretion in deciding which cars to search because the location of the checkpoint is set by high-level Border Patrol officials, using factors such as the level of inconvenience to the public, safety considerations, and the potential for apprehending illegal aliens.[118] By contrast, prior to *Almeida-Sanchez*, Border Patrol agents on roving patrol had the discretion to stop any car within one hundred miles of the Border.[119] Second, the Government argued that the conditions surrounding a fixed checkpoint stop are much less intrusive and invasive and, therefore, less likely to shock or embarrass motorists.[120]

Rejecting these arguments, the Court in *Ortiz* concluded that,

> While the differences between a roving patrol and a checkpoint would be significant in determining the propriety of the stop, which is considerably less intrusive than a search, . . . they do not appear to make any difference in the search itself. The greater regularity attending the stop does not mitigate the invasion of privacy that a search entails. Nor do checkpoint procedures significantly reduce the likelihood of embarrassment. Motorists whose cars are searched, unlike those who are only questioned, may not be reassured by seeing that the Border Patrol searches other cars as well. Where only a few are singled out for a search, as at San Clemente, motorists may find the searches especially offensive.
>
> Moreover, we are not persuaded that the checkpoint limits to any meaningful extent the officer's discretion to select cars for search. The record in the consolidated proceeding indicates that only about 3 [percent] of the cars that pass the San Clemente checkpoints are stopped for either questioning or a search.[121]

116. *Id.* at 894.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 894-95.
121. *Id.* at 895-96 (citations omitted).

The Court was unpersuaded that the differences between roving patrols and checkpoints justified dispensing with the safeguards required in *Almeida-Sanchez.*[122] The Court, therefore, held that at all traffic checkpoints removed from the Border, or its functional equivalent, searches of private vehicles, are unconstitutional unless there is consent or probable cause.[123]

However, in *United States v. Peltier*,[124] the Supreme Court overturned the Ninth Circuit's reversal of Peltier's conviction on a federal narcotics offense in the United States District Court for the Southern District of California.[125] Four months prior to the Supreme Court handing down its ruling in *Almeida-Sanchez*, a roving border patrol stopped Peltier's automobile and discovered 270 pounds of marihuana in the trunk. Respondent was charged with a violation of 84 Stat. 1260, 21 U.S.C. § 841(a)(1).[126] After the Court denied Peltier's motion to suppress the evidence, Respondent stipulated that he "did knowingly and intentionally possess, with intent to distribute, the marihuana concealed in the 1962 Chevrolet which he was driving . . . ." Respondent was convicted by the district court. The Ninth Circuit, sitting en banc, reversed, holding that the "rule announced by the Supreme Court in *Almeida-Sanchez v. United States* . . . should be applied to similar cases pending on appeal on the date the Supreme Court's decision was announced."[127]

While Respondent's appeal was pending before the United States Court of Appeals, the Supreme Court held in *Almeida-Sanchez* that a warrantless automobile search, some twenty-five air miles from the Mexican border was unconstitutional, absent probable cause.[128] In *Peltier*, the Government admitted that the search of Peltier's car some seventy miles from the Border and the seizure of the marihuana were not constitutionally permitted under the standard announced in *Almeida-Sanchez*, but it argued that the standard should not be applied to searches conducted before the *Almeida-Sanchez* decision was issued.[129]

On certiorari, the Supreme Court reversed.[130] In a five person majority authored by Justice Rehnquist, the Court held that considerations of judicial integrity and of deterrence of unlawful police conduct, which were the policies underlying the Fourth Amendment, did not require that the

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122. *See id.* at 896-97.

123. *Id.* (footnote omitted).

124. 422 U.S. 531 (1975).

125. *Id.* at 542.

126. *Id.* at 532 (citation omitted).

127. 422 U.S. 531, 532 (1975) (citing United States v. Peltier, 500 F.2d 985, 986 (9th Cir. 1974) (footnotes omitted)) (footnote omitted) (emphasis added) (last omission in original).

128. 413 U.S. 266, 273 (1973).

129. *Id.* at 533 (footnote omitted) (emphasis added).

130. *Id.* at 542.

