# Illegal Aliens And Enforcement: Present Practices And Proposed Legislation*

## I. INTRODUCTION**

The Immigration and Naturalization Service (INS) estimates that between four and twelve million aliens of all nationalities now reside throughout the United States in violation of the immigration laws.[1] Congressional hearings on illegal immigration indicate that illegal aliens[2] have a major adverse impact on the American economy and labor market.[3] While these findings are highly speculative and have

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**As this article goes to press, several significant cases were decided by the United States Supreme Court which bear heavily on the subject discussed herein. In United States v. Ortiz, 43 U.S.L.W. 5026 (U.S., June 30, 1975), the Court held that the Fourth Amendment forbids immigration officers, in the absence of consent or probable cause, to search private vehicles at traffic checkpoints removed from the border and its functional equivalent. In United States v. Brignoni-Ponce, 43 U.S.L.W. 5028, 2032 (U.S., June 30, 1975), the Court held that, except at the border and its functional equivalent, immigration officers on roving patrol "may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country". The effect of these decisions is to limit constitutionally the statutory power of immigration officers. While it is unfortunate that these cases were decided after the completion of this article, the Court's opinions are consistent with the analysis advanced in this article.

[1]Letter from James F. Greene, Deputy Commissioner of the INS, to the authors, January 14, 1975, on file in U.C. Davis Law Review Office.

[2]Illegal aliens are defined as those aliens who have either entered the United States illegally or violated the conditions of lawful admission. *See* 1973 INS ANNUAL REP. 8; CALIFORNIA STATE SOCIAL WELFARE BOARD, POSITION STATEMENT, ISSUE: ALIENS IN CALIFORNIA at 5 (1973) [hereinafter cited as POSITION STATEMENT].

[3]In H.R. REP. NO. 93-108, 93rd Cong., 1st Sess. 7 (1973) [hereinafter cited as REP. ON H.R. 982], a Department of Labor spokesman noted, with respect to the adverse impact of illegal aliens on the national labor market, that illegally employed aliens:

1. Take jobs which would normally be filled by American workers.
2. Depress the wages and impair the working conditions of American citizens . . .
3. Compete with unskilled and uneducated American citizens . . .

been challenged as exaggerations,[4] the problem of equitably and effectively enforcing our restrictive immigration law remains.

Present enforcement efforts focus heavily on apprehending and expelling individual illegal aliens. In 1973, the INS located and apprehended over 650,000 illegal aliens.[5] Although this represented a 30% increase from 1972,[6] the number of illegal aliens within the country continues to rise.[7]

The economic incentive involved in illegal immigration, both to the alien and the employer who hires illegal aliens, is too powerful for present enforcement practices to check. The current Commissioner of the INS recently stated that:

> Some method of turning off that attraction, the opportunity to get a job, seems to me essential. I am convinced . . . that the illegal alien problem is largely insoluble if we can't turn off the magnet somehow. I just think it is not practical to build the Immigration Service large enough to bar the border and to go to all of the cities and countryside and remove them.[8]

The economic magnet to which the Commissioner refers is the product of a combination of factors. First is the "push" of economic underdevelopment in the countries from which most illegal aliens come.[9] Second is the "pull" provided both by employers who willingly hire illegal aliens[10] and entrepreneurs who smuggle people into

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4. Increase the burden on American taxpayers through added welfare costs . . .
5. Reduce the effectiveness of employee organizations.
6. Constitute for employers a group highly susceptible for exploitation.

*See also* United States v. Baca, 368 F. Supp. 398, 402-03 (S.D. Cal. 1973) for impact of illegal aliens from Mexico.

[4]*See* Steinman, *Scapegoats of Unemployment,* NATION, April 17, 1972, Vol. 214 at 497-500; Raza Association of Spanish Surnamed Americans, A COMPREHENSIVE ANALYSIS OF THE RODINO BILL BEFORE CONGRESS, at 10-16 (May 1973); Abrams and Abrams, *Immigration Policy — Who Gets In and Why?*, THE PUBLIC INTEREST, Winter 1975, at 24-27.

[5]1973 INS ANNUAL REP. 8.

[6]*Id.*

[7]*Hearings before the Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary,* 93rd Cong., 2d Sess., ser. 37, at 10 (1974) [hereinafter cited as *Immigration Hearings 1974*].

[8]*Id.* at 5.

[9]*Hearings on Illegal Aliens before Subcomm. No. 1 of the House Comm. on the Judiciary,* 92d Cong., 1st Sess., ser. 13, pt. 2, at 486 (1972) [hereinafter cited as *Illegal Alien Hearings*]. For material specifically regarding illegal aliens from Mexico, *see* Comment, *Commuter, Illegals & American Farmworkers: The Need for a Broader Approach to Domestic Farm Labor Problems,* 48 N.Y.U. L. REV. 439, 483 (1973); DEPARTMENT OF JUSTICE, SPECIAL STUDY GROUP ON ILLEGAL IMMIGRANTS FROM MEXICO, A PROGRAM FOR EFFECTIVE AND HUMANE ACTION ON ILLEGAL MEXICAN IMMIGRANTS, at 7-8 (1973) [hereinafter cited as CRAMTON REPORT].

[10]In REP. ON H.R. 982, *supra* note 3, at 15-16, it was stated that:

> The present lawful employment of unlawful aliens not only presents an economic magnet attracting workers to our country, but also

the country for lucrative profits.[11] The final factor is that at the present time, it is not illegal for an employer to hire illegal aliens.[12] Until these factors are removed, the problem of illegal immigration will persist regardless of the government's use of force or power to apprehend illegal aliens.[13]

Not only are present enforcement practices ineffective, but they also serve to subject individuals to the harassment of being stopped for questioning regarding their right to be in the United States.[14] Search operations which have been most successful in terms of the numbers of illegal aliens located, have served to disrupt communities and affect the constitutional rights of thousands of people, particularly members of visible minority groups.[15] Despite this adverse impact on civil rights, public pressure is increasing on both the INS and local officials to solve the problem of illegal immigration through increased arrests.[16]

While the problem of illegal immigration is no doubt serious, the rights of both aliens and citizens to be free from unwarranted governmental intrusion must also be protected. This article will examine possible legal restraints on immigration officers and local officials who attempt to locate and apprehend illegal aliens and current Congressional proposals which attempt to solve the problem. The article will first deal with Fourth Amendment limitations on the power of INS officials to locate illegal aliens. Next, it will discuss the constitutional and statutory prohibitions which should limit the power of

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> provides an economic incentive for the employer to hire illegal aliens who are often highly productive and willing to work for wages and under working conditions that are unattractive to American workers.

This explains why of the 780,000 deportable aliens located in fiscal year 1974, 93% were employed or seeking employment when apprehended. Letter, *supra* note 1.

[11] 1973 INS ANNUAL REP. 9-11.

[12] 8 U.S.C. § 1324 (1973). *See also* REP. ON H.R. 982, *supra* note 3, at 6.

[13] As Leonard Gilman, Regional Commissioner of the INS, stated:

> Regardless of how much apprehending force or power we [the INS] have . . . It is not the ultimate answer to this problem. We must remove the incentive. When this is done — when we control the incentive for them to come — then we can meet this problem . . . with the present force we have.

*Illegal Alien Hearings, supra* note 9, pt. 1 at 81.

[14] Hayden, *The Immigration and Naturalization Service and Civil Liberties: A Report on the Abuse of Discretion,* ACLU REPORTS 1-30 (1974) [hereinafter cited as Hayden].

[15] *Hearings before the Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary,* 93d Cong., 1st Sess., ser. 22, at 45 (1973) [hereinafter cited as *Immigration Hearings 1973*]. *See also San Francisco Chronicle,* April 22, 1975, at 4, col. 7; *Los Angeles Times,* November 1, 1974, pt. II, at 6, col. 1.

[16] *See* GAO REPORT TO CONGRESS, MORE NEEDS TO BE DONE TO REDUCE THE NUMBER AND ADVERSE IMPACT OF ILLEGAL ALIENS IN THE UNITED STATES, ser. B125051, at 14 (1973) [hereinafter cited as GAO REPORT]; *Los Angeles Times,* October 31, 1974, at 1, col. 7.

local officials to seek out and arrest illegal aliens. Finally, the article examines current Congressional legislation introduced by Representative Peter Rodino which would make it a crime for an employer knowingly to hire illegal aliens.

## II. POWERS OF IMMIGRATION OFFICERS

The Immigration and Nationality Act vests primary enforcement responsibilities in the Attorney General of the United States, who has in turn delegated that responsibility to the INS.[17] Immigration officers, specifically those members of the Border Patrol and the Investigations Division of the INS,[18] have broad statutory enforcement powers to prevent unlawful entry and to detect and arrest aliens who enter or remain in the country illegally.[19] This section will deal only briefly with the powers of INS officers to prevent illegal entry[20] and concentrate upon INS operations in the interior to locate illegal aliens.[21]

### A. BORDER SEARCHES: THE POWER TO PREVENT ILLEGAL ENTRY

Section 287(a)(3) of the Immigration and Nationaltiy Act (INA) authorizes immigration officers, without warrant, "within a reasonable distance from any external boundary of the United States, to board and search for aliens any . . . conveyance or vehicle".[22] At a minimum, this section codifies the well established rule that searches and seizures of those travellers crossing the border need not be based upon a warrant or probable cause.[23] Stops for identification and searches of vehicles crossing the border without probable cause are considered reasonable given the unique governmental interest in controlling what passes through the border.[24] This governmental interest outweighs the individual's interest in privacy, since the invasion of privacy is expected, routine and directed at the neutral class of those who cross the border.[25]

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[17] 8 U.S.C. § 1103(a) (1974); 8 C.F.R. § § 2.1, 103.1 (1974).
[18] 1973 INS ANNUAL REP. 8.
[19] 8 U.S.C. § 1357 (1974). *See* Gordon, *Powers and Responsibilities of Immigration Officers*, 59 A.B.A.J. 64 (1973).
[20] *See* Comment, *Border Searches: Beyond Almeida-Sanchez*, this volume.
[21] *See* note 42 *infra*, for a discussion of judicial remedies to enforce official compliance with search and seizure standards for immigration officers.
[22] 8 U.S.C. § 1357(a)(3) (1974).
[23] Henderson v. United States, 390 F.2d 805, 808 (9th Cir. 1967), in which the court stated that "the mere fact that a person is crossing the border is sufficient cause for a search". *See also* Carroll v. United States, 267 U.S. 132, 154 (1925).
[24] Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973), *citing* Carroll v. United States, 267 U.S. at 154.
[25] Note, *Border Searches and the Fourth Amendment*, 77 YALE L.J. 1007, 1012 (1968).

