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Fourth Amendment Right or Fourth Amendment Wrong: INS Power after the Immigration Reform and Control Act of 1986

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FOURTH AMENDMENT RIGHT OR FOURTH AMENDMENT WRONG: INS POWER AFTER THE IMMIGRATION REFORM AND CONTROL ACT OF 1986

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I. INTRODUCTION

With the passage of the Immigration Reform and Control Act of 1986¹ [hereinafter IRCA], Congress temporarily alleviated the pressure

¹ Pub. L. No. 99-603 (codified as 8 U.S.C. § 1324a) (1986). Future references will be made under the United States Code section.

on undocumented workers.² More importantly, however, the IRCA drastically alters the implications of an Immigration and Naturalization Services [hereinafter INS]³ workplace sweep by creating a consequence of criminal sanctions⁴ for the employer discovered to have hired undocumented aliens.⁵ With this new sanction power in place, the current standard of allowing the INS to either obtain search warrants under a civil administrative standard⁶ or to classify the sweep as outside consti-

² See *infra* note 4 and accompanying text. Because of the amnesty provisions, workplace sweeps have temporarily become less effective as a great many illegal aliens will have their status adjusted pursuant to the IRCA. However, there is now greater pressure on the employer as he faces criminal sanctions under the new Act.

³ The Immigration and Naturalization Service [hereinafter INS] is the agency charged with the regulation of immigration into the United States and the enforcement of the applicable laws. See 8 U.S.C. §§ 1101-1503 (1986).

⁴ Criminal punishment will result under the IRCA only where "[a]ny person or entity . . . engages in a pattern or practice of violations." 8 U.S.C. § 1324a(f)(1) (1986). Each undocumented alien found to have been hired will subject the employer to a fine of up to \$3000 or the possibility of up to six months in jail. *Id.*

⁵ On June 1, 1987, with the passage of the Immigration Reform and Control Act of 1986, it became a criminal offense to knowingly employ an unauthorized alien. 8 U.S.C. § 1324a(a)(1) (1986). The Act also makes it illegal to "continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien." *Id.* § 1324a(a)(2). Further, it is illegal to hire any other individual without examining particular documents and obtaining a signature on an employment authorization form. See 8 U.S.C. § 1324a(b)(1). The documents used for verification are of three types. Documents establishing both employment authorization and identity include: (i) United States passports; (ii) certificate of U.S. citizenship; (iii) certification of naturalization; (iv) certain unexpired foreign passports; and (v) certain resident alien cards. *Id.* § 1324a(b)(1)(B). Documents evidencing employment authorization include: (i) a social security card; (ii) United States birth certificate; and (iii) other documentation of employment approved by the Attorney General. *Id.* § 1324a(b)(1)(C). Documents establishing identity include: (i) driver's license or other state issued identification; and (ii) other approved means of identification for minors. *Id.* § 1324a(b)(1)(D). Finally, the employer must attest under penalty of perjury that she has verified the employee's status. See 8 U.S.C. § 1324a(b)(2). "The individual must attest, under penalty of perjury . . . that the individual is a citizen or national of the United States, an alien lawfully admitted for permanent residence, or an alien who is authorized under this chapter . . . to be hired . . . for such employment." *Id.* It is also important to note that the employer is required to keep these records for a specified period of time. *Id.* § 1324a(b)(3). On May 4, 1988, the so-called "unauthorized alien amnesty program" will be abolished. See 8 U.S.C. § 1255(a)(1)(A)-(2)(A). "The Attorney General may adjust the status of an alien to that of an alien admitted for temporary residence if the alien: (A) applies before May 4, 1988; and (B) establishes that he entered the United States before January 1, 1982, and that he has unlawfully resided continuously in the United States from that time until the application was filed. *Id.*

⁶ See *infra* notes 61-72 and accompanying text.

tutional protection⁷ is a violation of the business owner's fourth amendment protection against unreasonable search and seizure.

Prior to the IRCA, INS workplace sweeps were little more than an inconvenience to the business owners. With the primary purpose of the raids being to apprehend undocumented workers, the business owner faced no more than a temporary disruption of the workplace and the potential loss of easily replaced workers. Now, as both workers and employers are suspects—the former for unauthorized entry and the latter for violating the IRCA—INS workplace sweeps have become the major source of recovering evidence for use against business owners,⁸ thereby raising serious constitutional issues which require a re-examination of the controlling case law.

This Note examines the legal system's scrutiny of the fourth amendment implications of INS workplace sweeps and suggests that the recent adoption of the IRCA and its criminal sanctions dictate the development of a higher standard for upholding the constitutionality of workplace raids. Consideration is first given to the type of INS activity which is under scrutiny in the course of a workplace sweep. Next, Part III will examine the development of case law pertaining to the current power of the INS to constitutionally conduct workplace sweeps under the fourth amendment. Part IV will then discuss the development of an appropriate standard against which workplace sweeps must be measured in determining their legality. Finally, this Note will conclude that the IRCA mandates the implementation of a standard for the issuance of an INS warrant based on a showing of probable cause equivalent to that applied in criminal law enforcement. It will further conclude that search warrants based on ethnic appearance are violative of the equal protection clause and that before a worker may be detained, an INS officer must have a reasonable suspicion, above ethnic appearance, that the person is undocumented.

II. THE IMMIGRATION PROBLEM AND WORKPLACE RAIDS

Illegal immigration of Mexican citizens is a growing national problem. It is estimated that between one and twelve million undocumented immigrants currently reside in the United States,⁹ the majority consist-

⁷ See *Immigration and Naturalization Serv. v. Delgado*, 466 U.S. 210 (1984) (factory sweep is not within the fourth amendment protections as it does not constitute a seizure since workers could reasonably believe they were free to walk away). See also *infra* notes 73-83 and accompanying text.

⁸ Comment, *Reexamining the Constitutionality of INS Workplace Raids After the Immigration Reform and Control Act of 1986*, 100 HARV. L. REV. 1979, 1981-83 (1987).

⁹ Note, *A Reprise of Warrants, Probable Cause, and Articulate Suspicion In Immigration Enforcement—LaDuke v. Nelson*, 61 WASH. L. REV. 1253, 1256 (1984). See also *Delgado*,

ing of Mexican nationals.¹⁰ To combat this influx of immigrants seeking the economic benefits found in the United States, the INS has developed an extensive array of enforcement strategies.¹¹ While some applaud the efforts of the INS,¹² the great majority of commentators criticize current techniques as having: (1) limited effect on the illegal immigration problem;¹³ (2) no justifiable connection between the ends achieved and the methods used;¹⁴ and (3) violated both the employer's and employee's fourth amendment right to be free from unreasonable searches and seizures,¹⁵ because of the INS' tremendous enthusiasm aimed at remedying the immigration problem.

The most prevalent and most criticized enforcement technique used by the INS is the workplace sweep or raid. These raids take place as fifteen to twenty-five INS agents move systematically through the work area¹⁶ with additional officers stationed at all exits and entrances to prevent escape.¹⁷ Although officers are instructed to be courteous and avoid

466 U.S. at 223 (Powell, J., concurring) (recent estimates of the number of illegal aliens in this country range between 2 and 12 million, although the consensus appears to be that the number at any one time is between 3 and 6 million); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) (1972 INS figures showed one million illegal aliens while 1974 figures revealed as many as 10 or 12 million illegal aliens).

¹⁰ *Brignoni-Ponce*, 422 U.S. at 879 (the government in 1974 estimated that 85% of the aliens illegally in the country were from Mexico) (citations omitted); Catz, *Fourth Amendment Limitations on Non-border Searches for Illegal Aliens: The Immigration and Naturalization Service Meets the Constitution*, 39 OHIO ST. L.J. 66, n.5 (1978) (approximately 90% of those arrested were Mexican nationals).

¹¹ See *Immigration and Naturalization Serv. v. Delgado*, 466 U.S. 210 (1984) (factory sweep); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (stationary boarder patrol checkpoints); *Brignoni-Ponce*, 422 U.S. at 873 (roving patrol of Mexican Border); *LaDuke v. Nelson*, 762 F.2d 1318 (9th Cir. 1985) (farm and ranch checks of migrant housing).

¹² See generally *Delgado*, 466 U.S. at 210.

¹³ See generally Note, *supra* note 9, at 1253; Catz, *supra* note 10, at 667.

¹⁴ See generally Note, *INS Factory Raids as Non-Detentive Seizures*, 95 YALE L. REV. 767 (1986) [hereinafter Note, *INS Raids*]; Note, *The Immigration and Naturalization Service and Racially Motivated Questioning: Does Equal Protection Pick up Where the Fourth Amendment Left Off?* 86 COLUM. L. REV. 800 (1986) [hereinafter Note, *Racially Motivated Questioning*].

