# TO SLEEP WITHOUT FEAR:

## AN ARGUMENT FOR THE APPLICATION OF THE EXCLUSIONARY RULE IN REMOVAL PROCEEDINGS

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*As President Franklin D. Roosevelt reminded a convention of the Daughters of the American Revolution:*

*"Remember, remember always that all of us, and you and I especially, are descended from immigrants and revolutionists."*[1]

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[1] Kennedy, John F. "Chapter 1: A Nation of Nations." In *A Nation of Immigrants*, 3. Rev. and Enl. ed. New York, New York: Harper Perennial, 2008.

## INTRODUCTION

"If you don't open the door, we're going to make things worse."[2] An Immigration and Customs Enforcement[3] (ICE) agent screamed these words to Walter Chavez, a lawful permanent resident[4] (LPR) of the United States, on the morning of April 2, 2008. Chavez had just returned to his home at 7:15 a.m., when six unmarked vehicles converged onto his property. An ICE agent grabbed him by the shirt collar and pulled him out of his car, while two other ICE agents approached his vehicle. Although the agents wore jackets with "ICE" clearly printed on them, none of the agents identified themselves.

This behavior came as quite a shock to Chavez, who had lived in the United States legally with Ana Galindo, also an LPR, for twenty-eight years. The ICE agents pushed Chavez and demanded to see Galindo. As Chavez opened the door to his home, at least seven ICE agents entered without asking permission. None of them possessed a valid judicial search warrant.

As Chavez entered the premises, he called out to Galindo, who was in the shower. Ms. Galindo put a shirt on, but was still not properly dressed. An ICE agent screamed at her, "Where are the illegal people?" Another agent repeatedly screamed the same question at Chavez. Yet another agent warned, "It's illegal to be hiding illegals. If you don't tell me where they are, things will get worse. If you don't tell me where they are, we'll arrest you." A female agent questioned Galindo about her sisters. Based upon Galindo's reply, the agent acknowledged that Galindo was not the person the agents were seeking to arrest.

Having heard the commotion, the couple's nine-year-old son, W.C., a United States citizen, ran to his mother, crying. As he did, four of the ICE agents opened their jackets, displayed their guns and placed their hands on their firearms. One agent pointed his gun at Galindo and W.C.. In front of a terrified W.C., the agent said to Galindo: "If you're hiding illegal people here, we're going to take your son and your residency away."

Upon request, Galindo produced identification, including her New Jersey state driver's license, as well as her and Chavez's green cards and her son's United States passport. Throughout the search, the agents rummaged through family photos and other personal items. Before leaving, one of the agents directly announced, "We're going to come back. And next time it will be worse." W.C. was severely traumatized by the raid.

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[2] Facts and language on this page are taken nearly verbatim from the fact pattern outlined in Maria Argueta, et al., v. U.S. Immigration and Customs Enforcement, et al., Civil Action No. 08-1652 (PGS), United States District Court, D. New Jersey. May 6, 2009. https://casetext.com/case/argueta-v-us-immigration-customs-enforcement.

[3] The Immigration and Customs Enforcement agency is under the direction of the Department of Homeland Security. It enforces federal laws governing border control, customs, trade and immigration to promote homeland security and public safety. "ICE: Overview." U.S. Customs and Immigration Enforcement. Accessed April 6, 2015. http://www.ice.gov.

[4] A lawful permanent resident (LPR) is a non-citizen of the United States who is residing in the U.S. under legally recognized and lawfully recorded permanent residence as an immigrant. Also known as a "Green Card Holder" or "Permanent Resident Alien." "Lawful Permanent Resident (LPR)." Official Website of the Department of Homeland Security. Accessed April 6, 2015. http://www.uscis.gov/tools/glossary/lawful-permanent-resident-lpr.

What was the most alarming aspect of this home raid? Was it the ICE agent grabbing Mr. Chavez and physically pulling him from his car? The ICE agents' lack of identification, a judicial warrant and consent to a search? When the ICE agent pointed a gun at a child and threatened his mother? Is it particularly concerning because the parents were LPRs? Because the child was a U.S. citizen?

This is an age of unprecedented immigration enforcement.[5] Approximately 438,000 noncitizens were removed from the United States in 2013.[6] In recent years the number of removals has increased exponentially.[7] The most controversial of these raids are those that take place in the privacy of the home.[8] Testimonies in immigration courts paint a picture of arbitrary arrests and threats of violence by ICE agents. As immigration officers and other law enforcement agencies escalate enforcement of immigration law, it is increasingly unclear who is protecting noncitizens from violations of the Fourth Amendment right from unreasonable searches and seizures. Procedural deficiencies in the current immigration system have created an asymmetry between enforcement realities and the adjudicative capacity and competence of immigration courts.[9] Judicial action is needed to correct this asymmetry and to protect the rights of noncitizens.

A Nation of Immigrants

The United States prides itself on being a "Nation of Immigrants."[10] This truism, however, hides as much as it illuminates.[11] Immigrants have come to America for over five hundred years in search of the entire range of human freedoms and ambitions. Immigration is mythologized in American history. The United States is supposed to be unique, the place where people disencumber themselves from their pasts and live in a land of opportunity and freedom. America is history's tabula rasa, a nation where immigrants are not reduced to second-class citizens.

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[5] Chacón, Jennifer M. "A diversion of attention? Immigration courts and the adjudication of fourth and fifth amendment rights." *Duke Law Journal* 59 (2010).

[6] Simanski, John. "Immigration Enforcement Actions: 2013." Department of Homeland Security: Publications, Office of Immigration and Statistics: Policy Directorate. September 23, 2014. Accessed April 11, 2015. http://www.dhs.gov/publication/immigration-enforcement-actions-2013.

[7] There were 418,397 removals in 2012, compared with 165,168 removals in 2002 and just 30,039 in 1990. "Table 39: Aliens Removed or Returned: Fiscal Years 1892 to 2013." Department of Homeland Security, Yearbook of Immigration Statistics: 2013 Enforcement Actions. October 1, 2014. Accessed April 14, 2015. http://www.dhs.gov/yearbook-immigration-statistics-2013-enforcement-actions.

[8] Kyllo v. United States, 533 U.S. 27, 31 (2001) ("[W]ith few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.").

[9] Chacón, *A Diversion of Attention*, p. 1569.

[10] This term was popularized by President John F. Kennedy's brief history of the United States and Immigration, titled "A Nation of Immigrants." *See* Kennedy, *supra* note 1. Written while President Kennedy was still a senator, the book was published posthumously in 1964, just before the passage of the Immigration and Nationality Act of 1965.

[11] Martin, Susan Forbes. "Introduction." In *A Nation of Immigrants*, 2. New York, New York: Cambridge University Press, 2011.

Parallel to the fable of immigration, however, is a history of racism, restriction and limited rights. Each generation praises its own ancestors and vindicates newcomers: the Catholics, then the Germans, followed by the Chinese, the Eastern Europeans, and now persons of Middle Eastern descent. Nativism has colored every major political movement in the United States. Consider the Alien and Sedition Acts, the Know-Nothing Party, the Palmer Raids of WWI, Japanese Internment during WWII and the USA PATRIOT Act. In a democracy, prejudice is easily institutionalized. Anti-immigrant sentiment was widespread before the United States was even a country: in 1751, Benjamin Franklin lamented: "Why should Pennsylvania, founded by the English, become a colony of Aliens, who will shortly be so numerous as to Germanize us instead of our Anglifying them, and will never adopt our language or customs, any more than they can acquire our complexion?"[12]

Today there are few topics more divisive than immigration. From border security to undocumented workers to refugees, the opportunities to both pity and admonish migrants are endless. These divisions inspired artist Jaime Mendoza to title one of his murals: "Immigration: The New Black."[13] It has been nearly thirty years since meaningful comprehensive immigration reform was passed[14] and Congress is no closer to a coordinated strategy today.[15] Executive Action was promised and delayed twice in 2014, and stalled by the Judiciary in 2015. Yet despite heated rhetoric on immigration, there remains a uniquely American commitment to the immigrant ideal.

Although political prejudices have shifted over time, Americans remain committed to equal protection under the laws and to basic human rights. Rights protection does not always mean a right to remain in the United States. Removal proceedings are necessary to maintain the rule of law. However, these proceedings, and the means by which immigrants are brought to them, must operate by fair and just standards. Despite the sovereign right of the United States government to determine which immigrants can stay and which must leave,[16] it goes against fundamental American values to be vengeful, or to abuse any person on American soil. This is why Constitutional protections, at least to a certain extent, are extended to all *persons* in the United States, and not just its citizens.

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[12] Franklin, Benjamin. *Observations Concerning the Increase of Mankind*. Tarrytown, N.Y., Reprinted, W. Abbatt, 1755. Print.

[13] Mendoza, Jaime. "Immigration: The New Black." Galería De La Raza: Sky Writings (Failed Promises). January 1, 2007. Accessed April 9, 2015. http://www.galeriadelaraza.org/eng/photos/index.php?op=view&id=655;
This mural was referenced in the 2013 Pierre Genest Memorial Lecture at Osgoode Hall Law School. Rodríguez, Cristina. "Immigration and the Civil Rights Agenda." YouTube. March 12, 2013. Accessed April 14, 2015. https://www.youtube.com/watch?v=VwIT21m0aeo.

[14] The last comprehensive reform was signed into law by Ronald Reagan on November 6, 1986. Immigration Reform and Control Act (IRCA), Pub.L. 99–603, 100 Stat. 3445.

[15] The closest that Congress has come to comprehensive reform in recent years was the bipartisan "Gang of Eight" bill titled the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, or S.744, which passed the Senate but has not since been brought to the House floor.

[16] The Chinese Exclusion Case (Chae Chan Ping), 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution.").

This paper proposes that the exclusionary rule be applied to removal proceedings so as to deter immigration officers from abusing the Fourth Amendment rights of noncitizens. To oversimplify, this would allow for the suppression of most illegally obtained evidence from use in removal proceedings.

Chapter I explores the history and structure of the Fourth Amendment. A brief analysis of Fourth Amendment rights as applied to noncitizens will be followed by an explanation of the plenary power doctrine, restrictions on the Fourth Amendment rights of noncitizens, and the "unwritten assumption" that noncitizens are less deserving of basic rights.

Chapter II defines the exclusionary rule and its relation to the Fourth Amendment. Criticism of the rule and its application in criminal and quasi-criminal proceedings will be followed by an analysis of the application of the rule in deportation proceedings prior to the decision of *INS v. Lopez-Mendoza.*

Chapter III will analyze the precedent, *INS v. Lopez-Mendoza*,[17] which held that the exclusionary rule does not apply in deportation proceedings. Following a discussion of the historical background to the case, the decision will be critiqued as resting on flawed intellectual ground. Evidence concerning immigration enforcement over the past thirty years since the case was decided will be presented as further support for why the original holding ought to be overruled. The three main premises for the holding will be considered: (1) the issue of deportation as "purely civil,"[18] (2) the question of suppression of a body, and (3) the wisdom and results of a balancing test of social costs and benefits of application of the rule.

Chapter IV analyzes the potential for reversal outlined in Part V of the *INS v. Lopez-Mendoza*. Modern circumstances support a conclusion that Fourth Amendment violations have become widespread. Furthermore, the Circuit split on what constitutes an "egregious violation" mandates clarification from the Supreme Court, and that the Supreme Court ought to adopt the criterion used by the 9th Circuit.

Chapter V presents home raids as a case study for why the exclusionary rule would work effectively to deter Fourth Amendment rights violations by immigration officers. A defense of the special place of the home will be followed by evidence supporting widespread ICE officer misconduct.

Chapter VI examines criticism of the exclusionary rule. It then argues that the distinct character of removal proceedings, and widespread violations today, requires immediate application of the rule.

[17] INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).
[18] *Lopez-Mendoza*, 468 U.S. 1032.

## WHAT'S IN A NAME: TERMINOLOGY

### On "Noncitizens"

The issue of immigration terminology is a subject entirely unto itself. There are many names for immigrants: aliens, legal residents, expatriates, foreigners, undocumented persons and illegals. The list is long and diverse, shaded by political leanings and popular opinion. The 2014 immigration crisis was no exception: for some, migrants were "illegal-alien kids." Others argued that children don't migrate; they flee. Where migration is concerned, there is a temptation to move beyond political vocabulary and onto oceanic terms: politicians call for a need to "stem the tide" and "manage the flow" of immigration.

The Immigration and Nationality Act (INA), the basic body of immigration law, classifies persons as either a "national" or an "alien." Nearly all nationals in the United States are citizens,[19] and since even non-citizen nationals have nearly identical rights as citizen nationals, the terms "national" and "citizen" are used interchangeably.[20] The term "alien" is used indiscriminately, for both persons who have just arrived at a port of entry and for those who have been legal residents for decades. Many persons believe that the term "alien" solidifies racial and cultural stereotypes, and reinforces "outsider" status.[21]

The term "noncitizen" conveys essentially the same technical meaning as "alien" without the negative connotation.[22] Justice Sonia Sotomayor, a pioneer in the debate against the term "alien," authored the first Supreme Court case to use the term "undocumented immigrant,"[23] in *Mohawk Industries, Inc. v. Carpenter*[24] (2009). This essay will follow this trend and use the term "noncitizen" to refer to those who are statutorily described as "aliens."

### On "Deportation" and "Removal" Proceedings

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996[25] (IIRIRA) reformed a substantial part of U.S. immigration law. IIRIRA got rid of the distinction between noncitizens who were inadmissible (who did not receive discretionary relief and were excluded from entry) and those who were deportable (those did not receive discretionary relief and were deported).[26] What is important about this change is that IIRIRA "redrew the line" at admission instead of entry.[27] This means that noncitizens that entered the United States without inspection became "inadmissible" rather than "deportable."[28]

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[19] Most non-citizen nationals are natives of American Samoa and Swains Island.
[20] Legomsky, Stephen H., and Cristina M. Rodríguez. "Overview of United States Immigration Law." In *Immigration and Refugee Law and Policy*, 6. 6th ed. St. Paul, Minnesota: Foundation Press, 2015.
[21] Ibid.
[22] Ibid.
[23] Liptak, Adam. "Sotomayor Draws Retort From a Fellow Justice." *New York Times*, December 9, 2009. http://www.nytimes.com/2009/12/09/us/09sotomayor.html.
[24] Mohawk Industries, Inc. v. Carpenter, 558 U.S. 100 (2009).
[25] Division C of Pub.L. 104–208, 110 Stat. 3009-546.
[26] Legomsky and Rodriguez, *Immigration and Refugee Law and Policy,* p. 428.
[27] Legomsky and Rodriguez, *Immigration and Refugee Law and Policy,* p. 531.
[28] Ibid.; INA § 212(a)(6)(A) and INA § 235(a)(1).

Today, both exclusion and deportation proceedings are termed "removal" proceedings.[29] Despite this change, IIRIRA maintains the fundamental distinction between exclusion[30] and deportation.[31] For the purposes of this essay, the two terms will be used interchangeably.

All noncitizens, both legal residents and undocumented persons, go through the same kind of removal proceeding. A removal proceeding consists of the Department of Homeland Security (represented by an ICE attorney) and the noncitizen. The presiding immigration judge is not a traditional "Article III" judge from the Judiciary Branch. Immigration judges report to the Executive Office for Immigration Review (EOIR), which is part of the Department of Justice and headed by the Attorney General, who is nominated by the Executive and confirmed by the Senate. Thus immigration judges are "Article II" judges, most immediately related to the federal-executive branch.

The DHS initiates the removal process by giving a noncitizen a "Notice to Appear," which specifies the statutory deportability (or inadmissibility) grounds that the DHS is charging.[32] The immigration judge will decide if the accused person is a noncitizen, and, if so, whether he or she fits within one or more of the alleged deportability grounds.[33] If the individual in question is found not to be deportable, then proceedings are terminated. Should the immigration judge find the person deportable, that judge can then decide if the noncitizen is eligible for, and deserving of, any affirmative discretionary relief for which he or she applied.[34] If discretionary relief is denied, an order of removal is entered. If discretionary relief is given, depending on the form of that relief, the immigration judge will either order the proceedings terminated or grant voluntary departure.[35] This essay will discuss the individual merits hearing, at which claims of suppression of evidence are filed.

After the immigration judge's decision, there remains an opportunity for appeal to the Board of Immigration Appeals (BIA). This court, authorized up to fifteen members, is the highest administrative body for interpreting and applying immigration laws.[36] Like immigration judges, BIA judges are appointed by the Attorney General. BIA decisions are frequently unpublished, but those that are published become established precedent. Cases that are appealed from the BIA go to the U.S. Court of Appeals for the Federal Circuit and ultimately the Supreme Court of the United States. BIA precedent is binding on all DHS officers and immigration judges, unless a federal court decides otherwise or is overruled by the Attorney General.[37]

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[29] Ibid.; INA § 240.
[30] INA § 212(a).
[31] INA § 237(a).
[32] Legomsky and Rodriguez, *Immigration and Refugee Law and Policy,* p. 532; INA § 239.
[33] Ibid.
[34] Ibid.
[35] Ibid.
[36] "Board of Immigration Appeals." The United States Department of Justice, Executive Office for Immigration Review. Accessed April 14, 2015. http://www.justice.gov/eoir/biainfo.htm.
[37] Ibid.

