

RETHINKING THE ROLE OF THE EXCLUSIONARY RULE IN REMOVAL PROCEEDINGS

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INTRODUCTION

On December 12, 2006, the Department of Homeland Security's Immigration and Customs Enforcement ("DHS ICE") swept up over 12,000 meatpacking workers¹ in the largest immigration raid in the Nation's history.² While Secretary of Homeland Security Michael Chertoff praised the raids as part of the Nation's comprehensive plan to combat illegal immigration and bolster national security,³ many observers denounced the suspect manner in which they were carried out⁴ and the

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¹ Press Release, United Food & Commercial Workers Int'l Union, Workers Sue To Stop Mass Arrests and Detentions by Federal Agents (Sept. 12, 2007) [hereinafter Workers Sue To Stop Mass Arrests], http://www.ufcw.org/press_room/index.cfm?pressReleaseID=349. Only 1,282 of these people, however, were actually arrested; only sixty-five of those arrested were cited for identity theft, the proffered basis for the raids. See Julia Preston, *Immigrants' Families Figuring Out What To Do After Federal Raids*, N.Y. TIMES, Dec. 16, 2006, at A13; Workers Sue To Stop Mass Arrests, *supra*.

² See Dianne Solís, *Trying To Comply Might Not Cut It for Businesses*, DALLAS MORNING NEWS, Dec. 14, 2006, at 21A.

³ See Press Release, U.S. Dep't of Homeland Sec., Remarks by Sec'y of Homeland Sec. Michael Chertoff, Immigration & Customs Enforcement Assistant Sec'y Julie Myers, & Fed. Trade Comm'n Chairman Deborah Platt Majoras at a Press Conference on Operation Wagon Train (Dec. 13, 2006) [hereinafter Remarks on Operation Wagon Train], http://www.dhs.gov/xnews/releases/pr_1166047951514.shtm. Secretary Chertoff set the context by reminding the audience that illegally obtained documents "are used by terrorists who want to get on airplanes" and "criminals who want to prey on our citizens." *Id.* Chertoff later remarked that "[w]hile this theft is not, in itself, related to national security, the issue of fraudulent identification is one which, as the 9/11 Commission recognized, poses a homeland security challenge." *Id.*

⁴ See Greg Aamot, *Worthington Workers Sue over Tactics in Immigration Raid*, MINN. PUB. RADIO, Sept. 4, 2007, <http://minnesota.publicradio.org/display/web/2007/09/04/swiftraidlawsuit/> (noting allegations of "abusive and illegal tactics" during the

community and family fractures that followed.⁵ In September of 2007, the United Food and Commercial Workers International Union (“UFCW”) filed a class action suit on behalf of its members against DHS and ICE, alleging pervasive Fourth Amendment violations and seeking an injunction against future illegal workplace raids.⁶

Illegal aliens were not the only alleged victims. Michael Graves, for example—a twenty-one year veteran of the plant and a lifelong American citizen—was held in handcuffs for eight hours and quizzed on how to get from Iowa to Mississippi; ICE denied some workers access to counsel, food, and bathrooms, and physically abused others.⁷

The Swift Raids underscore both the scale of the current immigration problem and the detrimental effect that overzealous enforcement of immigration laws can have on undocumented aliens and American citizens. Such concerns are not limited to the workplace: Automobile stops by state and local police officers⁸ as well as roving federal border patrols,⁹ large-scale home raids targeting ethnic communities,¹⁰ and the use of immigration laws to fight the war on terror have exposed large numbers of people—particularly ethnic and racial minorities—to

raids, including racial insults hurled at Hispanic workers).

⁵ Judy Keen, *Effects of Raid Still Felt in Iowa Town*, USA TODAY, Feb. 12, 2007, at 3A; see also Preston, *supra* note 1 (noting “the sadness, the emptiness, [and] the fear” pervading the affected communities, and the difficult decisions faced by deported parents in leaving behind their legal resident children).

⁶ See Original Complaint at 2, *United Food & Commercial Workers Int’l Union v. Chertoff*, 2007 WL 4825029 (N.D. Tex. filed Sept. 12, 2007) (No. 07 Civ. 188); *Workers Sue To Stop Mass Arrests*, *supra* note 1.

⁷ See Complaint at 3–7, *United Food & Commercial Workers Int’l Union*, 2007 WL 4825029 (No. 07 Civ. 188); Mark Gruenberg, *UFCW, Workers Sue to Stop Mass Immigration Raids*, WORKDAY MINN., Sept. 12, 2007, http://www.workdayminnesota.org/index.php?news_6_3279.

⁸ See *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 528–30 (6th Cir. 2002).

⁹ See *United States v. Brignoni-Ponce*, 422 U.S. 873, 882–84 (1975).

¹⁰ See Nina Bernstein, *U.S. Raid on Immigrant Household Deepens Anger and Mistrust on L.I.*, N.Y. TIMES, Apr. 10, 2007, at B1 (describing an early morning raid on a Hispanic family’s home that contained no illegal immigrants, but had drawn complaints of “noise, trash and traffic” from neighbors in the “wealthy beachfront community”); Editorial, *Raids Promise To Make Bad Immigration Situation Worse*, THE TENNESSEAN, Aug. 21, 2007, (Online Ed.) (on file author) [hereinafter *Raids Make Bad Situation Worse*] (describing raids by federal and local officials on Hispanic-populated trailer parks).

constitutional violations.¹¹ Finding the proper balance between our territorial response to the other and our engrained loyalty to core constitutional values is hardly a new problem in American society.¹² As the number of illegal immigrants in the country continues to grow,¹³ however, finding a reasonable solution to the problem has become ever more pertinent.

While most agree that law enforcement officials should adhere to constitutional mandates, many disagree on how best to deter violations. The exclusionary rule, for example, has garnered both praise and criticism¹⁴ since the Supreme Court first adopted it for federal law enforcement officers in 1914.¹⁵ In criminal trials, the rule generally forbids the introduction of evidence obtained in violation of the Fourth Amendment in order to prove a defendant's guilt.¹⁶ In *INS v. Lopez-Mendoza*,¹⁷ however, the Supreme Court declared that the rule would no

¹¹ This Note assumes, for the purpose of arguing that the exclusionary rule should apply in removal proceedings, that the Fourth Amendment applies to resident aliens in the United States. Recently, however, the Court has cast some doubt on this assumption. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990). While a full argument is beyond the scope of this Note, this author believes that the Fourth Amendment does apply to resident aliens. For a more detailed analysis of the issues involved, see Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 990 (1991) (describing "Chief Justice Rehnquist's sudden discovery—fortunately tentative, in dictum, and not speaking for a majority of the Court—that newly arrived aliens may not be included among the 'people'"); Michael Scaperlanda, *The Domestic Fourth Amendment Rights of Aliens: To What Extent Do They Survive United States v. Verdugo-Urquidez?*, 56 MO. L. REV. 213, 241 (1991).

¹² See *Korematsu v. United States*, 323 U.S. 214, 219–20 (1944) (upholding the exclusion of all persons of Japanese ancestry—including American citizens—from a military zone on the Pacific Coast during World War II); Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1832–33 (2007) (discussing the Chinese Exclusion Act as an early example of the sometimes "virulent aspects of U.S. immigration policy").

¹³ See MICHAEL HOEFER ET AL., OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2006 2–3 (2007), http://www.dhs.gov/xlibrary/assets/statistics/publications/ill_pe_2006.pdf (noting that the unauthorized alien population rose by an annual average of 515,000 between 2000 and 2006).

¹⁴ See *Hudson v. Michigan*, 547 U.S. 586, 590–92 (2006) (describing the Court's changing views on the rule); Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 119, 119 n.1 (2003) (listing a sampling of the "vast literature" on the exclusionary rule).

¹⁵ See *Weeks v. United States*, 232 U.S. 383, 398 (1914).

¹⁶ *The Exclusionary Rule*, 35 GEO. L.J. ANN. REV. CRIM. PROC. 186, 186–87 (2006).

¹⁷ 468 U.S. 1032 (1984).

longer apply to civil deportation proceedings.¹⁸ While many have criticized the decision,¹⁹ the exclusionary rule has remained relegated to the sidelines during the past two decades, fostering an environment in which immigration officials may purposefully violate the Fourth Amendment in order to secure an alien's removal.²⁰

This Note argues that vast changes in the immigration laws since 1984 necessitate an examination of *Lopez-Mendoza's* cost-benefit analysis, leading to the readoption of the exclusionary rule in removal proceedings.²¹ Part I examines the rule's history, including the dual reasoning behind the judicially created deterrent and its application in deportation proceedings. While the Court's early decisions discussed the rule as an integral part of the Fourth Amendment, subsequent cases have exhibited a more cautious assessment of its worth. This assessment weighs the likelihood of deterring illegal searches and seizures against the social costs of excluding probative evidence in light of the facts and circumstances surrounding the procedure in question. *Lopez-Mendoza*, for example, decided that the rule's costs outweighed its benefits after examining immigration enforcement and deportation as they existed in 1984.