¹⁵ The fourth amendment provides "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . 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." U.S. CONST. amend. IV. See also *LaDuke*, 762 F.2d at 1318; Note, *supra* note 9, at 1253; Note, *INS Raids*, *supra* note 14, at 770; Note, *Racially Motivated Questioning*, *supra* note 14, at 801. See generally Caldwell, *Seizures of the Fourth Kind: Changing the Rules*, 33 CLEV. ST. L. REV. 323 (1985).

¹⁶ See *Immigration & Naturalization Serv. v. Delgado*, 466 U.S. 210, 231 (1984) (Brennan, J. concurring).

¹⁷ See *International Ladies Garment Workers Union v. Sureck*, 681 F.2d 624, 631 (9th Cir. 1982), *rev'd sub nom. Immigration and Naturalization Serv. v. Delgado* 466 U.S. 210 (1984).

disruption of the workplace, the agents' entrance is usually followed by frenzied cries of "La Migra" ("the immigration") and attempts by some workers to hide or run from the INS officers.¹⁸ Officers then question each worker,¹⁹ with those suspected of being undocumented aliens handcuffed and led away.²⁰

III. IMMIGRATION CONTROL UNDER A FOURTH AMENDMENT ANALYSIS: THE CURRENT STATE OF WORKPLACE AND NON-WORKPLACE INS ACTIVITY

The fourth amendment provides that:

[t]he 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.²¹

Traditionally, where the state activity had been termed a "search,"²² the determination of its legality by the United States Supreme Court was based on the existence of a search warrant,²³ probable cause,²⁴ or consent.²⁵ More recently, however, the Court has increased the number of exceptions to the warrant requirement, demanding a warrant only where a traditional arrest or thorough search takes place.²⁶ Through this expansion, the employer's rights are sacrificed in the name of immigration control.

¹⁸ *Id.* at 627.

¹⁹ *Id.*

²⁰ *Delgado*, 466 U.S. at 230.

²¹ U.S. CONST. amend. IV (emphasis added).

²² The meaning of the word "search" is not easily captured within any verbal formulation. For a current review of searches and their definition see *Katz v. United States*, 389 U.S. 347 (1967) (police use of a listening device on a public phone booth constitutes an unreasonable search where it infringed on the caller's expectation of privacy). See generally 2 W. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* 301-20 (2d ed. 1984).

²³ See *United States v. Ventresca*, 380 U.S. 102 (1965) (warrant strongly preferred).

²⁴ See *Henry v. United States*, 361 U.S. 98 (1959) (probable cause is deeply rooted in our history).

²⁵ Consent is the classic exception to the warrant requirement. See 2 W. LAFAVE, *supra* note 22, at 120-21. In the immigration context, consent by owners to INS searches was commonplace. See *supra* notes 1-6 and accompanying text. After the IRCA, however, owners will be less likely to consent as they face criminal sanctions.

²⁶ See, e.g., *Dunaway v. New York*, 442 U.S. 200 (1979) (traditional arrest where suspect is taken into custody and subjected to interrogation).

*A. Placing Immigration Control in a Criminal Context:
The Fourth Amendment Balancing Test*

With the passage of the IRCA, the INS is more akin to a police force than to an administrative agency. Already possessing the power to interrogate, without a warrant, any alien or person believed to be an alien,²⁷ or to arrest any alien in violation of admissions laws,²⁸ the addition of the power to sanction employers requires that the INS be regulated by fourth amendment standards identical to those applicable to criminal law enforcement. To this point, courts have been reluctant to apply the fourth amendment standards governing police activity to equivalent behavior by the INS. The illogical result of this reluctance is that the fourth amendment guarantee offers less protection in an INS confrontation than in a police confrontation.²⁹

1. *Terry v. Ohio*: Non-Arrest Seizures and
Creation of the Balancing Test

In *Terry v. Ohio*,³⁰ the United States Supreme Court addressed the issues surrounding "police-citizen" encounters³¹ and the fourth amendment, suggesting that an encounter amounting to less than a technical arrest or a full blown search may be within the amendment's parameters.³² In *Terry*, an experienced police detective observed two strangers repeatedly walking past a particular store. Suspecting that criminal activity was afoot, the detective approached the men, identified himself as an officer, and asked their names. When the men "mumbled something in response," the detective grabbed Terry and patted down his outside clothing without placing his hands under the outer garment until he felt what he reasonably believed to be a gun. Terry was then ordered into the store, where the gun was removed from the pocket of his overcoat.³³

The issue before the Court was whether the detective's activities were

²⁷ 8 U.S.C. § 1357(a)(2) (1986).

²⁸ *Id.* § 1357(a)(2).

²⁹ Note, *INS Raids*, *supra* note 14, at 767. The disparity in the amount of protection afforded one's fourth amendment rights in the criminal arena as opposed to that in an immigration context is unexplainable in light of the powers now possessed by the INS. As both the police and INS are empowered to enforce criminal laws, logic dictates that they be held to identical standards. See Comment, *supra* note 8, at 2000. See also Note, *Racially Motivated Questioning*, *supra* note 14, at 334-36.

³⁰ 392 U.S. 1 (1968).

³¹ *Id.* at 13. "[E]ncounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life." *Id.* See Caldwell, *supra* note 15, at 323-24.

³² *Terry*, 392 U.S. at 19.

³³ *Id.* at 4-7.

such as to constitute a search and/or a seizure; and if so, whether the search or seizure was reasonable under the circumstances. Rejecting the belief that the fourth amendment does not come into play absent a “‘technical arrest’ or a ‘full-blown search,’”³⁴ and adopting the view that “whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person,”³⁵ Chief Justice Warren declared that Terry had unquestionably been seized and subjected to a search when his outer garments were patted down.³⁶ The so-called “stop-and-frisk” was now within the purview of the fourth amendment’s protections.³⁷

Having acknowledged the existence of both a search and a seizure, the Court moved to the issue of reasonableness. Faced with a decision complicated by the absence of probable cause, Chief Justice Warren, citing that the Court was dealing with “an entire rubric of police conduct—necessary swift action predicated upon on the spot observations of the officer,” rejected the extremes of (1) requiring probable cause, thus leaving the police incapable of investigating suspicious behavior; and (2) adhering to past holdings which would render the scenario outside fourth amendment protections.³⁸ Taking an intermediate stance to evaluate the reasonableness of a stop-and-frisk, the *Terry* Court adopted a balancing test, pitting the governmental interest served by the search or seizure against the degree of intrusion on individual fourth amendment rights.³⁹ The stop-and-frisk scenario was now to be regulated by a reasonable suspicion standard.⁴⁰

2. Application of the Balancing Test to INS Non-Workplace Activity

In the immigration context, the balancing test and seizure definition announced in *Terry* were first applied outside the workplace. In *Almeida-*

³⁴ *Id.* at 19.

³⁵ *Id.* at 16. “It is quite plain that the fourth amendment governs ‘seizures’ of the person which do not eventuate in a trip to the station house and prosecution for crime—‘arrests’ in traditional terminology.” *Id.*

³⁶ *Id.* at 19.

³⁷ Traditionally, a distinction was drawn between a “stop” and an “arrest” or “seizure” of the person and between a “frisk” and a “search.” *Id.* at 17 n.15. Early cases held that a frisk was not a “search” and that the “stop” without an arrest was not a seizure. *State v. Terry*, 5 Ohio App. 2d 122, 125-30, 214 N.E.2d 114 (1966); *People v. Rivera*, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964), *cert. denied*, 379 U.S. 978 (1965). The view taken by the *Terry* Court recognizes that the fourth amendment governs all intrusions by agents of the public upon personal security. *Terry v. Ohio*, 392 U.S. 1, 18 n.15 (1968).

³⁸ 392 U.S. at 16-20. See Note, *INS Raids*, *supra* note 14, at 1987.

³⁹ 392 U.S. at 20-21.

⁴⁰ The Court requires that “in justifying the particular intrusion the officer must point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Id.* (citations omitted). This determination is not to be based on unparticularized suspicion or a hunch. *Id.* at 27.