Almeida-Sanchez decision be applied retroactively to searches conducted prior to the date of the decision, since prior to that decision:

> (1) Border Patrol agents had acted pursuant to statutory and regulatory authority to conduct warrantless searches, and
> (2) The United States Court of Appeals had repeatedly upheld roving border patrol searches.[131]

When Peltier's car was stopped and searched, the Border Patrol agents were acting pursuant to section 287(a)(3) of the Immigration Act of 1952, which authorizes officers to search vehicles "within a reasonable distance from any external boundary of the United States" without a warrant.[132] Pursuant to this statutory authorization, the Attorney General formulated regulations establishing "reasonable distance" as "100 air miles from any external boundary of the United States."[133] Hence, since the officers were acting reasonably and pursuant to statutory authorization, "'the imperative of judicial integrity' is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner."[134]

What is ironic about the decision in *Peltier* is that had the Respondent been stopped four months later it would have been unconstitutional, but since he was stopped prior to the court's decision in *Almeida-Sanchez*, the stop was constitutional and the conviction would not be reversed retroactively.[135]

United States v. Brignoni-Ponce[136] was decided on the same day as *Ortiz*.[137] In *Brignami-Ponce*, two Border Patrol agents were working the San Clemente checkpoint on Interstate 5.[138] As the checkpoint was closed because of inclement weather, the agents were checking northbound traffic from a parked patrol car.[139] Because the road was dark, the officers used their headlights to illuminate the road.[140]

The Court held that except at the border or its functional equivalents, officers on roving patrols or at fixed checkpoints may not stop vehicles,

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131. *Id.* at 541.
132. 66 Stat. 233, 8 U.S.C. § 1357(a)(3) (2000).
133. 422 U.S. at 539-40 (footnotes omitted) (citing 22 Fed. Reg. 9808 (1957), as amended, 29 Fed. Reg. 13244 (1964), 8 CFR § 287.1(a)(2) (1973).
134. *Id.* at 537 (citations omitted).
135. *See generally id.*
136. 422 U.S. 873 (1975).
137. *Compare id.* at 873, *with* United States v. Ortiz, 422 U.S. 891, 891 (1975).
138. *Brignoni-Ponce*, 422 U.S. at 874.
139. *Id.*
140. *Id.*

unless they are able to articulate specific facts, that along with rational inferences from such facts, create a reasonable suspicion that the persons who are in the vehicles are in United States illegally.[141] Here the officers did not have reasonable suspicion, relying exclusively on the "Mexican ancestry of the occupants" of the vehicle.[142]

IV. RACIAL PROFILING AND THE EXCLUSIONARY RULE

Although courts have consistently held that police and Border Patrol stops based on race or national origin are impermissible violations of the Fourth Amendment protection against unreasonable searches and seizures, law enforcement continues to use race as a primary determinant in making automobile stops. In *United States v. Mallides*,[143] defendant was convicted of aiding and abetting illegal entry of aliens under 18 U.S.C. § 2 and 8 U.S.C. § 1325[144] in the United States Magistrate Court for the Southern District of California. He appealed, arguing that the conviction resulted from the introduction of evidence that was the product of an unlawful detention and thus the evidence should have been suppressed.[145] The United States District Court for the Southern District of California affirmed the conviction.[146] On appeal, the Ninth Circuit Court of Appeals reversed the conviction, holding that the fact that several "Mexican-American appearing" males were riding in a sedan at dusk, and "sitting erectly" would not justify stopping them on suspicion of being illegal aliens.[147]

Police officers spotted defendant's older model Chrysler Imperial turning onto Airport Road in the city of Oceanside.[148] Mallides'[149] conduct was not suspicious or unusual.[150] He did not drive erratically or behave in a suspicious manner.[151] The articulated facts upon which the officers based the stop was that "six Mexican-American appearing males were riding in a Chrysler Imperial at dusk, sitting erectly, and none turned to look at the passing patrol car."[152]

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141. *Id.* at 884.
142. *Id.* at 885-86.
143. 473 F.2d 859 (9th Cir. 1973).
144. *Id.* at 860.
145. *Id.*
146. United States v. Mallides, 339 F. Supp. 1, 4 (S.D. Cal. 1972).
147. *Mallides*, 473 F.2d at 861, 862.
148. *Id.* at 860.
149. "Mallides[, in fact,] was not of Mexican origin." *Id.* at 860 n.1. He was a naturalized United States citizen who was born in Iraq. *Id.*
150. *Id.* at 861 (footnote added).
151. *Id.* at 860.
152. *Id.* at 861.