¹⁸ As Justice White noted in his dissent, "[p]rior to the decision of the Board of Immigration Appeals in [*In re*] *Sandoval*, 17 I. & N. Dec. 70 (B.I.A.] 1979), neither the Board nor any court had held that the exclusionary rule did not apply in civil deportation proceedings." *Id.* at 1058 (White, J., dissenting). Indeed, the major treatise on immigration law had informed practitioners that the exclusionary rule was available to their clients, *id.* at 1059, and the Supreme Court had stated in dictum that evidence obtained illegally by the Labor Department could not be used in deportation proceedings, *see id.* at 1041 (majority opinion); *see also* *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 155 (1923) ("It may be assumed that evidence obtained by the Department through an illegal search and seizure cannot be made the basis of a finding in deportation proceedings.").

¹⁹ *See* 1 WAYNE R. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 1.7(f) (4th ed. 2004) (describing the cost-benefit analysis used by the majority as "extreme and fundamentally unsound"); Judy C. Wong, Note, *Egregious Fourth Amendment Violations and the Use of the Exclusionary Rule in Deportation Hearings: The Need for Substantive Equal Protection Rights for Undocumented Immigrants*, 28 COLUM. HUM. RTS. L. REV. 431, 444 (1997) ("The Supreme Court's cost-benefit analysis in *Lopez-Mendoza* has been roundly criticized.").

²⁰ *See* Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 394-95 (2003).

²¹ In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act conflated exclusion and deportation into a single removal proceeding. A "removable" alien thus refers to an alien who is either inadmissible under 8 U.S.C. § 1182 or deportable under 8 U.S.C. § 1227. 8 U.S.C. § 1229a(e)(2) (2000).

Part II of this Note describes two significant and interrelated changes to the immigration landscape since the Court's decision: the criminalization of immigration law and the increasing involvement of state and local officials in immigration enforcement. In contrast to the *Lopez-Mendoza* court's characterization of deportation as a "purely civil action,"²² removal proceedings have become increasingly punitive over the past two decades. This development is characteristic of immigration enforcement generally, which has taken on a "zero-tolerance" approach as the political dialogue has conflated criminal and immigration matters. The tragic events of September 11, 2001, hastened this transformation, heightening security concerns and changing the public's perception of aliens. The most recent manifestation of this shift is the enforcement of immigration law by state and local officials—both at the federal government's request and on localities' own initiatives. This new immigration system has exposed illegal aliens, legal aliens, and U.S. citizens to a heightened risk of constitutional violations.

Immigration enforcement is a much different animal than its 1984 ancestor, suggesting a reassessment of the constitutional safeguards that the Court deemed adequate over twenty years ago. Part III walks through an analysis of the exclusionary rule's deterrence benefits and social costs in light of the current state of immigration. While the rule does impose some costs, the likelihood of deterrence—and the resulting promise of liberty for aliens and citizens alike—tip the scales in favor of readopting the exclusionary rule in removal proceedings.

I. THE EXCLUSIONARY RULE, DEPORTATION PROCEEDINGS, AND *INS V. LOPEZ-MENDOZA*

The exclusionary rule is a judicially created evidentiary doctrine designed to deter Fourth Amendment violations by prohibiting the admission of illegally obtained evidence at trial.²³ While the Fourth Amendment does not explicitly mention exclusion, some view the rule as a natural extension of the amendment's protection "against unreasonable searches and seizures."²⁴ Others question the rule's necessity and usefulness.²⁵

²² *Lopez-Mendoza*, 468 U.S. at 1038.

²³ *The Exclusionary Rule*, *supra* note 16, at 186–87.

²⁴ U.S. CONST. amend. IV; *see* *United States v. Leon*, 468 U.S. 897, 930–38 (1984) (Brennan, J., dissenting) ("A proper understanding of the broad purposes

Despite continued debate, it remains entrenched in criminal procedure and certain non-criminal venues.²⁶ Although the rule's purpose is not to vindicate the violation of an individual right, a defendant must have suffered a constitutional violation in order to challenge the introduction of illegally obtained evidence.²⁷ A challenge typically takes the form of a pretrial motion to suppress: If the defendant's motion is successful, evidence determined to be the fruit of a Fourth Amendment violation is rendered inadmissible at trial.²⁸ Improperly admitted evidence may require reversal.²⁹

A. *Evolution of the Exclusionary Doctrine*

The Supreme Court's early decisions established the rule as a means of deterring unlawful police activity and upholding judicial integrity. The Court first applied the rule to federal law enforcement officials in *Weeks v. United States*.³⁰ To admit evidence obtained in violation of the law, the Court remarked, would "affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution."³¹ Such neglect would effectively siphon all value from the Fourth Amendment by hollowing out its promise of protection.³² Belief in the rule's value carried over to *Mapp v. Ohio*,³³ which extended the rule to illegal searches and seizures by state officials.³⁴ "Nothing," opined the Court, "can destroy a government more

sought to be served by the Fourth Amendment demonstrates that the principles embodied in the exclusionary rule rest upon a far firmer constitutional foundation than the shifting sands of the Court's deterrence rationale."); *Mapp v. Ohio*, 367 U.S. 643, 657 (1961) ("[T]he exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments . . .").

²⁵ See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 785–800 (1994).

²⁶ See *Hudson v. Michigan*, 547 U.S. 586, 603 (2006) (Kennedy, J., concurring) ("[T]he continued operation of the exclusionary rule, as settled and defined in our precedents, is not in doubt."); *United States v. \$557,933.89, More or Less*, in U.S. Funds, 287 F.3d 66, 80 (2d Cir. 2002) (forfeiture case); *People v. Marsh (In re Marsh)*, 237 N.E.2d 529, 531 (Ill. 1968) (juvenile delinquency proceeding); LAFAVE, *supra* note 19 (various administrative proceedings).

²⁷ *The Exclusionary Rule*, *supra* note 16, at 187.

²⁸ See FED. R. CRIM. P. 12(b)(3)(c); LAFAVE, *supra* note 19, § 1.6(a).

²⁹ *The Exclusionary Rule*, *supra* note 16, at 187.

³⁰ 232 U.S. 383 (1914).

³¹ *Id.* at 394.

³² See *id.* at 393.

³³ 367 U.S. 643 (1961).

³⁴ See *id.* at 655.

quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.”³⁵ Judicial integrity and institutional self-preservation were not the only driving forces behind the Court’s opinion, though; the rule was also needed “to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.”³⁶

Mapp’s expansive language soon gave way to a more tailored interpretation, shifting focus from “the imperative of judicial integrity”³⁷ to the rule’s deterrent effect. In *United States v. Calandra*,³⁸ for example, the Court introduced a simple balancing test to determine whether to apply the rule to witness testimony before a grand jury based on evidence obtained from an illegal search.³⁹ The Court weighed the “potential injury to the historic role and functions of the grand jury against the potential benefits of the rule,” finding that it would have an “uncertain” and “incremental deterrent effect.”⁴⁰ The majority’s curt treatment of judicial integrity⁴¹ foreshadowed the adoption of an explicit deterrence-based balancing test in *United States v. Janis*.⁴² Reaffirming that the “prime purpose of the rule, if not the sole one,” was deterrence,⁴³ the Court applied the test to federal civil tax proceedings and found that the social costs imposed by exclusion outweighed the small likelihood of deterring illegal conduct.⁴⁴ This balancing test would be applied to deportation proceedings several years later in *INS v. Lopez-Mendoza*.

B. Suppressing Evidence in Deportation Proceedings

1. The Mechanics of Deportation

Before an alien can move to suppress evidence, he or she must be summoned to a removal hearing by a notice to appear.⁴⁵

³⁵ *Id.* at 659.

³⁶ *Id.* at 656 (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)).

³⁷ *Elkins*, 364 U.S. at 222.

³⁸ 414 U.S. 338 (1974).

³⁹ *See id.* at 348–49.

⁴⁰ *Id.* at 349, 351.

⁴¹ *See id.* at 355 n.11.

⁴² 428 U.S. 433 (1976).

⁴³ *Id.* at 446 (internal quotation marks omitted).

⁴⁴ *See id.* at 454.

⁴⁵ *See* 8 U.S.C. § 1229(a)(1) (2000).