Sanchez v. United States,⁴¹ the Court was asked to rule on the constitutionality of vehicle searches by roving border patrols.⁴² In what Justice Powell's concurrence termed a "relatively unstructured" application of the balancing test,⁴³ the five member majority found that absent probable cause to believe that the vehicle contained illegal aliens, the government's interest in deterring unlawful immigration was insufficient to justify the severe infringement on fourth amendment rights entailed by a roving border patrol's nonconsensual vehicle search.⁴⁴

In *United States v. Brignoni-Ponce*,⁴⁵ the Court was asked to determine the United States Border Patrol's authority to stop automobiles, not to search them, but to question the occupants about their citizenship and immigration status.⁴⁶ Applying the *Terry* standard, the Court found that the minimal intrusion of a *brief*⁴⁷ stop for questioning purposes was justified by the state's interest in protecting the public and preventing crime.⁴⁸ Like the stop-and-frisk in *Terry*, the *Brignoni-Ponce* Court did not require probable cause for the stop,⁴⁹ but rather that the roving

⁴¹ 413 U.S. 266 (1973).

⁴² Petitioner was a Mexican citizen and holder of a valid work permit. He was stopped by border police 25 air miles north of the Mexican border on a highway which runs parallel to the border without touching it. Without probable cause or even reasonable suspicion, the vehicle was searched, uncovering a large quantity of marijuana. Petitioner challenged the constitutionality of the warrantless search. *Id.* at 267-68. The border patrol conducts three types of surveillance along roadways with the aim of deterring the illegal importation of aliens: (1) permanent check points at certain major intersections; (2) temporary checkpoints at various places; and (3) roving patrols such as the one at issue. *Id.* at 268.

⁴³ *Id.* at 283-84 (Powell, J., concurring); See Catz, *supra* note 10, at 75-78; Comment, *supra* note 7, at 1986. Justice Powell's concurrence is of significance as the 5-4 split of the Court creates some uncertainty regarding the opinion. Advocating a somewhat different type of probable cause, Justice Powell suggested that certain factors pertaining to the area searched—i.e., geographic region—may be substituted for particular knowledge of the persons or vehicle. 413 U.S. at 283-84 (Powell, J., concurring). With the four dissenters showing signs of support for such a standard, *id.* at 288 (White, J., dissenting), the majority of the Court appeared to view roving patrols as constitutional if supported by an "area warrant" issued on less than probable cause. See Catz, *supra* note 10, at 79.

⁴⁴ 413 U.S. at 273.

⁴⁵ 422 U.S. 873 (1975).

⁴⁶ Respondent was traveling near the Mexican border. A usual fixed checkpoint was closed due to weather, but officers were observing northbound traffic from a patrol car. Respondent's car was stopped solely because the three occupants appeared of Mexican descent. The officers questioned the occupants and upon determining they were illegally in the country, arrested them. *Id.* at 880.

⁴⁷ The Court's decision is specifically limited to the "minimal intrusion of a brief stop," usually lasting about one minute. *Id.* at 880-81.

⁴⁸ *Id.* at 881.

⁴⁹ The *Brignoni-Ponce* Court distinguished *Almeida-Sanchez* on the ground that a stop for questioning was less intrusive than a search, and that the stop was near the border. *Id.* at 876-77.

patrols have a reasonable suspicion that the vehicle contained aliens who may be in the country illegally.⁵⁰

In a third decision, *United States v. Martinez-Fuerte*,⁵¹ the Court was asked to rule on the constitutionality of fixed checkpoint stops where, absent any warrant, probable cause, or particularized suspicion, vehicles were referred selectively to a secondary inspection area for questioning about citizenship and immigration status.⁵² In a sharp divergence from the limitations of INS powers exhibited in *Almeida-Sanchez* and *Brignoni-Ponce*, the Court, while admitting that a seizure had occurred,⁵³ held such a stop to be constitutional. ⁵⁴ Applying the *Terry* standard, as did its predecessors, the *Martinez-Fuerte* Court found the intrusion on the individual's fourth amendment interests to be "quite limited,"⁵⁵ while the need of the government to conduct such stops was "great" and "the most important of the traffic-checking operations."⁵⁶

Distinguishing from the reasonable suspicion requirement of *Almeida-Sanchez*, and rejecting the idea of particularized suspicion, the Court reasoned that "the Fourth Amendment imposes no irreducible requirement of such suspicion."⁵⁷ In adopting such a position, the Court added fuel to the fire started by Justice Powell's concurrence in *Almeida-*

⁵⁰ Any number of factors may be included in the determination of reasonable suspicion, i.e., characteristics of the area, proximity to the border, the driver's behavior, appearance of the vehicle, characteristics of the occupants, etc.. *Id.* at 885 (citations omitted).

⁵¹ 428 U.S. 543 (1976).

⁵² The checkpoint in question was the Interstate 5, San Clemente checkpoint, located 66 miles north of the border. Interstate 5 is the principle highway between San Diego and Los Angeles. At the checkpoint, a point agent, standing between 2 lanes of traffic, visually screens northbound vehicles as they slowly move through the checkpoint. In a small number of cases the point agent will motion a vehicle to a secondary inspection area, where investigation may last 3-5 minutes.

In the instant case, *Martinez-Fuerte*, a U.S. citizen, was driving with two female passengers, both illegal aliens. At the checkpoint, the car was sent to the secondary investigation area, where the passengers admitted their illegal status. *Martinez-Fuerte* was charged with illegal transportation of aliens in violation of 8 U.S.C. § 1324(a)(2) (1986). *Id.* at 546-49.

⁵³ *Id.* at 556. "It is agreed that checkpoint stops are 'seizures' within the meaning of the Fourth Amendment." *Id.*

⁵⁴ *Id.* at 562.

⁵⁵ The Court reasons that "[t]he stop does intrude to a limited extent on motorists' right to 'free passage' without interruption. . . . [I]t involves only a brief detention." *Id.* at 557-58.

⁵⁶ 428 U.S. at 556-57. The Court cited the necessity of a traffic checking program in the interior, since illegal entry cannot be controlled at the border. "A requirement that stops on major routes inland always be based on reasonable suspicion would be impractical" because heavy traffic hampers close study of a vehicle. *Id.* at 557.

⁵⁷ *Id.* at 561.

*Sanchez*⁵⁸ by citing the fact that area warrants had been upheld in certain circumstances.⁵⁹

The application of the criminal standards developed in *Terry* to INS non-workplace activity has yielded confusing results. In a span of three years⁶⁰ the Court moved from a position severely limiting the power of the INS to one removing any requirements of justification for a seizure in particular situations. As will be seen in the following analysis of the application of *Terry* to the workplace, *Martinez-Fuerte* is indicative of a trend which, under the current IRCA, is in need of reversal.

B. Application of the Terry Standard to INS Workplace Activity

1. Establishment of a Civil Administrative Standard for INS Search Warrants

In *Blackie's House of Beef, Inc. v. Castillo*,⁶¹ the Court of Appeals for the District of Columbia, upheld an INS search warrant based on less than traditional probable cause,⁶² holding that because an INS search is conducted pursuant to a civil administrative mandate, a warrant issued for such a search is not required to be evaluated under the probable cause standard applied to criminal warrants.⁶³ In distinguishing the search in *Blackie's* from those occurring in a criminal context, the court noted that the detention and deportation of illegal aliens is not a criminal law enforcement activity as there is no sanction, criminal or otherwise, imposed upon a knowing employer of illegal aliens.⁶⁴ The purpose behind the issuance of the warrant was held to be aiding the INS in the exercise of its civil statutory mandate, not the aiding of police in enforcing criminal laws.⁶⁵

⁵⁸ *Id.* See *supra* notes 43-44 and accompanying text.

⁵⁹ The decision in *Martinez-Fuerte* was by a 7-2 vote. Following the logic discussed in notes 43-44, *supra*, it appears that Justice Powell's logic has won out, indicating a trend toward awarding the INS more power with less restrictions.

⁶⁰ This refers to the three year span between 1973—*Almeida-Sanchez*— and 1976—*Martinez-Fuerte*.

⁶¹ 659 F.2d 1211 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 940 (1982).

⁶² The warrant in *Blackie's* failed to particularly describe the persons to be searched for, a traditional requirement of a criminal warrant. On a standard form warrant, with the word "property" marked out and the word "persons" filled in, the warrant specified a search of "the entire premises . . . there is now being concealed certain persons namely Aliens . . ." The district court found the warrant to be inadequately supported by a criminal type probable cause standard. *Id.* at 1214-15.

⁶³ *Id.* at 1218-19 (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978)).

⁶⁴ *Id.* at 1218. See also *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (deportation of illegal aliens is not criminal enforcement activity).