The court noted that the same constitutional standards are applied to the conduct of state police officers as to federal law enforcement officers.[153] While the driver of a vehicle and a pedestrian are in somewhat different circumstances, the Ninth Circuit applied the *Terry v. Ohio* standard to automobile searches so that the validity of the stop is assessed according to two criteria.[154] First, "was the officers' action justified" in the first place and second, was it "reasonably related in scope to the circumstances which justified the interference in the first place."[155] For the stop to be justifiable, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[156]

The court held that because "[t]he stop and detention were illegal," the result of such illegal conduct is inadmissible.[157] There is nothing inherently suspicious about six people together in a sedan, sitting erect, and "[t]he conduct does not become suspicious simply because the skins of the occupants are nonwhite or because they sit up straight or because they do not look at a passing police car."[158]

Similarly, in *United States v. Sanchez-Vargas*,[159] the defendant was convicted of a violation of 8 U.S.C. §§ 1324(a)(1)(A), and 1324(a)(1)(B) of the Immigration Reform and Control Act, for bringing an alien into the United States illegally and for illegally transporting an alien within the United States.[160] Border Patrol Agent Scott stopped Sanchez-Vargas while he was driving a light-colored vehicle in the vicinity of the Otay Mesa Port of Entry.[161] Agent Scott testified that minutes prior to the stop, he had received radio transmissions from two other agents.[162] One agent had said he had seen three vehicles, a van, a pickup, and a light-colored car "driving through the international boundary fence west of the Otay Mesa Port of Entry."[163] The second officer reported that he had observed the light-color auto, making two U-turns and that it was heading north.[164] Agent Scott initiated a high-speed chase and subsequently apprehended Sanchez-Vargas.[165]

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153. *Id.* at 860.
154. *Id.* at 861.
155. *Id.* (citing and quoting Terry v. Ohio, 392 U.S. 1, 16, 20 (1968)).
156. *Id.* (quoting *Terry*, 392 U.S. at 21) (quotation marks omitted).
157. *Id.* at 862.
158. *Id.* at 861.
159. 878 F.2d 1163 (9th Cir. 1989).
160. *Id.* at 1165.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*

The Court of Appeals reviewed the case *de novo* and held that Scott had justifiably "founded suspicion" to stop Sanchez-Vargas.[166] All of the facts taken together, including the radio transmissions of the other two agents and his own personal observations, gave Scott "specific and articulable facts sufficient to warrant an investigative stop of Sanchez-Vargas' vehicle."[167]

In a related case, Inez Ramon Salinas had entered a conditional guilty plea, agreeing to one count of marijuana possession with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(D).[168] Salinas appealed the conviction, arguing "that the district court erred [in] denying his motion to suppress the evidence because the officer who stopped his vehicle lacked founded suspicion of criminal conduct."[169]

Officer Moreno was patrolling the heavy morning traffic on State Highway 80, a two lane road running North from Mexico into Arizona, when he observed Salinas' automobile, a white Pontiac traveling northward at normal speed.[170] The vehicle was an older model, which, based on Officer Moreno's experience, was often used for drug and alien smuggling. The vehicle also appeared loaded down, the driver was of Spanish or Mexican origin, and that as the vehicle passed, the driver "glanced at him."[171] The factors lead Agent Moreno to follow [Salinas].[172] After following the vehicle for four or five miles, Moreno noticed there was dust on the trunk of the vehicle and fresh handprints visible on it.[173] A registration check revealed that the vehicle was duly registered in Bisbee, near Naco, a town which repeatedly had a large concentration of drug and alien smugglers.[174]

Salinas moved to suppress the marijuana on the ground that Moreno lacked founded suspicion to stop the vehicle.[175] The Ninth Circuit agreed, holding that the agent lacked founded suspicion to make the investigatory stop.[176] "Thousands of United States citizens of Mexican ancestry drive old cars on perfectly legitimate errands, with 100 pounds of potatoes or carpenter tools or other commodities weighing down the rear springs. A

166. *Id.* at 1166.
167. *Id.*
168. United States v. Salinas, 940 F.2d 392, 393 (9th Cir. 1991).
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* at 393-94.
173. *Id.* at 394.
174. *Id.*
175. *Id.* at 393-94.
176. *Id.* at 393.