This written notice describes the nature of the proceeding, the alleged violations of law, the charges against the alien, the time and place at which the proceedings will occur, and the consequences of failing to appear.⁴⁶ An immigration judge may remove an alien for any of the reasons enumerated in 8 U.S.C.A. § 1227(a), such as illegal presence, disregarding a condition of entry, committing a crime of moral turpitude, failing to register under the Alien Registration Act, or falsifying documents.⁴⁷ Aliens have the “privilege”⁴⁸ of representation by counsel during removal proceedings, and they receive a “reasonable opportunity” to examine the evidence against them, present evidence on their own behalf, and cross-examine witnesses proffered by the government.⁴⁹ While the Federal Rules of Evidence do not apply to removal proceedings, aliens are entitled to due process.⁵⁰

An alien’s burden of proof depends on whether the government has charged an alien with inadmissibility or deportability. An alien who enters the U.S. without inspection, for example, is considered an applicant for admission—as if he or she was still at the border. An admitted alien who violates the law, on the other hand, is considered deportable.⁵¹ An applicant for admission must prove that he or she “is clearly and beyond doubt entitled to be admitted and is not inadmissible.”⁵² An admitted alien, on the other hand, has the burden of establishing by clear and convincing evidence that he or she is legally present in the country.⁵³

⁴⁶ *Id.* § 1229(a)(1)(A)–(G).

⁴⁷ See 8 U.S.C.A. § 1227(a)(1)–(3) (West 2007).

⁴⁸ Note that this is *not* a right. See Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1896 n.37 (2000) (“Courts have invariably held that there is no Sixth Amendment right to counsel in deportation proceedings. Due process, however, has sometimes been held to require counsel as a matter of ‘fundamental fairness.’” (citations omitted)).

⁴⁹ 8 U.S.C. § 1229a(b)(4)(A)–(B) (2000).

⁵⁰ See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“[T]he Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”); *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 405–06 (3d Cir. 2003).

⁵¹ See 8 U.S.C.A. § 1227(a)(2); 8 U.S.C. § 1229a(a)(2); *Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1118 (9th Cir. 2007).

⁵² 8 U.S.C. § 1229a(c)(2)(A).

⁵³ *Id.* § 1229a(c)(2)(B).

The government's burden of proof also varies by charge. When an applicant for admission fails to make the required showing, the government need not prove anything. When the government attempts to remove an admitted alien, the government must establish by clear and convincing evidence that the alien is deportable.⁵⁴ The immigration judge can order an alien removed only after the government meets this burden, with "reasonable, substantial, and probative evidence" produced at the hearing.⁵⁵ In all removal proceedings, however, DHS must initially establish alienage by clear and convincing evidence, which shifts the burden to the individual to prove time, place, and manner of entry.⁵⁶ Officers typically record evidence of alienage and deportability gathered during an arrest in a Form I-213, Record of Deportable Alien.⁵⁷ A victim of an illegal search and seizure will therefore seek to preclude this form's entry into proceedings, along with any other evidence discovered through a constitutional violation.

2. Suppression of Evidence Before *INS v. Lopez-Mendoza*

Prior to 1979, practitioners and courts agreed that the exclusionary rule applied to deportation proceedings. While the Supreme Court had not ruled conclusively on the issue, it had "assumed" in *United States ex rel. Bilokumsky v. Tod*⁵⁸ that illegally seized evidence could not be introduced.⁵⁹ Lower courts had generally followed suit. In *Ex parte Jackson*,⁶⁰ for example, an employer who was unhappy with his unionizing workers found some "federal agents" to help him raid their union hall.⁶¹ "[W]ithout warrant or process," the agents destroyed property, beat and insulted the workers and their families, and generally "perpetrated a reign of terror, violence, and crime against citizen

⁵⁴ *Id.* § 1229a(c)(3)(A).

⁵⁵ *Id.* § 1229a(c)(1)(A), (3)(A); *see also* Duvall v. Attorney Gen., 436 F.3d 382, 388 (3d Cir. 2006).

⁵⁶ *See* 8 U.S.C. § 1361 (2000); *Murphy v. INS*, 54 F.3d 605, 608–09 (9th Cir. 1995); *In re Benitez*, 19 I. & N. Dec. 173, 176–77 (B.I.A. 1984) (establishing that admission of foreign birth proves alienage and shifts the burden to the alien to prove time, place, and manner of entry).

⁵⁷ *See* *Martinez-Camargo v. INS*, 282 F.3d 487, 489 (7th Cir. 2002).

⁵⁸ 263 U.S. 149 (1923).

⁵⁹ *See id.* at 155.

⁶⁰ 263 F. 110 (D. Mont. 1920).

⁶¹ *See id.* at 111–12.

and alien alike.”⁶² Because the manner in which the evidence was seized violated the Fourth Amendment, the petitioner’s subsequent deportation proceeding was found to be “unfair and invalid.”⁶³

The exclusionary rule enjoyed a few more decades of similarly enthusiastic treatment and unquestioned acceptance⁶⁴ before the Board of Immigration Appeals (“BIA”) decided *In re Sandoval*, a case involving a warrantless search of an alien’s dwelling.⁶⁵ Despite the rule’s assumed applicability, as well as a contemporary circuit court case strongly supporting exclusion,⁶⁶ the BIA applied the *Calandra* and *Janis* balancing test. A three-member majority of the Board concluded that the costs of suppressing probative evidence outweighed the “remote likelihood” that the rule would have any deterrent effect and held that it would not apply in civil deportation proceedings.⁶⁷

3. The Death of the Exclusionary Rule

Five years later, the issue reached the Supreme Court in two consolidated appeals from the Ninth Circuit. In 1976, INS agents targeted a transmission repair shop in California on an informant’s tip.⁶⁸ The shop’s owner confronted the agents, who did not have a warrant, and refused to let them enter the shop to interrogate his employees.⁶⁹ While one agent talked to the owner, another slipped inside and questioned employee Adan Lopez-Mendoza.⁷⁰ After Lopez-Mendoza admitted he was from

⁶² *Id.*

⁶³ *Id.* at 112–13 (“The Declaration of Independence, the writings of the fathers, the Revolution, the Constitution, and the Union, all were inspired to overthrow and prevent like governmental despotism. They are yet living, vital, and potential forces to those ends, to safeguard all domiciled in the country, alien as well as citizen.”).

⁶⁴ See *In re Sandoval*, 17 I. & N. Dec. 70, 74 (B.I.A. 1979) (“It is undisputed . . . that the Fourth Amendment’s prohibition against unreasonable searches and seizures applies in deportation proceedings, and that evidence obtained as the result of an unlawful search cannot be used.” (quoting CHARLES GORDON & HARRY N. ROSENFELD, IMMIGRATION LAW AND PROCEDURE 5–31 (rev. ed. 1977))).

⁶⁵ See *id.* at 73–74.

⁶⁶ See *Wong Chung Che v. INS*, 565 F.2d 166, 169 (1st Cir. 1977) (“There is no doubt that, if the landing permit was obtained through an illegal search, its admission into evidence infected the deportation proceeding.”); *Sandoval*, 17 I. & N. Dec. at 75 (citing *Wong Chung Che*, 565 F.2d 166).

⁶⁷ See *Sandoval*, 17 I. & N. Dec. at 70–71.

⁶⁸ See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1035 (1984).

⁶⁹ See *id.*

⁷⁰ See *id.*

Mexico, the agent arrested him.⁷¹ One year later, in a separate mass raid at a potato processing plant in Pasco, Washington, INS agents stationed themselves at the plant's entrance during a shift change and picked out suspicious-looking individuals who could not answer their questions in English.⁷² The agents arrested Elias Sandoval-Sanchez along with thirty-six of his coworkers.⁷³

Both men elected formal deportation hearings and alleged Fourth Amendment violations. The Immigration Judges in both cases nevertheless found them deportable, and the men appealed to the BIA.⁷⁴ In both cases the BIA relied on *Sandoval* to rule that the illegality of an arrest had no bearing on a subsequent deportation hearing, and declined to apply the exclusionary rule.⁷⁵ Both appealed to the Ninth Circuit. The Court of Appeals, sitting en banc, vacated Lopez-Mendoza's deportation order for a determination of whether his Fourth Amendment rights had been violated;⁷⁶ the Court similarly reversed Sandoval-Sanchez's deportation order, finding that he had suffered a Fourth Amendment violation and holding that the exclusionary rule therefore applied.⁷⁷

The Supreme Court granted certiorari and reversed the Ninth Circuit in a 5-4 decision, holding that the exclusionary rule did not apply in deportation proceedings.⁷⁸ As the BIA had predicted five years earlier,⁷⁹ the Court employed the *Calandra* and *Janis* cost-benefit test. Justice O'Connor began by emphasizing the "purely civil" and "streamlined" nature of deportation hearings, which required less constitutional protection than criminal proceedings.⁸⁰ Before reaching the merits of exclusion, though, the Court disposed of Lopez-Mendoza's appeal, stating that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never

⁷¹ *See id.*

⁷² *See id.* at 1036–37.