⁶⁵ 659 F.2d at 1218. A showing of less than criminal probable cause was found appropriate because (1) Congress contemplated vigorous INS enforcement; (2) INS activity is distinguishable from criminal investigation as the employer faces no sanction; and (3) the

With the determination that an administrative standard of probable cause was appropriate for the issuance of an INS warrant, the *Blackie's* court was left to define the parameters of such a standard. Unclear as to how to proceed, the court defined a hybrid standard of probable cause.⁶⁶ In a synthesis of the decisions in *Marshall v. Ballou*,⁶⁷ *Delaware v. Prouse*,⁶⁸ and *Camara v. Municipal Court*,⁶⁹ the *Blackie's* court noted that, in a civil administrative context, the permissibility of a law enforcement practice is determined by balancing the intrusion on the individual's fourth amendment rights against the promotion of legitimate state interests.⁷⁰ Where sufficient specificity and reliability are found to "prevent the exercise of unbridled discretion by law enforcement officials,"⁷¹ this balance favors the state. In sum, although not requiring a particular description of the persons to be seized, the court found the balancing test to require that the warrant specify the location, time and scope of the search if it was to be upheld.⁷² By such a decision, the court severely impaired the right of business owners to be free from arbitrary and capricious administratively mandated searches.

2. *INS v. Delgado*: Taking Immigration Outside the Fourth Amendment

In 1984, the Supreme Court announced the most controversial decision in the immigration line of cases in *Immigration and Naturalization Services v. Delgado*.⁷³ Acting pursuant to two warrants, the INS conducted a workplace sweep of Southern California Davis Pleating Co. [hereinafter Davis Co.], searching for undocumented aliens. The warrants were based on a showing of probable cause that numerous illegal

balancing test is satisfied. *Id.* International Molder's and Allied Workers' Local Union No. 164 v. Nelson, 799 F.2d 547 (9th Cir. 1986) (to the extent that warrants authorize the INS to seize employees suspected of being illegal aliens, "probable cause" is required).

⁶⁶ 799 F.2d at 553. Hybrid is taken to mean a rational compromise between the pure warrantless standard and the strict probable cause standard of purely criminal searches. See *infra* notes 67-69.

⁶⁷ 436 U.S. 307 (1978) (warrant is required for searches conducted pursuant to administrative mandate to protect individual's fourth amendment interest in reasonableness).

⁶⁸ 440 U.S. 648 (1979) ([r]easonableness shall be determined by weighing the state's interest against the interest in freedom from intrusion on privacy and security).

⁶⁹ 387 U.S. 523 (1967) (warrantless administrative searches are not justified on grounds they make minimal demands on occupants).

⁷⁰ *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1224 (D.C. Cir. 1981) (citing *Prouse*, 440 U.S. at 654), *cert. denied*, 455 U.S. 940 (1982).

⁷¹ 659 F.2d at 1225 (citing *Prouse*, 440 U.S. at 654).

⁷² 659 F.2d at 1226. See Comment, *supra* note 8, at 1981-82.

⁷³ 466 U.S. 210 (1984).

aliens were employed by Davis Co. Neither warrant particularly described or otherwise identified any undocumented alien.⁷⁴

Upon entering the factory, agents were positioned at all entrances and exits, with additional agents moving systematically through the factory questioning most, but not all of the work force. Armed and displaying badges, the agents asked the employees, who were still at their work stations, between one and three questions. If the agents believed the worker to be a United States citizen, the questioning stopped. If the employee gave an unsatisfactory response, she was asked to produce her immigration papers. During the sweep, employees not being questioned continued their work and were free to walk around the factory. Four employees questioned in the sweep challenged the search as a violation of both their fourth amendment right to be free from unreasonable searches and seizures and the equal protection component of the due process clause.⁷⁵

In *Delgado*, a widely criticized decision,⁷⁶ the Court reversed the Ninth Circuit Court of Appeals' decision in *International Ladies' Garment Workers' Union v. Sureck*.⁷⁷ The *Delgado* Court failed to recognize any constitutional grounds of protection, fourth amendment or otherwise, for workplace sweeps.⁷⁸ Writing for the majority, Justice Rehnquist looked to *Delgado's* non-workplace predecessors as a means of escaping the problems created by the *Terry* seizure definition. Reminding us that "the fourth amendment does not proscribe all contact between the police and citizens, but is designed 'to prevent arbitrary and oppressive interference by law enforcement officials with privacy and personal security of individuals,'" ⁷⁹ Justice Rehnquist applied the *Terry* standard⁸⁰ and

⁷⁴ *Id.* at 213.

⁷⁵ *Id.*

⁷⁶ The *Delgado* decision has been widely criticized by commentators due to its holding on the seizure issue. See Note, *Constitutional Law—INS Raids on Garment Factories—The Fourth Amendment and Expediency*, 18 CREIGHTON L. REV. 151, 151-53 (1984) (INS work sweeps violate the fourth amendment); Note, *Immigration and Naturalization Service v. Delgado: Factory Raids: Seizure or Brief Encounter?*, 18 J. MARSHALL L. REV. 509, 510 (1985) (work sweeps without articulable suspicion or a warrant violate the fourth amendment); Caldwell, *supra* note 15, at 326.

⁷⁷ *International Ladies' Garment Workers' Union v. Sureck*, 681 F.2d 624 (9th Cir. 1982). The holding in the lower court concluded that the entire work force had been seized because, with agents at all the doors, no reasonable worker would feel that she was free to walk away. *Id.* at 634. The Ninth Circuit also required that an employee could only be questioned on a reasonable suspicion that she was an undocumented alien. *Id.* at 639-45.

⁷⁸ *Immigration & Naturalization Serv. v. Delgado*, 466 U.S. 210, 218-21 (1984).

⁷⁹ 466 U.S. at 215 (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 544 (1976)).

⁸⁰ Justice Rehnquist applied a standard different than that applied in *Terry*. The test used by Justice Rehnquist was found in a footnote in *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968), but was not applied in that case. See *supra* notes 35-37 and accompanying text. The test applied in *Delgado* included the components of physical force and show of authority. 466

upheld the sweep, determining that the questioned workers could hardly have believed they were not free to walk away⁸¹ as they were engaged in "classic consensual encounters rather than fourth amendment seizures."⁸² Analogizing to the fixed check-point stops of *Martinez-Fuerte*, the Court dismissed the idea that any restricted freedom was due to the workplace atmosphere rather than the psychological effect of an invasion by armed INS agents.⁸³ The majority concluded that the INS activity was unintrusive and did not merit fourth amendment protection.

3. *LaDuke v. Nelson*: Probable Cause and Particularized Suspicion Return

In 1985, the United States Court of Appeals for the Ninth Circuit reaffirmed its position on the protection of fourth amendment rights in an immigration context through⁸⁴ its holding in *LaDuke v. Nelson*.⁸⁵ Carefully reasoned,⁸⁶ the court's holding is essential to an understanding of the problems facing both workers and employers under the IRCA.

In *LaDuke*, three United States citizens sought an injunction prohibiting the INS from conducting raids on farm labor housing⁸⁷ without a valid search warrant on the grounds that the raids violated their fourth amendment rights. The plaintiffs were residents in the Spokane Sector,⁸⁸ an area frequently subject to surprise warrantless searches by the INS. Typically, armed border patrol agents cordoned off migrant housing during early morning or late evening hours, surrounded the residences with emergency vehicles and flashing lights, and conducted house to house searches either without consent or with the supposed "knowing" consent of the occupants. Residents were not advised of their right to

U.S. at 215. Although these elements are arguably satisfied in *Delgado*, the use of the "footnote" test allowed Justice Rehnquist to finesse his way around the application of *Terry*.

⁸¹ *Id.* at 220-21.

⁸² *Id.* See also *Florida v. Royer*, 460 U.S. 491 (1983); *United States v. Mendenhall*, 446 U.S. 544 (1980).

⁸³ See *Immigration and Naturalization Serv. v. Delgado*, 466 U.S. 210, 220 (1984). The psychological pressures were among the respondent's strongest arguments on the seizure question. See also *infra* notes 118-23 and accompanying text.

⁸⁴ See *supra* notes 76-77 and accompanying text. The Ninth Circuit was also the court which was overruled in the *Delgado* decision. As will be seen, the Ninth Circuit's decisions may have been before their time. See *infra* notes 163-65 and accompanying text.

⁸⁵ 762 F.2d 1318 (9th Cir. 1985).

⁸⁶ See *infra* notes 104-15 and accompanying text.

⁸⁷ Farmers who have sufficient crops to require the extensive use of hand labor often provide quarters for the workers. The fact that the court considers the farm housing to be a residence rather than a workplace is the first distinction drawn by the court. See *infra* notes 136-37 and accompanying text.