driver who glances at a border patrol car does not thereby become a suspicious character."[177]

Similarly in *Gonzalez-Rivera v. INS*,[178] the Ninth Circuit Court of Appeals reversed the deportation order of Mario Gonzalez-Rivera, holding that Border Patrol Officers stopped the deportee solely on the basis of his Hispanic appearance and that the stop was an "egregious constitutional violation."[179] Gonzalez-Rivera appealed to the Ninth Circuit after the Board of Immigration Appeals (BIA) reversed the Immigration Judge's (IJ) ruling that the Border Patrol agents stopped the deportee simply because of his "Hispanic appearance."[180]

Gonzalez was riding in the car his father was driving. They were traveling north on Highway 805 near San Diego[181] when two Border Patrol Agents stopped the car.[182] The agents discovered that Gonzalez' father was in the United States legally, but Gonzalez could not produce documents showing he was in the United States legally.[183] After arresting Gonzalez, the agents learned that he had entered the United States without inspection.[184] Gonzalez requested a deportation hearing without signing any documents or making any sworn statements.[185]

At the deportation hearing, Gonzalez filed a written motion to suppress evidence, arguing that his detention, arrest, and interrogation, were "an egregious violation of his Fourth Amendment rights," because he was stopped simply based on his Hispanic appearance.[186] At the hearing, the I-213 Form was admitted into evidence despite Gonzalez' objection.[187] Officer Wilson testified that Highway 805 is a major corridor of alien smuggling, that almost everyone who travels the highway is of Hispanic origin, and that there was nothing wrong or suspicious about the vehicle or the way that Gonzalez was driving.[188] On the stand, Wilson said he based the stop on the following factors:

> (1) Gonzalez and his father appeared to be Hispanic; (2) both of them sat-up straight, looked straight ahead and did not turn their heads to acknowledge the Border Patrol car; (3)

177. *Id.* at 395.
178. 22 F.3d 1441 (9th Cir. 1994).
179. *Id.* at 1443.
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*

> Gonzalez' mouth appeared to be "dry"; (4) Gonzalez was blinking; and (5) both men appeared to be nervous.[189]

However, after reading the I-213 Form to refresh his recollection, Wilson contradicted himself.[190] He changed his description and said "that when [Gonzalez and his father] saw us, they turned, they *turned and looked at us*, and right away turned their heads, and just sat straight." He could not remember what Gonzalez was wearing, except that he had on a cap.[191] The INS attorney stated that while "everybody who is wearing a cap is not an illegal alien, . . . all [of] these facts put together, seem to indicate articulable facts, . . . to make a reasonable stop."[192]

The Ninth Circuit agreed with the IJ and concluded that the officers stopped Gonzalez because of his Hispanic appearance and that all of the other alleged factors "for the stop were either fabricated or of such minimal probative value in determining whether Gonzalez and his father looked suspicious that no reasonable officer would have relied on them."[193] The Ninth Circuit noted that "[i]n *Brignoni-Ponce*, the Supreme Court held that 'Hispanic appearance alone is insufficient to justify a stop.'"[194] The Ninth Circuit added that because this was an egregious violation of the Fourth Amendment, the court was required to suppress the evidence.[195]

V. RIGHTS, MEMBERSHIP, AND PERSONHOOD

The answer to the question of whether there is a Mexican Exception to the Fourth Amendment is at once both complex and at the same time remarkably simple. While the federal courts have consistently held that in principle, Hispanic or Mexican appearance is not sufficient to justify a stop, they also have held that Hispanic appearance is one of several factors that may, in conjunction with other articuable facts which, as in *Terry*, "taken together with rational inferences from those facts, reasonably warrant that intrusion."[196]

The reality, of course, is that there is a Mexican Exception. Mexican appearing persons are routinely stopped with articulable facts that are consistent with law-abiding behavior such as driving on a highway within

189. *Id.*
190. *Id.* at 1443-44.
191. *Id.* at 1444 (citation omitted) (emphasis in original).
192. *Id.*
193. *Id.* at 1447.
194. *Id.* (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 886-87 (1975)).
195. *Id.* at 1452.
196. Terry v. Ohio, 392 U.S. 1, 21 (1968).