⁷³ *See id.* at 1037.

⁷⁴ *See id.* at 1035–38.

⁷⁵ *See id.* at 1036, 1038.

⁷⁶ *See id.* at 1034–36.

⁷⁷ *See id.* at 1038.

⁷⁸ *See id.* at 1034, 1051.

⁷⁹ *See In re Sandoval*, 17 I. & N. Dec. 70, 76 (B.I.A. 1979).

⁸⁰ *See Lopez-Mendoza*, 468 U.S. at 1038–39.

itself suppressible as a fruit of an unlawful arrest.”⁸¹ Since Lopez-Mendoza had objected only to his forced physical appearance at his deportation hearing—not to the evidence offered against him—the illegality of his arrest had no effect on the proceeding.⁸² Since Sandoval-Sanchez’s case suffered no such infirmities, the Court turned to *Janis* and *Calandra* to weigh the costs and benefits of exclusion in the immigration context.

The majority first analyzed the rule’s social benefits and found the value of deterrence “difficult to assess.”⁸³ On the one hand, the majority recognized that the rule was most likely to deter when an officer’s primary objective was obtaining evidence for use in the proceeding in question—the exact situation before the Court.⁸⁴ Four other factors, on the other hand, lessened the rule’s deterrence value. First, the Court noted that immigration officials must often only prove alienage in order to meet their burden in deportation proceedings. Since this was sometimes possible to prove without resorting to evidence obtained from an arrest, the majority thought that suppression would not be at the forefront of officers’ minds.⁸⁵ Second, the majority noted that over 97.5% of arrested aliens chose voluntary departure without a formal hearing, further decreasing the likelihood that officers would conform their conduct in anticipation of exclusion.⁸⁶ Third—and “perhaps most important”—the majority stated that the INS’s “own comprehensive scheme for deterring Fourth Amendment violations” was a sufficient guard against unlawful conduct.⁸⁷ Lastly, alternative remedies existed for checking potential INS misconduct, including the possibility of civil suits.⁸⁸ The exclusionary rule, therefore, was “unlikely to provide significant, much less substantial, additional deterrence.”⁸⁹

The Court measured this minimal deterrence value against suppression’s “unusual and significant” social costs in the

⁸¹ *Id.* at 1039–40.

⁸² *Id.* at 1040. *But see id.* at 1052 n.1 (White, J., dissenting) (“I . . . question the Court’s finding that Lopez-Mendoza failed to object to admission of the evidence.”).

⁸³ *See id.* at 1041–42 (majority opinion).

⁸⁴ *See id.* at 1042–43.

⁸⁵ *See id.* at 1043.

⁸⁶ *See id.* at 1044.

⁸⁷ *See id.* at 1044–45.

⁸⁸ *See id.* at 1045.

⁸⁹ *Id.* at 1046 (quoting *United States v. Janis*, 428 U.S. 433, 458 (1976)).

immigration context.⁹⁰ First, the majority noted that prohibiting probative evidence “would require the courts to close their eyes to ongoing violations of the law”—an outcome that the Court “ha[d] never before accepted.”⁹¹ Second, apparently contradicting its earlier statement that immigration officers received sufficient investigatory training, the Court stated that officers’ and attorneys’ lack of familiarity with the “intricacies of Fourth Amendment law” would complicate the “streamlined” nature of deportation hearings,⁹² divert attention from the “main issues” to be resolved,⁹³ and “result in the suppression of” lawfully obtained evidence.⁹⁴ Lastly, enforcement officers were simply too busy scooping up large numbers of illegal aliens to be expected to compile detailed reports of every encounter or to testify that they complied with the Fourth Amendment.⁹⁵ Finding that these costs outweighed any deterrence the rule provided, the majority concluded that “[t]here comes a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches.”⁹⁶

A plurality of the Court added two codas.⁹⁷ First, Justice O’Connor stated that the Court’s opinion about the “rule’s value might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread.”⁹⁸ Second, she noted that the Court was not currently considering “egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.”⁹⁹

⁹⁰ *See id.*

⁹¹ *See id.*

⁹² *See id.* at 1048.

⁹³ *See id.* (quoting *In re Sandoval*, 17 I. & N. Dec. 70, 80 (B.I.A. 1979)).

⁹⁴ *See id.* at 1049.

⁹⁵ *See id.*

⁹⁶ *Id.* at 1050 (quoting *United States v. Janis*, 428 U.S. 433, 459 (1976)).

⁹⁷ Chief Justice Burger joined in all but Part V of the opinion. *Id.* at 1034 n.**.

⁹⁸ *Id.* at 1050.

⁹⁹ *Id.* at 1050–51.

4. Post-*Lopez-Mendoza* Developments

In the years following *Lopez-Mendoza*, courts followed the decision's main thrust while grappling with this "egregious" exception—including whether it was an exception at all. In *Adamson v. Commissioner*,¹⁰⁰ the Ninth Circuit held that it was, reasoning that *Lopez-Mendoza* had left some leeway for the circuits to safeguard "judicial integrity."¹⁰¹ The contours of the exception were fleshed out in *Gonzalez-Rivera v. INS*.¹⁰² The court held that all "bad faith violation[s] of an individual's [F]ourth [A]mendment rights"—including stops based solely on a person's race—were "sufficiently egregious" to trigger exclusion.¹⁰³ The court also clarified that an egregious violation could be found *either* if it "transgressed notions of fundamental fairness" or "undermine[d] the [evidence's] probative value."¹⁰⁴ Lastly, in *Orhorhaghe v. INS*,¹⁰⁵ the Ninth Circuit expanded the holding to include stops based solely on an alien's foreign-sounding name.¹⁰⁶ Several circuits have subsequently adopted an "egregious" exception to the *Lopez-Mendoza* rule,¹⁰⁷ with at least one circuit concurring with the Ninth Circuit's race-conscious definition.¹⁰⁸

While these cases are theoretically good news for aliens who are stopped on the basis of race—at least in some circuits—their practical effect is that officers will simply stop admitting that race motivated an arrest.¹⁰⁹ If officers can easily conceal the use of race, motions to suppress are unlikely to succeed at removal hearings.¹¹⁰ Moreover, the changes that have taken place in

¹⁰⁰ 745 F.2d 541 (9th Cir. 1984).

¹⁰¹ See *id.* at 545–46.

¹⁰² 22 F.3d 1441 (9th Cir. 1994).

¹⁰³ See *id.* at 1449–51.

¹⁰⁴ See *id.* at 1451.

¹⁰⁵ 38 F.3d 488 (9th Cir. 1994).

¹⁰⁶ *Id.* at 492.

¹⁰⁷ See *Kandamar v. Gonzales*, 464 F.3d 65, 70 (1st Cir. 2006); *United States v. Olivares-Rangel*, 458 F.3d 1104, 1115 n.9 (10th Cir. 2006); *United States v. Bowley*, 435 F.3d 426, 430–31 (3d Cir. 2006); *Verduzco-Contreras v. Gonzales*, 160 F. App'x 406, 408 (5th Cir. 2005); *Rampasard v. U.S. Att'y Gen.*, 147 F. App'x 90, 92 (11th Cir. 2005); *United States v. Navarro-Diaz*, 420 F.3d 581, 587 (6th Cir. 2005).

¹⁰⁸ See *Almedia-Amaral v. Gonzales*, 461 F.3d 231, 234–37 (2d Cir. 2006).

¹⁰⁹ See Jonathan L. Hafetz, Note, *The Rule of Egregiousness: INS v. Lopez-Mendoza Reconsidered*, 19 WHITTIER L. REV. 843, 861 (1998) (suggesting that INS agents will "conceal[] their use of race from courts").

¹¹⁰ See *id.* at 861, 872 (arguing that it is almost impossible to distinguish a race-based stop in immigration enforcement, since racial factors pervade almost all

immigration enforcement over the past two decades have increased the likelihood that aliens will find themselves victims of constitutional violations—race-based or otherwise. These immense changes to the substance, enforcement, and process of immigration law mandate expanding the current “glimmer of hope of suppression”¹¹¹ to a full-fledged application of the exclusionary rule in removal proceedings.