⁸⁸ This area is comprised of eastern Washington, a part of northern Idaho, and a part of Montana. *LaDuke v. Nelson*, 560 F. Supp. 158, 160 (E.D. Wash. 1982), *aff'd*, 762 F.2d 1318 (9th Cir. 1985).

refuse the officers entry.⁸⁹ Those who fled or were otherwise suspected of being illegal aliens were arrested.⁹⁰

In affirming the district court's decision to grant an injunction against the INS, the Ninth Circuit emphasized three components: (1) warrantless *entries* of farm dwellings were barred absent clear consent or probable cause; (2) warrantless *searches* of migrant farm dwellings were barred absent probable cause; and (3) "stopping, detaining, and interrogating [migrant workers] by force, threats of force, or a command based on official authority, absent a warrant, probable cause or reasonable suspicion based on articulable facts that the person is an [illegal alien]"⁹¹ was barred. In the application of the balancing test, the court, while not disputing the legitimacy of the INS' enforcement needs, found that the housing sweeps could not be viewed as a "casual encounter," as the intrusiveness of such searches causes them to "run afoul of the fourth amendment."⁹²

IV. THE NECESSITY OF A PROBABLE CAUSE STANDARD FOR INS ACTIVITY

Under current law, arrests and full searches require probable cause,⁹³ while a less intrusive detention will require only a showing of reasonable suspicion.⁹⁴ Where the activity falls below this requisite level of intrusion, minimally intrusive or non-detentive activities require no showing of suspicion.⁹⁵ In the context of immigration enforcement, once a civil administrative standard of probable cause is met,⁹⁶ INS workplace raids do not run afoul of the fourth amendment as no action of the INS agents in the course of such raids constitutes an unreasonable search or seizure.⁹⁷ The development of such a standard, however, has blurred the distinction between the different degrees of intrusiveness and has created a situation which allows the courts to justify constitutional infringement as being in accord with the balancing test established in *Terry*.

The enactment of the IRCA creates an urgent need for the establish-

⁸⁹ 560 F. Supp. at 159.

⁹⁰ *Id.* See Note, *supra* note 9, at 1262.

⁹¹ 762 F. 2d at 1331.

⁹² *Id.*

⁹³ *United States v. Harris*, 403 U.S. 573 (1971) (search warrant); *Henry v. United States*, 361 U.S. 98 (1959) (arrest warrant). See generally 2 W. LaFAVE, *supra* note 22, at 18-50.

⁹⁴ *Terry v. Ohio*, 392 U.S. 1, 21 (1968). See also *supra* notes 30-40 and accompanying text.

⁹⁵ *Immigration and Naturalization Serv. v. Delgado*, 466 U.S. 210 (1984). For a detailed explanation of the holding, see *supra* notes 73-83 and accompanying text. For criticism of the decision, see *infra* notes 113-34.

⁹⁶ See *supra* notes 61-72 and accompanying text. For criticism of this standard see *infra* notes 98-112 and accompanying text.

⁹⁷ See generally 466 U.S. at 218-20.

ment of strict standards in the application of the *Terry* test to INS workplace sweeps. When the current standards were developed, no criminal sanctions against the business owner were available. With the IRCA now in place, the rationale behind the relevant decisions becomes outdated and the need for a criminal standard of probable cause becomes apparent.

A. The Warrant Requirement

The court's now outdated thinking is exhibited by the establishment of the civil administrative standard for the issuance of INS search warrants.⁹⁸ With the *Blackie's* decision resting on the absence of criminal sanction against the employer, the new IRCA fatally undermines the court's rationale. Because pattern offenders of the IRCA face severe fines and imprisonment,⁹⁹ the INS is no longer serving a civil administrative function, but rather, is serving one of criminal law enforcement. As such, the INS should be held to comply with a standard of probable cause equivalent to that required in the criminal context.

The standard to be applied is one of specific individualized suspicion. The fourth amendment specifically commands that no warrant shall issue without particularly describing "the place to be searched, and the persons or things to be seized."¹⁰⁰ In *Michigan v. Tyler*¹⁰¹ the Supreme Court made it clear that, although administratively mandated searches do not require probable cause when limited to administrative purposes,¹⁰² where government agents seek access to a workplace to "gather evidence for a possible prosecution," a warrant will be obtained "only upon a traditional showing of probable cause applicable to searches for evidence of crimes."¹⁰³ To meet the constitutional standard thus required of INS investigations under the IRCA, INS warrants must contain names or particular descriptions of the specific undocumented alien to be seized.¹⁰⁴

To completely accept the probable cause standard as applicable to the INS warrants requires that it be reconciled within the structure of the balancing test. It may be argued that the IRCA does not completely shift the INS' function to the criminal sphere, but rather, creates a dual

⁹⁸ See *supra* notes 61-72 and accompanying text.

⁹⁹ See *supra* notes 3-4 and accompanying text.

¹⁰⁰ U.S. CONST. amend. IV.

¹⁰¹ 436 U.S. 499 (1978).

¹⁰² *Id.* at 507.

¹⁰³ *Id.* at 512. The *Tyler* Court was dealing with evidence of alleged arson. The Court held that a subsequent investigation of the fire site required traditional probable cause. *Id.* (citing *United States v. Ventresca*, 380 U.S. 102 (1964)).

¹⁰⁴ See *Blackie's House of Beef v. Castillo*, 480 F. Supp. 1078, 1085, 1090 (D.D.C. 1979), *rev'd*, 659 F.2d 1211 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 940 (1982). See generally 2 W. LaFave, *supra* note 22, at 206-33.

function engaging both administrative and criminal authority. Acceptance of this view places two diametrically opposed power structures at odds. On the one hand "regulatory or enforcement authority generally carries with it all the modes of inquiry necessary to execute the authority granted."¹⁰⁵ On the other hand, criminal enforcement activity is strictly governed by constitutional guidelines. The confrontation is one of state power versus individual protection. Because of the severity of this conflict, a single standard is necessary to avoid inconsistent application.¹⁰⁶

Placed in the context of the balancing test, the criminal standard must prevail. In support of the lesser standard, the INS argues that a probable cause standard will inhibit its administrative function of immigration regulation.¹⁰⁷ When placed against the infringement, such a standard places on both the employer and the employee's fourth amendment rights, this argument is lost. Requiring the INS to obtain specific information about the unauthorized alien to be seized places very little extra burden on the agency. The necessary information may be easily obtained by the INS through the use of data bases, undercover operations, informants, or specific leads.¹⁰⁸ While the use of such techniques may necessitate additional funding, this cost is insufficient to counteract the weight afforded individual protection under the balancing test.

Further, the adoption of the lesser standard would fail to recognize the changes made by the IRCA. Whether one accepts the criminal function argument or the dual purpose argument, there is no doubt that a change has occurred. To accept the lower standard will allow the courts to advance administrative convenience as a justification for even the most intrusive searches.¹⁰⁹ The difficulty with such a justification arises in light of the criminal function of the INS. While the administrative purposes of the search may be sufficient to justify deportation of the illegal aliens found in such a sweep, the use of these aliens as evidence in the prosecution of the business owner will be subject to the exclusionary

¹⁰⁵ *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986) (use of aerial observation and photography is within E.P.A.'s statutory authority).

¹⁰⁶ If the application of the applicable standard is left to a case by case analysis, inconsistent application is sure to result. To avoid inconsistencies, a single standard is required.

¹⁰⁷ See Brief for Petitioner, *Immigration and Naturalization Serv. v. Delgado*, at 27.

¹⁰⁸ Comment, *Individualized Suspicion in Factory Searches—The "least intrusive alternative"*, 21 AM. CRIM. L. REV. 403, 421-22 (1984). The INS has long had at its disposal a number of techniques for identifying particular illegal aliens. *Id.* The INS may argue that in light of the large number of illegal aliens coming into the country, such a standard is a heavy burden. However, when placed within the confines of the balancing test, the burden on the state is much less than the possibility of injuring individual rights.

¹⁰⁹ See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1001-02 (1978).

rule¹¹⁰ thereby defeating the purpose of the Act.¹¹¹ By comparison, the probable cause standard affords the individual the requisite constitutional protection while simultaneously allowing the INS to properly execute both its administrative and criminal functions.¹¹²

B. *The Seizure: Re-Thinking Delgado*

The Court's finding in *Delgado*, that INS workplace sweeps do not constitute fourth amendment seizures, was based on the idea that a seizure occurs "if, in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave."¹¹³ Despite the Court's holding, an understanding of the law in *Terry* and the conditions under which an INS sweep takes place shows that the Ninth Circuit was correct in holding that the employees had been seized. By fatally aligning freedom of movement with the liberty interest associated with the ability to "walk away," Justice Rehnquist was able to reject the claim that the entire work force was seized even though agents were posted at all the exits. Although the workers were free to move about the factory, there can be no doubt that they were not free to leave.¹¹⁴

To support this proposition, critics need only look to the irrational implications of a strict interpretation of *Delgado*.¹¹⁵ If Justice Rehnquist's determinations are accepted as correct, *Delgado* constitutionally empowers workers to refuse to answer questions or walk away when approached

¹¹⁰ The exclusionary rule requires that evidence determined to have been unconstitutionally obtained be excluded from that which may be admitted at trial as against the individual whose rights were violated. See *Weeks v. United States*, 232 U.S. 383 (1914). The purpose behind this rule is to deter unreasonable searches and seizures by state actors. See *Wolf v. Colorado*, 338 U.S. 25 (1949). For general discussion of the exclusionary rule see 1 W. LaFAVE, *CRIMINAL PROCEDURE* 132-62 (1984).