The Supreme Court, however, has held that the exceptional power in section 287(a)(3) to conduct causeless searches at the border, does not extend to INS searches conducted beyond the border.[26] In *Almeida-Sanchez v. United States*,[27] a Border Patrol unit stopped the car of a Mexican citizen lawfully within the country in order to search his car for illegal aliens. This warrantless stop, which took place on a highway twenty-five miles from the Mexican border, was made even though the officers had no reason to believe that this car was any more likely to be carrying illegal aliens than any other vehicle in the area.[28] In reversing the conviction, the Supreme Court ruled that the Border Patrol's established practice of randomly stopping and searching automobiles for illegal aliens within one hundred miles of the border violated the Fourth Amendment.[29] Although the Court recognized the difficult problems associated with controlling the entry of aliens across long expanses of national boundaries, it considered the rights of those lawfully within the country "to free passage without interruption or search" paramount absent probable cause[30] or warrant.[31]

*Almeida* upset well established lower court opinions which had allowed immigration officials to exercise broad discretion in determining when the probability of discovering illegally entering aliens justified searches within the United States.[32] While INS officials may exercise broad discretion at the border,[33] the Court refused to allow these powers in areas adjacent to the border.[34] Although *Almeida* dealt with vehicle searches, its rationale would seem to limit the

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[26] Almeida-Sanchez v. United States, 413 U.S. at 272-75.
[27] *Id.* at 266.
[28] *Id.* at 267-68.
[29] *Id.* at 273.
[30] *Id.* at 273-74, *citing* Carroll v. United States, 267 U.S. at 153-54.
[31] Justice Powell in a concurring opinion in Almeida-Sanchez v. United States, 413 U.S. at 275, in which four of the dissenting justices (at 288) and two of the majority (at 270 n. 3) appeared to agree, concluded that roving searches would meet Fourth Amendment standards if conducted under the authority of an area search warrant issued by a magistrate on the basis of a generalized standard of probable cause that illegal aliens are travelling in an area adjacent to the border. For an excellent critique of this proposal, *see* Comment, *The Aftermath of Almeida-Sanchez v. United States: Automobile Searches for Aliens Take on a New Look*, 10 CALIF. WEST. L. REV. 657, 662-69 (1974).
[32] *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 55, 199 (1973).
[33] Almeida-Sanchez v. United States, 413 U.S. at 272-73.
[34] Prior to *Almeida*, it was well established that INS officials had broad statutory power to conduct operations within a reasonable distance from the border. As Justice White writes in his dissent, in *Almeida:*

> At the very least, this statute represents the considered judgment of Congress that proper enforcement of the immigration laws requires random searches of vehicles without warrant or probable cause within a reasonable distance of the international boundaries of the country.

*Id.* at 291.

power of INS officials to stop and interrogate individuals within the United States in order to locate illegal aliens.

## B. INTERIOR ENFORCEMENT: THE POWER TO INTERROGATE

Enforcement operations within the United States, which rely on interrogation of individuals to locate and apprehend illegal aliens, present formidable problems. While many illegal aliens enter the country surreptitiously[35] and are theoretically subject to apprehension at the border or its functional equivalent,[36] increasing numbers of aliens enter the country legally and subsequently become illegal aliens by violating the conditions of their admission.[37] Regardless of the mode of entry, once aliens have entered the United States they tend to settle and associate with citizens and aliens from their native land.[38] One having no specific information regarding an individual's illegal presence in the country, and thus relying solely on appearances, will have difficulty determining whether that individual is an illegal alien, a resident alien or a citizen.[39] As a result of the ability of illegal aliens to achieve relative anonymity within the United States, they become very difficult to locate.[40] Attempts to locate and apprehend illegal aliens create the potential for harassment of citizens and lawfully admitted aliens, especially those members of visible national minorities.[41] To minimize the potential for harassment, INS agents should have to meet a high evidentiary standard to

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[35] 84% of the number of illegal aliens apprehended in 1973 entered the country illegally. 1973 INS ANNUAL REP. 9.

[36] A functional equivalent to the border is a location where virtually everyone searched has just come from outside the country. Almeida-Sanchez v. United States, 413 U.S. at 272-73, United States v. Bowen, 500 F.2d 960, 965 (9th Cir. 1974), *cert. granted*, 95 S. Ct. 40 (1974). For a discussion of the potential effectiveness of enforcement at the Mexican border, *see* CRAMTON REPORT, *supra* note 9, at 13-16.

[37] Speech by Gen. Leonard Chapman, Commissioner of the INS, reported in *Los Angeles Times*, March 13, 1975, at 1, col. 5.

[38] Hayden, *supra* note 14, at 20. *See also* CRAMTON REPORT, *supra* note 9, at 10.

[39] As the then present Commissioner of the INS, Raymond Farrel, testified in regard to illegal aliens from Mexico:

> The Southwest region, as you know, has millions of people of Mexican extraction. It is very difficult to tell the citizen from the resident alien or the resident alien from the illegal.

*Illegal Alien Hearings*, *supra* note 9, pt. 5, at 1308.

[40] POSITION STATEMENT, *supra* note 2, at 7.

[41] A Justice Department study notes that: "Law enforcement efforts to locate and apprehend illegal aliens within Mexican-American communities create fears of harassment and discrimination". CRAMTON REPORT, *supra* note 9, at 12. Numerous complaints from members of Congress and other people regarding INS harassment were received by the House Subcommittee on Immigration, Citizenship and International Law. *Immigration Hearings 1973*, *supra* note 15, at 2. *See also* sources listed *supra* in notes 14 and 15.

justify the questioning of an individual regarding residency status.[42]

Section 287(a)(1) of the INA specifically grants immigration officers the power, without warrant, "to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States".[43] The courts have construed this statute to empower immigration officers to stop pedestrians and motorists for questioning.[44] A statute of this type, however, must be construed subject to Fourth Amendment limitations which prohibit unreasonable searches and seizures.[45]

While "not all personal intercourse between policemen and citizens involves 'seizures' of persons",[46] a seizure occurs whenever a policeman by "physical force or show of authority"[47] restrains an individual's "freedom to walk away".[48] In *Terry v. Ohio*[49] and *Adams v. Williams*[50] the Supreme Court utilized a balancing test to uphold temporary seizures for the purpose of investigation based on

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[42] The major means used to compel enforcement agents to adhere to a high evidentiary standard is the exclusionary rule. Mapp v. Ohio, 367 U.S. 643, 656 (1961). Although the exclusionary rule was developed for criminal cases, it can be used in deportation cases to suppress evidence that has been obtained as a result of an illegal seizure. *See* Au Yi Lau v. INS, 445 F.2d 217 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 864 (1971); Cheung Tin Wong v. INS, 468 F.2d 1123 (D.C. Cir. 1972). A deportation order, however, can be valid despite an illegal seizure if the order is supported by substantial evidence free from taint. Klissas v. INS, 361 F.2d 529, 530 (D.C. Cir. 1966). An illegal arrest alone does not make the deportation proceeding the fruit of the poisoned tree. Guzman-Flores v. INS, 496 F.2d 1245, 1248 (7th Cir. 1974). If a deportation proceeding is dismissed as a result of an illegal seizure, the question arises as to the legality of a subsequent arrest of the alien for similar immigration violations. While there have been no cases on this point, the determining factor should be whether the subsequent arrest was based on grounds independent of those discovered as a result of the original illegal seizure. However, since the INS grants most illegal aliens voluntary departure, rather than subjecting them to deportation proceedings, the use of the exclusionary rule would be limited. *See* Ortega, *The Plight of the Wetback*, 58 A.B.A.J. 251, 252 (1972). Despite the questionable usefulness of the exclusionary rule in deportation proceedings, it is still widely used in criminal cases involving immigration offenses. *See* Almeida-Sanchez v. United States, 413 U.S. 266. Further, there are other remedies such as the injunction and tort actions which can also be used as a means of compelling officials to adhere to high evidentiary standards prior to "seizing" individuals.

[43] 8 U.S.C. § 1357(a)(1) (1974).

[44] United States v. Montez-Hernandez, 291 F. Supp. 712, 715 (E.D. Cal. 1968). *See also*, Au Yi Lau v. INS, 445 F.2d at 222-23 which interpreted section 287(a)(1) as applied to pedestrians, and United States v. Bowman, 487 F.2d 1229, 1231 (10th Cir. 1973) and United States v. Brignoni-Ponce, 499 F.2d 1109, 1111 (9th Cir. 1974), *cert. granted*, 95 S. Ct. 40 (1974), which interpreted section 287(a)(1) as applied to motorists. These cases are discussed in greater detail in text *infra*.

[45] Almeida-Sanchez v. United States, 413 U.S. at 272.

[46] Terry v. Ohio, 392 U.S. 1, 19 n. 16 (1968).

[47] *Id.*

[48] *Id.* at 16.

[49] *Id.*

[50] Adams v. Williams, 407 U.S. 143 (1972).

less than probable cause to arrest since the intrusion on personal privacy was less than that which accompanies an arrest.[51] The Court, however, emphatically condemned "intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches".[52] In order to justify a seizure, a law enforcement agent "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion".[53] General or class suspicion therefore is not sufficient.

The power of immigration officers is subject to the constitutional constraints of the Fourth Amendment.[54] In interpreting section 287(a)(1) as it applies to both the questioning of motorists and pedestrians constitutional considerations apply only when a "seizure" of the person has taken place.[55] Therefore, the major issue in the cases which examine the power of INS officials to interrogate under section 287(a)(1) is the evidentiary standard which the officer must meet to justify a seizure for purposes of interrogation.

### *1. FIELD INTERROGATION OF PEDESTRIANS*

For increased efficiency, the INS largely conducts its questioning of pedestrians in the context of area control operations.[56] It directs these operations at geographic areas where illegal aliens are known or suspected to congregate.[57] The areas involved range from neighborhoods, bus stops and other public places to private businesses and residences.[58] Individuals in these areas who appear "foreign" are

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[51] *Id.* at 146; Terry v. Ohio, 392 U.S. at 21, 22-27.
[52] Terry v. Ohio, 392 U.S. at 22.
[53] *Id.* at 21.
[54] *See* Almeida-Sanchez v. United States, 413 U.S. at 272; Au Yi Lau v. INS, 445 F.2d at 223.
[55] Terry v. Ohio, 392 U.S. at 19 n. 16; United States v. Burrell, 286 A.2d 845, 846-47 (D.C. App. 1972).
[56] "Under our [the INS] present budgetary and manpower constraints area control operations are used almost exclusively as compared with individual investigations for routine immigration violations." Letter from Robert J. Seitz, Public Information Officer of the Southwest Region of the INS, to the authors, November 12, 1974, on file in U.C. Davis Law Review Office. *See also* 1972 INS ANNUAL REP. 8; 1973 INS ANNUAL REP. 9.
[57] Usually an area is chosen based upon complaints or investigative leads. *See Immigration Hearings 1973, supra* note 15, at 6. Yet operations are frequently conducted without any prior clues. *See* Shu Fuk Cheung v. INS, 476 F.2d 1180 (8th Cir. 1973) and Yam San Kwai v. INS, 411 F.2d 683 (D.C. Cir. 1969), *cert. denied* 396 U.S. 877 (1969). Charles Gordon, General Counsel for the INS, testified at the *Immigration Hearings 1973, supra* note 15, at 121, that:

> Various methods are used to locate the [illegal aliens] and one of the methods is to ascertain the places where aliens may gather or may be found or experience has demonstrated that aliens may be found . . .

[58] INS officers have statutory authority to enter private lands other than dwellings within twenty-five miles from any external boundary without a warrant. 8

asked to justify their right to be or remain in the country.[59] Since illegal aliens normally live and work in areas populated by people with similar characteristics,[60] it is not surprising that many citizens and legal residents are subjected to the harassment of field interrogation.[61]

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U.S.C. § 1357(a)(3) (1974). Outside the twenty-five mile limit, immigration officers have the power to enter private lands without a warrant upon a showing that illegal aliens are likely to be found there. Taylor v. Fine, 115 F. Supp. 68 (S.D. Cal. 1953). These powers, however, are interpreted by the INS to allow officials to enter farms but not private places of business. Thus, without the consent of the owner, either a warrant must be obtained or the interrogation of employees must take place outside the place of business. *See* Gordon, *supra* note 19, at 65.