## I. The Fourth Amendment and Noncitizens

### A. Brief History of the Amendment

A man's home is his castle. *Et domus sua cuique est tutissimum refugium*[38] (literally: each man's home is his safest refuge). Sir Edward Coke coined the aforementioned castle doctrine in the 17th century as a well-established aspect of English common law, although the inviolability of the home had been at the center of Western civilization for centuries.

Colonial Americans carried the common law tradition, but did not have the same liberties afforded to their British brethren. British legislation such as the Excise Act of 1754, which enabled tax collectors to use writs of assistance to search colonists' homes and seize prohibited goods. The colonists had this act in mind when they drafted protections against unreasonable searches and seizures into their state constitutions.

The Virginia Declaration of Rights, Section 10, set precedent for the Fourth Amendment of the Constitution:

> That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted.[39]

The Fourth Amendment of the United States Constitution borrowed language from the Virginia Declaration of Rights and reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[40]

The Bill of Rights originally applied only to the federal government, and so the Fourth Amendment protections varied across states depending on their constitutions. The parameters of criminal law were also defined by each state. It was not until *Mapp v. Ohio,*[41] decided in 1961, that the Supreme Court, using the Due Process Clause of the Fourteenth Amendment, applied the Fourth Amendment, equally, to *all* states.

The Fourth Amendment stipulates that, in order for evidence to be deemed admissible during a search or seizure, the officer be justified by probable cause.[42] Probable cause exists

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[38] Bouvier, John. "Domus Sua Cuique Est Tutissimum Refugium." A Law Dictionary, Adapted to the Constitution and Laws of the United States. January 1, 1856. Accessed April 13, 2015. http://legal-dictionary.thefreedictionary.com/Domus sua cuique est tutissimum refugium.

[39] Mason, George. "Section 10." The Virginia Declaration of Rights. June 12, 1776.

[40] U.S. Const. amend. IV.

[41] Mapp v. Ohio, 367 U.S. 643 (1961).

[42] Kyllo v. United States, 533 U.S. 27, 31 (2001).

when the known facts and circumstances would warrant a reasonable person to believe that there is evidence of wrongdoing.[43]

B. Fourth Amendment Protections for Noncitizens

The Fourth Amendment refers to *persons*, and protects all noncitizens on American soil. "First, it is uncontroversial that the Fourth Amendment applies to aliens and citizens alike,"[44] affirmed the Second Circuit in 2013, citing a passage of *INS v. Lopez-Mendoza* that affirmed the same principle.[45] Although noncitizens are entitled to protection under the Fourth Amendment, there are many attenuating circumstances under which these rights are diminished:

*Congressional Power and Judicial Underenforcement of Immigrant Rights*

Immigration, like political questions, is an area in which the Court has exhibited judicial restraint. This is because Congress has something called "plenary power" over questions of immigration. The Court has repeatedly emphasized that "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens.[46] Essentially: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[47] This sentiment was recognized as recently as 2012, when in *Arizona v. United States* the federal power to determine immigration policy was described as "well settled."[48] Although the Constitution does not expressly authorize the federal government to regulate immigration, this power derives from various parts of the Constitution.[49] These include the Commerce Clause– Congress may "regulate commerce with foreign nations" as well as "among the several states"[50] – and the Naturalization Clause – authorizes Congress "[t]o establish an uniform Rule of Naturalization."[51] This power might also be found in the Migration/Importation Clause, which implicates that Congress may prohibit "migration" after 1808 – "The Migration or Importation of such Persons…shall not be prohibited by the Congress."[52] This clause was primarily concerned with the stop of the slave trade, although the justices in the *Passenger Cases* debated whether this power was relevant to immigration as well. The Necessary and Proper clause[53] also offers implied Congressional power over immigration.

The Supreme Court has never fully enforced compliance with Fourth Amendment arrests leading to removal proceedings.[54] Noncitizen's rights are an area in which the judiciary is

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[43] Ibid.
[44] Cotzojay v. Holder, 725 F. 3d 172, 181 (2d Cir. 2013).
[45] *INS v. Lopez-Mendoza*, 468 U.S. 1046 (observing that it is "[i]mportant ... to protect the Fourth Amendment rights of all persons," despite finding that application of the exclusionary rule is not necessary in every context.).
[46] Oceanic Navigation Co. v. Stranahan, 214 U. S. 320, 214 U. S. 339 (1909).
[47] Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).
[48] 567 U.S. 2498 (2012).
[49] Legomsky and Rodriguez, *Immigration and Refugee Law and Policy,* p. 100-103.
[50] U.S. Const. art. I § 8, cl. 3.
[51] U.S. Const. art. I § 8, cl. 4.
[52] U.S. Const. art. I § 9, cl. 1.
[53] U.S. Const. art. I § 8, cl. 18.
[54] Cade, Jason A. "Policing the Immigration Police: ICE Prosecutorial Discretion and the Fourth Amendment." *Columbia Law Review Sidebar* 113 (2013): 190-98.

particularly restrained in its constitutional enforcement, particularly because of the plenary power doctrine.

Some Supreme Court decisions have even called into question the future of noncitizen rights as defined by the Judiciary Branch. A 1990 opinion titled *United States v. Verdugo-Urquidez*[55] probed the importance of a noncitizen's ties with the United States. In dicta, then-Justice William Rehnquist claimed that noncitizens in the United States only "receive constitutional protections when they have come within the territory of the United States and *developed substantial connections with this country*" (emphasis added).[56] The case dealt with a warrantless search by U.S. federal agents of a Mexican citizen's home in Mexico. The Supreme Court ultimately ruled that the Constitution does not apply extraterritorially to protect property located outside the United States.[57] Although then-Justice Rehnquist's language about 'substantial connections' was only dicta, it opened the possibility for a future restriction of rights.

*Restrictions*

The strength of Constitutional protections for noncitizens varies largely based on proximity to a border. Ports of entry, particularly in recent years, are considered high national security concerns, and as a result the Supreme Court grants more generous understandings of reasonableness to searches and seizures that occur close to the border.[58] Furthermore, Fourth Amendment protections were ruled not applicable when INS officers ask immigrants in the workplace about their immigration status.[59]

Custom and Border Protection (CBP) officers under 8 U.S.C. § 1357(a)(3) have the right to stop and conduct warrantless searches on vessels, trains, aircraft, or other vehicles anywhere within "a reasonable distance from any external boundary of the United States." A reasonable distance has been defined as 100 air miles from any external boundary of the U.S., including coastal boundaries, unless an agency official sets a shorter distance. This 100-mile border zone was adopted by the U.S. Department of Justice in 1953; at the time there were fewer than 1,100 Border Patrol agents nationwide and today, there are over 21,000 agents.[60] Approximately two-thirds of the United States population lives within 100 miles of a U.S. land or coastal border.[61] The American Civil Liberties Union has noted that this wide area has enabled CBP agents to act

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[55] United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).
[56] Ibid. at 271.
[57] Ibid. at 268–72.
[58] *See, e.g.*, Chacón, Jennifer M. "Border exceptionalism in the era of moving borders."*Fordham Urb. LJ* 38 (2010): 129; United States v. Flores-Montano, 541 U.S. 149, 150 (2004) (upholding suspicionless search of gas tank at border).
[59] INS v. Delgado, 466 U.S. 210 (1984).
[60] "The Constitution in the 100-Mile Border Zone." American Civil Liberties Union. Accessed April 10, 2015. https://www.aclu.org/constitution-100-mile-border-zone?redirect=technology-and-liberty/fact-sheet-us-constitution-free-zone,immigrants-rights/constitution-100-mile-border-zone.
[61] The following states lie entirely or almost entirely within this area: Connecticut, Delaware, Florida, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island and Vermont lie entirely or almost entirely within this area. Nine of the ten largest U.S. metropolitan areas lie within the zone, as determined by the 2010 Census: New York City, Los Angeles, Chicago, Houston, Philadelphia, Phoenix, San Antonio, San Diego and San Jose.

as if in a "Constitution-free" zone, resulting in stops without even the lowest standard of probable cause and creating a diversion of attention.[62]

In the interior of the United States, noncitizens are afforded more protection. Presence in the United States is enough to afford noncitizens protections in criminal procedure.[63] Perhaps the most important decision regarding noncitizen rights was the case of *Yick Wo v. Hopkins*,[64] decided in the age of Chinese Exclusion.[65] *Yick Wo* concerned an 1880 San Francisco ordinance that said persons could not operate laundry in a wooden building without a permit from the Board of Supervisors.[66] At the time, persons of Chinese origin owned the majority of the laundries in wooden buildings. The Court decided that the facts "establish an administration directed so exclusively against a particular class of persons," resulting in the "practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment."[67] Thus racially discriminatory application of a facially neutral statute violated the Equal Protection Clause. Though many subsequent immigration cases were restrictive of immigrant rights, *Yick Wo* established the outer limit: that rights could not be totally stripped away.

Recent Supreme Court decisions also affirm the rights of noncitizens and are more reflective of modern humanitarian standards. The recent *Arizona v. United States*[68] decision (2012) affirmed that all searches and seizures of noncitizens in the United States must conform to the standards set by the Fourth Amendment. This case also affirmed the power of the federal government over immigration issues.

*The Unwritten Assumption*

Though absent from most literature on removal proceedings and the exclusionary rule, the issue of racism and prejudice against noncitizens is worth noting here. Underlying some immigration law is the notion that noncitizens are not deserving of rights because they are not, by accident of birth, natural-born citizens.

"Our immigration system has been broken for a very long time, and everybody knows it"

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[62] "The Constitution in the 100-Mile Border Zone." American Civil Liberties Union. Accessed April 10, 2015. https://www.aclu.org/constitution-100-mile-border-zone?redirect=technology-and-liberty/fact-sheet-us-constitution-free-zone,immigrants-rights/constitution-100-mile-border-zone.

[63] Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (holding protections of Fourteenth Amendment "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality."); Plyler v. Doe, 457 U.S. 202, 211–12 (1982) (the Equal Protection Clause applies to undocumented noncitizens within U.S. territory).

[64] *Yick Wo*, 118 U.S. 356 (1886).

[65] The foundational cases of immigration law were created during the era of Chinese Exclusion. It is interesting to consider whether the outcome of these cases would have been different had the plaintiffs not been from China.

[66] *Yick Wo*, 118 U.S. 356 at 366.

[67] Ibid. at 373.

[68] *Arizona v. United States*, 132 S. Ct. 2492 (2012).

exclaimed President Obama in 2014.[69] The Department of Homeland Security is consistently voted the "worst place to work" in the entirety of the federal government.[70] In a ranking of the smaller federal agencies, the Immigration and Customs Enforcement agency tied for last place (#314).[71]

Immigration law itself is a complex, and at times historically reflective of political waves of xenophobia. The most extreme example of immigration law gone wrong in court might be the 1953 landmark case of *Shaughnessy v. Mezei*.[72] After spending twenty-five years[73] as a legal resident of the United States, the respondent traveled to Rumania to visit his dying mother.[74] When he returned, Mezei was excluded from admission on undisclosed security grounds. No other country would accept him.[75] The Supreme Court summarily rejected his challenge to exclusion, and as a result Mezei was doomed to possible indefinite, life-long detention.[76] The Court concluded: "An alien in respondent's position is no more ours than theirs."[77] Even for those who might object to Mezei's admission to the United States, total deprivation of his liberty and indefinite detention is a gross violation of human rights by any standard.

Justice Jackson noted the extremity of this conclusion in his dissent: "Government counsel ingeniously argued that Ellis Island is his "refuge" whence he is free to leave in any direction except west. That might mean freedom, if only he were an amphibian!...It overworks legal fiction to say that one is free in law when by the commonest of common sense he is bound."[78]

This example serves as fair warning of the extent to which legal acrobatics can ignore very real human rights abuses. The rights of sovereignty, without question, allow the United States to set its own standards of entrance. Certainly there is an argument to be made that when noncitizens step foot onto American soil they engage in a covenant of good behavior in exchange for protection. Those who break this covenant ought to be subject to penalty like any other citizen who breaks the law, and in instances of serious crimes, be subject to removal. The Court must remain ever vigilant, however, not to break its own covenant and to respect every person on U.S. soil.

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[69] Lavender, Paige. "Obama: 'Everybody Knows' Our Immigration System Has Been Broken A Long Time." *Huffington Post*, November 21, 2014. http://www.huffingtonpost.com/2014/11/21/obama-immigration_n_6201154.html.

[70] "Overall Rankings (Large Agencies)." Best Places to Work in the Federal Government. 2014. Accessed April 11, 2015. http://bestplacestowork.org/BPTW/rankings/overall/large.

[71] "Overall Rankings (Small Agencies)." Best Places to Work in the Federal Government. 2014. Accessed April 11, 2015. http://bestplacestowork.org/BPTW/rankings/overall/sub.

[72] Shaughnessy v. Mezei, 345 U.S. 206 (1953).

[73] Ibid. at 217.

[74] Ibid. at 208.

[75] Ibid. at 209.

[76] Ibid. at 217. It was not until June 2001 that the Supreme Court would not allow indefinite detention. Zadvydas v. Davis, 533 U.S. 678 (2001).

[77] Ibid. at 216.

[78] Ibid. at 220.

## II. THE EXCLUSIONARY RULE

### A. Meaning of the Rule

*History*

The exclusionary rule excludes illegally obtained evidence from court so as to deter illegal searches and seizures. Some legal scholars interpret it as essential to a reading of the Fourth Amendment, while others call it a judicial construct. The best summary of the exclusionary rule can be found in *United States v. Calandra*: "In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[79]

As a remedial device, the application of the rule has been restricted to those areas where its objectives are thought to be best served.[80] Still, the exclusionary rule means more than deterrence alone; it protects the integrity of the judiciary as an active protector of rights.

A history of the rule would perhaps trace a history of the Court itself. As Justice Blackmun noted, "If a single principle may be drawn from this Court's exclusionary rule decisions…it is that the scope of the exclusionary rule is subject to change in light of changing judicial understanding about the effects of the rule outside the confines of the courtroom."[81] This can be noted particularly by the incorporation of the Bill of Rights.

From the exclusionary rule comes the "fruit of the poisonous tree" doctrine, which means that, if the source of the evidence (the tree) is itself tainted, then any evidence gained (the fruit) is also tainted and cannot be used in court. The idea itself was articulated in *Silverthorne Lumber Co. v. United States*,[82] and Justice Felix Frankfurter first used the term in *Nardone v. United States.*[83]

Critiques of the Exclusionary Rule have found remedy in a serious of restrictions on its applicability. The Court has carved out an increasing number of exceptions in the past fifty years. Many of these are related to the case of *United States v. Leon,*[84] decided on the same day as *INS v. Lopez-Mendoza*, which established the good-faith exception. The Court held that evidence would not be excluded if it was obtained by officers who reasonably rely on a search warrant that turns out to be invalid. Later cases would expand even further on these exceptions, such as when evidence is the result of an "inevitable discovery"[85] and if the evidence is later obtained through a constitutionally valid search or seizure.[86]

*Critique of the Exclusionary Rule*

Opinions on the merit of the exclusionary rule are intensely political. Former Dean of Yale Law School Guido Calabresi called the exclusionary rule the litmus test for distinguishing between liberals and conservatives in the United States.[87] For liberals, it is a "pillar of privacy"[88]

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[79] United States v. Calandra, 414 U.S. 338, 348 (1974).
[80] Ibid.
[81] United States v. Leon, 468 U.S. 897, 928 (1984) (Blackmun, J., concurring).
[82] 251 U.S. 385 (1920).
[83] 308 U.S. 338, 341 (1939).
[84] 468 U.S. 897 (1984).
[85] Nix v. Williams, 467 U.S. 431 (1984).
[86] Maryland v. Macon, 472 U.S. 463 (1985).
[87] Calabresi, Guido. "The Exclusionary Rule." *Harv. JL & Pub. Pol'y* 26 (2003): 111.

that protects persons from lawless police action. They argue that the supposed costs of the exclusionary rule are actually costs imposed by the Fourth Amendment itself. Most of the evidence is suppressed via the exclusionary rule would never have been acquired if the police had obeyed the Fourth Amendment.

For conservatives, it is an "absurd" rule that priorities procedural technicalities over truth and allows criminals to roam free. "The criminal is to go free because the constable has blundered," complained Justice Cardozo.[89] The Court responded to this critique in *Mapp v. Ohio*, arguing "the criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."[90] It reasoned that it could not ignore Fourth Amendment obligations, nor could it profit from illegal activity such as forced testimony.

Oftentimes the core of the debate over the exclusionary rule is not over the rule itself, but rather interpretation of the Fourth Amendment: the scope of law enforcement power over individual privacy. The exclusionary rule is just a stage upon which the debate of privacy rights is played.

B. The Exclusionary Rule and its Procedural Requirements

*Criminal v. Civil Procedure*

The exclusionary rule traditionally applies only to criminal proceedings. The critical difference between criminal and civil procedure is that Constitutional rights are most protected in criminal procedure. In criminal procedure a federal, state or local government agency takes action against a person or organization that the government claims has violated the law (e.g. theft, assault or trafficking of controlled substances). The rules of criminal procedure are designed to protect the rights of the defendant because the government has the burden of proof. This means that government must establish proof of guilt beyond a reasonable doubt, and the defendant is innocent until proven guilty.