II. THE CRIMINALIZATION OF IMMIGRATION

A. *Politics, Policy, and the Immigration Problem: Changes in the Substance of Immigration Law*

Concern over the illegal immigration problem grew in the decade following *Lopez-Mendoza*, resulting in a stricter enforcement policy. The Immigration Reform and Control Act of 1986 (“IRCA”)¹¹² signaled the rising status of immigration as a prominent political issue and the increasing concern that illegal aliens were adversely impacting the country.¹¹³ The IRCA granted conditional amnesty to certain aliens, imposed sanctions on employers who hired undocumented workers, and prioritized the enforcement of immigration laws.¹¹⁴ The sharp debate between pro- and anti-immigrant factions that had led to the compromise bill¹¹⁵ continued in the following years as calls for an even tougher stance against illegal aliens grew louder.¹¹⁶ In

stops); see also *Almeida-Amaral*, 461 F.3d at 237 (holding that an alien who “offers nothing other than his own intuition to show that race played a part in the arresting agent’s decision” will fail to trigger exclusion).

¹¹¹ *Navarro-Chalan v. Ashcroft*, 359 F.3d 19, 22 (1st Cir. 2004).

¹¹² Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified in scattered sections of 8 U.S.C.).

¹¹³ See Bernard D. Reams, Jr. & Mary Ann Nelson, *Immigration Reform and the Simpson-Rodino Act: A Legislative History of the Reform and Control Act of 1986 (P.L. 99-603) with Related Documents and Secondary Sources*, 22 INT’L J. LEGAL INFO. 12, 13 (1994).

¹¹⁴ See *id.* at 12–13; Steve Sosa, *An Introduction to Search and Seizure Under the Immigration Reform and Control Act of 1986*, 10 CHICANO L. REV. 33, 45–46 (1990) (expressing concern that the IRCA’s broadening of enforcement power could erode Fourth Amendment rights).

¹¹⁵ See Reams & Nelson, *supra* note 113, at 16–17 (describing the “growing anti-alien feelings in the border states” and the more “liberal concern[s]” that dictated the law’s final form and passing).

¹¹⁶ See Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 629–31 (2003) (discussing the motives for the IRCA and noting the “renewed sense of crisis that lead [sic] Congress

1996, Congress enacted the Antiterrorism and Effective Death Penalty Act ("AEDPA")¹¹⁷ and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA").¹¹⁸ These laws expanded the list of crimes for which non-citizens, including lawful permanent residents, faced mandatory detention and deportation,¹¹⁹ and limited relief traditionally available to those who were in removal proceedings.¹²⁰ By the late 1990s, then, many commentators had announced the dawn of "crimmigration"¹²¹: the immigration system's embrace of the "severity revolution,"¹²² the "convergence [of] the criminal justice and deportation systems,"¹²³ and the general emergence of a harsher and more criminally punitive regime to combat the perceived border "crisis."¹²⁴

The legal reaction to the tragic events of September 11th, 2001, further clouded the distinction between criminal and non-

to take Draconian measures against undesirable, 'criminal' aliens a decade later").

¹¹⁷ Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 22, 28, and 42 U.S.C.).

¹¹⁸ Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 and 18 U.S.C.).

¹¹⁹ See Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 84-85 (2005); Amy Langenfeld, Comment, *Living in Limbo: Mandatory Detention of Immigrants Under the Illegal Immigration Reform and Responsibility Act of 1996*, 31 ARIZ. ST. L.J. 1041, 1044-45 (1999) (expressing concern over the possibility that many aliens could face indefinite detention under the new laws).

¹²⁰ See *INS v. St. Cyr*, 533 U.S. 289, 297 & n.7 (2001) (noting that the AEDPA revoked review for deportation orders for aggravated felonies, drug convictions, certain weapons and national security violations, and multiple crimes of moral turpitude, and that the IIRIRA narrowed the class of aliens who may be granted cancellation of removal by the Attorney General). While the INS initially argued that these limitations applied retroactively to aliens previously convicted through plea agreements, of aggravated felonies, the Supreme Court disagreed. See *id.* at 326.

¹²¹ This term generally describes the "importation of criminal categories, processes and techniques into the regulation of immigrants," but may in fact fail to capture the truly unique, dynamic interaction between the two areas of law. See Miller, *supra* note 116, at 616-20 (describing the "legal landscape" and documenting scholarly works on the topic).

¹²² See Miller, *supra* note 119, at 83. Miller describes the "severity revolution" as a break from traditional values in the field of criminal punishment, including the promotion of the "severity of punishment as an overarching good." See *id.* at 83 & n.6.

¹²³ *Id.* at 83.

¹²⁴ See Chacón, *supra* note 12, at 1839-40 (describing prevalent public belief in the connection between immigration and crime, despite a lack of empirical support); Miller, *supra* note 116, at 613 & n.8.

criminal aliens—while sharpening the divide between all aliens and the rest of society¹²⁵—by pulling immigration enforcement under the umbrella of the war on terror. Immigration law became an important tool in this new conflict because of its higher tolerance for enforcement tactics based on ethnicity and citizenship.¹²⁶ The Absconder Apprehension Initiative (“AAI”), for example, targeted aliens with outstanding warrants of removal; officials focused particularly on “priority absconders” from countries “in which there ha[d] been Al Qaeda terrorist presence or activity.”¹²⁷ Similarly, the National Security Entry-Exit Registration System (“NSEERS”)¹²⁸ established a procedure for interviewing, fingerprinting, and photographing non-immigrant males from designated Muslim and Arabic countries.¹²⁹ Lastly, the USA PATRIOT Act of 2001 allowed the government to detain non-citizens without charge “in the event of an emergency or other extraordinary circumstance.”¹³⁰ In many respects, these initiatives simply continued the zero-tolerance approach to immigration enforcement that existed prior to the attacks.¹³¹ Alien populations were now viewed as double-threats, though—unwanted for their simple presence in the country as well as for harboring potentially violent terrorists in their midst.

¹²⁵ See Miller, *supra* note 119, at 112–13.

¹²⁶ See Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 385–86 (2006).

¹²⁷ See Miller, *supra* note 119, at 87–88; see also *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S.C.) (authorizing positions to be used for the apprehension of fugitive aliens); *Deputy Attorney General Releases Internal Guidance for ‘Absconder’ Apprehensions*, 79 INTERPRETER RELEASES 261, 261 (2002).

¹²⁸ 8 C.F.R. § 264.1 (2008).

¹²⁹ See *Registration of Certain Nonimmigrant Aliens from Designated Countries*, 67 Fed. Reg. 67766 (Nov. 6, 2002). The NSEERS program has been replaced in part by US-VISIT, which subjects all non-immigrants entering the U.S. to photographing and fingerprinting. See *Requirements for Biometric Identifiers from Aliens on Departure from the United States*, 8 C.F.R. § 215.8 (2008); *Enrollment of Additional Aliens in US-VISIT*, 71 Fed. Reg. 42605 (July 27, 2006) (to be codified at 8 C.F.R. §§ 215, 235); *Notice to Nonimmigrant Aliens Subject to be Enrolled in the United States Visitor and Immigrant Status Indicator Technology System*, 69 Fed. Reg. 482 (Jan. 5, 2004). “[C]ertain nonimmigrant alien visitors from Iran, Iraq, Libya, Sudan, Syria, Pakistan, Saudi Arabia, and Yemen are [still] subject to NSEERS registration,” however. U.S. Immigration & Customs Enforcement, *Frequently Asked Questions (FAQs)* (Oct. 15, 2007), <http://www.ice.gov/pi/faqs.htm>.

¹³⁰ See 8 C.F.R. § 287.3 (2008).

¹³¹ See Miller, *supra* note 119, at 87.

B. Engorged Enforcement and Pared-Down Process

The “criminalization” that underlies these substantial developments in the law has also augmented the enforcement and process of typical immigration violations.¹³² This change took place structurally with the transfer of immigration duties from INS to the newly created Department of Homeland Security in 2003.¹³³ The Homeland Security Act of 2002, which established the new agency, was enacted to “mobilize and organize our nation to secure the homeland from terrorist attacks.”¹³⁴ One of the primary reasons for DHS’s structural breadth was to “provide the unifying core for the vast national network of organizations and institutions involved in efforts to secure our nation.”¹³⁵ Bringing the former INS under DHS’s umbrella, therefore, strengthened the already popular notion that a “focused effort from our entire society” was needed to ward off the dangers posed by illegal immigrants.¹³⁶ This collective effort, steeped in the vocabulary of a dynamic struggle against a predatory foe, transgresses the civil notions of administrative compliance that once governed the immigration system.

1. The New Enforcement Regime

The two main enforcement bodies under DHS—Immigration and Customs Enforcement (“ICE”) and U.S. Customs and Border Patrol (“CPB”)—are practically indistinguishable from criminal law enforcement organizations.¹³⁷ Border Patrol agents, for example, can “conduct surveillance, pursue suspected undocumented aliens, make stops, and effectuate arrests.”¹³⁸ ICE, which combines the investigative and intelligence arms of the former INS as well as the “resources, responsibilities and authorities” of the Federal Protective Service, is DHS’s largest investigatory unit.¹³⁹ As the agency itself proclaims, its name

¹³² See Stumpf, *supra* note 126, at 376, 381.