[59] Committee on Immigration and Nationality of the Association of the Bar of the City of New York, *Palmer Raids Revisited*, reproduced in INTERPRETER RELEASES, vol. 50, n. 12, at 74-75 (1973). At Congressional hearings, INS officials testified as to the criteria used by INS agents when determining who to stop. Donald T. Williams, acting District Director of the Los Angeles Office of the INS, testified at the *Immigration Hearings 1973*, *supra* note 15, at 6-7, that an immigration officer based on his past experience,

> looks for individuals who by their speech — perhaps he can't speak English — and sometimes by their appearance, he can determine that they may be from one of the countries where a large number of illegal aliens are coming from.

Sol Marks, District Director of the New York Office of the INS testified, *id.* at 26, that:

> some of our men will observe the shoes these people are wearing, and these shoes are peculiar and unique in that they are generally cheap shoes that have been fabricated in institutions, like prisons. The cut of their clothing, oftentimes it is skimpily fitted; the lapels are quite different from the general run of our American styles, or people that we would ordinarily encounter. Oddly enough, there is one group that carries a brown paper bag in going to work, and that sometimes, together with other factors, leads to stopping and interrogation. Many of them might be wearing ponchos draped over their shoulders.

[60] *See* note 38 *supra*.

[61] *See* notes 14 and 15 *supra*. Congressman Jerome Waldie stated in *Immigration Hearings 1973*, *supra* note 15, at 141, that:

> I not only received written complaints but I went down into the area [where INS searches had occurred] and I tell you, there is no greater bone of contention in Los Angeles and in San Ysidro and in National City and in Chula Vista among Americans who are of Mexican descent . . . they are being stopped all the time.

A search within the Mexican-American community in Los Angeles in 1973 was described in the *Advocate*, a publication of the Los Angeles Trial Lawyers Association. The report stated that:

> Search operations are being conducted, without reasonable or probable cause to believe that individuals stopped and interrogated are in fact aliens, merely because such persons appear to be "foreign looking". Reports come in almost daily of immigration officers stopping and interrogating individuals at bus stops, on public streets, in private businesses and of knocking on doors at private residences and apartments and requiring individuals therein to produce proof of their lawful status in the United States.

Reproduced in 119 CONG. REC. S17813 (daily ed. Sept. 26, 1973). The INS estimated that in this particular operation, 7000 persons besides the 11,500

In interpreting section 287(a)(1), the courts have recognized that not all field interrogations constitute a "seizure". In *Yam Sang Kwai v. INS*[62] and *Shu Fuk Cheung v. INS*[63] immigration officers conducted a typical area control operation. Agents entered a restaurant to check for illegal aliens knowing only that the establishment employed oriental persons and served oriental food. When they encountered an individual of oriental descent who appeared to be an alien, the officers questioned that person as to his right to be in the country. In upholding this operation, the court interpreted section 287(a)(1) as granting immigration officers the right "to seek to interrogate individuals reasonably believed to be of alien origins".[64] Such belief can be based largely on appearances,[65] although another case seems to suggest that appearances alone are insufficient.[66]

In both *Yam Sang Kwai* and *Shu Fuk Cheung*, the judges assumed that after the initial confrontation the suspect voluntarily cooperated with the officers and thus was not "seized" against his will.[67] Absent a seizure, immigration officers, like police officers, are not subject to the more rigorous standards of *Terry*[68] and the court is free to interpret the statute literally.

In contrast, detention of unwilling individuals reasonably believed

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illegal aliens apprehended were interrogated. Of the 7000, 1750 were citizens and 5250 were resident aliens. Despite the disruption these operations caused, the INS attributed the relatively low rate of non-illegal aliens interrogated to the amount of pre-search information. *See Immigration Hearings 1973, supra* note 15, at 143. In the Yakima Valley of Washington state, charges have been made in the *Yakima Herald Republic*, May 16, 1974, that:

> Immigration agents "corral" labor camps so illegal workers don't run away . . . agents bust into people's homes late at night and humiliate both legal and illegal workers in their sweeps through migrant camps.

The American Civil Liberties Union has filed suit against the INS for people affected by INS searches in Chicago, New York and Los Angeles. *See* Hayden, *supra* note 14, at 29.

[62]411 F.2d 683 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 877 (1969).

[63]476 F.2d 1180 (8th Cir. 1973).

[64]*Id.* at 1182. *See also* Au Yi Lau v. INS, 445 F.2d at 222.

[65]Hon Keung Kong v. INS, 356 F. Supp. 571, 573 (E.D. Mo. 1973). *See also* Yam Sang Kwai v. INS, 411 F.2d at 684; Shu Fuk Cheung v. INS, 476 F.2d at 1181.

[66]Cheung Tin Wong v. INS, 468 F.2d 1123, 1127 (D.C. Cir. 1972).

[67]Judge McGowan concurring in Yam San Kwai v. INS, 411 F.2d at 688 writes that:

> The evils of the dragnet detention for investigation in any area of law enforcement are always a legitimate area of judicial concern. But that concern may more properly be pursued at the instance of one who has clearly been detained against his will.

*But see* Judge Wright's dissent, *id.* at 691-92.

[68]Terry v. Ohio, 392 U.S. at 19 n. 16. *See also* United States v. Burrell, 286 A.2d at 846-47 where the court as a matter of law held that if a police officer touches the suspect on the elbow and says, "Hold it, sir, could I speak with you a second", that no seizure has taken place within the purview of Terry v. Ohio despite the fact that the trial court so held. Since no seizure had taken place, the officer need not substantiate the reasons for the stop.

to be aliens for the purpose of questioning raises constitutional questions analogous to those in *Terry* and *Adams*. In *Au Yi Lau v. INS*[69] an informer's tip led INS agents to a Chinese restaurant where without warrant the officers identified themselves to the owner and obtained permission to interview employees. In response to the appearance of the INS officers, three individuals of oriental appearance attempted to flee and the officers forcibly detained them for questioning. In the companion case of *Tit Tit Wong v. INS*,[70] an immigration officer, while interrogating an alien believed to be illegally in the country, noticed two individuals of Chinese descent depart in an odd manner. The officer later pursued the two to their car, took their keys, and detained them for questioning.

In analyzing these two cases, the court distinguished *Yam Sang Kwai* in which suspected alienage was sufficient to justify seeking out people for questioning.[71] When immigration officers detain people against their will,[72] the statutory authority of section 287(a)(1) must be construed consistently with constitutional standards governing similar detentions made by other law enforcement agents.[73] Applying the standards enunciated in *Terry*, the court interpreted section 287(a)(1) to allow immigration officers to make temporary forcible detentions for the purpose of interrogation under circumstances creating a reasonable suspicion that the individual so detained is illegally in the country.[74]

A more recent decision, however, appears to severely limit the applicability of the standard enunciated in *Au Yi Lau*. In *Cheung Tin Wong v. INS*,[75] an INS officer observed an oriental pedestrian's apparent inability to speak English and subsequently temporarily detained him for questioning.[76] The court, though recognizing the detention as a seizure, refused to extend the reasonable suspicion standard of *Au Yi Lau* to any seizure by INS officers.[77] Rather, the court held that section 287(a)(1) grants INS officers the power to detain temporarily for questioning individuals reasonably believed to be aliens.[78] Given that such a detention was a seizure which in-

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[69] 445 F.2d 217 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 864 (1971).
[70] 445 F.2d 217 (D.C. Cir. 1971).
[71] *Id.* at 222.
[72] *See* text accompanying notes 46-48 *supra*.
[73] Au Yi Lau v. INS, 445 F.2d at 223.
[74] *Id.*
[75] 468 F.2d 1123 (D.C. Cir. 1972).
[76] Although the actual seizure technically was a car stop, the court in its opinion utilized and interpreted the standards established in *Yam Sang Kwai* and *Au Yi Lau* for pedestrians rather than relying on the car stop cases. The INS, moreover, utilizes this case to justify the temporary detention of aliens. *See Immigration Hearings 1973, supra* note 15, at 39-40.
[77] Cheung Tin Wong v. INS, 468 F.2d at 1127.
[78] *Id.* at 1128. *See also* 1973 INS ANNUAL REP. 17.

fringed upon constitutionally protected rights, the court's interpretation does not afford these rights adequate protection.

As in *Au Yi Lau*, the court in *Cheung Tin Wong* stated that it was utilizing the standard developed in *Terry* and *Adams* that a "brief stop of a suspicious individual in order to determine his identity may be most reasonable in light of the facts known to the officer at the time".[79] The suspicious behavior relied upon in *Cheung Tin Wong*, however, was that the detained individual appeared to be an alien based upon his apparent inability to speak English.[80] Although the court appears to have insisted upon more than ethnic appearance alone to justify the seizure,[81] a standard based upon suspected alienage rather than suspicion of illegal presence is questionable.

While the situation in *Terry* is definitely analogous, the suspicious behavior that justified the stop in *Terry* related to possible criminal activity.[82] In contrast, the court in *Cheung Tin Wong* sanctioned a temporary detention of an individual solely on the ground that he appeared to be an alien,[83] even though being an alien is not a crime.[84] Although interrogation by INS officials tends to be brief and narrow in scope,[85] such interrogation, like that by police officers, serves to stigmatize and induce fear in those who are questioned.[86] INS operations have also created general fears of harassment and discrimination within minority communities.[87] Any standard based on alienage, even if based upon an inability to speak English, subjects citizens who speak a foreign language or who have

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[79] Cheung Tin Wong v. INS, 468 F.2d at 1127, *citing* Terry v. Ohio, 392 U.S. at 21-22 and Adams v. Williams, 407 U.S. at 146.

[80] *Id.* at 1128.

[81] *Id.* at 1127.

[82] Terry v. Ohio, 392 U.S. at 30.

[83] Cheung Tin Wong v. INS, 468 F.2d at 1128.

[84] Not only is it not a crime to be an alien, but state discrimination based on alienage is inherently suspect. Graham v. Richardson, 403 U.S. 365, 372 (1971). Further, while being an illegal alien is a violation of federal immigration statutes, the mere fact that one is an illegal alien is not a crime and subjects the illegal alien to deportation rather than criminal sanctions. Abrams and Abrams, *supra* note 4, at 23; GORDON & ROSENFELD, IMMIGRATION LAW AND PROCEDURE, Vol. 2, § 9:1 at 9-4 (1975). *See also* Justice Powell's concurring opinion in Almeida-Sanchez v. United States, 413 U.S. at 278. For a discussion of the criminal penalties which an illegal alien might be subject to, *see* GORDON & ROSENFELD, IMMIGRATION LAW AND PROCEDURE, Vol. 2, § § 9:22-9:40, at 9-49 - 9-85 (1975).

[85] *Immigration Hearings 1973, supra* note 15, at 140. Yet, although aliens legally within the country are required to carry some form of identification on their person at all times as per 8 U.S.C. § 1304(d) (1974), citizens usually carry no papers which indicate that they are citizens and consequently may have difficulty proving their citizenship to an INS officer. *See Immigration Hearings 1973, supra* note 15, at 7.

[86] Judge J. Skelly Wright dissenting in Yam San Kwai v. INS, 411 F.2d at 693, considered the intrusion of INS interrogation to be severe.