Civil procedure is a process through which a complaint is adjudicated (e.g. divorce, injury cases or estate distribution). In civil procedure, claims are adjudicated on a preponderance of evidence. The rules of civil procedure are designed to make the process as streamlined as possible. Because the results of civil procedure (most frequently the loss of money) are considered less severe than those of criminal procedure (most frequently the loss of liberty), parties in civil procedure have fewer rights. They are not warned against making incriminatory statements and the Sixth Amendment right to counsel does not apply. The distinction between criminal and civil procedure is not one of legal semantics. The difference has real world consequences for immigrants. It is difficult to imagine higher stakes: deportation can mean return to a country in which an immigrant has no remaining family and might not speak the language. It leaves spouses without partners, workers without employees and communities without friends.

If a non-citizen enters into criminal proceedings, the exclusionary rule applies. This was established definitively in *Wong Sun v. United States.*[91] This paper will analyze removal proceedings, which have been classified as civil by the case *INS v. Lopez-Mendoza* and thus rendering the exclusionary rule inapplicable.

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[88] Ibid.
[89] People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).
[90] *Mapp,* 367 U.S. at 659.
[91] 371 U.S. 471 (1963).

*The Exclusionary Rule in Quasi-Criminal Proceedings*

The inapplicability of the exclusionary rule to civil proceedings was reaffirmed in *United States v. Janis*, which stated that the Court has "never applied it [the exclusionary rule] to exclude evidence from a civil proceeding, federal or state."[92] The Court claimed the primary reason for this (beyond that of precedent) was that, when doing a cost-benefit analysis, the costs of excluding relevant evidence in civil proceedings outweigh the deterrence benefits achieved through application of the rule.[93]

There are some instances in which the exclusionary rule might be applied to selective civil proceedings, and *Janis* notes the case of *One 1958 Plymouth Sedan v. Pennsylvania*[94] as an exception in which a civil forfeiture proceeding is classified as quasi-criminal in nature. In the case of *Plymouth,* two law enforcement officers pulled over the car of George McGonigle because it was weighed down in the rear, and subsequently found cases of liquor that failed to bear Pennsylvania tax seals.[95] As the officers had not had a search or arrest warrant, Mr. McGonigle sought dismissal of the forfeiture of petition on the ground that the forfeiture of the vehicle depended on the admission of evidence obtained in violation of the Fourth Amendment.[96] The Supreme Court decided that the exclusionary rule applied because the Pennsylvania forfeiture proceeding was "quasi-criminal" in nature: "forfeiture is clearly a penalty for the criminal offense and can result in even greater punishment than the criminal prosecution has in fact been recognized by the Pennsylvania courts."[97]

The precedent from *Plymouth,* though narrow, planted the seed for future applications of the exclusionary rule in civil proceedings that are quasi-criminal in nature. The precedent case for the exclusionary rule and deportation proceedings, titled *INS v. Lopez-Mendoza*[98], cited "purely civil" nature of deportation as a reason against application of the exclusion rule.[99] Should deportation (today, removal) proceedings be found to be quasi-criminal in nature, then the Court has precedent for applicability of the exclusionary rule.

*Suppression Motions in Removal Proceedings*

There are few specific rules to help immigration judges decide what evidence is admissible in removal hearings.[100] To use the exclusionary rule, a defendant must make a challenge of a pretrial motion to suppress evidence. This means that s/he challenges the nature and circumstances under which immigration officers obtained the evidence giving rise to her/his removal proceedings. Common claims include entrance into a home by an ICE officer without consent, or that an ICE officer arrested the respondent as a result of a stop predicated only on race, e.g.: "Hispanic appearance."[101] If the motion is successful, then the illegally obtained

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[92] United States v. Janis, 428 U.S. 433, 447 (1976).
[93] Ibid. at 488.
[94] One 1958 Plymouth Sedan v. Pennsylvania*,* 380 U.S. 693 (1965).
[95] Ibid. at 694.
[96] Ibid. at 694-95.
[97] Ibid. at 701-702.
[98] *Lopez-Mendoza*, 468 U.S. 1032.
[99] *Lopez-Mendoza*, 468 U.S. at 1038.
[100] Legomsky and Rodriguez, *Immigration and Refugee Law and Policy,* p. 719.
[101] Mahoney, Kate. "What To Do When the Constable Blunders? Egregious Violations of the Fourth Amendment in Removal Proceedings." *Immigration Law Advisor, A Legal Publication of*

evidence is inadmissible at trial.[102] Noncitizens generally argue that verbal admissions and the Record of Inadmissible/Deportable Alien (Form I-213) be suppressed.

*The Exclusionary Rule Prior to INS v. Lopez-Mendoza*

As early as 1923, the Supreme Court stated (in dicta): "[I]t may be assumed that evidence obtained…through an illegal search and seizure cannot be the basis of a finding in deportation proceedings."[103] The INS applied the exclusionary rule to all deportation proceedings until 1979.[104] The Board of Immigration Appeals consistently denied requests for suppression throughout the 1970s.[105]

In his dissent in *INS v. Lopez-Mendoza*, Justice White further commented: "the simple fact is that prior to 1979 the exclusionary rule was available in civil deportation proceedings, and there is no indication that it significantly interfered with the ability of the INS to function."[106] There is documented evidence that circuit courts applied the exclusionary rule for well over sixty years before the case of *Lopez-Mendoza* was decided:[107]

Application stopped with the 1979 decision of *Matter of Sandoval*.[108] In *Sandoval*, immigration officers entered and searched an apartment without consent. As a result of the search, Sandoval was held in custody until she signed an affidavit admitting alienage and illegal entry. After conceding that the search was indeed warrantless and violated the Fourth Amendment, the BIA used the *Janis* test[109] to weigh the costs and benefits of applying the exclusionary rule in deportation proceedings. The Court concluded that the social costs outweighed the benefits. Crucial in the decision was that, while exclusion in a criminal proceeding allows for "immunity of past conduct," exclusion in deportation proceedings would allow for a "continuing violation of this country's immigration laws."[110] The legitimacy of this claim will be addressed in Chapter III.

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*the Executive Office for Immigration Review* 6.8 (2012): 1-13. http://www.justice.gov/eoir/vll/ILA-Newsleter/ILA 2012/vol6no8.pdf.

[102] *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

[103] United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 155 (1923); Nigro Jr, Bernard A. "Exclusionary Rule in Administrative Proceedings." *Geo. Wash. L. Rev.* 54 (1985): 572.

[104] Sandoval, 17 I. & N. Dec. 70, 93 (B.I.A. 1979).

[105] U.S. Department of Justice, Executive Office for Immigration Review. "FY 2013 Statistics Yearbook." (2014). Web. http://www.justice.gov/eoir/statspub/fy13syb.pdf.

[106] *Lopez-Mendoza*, 468 U.S. at 1059.

[107] *See, e.g.*, Wong Chung Che v. INS, 565 F.2d 166, 169 (1st Cir. 1977) (holding that if evidence "was obtained through an illegal search, there is no authority of which we are aware that would make it admissible" in a deportation proceeding); *Matter of Garcia-Flores*, 17 I&N Dec. 325, 328-29 (BIA 1980) (announcing a three-part test for exclusion of evidence obtained as a result of certain regulatory violations that prejudiced the respondent); *Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980) (excluding the respondent's admissions of alienage because they were made involuntarily under coercive conditions).

[108] Matter of Sandoval, 17 I. & N. Dec. 70 (1979).

[109] United States v. Janis, 428 U.S. 433, 448-53 (1976).

[110] *United States v. Janis*, 428 U.S. at 81.

## III. ANALYSIS OF RELEVANT CASE: *INS V. LOPEZ-MENDOZA*

In *INS v. Lopez-Mendoza* authored by Justice Sandra Day O'Connor, the Supreme Court ruled 5-4 that the exclusionary rule does not apply to deportation proceedings. The following is a critique of the original holding and an explanation of why today, over thirty years later, *Lopez-Mendoza* can and must be overturned. Part V of the opinion offered grounds for when the ruling might be overturned; the groundwork for this argument will be presented here and further analyzed in Chapter IV.

### A. Historical Background of the Case

*INS v. Lopez-Mendoza* was decided at the height of the 1980s' immigration debate. At the time, no major immigration policy had been made since the1965 Immigration and Nationality Act (Hart-Celler Act). It was not until two-and-a-half-years after *Lopez-Mendoza* that comprehensive reform would be passed in the form of the Immigration Reform and Control Act (IRCA).[111] This Act was described as a three-legged stool to stem illegal immigration, using border enforcement, employer sanctions and, most controversially, legalization opportunities.

As the Executive and Congress tangled over immigration reform, the Judiciary was having its own internal struggle. There have been few ideological gulfs larger between two federal courts than that of the Supreme Court and the Ninth Circuit[112] in the early 1980s'.[113] This is largely because the political leaning of the Ninth Circuit underwent a dramatic change in the 1980's. The 1978 enactment of the Omnibus Judge Act[114] enabled President Carter to appoint 15 of the 26 Ninth Circuit judges in the space of a few short years, leading to domination of the Circuit by Democrats.[115] As a result, and as it remains today, the Ninth Circuit became a liberal bench and inevitably clashed with the more conservative Supreme Court.

Ideological differences between the Ninth Circuit and the Supreme Court were exacerbated following the election of Republican President Ronald Reagan. In sixteen of the Ninth Circuit cases decided by the Supreme Court in 1984, the U.S. Solicitor General's office defended the Circuit ruling only twice.[116] Tensions between the Ninth Circuit and the Supreme Court ran so high that at one point the Los Angeles Times reported "9th Circuit Is '0 for 22' in High Court Reviews," as the Supreme Court had reversed every Ninth Circuit appellate decision that had occurred so far in that term. The case was no different in *Lopez-Mendoza*, where the Supreme Court reversed the Ninth Circuit holding. Considering that the Ninth Circuit generally handles approximately one-half of the nation's immigration cases, immigration could be arguably the point of greatest contention between the two courts.[117]

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[111] Immigration Reform and Control Act (IRCA), Pub.L. 99–603, 100 Stat. 3445, enacted November 6, 1986.

[112] The 9th Circuit is the largest of the 13 courts of appeals. It hears appeals from the Districts of Alaska, Arizona, the Central/Eastern/Northern/Southern Districts of California, Hawaii, Idaho, Montana, Nevada, Oregon and the Eastern/Western District of Washington.

[113] Legomsky and Rodriguez, *Immigration and Refugee Law and Policy,* p. 737-38.

[114] Pub. L. No. 95-486, 92 Stat. 1629 (1978).

[115] Hager, Philip. "9th Circuit Is "0 for 22" in High Court Reviews." LA Times 25 June 1984: 1, 16; Legomsky and Rodriguez, *Immigration and Refugee Law and Policy,* p. 738.

[116] Hager, Philip. "9th Circuit Is "0 for 22" in High Court Reviews." LA Times 25 June 1984: 16.

[117] Legomsky and Rodriguez, *Immigration and Refugee Law and Policy,* p. 738.

B. Facts and Procedural History

*INS v. Lopez-Mendoza* was a consolidated case involving two Mexican residents, Adan Lopez-Mendoza and Elias Sandoval-Sanchez. INS agents[118] without warrants arrested both respondents at their place of work.[119] Both respondents admitted to unlawful entry during questioning.[120]

Lopez-Mendoza formally acknowledged his illegal entry and Mexican nationality by signing an affidavit and I-213 Record of Deportable Alien.[121] Although Lopez-Mendoza moved to terminate his deportation proceedings based on his illegal arrest, the immigration judge claimed the legality of his arrest was not relevant and found him deportable.[122] The BIA dismissed his appeal because Lopez-Mendoza had not objected to the admission of the affidavit or the I-213 form.[123] The Ninth Circuit Court of Appeals reversed, vacating the order of deportation and remanded for a determination of whether a Fourth Amendment rights violation had occurred.[124]

Sandoval-Sanchez similarly moved to terminate his deportation proceedings based on his illegal arrest, and also moved to suppress the evidence that he had given to the INS officers. As in Lopez-Mendoza's case, the immigration judge did not believe the legality of the arrest was relevant and ordered Sandoval-Sanchez deportable.[125] Again, the BIA dismissed the appeal and claimed that the circumstances of the arrest did not affect his admission of illegal status.[126] The Ninth Circuit Court of Appeals stated that the detention of Sandoval-Sanchez had violated the Fourth Amendment. They applied the exclusionary rule and ordered that his incriminating statements were a result of his illegal detention. His deportation order was reversed.

Thus the Ninth Circuit Court of Appeals reversed and ruled in favor of both men.[127] This Ninth Circuit Court demanded the exclusionary rule be applied so as to maintain the integrity of the Fourth Amendment: "If the Fourth Amendment is to retain its vitality as guardian of the privacy of citizens and non-citizens alike, the federal judiciary must be constantly vigilant in ensuring adherence to its commands by those charged with enforcing our laws."[128] The exclusionary rule was, then, the "best and indeed the only realistic way to ensure that immigration officers respect the precious values embodied in the Fourth Amendment."[129] After this District Court ruling, the Solicitor General's Office insisted that the Supreme Court had

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[118] At the time of the holding, Immigration and Naturalization agents were the arm of immigration enforcement. In 2003 the Department of Homeland Security absorbed the INS and the agents were renamed as part of Immigration and Customs enforcement.
[119] *Lopez-Mendoza*, 468 U.S. at 1035–3.
[120] Ibid. at 1035, 1037.
[121] Ibid. at 1035.
[122] Ibid. at 1035.
[123] Ibid. at 1036.
[124] *Lopez-Mendoza v. INS*, 705 F. 2d 1059, 1075 (9th Cir. 1983).
[125] *Lopez-Mendoza*, 468 U.S. at 1037-38.
[126] Ibid. at 1038.
[127] Ibid. at 1034-38.
[128] Lopez-Mendoza v. INS, 705 F.2d 1059, 1075 (9th Cir. 1983).
[129] Ibid.

never applied the exclusionary rule to civil proceedings, and that as such reversal was required.[130]

C. Supreme Court Holding

The Court clarified that at issue in *Lopez-Mendoza* was "whether an admission of unlawful presence in this country made subsequent to an allegedly unlawful arrest must be excluded as evidence in a civil deportation hearing."[131] The Supreme Court almost immediately disposed of Lopez-Mendoza's claim because he had not objected to the evidence offered against him, but rather only his deportation hearing itself (see premise #2 below).[132] Because Sandoval-Sanchez *did* object to the evidence offered against him, his claim formed the basis for the rest of the opinion.

Sandra Day O'Connor wrote the majority opinion, joined by Justices Blackmun, Powell and Rehnquist. Chief Justice Burger joined all but Part V[133] of the opinion. The Majority held that the exclusionary rule "need not be applied" in deportation proceedings.[134] Justices Brennan, White, Marshall and Stevens each wrote dissents.

The Supreme Court substantiated its ruling on the following premises: (1) deportation is a purely civil action, (2) the identity of a defendant in a criminal or civil proceeding is never itself suppressible as the fruit of an unlawful arrest and (3) using the balancing test established in *United States v. Janis,*[135] likely social costs of excluding unlawfully obtained evidence in deportation proceedings outweigh the likely benefits. Each of these three premises will be analyzed in turn for their internal logic and applicability today.

D. Critique of the Majority Analysis

1. The Hoary Characterization of Deportation as a Civil Proceeding

The Court in *Lopez-Mendoza* held that a deportation proceeding is a "purely civil action" that exists "to determine eligibility to remain in this country, not to punish an unlawful entry."[136] The following analysis critiques this "purely civil" interpretation, and why removal proceedings today ought to be characterized as quasi-criminal.

*a. Deportation Defined as "Purely Civil"*

The Court argues that a deportation proceeding is meant to determine an individual's "right to remain in this country in the future" and not to "punish an unlawful entry."[137]Justice O'Connor cites two cases, *Bugajewitz v. Adams*[138] and *Fong Yue Ting v. United States,*[139] as the precedent that established that deportation proceedings are civil actions.

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[130] Brief for the Petitioner at 21-22, *Lopez-Mendoza*, 468 U.S. 1032 (No. 83-491).
[131] *Lopez-Mendoza*, 468 U.S. at 1034.
[132] Ibid. at 1040.
[133] The Chief Justice's statement will be analyzed in greater detail in Chapter IV.
[134] *Lopez-Mendoza*, 468 U.S. at 1034.
[135] 428 U. S. 433.
[136] *Lopez-Mendoza*, 468 U.S. at 1038.
[137] Ibid.
[138] 228 U. S. 585, 228 U. S. 591 (1913).
[139] 149 U. S. 698, 149 U. S. 730 (1893).

*Fong Yue Ting* upheld, 6-3, an 1892 Act that deemed a Chinese laborer deportable if he was unable to procure a certificate of residency. Should he lose that certificate, the laborer would be deported unless able to assure testimony of residential status given *by at least on credible white witness* (emphasis added).[140] The Court upheld the racist law and stated in dicta: "But they [Chinese laborers] continue to be aliens, having taken no steps towards becoming citizens."[141] *Fong Yue Ting* set the precedent that deportation is a civil remedy: "The order of deportation is not a punishment for crime. It is not banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country..."