¹³³ See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 5, 6, 18, 44, and 49 U.S.C.).

¹³⁴ U.S. DEP’T OF HOMELAND SEC., SECURING OUR HOMELAND: U.S. DEPARTMENT OF HOMELAND SECURITY STRATEGIC PLAN 9 (2004), *available at* http://www.dhs.gov/xlibrary/assets/DHS_StratPlan_FINAL_spread.pdf.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See Stumpf, *supra* note 126, at 387.

¹³⁸ *Id.*

¹³⁹ See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP’T OF HOMELAND

“belies the scope of its authority and activities,” which in fact “go far beyond the[] stereotypical concepts” of immigration and customs enforcement.¹⁴⁰ Even within the first of these traditional fields, ICE has focused on “[r]e-[i]nventing [i]mmigration [e]nforcement” with “creative immigration enforcement tools,” leading to a sevenfold increase in the number of criminal and administrative arrests since INS’s last full year of operation.¹⁴¹ The crime of illegal reentry after deportation, for example, is now the most prosecuted offense by the Los Angeles U.S. Attorney’s office.¹⁴²

ICE’s Fugitive Operations Unit illustrates the “evolving symbiosis between criminal law enforcement and immigration regulation.”¹⁴³ The Unit’s primary goal is “to identify, locate, apprehend, process, and remove fugitive aliens from the United States with the highest priority placed on those fugitives who have been convicted of crimes.”¹⁴⁴ The teams meet this goal by engaging in traditional police activity such as raiding houses containing alleged fugitives, often in pre-dawn hours while the residents are asleep.¹⁴⁵ The number of arrests made by the unit doubled in 2006 and again in 2007.¹⁴⁶ On October 3, 2007, for example, ICE announced that it had netted over 1,300

SEC., ICE FISCAL YEAR 2006 ANNUAL REPORT: PROTECTING NATIONAL SECURITY AND UPHOLDING PUBLIC SAFETY 2 (2007) [hereinafter ICE FISCAL YEAR 2006 ANNUAL REPORT], available at <http://www.ice.gov/doclib/about/ICE-06AR.pdf>.

¹⁴⁰ *Id.* As examples of its “broad scope of operations,” ICE cites its role in combating terrorism and safeguarding children from “pedophiles, human traffickers, international sex tourists and other predatory criminals.” *Id.* at 2–3.

¹⁴¹ *See id.* at 7–8, 11.

¹⁴² *See* Press Release, U.S. Immigration & Customs Enforcement, U.S. Dep’t of Homeland Sec., Largest-ever ICE Operation Targeting Criminal Aliens and Illegal Alien Fugitives Nets More than 1,300 Arrests in Los Angeles Area (Oct. 3, 2007) [hereinafter ICE Operation], <http://www.ice.gov/pi/news/newsreleases/articles/071003losangeles.htm>.

¹⁴³ *See* Miller, *supra* note 119, at 94.

¹⁴⁴ OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., OIG-07-34, AN ASSESSMENT OF THE UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT’S FUGITIVE OPERATIONS TEAMS 4 (2007) [hereinafter OIG ASSESSMENT OF ICE FUGITIVE OPERATIONS TEAMS], http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_07-34_Mar07.pdf.

¹⁴⁵ *See* Nina Bernstein, *Immigration Raids Single Out Hispanics, Lawsuit Says*, N.Y. TIMES, Sept. 21, 2007, at B3; Sandra Forester, *Immigration Raids Spark Anger in Sun Valley Area*, IDAHO STATESMAN, Sept. 21, 2007, at 1.

¹⁴⁶ *See* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP’T OF HOMELAND SEC., ICE FUGITIVE OPERATIONS PROGRAM (2007) [hereinafter FUGITIVE PROGRAM], http://www.ice.gov/pi/news/factsheets/nfop_fs.htm.

individuals in the largest enforcement initiative in the unit's history.¹⁴⁷ The unit's scope and reach seem unlikely to slow down in the near future.¹⁴⁸

2. Expedited Removal, Detention, and the Punitive Nature of Deportation

The evolution of immigration procedure likewise reflects an increasing emphasis on eradication of threat and punishment of offenders—the same indicators of a criminal justice system. One facet of ICE's "creative" new approach to enforcement and removal, for example, has been the use of expedited removal proceedings for "other-than-Mexican (OTM) aliens" found close to the border, ending the so-called "catch and release" practice and "eliminating the time spent litigating to a final order of removal before immigration judges."¹⁴⁹ An emphasis on expediency over process was similarly evident in the Justice Department's 2006 mandate that the Board of Immigration Appeals issue single-member affirmances without opinion.¹⁵⁰ DHS's efforts at "re-engineering the detention and removal system" to remove aliens "from the country quickly and efficiently"¹⁵¹ highlight another trend—the increasing use of detention as an immigration sanction.¹⁵² In addition to the expanded use of non-citizen detention without bond for suspected terrorists¹⁵³ and regular criminal aliens in removal proceedings,¹⁵⁴ DHS now detains permanent residents, women, and children that it formerly

¹⁴⁷ See ICE Operation, *supra* note 142.

¹⁴⁸ See FUGITIVE PROGRAM, *supra* note 146 ("Given the success of the fugitive operations effort, ICE is proposing to add six more Fugitive Operations Teams in fiscal year 2008.").

¹⁴⁹ See ICE FISCAL YEAR 2006 ANNUAL REPORT, *supra* note 139, at 11.

¹⁵⁰ See 8 C.F.R. § 1003.1(e)(4) (2008); Evelyn H. Cruz, *Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals's Summary Affirmance Procedures*, 16 STAN. L. & POL'Y REV. 481, 500–01 (2005) (describing the "devastating" changes at the BIA).

¹⁵¹ ICE Operation, *supra* note 142.

¹⁵² See Stumpf, *supra* note 126, at 391.

¹⁵³ See Margaret H. Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 50 LOY. L. REV. 149, 158–61 (2004) (discussing the INS's post-9/11 implementation of detention without bond for terrorism suspects under both section 412 of the PATRIOT Act and section 236(c) of the INA).

¹⁵⁴ See *Demore v. Kim*, 538 U.S. 510, 531 (2003) (holding that detention of a criminal alien during removal proceedings, without an individualized bond hearing, is constitutionally permissible); Taylor, *supra* note 153, at 162–63, 166–69.

released¹⁵⁵ and imposes incarceration as a penalty for the act of entry itself.¹⁵⁶ Detention is even mandatory for many asylum seekers entering the country.¹⁵⁷ With a focus on incapacitation, increased detention for immigration violators mirrors the punitive nature of the criminal justice system.¹⁵⁸

Deportation is perhaps the “most ‘criminalized’ sector of immigration law” and a key tool in the larger focus on maximizing social control over alien populations.¹⁵⁹ The recognition that the banishment of an individual from his or her home, family, and employment embodies consequences similar to—if not in excess of—incarceration is not new.¹⁶⁰ The category of deportable aliens, however, has greatly expanded in the past decade, and now includes even long-term lawful permanent residents.¹⁶¹ Accompanying this change is the increasing use of deportation as a crime-reducing tool, supplanting the traditional justification of maintaining the legitimacy of the immigration system.¹⁶² An individual who committed a misdemeanor twenty years ago, for example, yet has lived a productive and positive life since then, marrying and having American-citizen children, can now face deportation for the decades-old crime.¹⁶³ Deportation has grown to serve important incapacitation, deterrent, and retributive functions in the new security-

¹⁵⁵ Stumpf, *supra* note 126, at 391; *see also* Lara Yoder Nafziger, *Protection or Persecution?: The Detention of Unaccompanied Immigrant Children in the United States*, 28 *HAMLIN J. PUB. L. & POL’Y* 357, 381 (2006) (noting a 2003 Amnesty International study “found that approximately one-third of all detained unaccompanied juveniles encountered ‘harsh conditions in a secure jail-like facility designed for the incarceration of juvenile offenders’”).

¹⁵⁶ *See* Miller, *supra* note 116, at 617 (noting also that “heavy fines and forfeiture of property” are used to punish entry).

¹⁵⁷ *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (2000); Kristen M. Jarvis Johnson, *Fearing the United States: Rethinking Mandatory Detention of Asylum Seekers*, 59 *ADMIN. L. REV.* 589, 619 (2007) (“Detention isolates asylum seekers from the outside world and degrades them to the level of criminals facing punishment.”).