[87] *See* note 61 *supra.*

an accent to temporary detention for questioning.[88] The adoption of a standard based on alienage also tends to legitimize searches for illegal aliens based upon mere hunch rather than forcing INS officials to minimize individual harassment by prior investigation.[89]

In ascertaining an equitable standard these individual interests must be balanced against the government's interest in controlling illegal immigration.[90] This governmental interest, however, is no greater than the state's interest in preventing and detecting violent crime which was articulated in *Terry*.[91] Even assuming that the control of illegal aliens is a significant governmental interest,[92] the government may have a more effective and less intrusive means of solving this problem by making it a crime to employ illegal aliens.[93] Given these factors, section 287(a)(1) should be interpreted to allow temporary detention of pedestrians for questioning only when INS officials have particular grounds to support a reasonable suspicion that the person to be detained is illegally in the country.

The determination of what constitutes a reasonable suspicion that a particular individual is illegally in the country is a factual ques-

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[88] A Senate staff official stated that:

> Americans with Spanish or Italian or any kind of accent are easy marks . . . They get hauled off the job, prove they're citizens but lose a day's work in the process. It borders on harassment.

*Wall Street Journal*, January 8, 1975, at 1, col. 4.

[89] The INS district offices in Los Angeles and New York received about 33,000 complaints or leads concerning illegal aliens in fiscal year 1972 and had a backlog of about 77,000 uninvestigated complaints at the time of the General Accounting Office's Review of the INS. GAO REPORT, *supra* note 16, at 10. Congressman Jack McDonald testified that over 130,000 complaints were destroyed in the Los Angeles office alone between June 1971 and March 1972. *Illegal Alien Hearings*, *supra* note 9, pt. 5, at 1268.

[90] The balancing test has been used by the Court in other cases involving Fourth Amendment issues. *See* Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967); Terry v. Ohio, 392 U.S. at 20-21.

[91] Terry v. Ohio, 392 U.S. at 24.

[92] In Justice Powell's concurring opinion in Almeida-Sanchez v. United States, 413 U.S. at 275, he states:

> There can be no question as to the seriousness and legitimacy of the law enforcement problem with respect to enforcing along thousands of miles of open border valid immigration and related laws.

*But see* sources cited in note 4 *supra*, which question the seriousness of the problem.

[93] Charles Gordon, General Counsel for the INS, stated:

> I suppose many persons would urge that the most urgent immediate objective is to enlarge the enforcement apparatus and strengthen enforcement procedures . . . but . . . they can have only a limited impact in attempting to reduce the enormous impact of illegal aliens . . . We [INS] believe that if such employment [of illegal aliens] is prohibited, the compliance of law-abiding employers would remove the chief inducement for illegal entry and would inevitably result in a marked reduction of border violators.

*Illegal Alien Hearings*, *supra* note 9, pt. 5, at 1526. *See also* Leahy, *Border Patrol Checkpoint Operation Under Warrants of Inspection: The Wake of Almeida-Sanchez v. United States*, 5 CAL. WEST. INT. L.J. 62, 66 (1974).

tion,[94] requiring a case by case analysis.[95] Prior cases offer some indication of the types of facts which would be sufficient.[96] A reasonable suspicion can be based on the officer's personal observations or on reliable information supplied by third parties.[97] While appearances alone would not create a basis for a reasonable suspicion of illegal presence,[98] the flight of individuals who appear to be aliens in response to the appearance of immigration officials has been held to be sufficient.[99] That a general area has been known to contain a large number of illegal aliens does not warrant an intrusion unless independent grounds exist to suspect that the individual to be detained is illegally in the country.[100] Reliable information which established that illegal aliens are in a specific location would probably support an investigative stop. A standard based on illegal presence does not prohibit INS officials from the practice of making investigative stops; it merely prevents abuse of that practice. As Judge J. Skelly Wright wrote in his dissenting opinion in *Yam Sang Kwai:*

> We entirely ignore the letter and spirit of the Fourth Amendment when we sanction detention of an individual for interrogation by law enforcement officers on grounds no more substantial than the ethnic character of his restaurant or his own apparent race or national origin.[101]

### *2. INVESTIGATIVE CAR STOPS*

Automobile stops in the interior by INS officials in order to question passengers about their right to be in the United States present an even more compelling case for stricter standards than pedestrian stops. While a pedestrian is technically not "seized" by a law enforcement agent unless he is detained,[102] a motorist's liberty of movement is restrained and he or she consequently is "seized" whenever a law

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[94] Au Yi Lau v. INS, 445 F.2d at 223.
[95] *Id.*
[96] *See* LaFave, *Street Encounters and the Constitution: Terry, Sibron, Peters and Beyond*, 67 MICH. L. REV. 39, 73-84 (1968).
[97] Adams v. Williams, 407 U.S. at 147. *See also* Spinelli v. United States, 393 U.S. 410 (1969) regarding the reliable informant.
[98] Cheung Tin Wong v. INS, 468 F.2d at 1127. *See also* United States v. Mallides, 473 F.2d 859, 861-62 (9th Cir. 1973).
[99] Au Yi Lau v. INS, 445 F.2d at 223, 225.
[100] Cheung Tin Wong v. INS, 468 F.2d at 1127-28. *See also* United States v. Davis, 458 F.2d 819, 822 (D.C. Cir. 1972), United States v. Mallides, 473 F.2d at 861 n. 3 and Sibron v. New York, 392 U.S. 40, 62 (1968). These cases, although recognizing that certain areas are more likely than others to have high incidents of crime, absent other reliable indicia or suspicious circumstance, no seizure of an individual is warranted solely based on the characteristics of the geographic area.
[101] 411 F.2d at 694.
[102] Terry v. Ohio, 392 U.S. at 19 n. 16; Cupp v. Murphy, 412 U.S. 291, 294 (1973); United States v. Nicholas, 448 F.2d 622, 624 (8th Cir. 1971). *See also* text accompanying notes 46-48 *supra.*

enforcement agent directs that the vehicle be stopped.[103]

Although the Supreme Court has not determined the minimum justification required for an automobile stop,[104] the Court recently reaffirmed the right of those travelling by automobile "to free passage without interruption [seizure] or search".[105] One commentator has recently argued that the interference with a motorist's right to privacy and free passage is so severe that a police officer in order to stop a car should meet the high evidentiary standard of probable cause to arrest.[106] Most lower courts, however, relying on *Terry*, require that police officers making an investigative stop act on a reasonable suspicion that the detained motorist may presently be involved in criminal activity.[107]

A motorist's right to free passage must be protected by an evidentiary standard which is comparable to that suggested for pedestrians.[108] That standard would require an INS officer to have a reasonable suspicion that the motorist is engaged in illegal activity or is an illegal alien prior to stopping the car. The lower courts, however, have failed to articulate a consistent standard regarding the power of INS officials to stop motorists without a warrant,[109] and most of the standards adopted have afforded little protection to the motorist's right to free passage.

The Tenth Circuit in *Bowman v. United States*[110] interpreted section 287(a)(1) as giving immigration officers the right to stop any vehicle for the purpose of ascertaining the nationality of the motorists.[111] Rather than analyzing the car stop as a seizure, the court relied on the pre-*Almeida* cases which had upheld the constitutionality of section 287(a)(1) as applied to motorists.[112] The *Bowman* interpretation allows INS officers to conduct warrantless vehicle stops anywhere in the United States without probable cause or even

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[103] Carpenter v. Sigler, 419 F.2d 169, 171 (8th Cir. 1969). *See also* United States v. Nicholas, 448 F.2d at 624 n. 3; United States v. Ward, 488 F.2d 162, 168-69 (9th Cir. 1973).

[104] *See* United States v. Mallides, 473 F.2d at 861.

[105] Almeida-Sanchez v. United States, 413 U.S. at 274, *citing* Carroll v. United States, 267 U.S. at 153-54.

[106] Note, *Nonarrest Automobile Stops: Unconstitutional Seizures of the Person*, 25 STAN. L. REV. 865 (1975).

[107] *See* United States v. Fisch, 474 F.2d 1071, (9th Cir. 1973), *cert. denied*, 93 S. Ct. 2742 (1973); United States v. James, 452 F.2d 1375 (D.C. Cir. 1971); United States v. Catalano, 450 F.2d 985 (7th Cir. 1971).

[108] *See* text accompanying notes 82-101 *supra*.

[109] For discussion of the warrant, *see* note 31 *supra* and Leahy, *supra* note 93, at 62.

[110] 487 F.2d 1229 (10th Cir. 1973).

[111] *Id.* at 1231.

[112] *Id.* at 1231. *See also* Fernandez v. United States, 321 F.2d 283 (9th Cir. 1963); United States v. Correja, 207 F.2d 595 (3rd Cir. 1953); United States v. Montez-Hernandez, 291 F. Supp. 712 (E.D. Cal. 1968).

a reasonable suspicion that any of the occupants are illegal aliens.[113]

Even in cases where courts have classified car stops as seizures, the evidentiary standard applied has been inadequate. In *United States v. Grando*[114] and *United States v. Saldana*[115] immigration officers stationed themselves next to a toll booth some eight hundred miles from the Mexican border. The booth was located on a major interstate turnpike which also served as an important route for the transportation of illegal aliens from Mexico to Chicago. These INS officers stopped vehicles which were carrying people who appeared to be of Mexican descent in order to question them as to their nationality.[116] In upholding these stops, the court relied on the fact that approximately 100 illegal aliens of Mexican descent had been discovered at this location in the past.[117] Such an analysis, however, allows officers to intrude upon constitutionally protected rights based on mere hunch. The fact that innocent activity occurs in a high crime area provides no basis for converting innocuous conduct into suspicious activity.[118] Conduct does not become suspecious simply because the skins of the occupants of the car are non-white.[119] Reliance on nationality alone as a basis for these car stops suggests discrimination on the basis of nationality. Such discrimination is inherently suspect and subject to close judicial scrutiny.[120]

In contrast to *Bowman*, *Grando*, and *Saldana*, the Ninth Circuit has adopted an evidentiary standard for car stops which represents a more equitable approach. In *United States. v. Brignoni-Ponce*[121] INS officials stopped a car sixty-five miles north of the Mexican border on Interstate 5 between San Diego and Los Angeles because the passengers appeared to be of Mexican descent. In reversing the conviction for transporting illegal aliens, the court held that section 287(a)(1) did not give immigration officers a "carte blanche" to stop vehicles anywhere in the United States in order to question people regarding their residency status.[122]

The standard the Ninth Circuit adopted is in accord with the reasonable suspicion standard established for pedestrian seizures in

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[113] *See* United States v. Brignoni-Ponce, 499 F.2d 1109, 1110-11 (9th Cir. 1974), *cert. granted*, 95 S. Ct. 40 (1974), which interpreted *Bowman*. Confirmation of this interpretation is found in the Tenth Circuit's case of United States v. Newman, 490 F.2d 993, 995 (10th Cir. 1974), in which a car stop by an INS officer seven hundred miles from the border would have been upheld.

[114] 453 F.2d 769 (10th Cir. 1972).

[115] 453 F.2d 352 (10th Cir. 1972).

[116] *See also* United States v. Montez-Hernandez, 291 F. Supp. at 716.

[117] United States v. Saldana, 453 F.2d at 354.

[118] United States v. Mallides, 473 F.2d at 861 n. 3. *See* note 100 *supra*.

[119] *See* United States v. Brignoni-Ponce, 499 F.2d at 1112.

[120] Graham v. Richardson, 403 U.S. 365, 372 (1971); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

[121] 499 F.2d 1109 (9th Cir. 1974), *cert. granted*, 95 S. Ct. 40 (1974).

[122] *Id.* at 1110.