In the other case that *Lopez-Mendoza* cites, *Bugajewitz v. Adams,* the Majority opinion authored by Justice Holmes reaffirmed that deportation is not "a punishment" and that "it is simply a refusal by the Government to harbor persons whom it does not want."[142] Just after *Lopez-Mendoza* was decided, Yale Law School Professor Peter Schuck commented on *Bugajewitz v. Adams,* noting that the distinction between deportation as a civil administration proceeding and not a criminal prosecution "possesses little logical power: at least concerning aliens who have established a foothold in American society, it is a legal fiction with nothing, other than considerations of cost and perhaps administrative convenience, to recommend it."[143] Schuck noted that the weight of doctrine heavily influenced the opinion, and that precedent "possess[es] the staying power that [Justice] Holmes knew to be far more important in law than logic."[144]

Precedent will always weigh heavily on the Court. Perhaps, though, it might have been more appropriate to cite *Harisiades v. Shaughnessy*, which include more moderate language: "Deportation, *however severe its consequences*, has been consistently classified as a civil rather than a criminal procedure" (emphasis added).[145] Or the Court could have noted the lack of a tabula rasa, as Justice Frankfurter did in *Galvan v. Press*: "Since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the ex post facto Clause, even though applicable only to punitive legislation, should be applied to deportation. But the slate is not clean."[146] Thus precedent has continually outweighed procedural rights for immigrants.

*b. Ramifications of the Classification*

Because deportation is classified as civil procedure, all immigrants, including those who arrived legally, do not have the constitutional protections explicitly offered to criminal

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[140] Ibid. at 727.
[141] Ibid. at 724.
[142] Bugajewitz v. Adams, 228 U.S. at 588.
[143] Schuck, Peter H. "The transformation of immigration law." *Columbia Law Review* (1984): 1-90.
[144] Schuck, *The Transformation of Immigration Law*, p. 25.
[145] Harisiades v. Shaughnessy 342 U.S. 580, 594 (1952).
[146] Galvan v. Press, 347 U.S. 522, 531 (1954). Justice Black also wrote a compelling dissent in this case, as he was unwilling to say a man with an American wife and four American children, who had lived in the United States for thirty-six years, could be driven from the United States because he joined a political party that had been recognized as perfectly legal at the time.

defendants. The immediate conclusion is that, so long as deportation is classified as civil, the exclusionary rule cannot apply.

This classification has other serious effects: Immigrants do not have the Sixth Amendment right to Assistance of Counsel.[147] Even juveniles, mentally ill persons and LPRs do not have a right to a government-appointed lawyer in their deportation hearings. Those who can afford to pay for their own lawyer[148] are permitted to do so.

The Fifth Amendment right to a Miranda warning[149] is also not applicable.[150] Similarly, ex post facto laws[151] apply to criminal or quasi-criminal punishments and not to deportation because deportation is not considered to be punishment. This means that lawful residents who have pled guilty to minor offenses upon the correct advice of council could later be deported retroactively. Immigrants also have no right to have their removal proceeding in a nearby venue, meaning that the government can detain them hundreds of miles away from their home, without access to evidence or witnesses.[152]

*c. Removal Proceedings as Quasi-Criminal*

In the thirty years since *Lopez-Mendoza* was decided, immigration law has increasingly taken on punitive attributes while failing to adopt the procedural checks and balances that protect criminal defendants from violations of Due Process.[153] This preoccupation with enforcement has not been paired with an equivalent concern for noncitizen rights, leaving noncitizens exposed to risks of error when the stakes – removal from the United States – could not be higher.[154] This imbalance has been aptly described as the "asymmetric incorporation of criminal justice norms."[155]

Removal proceedings do not need to be classified as purely civil or criminal. Legally, a middle ground can be defined. These proceedings ought to be classified as quasi-criminal for the following reasons: (1) in dicta in *Padilla v. Commonwealth of Kentucky*[156] the Court indicated that removal proceedings have characteristics of criminal proceedings and opened the door for this kind of classification, (2) recent procedural changes reflect the criminalization of immigration law, (3) the increasingly punitive nature of measures taken by immigration agents are akin to punishment as proscribed by criminal procedure.

1. Recent Court Distinctions: *The Case of Padilla*

The Court acknowledged the convergence of criminal procedure and immigration law in the 2010 case of *Padilla v. Commonwealth of Kentucky*. In *Padilla*, a legal permanent resident of

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[147] 8 U.S.C. §1229a(b)(4)(A)(2000).
[148] 8 U.S.C. § 1362 (2006).
[149] Miranda v. Arizona, 384 U.S. 436 (1966).
[150] Bustos-Torres v. INS, 898 F.2d 1053, 1056 (5th Cir. 1990).
[151] U.S. Const. art. I, § 9, cl. 3.
[152] Markowitz, Peter L. "Deportation Is Different." *U. Pa. J. Const. L.* 13 (2010): 1302.
[153] For a detailed analysis of this asymmetry, *see*: Legomsky, Stephen H. "New Path of Immigration Law: The Asymmetric Incorporation of Criminal Justice Norms." *Immigr. & Nat'lity L. Rev.* 28 (2007): 469.
[154] Ibid.
[155] Ibid.
[156] 559 U.S. 356 (2010).

more than forty years who had served in the Vietnam War faced deportation because he pled guilty to transporting marijuana.[157] His defense attorney erroneously advised him that his long-term residency made him immune from deportation.[158] A 7-2[159] ruling held that the Sixth Amendment right to effective assistance of counsel[160] requires defense attorneys to inform non-citizens whether a guilty plea or criminal conviction might carry risk of deportation.

*Padilla v. Kentucky* was a watershed in the characterization of deportation, as it acknowledged what scholars had observed for years: "Immigration and criminal law are closely intertwined, and deportation cannot be accurately characterized as purely civil."[161]

The Court based its conclusion on recent changes to immigration law, including the Congressional elimination of the Judicial Recommendation Against Deportation in 1990, which had allowed an immigration judge to recommend that a non-citizen convicted of a deportable offense not be deported.[162] The Court acknowledged the changing "landscape of federal immigration law…expanded the class of deportable offenses" and rendered the "drastic measure" of deportation or removal...virtually inevitable for a vast number of noncitizens convicted of crimes."[163] This had "dramatically raised the stakes of a noncitizen's criminal conviction," and that "[a]lthough removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process."[164]

Justice Stevens, writing for the Court, observed that it was "most difficult to divorce the penalty from the conviction in the deportation context" because "our law has enmeshed criminal convictions and the penalty of deportation for nearly a century."[165] The Court further noted: "deportation is an integral part – indeed, sometimes the most important part – of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[166]

As Cardozo Law School Professor Peter Markowitz states, *Padilla* marks the beginning of a realization that deportation is neither purely civil nor criminal; "rather, deportation is different…a unique legal animal that lives in the crease between civil and criminal labels."[167] Many scholars believe that the Court's changing view of deportation might make rights attendant to a criminal available in deportation proceedings.[168]

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[157] Padilla v. Commonwealth of Kentucky, 559 U.S. at 1477.
[158] Ibid. at 1478**.**
[159] Justice Stevens was joined in the majority by Justices Kennedy, Ginsburg, Breyer, Sotomayor. Justice Alito wrote a concurrence that was joined by Chief Justice Roberts. Justice Scalia wrote a dissent, which was signed by Justice Thomas.
[160] NB: Noncitizens in criminal proceedings do have this right to counsel; it is in removal proceedings in which the Sixth Amendment does not apply.
[161] Rossi, *Revisiting INS v. Lopez-Mendoza*, p. 27-8.
[162] *Padilla*, 559 U.S. at 1479.
[163] Ibid. at 1478 (citing Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)).
[164] Ibid. at 1480–81.
[165] Ibid. at 1481 (citing Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893)).
[166] Ibid. at 1480.
[167] Markowitz, *Deportation Is Different*, at 1299.
[168] For examples of this recent literature, *see, e.g*., Rossi, Elizabeth A. "Revisiting INS v. Lopez-Mendoza: Why the fourth amendment exclusionary rule should apply in deportation proceedings." *Colum. Hum. Rts. L. Rev.* 44 (2012): 477.; Maddali, Anita Ortiz. "Padilla v. Kentucky: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes

2. Procedure

A field of legal research has grown around the recent convergence of criminal and immigration law, nicknamed "crimmigration,"[169] and the lack of procedural protections offered to noncitizens. The title is fitting of the convergence that is obvious at face value: both criminal and deportation proceedings are often initiated by an arrest, and the very nature of an arrest inevitably carries with it a risk for abuse by the officer. The conspicuous difference between removal proceedings and criminal proceedings is, in removal proceedings, the defendant has no right to a government-appointed lawyer, and that the punishment is frequently complete removal, as opposed to temporary incarceration.

i. Burden of Proof: In a removal proceeding, the DHS must establish "clear, unequivocal, and convincing evidence"[170] – that it is substantially more likely than not – that the person in question is an alien. No decision on deportability is valid unless it is based upon reasonable, substantial, and probative evidence.[171] Once alienage is established, the burden is on the respondent to show the time, place, and manner of entry.[172] If the respondent does not sustain the burden of proof and cannot procure a visa or other entry document or if there is no record in the custody of the DHS establishing his entry, he or she is presumed to be in the United States in violation of the law.[173]

This burden of proof rests *between* the requirements for civil and criminal procedure. It is higher than that in other civil cases, which are determined on a preponderance of evidence, but lower than that in criminal cases, which require the government to prove guilt beyond a reasonable doubt. This supports a classification of removal proceedings as quasi-criminal.

ii. Detention: Deportation often results in incarceration.[174] These detention centers resemble penal incarceration practice. The 2014 American immigration crisis highlighted substandard conditions in detention centers. Reporters described children "corralled behind chain-link fences topped with razor wire" who slept under metallic Mylar blankets.[175] The

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Punishment for Lawful Permanent Residents?." *American University Law Review* 61, no. 1 (2011); Sweeney & Scholten, Penalty and Proportionality in Deportation for Crimes, 31 St. Louis U. Pub. L. Rev. 11, 11 (2011).

[169] There is much literature on the subject on crimmigration; *see, e.g.*, Daniel Kanstroom, Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases, 113 Harv. L. Rev. 1889, 1890 (2000); Jennifer Chacón, Managing Migration through Crime, 109 Colum. L. Rev. Sidebar 135, 137 (2009), http://www.columbialawreview.org/wpcontent/uploads/2009/12/135_Chacon.pdf; Peter L. Markowitz, Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings, 43 HARV. C.R.-C.L. L. REV. 289, 289 (2008); Juliet Stumpf, The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power, 56 Am. U. L. Rev. 367, 376 (2006); Teresa A. Miller, Blurring the Boundaries Between Immigration and Crime Control After September 11th, 25 B.C. Third World L.J. 81, 83 (2005).

[170] Woodby v. INS, 385 U.S. 276 (1966).

[171] INA § 240(c)(3)(A).

[172] INA § 291.

[173] Ibid.

[174] *See, e.g.*, 8 U.S.C. 1252(a) (1982).

[175] Hennessy-Fiske, Molly, and Cindy Carcamo. "Overcrowded, Unsanitary Conditions Seen at Immigrant Detention Centers." *LA Times*, June 18, 2014.

American Civil Liberties Union of Arizona filed a complaint with the DHS during this crisis, calling conditions at the stations "inhumane and inadequate."[176]

iii. Inclusion of Local Police: The most obvious increase in the criminalization of immigration law is the inclusion of local officers in enforcement. When *Lopez-Mendoza* was decided, all arrests came from INS officers, whereas today an increasing number of state and local enforcement agencies are involved.[177] This means that local officers, who are not trained to protect the rights of noncitizens, are enforcing federal immigration law in addition to state criminal law. This is possible through formal agreements under Section 287(g) of the INA, through participation in the Secure Communities and the Criminal Alien Program, through state laws, and through policies promoted by local mayors, sheriffs, and police chiefs.[178] Thus all of the rights protection precautions that ICE claims are taught to their officers in training is not enough to protect widespread violations, because local agents do not receive the same training.[179] Were the exclusionary rule to apply, however, it would serve as a deterrent for illegal police behavior at all levels of government.

3. Punishment

i. Punitive: The 1996 Illegal Immigration Reform and Immigrant Responsibility Act colored deportation proceedings with punitive language. The Act required the deportation of noncitizens for prior offenses even if courts determined that there was a legitimate reason for the noncitizen to remain in the United States.[180] Proponents of the law praised the enforcement measures, while critics noted the high cost of detention. In most cases, deportation means permanent expulsion. There is a ten-year bar for aliens removed after a removal hearing, for both legal immigrants[181] and those here illegally.[182] It is unclear how this bar to readmission is non-punitive.

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http://www.latimes.com/nation/nationnow/la-na-nn-texas-immigrant-children-20140618-story.html#page=1.

[176] Ibid.

[177] *See, e.g.*, Sweeney, Maureen A. "Shadow Immigration Enforcement and Its Constitutional Dangers." *J. Crim. L. & Criminology* 104 (2014).

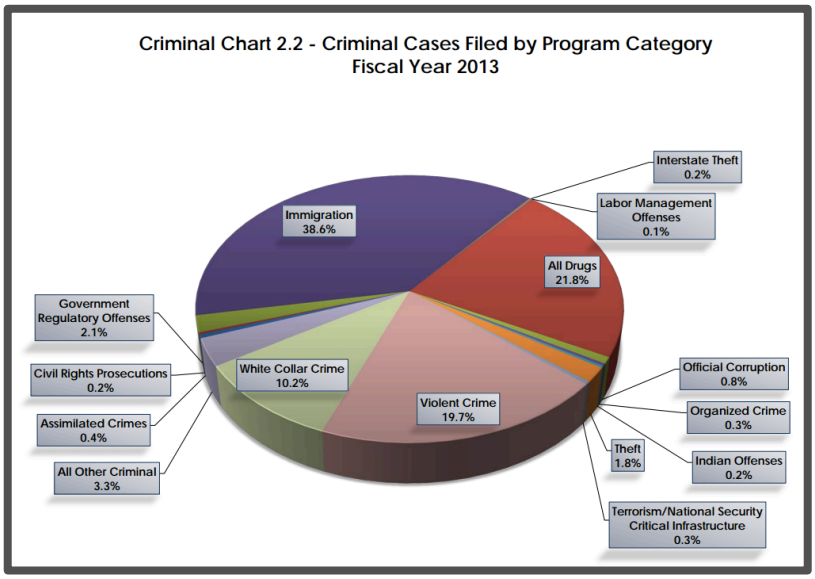
[178] Legal Action Center, Matthew Price, Jenner and Block LLP, and Melissa Crow. "Practical Advisory: Motions to Suppress in Removal Proceedings: Cracking Down on 4th Amendment Violations." Legal Action Center: Practical Advisories: American Immigration Center, 15 Aug. 2013. Web. 20 Feb. 2015. http://www.legalactioncenter.org/sites/default/files/motions_to_suppress_in_removal_proceedings-_cracking_down_on_fourth_amendment_violations.pdf.

[179] Ibid., 13.

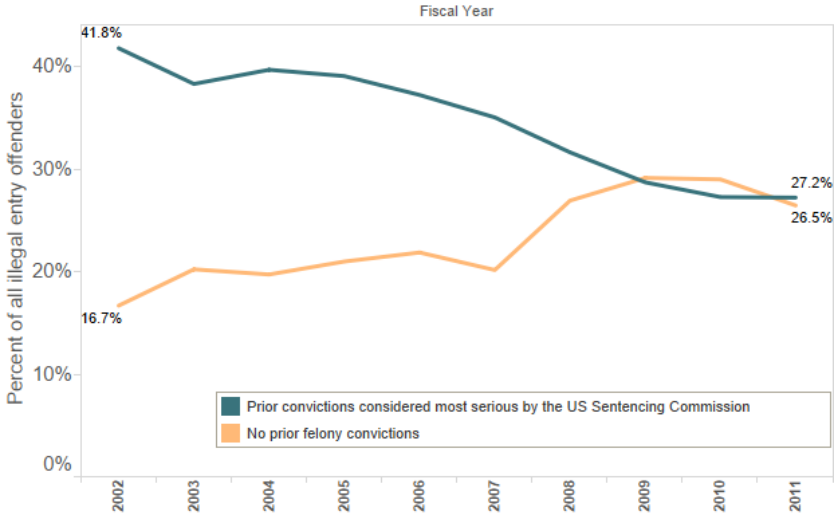
[180] Pauw, Robert. "A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply." *Administrative Law Review* (2000): 306.

[181] INA § 212(a)(9)(A)(ii)(II).

[182] INA § 212(a)(9)(B)(i)(II).




**As prosecutions have increased, more illegal entry offenders have minor or no criminal history**




Source: US Sentencing Commission Guideline Application Frequencies (2002 - 2011) http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Guideline_Application_Frequencies/2011/GAF_FY2011.cfm Accessed: 4/9/2013.

ii. The Leading Cause of Prosecution: [183] In recent years, immigration-related offenses have become the leading type of prosecution, constituting more than 38.5% of total criminal cases in FY 2013.[184] Prosecutions rose from 12,500 in 2002 to more than 85,000 in 2013. [185] A Human Rights Watch report noted that illegal entry and reentry prosecutions have increased 1,400 and 300 percent, respectively, over the past 10 years. [186] This is largely due to the fact that persons with no prior criminal record are no longer deported without prosecution. Today, illegal entry is a misdemeanor that is punishable by as much as six months in prison. Illegal reentry is punishable by a maximum sentence of two years; however, prior criminal convictions can increase incarceration to twenty years.