¹¹¹ The purpose behind the change of the IRCA was to diminish the number of aliens encouraged to work in the United States by imposing criminal sanctions on those who hired them. If the possibility of such a sanction is practically removed through the exclusionary rule, the purpose is defeated.

¹¹² The primary function is to prosecute IRCA violators. The probable cause standard will require sufficient proof prior to the issuance of a warrant to avoid exclusionary rule concerns.

¹¹³ 466 U.S. 210, 215 (1984).

¹¹⁴ *Id.* at 218.

¹¹⁵ See *supra* notes 80-83 and accompanying text. "Ordinarily, when people are at work their freedom to move about has been meaningfully restricted, not by actions of law enforcement officials, but by the workers' voluntary obligations to their employers." 466 U.S. at 218. Some degree of proof does show workers may have been free to leave and not known it. The facts show that a worker walked out the door and when the agent tried to stop him, the worker pushed him aside and ran away without further incident. The Court held that no conclusions may be drawn from such ambiguous and isolated behavior. *Id.* at 218 n.6.

by INS agents.¹¹⁶ In reality, resistance to INS questioning results in increased suspicion and encourages INS agents to take additional steps to determine the status of the uncooperative worker.¹¹⁷ With flight or resistance generating increased scrutiny of the worker, there is an absence of a reasonable belief that the worker is free to leave and thus, a seizure occurs under the fourth amendment.

Compounding the physical intrusiveness of workplace sweeps is the psychological toll exacted on both legal and illegal workers. From the outset of a workplace sweep, minority workers, the direct target of citizenship questioning by the INS,¹¹⁸ are placed in a defensive stance caused by the fear of discriminatory enforcement. INS agents rarely announce or otherwise communicate to the workers that only illegal aliens are to be arrested.¹¹⁹ Even assuming the workers subjected to the sweeps are aware of this purpose, the fear of those legally working that they may be mistaken for an illegal alien or that their citizenship will be disbelieved, is in no way lessened.¹²⁰ Based on its recognition of "wholesale harassment by certain elements of the police community,"¹²¹ the Supreme Court has acknowledged the existence of this psychological effect, holding that minorities may feel "unusually threatened" when confronted by white male officers.¹²² The overall result of these factory sweeps is to produce in many workers a state of anxiety concerning future sweeps and subsequent arrests.¹²³ Notwithstanding the holding of *Delgado*, the totality of the circumstances does not give rise to the belief that the workers are free to leave in the course of such a search.

A final flaw of the *Delgado* Court's analysis was its reliance on the

¹¹⁶ See Comment, *supra* note 8, at 1985; Note, *supra* note 9, at 1258; Note, *INS Raids*, *supra* note 14, at 772; Caldwell, *supra* note 15, at 332-34.

¹¹⁷ Comment, *supra* note 8, at 1985; Caldwell, *supra* note 15, at 332-34.

¹¹⁸ Note, *INS Raids*, *supra* note 14, at 772. See also *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975) (the likelihood of a person of Mexican ancestry being an alien is high enough to make Mexican appearance a relevant factor in requiring questioning); *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976) (apparent Mexican ancestry sufficient to question at border auto checkpoint); *Yam Sang Kwai v. Immigration and Naturalization Serv.*, 411 F.2d 683, 687 (D.C. Cir.) (questioning of suspect caused by appearance of Asian descent), *cert. denied*, 396 U.S. 877 (1969).

¹¹⁹ See, e.g., *Immigration and Naturalization Serv. v. Delgado*, 466 U.S. 210, 212 (1984).

¹²⁰ *Id.*

¹²¹ *Terry v. Ohio*, 392 U.S. 1, 14 (1968). The Court continues, noting that "the degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security caused by those practices." *Id.* at 17 n.14.

¹²² *United States v. Mendenhall*, 446 U.S. 544, 558 (1980) (fact that black female may be intimidated by white male officers is relevant but not decisive).

¹²³ *Delgado*, 466 U.S. at 230 (Brennan, J., concurring in part, dissenting in part) (INS agents warned a worker they would return to check on him because he spoke english too well).

easily distinguished non-workplace line of cases.¹²⁴ By adopting the opinion of the *Martinez-Fuerte* Court that not all police-citizen encounters are governed by the fourth amendment,¹²⁵ the Court appeared to be analogizing factory sweeps with auto checkpoints.¹²⁶ These INS activities, however, are not analogous.

As noted by the *Martinez-Fuerte* Court, "one's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence."¹²⁷ The issue raised is to which is a factory more comparable, an auto or a residence? In light of the IRCA, it is the latter.¹²⁸ The degree of intrusiveness between the activities is distinctly different. In an auto stop the intrusion on the interest of the motorist is minimal.¹²⁹ Drivers are stopped only briefly, to allow agents to look into the car as could any other person on the road. A business establishment, however, plainly enjoys certain protections under the fourth amendment¹³⁰ and sweeps are highly intrusive. The factory owner "has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings, and it is equally clear that expectation is one society is prepared to observe."¹³¹ Like the occupant of a residence, the businessman has a constitutional right to go about his business free from unreasonable entries on his private commercial property.¹³² Under the current law, the INS may search the premises of a non-consenting business owner,¹³³ disrupting the workplace, seizing workers, and amassing evidence against the owner, simply by meeting the civil administrative warrant requirement.¹³⁴ While the expectation of privacy in the workplace does not reach the exact level accorded the home, this resemblance is far greater than that of a factory and an auto.¹³⁵

¹²⁴ See *supra* notes 41-60 and accompanying text.

¹²⁵ *Immigration and Naturalization Serv. v. Delgado*, 466 U.S. 210, 215 (1984).

¹²⁶ See *id.* at 221 (Powell, J., concurring).

¹²⁷ 428 U.S. 543, 561 (1976) (citations omitted).

¹²⁸ For an analogy of workplace to a residence see *infra* notes 165-70 and accompanying text.

¹²⁹ *Martinez-Fuerte*, 428 U.S. at 562 ("resulting intrusion on the interest of the motorist [is] minimal."); see also *Ingersoll v. Palmer*, SF No. 25001 (Cal. Oct. 29, 1987) (sobriety checkpoints are unintrusive and reasonable within guidelines of *Terry*).

¹³⁰ *Dow Chemical Co. v. United States*, 476 U.S. 227, 235 (1986) (aerial photographs taken of the outside areas of the plant do not infringe on the owners expectation of privacy) (citing *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978); See *v. City of Seattle*, 387 U.S. 541 (1967)).

¹³¹ *Dow Chemical*, 476 U.S. at 236.

¹³² *Id.* at 237. See also *See v. City of Seattle*, 387 U.S. 541, 543 (1967).

¹³³ This assumes, under current law, that the civil administrative standard is met. See *supra* notes 61-71 and accompanying text.

¹³⁴ *Id.* See also notes 1-8 and accompanying text.

¹³⁵ Autos are open for public viewing. They are easily looked into and state window

Had the *Delgado* Court correctly considered the totality of the circumstances surrounding INS raids, the decision would have been different.¹³⁶ While *Delgado* is still good law, the weight of the evidence shows that INS workplace sweeps are both physically and psychologically intimidating to the point that no reasonable person could possibly feel free to leave. When combined with the damage which may be inflicted upon business owners under the IRCA, a per se rule declaring all INS workplace raids to be seizures appears appropriate. By adopting the per se rule, the criminal function of the INS would be recognized and a probable cause standard would become an absolute necessity.