*Au Yi Lau.*[123] Under the Ninth Circuit's interpretation, immigration officers in order to justify automobile stops at non-border checkpoints,[124] or on roving patrol[125] must have a reasonable or founded suspicion that illegal aliens are in the automobile. This test forces officials to articulate "some basis from which the court can determine that the temporary detention was not arbitrary or harassing".[126] While a stop based solely on the Mexican appearance of the passengers is unjustified,[127] agents are not forbidden to stop cars carrying people of Mexican descent if independent grounds for suspicion exist.[128]

The Supreme Court has granted certiorari to *United States v. Brignoni-Ponce*,[129] and apparently will remedy the present inconsistency among the circuits. As in the case of seizures of pedestrians,[130] the standard of reasonable suspicion serves to protect the constitutional rights of domestic travellers while allowing enforcement agents to make vehicle stops to discover illegal aliens in transit when these stops are based on more than mere hunch or class suspicion.[131]

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[123] *Id.* at 1111. *See also* text accompanying notes 71-74 *supra.*

[124] United States v. Esquer-Rivera, 500 F.2d 313 (9th Cir. 1974). *See also* United States v. Bowen, 500 F.2d 960, 963-64 (9th Cir. 1974), *cert. granted*, 95 S. Ct. 40 (1974), in which the court refused to apply different standards to searches made at fixed checkpoints and those on roving patrol. For critique, *see* Judge Carr's dissent in United States v. Galvan, 500 F.2d 1131 (9th Cir. 1974).

[125] *See* United States v. Bugarin-Casas, 484 F.2d 853 (9th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974); United States v. Jaime-Barrios, 494 F.2d 455 (9th Cir. 1974); United States v. Ojeda-Rodriquez, 502 F.2d 560 (9th Cir. 1974).

[126] United States v. Jaime-Barrios, 494 F.2d at 457.

[127] United States v. Brignoni-Ponce, 499 F.2d at 1112; United States v. Mallides, 473 F.2d at 861-62.

[128] United States v. Bugarin-Casas, 484 F.2d at 855. In *Bugarin-Casas*, the fact that the car was riding low created a reasonable suspicion that smuggling was afoot. *See also* United States v. Ojeda-Rodriquez, 502 F.2d at 561, where the fact that the car was dusty, had scratches on its side and was dragging its tailpipe and muffler created a reasonable suspicion that smuggling was afoot; United States v. Mora-Chavez, 496 F.2d 1181, 1182 (9th Cir. 1974), where the fact that electronic sensors detected human foot traffic across the border created a founded suspicion to justify stopping two cars which were the only ones known to have been in the area where the sensors went off; United States v. Padilla, 500 F.2d 641, 644-45 (9th Cir. 1974), where the fact that two cars were travelling at high speeds and at unsafe intervals in the dark with no lights on a remote road known to be used by smugglers constituted a founded suspicion to justify a car stop by INS officers.

[129] *Certiorari granted*, 95 S. Ct. 40 (1974). After completion of this article, the United States Supreme Court handed down its opinion in United States v. Brignoni-Ponce, 43 U.S.L.W. 5028 (U.S., June 30, 1975). In their unanimous decision, the Court adopted the reasonable suspicion standard for vehicle stops.

[130] *See* text accompanying notes 82-101 *supra.*

[131] In Davis v. Mississippi, 394 U.S. 721, 726-27 (1969), the Supreme Court wrote:

> Investigatory seizures would subject unlimited numbers of innocent people to the harassment and ignominy incident to involuntary de-

## III. LOCAL ENFORCEMENT

The potential for harassment arises not only with INS enforcement operations but also with operations by local enforcement officials. Documented incidents of local police[132] harassment of highly visible minorities indicate that the utilization of untrained personnel is a major problem.[133] These untrained officials have been charged with using racially discriminatory[134] and legally suspect methods of enforcement.[135] This harassment and discrimination would be ample grounds by themselves for limiting the powers of legally authorized officials. The realization that local officials do not have the legal authority to enforce most federal immigration law makes the policy reasons for stopping unauthorized local enforcement become more compelling.

Three legal arguments demonstrate why any local enforcement of federal immigration law, without specific statutory provision, should not be allowed. First, federal statutes, legislative history, and judicial interpretation indicate that the federal government has preempted the field of immigration. Second, case law shows that local officials cannot enforce federal offenses that are subject merely to administrative disposition and are not triable in the courts. Third, assuming that federal law does not bar state action, state standards which are ap-

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> tention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizens, whether these intrusions be termed arrests or investigatory detentions.

Quoted with approval in United States v. Mallides, 473 F.2d at 862.

[132] In United States v. Mallides, 473 F.2d at 860, the court noted that one officer had testified that he stopped any car that had Mexican looking individuals in it. Recorded abuses include searches without warrant, unreasonably long periods of detention, and extortion of money from illegal aliens. *See Illegal Alien Hearings, supra* note 9, pt. 3, at 800-01. The *Fresno Bee*, Oct. 9, 1974, at 1, col. 1, reported a police practice in which illegal aliens were forced to pay bail under the threat of having the border patrol called. This bail was almost always forfeited since few illegal aliens would ever voluntarily show up in court.

[133] Local officials do not go through the special type of training that INS officials undergo. *See* THE BORDER PATROL, ITS ORIGIN AND ITS WORK, UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATIONALITY SERVICE, 1971, at 11. This lack of training has led to situations where local police have enlisted the aid of other untrained personnel in constitutionally suspect attempts to catch illegal aliens. In San Diego, in September of 1972, a program was instituted to have taxi cab drivers radio in to their dispatchers if they thought that they had any illegal aliens in their vehicles. No specific guidelines were given the drivers. Although the program was ostensibly voluntary, noncooperation could have resulted in the loss of the operator's permit. The taxi driver, therefore, was faced with a choice of either reporting all Mexicans he picked up or running the risk of losing his permit. Of course, he also had the choice of not picking up any Mexicans at all, but he could be punished for that, too. *See San Diego Star News*, Nov. 5, 1972.

[134] Article written by Herman Baca, member of MAPA, the Mexican American Political Association, in the *San Diego Union*, June 6, 1973, at B-11.

[135] *See* notes 132 and 133 *supra*.

plicable to the enforcement of federal immigration law may prevent local officials from locating or arresting persons for immigration violations.

## A. FEDERAL PREEMPTION

The United States Constitution clearly makes the federal government supreme in the field of immigration.[136] Two theories support this preemptive power. First is that when Congress passes a complete scheme of regulation, the states may not contradict or complement it.[137] Second is that immigration is intimately entwined with international relations, and international relations are the federal government's exclusive responsibility.[138] Congress, when it passed the Immigration and Nationality Act of 1952 recognized this federal preemption and drafted the various sections accordingly.

### *1. FEDERAL STATUTE SPECIFICALLY PROHIBITS UNAUTHORIZED LOCAL ENFORCEMENT*

According to section 274(a) of the INA, smuggling, harboring or shielding illegal aliens from detection constitutes a felony. Subsection (b) states:

> No officer or person shall have authority to make any arrest for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and *all other officers whose duty it is to enforce criminal law.* (emphasis added)[139]

Congress, by the language in this subsection, specifically seemed to include local law enforcement officials. The legislative history of section 274 makes this clear. The House of Representatives struck the words, "of the United States", from the phrase "all other officers of the United States whose duty . . . ", so that local officials could enforce this specific section.[140] Due to this specificity, no controversy exists regarding involvement of local police in operations designed to stop the felony of smuggling aliens.

The main point of contention regarding local enforcement revolves around section 275 of the INA. This section states that any alien who enters the country illegally or eludes examination by INS offi-

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[136] Hines v. Davidowitz, 312 U.S. 52, 62 (1941). For state court decisions recognizing federal preemption of the field of immigration, *see* Dolores Canning Co., Inc. v. Howard, 40 Cal. App. 3d 673, 685, 115 Cal. Rptr. 435, 443 (1974); De Canas v. Bica, 40 Cal. App. 3d 976, 979, 115 Cal. Rptr. 444, 445 (1974); Cobos v. Mello-Dy Ranch, 20 Cal. App. 3d 947, 951, 98 Cal. Rptr. 131, 133 (1971); Diaz v. Kay-Dix Ranch, 9 Cal. App. 3d 588, 593, 88 Cal. Rptr. 443, 446 (1970).
[137] Hines v. Davidowitz, 312 U.S. at 62-63.
[138] *Id.* at 63-64.
[139] 8 U.S.C. § 1324(b) (1974).
[140] CONF. REP. NO. 1505, 82nd Cong., 2d Sess. (1952).

cials is guilty of a misdemeanor. Any subsequent violation of this section, after conviction or deportation under it, constitutes a felony.[141] Section 275, unlike section 274, does not mention anything regarding local enforcement.[142] Since both of these sections deal with illegal entry into the United States and since both were considered by the same Congress, the legislators apparently intended one to be enforced by all enforcement officials and one to be enforced only by the INS. The specific reference in section 274 to local enforcement, both in language and legislative history, lends great weight to an inference that Congress considered immigration laws solely within the purview of federal enforcement and that special enabling language was needed to grant local officials the authority to enforce specific provisions.[143] The legislative history indicates that no local official has the power or authority to stop any person whom he believes is violating any portion of section 275.

### 2. *THE FEDERAL GOVERNMENT HAS COMPLETELY OCCUPIED THE FIELD OF IMMIGRATION*

While the previous statutory interpretation indicates that the legislative intent of Congress was clear, the basis for the contrary contention that local officials do have the authority to enforce federal immigration law is that section 275 of the INA is silent on the matter of local enforcement.[144] Even assuming that this particular section is silent, however, Congress in the area of immigration law can occupy the field so completely that conflicting or even harmonious state regulations can be excluded.[145]

In *Hines v. Davidowitz* [146] the Supreme Court dealt with the issue of federal preemption in the field of immigration. Pennsylvania had passed an Alien Registration Act which required aliens to register annually and carry an identification card. This procedure conflicted

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[141] 8 U.S.C. § 1325 (1974).
[142] This section mentions only immigration officers, *see id.*
[143] The argument can be made, however, that since § 275 was carried over relatively intact from previous legislation, (45 Stat. 1551, 1929, 8 U.S.C. § 180a (1946)), while § 274 appeared for the first time in a 1952 statute, (Pub. L. No. 283, 82d Cong., 2d Sess., March 20, 1952), that they were not considered by the same Congress. However, the same Congress which passed § 275 reviewed § 274 closely enough to change its penalty provision substantially. The change was from a one to a two tiered penalty system. The original provided only a misdemeanor charge, while the new one provides for a misdemeanor and then a felony charge, based upon the number of offenses involved. This change appears to indicate that the Congress did review § 275 and saw fit not to include any local enforcement provision. Compare with Note, *Wetbacks: Can The States Act To Curb Illegal Entry?*, 6 STAN. L.R. 287, 313-16 (1954).
[144] 8 U.S.C. § 1325 (1974).
[145] Hines v. Davidowitz, 312 U.S. at 66-67 (1941).
[146] *Id.*

with the Federal Alien Registration Act[147] which, at the time, had a registration provision but did not require an identification card. The Court stated that since immigration is particularly a federal interest,[148] the Congressional purpose in enacting a regulation could be determinative of whether Congress had left any room for the states to act. In the majority opinion Justice Black wrote that the chairman of the Senate subcommittee had stated that the purpose of the 1940 Federal Alien Registration Act was to make registration "a harmonious whole".[149] The Court decided that this left no room for the states to act in the same area.[150]

The Congressional purpose in *Hines v. Davidowitz* is analogous with the purpose announced in the House of Representatives committee report which accompanied the Immigration and Nationality Act of 1952.[151] The report stated that, "The purpose of the bill is to enact a comprehensive . . Immigration and Nationality Code."[152] Therefore, any state enforcement under section 275 would seem to fall under the prohibition in *Hines* that,

> where the federal government, in the exercise of its superior authority in this field [immigration] has enacted a complete scheme of regulation, states cannot . . . complement the federal law.[153]

Since state enforcement is complementary to federal enforcement, and since Congress apparently intended to occupy the field, even assuming section 275 is silent on the matter of local enforcement, states are precluded from enforcing any immigration law unless they have specific statutory authority.