The Human Rights Watch report notes that many of those targeted for prosecution have minor or no criminal histories. Thus the vast majority of the prosecuted are not criminals who threaten public safety, but persons

[183] The Chart titled "Criminal Chart 2.2" can be found in "United States Attorneys' Annual Statistical Report: Fiscal Year 2013." U.S. Department of Justice Executive Office for United States Attorneys. 2014: 27. http://www.justice.gov/sites/default/files/usao/legacy/2014/09/22/13statrpt.pdf.

[184] Ibid. *See also*: Preston, Julia. "More Illegal Crossings Are Criminal Cases, Group Says." *New York Times*, June 18, 2008. http://www.nytimes.com/2008/06/18/us/18immig.html?pagewanted=print.

[185] The Chart titled" As prosecutions have increase, more illegal entry offenders have minor or no criminal history" can be found in "US: Prosecuting Migrants Is Hurting Families." Human Rights Watch. May 22, 2013. Accessed April 9, 2015. http://www.hrw.org/news/2013/05/22/us-prosecuting-migrants-hurting-families.

[186] Ibid.

trying to return to their families. This trend caught the notice of US District Judge Robert Brack, who estimates he has sentenced over 11,000 people for illegal reentry. He commented: "For 10 years now, I've been presiding over a process that destroys families every day and several times each day."[187] Though being a part of a family does not make a noncitizen immune from the INA, it does call into question the priorities of ICE.

Although the subject for another paper, considering the number of illegal entry offenders, and the present limited resources of ICE, it seems that resources would be best spent targeting those criminals that are the most dangerous. Also considering that many undocumented persons will not be discovered because of relative non-enforcement in relation to the total scale of enforcement, the current system, which in reality is non-prioritizing, has become downright capricious. Despite present ICE policies for prioritization, the data remain as they are, and these increasing prosecutions are indicative of the increasing criminalization of removal.

iii. Rhetorical argument against punishment: As Justice Brewer wrote in his compelling dissent: "it needs no citation of authorities to support the proposition that deportation is punishment."[188] Though the Court clearly has its own reasoning for declaring deportation to be a civil proceeding, to claim that it is civil because it is not punishment, or at the very least to not acknowledge the suffering that it might cause, cannot be said to be justice. Justice Brewer recognized that he was not alone in seeing deportation as being as dreadful as it really is, and quoted President James Madison, a "framer of this Constitution" in his dissent:

> If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness — a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent, as well as the movable and temporary kind; where he enjoys, under the laws, a greater share of the blessings of personal security and personal liberty than he can elsewhere hope for…if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.[189]

Some scholars would argue that banishment is the worst thing that can happen to any human (see Genesis 3:24). Still, removal today is not as severe as the original meaning of punitive ejection of a citizen. For some immigrants, it is a return to the status quo ante. For others, it might mean return to a country in which one has not lived for over thirty years. Regardless of the extent to which deportation might be regarded as punishment, it is difficult to deny its punitive qualities.

To conclude, dicta indicating that deportation is intimately related to the criminal process in *Padilla*, recent scholarship on crimmigration and procedural changes in immigration law, and the increasingly punitive nature of removal proceedings lead to the conclusion that removal proceedings are no longer "purely civil," but rather quasi-criminal. The asymmetry between the increased criminalization of deportation proceedings necessitates increased legal protections such as the exclusionary rule.

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[187] Ibid.
[188] Fong Yue Ting v. United States, 149 U.S. at 740.
[189] Ibid. at 740-41.

2. The Suppression of a Body

The Court quickly dismissed respondent Lopez-Mendoza's claim because he had objected only to the fact that he had been summoned to a deportation hearing following an unlawful arrest.[190] The Court ruled with the BIA that "'[t]he mere fact of an illegal arrest has no bearing on a subsequent deportation proceeding."[191] Lopez-Mendoza did not have a strong claim to the exclusionary rule because he did not object to the evidence offered against him.

Sandoval-Sanchez, by contrast, had a more substantial claim because he objected to both the arrest itself *and the evidence* offered against him. The Court used this opportunity to note that the body of the respondent is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred.[192] As such, noncitizens making suppression claims must ask for suppression of evidence that reveals their immigration status or other crimes; they cannot object to the search itself.

3. The *Janis* Balancing Test

a. *The False Equivalence of the Application of the* Janis *Test*

The Court next applied the balancing test set by *United States v. Janis*, which decides in what types of proceedings explication of the exclusionary rule is appropriate by weighing the likely social benefits of excluding unlawfully seized evidence against the likely costs.[193]

Justice Blackmun was the author of *Janis*, and when Justice O'Connor was assigned to write *Lopez-Mendoza* she sent him a draft to "preview" because she relied on *Janis.*[194] At the time of her writing *Lopez-Mendoza* (1984), Justice O'Connor had been a Justice for two and a half years, and so was not part of the Court when *Janis* was decided in 1976. It is interesting to note that Justice Blackmun's law clerk, when reviewing the draft opinion, encouraged Justice Blackmun to await the dissent before casting his final vote. The law clerk believed that Justice O'Connor's opinion was contradictory, because she argues that exclusion would have a minimal deterrent impact because the chances of a particular arrestee invoking it were small, while at the same time stating that the application of the rule in deportation hearings would burden the process.[195] Despite this advice, Justice Blackmun joined Justice O'Connor's opinion before reading the dissent.[196]

The application of the *Janis* test in *Lopez-Mendoza* is strange considering the factual and legal differences between the two cases.[197] In *Janis*, two men were accused of illegal bookmaking. Using the balancing test mentioned above, *Janis* established that the exclusionary rule does not apply to civil cases where unconstitutionally seized evidence is used by a different

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[190] *Lopez-Mendoza*, 468 U.S. at 1040.
[191] Ibid.
[192] Ibid. at 1039-40.
[193] United States v. Janis, 428 U. S. 433 (1976).
[194] Sandra Day O'Connor, Letter to Harry Blackmun on *INS v. Lopez-Mendoza* (May 22, 1984), Blackmun Papers, Box 407; Maclin, "The Good-Faith Exception," p. 258.
[195] Law Clerk, Memorandum to Harry Blackmun on *INS v Lopez-Mendoza* 1-2 (May 23, 1984), Blackmun Papers, Box 407; Maclin, "The Good-Faith Exception," p. 259.
[196] Harry Blackmun, Letter to Sandra Day O'Connor on *INS v Lopez-Mendoza* (May 29, 1984), Blackmun Papers, Box 407; Maclin, "The Good-Faith Exception," p. 259.
[197] Maclin, "The Good-Faith Exception," p. 258-59.

sovereign (in this case the IRS) than that which seized it (a local police officer)[198]. The Court based its conclusion on how exclusion would not have a deterrent impact on police officers' actions, as the officers were already deterred by how illegally acquired evidence was suppressible in criminal proceedings.[199] Thus the illegally acquired evidence fell outside of their zone of primary interest.[200] Considering that the primary motivation of the exclusionary rule is to deter police misconduct, if its implementation would have no additional effect, then it is almost useless to apply it.

*Janis* left open whether the exclusionary rule applied to intra-sovereign violations.[201] The question of the admission of illegally acquired evidence in deportation proceedings is exactly this kind of intra-sovereign relation, making the Court's decision to apply this test particularly confusing. The INS officers in *Lopez-Mendoza* (and today, U.S. Immigration and Customs Enforcement officers) are not the police officers described in *Janis*. The evidence in question *does* fall inside of the zone of primary interest of immigration officers, whose primary role is to discover undocumented immigrants. In deportation cases, there is a direct relation between the constitutional violation and the government agency that will use the illegally obtained evidence. This is exactly the circumstance in which the exclusionary rule is most effective. Thus the Court appears to disagree with the outer limit that the *Janis* test had established.

Justice O'Connor concedes that the agency officials who affect the unlawful arrest are the same officials who subsequently bring the deportation action, and that "the exclusionary rule is likely to be most effective when applied to such "intrasovereign" violations."[202] Despite this concession about intrasovereign relations, Justice O'Connor claims that several other factors reduce the likely deterrent value, and outweigh the benefits of the exclusionary rule. At this point in the opinion, the value of this balancing test appears to be increasingly subjective, and inconsistent within the Court itself. Professor Tracey Maclin of the Boston University School of Law argues that the Court was focused more on forbidding the use of the exclusionary rule in civil proceedings than on applying principled legal analysis.[203]

The use of a cost-benefit approach can be criticized as subjective in itself. The Court even acknowledges this, stating: "as imprecise as the exercise may be." One might expect a cost-benefit approach to include some kind of empirical evidence or statistics. If this seems out of the scope of the Court, then one might expect an analysis of legal doctrine or Constitutional principles. Yet few, if any, of these concrete methods appear in the balancing test offered in *Lopez-Mendoza*. The Court's analysis relies more on its on speculation, and frequently contradicts itself.

The logic of a balancing test was also called into question in the case of *United States v. Leon.*[204] Decided on the same day as *Lopez-Mendoza*, it determined the "good faith exception" to the exclusionary rule. Justice Brennan, who dissented in both opinions, wrote in *Leon*: "the reality is that the Court's opinions represent inherently unstable compounds of intuition,

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[198] *Janis* 428 U.S. at 460.
[199] Ibid. at 454.
[200] Ibid. at 457-58.
[201] Ibid. at 456.
[202] *Lopez-Mendoza*, 468 U.S. at 1043.
[203] Maclin, "The Good-Faith Exception," p. 259.
[204] United States v. Leon, 468 U.S. 897 (1984).

hunches, and occasional pieces of partial and often inconclusive data."[205] Justice Brennan similarly noted in *New Jersey v. T.L.O* that balancing test are "not a neutral, utilitarian calculus but an unanalyzed exercise of judicial will."[206] Some scholars have criticized the modern balancing test.[207]

*b. Evaluating the* Janis *Test:*

When using the *Janis* test, the Court does not maintain consistent logic, and modern circumstances would cause the balancing test to shift in favor of use of the exclusionary rule today.

*i. Social Benefits*

Benefit 1: The Court first argues that, regardless of how the arrest of an illegal alien is effected, deportation will still be possible when evidence not derived directly from the arrest is sufficient to support deportation.[208] This conclusion is not dispositive. The Court has never relied on the fact that, despite successful Fourth Amendment claims, many criminal defendants are eventually convicted.[209] Justice White notes in his dissent that no argument has ever been made that the act of criminal defendants pleading guilty has a deterrent effect in criminal cases[210]; it is difficult to understand application in this context.

Benefit 2: Next the Court cites a lack of challenges to arrests as a reason that the deterrence value of applying the exclusionary rule in deportation proceedings would be low.[211] The Court diminishes the importance of suppression claims, citing that over 97.5% of undocumented immigrants agree to voluntary deportation without a formal hearing.[212] This citation does not make sense because the choice of voluntary behavior does not prove the nonexistence of violations by immigration officers. Most undocumented immigrants choose voluntary departure because it does not carry the bar to reentry and other potential consequences that can arise with an order of removal. Furthermore, if "every INS agent knows, therefore, that it is highly unlikely that any particular arrestee will end up challenging the lawfulness of his arrest in a formal deportation proceeding"[213] as the Court says it does, then this encourages officers not to regulate their behavior. At face value this conclusion encourages illegal behavior.

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[205] Ibid. at 942 (Brennan, J., dissenting).
[206] New Jersey v. T. L. O., 469 U.S. 325, 369 (1985) (Brennan, J., dissenting).
[207] *See, e.g.*, Schwartz, Bernard. "Cost-Benefit Analysis in Administrative Law: Does it Make Priceless Procedural Rights Worthless?." *Administrative Law Review* (1985): 13-14.; Schmidt, Christopher J. "Ending the Mathews v. Eldridge Balancing Test: Time for a New Due Process Test." *Sw. L. Rev.* 38 (2008): 288-94.; Macdonald, Lindsay. "Why the Rule-of-Law Dictates That the Exclusionary Rule Should Apply in Full Force to Immigration Proceedings." *U. Miami L. Rev.* 69 (2014): 214.
[208] *Lopez-Mendoza*, 468 U.S. at 1043.
[209] Maclin, "The Good-Faith Exception," p. 260.
[210] *Lopez-Mendoza*, 468 U.S. at 1054 (White, J., dissenting).
[211] *Lopez-Mendoza*, 468 U.S. at 1044.
[212] Ibid.
[213] Ibid.

Furthermore, as Justice White makes clear in his dissent, the possibility of exclusion of evidence "quite obviously plays a part in the decision whether to contest either civil deportation or criminal prosecution."[214] If a lawyer knows that a suppression claim will be unsuccessful, there is no reason to raise grounds for exclusion in the first place.

The Court in *Lopez-Mendoza* cited the Board in *Sandoval*, which had noted that there were fewer than fifty BIA proceedings since 1952 in which motions had been made to suppress evidence on Fourth Amendment grounds.[215] For the Supreme Court, fifty cases in thirty years were not substantial enough to indicate widespread violations or reason for concern. Immigration officer violations in recent years have become so frequent that, despite the obvious disincentive of suppression claims being frequently unsuccessful, an increasing number of suppression motions have been filed in deportation proceedings.[216] In the three-year period between 2006-2009, forty-eight suppression motions were filed with the BIA.[217]

This dramatic increase in suppression motions is largely the result of the new arrest performance expectations instituted for the Immigration and Customs Enforcement in 2006. A high percentage of collateral arrests have led to allegations that ICE agents are using home raids to meet these inflated arrest expectations. This means that ICE is using home raids for alleged targets as a pretext to enter homes and seize mere civil immigration violators.[218]

Today, ICE agents frequently fail to obtain legal consent before entering a home.[219] Though the ICE has a requirement of reasonable suspicion to make an arrest, many arrests have no basis for initial seizures.[220] An analysis of these actions leaves little doubt as to why there has been such an increase in suppression motions, despite the fact that, as a result of *Lopez-Mendoza*, they will not succeed.

Benefit 3: The Court claims its "most important" reason for not applying the exclusionary rule is that the INS had its own "comprehensive scheme" for deterring Fourth Amendment violations by its agents.[221] The existence of a scheme, however, does nothing to prove success in real life. The

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[214] *Lopez-Mendoza*, 468 U.S. at 1054 (White, J., dissenting).
[215] *Lopez-Mendoza*, 468 U.S. at 1058-59.
[216] Elias, *Good Reason to Believe*, p. 1124–25 ("[R]espondents in immigration proceedings have argued with increasing frequency that evidence against them should be suppressed because it was obtained illegally by government officials whose actions violated the respondents' constitutional rights.").
[217] Not all BIA decisions are published. This analysis used those available on the Westlaw Database, which does not include any immigration court decisions, which is where the majority of suppression motions are likely to be raised. "Federal Immigration - Board of Immigration Appeals' Administrative Decisions," https://web2.westlaw.com/scope/default.wl?rs=WLW9.05&ifm=NotSet&fn=_top&sv=Split&tc=110 1&tf=770&db=FIM-BIA&vr=2.0&rp=%2fscope%2fdefault. wl&mt=Immigration; Chiu, Bess, Lynly Egyes, Peter Markowitz, and Jaya Vasandani. "Constitution on ICE: A Report on Immigration Home Raid Operations." Cardozo Immigration Justice Clinic. January 1, 2009: 13. http://davis911truth.org/wp-content/uploads/2014/06/cardozo-law-school-study-on-ICE1.pdf.
[218] Ibid. at 11.
[219] Ibid. at 10.
[220] Ibid. at 11.
[221] *Lopez-Mendoza*, 468 U.S. at 1044.

very existence of these programs on rights protection created by the INS suggests that there is a valid problem. Something about this argument implies that supposed internal checks are "good enough" for immigrants, and that to take further precautions would require more effort than the Court believes immigrants might deserve. In the United States no agency can be said to thoroughly engage in rights protection without a system of checks and balances.

Perhaps the argument for internal sanctions would hold more weight if it were true. Justice White notes in his dissent that the Court could not point to a single instance in which that scheme was invoked.[222] Though the INS suggested that its disciplinary rulers were "not mere paper procedures" by citing that 20 officers had been suspended for misconduct toward aliens in four years, it does not assert that any of these officers were disciplined for Fourth Amendment violations.[223]

Finally, as stated above, the recent use of local officers in immigration enforcement means that an increasing number of arrests occur by those not who might not have received adequate training and who might assume that noncitizens have no rights.

Benefit 4: The last argument that the Court makes is that the deterrent value of the exclusionary rule in deportation proceedings is undermined by the availability of alternative remedies for Fourth Amendment rights violations.[224] This is an odd conclusion considering that alternative remedies for rights violations were practically nonexistent at the time of the writing of Lopez-Mendoza, and today alternative remedies are even more difficult to acquire. Once an immigrant has been removed from the country, he or she is in no position to file civil actions in federal courts.[225]

Justice White noted in his dissent that the suggestion of civil suits as providing adequate protection is "unrealistic."[226] He explains: "It is doubtful that the threat of civil suits by these persons will strike fear into the hearts of those who enforce the Nation's immigration laws."[227] Several district court rulings have acknowledged the lack of remedies. Just a year after *Lopez-Mendoza* was decided, the 9th Circuit granted injunctive relief against repeated home invasions by immigration officers, noting that the vulnerability of the immigrants made damage actions highly unlikely.[228]

Today, the immigrant population is more vulnerable and legally marginalized than it was in 1984.[229] There have been two major shifts in the restriction of immigrant rights since 1984[230]:

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[222] *Lopez-Mendoza*, 468 U.S. at 1054-55 (White, J., dissenting).
[223] Ibid at 1054-55 (White, J., dissenting).
[224] *Lopez-Mendoza*, 468 U.S. at 1045.
[225] Ibid.
[226] Ibid. at 1055 (White, J., dissenting).
[227] Ibid.
[228] *LaDuke v. Nelson*, 762 F.2d 1318 (9th Cir. 1985) (dealing with a suit against INS officials by migrant farm workers, alleging that the INS regularly searched migrant housing without warrants or even articulable suspicion that illegal aliens were present); Elias, *Good Reason to Believe*, p. 1150.
[229] Wishnie, Michael J. "Immigrants and the Right to Petition." *NYUL Rev.* 78 (2003): 667. *21st century America*. Univ of California Press, 2011.
[230] Elias, *Good Reason to Believe*, p. 1151.

the Supreme Court ruling in *United States v. Verdugo-Urquidez*[231] and the aftermath of the terrorist attacks of 9/11. Changes made during these periods have made it even harder for immigrants to seek alternative remedies for rights violations through civil proceedings.