100 air miles of the border,[197] driving a late model sedan,[198] wearing a cap,[199] and driving a car that appears to be weighed down[200] or has a number of passengers in it.[201] Mexican-appearing persons are also placed in a catch-22 situation where either looking at the officers or not looking at the officers may be interpreted as suspicious conduct.

Martinez-Fuerte was significant because it upheld the constitutionality of searches at fixed checkpoints, which were described by the Court as a de minimis intrusion on the Fourth Amendment right to protection against unreasonable searches and seizures.[202] Although the Supreme Court has maintained that aliens are entitled to the protection of the Fourth Amendment,[203] it also has eroded that right by holding in *López-Mendoza* that illegally obtained evidence need not be excluded in a civil deportation hearing because the benefits obtained from excluding reliable evidence from a deportation proceeding would not "outweigh the social cost" of permitting illegal aliens to remain in the United States.[204] In a perverse reversal of Justice Cardozo's admonition that the criminal shall go free because of the Constable's blunder, Justice O'Connor reasoned that it was never suggested that the criminal had to go free in this country and that deported aliens were allowed to go "free" in Mexico.[205]

In *Verdugo-Urquidez*, the Court further eroded Fourth Amendment protections by holding that a Mexican national who was legally in the United States, but was brought here against his will by law enforcement, was insufficiently connected to the United States to be considered one of "the people," reasoning that "the people" was a term of art designed to describe persons who were somehow politically "connected" to the United States.[206]

There are three distinct claims or concerns entailed in the issues addressed in this Essay. The first issue, or area of concern, is the extent to which the so-called Mexican Exception is similar to other constitutionally recognized exceptions to the Fourth Amendment, such as the moving automobile or plain view exceptions, or the Open Fields Doctrine. The Open Fields Doctrine, for example, obviously has greater impact on homeless persons and others who do not own property, but critics will argue that it does not mean that there is a "homeless" exception to the

197. *See generally* United States v. Peltier, 422 U.S. 531 (1975).
198. *See generally* United States v. Mallides, 473 F.2d 859 (9th Cir. 1973).
199. *See generally* Gonzalez-Rivera v. INS, 22 F.3d 1441 (9th Cir. 1994).
200. *See generally* United States v. Salinas, 940 F.2d 392 (9th Cir. 1991).
201. *See generally Mallides*, 473 F.2d at 859.
202. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 557-58 (1976).
203. *See, e.g.*, Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973).
204. INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984).
205. *Id.* at 1047.
206. United States v. Verdugo-Urquidez, 494 U.S. 259, 264-66 (1990).

Fourth Amendment. Poor people are similarly more likely to be viewed suspiciously by law enforcement, but that would not justify the inference of a "poor person exception" to the Fourth Amendment.

Some will argue that there is no Mexican Exception and that being Mexican-looking may be considered as one of several articulable facts in inferring reasonable suspicion. In *United States v. Sokalow*,[207] the Supreme Court held that just because a person is involved in innocent activity, that is not a reason to preclude the police from using innocent activity as one of several factors which together may justify an inference of suspicious conduct which would justify the stop.[208] Mexican appearance similarly is a factor, that in conjunction with other factors, may be used to infer reasonable suspicion by an officer.

The second area of concern is whether there is a double standard in the treatment of "Mexican-looking" immigrants and the treatment of other immigrants. While the rules are said to be racially neutral and Border Patrol agents are ostensibly simply seeking to stop and to apprehend any foreign-looking person that arouses suspicion and appears to be in this country illegally, to be transporting illegals, or to be involved in the drug traffic, the reality is that officers are largely looking for suspicious conduct among Mexican-looking persons. Every Mexican crossing the border knows that it is those persons who are more indigenous-looking who are more apt to be stopped. Even Mallides, a naturalized citizen from Iraq, was stopped because he was in the company of five other Mexican-looking persons and because he was presumed to be Mexican.[209] Although there has been a recent influx of Russian and Eastern European immigrants, there is no indication that Border Patrol agents are looking for Russian-or Eastern European-looking persons who act suspiciously. The problem of course is that most Russian and Eastern European immigrants are phenotypically indistinguishable from other Anglo-Americans.

Indeed, in the society at large, the word "illegal alien" has become virtually synonymous with being Mexican, as noted in the political campaign in support of California Proposition 187.[210] The reality is that the vast majority of those who are stopped, questioned, and apprehended as a result of Border Patrol stops are largely Mexican-appearing persons.[211] Renato Rosaldo notes that a large number of people in the United States

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207. 490 U.S. 1 (1989).