### 3. *IMMIGRATION ENFORCEMENT BY LOCAL OFFICIALS INFRINGES ON INTERNATIONAL RELATIONS*

The Supreme Court based its decision in *Hines*[154] on the principle reemphasized in *Zschernig v. Miller*[155] that states should not get involved in international relations. In *Hines* the Court noted that any state enforcement of laws regarding aliens was a particularly dangerous area since,

> Subjecting . . . [aliens] . . . to indiscriminate and repeated interception and interrogation by public officials . . . bears an inseparable relationship to the welfare and tranquility of all the states.[156]

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[147] *Id.* at 72-74.
[148] *Id.* at 68-69.
[149] *Id.* at 72.
[150] *Id.* at 74.
[151] 2 U.S. CODE CONG. AND ADMIN. NEWS (1952) at 1653.
[152] *Id.*
[153] Hines v. Davidowitz, 312 U.S. at 66.
[154] *Id.* at 64.
[155] Zschernig v. Miller, 389 U.S. 429 (1968).
[156] Hines v. Davidowitz, 312 U.S. at 65-66.

In *Zschernig*, an Oregon intestacy statute based the rights of foreign heirs on whether the particular foreign government involved had a system of law which provided for property confiscation. The Court held that this statute was too involved with foreign policy and therefore was an intrusion into the exclusively federal field of international relations.[157]

Recently the President of Mexico made an official protest to the President of the United States regarding the treatment of Mexican nationals by American officials.[158] Reports of abuse of Mexican nationals by enforcement officials have similarly brought reaction from the Mexican government.[159] Present local enforcement efforts can exacerbate this situation since local officials who enforce federal immigration law work under the handicap of having no statewide policy to follow.[160] This unfortunately leads to erratic, haphazard and discriminatory enforcement, often with police in the same geographic area operating under completely different standards.[161] Since local enforcement of immigration laws against foreign nationals has international overtones, and since international relations is exclusively a federal field,[162] states should only be allowed to act on specific Congressional authorization.

## B. LOCAL OFFICIALS CANNOT ENFORCE FEDERAL OFFENSES WHICH ARE NOT TRIABLE IN THE COURTS

Since being in the United States "illegally" is neither a felony nor a misdemeanor,[163] an alien who is apprehended after having completed his entry into the country[164] is only subject to deportation,

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[157] Zschernig v. Miller, 389 U.S. at 440-41.

[158] *Los Angeles Times*, Nov. 1, 1974, at 6, col. 1, part 2.

[159] *See* CRAMTON REPORT at 12-13, 50; *New York Times*, July 15, 1974.

[160] The INS operational priorities apply only to the INS, not to local officials. *See* ESTABLISHMENT OF OPERATIONAL PRIORITIES – FY 1975, LEONARD CHAPMAN, Commissioner of the INS.

[161] A prime example of this is in the San Diego area. The San Diego County Sheriff's Department Manual of Policies and Procedures has a section entitled "Detaining and/or arrest of illegal aliens", which states that San Diego County Sheriffs cannot arrest or detain an alien except in conjunction with some violation of the penal code other than immigration. However, the police department of the City of San Diego has a policy, stated in a memorandum from the Chief of Police's legal advisor, Eugene Gordon (May 8, 1973), which allows their officers to stop and detain aliens upon "reasonable suspicion" that they are violating federal immigration laws. This type of diversity of policy in the same geographic area leads to confusion at best and abuse at worst. *See* note 132 *supra*.

[162] Hines v. Davidowitz, 312 U.S. at 63.

[163] Neither 8 U.S.C. § 1324 nor § 1325 make illegal presence a crime. *See* note 84 *supra*.

[164] Cal. Atty. Gen. Office, unpublished letter to Assemblyman Peter Chacon, Aug. 8, 1973, at 4-5 [hereinafter cited as Atty. Gen. Letter].

not criminal prosecution.[165] Accordingly, a major legal issue in local enforcement of immigration law is whether a local official can enforce federal law when the offense involved is tried not by the courts, but rather by administrative hearing.[166]

In *Kurtz v. Moffitt and Another*,[167] two San Francisco police officers arrested and detained without warrant a military deserter. Desertion from the military, at that time, was not a felony or misdemeanor[168] and could only be punished by Court Martial.[169] The Supreme Court held that a local official had no authority to arrest and detain a deserter whose offense was not triable and punishable in the courts.[170]

A direct analogy exists between the *Kurtz* case and local enforcement of federal immigration law. Both situations directly involve the authority of local officials to enforce a federal offense not punishable by the courts. Both the offenses of illegal presence and desertion are exclusively federal and both are tried in quasi judicial hearings.[171] Since the *Kurtz* situation is so similar to local enforcement of immigration offenses, the reasoning and holding should control immigration law enforcement to deny local officials the authority to arrest or detain an illegal alien merely for illegal presence.

## C. STATE STANDARDS TO ENFORCE IMMIGRATION LAW

The argument that federal law precludes state officials from enforcing immigration law, though compelling, is not subscribed to by most states.[172] The states maintain that the silence of section 275 gives them discretion whether or not to enforce immigration statutes. Two questions arise concerning the authority of state officials to enforce immigration law under their own state statutes. The first is what state statutes are applicable to immigration enforcement, and the second is what constraints state arrest and detention standards place on local officials.

California contains a great many illegal aliens who have a substantial impact upon the state economy.[173] The state has a common border with Mexico, major seaports, and large agricultural and indus-

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[165] Once completed, entry is no longer subject to criminal penalties. *See id.* and note 84 *supra.*
[166] 8 U.S.C. § 1251 (1974).
[167] Kurtz v. Moffitt and Another, 115 U.S. 487 (1885).
[168] *Id.* at 501.
[169] *Id.*
[170] *Id.* at 504-05.
[171] *See* notes 166 and 169 *supra.*
[172] In regard to enforcement in California and Illinois, *see supra* notes 132 and 164, at 5.
[173] *See* POSITION STATEMENT, *supra* note 2.

trial areas, all of which attract illegal immigrants. California officials do enforce immigration law.[174] Therefore, California will be used to illustrate state enforcement issues.

*1. STATUTORY AUTHORITY*

California Penal Code section 836 states that a peace officer may arrest a person without a warrant,

> 1. Whenever he has reasonable cause to believe that the person has committed a public offense in his presence
> 2. When a person arrested has committed a felony although not in his presence
> 3. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony whether or not a felony has in fact been committed.[175]

These standards apply not only to offenses against state law, but also to offenses against federal law, when the federal statute does not set out specific guidelines and no federal preemption exists.[176] Therefore, in order for a California state enforcement official to arrest an alien without a warrant, in accordance with section 275 of the INA, he must either have seen the alien crossing the border (misdemeanor),[177] or evading an INS official (misdemeanor),[178] or have reasonable cause to believe the alien has crossed the border illegally after having been once prosecuted and/or deported for immigration violations (felony).[179]

The central issue here is whether an alien is constantly committing a misdemeanor by being in the country illegally and therefore commits a misdemeanor within the meaning of section 836 while in the presence of an officer. According to *United States v. Mallides*,[180] "entry" itself is not an indefinitely continuing crime. The California State Attorney General[181] has stated that when an alien reaches "a place of temporary safety" as in *People v. Salas*,[182] the misdemeanor itself is no longer being committed. Therefore, a California police officer must have reason to believe that the alien has not yet completed the entry process to arrest for the misdemeanor. According to *United States v. Doyle*,[183] a mere assumption that an illegal entry has taken place is not sufficient ground for arrest.

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[174] *See* Atty. Gen. Letter, *supra* note 164, at 5.
[175] CAL. PENAL CODE § 836 (West 1974).
[176] *See* Ker v. California, 374 U.S. 23, 37 (1963); United States v. Di Re, 332 U.S. 581, 589 (1948).
[177] 8 U.S.C. § 1325 (1974).
[178] *Id.*
[179] *Id.*
[180] 339 F. Supp. 1 (S.D. Cal. 1972), *rev'd on other grounds*, 473 F.2d 859 (9th Cir. 1973).
[181] Atty. Gen. Letter, *supra* note 164, at 5.
[182] 7 Cal. 3d 812, 821, 103 Cal. Rptr. 431, 437, 600 P.2d 7, 14 (1971).
[183] 181 F.2d 479, 479-80 (2d Cir. 1950).

### *2. DETENTION STANDARDS*

The usual practice in California[184] is for local enforcement officials to detain rather than arrest suspected illegal aliens.[185] The California Supreme Court case of *Irwin v. Superior Court*[186] held that "a detention based on mere hunch is not enough."[187] The California standard for detention was given as a three part test:

> [1.] There must be a "rational" suspicion by the peace officer that some activity out of the ordinary is or has taken place; [2.] some indication to connect the person under suspicion with the unusual activity; and [3.] some suggestion that the activity is related to crime.[188]

Since presence in the country after having made an illegal entry is not a "crime", and since illegal presence is a federal administrative offense,[189] California officials seem only able to stop suspected aliens for arrest or detention if suspicion relates to some crime, as opposed to mere illegal presence.

## D. THE VALUE OF LOCAL ENFORCEMENT

Federal preemption,[190] the *Kurtz* case,[191] and some state statutes[192] preclude local officials from seeking out and detaining or arresting aliens merely on the ground of illegal presence. State statutes[193] and federal preemption[194] also preclude arrests made by local officials on misdemeanor violations of federal immigration law. Finally, statutory analysis based on legislative history[195] and federal preemption[196] preclude arrests for felony violations under section 275 of the Immigration and Nationality Act. Despite these arguments, local officials apprehend approximately 10% of all immigration law violators.[197] Since the Commissioner of the INS does not believe that increased numbers of enforcement agents alone can control the illegal alien problem,[198] the value of local enforcement seems minimal. In addition, the legal arguments and the charges of harassment of ethnic groups would seem to indicate that some method

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[184] *See* Atty. Gen. Letter, *supra* note 164, at 5.
[185] *Id.*
[186] 1 Cal. 3d 423, 82 Cal. Rptr. 484; 462 P.2d 12 (1969).
[187] *Id.* at 427; 82 Cal. Rptr. at 486, 462 P.2d at 14.
[188] *Id.*
[189] *See* note 84 *supra.*
[190] *See* text accompanying notes 144-62 *supra.*
[191] *See* text accompanying notes 163-71 *supra.*
[192] *See* text accompanying notes 172-83 *supra.*
[193] *See* text accompanying notes 144-62 *supra.*
[194] *See* text accompanying notes 172-83 *supra.*
[195] *See* text accompanying notes 139-43 *supra.*
[196] *See* text accompanying notes 144-62 *supra.*
[197] 1973 INS ANNUAL REP. at 12.
[198] *See* note 8 *supra.*

other than utilizing local officials must be found to halt illegal immigration.