*Verdugo-Urquidez* restricted the applicability of the Fourth Amendment to immigrants. Chief Justice Rehnquist wrote for the majority and claimed "'the people' protected by the Fourth Amendment…refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[232] This decision has led to significant confusion on the applicability of Fourth Amendment rights. The further Fourth Amendment rights are restricted, the fewer opportunities immigrants have to make a claim for declaratory relief.

Immigrant rights were further restricted in the aftermath of the attacks on September 11, 2001. Legislation such as the USA PATRIOT Act[233] fed into the xenophobia of the time. Whereas previously the United States Immigration and Naturalization Service (INS) had been part of the U.S. Department of Justice (1933-2003), most of its functions were transferred to three new entities: U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP), within the new Department of Homeland Security (DHS). The transfer of immigration authority to the DHS[234] was a marked shift in how immigration is understood in American society: as a security issue.[235]

The 1996 amendments to the INA limited judicial review of removal proceedings, eroding claims for rights violations and leaving only the petition-for-review process as the primary opportunity for recourse.[236] The Second Circuit even went so far as to say that it does not have jurisdiction to hear claims under the Torture Victim Protection Act by nonresident aliens who were mistreated by U.S. officials and removed to nations where they were subjected to torture.[237]

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[231] United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

[232] Ibid. at 265.

[233] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT ACT), Pub. L. No. 107-56, 115 Stat. 272 (2001)

[234] As a side note, the change in classification of immigration from the Treasury Department (Immigration Act of 1891), to the United States Department of Commerce and Labor (1903) and the Department of Labor (1913). These changes might reflect the changing perception of immigration in the eyes of the American government.

[235] The present Congressional obsession with border security, despite the fact that all of the 9/11 terrorists had entered the United States legally; that approximately forty percent of the current undocumented immigrant population came here legally but overstayed their visas; and the fact that the Canadian border is a larger security threat. Furthermore, the DHS has continually failed to publish overstay statistics, and the U.S. Government Accountability Office (GAO) reported that DHS's unmatched arrival-departure records totaled more than 1 million persons last year

[236] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 381(a), 110 Stat 3009-546, 3009-650 (revising section 279 of the INA, which is codified at 8 U.S.C. § 1329 and which some courts had previously held was an independent cause of action against the INS); id. § 306(b)(9) (amending INA § 242(b)(9)); Elias, *Good Reason to Believe*, p. 1153.

[237] Arar v. Ashcroft, 532 F.3d 157, 162-64 (2d Cir. 2008); Elias, *Good Reason to Believe*, p. 1154.

Those who are able seek redress are almost exclusively the wealthy elite who can afford to pay for legal representation. Take the example of San Francisco lawyer Philip Kim Hwang, who practices with the Lawyers' Committee for Civil Rights. Hwang has attested that his organization has settled eight lawsuits alleging officer misconduct against immigration authorities in the past ten years. He noted, "In most cases they don't formally acknowledge that there was wrongdoing but they pay out a significant amount, which is the government's de facto acknowledgment that there was a mess-up."[238]

Finally, the civil remedies that are available to immigrants would not redress the injury that is at the heart of the claim: removal from the United States. Instead, the respondent would be awarded monetary damages. For many immigrants, the opportunity to stay in the United States is priceless.

*ii. Social Costs*

Cost 1: The Court first argues that use of the exclusionary rule might result in the release of an undocumented immigrant and "require the courts to close their eyes to ongoing violations of the law."[239] The Court here conflates illegal and legal immigration. Deportation proceedings, again, are for all immigrants, both those who came here legally or not. It is likely that the anti-immigrant rhetoric found its way into the language of the Court and led it to equate the release of an undocumented person to releasing a criminal at large.

The Opinion claims that "entering or remaining unlawfully in this country is itself a crime" and cites 8 U.S.C. §§ 1302, 1306, 1325. This judgment that, if released, the petitioners would be "remaining unlawfully" and in "continuing violation" of the law, is too broad. Although failure to obey certain registration requirements is a crime,[240] no provision makes overstaying a nonimmigrant visa a criminal offense.[241] Justice White further notes in his dissent that the statute that describes illegal entry as a crime does not describe a continuing offense.[242]

The modern Supreme Court has already addressed this issue: In *Arizona v. United States*, the Court ruled that a violation of immigration law is no longer considered an ongoing crime: "As a general rule, it is not a crime for a removable alien to remain present in the United States."[243] Thus, if *Lopez-Mendoza* were decided again, this argument would not stand.

Cost 2: Next the Court notes that application of the exclusionary right "significantly change[s] and complicate[s] the character" of deportation hearings.[244] This assertion contradicts the earlier claim that illegal aliens are unlikely to raise Fourth Amendment challenges. If few aliens will make a Fourth Amendment claim, these invocations of the exclusionary rule are not enough to complicate the entire system.

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[238] Ward, Stephanie Francis. "Illegal Aliens on ICE." *ABAJ* 94 (2008): 44-45.
[239] *Lopez-Mendoza*, 468 U.S. at 1046.
[240] *See* INA §§ 262, 266.
[241] Legomsky and Rodriguez, *Immigration and Refugee Law and Policy,* p. 723.
[242] Justice White cites Gonzales v. City of Peoria, 722 F.2d 468, 473-474 (CA9 1983); United States v. Rincon-Jimenez, 595 F.2d 1192, 1194 (CA9 1979)
[243] Arizona v. United States, 132 S. Ct. 2492, 2505 (2012).
[244] *Lopez-Mendoza*, 468 U.S. at 1048-49.

This statement is also contradicted by an earlier claim that the INS provides sufficient training to officers to deter illegal searches.[245] If INS officers really did receive sufficient training, then few violations would incur claims on exclusionary grounds and complicate the system. As Justice White noted in his dissent, the government could not provide an example of when ICE regulations had been used.[246]

Today, the ICE might claims that INS regulations do not apply to them because they are a new agency. This is a distinction without a difference. The Homeland Security Act of 2002 reassigned all of INS's detention and removal duties to the Department of Homeland Security.[247] ICE today similarly does not sufficiently deter rights violations.

Cost 3: Finally, the Court cites as a cost of application that the chaotic circumstances surrounding arrests of many undocumented immigrants means that INS officers "cannot be expected to compile elaborate, contemporaneous, written reports detailing the circumstances of every arrest."[248] Consider if an INS officer had made the above defense in Court. To claim that a police officer is stressed or overworked does not make illegal behavior acceptable. The weakness of this argument did not go unnoticed: a law clerk told Justice Blackmun "Because the standards are so low, it is hardly placing an onerous burden on the INS to force it to abide by those standards or forgo use of evidence obtained in an illegal manner."[249]

E. Final Analysis

*The Dissenting Argument about the Roots and Applicability of the Exclusionary Rule*

Despite popular conception of the exclusionary rule as a judicial construct, two of the dissenters in *Lopez-Mendoza* wrote that the roots of the exclusionary could be found in the Fourth Amendment itself. Justice Brennan wrote that he believed the basis for the exclusionary rule was not derived from its effectiveness as a deterrent, but rather that it could be found "in the requirements of the Fourth Amendment itself."[250]

Justice Marshall also affirmed the exclusionary rule's constitutional mandate.[251] He quotes *United States v Calandra*[252] in reasoning that there is no other way to achieve "the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people — all potential victims of unlawful government conduct — that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government."[253]

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[245] Ibid. at 1044-45.
[246] *Lopez-Mendoza*, 468 U.S. at 1054 (White, J., dissenting).
[247] *See* 6 U.S.C. § 251 (2012) ("[T]here shall be transferred from the Commissioner of Immigration and Naturalization to the Under Secretary for Border and Transportation Security all functions performed under . . . [t]he detention and removal program."); Elias, *Good Reason to Believe*, p. 1146–50.
[248] *Lopez-Mendoza*, 468 U.S. at 1049.
[249] Law Clerk, Memorandum to Harry Blackmun on *INS v. Lopez-Mendoza* 18 (Apr. 16, 1984), Blackmun Papers, Box 407; Maclin, "The Good-Faith Exception," p. 262.
[250] *Lopez-Mendoza*, 468 U.S. at 1051.
[251] *Lopez-Mendoza*, 468 U.S. at 1060.
[252] United States v. Calandra, 414 U.S. 338, 348, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974).
[253] Ibid. at 1060-61.

This opinion was not shared by the majority of the other justices, and is certainly not part of the increasingly popular trend against the exclusionary rule; discussion of this waning popularity can be found in Chapter VI.

*Conclusion*

One might wonder to what extent opposition to the exclusionary rule colored *Lopez-Mendoza*. Then-Chief Justice Rehnquist wrote in a letter to Justice O'Connor that he would not be able to join in her opinion if she retained the widespread-violation exception because he believed it went "too far." He also argued during the conference that the Court should not "let the exclusionary rule spread."[254] Still, a majority of the Justices in *Lopez-Mendoza* rejected completely abolishing the exclusionary rule: four justices joined Part V of the opinion, which carved out exceptions in which the rule would apply both in select circumstances at the time and potentially more often in the future, and the four dissenters would also have preserved some version of the exclusionary rule.

Some scholars argue that the conclusion of the Court in *Lopez-Mendoza* reflects, perhaps at its very core, an unspoken belief that immigrants do not deserve Fourth Amendment protection.[255] Justice White notes in his dissent that this argument explains the real reason for the ruling: "Rather than constituting a rejection of the application of the exclusionary rule in civil deportation proceedings, however, this argument amounts to a rejection of the application of the Fourth Amendment to the activities of INS agents."[256]

With a test as subjective as the *Janis* test, it would have been just as easy to weigh evidence that indicates social costs of *not* applying the exclusionary rule far outweigh the benefits. The Court explicitly says that the efficacy of internal INS guidelines were the most compelling reason that the Court believed the exclusionary rule was not necessary. Today the lack of other options for redress and widespread rights violations make it clear that these internal regulations are not working. Today, the scale weighs even more obviously on the side of the noncitizen. With the added acknowledgement by the Court in *Padilla* that removal proceedings ought to now be classified as no longer purely civil, there is much evidence to support the application of the exclusionary rule.

## IV. EXCEPTIONS TO THE STATUS QUO OF PART V OF *LOPEZ-MENDOZA*

Although Part V of *INS v. Lopez-Mendoza* was signed by only a plurality of four justices[257], lower courts have applied the language as though it were law and not dictum, reasoning by inference that the dissenters agreed with the exception in Part V.[258] The weight and meaning of this paragraph remain a subject of debate.

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[254] Maclin, "The Good-Faith Exception," p. 258.
[255] Maclin, "The Good-Faith Exception," p. 262.
[256] *Lopez-Mendoza*, 468 U.S. at 1059 (White, J., dissenting).
[257] Chief Justice Rehnquist did not sign Part V of the opinion.
[258] *See, e.g.*, Rossi, *Revisiting INS v. Lopez-Mendoza*, p. 5; Puc-Ruiz v. Holder, 629 F.3d 771, 778 n.2 (8th Cir. 2010) (stating that "it is reasonable to read Lopez-Mendoza as showing that eight justices would have applied the exclusionary rule in circumstances where evidence was obtained through an 'egregious' Fourth Amendment violation" because four additional justices,

Part V outlines two caveats to the holding: (1) that the Court's "conclusions concerning the exclusionary rule's value might change, if there developed good reason to believe that Fourth Amendment violations by [Immigration and Naturalization Service (INS)] officers were widespread,"[259] and (2) that "we do not deal here with egregious violations of the Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained."[260] The ambiguities of each section will be analyzed in turn.

A. Widespread Violations

The Court claims that it would consider reversal of its holding and apply the exclusionary rule if Fourth Amendment violations by INS officers were widespread. The promise of reversal is offered without an explanation of how the Court might know when violations would reach the level of "widespread." This ambiguity is the reason that the Chief Justice did not sign onto this part of the opinion.[261] Considering that the holding rendered the exclusionary rule inoperable in nearly all circumstances, immigrants have no incentive to report a violation. If anything, *INS v. Lopez-Mendoza* made immigrants less likely to bring Fourth Amendment claims.

*Accounts of Widespread Violations*

At the time of the holding of Lopez-Mendoza, the Court held faith in the efficacy of internal INS procedures to deter ICE agents from rights violations. Since this decision, the INS has been transformed as an agency, and there has been a dramatic increase in the number and scope of violations of Fourth Amendment rights.

The American Bar Association Journal went so far in 2008 as to note the recent trend of immigration lawyers arguing that ICE violations had become so widespread that it might be necessary to revisit the Supreme Court's holding in Lopez-Mendoza.[262]

The Department of Justice's Executive Office of Immigration Review (EOIR) maintains records on the nature of immigration cases. The EOIR publishes yearly data on immigration matters such as the total number of individuals in immigration proceedings and the outcome of those proceedings. At the time of writing this essay the most recent report is that for fiscal year

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those in the dissent, would have applied the exclusionary rule in all deportation proceedings); Gonzalez-Rivera v. INS, 22 F.3d 1441, 1448 n.2 (9th Cir. 1994) ("Although the part of the opinion where the 'egregiousness' caveat appears was joined by only three other Justices, the four dissenters, who contended that the exclusionary rule applies in the civil and the criminal contexts alike, would have approved any limitation on the majority's decision.").

[259] *Lopez-Mendoza*, 468 U.S. at 1050.

[260] *Lopez-Mendoza*, 468 U.S. at 1050–51.

[261] Although the Chief Justice's reasons are not stated directly, in a letter to Justice O'Connor he claims that he saw "no point in intimating that constitutional adjudication will weave and bob with some sort of Gallup Poll reflection of how many [Fourth] [A]mendment violations occur." Warren Burger, Letter to Sandra Day O'Connor on *INS v. Lopez-Mendoza* (June 25, 1984), Blackmun Papers, Box 407; Maclin, "The Good-Faith Exception," p. 263.

[262] Ward, Stephanie Francis. "Illegal Aliens on ICE." *ABAJ* 94 (2008): 44-45.
("Immigration lawyers say the searches have become both—widespread and egregious—and that it is time for the court to revisit Lopez-Mendoza.").

2013.[263] The following chart illustrates the number of Immigration Judge decisions that terminated deportation cases between 2009-2013.[264]

| IJ Decisions by Disposition - Initial Case Completions | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | Termination | | Relief | | Removal | | Other | | Total |
| | Number | % of Total | Number | % of Total | Number | % of Total | Number | % of Total | |
| FY 09 | 13,937 | 6.4 | 23,251 | 10.7 | 178,270 | 82.4 | 850 | 0.4 | 216,308 |
| FY 10 | 19,776 | 9.6 | 25,155 | 12.2 | 160,295 | 77.8 | 932 | 0.5 | 206,158 |
| FY 11 | 20,516 | 10.1 | 26,459 | 13.1 | 154,762 | 76.3 | 971 | 0.5 | 202,708 |
| FY 12 | 19,682 | 11.5 | 25,824 | 15.1 | 125,239 | 73.0 | 756 | 0.4 | 171,501 |
| FY 13 | 19,107 | 13.3 | 24,006 | 16.7 | 99,611 | 69.3 | 954 | 0.7 | 143,678 |

Remember that the Court reasoned in *Lopez-Mendoza* that there were "fewer than fifty BIA proceedings since 1952" in which motions had been made to suppress evidence on Fourth Amendment grounds.[265] Since this holding, suppression motions have skyrocketed. The above chart indicates that there were 19, 107 termination motions alone in 2013: a substantial enough increase even when considering internal changes.

A report by the Benjamin N. Cardozo School of Law reported a nine-fold increase in the filing of suppression motions, a twenty-two-fold increase in suppression motions related to home raids, and a five-fold increase in the grant rate of suppression motions in New York and New Jersey between 2006 and 2009.[266]

Many personal accounts of ICE wrongdoing have leaked to the press. The most notorious of these is the case of U.S. citizen Pedro Guzman. Twenty-nine-year-old Guzman, who is developmentally disabled, was wrongly deported to Tijuana with $3 in his pocket in 2008.[267] Homeless, Guzman ate out of dumpsters and spent the majority of 89 days on foot avoiding human contact. After his family traveled to Mexico to find him, Guzman's mother lamented: "They returned half my son to me. He isn't normal."[268]

*The Evolution of Immigration Enforcement*

The Fugitive Operations Teams of ICE have undertaken a number of high- profile nationwide enforcement operations in recent years: Operation "Return to Sender,"[269] Operation

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[263] "FY 2013 Statistics Yearbook." U.S. Department of Justice, Executive Office for Immigration Review. January 1, 2014. Accessed April 20, 2015. http://www.justice.gov/eoir/statspub/fy13syb.pdf.