C. Constitutional Considerations Outside the Fourth Amendment

In addition to fourth amendment concerns, serious equal protection¹³⁷ issues arise out of the INS' current practice of establishing probable cause and reasonable suspicion solely through ethnic appearance. Because the amnesty provision¹³⁸ of the IRCA significantly reduces the probative value of ethnic appearance, a clear determination of the weight to be accorded this evidence is required.¹³⁹

The Supreme Court held in *Brignoni-Ponce*¹⁴⁰ that Mexican appearance alone was insufficient to establish reasonable suspicion as required by *Terry*,¹⁴¹ although it may be considered as a factor. The constraints drawn by *Brignoni-Ponce*, however, have been avoided by the subsequent determinations in *Martinez-Fuerte*¹⁴² and *Delgado*¹⁴³ that because INS

tinting laws often require that they remain that way. Factories, however, are operated behind closed doors and often behind walls obstructing both the public's view and that of business competitors. The business owner is free to decide who comes on company property and who does not. While not identical to the expectation of privacy in a home, the factory owner does possess an expectation of privacy well above that of an auto owner.

¹³⁶ See Caldwell, *supra* note 15, at 333.

¹³⁷ U.S. CONST. amend. XIV. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

¹³⁸ See 8 U.S.C. § 1255a(a)(1)(A)-(2)(A) (Supp. IV 1986). See also notes 1-7 and accompanying text.

¹³⁹ See Comment, *supra* note 8, at 1996. The statistics clearly illustrate the reduction of probative value. Sixty-two percent (12.4 million) of the Hispanic population lives in four border states, of whom, roughly 2.5 million were unauthorized. Assuming that sixty percent of these immigrants participate in the legalization program, 850,000 unauthorized aliens will remain while the lawfully present population will grow to roughly 11.6 million. Thus, potentially only seven percent of all persons of hispanic ancestry in the border states will be illegal. *Id.*

¹⁴⁰ 422 U.S. 873 (1975).

¹⁴¹ 392 U.S. 1, 17-18 (1968). Under *Terry*, a reasonable suspicion is required for a detention. *Id.*

¹⁴² 428 U.S. 543, 563 (1976) (this intrusion is so sufficiently minimal that no particularized reason need justify it).

¹⁴³ 466 U.S. 210, 218-21 (1984).

operations are unintrusive, no seizure results, and thus reasonable suspicion is not required to detain a suspected illegal alien.

Where a government agency invidiously discriminates against a class on the basis of national origin or racial appearance,¹⁴⁴ it will be subject to strict scrutiny.¹⁴⁵ Under this standard, a suspect classification will be upheld only where the state can demonstrate that the classification is narrowly tailored to serve a compelling state interest in the least restrictive manner.¹⁴⁶ The INS' sole reliance on racial appearance to articulate reasonable suspicion neither serves a compelling state interest¹⁴⁷ nor is the least restrictive means of achieving that interest. As has been seen, the INS has at its disposal a number of less convenient and more costly alternative methods to establish a compelling state interest.¹⁴⁸ Under an equal protection analysis, however, administrative convenience is insufficient to establish a compelling state interest.¹⁴⁹

A second major deficiency is that the INS' use of ethnic appearance in the decision to detain a specific worker is fatally overinclusive.¹⁵⁰ With only seven percent of all Hispanics in the Border states being unauthorized aliens, the chances of a particular Hispanic worker being actually undocumented are insufficient to justify the infringement a mistake would make on a citizen's or legal alien's constitutional rights.¹⁵¹ In light of these equal protection problems, ethnic appearance alone is insufficient to establish either probable cause or reasonable suspicion.

Protecting against ethnic discrimination dictates that the courts carefully scrutinize the facts put forth by the INS to establish either reasonable suspicion or probable cause. Because of the equal protection problems associated with racial appearance, a magistrate must deter-

¹⁴⁴ National origin and racial appearance are "suspect classifications" and as such, will be held to a strict scrutiny standard. *Korematsu v. United States*, 323 U.S. 214, 216 (1944). A suspect classification is said to be one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

¹⁴⁵ *Korematsu*, 323 U.S. at 216.

¹⁴⁶ See, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984); *Plyer v. Doe*, 457 U.S. 201, 217 (1982); *Hernandez v. Texas*, 347 U.S. 475, 479 (1954).

¹⁴⁷ See *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980). "Only two of this Court's modern cases have held the use of racial classification to be constitutional." *Id.* (Citing *Korematsu v. United States*, 323 U.S. 214 (1944) (wartime required the exclusion of people of Japanese ancestry); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (wartime exclusion of people of Japanese ancestry, but must offer opportunity to show loyalty)).

¹⁴⁸ See *supra* note 108 and accompanying text.

¹⁴⁹ See *Bounds v. Smith*, 430 U.S. 817, 825 (1977); Note, *Racially Motivated Questioning*, *supra* note 14, at 819-20.

¹⁵⁰ Where it is extreme, over-inclusiveness may be fatal under strict scrutiny. See *Ex parte Endo*, 323 U.S. 283 (1944).

¹⁵¹ Comment, *supra* note 7, at 1999.

mine that non-racial factors actually motivated the INS activity.¹⁵² By prohibiting the INS' use of ethnic appearance, both warrant procedures and questioning practices will be brought within constitutional requirements. Under the spirit of *Terry* and its progeny, such a restriction is mandatory.

D. LaDuke v. Nelson: The Prototypical Standard

The holding in *LaDuke* is essential to the movement of the law toward a standard which conforms to the needs of the IRCA. Although decided before the IRCA was passed, the Ninth Circuit Court of Appeals prohibited searches without probable cause, effective consent, or valid warrants. Farm workers may be detained only where INS agents possesses a valid warrant, probable cause or articulable suspicion.

In conjunction with the holding of the case, a thorough understanding of *LaDuke's* relationship to *Delgado* is essential¹⁵³ as on the surface, the facts appear distinguishable.

The first distinction drawn by the court pertained to the area searched. In *Delgado*, the INS raided a factory, while in *LaDuke* the INS swept through farm housing.¹⁵⁴ The premise of this distinction was that farm housing did not constitute a workplace and, as such, the *LaDuke* search of a "residence" constituted a level of intrusiveness protected even under the *Delgado* rationale.¹⁵⁵

A second factor cited by the *LaDuke* court was the disparity between the authority granted the INS agents prior to each of the two searches.¹⁵⁶ In *Delgado*, the agents acted pursuant to warrants issued on a showing that numerous unidentified illegal aliens were employed at the factory.¹⁵⁷ No such warrant was issued in *LaDuke* nor was there any specific showing of consent.¹⁵⁸ While general criminal law advocates warrantless searches in certain circumstances, a mere articulable suspicion, without more, will be insufficient to justify an intrusion as grievous as that into

¹⁵² Note, *Racially Motivated Questioning*, *supra* note 14, at 818.

¹⁵³ The two decisions appear to be dealing with two entirely different types of INS activity. When looked at carefully, however, the IRCA places them in a different perspective suggesting that they are not as different as it may seem. See *infra* notes 163-72 and accompanying text.

¹⁵⁴ *LaDuke v. Nelson*, 762 F.2d 1318, 1328 (9th Cir. 1985).

¹⁵⁵ See *Immigration and Naturalization Serv. v. Delgado*, 466 U.S. 210, 224 (1984) (Powell, J., concurring). A warrantless search of a residence under the circumstances found in *LaDuke* would likely have been held unconstitutional by the *Delgado* Court. *Id.*

¹⁵⁶ See *infra* notes 157-58 and accompanying text.

¹⁵⁷ 466 U.S. at 212.

¹⁵⁸ 762 F.2d at 1328 n.13, 1332 n.19.

a residence.¹⁵⁹ As the court determined the farm houses to be residences, the searches were unconstitutional.

A final distinction which sets *LaDuke* apart is the procedural history of each case.¹⁶⁰ In *Delgado*, the Court was asked to rule on the adequacy of a summary judgment in favor of the INS, thus requiring that all issues of fact be resolved in favor of the agency.¹⁶¹ As the degree of fear felt by the factory workers was a question of fact, the Court was within its powers¹⁶² to find the *Delgado* activity to be non-threatening. *LaDuke*, however, is based on an appeal from a trial on the merits.¹⁶³ With no mandatory inferences to be drawn, the court was free to decide that the *LaDuke* activity constituted a mass seizure.¹⁶⁴

Placed in the context of these distinctions, the cases appear reconcilable while neither lends any significant support to the propositions espoused by the other. Upon close inspection, however, the effect of these distinctions may be weakened, leaving a standard applicable to the workplace arena.

First, the distinctions propounded by the Ninth Circuit were likely not drawn to suggest that the *LaDuke* holding had no application to a factory raid. On the contrary, in order to perpetuate its views on protection of fourth amendment guarantees in an immigration context and to avoid being bound by the *Delgado* decision, the distinctions were made out of necessity.¹⁶⁵ Having had its decision in *Delgado* reversed,¹⁶⁶ the Ninth Circuit was forced to carefully distinguish *Delgado* to prevent a repeat occurrence.