¹⁵⁸ *See* Miller, *supra* note 116, at 631, 657–58.

¹⁵⁹ *See* Miller, *supra* note 119, at 98–99.

¹⁶⁰ *See In re Sandoval*, 17 I. & N. Dec. 70, 95 (B.I.A. 1979) (Appleman, concurring in part and dissenting in part) (“[O]ne cannot ignore the severe consequences of deportation in some cases, and its analogy to a criminal sanction . . .”).

¹⁶¹ *See* Kanstroom, *supra* note 48, at 1893–94.

¹⁶² *See id.* at 1892.

¹⁶³ *See* Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution’s Criminal Procedure Protections Must Apply*, 5 *BENDER’S IMMIGR. BULL.* 475, 475 (2000).

immigration paradigm.¹⁶⁴ This convergence with criminal law suggests the need for a reevaluation of whether the constitutional safeguards that apply in that context should apply in deportation proceedings as well.¹⁶⁵

C. Circling the Wagons¹⁶⁶: State and Local Involvement in Immigration Enforcement, Recent Initiatives, and the Heightened Risk of Constitutional Violations

Perhaps the sharpest change in immigration enforcement that the system's realignment has brought about—and pertinent to Fourth Amendment concerns—is the involvement of state and local police in investigating and apprehending immigration violators. Some localities have actively sought out this power;¹⁶⁷ the Department of Justice (“DOJ”) has prodded others to make immigration enforcement a priority.¹⁶⁸ This was not always so. In 1996, the DOJ's Office of Legal Counsel (“OLC”) issued an opinion concluding that states had the power to enforce criminal provisions of the immigration laws, but did *not* have the authority to detain aliens for civil violations.¹⁶⁹ Then, in 2002, the OLC secretly revised its 1996 opinion and concluded that states in fact had the inherent authority to enforce civil provisions of immigration laws.¹⁷⁰ This about-face coincided with the INS beginning to enter civil immigration information into the National Crime Information Center (“NCIC”).¹⁷¹ When state or local police run an NCIC check on an alien with an outstanding warrant during a routine traffic stop, for example, an Immigration Violator File “hit” will alert the officer to verify with

¹⁶⁴ See Kanstroom, *supra* note 48, at 1894.

¹⁶⁵ See *id.*; Pauw, *supra* note 163, at 475.

¹⁶⁶ See Remarks on Operation Wagon Train, *supra* note 3.

¹⁶⁷ See IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., ICE AGREEMENTS OF COOPERATION IN COMMUNITIES TO ENHANCE SAFETY AND SECURITY: ICE ACCESS 1 (2007), available at <http://www.ice.gov/doclib/pi/news/factsheets/accessfactsheetv31.pdf>. (describing the ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS) program and noting “widespread interest from local law enforcement agencies”).

¹⁶⁸ See Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1087 (2004).

¹⁶⁹ See *Nat'l Council of La Raza v. Dep't of Justice*, 339 F. Supp. 2d 572, 575 (S.D.N.Y. 2004).

¹⁷⁰ See *id.* at 576.

¹⁷¹ See *Nat'l Council of La Raza v. Gonzales*, 468 F. Supp. 2d 429, 433 (E.D.N.Y. 2007).

DHS, and then detain or arrest the alien until DHS arrives to take custody.¹⁷² This new “inherent authority” has raised concerns that officers will engage in unlawful racial profiling by stopping and detaining individuals they suspect of being illegal immigrants based solely on their appearance.¹⁷³

On top of NCIC-based apprehensions, state and local police have assisted ICE in large-scale roundups such as Operation Return to Sender,¹⁷⁴ a nationwide initiative that resulted in the arrest of over 2,100 individuals.¹⁷⁵ Smaller initiatives—such as Operation Crosscheck¹⁷⁶ in Minnesota—have become prevalent at the local level, involving extensive collaboration with police officials to identify and apprehend targets.¹⁷⁷ These initiatives were tied in with the executive branch’s recent announcement of a “crackdown” after political consensus failed to materialize over

¹⁷² See *id.* at 434.

¹⁷³ See *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 95 F. Supp. 2d 723, 733, 737 (N.D. Ohio 2000) (finding that the plaintiffs in a class action suit lacked standing to enjoin the highway patrol from interrogating motorists regarding immigration status based on their Hispanic appearance, but that they did establish a prima facie case of race discrimination under the equal protection clause), *aff’d in part*, 308 F.3d 523 (6th Cir. 2002); *Murillo v. Musegades*, 809 F. Supp. 487, 500, 503 (W.D. Tex. 1992) (granting a preliminary injunction against El Paso Border Patrol due to “stops, questioning, detentions, searches, arrests, verbal and physical abuses, harassment, and humiliation based upon [U.S.] citizens’ and residents’ mere Hispanic appearance”); Wishnie, *supra* note 168, at 1102–15 (detailing the risk of racial profiling by state and local police, and noting two pre-9/11 studies which suggested that officials “frequently resorted to stereotypes and discrimination” in routine immigration enforcement); Carrie L. Arnold, Note, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113, 119–21 (2007) (documenting evidence of racial profiling in the “Chandler Roundup,” a five-day joint operation between local police and border patrol agents).

¹⁷⁴ See ICE FISCAL YEAR 2006 ANNUAL REPORT, *supra* note 139, at 25; OIG ASSESSMENT OF ICE FUGITIVE OPERATIONS TEAMS, *supra* note 144, at 26–28.

¹⁷⁵ See Press Release, U.S. Immigration & Customs Enforcement, U.S. Dep’t of Homeland Sec., ICE Apprehends More than 2,100 Criminal Aliens, Gang Members, Fugitives and Other Immigration Violators in Nationwide Interior Enforcement Operation (June 14, 2006), http://www.dhs.gov/xnews/releases/press_release_0926.shtm.

¹⁷⁶ In hockey, a cross-check involves shoving the other player with the stick held between both hands; the violent move can result in a game misconduct. See NHL RULEBOOK R. 50 (2005–2006 ed.), available at <http://www.nhl.com/hockeyu/rulebook/rule50.html>. The former INS has a similar history of dubious operation-naming. See Christopher J. Walker, *Border Vigilantism and Comprehensive Immigration Reform*, 10 HARV. LATINO L. REV. 135, 142–43 (2007) (describing “Operation Wetback”).

¹⁷⁷ See Complaint at 12, *Arias v. Immigration & Customs Enforcement*, No. 07-01959 (D. Minn. Apr. 19, 2007).

proposed immigration reform.¹⁷⁸ As political reconciliation remains elusive, state and local participation in immigration enforcement continues to increase.¹⁷⁹

While the stated purpose of many of these inter-agency raids is to apprehend “aliens with unexecuted Warrants of Removal or Deportation and other identified criminal aliens,”¹⁸⁰ evidence suggests that officials sometimes target particular ethnic communities,¹⁸¹ and that the individuals swept up are not the fugitives or criminals identified on warrants. According to the Office of the Inspector General’s Assessment of the Fugitive Operations Teams, the local police “typically only provide support through their uniformed presence and do not participate in apprehensions or the interview process.”¹⁸² In reality, local participation can also facilitate the targeting of undesirable racial or ethnic communities.¹⁸³ By directing federal authorities to target destinations, local police can quell public discontent over encroaching alien populations by effectively cleansing their neighborhoods of immigrants.¹⁸⁴

This development, in conjunction with ICE’s overly aggressive tactics, is problematic for both legal aliens and U.S. citizens of particular ethnic and racial backgrounds, who may find themselves targets of community frustration and consequently victims of illegal searches and seizures. Latino families living legally in New York, for example, filed a class action lawsuit in September of 2007 alleging that ICE agents had

¹⁷⁸ See Robert Pear, *Bush Plans Immigration Crackdown*, N.Y. TIMES, Aug. 10, 2007, at A10. The initiative embodied familiar themes: workplace compliance, border security, and hunting down fugitive “alien absconders” and street gang members. *Id.*

¹⁷⁹ See Press Release, U.S. Immigration & Customs Enforcement, U.S. Dep’t of Homeland Sec., Jim Pendergraph Selected as ICE’s State and Local Coordinator: Newly Created Senior Executive Position to Emphasize Public Safety Cooperation and Coordination (Oct. 9, 2007), <http://www.ice.gov/pi/news/newsreleases/articles/071002washington.htm>.

¹⁸⁰ Reply at 5, *Arias v. Immigration & Customs Enforcement*, No. 07-01959 (D. Minn. Apr. 25, 2007).

¹⁸¹ See *Democracy Now!: 750+ Immigrants Detained in “Operation Return To Sender” Raids* (NPR radio broadcast Apr. 27, 2007), http://www.democracynow.org/2007/4/27/750_immigrants_detained_in_operation_return.