[264] Chart titled "IJ Decisions by Disposition – Initial Case Completions" can be found Ibid., C2.

[265] *Lopez-Mendoza*, 468 U.S. 1032, 1071.

[266] Chiu et al., *Constitution on ICE*, p. 13-14.

[267] Esquivel, Paloma. "Suit Filed over Man's Deportation Ordeal." *LA Times*, February 28, 2008. Accessed April 1, 2015. http://articles.latimes.com/2008/feb/28/local/me-guzman28.

[268] Quinones, Sam. "Disabled Man Found after 89-day Ordeal." *LA Times*, August 8, 2007. http://articles.latimes.com/2007/aug/08/local/me-found8.

[269] "U.S. Officials Nab 2,100 Illegal Immigrants in 3 Weeks." *USATODAY*, June 14, 2006. Accessed April 8, 2015. http://usatoday30.usatoday.com/news/nation/2006-06-14-immigration-arrests_x.htm.

"Cross-Check,"[270] Operation "Community Shield,"[271] and Operation Return to Sender. Initiated in 2006, the latter was able to arrest more than 2,000 illegal immigrants in three weeks.[272]

These programs claim to target the most dangerous criminals; however, in reality the majority of those arrested are not those for whom the ICE agents have arrest warrants. Rather the arrests are collateral It is also important to note that, considering that a majority of immigrants do not have representation in deportation proceedings, there are undoubtedly more violations than are reported. [273]

The Department of Justice allowed for the enforcement of immigration laws state and local police, who generally enforce criminal law, in 2002.[274] The Attorney General explained that the Office of Legal Counsel had concluded that in the wake of 9/11 state and local police possess "inherent authority" to enforce immigration laws.[275] As mentioned earlier, the inclusion of these officers, who are largely untrained in immigrant rights, opens the door for further rights violations.

ICE transgressions have not gone unnoticed. The Congressional House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law held a hearing on "Problems with ICE Interrogation, Detention, and Removal" on February 13, 2008.[276] In the international community, the United Nations Human Rights Council noted in 2008 that ICE agents frequently disregard due process in workplace and household raids.[277] The Special Rapporteur recorded accounts from victims that ICE agents had entered their homes without a

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[270] Press Release, U.S. Immigration and Customs Enforcement, ICE Arrests 148 Immigration Violators, Criminals and Fugitives in Dallas (Apr. 27, 2007), available at http://www.ice.gov/pi/news/newsreleases/articles/070427dallas.htm.

[271] "Press Release: , 11 Arrested in Kenosha During ICE-led Operation Targeting Gang Members." *U.S. Immigration and Customs Enforcement*, November 20, 2008. http://www.ice.gov/pi/nr/0811/081120kenosha.htm.

[272] "U.S. Officials Nab 2,100 Illegal Immigrants in 3 Weeks." *USATODAY*, June 14, 2006. Accessed April 8, 2015. http://usatoday30.usatoday.com/news/nation/2006-06-14-immigration-arrests_x.htm.

[273] Burch Elias, Stella. "Good Reason to Believe: Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza." *Wis. L. Rev.* (2008): 1129-1133.

[274] Elias, *Good Reason to Believe*, p. 1135; Marcus Stern & Mark Arner, Police May Gain Power to Enforce Immigration: Plan Has Local Officers, Rights Groups on Edge, SAN DIEGO UNION- TRIB., Apr. 3, 2002, at A1 (reporting on the U.S. Department of Justice's Office of Legal Counsel's reversal of long-standing legal tradition).

[275] Ashcroft, John. "Attorney General Prepared Remarks on the National Security Entry-Exit Registration System." #06-05-02: Announcing the National Security Entrance and Exit Registration System. June 6, 2002. Accessed April 20, 2015. http://www.justice.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm.

[276] "Problems with ICE Interrogation, Detention, and Removal Procedure." Hearing Before the H. Subcomm. on Immigration, Citizenship, Refugees, Border Security, and Int'l Law of the H. Comm. on the Judiciary. February 13, 2008. Accessed April 20, 2015. http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg40742/html/CHRG-110hhrg40742.htm.

[277] Bustamante, Jorge. "Report of the Special Rapporteur on the Human Rights of Migrants." U.N. Human Rights Council: U.N. Doc A/HRC/7/12/Add.2. March 5, 2008.

warrant, coerced to sign voluntary departure agreements, and denied access to a lawyer.[278] Human Rights Watch has a website devoted entirely to critiques of U.S. immigration policy and effects.[279]

B. Egregious Violations

*A Question of Language*

The Court leaves open whether exclusion might be available when there have been "egregious violations of the Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained."[280] The vague language of this "egregious violations" exception has baffled lower courts since its inception.

First, what constitutes an egregious violation? The term "egregious" comes from Latin, meaning literally to be out from (*ex*) the flock (*greg*). Thus an egregious violation would be one that is worse than the average violation. The language is purposefully vague, and has puzzled lower courts since its inception.

Next, the reference to "fundamental fairness" implies that exclusion might be warranted in the case of INS searches and seizures that violate Due Process protections. The use of the word "and" might indicate that exclusion is necessary only when a search violates *both* Due Process protections *and* produces evidence that has been undermined by the search.[281] This phrasing is awkward because Fourth Amendment violations rarely result in the discovery of non-probative evidence.[282] Thus there is a conflict between the first clause and the second.

The citation to *Rochin v. California*[283] does not clarify the Court's position. In *Rochin*, a LA deputy sheriff directed a doctor to force an emetic solution through a tube into Rochin's stomach so as to procure evidence of morphine capsules.[284] The Court held that such method of extraction "shocks the conscience"[285] and violates Due Process.[286] The evidence in *Rochin* was suppressed because it violated Due Process. However, that evidence was probative of the alleged drug-possession crime for which Rochin was accused.

It is possible that the Court suggests a more moderated standard than physical aggression. The next sentence states that at issue is the exclusion of "credible evidence gathered in connection with peaceful arrests by INS officers."[287] This might implicate that any non-peaceful arrest, or an arrest made by a non-INS officer, is automatically egregious. The language creates more questions than it answers.

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[278] Ibid., 17.
[279] "Unfair Immigration Policies." Human Rights Watch. Accessed April 20, 2015. http://www.hrw.org/united-states/us-program/unfair-immigration-policies.
[280] Ibid., 1050-51.
[281] Maclin, "The Good-Faith Exception," p. 263.
[282] Ibid.
[283] Rochin v. California, 342 U. S. 165 (1952).
[284] Ibid. at 166.
[285] Ibid. at 172.
[286] Ibid. at 173.
[287] *Lopez-Mendoza*, 468 U.S. at 1051.

*Circuit Split*

The "egregious violations" exception has undermined the Court's original assertion that its decisions would prevent further constitutional litigation in deportation proceedings. Lower courts, from Immigration Judges to Circuit Courts to the BIA, have not reached a consensus[288] on how to apply this exception because the original holding was so vague. Different courts have emphasized different aspects of the holding and held different opinions on how to interpret relevant provisions.

The Third Circuit articulated its confusion (and failure to provide a definition) in *Oliva-Ramos v. U.S. Attorney General*: "there is no one-size-fits-all approach to determining whether a Fourth Amendment violation is egregious."[289] The Third Circuit lists factors that might be considered such as "improper seizures…arrests occurred under threats, coercion, or physical abuse," and claimed that these factors were merely "illustrative…nor is any one factor necessarily determinative of the outcome in every case."[290] If anything, this impractical standard only adds to the confusion. After this analysis, the Third Circuit does not even take a position on whether the circumstances in this case were egregious; rather it "merely conclude[s] that Oliva-Ramos must be permitted to present evidence to support his contention that the Government's conduct here falls within the exception [for egregious violations]."[291]

The circuit's split and subsequent BIA confusion creates a mandate for the reevaluation of *Lopez-Mendoza,* as these different interpretations undermine fundamental fairness and due process. The Supreme Court had ruled in *Francis v. INS* that

> Fundamental fairness dictates that permanent resident aliens who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner. We do not dispute the power of the Congress to create different standards of admission and deportation for different groups of aliens. However, once those choices are made, individuals within a particular group may not be subjected to disparate treatment on criteria wholly unrelated to any legitimate governmental interest.[292]

Consider the following examples[293]:

The majority of circuits, led by the First and Second Courts, apply a conduct-based analysis, using an "aggravating-factors" test that relies on the presence of certain factors that might render a violation egregious.[294]

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[288] For a more detailed catalog of the various circuit court interpretations of the egregious violations exception, *see*: Rossi, Elizabeth A. "Revisiting INS v. Lopez-Mendoza: Why the fourth amendment exclusionary rule should apply in deportation proceedings." *Colum. Hum. Rts. L. Rev.* 44 (2012): 477. A succinct summary of the different opinions can be found on pages 51-55. *See also* EOIR report, pages 10-12; See also Burch Elias, Stella. "Good Reason to Believe: Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza." Wis. L. Rev. (2008): 1109.

[289] Oliva-Ramos v. U.S. Attorney Gen., 694 F.3d 259, 275, 279 (3d Cir. 2012).

[290] Ibid. at 279.

[291] Ibid. at 282.

[292] Francis v. INS, 532 F.2d 268, 273 (2d Cir. 1976).

[293] The cases in this section are compiled in Rossi, *Revisiting INS v. Lopez-Mendoza*, p. 29-55.

The Seventh Circuit ruled in 2010 that "very minor physical abuse coupled with aggressive questioning" does not constitute an egregious violation of the Fourth Amendment.[295] In this case a defendant alleged that ICE agents handcuffed him, lifted his hands behind his back, and made him feel as if his arms were going to break.[296] At the detention center the defendant refused to sign papers and a man yelled at him "Sign the f***ing papers. You don't have any rights"[297] (redaction added). Though the Court uses this case as an example of what might not be considered an egregious violation, it neither addressed what might be considered egregious, nor defined "minor" physical abuse. Nor did it address the question of whether such aggressive questioning might have undermined the reliability of the evidence.

The Fourth Circuit has similarly ruled narrowly, holding that illegally obtained fingerprints are admissible because they are identity related.[298]

The Ninth Circuit, by contrast, most closely approximates the standard for applying the exclusionary rule in criminal proceedings, and is the best interpretation.[299] The split between the Ninth Circuit and the other courts is a dramatic one.[300] The Ninth Circuit uses a "bad faith" test: a Fourth Amendment violation is in bad faith when "evidence is obtained by deliberate violations of the Fourth Amendment, or by conduct a reasonable officer should have known is in violation of the Constitution."[301] Thus the Court held in *Orhorhaghe v. INS* that seizing a person solely based on a foreign-sounding name constitutes an egregious violation.[302] This is because race-based stops constitute "arbitrary and discriminatory enforcement of the law."[303]

The Board of Immigration Appeals then must attempt to interpret these confusing Circuit opinions, as it must apply the law for the federal circuit in which it is based.[304] BIA decisions are not required to be published and have little precedential value unless otherwise specified. The

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[294] U.S. Department of Justice, Executive Office for Immigration Review, *FY 2013 Statistics Yearbook*, p. 3.
[295] Gutierrez-Berdin v. Holder, 618 F.3d 647, 652 (7th Cir. 2010).
[296] Ibid at 650.
[297] Ibid at 650.
[298] *United States v. Oscar-Torres*, 507 F.3d 224, 228 (4th Cir. 2007).
[299] Rossi, *Revisiting INS v. Lopez-Mendoza*, p. 42; NB: it was the 9th Circuit that originally ruled in favor of both Lopez-Mendoza and Sandoval-Sanchez.
[300] U.S. Department of Justice, Executive Office for Immigration Review, *FY 2013 Statistics Yearbook*, p. 13.
[301] Gonzalez-Rivera v. INS, 22 F.3d 1441, 1449 (9th Cir. 1994) (quoting Adamson v. Comm'r, 745 F.2d 541, 545 (9th Cir. 1984)).
[302] Orhorhaghe v. INS, 38 F.3d 488, 503 (9th Cir. 1994).
[303] Ibid., at 502, 504.
[304] *See, e.g.*, Rossi, *Revisiting INS v. Lopez-Mendoza*, p. 46; Abdulai v. Ashcroft, 239 F.3d 542, 553 (3d Cir. 2001) ("The BIA is required to follow court of appeals precedent within the geographical confines of the relevant circuit."); Anselmo, 20 I. & N. Dec. 25, 31 (B.I.A. 1989) ("Where we disagree with a court's position on a given issue, we decline to follow it outside the court's circuit. But, we have historically followed a court's precedent in cases arising in that circuit.").

resultant effect is another court that lacks doctrinal coherence or consistency.[305] The BIA has declined to interpret Lopez-Mendoza or state what might constitute an egregious violation.[306]

C. Conclusion

The confusion about the vague terms "egregious violations" and "widespread violations" must be resolved. The split between the circuit courts, which has spilled into the BIA, as well as confusion amongst immigration judges, creates a mandate for the Supreme Court to clarify meaning. When it does rule on egregious violations, as stated earlier, it ought to conform to the 9th Circuit interpretation. Furthermore, enough evidence exists that violations of Fourth Amendment rights have become widespread enough for exclusionary rule to apply in *all* deportation proceedings.

## V. CASE STUDY: HOME RAIDS

The argument for application of the exclusionary rule in removal proceedings is strongest in the instance of home raids. In the past decade the number of home raids has risen exponentially and accounts of immigration officer misconduct have soared. The following case study suggests the negative implications of limited oversight of immigration officers, highlighting the need for the deterrence that application of the exclusionary rule would provide.

### A. Immigration Raids and the Home

*There's No Place Like Home*

The home is the inner sanctum of private life and as such has a special place in American law. The word "house" appears twice in the Bill of Rights, in both the Third and Fourth Amendments. The Supreme Court has recognized the special case of the home in several decisions. The sanctity of the home was reaffirmed in *Lawrence v. Texas,*[307] which struck down state sodomy laws and reaffirmed privacy rights in the home. A similar protection of privacy is delineated in Justice Scalia's opinion in *Kyllo v. United States,*[308] which found thermal imaging scans of a home to be a kind of search that violates a homeowner's reasonable expectation of privacy. Justice Scalia commented: "In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes."[309]

*Immigration Raids*

Immigration raids serve as a tool for immigration enforcement officers to arrest undocumented immigrants, visa overstayers, and persons who have committed other crimes of deportability. There are two divisions within ICE that carry out its interior immigration enforcement mandate: the office of Enforcement and Removal Operations (ERO, formerly the Office of Detention and Removal Operations), which seeks to identify and arrest immigrants for

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[305] Rossi, *Revisiting INS v. Lopez-Mendoza*, p. 46.
[306] U.S. Department of Justice, Executive Office for Immigration Review, *FY 2013 Statistics Yearbook*, p. 3.
[307] 539 U.S. 558 (2003).
[308] 533 U.S. 27 (2001).
[309] Ibid. at 37.

civil immigration violations; and the Homeland Security Investigations (HIS, formerly the Office of Investigations), which is a criminal investigative division of ICE that investigates national security threats, financial and smuggling violations, gang offenses, commercial fraud, and other immigration violations. Both use home raids on a regular basis.

These two offices led the spike in home raids that became prevalent during President George W. Bush's administration. A series of special operations were intended to target certain classes of immigrants such as Operation Predator, targeting immigrant sex offenders; the National Fugitive Operations Program (NFOP), targeting individuals with orders of deportation and Operation Community Shield, targeting immigrant gang members. The programs were not as effective at targeting criminals as planned: approximately seventy-three percent of the individuals apprehended by Fugitive Operations Teams (dispatched from NFOP) from 2003 through February 2008 had no criminal convictions.[310] The number of immigrants arrested with criminal convictions consistently has dropped in recent years.[311]

These programs were part of performance quotas that encouraged ICE agents to engage in collateral arrests to meet quotas. No other law enforcement agency in the United States has quotas. A recent analysis for the Migration Policy Institute concluded that NFOP had succeeded in apprehending the easiest targets to fulfill quotas requirements, rather than the most dangerous fugitives.[312]

*The Constitution and Home Raids*

To search a home, an immigration officer must have consent. Without consent from an adult resident[313] or in the case of exigent circumstances,[314] a search conducted without a judicial warrant[315] is presumed to be a Fourth Amendment violation. The warrant requirement is the strongest in homes: judicial warrants are required for home searches,[316] whereas only probable cause is necessary for arrests outside of the home.[317] The only exception to this rule is when the safety of another officer is in question.[318]Administrative warrants do not authorize agents to enter homes without consent because impartial magistrates do not issue them.[319] ICE officers rarely have judicial warrants and most often rely on supposed consent. Consent by an adult resident, however, is not enough to justify the seizure of an occupant without a reasonable suspicion of unlawful conduct. Furthermore, Fugitive Operations Teams frequently corral all residents into a

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[310] Mendelson, Margot, Shayna Strom, and Michael Wishnie. "Collateral Damage: An Examination of ICE's." Migration Policy Institute. February 1, 2009. Accessed April 18, 2015. http://lawprofessors.typepad.com/immigration/files/nfop_feb091.pdf.
[311] Ibid.
[312] Ibid.
[313] United States v. Matlock, 415 U.S. 164, 171 (1974).
[314] Michigan v. Tyler, 436 U.S. 499, 509 (1978) (citing Warden v. Hayden, 387 U.S. 294, 298-99 (1967)).
[315] Katz v. United States, 389 U.S. 347, 357 (1967).
[316] The DHS incorporates this constitutional requirement in its regulations. *See* 8 C.F.R. § 287.8(f)(2).
[317] Payton v. New York, 445 U.S. 573, 587 (1980).
[318] Terry v. Ohio, 392 U.S. 1 (1968).
[319] *See generally*, See v. City of Seattle, 387 U.S. 541 (1963); Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523 (1963).

common area, indiscriminately detaining and interrogating other residents. Only those violations that are deemed "egregious" or "shocking" result in suppression. This means that rights violations are accepted on a routine basis, and that only the worst cases of police misconduct have a chance at suppression.