Second, if viewed in light of why the distinction was drawn, the argument that farm housing does not constitute the workplace¹⁶⁷ is weakened. In distinguishing the two cases, the *LaDuke* court argued that if the INS truly believed that the occupants of farm housing were living at the workplace, they would be required, under *Delgado*, to seek consent of the farm owner—not the worker—in order to protect the owner's

¹⁵⁹ Exceptions to the warrant rule include exigent circumstances, searches incident to arrest, and searches pursuant to voluntary consent. See 2 W. LAFAYETTE, *supra* note 22 at 119-23.

¹⁶⁰ See Note, *supra* note 9, at 1265.

¹⁶¹ FED. R. CIV. P. 56 (summary judgment); CAL. CIV. PROC. CODE § 437c (West 1986).

¹⁶² While this decision may have been within the powers of the Court, this bears no relationship to the correctness of such a decision.

¹⁶³ *LaDuke v. Nelson*, 560 F. Supp. 158, 159 (E.D. Wash. 1982).

¹⁶⁴ See Note, *supra* note 8, at 1266.

¹⁶⁵ See *supra* notes 76-77 and notes 84-92 and accompanying text. The Ninth Circuit has shown its willingness to afford protection in the immigration arena through its holdings in *Delgado* and *LaDuke*.

¹⁶⁶ *International Ladies' Garment Workers' Union v. Sureck*, 681 F.2d 624 (9th Cir. 1982).

¹⁶⁷ *LaDuke v. Nelson*, 762 F.2d 1318, 1328 (9th Cir. 1985).

rights.¹⁶⁸ Under the IRCA, however, farm owners face the same criminal penalties as do factory owners if found to be employing illegal aliens. Although not “on the job,” illegal aliens found in the course of a farm sweep will be admissible as evidence against the owner based on the proximity of the housing to the workplace.¹⁶⁹ Viewed in these terms, the fact that farm housing is termed a “residence” by the court¹⁷⁰ has little, if any, effect on the rights of the farm owner. The distinction drawn by the court is based on the location of the worker at the time of the raid;¹⁷¹ a distinction which is meaningless to the owner. Farm owners and factory owners are functionally equivalent and as such, the same law should apply to both. As *Delgado* fails to afford sufficient constitutional protection,¹⁷² the law applied should be that of *LaDuke*.¹⁷³

The *LaDuke* decision offers a standard ideally suited for application to INS activity after enactment of the IRCA. More restrictive than *Delgado*, *LaDuke*'s emphasis on warrants, probable cause, and articulable suspicion significantly curtails the ability of the INS, with its new criminal law enforcement powers, to infringe upon fourth amendment rights. By applying *LaDuke* to the workplace, the court will be able to protect the now vulnerable rights of the business owner and avoid “the pitfall of encroaching upon the civil rights of Hispanic citizens and legal aliens on the basis of their physical or racial appearances, or their proximity to suspected illegal aliens.”¹⁷⁴

In a practical application to the workplace, *LaDuke* requires the following procedures. First, INS agents should obtain search or arrest

¹⁶⁸ *Id.*

¹⁶⁹ Farm housing is generally found immediately adjacent to where the work is being done. Because of this custom, it is a general presumption that illegal aliens discovered in an INS raid are employed at the workplace. 762 F.2d at 1326-28.

¹⁷⁰ *Id.* at 1328.

¹⁷¹ A juxtaposition of the two cases illustrates that the *LaDuke* court is drawing the distinction based on the location of the worker at the time of the raid. The key to this distinction appears to be whether the workers were “on the job” at the time of the raid. In *LaDuke*, the workers were not on the job, thus, rights were violated. In *Delgado*, workers were on the job, thus no rights were violated. To the business owner in *LaDuke*, this distinction has no meaning as he may still be sanctioned. The true benchmark is proximity to the workplace, not location. There is also ample evidence to show that owners of both a workplace and a residence maintain equivalent expectations of privacy. See *supra* notes 130-32 and accompanying text.

¹⁷² See *supra* notes 113-36 and accompanying text.

¹⁷³ Of the three distinctions drawn by the court, the area searched carries the greatest weight. If this distinction fails, then the warrant distinction must also fail as both searches were based on articulable suspicion. (The *Delgado* warrant was established under the civil administrative standard). The third distinction is purely procedural and adds no merit to the substantive discussion. In light of the weakness of these three distinctions, it appears likely that had *LaDuke* been decided after the IRCA, they would not have been needed. As this would fly in the face of *Delgado*, the Supreme Court would be forced to rule on the issue.

¹⁷⁴ Note, *supra* note 9, at 1269.

warrants based on a criminal standard of probable cause. To meet this standard, the INS will be required to show, by facts sufficient to convince a neutral magistrate, that a particularly described illegal alien is employed at that particular workplace.¹⁷⁵ A simple recitation of ethnic appearance or facts sufficient to meet the civil administrative standard will not satisfy this burden.

Second, if, once inside the workplace, agents deem it necessary to take action not permitted by the warrant, they should follow the guidelines for warrantless seizures as developed in *Terry*¹⁷⁶ and its progeny. This requires that any detention of a worker be based on either probable cause or articulable suspicion that the worker is undocumented.¹⁷⁷ Although warrantless activity was discouraged in *LaDuke*,¹⁷⁸ the state's interest in controlling immigration outweighs the infringement on individual rights where these countervailing interests exist. In total, *LaDuke* is a prototypical standard for governing INS workplace activity after the IRCA.

V. CONCLUSION

The passage of the Immigration Reform and Control Act of 1986 has greatly increased the powers of the Immigration and Naturalization Service. As business owners who employ illegal aliens now face criminal sanctions, the INS has outgrown its civil administrative duties and replaced them with those duties traditionally associated with criminal law enforcement. The standards regulating INS behavior, however, have failed to recognize this change, resulting in INS activity which violates both the business owner's and the worker's constitutional guarantee against unreasonable searches and seizures. To protect these rights, the courts must reject the civil administrative warrant standard and require the INS to meet a criminal standard of probable cause prior to the issuance of a warrant. Once inside the workplace, INS agents must be required to possess an articulable suspicion, above ethnic appearance, that a worker is undocumented before that worker is detained. Only through the implementation of such non-discriminatory procedures will the rights of citizens and legal aliens be adequately protected.

STEVEN L. MILLER*

¹⁷⁵ See, e.g., *Draper v. United States*, 358 U.S. 307 (1959).

¹⁷⁶ The reasonable suspicion standard should be applied. See *supra* notes 30-60 and accompanying text.

¹⁷⁷ *LaDuke v. Nelson*, 762 F.2d 1318, 1331 (9th Cir. 1985).

¹⁷⁸ *Id.*

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FORREST B. WEINBERG
1926–1988

*We are pleased to dedicate this issue of the
Cleveland State Law Review to the memory of
Forrest B. Weinberg, Assistant Professor of Law,
Cleveland-Marshall College of Law,
Cleveland State University, 1985–1988.*

The *Cleveland State Law Review* dedicates this issue to the memory of Forrest B. Weinberg, a Cleveland-Marshall College of Law faculty member who died May 27, 1988 after a long struggle with cancer. Forrest Weinberg will be remembered as an outstanding lawyer and scholar. He fulfilled a dream few are able to achieve when he left behind a successful practice and became accepted as a scholar in academe.

Forrest Weinberg's journey to his dream began in 1946, when, after serving for two years in the U.S. Navy, he entered the University of Cincinnati Law School. The academic side of Forrest Weinberg thrived in law school. He graduated first in his law school class. He was Editor-in-Chief of Law Review and was Order of the Coif. In 1951, he went on to earn his Master's degree in law from Harvard Law School.

Forrest Weinberg loved the law. Part of his love included the desire to share its richness with others by teaching. Teaching was also an integral part of his dream. Forrest Weinberg was admired and respected by his students and colleagues alike. He brought to the classroom the practicality of an experienced attorney and the exuberance that only one who loves his field can lend to the learning experience. His thinking exemplified the traditional traits of skepticism and rigor, but he added a special ability to think about the law in a dry-humored, practical and open way.

The other part of Forrest Weinberg's dream was the practice of law. He practiced with Hahn Loeser & Parks in Cleveland, Ohio for over 30 years. He fought for his clients and for the system, especially by his work as principal author of Ohio's Close Corporation Law.

Forrest Weinberg was a rare and inspiring individual. Although his life was cut short by cancer, he realized his dream in a manner that touched many lives. Forrest Weinberg will be missed by his colleagues, the legal community and his students for the insight, challenge, and humor he brought to the law. In this spirit, the Editors and Staff of the *Cleveland State Law Review* dedicate this issue to his memory.