208. *Id.* at 9-10.

209. *See* United States v. Mallides, 473 F.2d 859, 860 n.1 (9th Cir. 1973).

210. Ruben Navarett, Jr., *At the Birth of a New—and Younger—Latino Activism*, L.A. TIMES, Nov. 13, 1994, ¶ 5-6, *available at* http://www.navarrette.com/latimes/941113.html.

211. Scott Baldauf, *Border Patrol Criticized for a Form of 'Profiling,'* CHRISTIAN SCI. MONITOR, Oct. 27, 2000, ¶ 5-6, *available at* http://www.csmonitor.com/durable/2000/10/27/p1s3.htm.

have called into question the citizenship status of Latinos by using terms such as "alien" or "illegal" to describe undocumented workers.[212] "By a psychological and cultural mechanism of association all Latinos are thus declared to have a blemish that brands us with the stigma of being outside the law. We always live with that mark indicating that whether or not we belong in this country is always in question."[213]

The idea of a Mexican Exception to the Fourth Amendment is consistent with the recent movement toward closing the borders to non-citizens and denying basic due process protections to suspected terrorists. In a study of the *Promise Enforcement* cases, Victor C. Romero suggests that recent Supreme Court decisions on immigrants' rights favor conceptions of rights based on membership in the national community, or citizenship, over those based on personhood.[214] Federal courts appear to be increasingly reluctant to extend basic due process and equal protection guarantees under the Constitution to all persons, including non-citizens.[215] Romero advocates the personhood paradigm and eliminating "invidious stereotypes of the noncitizens as the 'alien' and by embracing instead the notion of equal personhood" to all regardless of citizenship or immigration status.[216]

Since most undocumented persons are of Mexican origin, and since Mexican-appearing persons are often confused with Middle-Easterners, the increased security measures that have been implemented in the "Post-911 Era" have had an adverse impact on the Latino population in the United States. Mexican-looking persons thus face a double jeopardy of sorts in that their physical appearance makes them more vulnerable to being stopped both as suspected "illegal aliens" and as would-be terrorists.

A third, final issue of concern is the treatment of Latinos who are traveling in the vicinity of the border. The so-called Mexican Exception is important because it infringes on the constitutional rights of all Latinos, regardless of place of birth or immigration status. As the court noted in *Mallides*, "Mexican-Americans as well as other Americans regularly ride in automobiles, often more than four in a big sedan. It is impossible to determine from looking at a person of Mexican descent whether he is an

212. Renato Rosaldo, *Cultural Citizenship, Inequality, and Multiculturalism, in* LATINO CULTURAL CITIZENSHIP: CLAIMING IDENTITY, SPACE, AND RIGHTS 31 (William V. Flores & Rina Benmayor eds., 1997).

213. *Id.*

214. *See generally* Victor C. Romero, *Expanding the Circle of Membership by Reconstructing the "Alien": Lessons From Social Psychology and the "Promise Enforcement" Cases*, 32 U. MICH. J.L. REFORM 1 (1998).

215. *See id.*

216. *Id.*

American citizen, a Mexican national . . ., or a Mexican alien without papers."[217]

The danger of course is that while these stops may lead to successful apprehensions, deportations, and prosecutions, they are based largely on racial profiling and racial stereotyping and abridge the Fourth Amendment rights of thousands of persons who are legally in this country and have committed no crimes. "Thus, Border Patrol officers may use racial stereotypes as a proxy for illegal conduct without being subjectively aware of doing so."[218] It is, therefore, imperative that courts use an objective standard in judging the reasonableness of the stop.

The so-called Mexican Exception to the Fourth Amendment has vast implications for Latinos and all Mexican-appearing persons, regardless of place of birth, citizenship, or immigration status. As Justice Brennan noted in his eloquent dissenting opinion in *Martinez-Fuerte*,

> 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 non-Mexican appearing motorists.[219]

217. United States v. Mallides, 473 F.2d 859, 860 (9th Cir. 1973).
218. Gonzalez-Rivera v. INS, 22 F.3d 1441, 1450 (9th Cir. 1994).
219. United States v. Martinez-Fuerte, 428 U.S. 543, 572 (Brennan, J., dissenting).