B. Evidence of ICE Misconduct in Homes[320]

*Cardozo School of Law Analysis*

A team from the Cardozo School of Law obtained two immigration raid datasets through a Freedom of Information Act (FOIA) lawsuit concerning home raids in Newark/Central New Jersey and Nassau/Suffolk County, New York between 2006-2007 and 2006-2008, respectively.[321] The convergence between these two data sets indicates the possibility of an agency-wide problem. Evidence of unusually high collateral arrests, unusually high numbers of Latino collateral arrests and a lack of recorded basis for seizure all point to the likelihood of Fourth Amendment violations by immigration officers.

Much of the data conflict with each other, and eyewitness accounts contradict with official recorded consent.[322] In the New Jersey data set, for example, reports of consent vary widely: in one arrest record an officer notes that a Newark Fugitive Operation team "gained access into apartment [redacted] by way of knocking, thus the door was opened from the intensity of the banging."[323] The same arrest report claims "Gained Access to home via: subject gave consent."[324]

Although the Constitution requires that a specific person be targeted, an increasing number of home raids result in collateral arrests. Data from the New Jersey and New York Field Offices indicate that this high percentage of collateral arrests is consistent with allegations that home raids are being used by ICE agents as a pretext to search for "mere civil immigration violators." There arrests seem to be linked with a DHS policy change to permit collateral arrests to count toward quotas.[325] As demonstrated in the adjacent charts, [326] over two-thirds of arrests in these home raids did not achieve their target and instead resulted in a statistically significant percentage of collateral arrests.

Fig. 3: **New Jersey Target vs. Collateral Data**

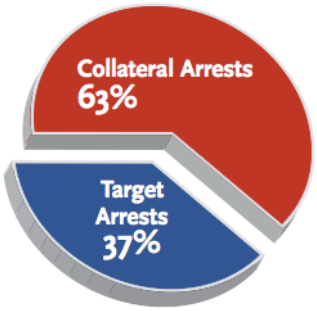
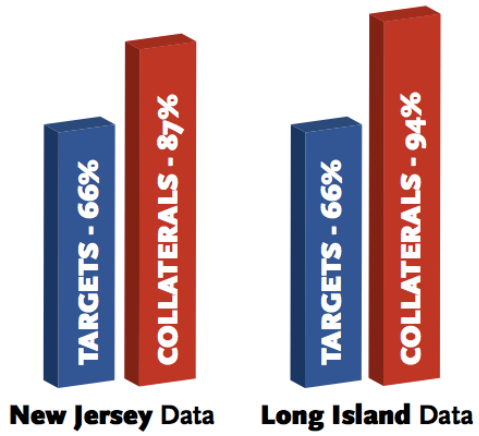



Fig. 4: **Long Island Target vs. Collateral Data**


[320] The evidence from this section comes from the first publication to attempt to catalogue recent Fourth Amendment Rights violations by immigration officers, using data obtained from a Freedom of Information lawsuit: Chiu et al., "Empirical Evidence," *Constitution on ICE,* p. 9-12.
[321] Chiu et al., *Constitution on ICE,* p. 9.
[322] Chiu et al., *Constitution on ICE,* p. 9.
[323] Chiu et al., *Constitution on ICE,* p. 10.
[324] Chiu et al., *Constitution on ICE,* p. 10.
[325] Chiu et al., *Constitution on ICE,* p. 11.
[326] Charts titled "Fig. 3" and "Fig. 4" can be found in Chiu et al., *Constitution on ICE,* p. 11.

Fig. 7
**Percentage of Arrestees who were Latino**




Racial or ethnic appearance is not sufficient justification for seizure.[327] Although the ethnicities of ICE targets is an indicator of the ethnic composition of immigrant communities in which raids take place, this does not explain why significantly more Latinos are arrested as collaterals than as targets.[328] As demonstrated in "Fig. 7,"[329] the overrepresentation of Latinos in collateral arrests by ICE agents during home raids indicates racial profiling.

The Constitution also requires reasonable suspicion for detention. Yet the majority of the arrests in the data set indicate that Fourth Amendment violations are widespread. As demonstrated in "Fig. 5" and "Fig. 6,"[330] over two-thirds of both data sets record no basis for initial seizure, and much of the results are inconsistent.

Some argue that federal immigration officers have even used home raids as a retaliatory technique. Two days after the 2007 New Haven, Connecticut aldermen vote to accept $250,359 in private funds to fund the highly controversial Elm City Resident Card,[331] ICE agents arrested thirty-two undocumented residents from the streets of Fair Haven and from inside their homes.[332] Michael Chertoff, then-

Fig. 5: **New Jersey Basis for Seizing & Questioning**

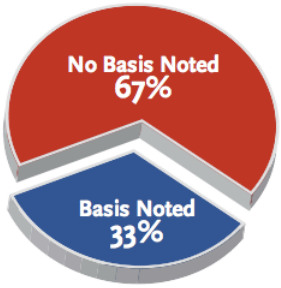
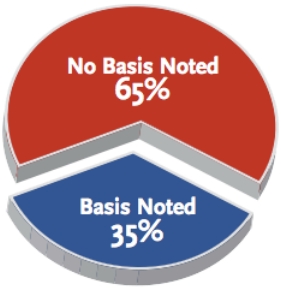



Fig. 6: **Long Island Basis for Seizing & Questioning**




[327] *See* United States v. Brignoni-Ponce, 422 U.S.873, 886-87 (1975) ("the likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens."); United States v. Manzo-Jurado, 457 F.3d 928, 937 (9th Cir. 2006) ("By itself, however, an individual's inability to understand english will not justify an investigatory stop because the same characteristic applies to a sizable portion of individuals lawfully present in this country."); Gonzales-Rivera v. INS, 22 F.3d 1441, 1443 (9th Cir. 1994) ("We conclude that the stop, which resulted solely from Gonzalez' Hispanic appearance, constituted a bad faith and egregious violation of the Fourth Amendment."); Chiu et al., *Constitution on ICE,* p. 34.

[328] Chiu et al., *Constitution on ICE,* p. 12.

[329] Chart titled "Fig. 7" can be found in Chiu et al., *Constitution on ICE,* p. 12.

[330] Chart titled "Fig. 5" and "Fig. 6" can be found in Chiu et al., *Constitution on ICE,* p. 11.

[331] Bailey, Melissa. "City ID Plan Approved." *New Haven Independent*, June 5, 2007. http://newhavenindependent.org/archives/2007/06/city_id_plan_ap.php.

[332] Bernstein, Nina. "Promise of ID Cards Is Followed by Peril of Arrest for Illegal Immigrants." *New York Times*, July 23, 2007.

secretary of the DHS, denied a link between the ID cards and the raids.[333]

*Adriana Aguilar, et al. v. Immigration & Customs Enforcement, et al.*[334]

The increase in ICE raids during 2006 and 2007 led to the filing of a class-action lawsuit that would not be settled until 2013. The suit included 22 plaintiffs who contended eight raids in which ICE agents had entered the homes of Latino families on Long Island and in Westchester County without warrants or other legal justification.[335] The plaintiffs contained a mix of persons, including Latino citizens, lawful permanent residents, U.S. citizens (one U.S. citizen family's home was raided twice), and children. The $1 million settlement paid for the costs of lawyers and granted $36,000 to each plaintiff for damages. It served as an expose of widespread Fourth Amendment violations in the case of home raids.

The plaintiffs' stories were chilling accounts of heavily armed ICE agents pounding on doors at pre-dawn hours, demanding and oftentimes forcing entry, without a valid search warrant. Even when residents said they did not know the person whom ICE agents were searching after, the residents were corralled into a central area and interrogated about their immigration status.

ICE conceded that it had not obtained judicial search warrants, but claimed that they had received informed consent for the searches. It seems that a "cowboy mentality" developed as a result of the raids: an e-mail obtained under a Freedom of Information request revealed that a federal immigration agent in Connecticut had invited a state trooper to join a scheduled set of raids in New Haven which stated: "We have 18 addresses — so it should be a fun time! Let me know if you guys can play!"[336]

In the four days after the plaintiffs filed suit, ICE began a week-long warrantless operation in Long Island, which it purported was to arrest gang members.[337] Only seven percent of the hundreds of men arrested were original targets and almost none were identified by local police as gang members.[338]

The subsequent settlement demanded that ICE issue and publish to all personnel a national policy and training memorandum/a that addressed the following three changes: (1) consent to enter or search a private residence must be sought in the language understood by the resident granting consent whenever feasible, and one or more Spanish-speaking officers must be available to seek consent where the target is thought to be from a Spanish-speaking country (2) in consent-based home operations agents cannot enter the curtilage or areas around a home

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http://query.nytimes.com/gst/fullpage.html?res=9E02E1DD1231F930A15754C0A9619C8B63&sec=&spon=&&scp=4&sq=Elm City Resident Card &st=cse.

[333] Ibid.

[334] Aguilar v. Immigration & Customs Enforcement Div., 811 F. Supp. 2d 803 (S.D.N.Y. 2011).

[335] Semple, Kirk. "U.S. Agrees to New Rules for Immigration Raids." *New York Times*, April 4, 2013. http://www.nytimes.com/2013/04/05/nyregion/us-agrees-to-set-new-rules-for-immigration-raids.html.

[336] Bernstein, Nina. "Report Says Immigration Agents Broke Laws and Agency Rules in Home Raids." *New York Times*, July 21, 2009. http://www.nytimes.com/2009/07/22/nyregion/22raids.html.

[337] "Aguilar, Et Al. v. Immigration and Customs Enforcement (ICE), Et Al." Center for Constitutional Rights. Accessed April 12, 2015. http://ccrjustice.org/ourcases/aguilar-v-ice.

[338] Ibid.

unless they obtain consent to do so (3) agents are forbidden from conducting protective sweeps through the homes without "a reasonable, articulable suspicion of danger." Despite these changes, there is no way to consistently check that immigration officers will follow the required changes. Considering that consent was questionable in previous raids, there is no evidence that future home raids will respect Fourth Amendment rights. With the inclusion of local and state police into the mix, to say that noncitizens can comfortably sleep at night without fear of a warrantless home raid is a happy delusion.

The Court ought to build on *Aguilar v. ICE* and apply the exclusionary rule in home raids. This would serve as an effective deterrent and indeed would be one of the only available remedies for Fourth Amendment violations available for noncitizens. This does not mean that home raids will stop completely, but rather that the application of the exclusionary rule would disincentivize immigration officers from engaging in abusive behavior. The vast list of Fourth Amendment rights restrictions will remain at the border and officers will likely continue to raid workplaces. However, they ought not to wake persons in the middle of the night by breaking into their homes without a judicial warrant and without clear probable cause.

## VI. The Future of the Exclusionary Rule and Removal proceedings

Though the Supreme Court today is more inclined than ever to acknowledge the increasingly penal nature of removal proceedings, the Court's opinion on the exclusionary rule is not as expansive.

### The End of Exclusionary Rule?

When he was a young lawyer in the Reagan White House, now-Chief Justice Roberts wrote a memorandum on evidence that would support "the campaign to amend or abolish the exclusionary rule."[339] Though the Reagan administration's attacks on the exclusionary rule didn't gain much ground, the young lawyer who once wrote this memo is now the Chief Justice of the United States.[340]

Today, Chief Justice Roberts and Justices Alito, Thomas and Scalia comprise a voting block against the exclusionary rule.[341] Recent assaults on the exclusionary rule include *Hudson v. Michigan*[342] and *Herring v. United States*.[343] David Moran, who argued on the side of Hudson in the Supreme Court, would later claim in a law review article that his loss signaled the "end of the Fourth Amendment as we know it."[344] In *Herring*, the Court went even further to restrict the

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[339] Liptak, Adam. "Justices Step Closer to Repeal of Evidence Ruling." *New York Times* 30 Jan. 2009. Web. 11 Apr. 2015. http://www.nytimes.com/2009/01/31/washington/31scotus.html?.

[340] Ibid.

[341] Kerr, Orin. "Ask the Author: Tracey Maclin on the Court and the Fourth Amendment." *SCOTUSblog*, January 2, 2013. http://www.scotusblog.com/2013/01/ask-the-author-tracey-maclin-on-the-court-and-the-fourth-amendment/.

[342] 547 U.S. 586 (2006).

[343] 555 U.S. 135 (2009).

[344] Moran, David A. "End of the Exclusionary Rule, among Other Things: The Roberts Court Takes on the Fourth Amendment." *Cato Sup. Ct. Rev.*(2005): 283; Liptak, "Justices Step Closer to Repeal of Evidence Ruling." *New York Times* 30 Jan. 2009.

exclusionary rule, concluding that evidence obtained from illegal searches based on negligent police mistakes and not repeated patterns or flagrant misconduct could not use the exclusionary rule used to suppress evidence.[345] Though the decision can be read both broadly (to render the entire rule useless) and narrowly, it certainly indicates the current anti-exclusionary rule sentiment of the Court.

This threat to the exclusionary rule, however, might be over. Yale Kamisar, law professor at the University of San Diego, commented that "we were we were saved by Barack Obama in the nick of time. If ever there was a court that was establishing the foundations for overthrowing the exclusionary rule, it was this one."[346] The Supreme Court today does not currently have the five votes it needs to gut the exclusionary rule. Still, as Professor Karlan of Stanford Law School notes: "you are not going to see any dimension along which there is going to be an expansion of defendants' rights in this court."[347]

The Exclusionary Rule and Removal

To overturn *Lopez-Mendoza* would seem to go against the grain. Or would it? There is enough evidence to distinguish the benefit of application of the rule to removal proceedings as opposed to other kinds of appeals. The larger debate over the exclusionary rule cannot swallow the debate on deportation proceedings, as the traditional arguments simply do not apply.

Opponents of the exclusionary rule cite modern remedies for those whose rights have been violated. At worst, the exclusionary rule can be understood to benefit the guilty because they were guilty – precisely because evidence of their guilt has surfaced – whilst the Founders envisioned robust remedies that would comfort innocent Americans.[348]

Noncitizens in removal proceedings, however, do not have the alternative remedies that critics offer, or that the Founders might have envisaged. Considering the lure of voluntary departure, and the knowledge that suppression claims have a miniscule chance of success, noncitizens do not just have the short end of the stick – there is no stick to hold onto in the first place. The lack of remedies for noncitizen victims necessitates application of the rule in this context, perhaps more than in any other proceeding. The nature of deportation proceedings, qua removal proceedings, is exactly what makes the exclusionary rule essential. For many noncitizens, the exclusionary could very well be the only effective remedy to redress a Fourth Amendment violation.[349]

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[345] *Herring*, 555, 704 U.S. 135.

[346] Liptak, Adam. "Justices Step Closer to Repeal of Evidence Ruling." *New York Times* 30 Jan. 2009. Web. 11 Apr. 2015. http://www.nytimes.com/2009/01/31/washington/31scotus.html?.

[347] Ibid.

[348] Amar, Akhil Reed. "Chapter 4: Confronting Modern Case Law." In *America's Unwritten Constitution: The Precedents and Principles We Live By*, 173-74. New York, New York: Basic Books, 2012.

[349] *Herring,* 555, 707 U.S. 135 (Ginsburg, J. dissenting). *See also* Mapp v. Ohio, 367 U.S. 643, 652 (1961) (noting "the obvious futility of relegating the Fourth Amendment to the protection of other remedies").

Conclusion

Immigration enforcement is critical to maintain the rule of law and to protect national security. However, the means by which this goal is attained ought not to violate the Constitution and its principles. The application of the exclusionary rule would not mean that noncitizens are any less at risk for deportation, or that those who have committed crimes are no longer deportable. Rather, it would serve to deter Fourth Amendment violations of a historically vulnerable population.

The problem of Fourth Amendment violations of noncitizens is not one that can be solved unilaterally by the exclusionary rule alone. Numerous accounts of immigration officer abuse, including the fact pattern offered at the front of this essay, make clear that something must be done, on multiple fronts, to counter these violations. Policy changes to eliminate arrest quotas, improved ICE training and supervision (as well as training for local and state officers authorized to make immigration-related arrests), and increased public accountability are all necessary to deter violations. Considering, however, the limitations of internal enforcement and the lack of civil remedies available to noncitizens, application of the exclusionary rule in removal proceedings is a crucial measure to deter immigration officer misconduct.

As long as the exclusionary rule exists, fundamental fairness and due process mandate that the rule be applied in removal proceedings. These proceedings can no longer be classified as purely civil, and changes in immigration law since the original holding of *INS v. Lopez-Mendoza* would require that the *Janis* balancing test weigh in favor of application of the exclusionary rule today. Only then will noncitizens, both legal and undocumented, be able to sleep without fear.