## IV. PENDING CONGRESSIONAL PROPOSALS: THE RODINO BILL

INS and local police enforcement of immigration laws with its emphasis upon detecting and apprehending individual illegal aliens, has not and will not have more than a minimal effect on reducing the volume of illegal entrants.[199] The most effective method of solving the problem is to take the economic profit out of illegal immigration by minimizing the employment opportunities available to illegal aliens in the United States.[200] As a result of extensive Congressional hearings on the problem of illegal immigration,[201] the House of Representatives in 1973 passed H.R. 982, the Rodino bill. The bill, which was submitted to the Senate but died in Senator Eastland's Immigration and Nationality subcommittee,[202] was to remove the incentive for illegal aliens to work in the United States and for employers to hire them.[203] Since Representative Rodino has resubmitted the bill to the 94th Congress[204] we will examine its potential effectiveness.

The Rodino bill amends section 274 of the INA to make it illegal for employers or agents to knowingly hire or supply for employment illegal aliens.[205] Section 274 presently states that while it is unlawful

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[199] *Illegal Alien Hearings*, *supra* note 9, pt. 5 at 1526; *also see* note 83 *supra*.

[200] *Id.*

[201] REP. ON H.R. 982, *supra* note 3, at 4.

[202] This bill, submitted to the 93d Congress by Representative Peter Rodino, had also been submitted, substantially unchanged, in the 92d Congress. It passed the House on September 12, 1972, but died in Senator James O. Eastland's subcommittee. Representative Rodino on January 14, 1975 resubmitted the bill to the 94th Congress, again as H.R. 982. *See The Christian Science Monitor*, Jan. 30, 1975, at 1.

[203] REP. ON H.R. 982, *supra* note 3, at 6.

[204] *See* note 202 *supra*. The remainder of the complete bill deals with adjustment of immigration status through amendment of section 245 of the INA, it institutes requirements that HEW disclose the names of illegal aliens receiving welfare benefits, and it puts prohibitions upon the misuse of illegal entry documents. Specifically, the act would exclude from status adjustment any alien who accepted unauthorized employment or who had entered and remained in the country without a visa while in transit between two other countries. The bill would allow illegal aliens from the Western hemisphere to adjust their status without leaving the country, a right all other aliens now possess. The final section of the bill would be a technical change making counterfeiting and unauthorized use of alien registration documents illegal. This last section was a direct response to a ruling regarding the present statute in United States v. Campos Serrano, 404 U.S. 293 (1971).

[205] Proposed amendment to § 274 of the INA, H.R. 982, 94th Cong., 1st Sess. introduced by Rep. Rodino Jan. 14, 1975, referred to the Committee on Judiciary.

> Sec. 2. Section 274 of the Immigration and Nationality Act (8 U.S.C. 1324) is amended by deleting the proviso in paragraph 4 of

if a person,

> willfully or knowingly conceals, harbors, or shields from detection or attempts to conceal, harbor, or shield from detection, in any place ... any [illegal] alien ... for the purpose of this section, employment (including the usual and normal practices incident to

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subsection (a) and by redesignating subsection (b) as subsection (e) and adding new subsection (b), (c), and (d) to read as follows:

"(b)(1) It shall be unlawful for any employer or any person acting as an agent for such an employer, or any person who for a fee, refers an alien for employment by such an employer, knowingly to employ, continue to employ, or refer for employment any alien in the United States who has not been lawfully admitted to the United States for permanent residence, unless the employment of such alien is authorized by the Attorney General: *Provided*, That an employer, referrer, or agent shall not be deemed to have violated this subsection if he has made a bona fide inquiry whether a person hereafter employed or referred by him is a citizen or an alien, and if an alien, whether he is lawfully admitted to the United States for permanent residence or is authorized by the Attorney General to accept employment: *Provided, further*, That evidence establishing that the employer, referrer, or agent has obtained from the person employed or referred by him a signed statement in writing in conformity with regulations which shall be prescribed by the Attorney General that such person is a citizen of the United States or that such person is an alien lawfully admitted for permanent residence or is an alien authorized by the Attorney General to accept employment, shall be deemed prima facie proof that such employer, agent, or referrer has made a bona fide inquiry as provided in this paragraph. The Attorney General of the United States shall prepare forms for the use of employers, agents, and referrers in obtaining such written statements and shall furnish such forms to employers, agents, and referrers upon request.

"(2) If, on evidence or information he deems persuasive, the Attorney General concludes that an employer, agent, or referrer has violated the provisions of paragraph (1), the Attorney General shall serve a citation on the employer, agent, or referrer informing him of such apparent violation.

"(3) If, in a proceeding initiated within two years after the service of such citation, the Attorney General finds that any employer, agent, or referrer upon whom such citation has been served has thereafter violated the provisions of paragraph (1), the Attorney General shall assess a penalty of not more than $500 for each alien in respect to whom any violation of paragraph (1) is found to have occurred.

"(4) A civil penalty shall be assessed by the Attorney General only after the person charged with a violation under paragraph (3) has been given an opportunity for a hearing and the Attorney General has determined that a violation did occur, and the amount of the penalty which is warranted. The hearing shall be of record and conducted before an immigration officer designated by the Attorney General, individually or by regulation and the proceedings shall be conducted in accordance with the requirements of title 5, section 554 of the United States Code.

"(5) If the person against whom a civil penalty is assessed fails to pay the penalty within the time prescribed in such order, the Attorney General shall file a suit to collect the amount in any appropriate district court of the United States. In any such suit or in any other

employment) shall not be deemed to constitute harboring.[206]

This specific exclusion of employers, known as the "South Texas Clause",[207] was designed solely to protect innocent employers who knowingly hire illegal aliens.[208] In practice, however, criminal sanctions against employers who knowingly hire illegal aliens have become meaningless.[209] The INS has not only failed to apprehend employers,[210] but the courts have denied standing to private parties who have attempted to sue employers.[211] Thus, the South Texas Clause has become, in reality, a complete exemption. The Rodino bill, if enacted, would delete the South Texas Clause and insert a section instituting a three tiered punishment scheme applicable to employers who knowingly hired illegal aliens.

The Rodino bill was drafted to satisfy and protect three conflicting interests.[212] The first and most obvious interest was that of cutting down the number of illegal aliens being attracted to the United States because of the availability of jobs. Punishment of unscrupulous employers who knowingly hired illegal aliens was thought to further this interest. The second interest was that of protecting the employer who unwittingly hired illegal aliens. The third interest was that of protecting lawful residents who belonged to visible ethnic minorities. If too stringent a standard was applied, employers faced with the possibility of criminal penalties for hiring illegal aliens would refrain from hiring any individual with a foreign accent or Spanish surname, and racially based job discrimination would result.[213]

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suit seeking to review the Attorney General's determination, the suit shall be determined solely upon the administrative record upon which the civil penalty was assessed and the Attorney General's findings of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive.

"(c) Any employer or person who has been assessed a civil penalty under subsection (b)(3) which has become final and thereafter violates subsection (b)(1) shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding $1,000, or by imprisonment not exceeding one year, or both, for each alien in respect to whom any violation of this subsection occurs."

[206] 8 U.S.C. § 1324(a) (1974).

[207] *See* Comment, *supra* note 9, at 485.

[208] During the Senate debate on the clause, the sponsor of the clause, Senator Kilgore, indicated that it was intended to protect the,

> man who unwittingly, or unknowingly or thoughtlessly hires a man he does not know to be a wetback [illegal entrant from Mexico] . . . once he finds out the real situation, he is knowingly and willfully harboring the man and authorities can go after him.

*See* 98 CONG. REC. pt. 1 at 793-94, Feb. 5, 1952.

[209] *Illegal Alien Hearings*, *supra* note 9, pt. at 200.

[210] *Id.*; *see also San Diego Union*, June 27, 1973, s. B, at 3, col. 7.

[211] Chavez v. Freshpact Foods Inc., 322 F. Supp. 146 (D. Colo., 1971).

[212] *See* REP. ON H.R. 982, *supra* note 3, at 10.

[213] *Id.* at 12.

## A. THE THREE TIERED SCHEME OF SANCTIONS: SECTION 274b

The proposed three tiered system of sanctions was designed to serve all three of these interests. Under the proposal, the process of enforcement would begin when the INS became aware that an alleged illegal alien was working at a given location. The INS would then have an agent investigate.[214] If the person was illegally in the country, the INS officer could issue a citation to the employer if the officer had sufficient information to sustain the belief that the employer had knowingly hired the illegal alien.[215] The issuance of a citation constitutes the first level of sanction. The citation would issue without a hearing and would involve no monetary penalty.[216] The INS would, however, keep a record of the citation for two years and if a subsequent violation occurred within those two years, the employer would be liable for penalties under the second tier.[217] If an INS hearings officer found the employer guilty of employing illegal aliens after an administrative hearing, a civil penalty of $500 could be assessed for every alien illegally employed.[218] Should the employer violate the section a third time, he would be charged with a misdemeanor. If an employer were convicted of knowingly employing illegal aliens, he could be fined $1000 and/or imprisoned for one year for every illegal alien employed.[219]

Although the initial offense under the three tiered scheme would routinely invoke only a citation, technically the employer could also be guilty of a felony under section 274(a).[220] Elimination of the South Texas Clause with its statement that employment does not mean "harboring"[221] leaves the obvious inference that under the proposed law employment would constitute harboring.[222] Therefore, if

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[214] *Id.* at 10.
[215] *Id., also* proposed § 274, *supra* note 205, at b(2).
[216] Proposed § 274, *supra* note 205, at b(2).
[217] *Id.* at b(3).
[218] *Id.* at b(4).
[219] *Id.* at c.
[220] 8 U.S.C. § 1324(a) (1974).
[221] *Id.; see also* text accompanying notes 206-11 *supra.*
[222] When this issue was raised, Charles Gordon, General Counsel for the INS, indicated that:

> I think there are two independent offenses. One is smuggling, harboring, related offenses that is a criminal violation which is more aggravated than mere knowing employment. In addition, a new offense would be created under (b), if this bill is adopted, which is knowingly employing illegal aliens. That offense may have nothing to do with harboring. The employer's conduct could also involve harboring, or transporting, or whatever. (Question: Don't you see the possibility that one might violate both?) Yes.

*Hearings before Subcomm. No. 1 of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., ser. 1 at 29, March 7 and 8, 1973 [hereinafter cited as *Hearings on H.R. 982*].

the INS could prove that the employer knowingly employed illegal aliens, the Justice Department would then have discretion whether to follow the three tiered scheme or prosecute under section 274(a). While a decision to prosecute would circumvent the supposed protections of the three tiered scheme, it would allow prosecutions of the flagrant violators who would otherwise merely be cited.

## B. THE REQUIREMENT OF "KNOWING" EMPLOYMENT

Since section 274(b) punishes only the person who knowingly employs illegal aliens, the major question is what constitutes such knowledge. For purposes of analysis this question poses two issues. The first is the quantum of evidence the government must show to prove the employer had knowledge. The second is who determines whether the employer had knowledge that he hired an illegal alien.

### *1. PROOF OF KNOWING EMPLOYMENT*

Under the proposed bill, sanctions apply both to employers who knowingly hire illegal aliens and to employers who knowingly "continue to employ" illegal aliens.[223] In order to enforce section 274(b) the INS would have to show that the employer had knowledge of the alien's illegal status.[224] Such proof would likely require the INS to obtain direct testimony from the illegal aliens employed.[225]

While the legislation imposes no direct obligations or requirements upon an employer to determine the legal status of his employees, it does provide for an affirmative defense against the imposition of civil and criminal penalties if an employer makes a bona fide inquiry.[226] The employer can make a prima facie case of bona fide inquiry by obtaining a signed writing from the employee attesting to the employee's legal right to seek employment.[227] Although a prima facie case can at times be overcome, immigration offenses under section 274 have been strictly construed in favor of the defendant.[228] Under these standards an unscrupulous employer could continue to hire illegal aliens merely by obtaining the alien's signature on a piece of paper.[229]

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[223] Proposed § 274, *supra* note 205, at b(1).
[224] REP. ON H.R. 982, *supra* note 3, at 10.
[225] *See* Comment, *The Wetback as Material Witness: Pretrial Detention or Deposition?*, 7 CAL. WEST. L.R. 175, 180 (1970). The cost of keeping illegal aliens as material witnesses limits their usefulness. *See The Christian Science Monitor*, Nov. 6, 1974, at 3, col. 1.
[226] REP. ON H.R. 982, *supra* note 3, at 11-12.
[227] Proposed § 274, *supra* note 205, at b(1).
[228] *See* United States v. Orejel-Tejeda, 194 F. Supp. 140 (N.D. Cal., 1961); United States v. Washington, 471 F.2d 402 (5th Cir., 1973), *cert. denied* 412 U.S. 930 (1973).
[229] *See Hearings on H.R. 982, supra* note 205, at 8.

### *2. THE DETERMINATION OF A VIOLATION: VARYING DEGREES OF DISCRETION*

Although it imposes sanctions only upon a showing of knowing employment, the proposed three tiered scheme in section 274 gives the INS wide discretion in enforcement. At each level of enforcement, different procedures are utilized in determining guilt or innocence. An INS field agent would determine the standard for the citation,[230] an INS hearing officer would administer the civil penalty at the second level,[231] and a judge of the federal district court would administer the criminal penalty at the third level.[232]

At the first tier, an INS field agent decides whether an employer knowingly hired illegal aliens based "on evidence or information he deems persuasive".[233] Although the citation subjects the employer to greater future liability,[234] the procedure does not provide for a hearing or appeal of an INS officer's decision.[235] This lack of review allows the agent to exercise broad discretion regarding the evidentiary standard required to determine knowing employment.

The lack of direct penalty can justify the absence of judicial safeguards at the first tier. Determination of a second violation, however, subjects an employer to potentially substantial monetary penalties.[236] Despite the magnitude of the penalty, a court of law does not make the determination of a violation at the second tier. The second tier provides only for an administrative hearing conducted by an INS officer in accordance with the Administrative Procedure Act.[237] Under the Administrative Procedure Act,[238] traditional judicial safeguards such as the exclusion of hearsay evidence and the right to a jury trial are not available.[239] Although the employer could appeal the administrative decision to the Board of Immigration Appeals and then to the courts,[240] any judicial review would be solely on the administrative record.[241] If substantial evidence on the record, considered as a whole, supported the administrative decision, it would be conclusive.[242]

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[230] Proposed § 274, *supra* note 205, at b(2).
[231] *Id.* at b(4).
[232] *Id.* at c.
[233] *Id.* at b(2).
[234] *Id.* at b(3).
[235] *Id.* at b(2); *also* REP. ON H.R. 982, *supra* note 3, at 10.
[236] Proposed § 274, *supra* note 205, at b(3). Under this provision an employer can be fined up to $500 per alien in respect to whom any violation is found to have occurred.
[237] *Id.* at b(4).
[238] 5 U.S.C. § 554 (1974).
[239] *See* K. DAVIS, ADMINISTRATIVE LAW TEXT, 3rd ed., at 194-214, 219-24, 276-84.
[240] Letter from Department of Justice in REP. ON H.R. 982, *supra* note 3, at 10.
[241] *Id.* at 11.
[242] *Id.*

The third tier would involve a hearing in a federal district court.[243] Here all the procedural safeguards of a criminal trial would be in effect, and the evidentiary standards would be most strict.[244] Although the INS would have a difficult time convicting an employer at this third level, the penalties imposed under the less stringent procedures at the second tier should serve as an effective deterrent to the employment of illegal aliens.

## C. THE POTENTIAL FOR FOSTERING DISCRIMINATORY HIRING PRACTICES

The penalties involved for hiring illegal aliens, especially as applied at the second tier, will probably encourage discriminatory hiring practices. Employers faced with the possibility of substantial civil or criminal penalties for hiring illegal aliens would probably refrain from hiring any individual with a foreign appearance, accent or surname.[245] An employer is not likely to take the risk of hiring a person whose employment might lead to a possible confrontation with the law.[246] Until an employer has an easy and reliable means for ascertaining a prospective employee's residency status and ability to accept employment,[247] the possible penalty will encourage employment discrimination. Currently, the only deterrent to this would be Title VII of the Civil Rights Act of 1964 which prohibits discrimination based on race, religion, sex or national origin.[248]

Even if an employer does hire an individual with a foreign appearance, he will probably require that individual to fill out forms indicating lawful employment status. The proposed bill does not require an employer to fill out a form for each worker.[249] An employer, to save himself time and effort, would probably only have those employees whom he suspects are illegal aliens fill out the forms. Presently since no method of ascertaining residency status now exists, employees with a foreign accent, appearance or surname would be

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[243] Proposed § 274, *supra* note 205, at c.

[244] *See* text accompanying notes 223-29 *supra.*

[245] REP. ON H.R. 982, *supra* note 3, at 12.

[246] In *Hearings on H.R. 982, supra* note 222, at 84-85, Congressman Roybal stated:

> The situation boils down to a fairly simple but crucial question. Suppose you have two equally qualified persons applying for the same job. One is white, while the other is Mexican or Asian. Would you as an employer take the risk of hiring a person who you think may lead you into a confrontation with the law, or one that is clearly safe by any standards?

[247] While all citizens are entitled to seek employment, not all lawfully admitted aliens are entitled to seek employment. *See* 20 C.F.R. § 422.104 (1974).

[248] *See* Espinoza v. Farah Manufacturing Company Inc., 462 F.2d 1331 (5th Cir., 1972).

[249] REP. ON H.R. 982, *supra* note 3, at 11-12.

singled out to fill out forms.[250]

## D. IDENTIFICATION: THE ULTIMATE SOLUTION

The central issue in enforcement of immigration laws is eventually one of identification; how to identify legal from illegal residents. Prospective employers are now unable to ascertain who is an illegal alien.[251] The Rodino bill places a particular burden on the employer to ascertain citizenship status. The burden carries with it the possibility of a criminal penalty if the decision is incorrect. The only effective criteria employers can use is foreign appearance,[252] which will obviously lead to racially discriminatory hiring practices.

Two suggested, interrelated additions to the Rodino bill would eliminate the possibility of racial discrimination. The first would create a uniform employment application procedure. The second would use the social security card for employment status identification.

A mandatory employment application procedure would serve to eliminate the employer's discretion regarding who should fill out identification forms. This proposal would require all employers to compel all their employees to attest to their employment status. This requirement would eliminate any discriminatory or differential treatment of certain ethnic groups.[253]

The second related addition would require use of social security cards as a means of ascertaining the employment status of individuals. An effective identification system keyed to the social security card itself should make it substantially easier to locate illegal aliens without fear of harassing citizens or lawfully admitted aliens.[254] Presentation of the card would attest to employment status for purposes of the mandatory employment application procedure.

A recent amendment to the social security law now allows the Social Security Administration to restrict the issuance of social secur-

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[250] In *Hearings on H.R. 982, supra* note 222, at 84, Congressman Roybal stated:

> This section leaves it up to the employer to decide who will be required to answer questions on citizenship or legal status. In practice, this would permit employers to treat persons of Mexican or Asian heritage differently from those of Caucasian background.

[251] Statement of John Edward McCarthy, Director of the U.S. Catholic Conference, Migration and Refugee Services, in *Illegal Alien Hearings, supra* note 9, pt. 5, at 1527.

[252] In San Francisco, the Director of the INS has stated that he has been calling up employers and asking them to fire illegal aliens. The result of this policy, according to local minority groups, is that "almost all of the persons being questioned are members of the minority community:" *See San Francisco Chronicle*, April 22, 1975, at 4, col. 7.

[253] Testimony of Congressman Roybal, in *Hearings on H.R. 982, supra* note 222, at 85.

[254] CRAMTON REP., *supra* note 9, at 24.

ity cards to persons legally authorized to work.[255] Pursuant to this law, the Social Security Administration will now only issue a social security card to citizens and those aliens permitted to accept employment.[256] The new requirement, however, would not affect anyone who currently has a social security card.[257] If the citizenship or employable alien requirement was made retroactive and every employee was required to show a social security card upon applying for employment, each employer would no longer be required to ascertain employment status.[258] The Social Security Administration could coordinate efforts with the INS to check numbers and ascertain counterfeits and duplications. This proposal would relieve the employer of the burden of playing immigration expert, and the potential for discrimination would be avoided.[259] Since the employer would have objective criteria upon which to distinguish legal and illegal employees, strict enforcement against unethical employers would be easier and thus the hiring of illegal aliens would be restricted.

## V. CONCLUSION

The solution to the problem of illegal immigration requires a broad approach.[260] Reliance solely on the apprehending power of the INS and local officials to detect illegal aliens is misplaced. Such efforts can only have a minimal impact on reducing the volume of illegal aliens. This ineffectiveness coupled with the potential for harassment dictate that INS officials meet high evidentiary standards when they attempt to locate illegal aliens and that local officials be precluded totally from conducting such operations. Adoption of legislation like the Rodino bill to minimize the employment oppor-

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[255] 42 U.S.C. § 405(c)(2) (1974). U.S. CODE CONG. AND ADMIN. NEWS, 1972, P.L. 92-603, § 137 at 1591-92.

[256] 20 C.F.R. § § 422.104, 422.107 (1974). Prior to these regulations the Social Security Administration was obligated to issue a card to any applicant regardless of immigration status. *See* Diaz v. Kay-Dix Ranch, 9 Cal. App. 3d at 598, 88 Cal. Rptr. at 449-50.

[257] 20 C.F.R. § 422.107 (1974). *See* Fragomen, *Immigrants and Social Security Cards in Migration Today*, reprinted in IMMIGRATION NEWSLETTER, National Lawyers' Guild, Los Angeles, vol. 3 no. 4, Sept. 1974, at 12.

[258] As mandated under the Social Security regulation, 20 C.F.R. § 422.107 (1974), the Social Security Administration is required to obtain sufficient evidence of citizenship or alien status of all social security applicants before issuing a card.

[259] *Hearings on H.R. 982, supra* note 222, at 85.

[260] If enforcement of the immigration laws can be materially improved, it will be imperative to have an adequate mechanism for dealing with those illegal aliens who have established strong ties within the American community. In order to avoid undue hardship to these people, statutory changes should be made in the immigration law to legitimize their status within the country. *See* CRAMTON REP., *supra* note 9, at 41-44; *also see* Wenzell and Kolodny, *Waiver of Deportation: An Analysis of Section 241(f) of the Immigration and Nationality Act*, 4 CAL. W. INT'L. L.J. 271, 313-14 (1973-1974).

tunities available to illegal aliens is a necessary step toward a comprehensive solution.

While punitive sanctions against the employment of illegal aliens will serve to discourage illegal immigration, the eventual solution to the problem lies outside the United States. The great economic disparity between the United States and much of the world has fostered illegal immigration. As the present Commissioner of the INS, General Leonard Chapman, stated:

> The forces of limited opportunity are bringing these people northward. They are so desperate there is little they won't do to find a job in this land of ours.[261]

Until this disparity disappears, illegal immigration will not be totally eliminated.

*Robert S. Chapman*
*Robert F. Kane*

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[261] *National Observer*, March 1, 1974, at 4, col. 1.