¹⁸² OIG ASSESSMENT OF ICE FUGITIVE OPERATIONS TEAMS, *supra* note 144, at 26.

¹⁸³ See *Jury Demand* at 8–12, *Flores-Morales v. George*, No. 07-0050 (M.D. Tenn. July 27, 2007); Bernstein, *supra* note 10.

¹⁸⁴ See *Raids Make Bad Situation Worse*, *supra* note 10 (“[T]he raids carry a perception of political show, to satisfy the strident voices claiming that illegal immigrants are stealing jobs and committing crimes against U.S. citizens.”).

conducted abusive pre-dawn raids on their homes, refused to show warrants, and told one family's twelve-year-old daughter that they would "be back" to get her.¹⁸⁵ The complaint alleged that the "unstated goal of these raids [was] to gain access to constitutionally protected areas in the hope of seizing as many undocumented persons as possible."¹⁸⁶ Similarly suspect raids—of homes, workplaces, and otherwise—have recently occurred across the country.¹⁸⁷

III. REWEIGHING THE COSTS AND BENEFITS OF THE EXCLUSIONARY RULE IN REMOVAL PROCEEDINGS

The current trend of overzealous immigration enforcement is alarming. Readopting the exclusionary rule—an "essential part"¹⁸⁸ of the Fourth Amendment—is one step toward crafting a more law-abiding, humane, and reasonable immigration policy.¹⁸⁹

¹⁸⁵ See Class Action Complaint at 15–16, 18–21, 23–25, 27–28, *Aguilar v. Immigration & Customs Enforcement*, No. 07-8224 (S.D.N.Y. Sept. 20, 2007).

¹⁸⁶ *Id.* at 3–4.

¹⁸⁷ See Complaint at 2, 13, 15–18, *Barrera v. Boughton*, No. 307-01436 (D. Conn. Sept. 26, 2007) (alleging that a local police officer, driving a pickup truck, promised eleven Hispanic men work, then drove them to an enclosed field where ICE arrested them; alleging also a pattern and practice of race-based traffic stops to check Latino drivers' immigration status); Original Complaint at 10–11, *United Food & Commercial Workers Int'l Union v. Chertoff*, 2007 WL 4825029 (N.D. Tex. Sept. 12, 2007) (No. 2-07CV-188-J) (alleging mass Fourth Amendment violations during the Swift Raids); Complaint for Violations of the Fourth and Fifth Amendments to the United States Constitution at 1–4, *Reyes v. Alcantar*, No. 07-2271 (N.D. Cal. Apr. 26, 2007) (alleging ICE violated a seven-year-old U.S. citizen's Fourth Amendment rights by detaining him after a home raid); Jury Demand at 2, 8–14, *Flores-Morales v. George*, No. 07-0050 (M.D. Tenn. Apr. 26, 2007) (alleging local and federal collaboration in using warrants for "suspects" as a pretext for rounding up and driving out Hispanic residents of the community); Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief and Damages at 2, *Arias v. Immigration & Customs Enforcement*, No. 07-1959 (D. Minn. Apr. 24, 2007) (alleging Fourth Amendment violations stemming from warrantless raids of Latino homes in Willmar, MN, during "Operation Crosscheck"); Nina Bernstein, *Promise of ID Cards Is Followed by Peril of Arrest for Illegal Immigrants*, N.Y. TIMES, July 23, 2007, at B1 (describing accusations that ICE retaliated against a municipal ID plan in New Haven by conducting illegal raids); Tyche Hendricks, *The Human Face of Immigration Raids in Bay Area: Arrests of Parents Can Deeply Traumatize Children Caught in the Fray, Experts Argue*, S.F. CHRON., Apr. 27, 2007, at A1 (describing the constitutional questions raised by Operation Return to Sender); Associated Press, *Groups Question Immigration Raid in Central Idaho*, AP Alert—Idaho, Sept. 22, 2007, 9/22/07 APALERTID 01:11:37 (Westlaw) (describing pre-dawn home raids).

¹⁸⁸ *Mapp v. Ohio*, 367 U.S. 643, 657 (1961).

¹⁸⁹ See Lucas Guttentag, *Immigration Reform: A Civil Rights Issue*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 157, 164 (2007) ("Robust legal protections and rights for

The *Lopez-Mendoza* Court explicitly left open the possibility that the “exclusionary rule’s value might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread.”¹⁹⁰ As the above-cited cases illustrate,¹⁹¹ the criminalization of immigration law has facilitated a decline in concern over Fourth Amendment compliance, potentially presenting the type of situation that the *Lopez-Mendoza* plurality contemplated. While empirical proof of “widespread” Fourth Amendment violations may be forthcoming, it is not a necessary prerequisite for readopting the exclusionary rule. Rather, the changes wrought on the immigration system have redefined the entire context in which individuals are sought out, apprehended, and removed—and in which the *Lopez-Mendoza* majority initially analyzed the rule’s effectiveness. This altered landscape requires a reweighing of the rule’s deterrent benefits and social costs, which leads to the conclusion that the exclusionary rule should once again apply in removal proceedings.

A. *Stare Decisis, Changed Conditions, and Overruling* INS v. Lopez-Mendoza

While *stare decisis* generally dictates adherence to decided cases, it is not “‘a universal, inexorable command,’ especially in cases involving the interpretation of the Federal Constitution.”¹⁹² Rather, it is the Supreme Court’s “duty to reconsider constitutional interpretations that depar[t] from a proper understanding of the Constitution” and to “bow[] to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.”¹⁹³ Overruling a case is appropriate when the prior judicial ruling is clearly seen as error.¹⁹⁴ Many share this view of *Lopez-Mendoza*.¹⁹⁵ Several

immigrants are essential, but none will endure unless the foundation of judicial review and enforcement is guaranteed.”)

¹⁹⁰ INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984).

¹⁹¹ See *supra* notes 180, 185, 187 and accompanying text.

¹⁹² Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 954 (1992) (Rehnquist, J., concurring in the judgment in part and dissenting in part) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting)).

¹⁹³ *Id.* at 955 (internal quotation marks omitted).

¹⁹⁴ *Id.* at 854 (plurality opinion).

¹⁹⁵ See *supra* note 19 and accompanying text.

“prudential and pragmatic considerations” may also inform the Court’s weighing of the costs of overruling and reaffirming a prior case.¹⁹⁶ These considerations include whether the rule is practically unworkable; whether society has come to rely on the rule and would suffer “special hardship” if repudiated; whether the law relating to the rule has changed so as to render the rule “abandoned doctrine”; and whether the rule’s underlying facts “have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.”¹⁹⁷

The facts underlying *Lopez-Mendoza* have drastically changed. The crux of the majority’s decision was the perception of deportation as a “purely civil action.”¹⁹⁸ While some still perceive deportation as such,¹⁹⁹ the overwhelming evidence shows that the removal of aliens has, for all practical purposes, become incarceration’s bedfellow.²⁰⁰ Similarly, the validity of the assumption that constitutional compliance can be entrusted to enforcement officials alone has withered with the immigration system’s comprehensive adoption of the criminal law paradigm.²⁰¹ These changes, along with several others described in the following sections, have robbed *Lopez-Mendoza* of its justification and compel overruling the case.

Reliance on *Lopez-Mendoza* is not sufficiently strong to support the case’s survival. DHS would likely argue that it has reasonably relied on the rule’s absence and would suffer institutional hardship if forced to change investigatory, apprehension and removal procedures. In reality, however, the exclusionary rule would simply compel DHS to comply with the Fourth Amendment—what the agency’s own safeguards ostensibly already ensure.²⁰² The application of the rule in the criminal context has shown that it is not a barrier to effective law enforcement, and any argument against its “handcuff[ing]” effect is simply an argument against the Fourth Amendment itself.²⁰³

¹⁹⁶ *Planned Parenthood*, 505 U.S. at 854.

¹⁹⁷ *Id.* at 854–55.

¹⁹⁸ *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).

¹⁹⁹ *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) (arguing that deportation is not a punishment).

²⁰⁰ See Kanstroom, *supra* note 48, at 1894–95; *supra* Part II.B.2.

²⁰¹ See *infra* Part III.B.1.b.i.

²⁰² See *supra* note 87 and accompanying text.

²⁰³ See LAFAVE, *supra* note 19, § 1.2(a) (“The exclusion of evidence is only the sanction which makes the rule effective. It is the rule, not the sanction, which

Indeed, the expansion of the “egregious” exception, as well as the rule’s existence prior to *Lopez-Mendoza*, shows that exclusion is workable in the immigration context.

B. Analyzing the Exclusionary Rule’s Costs and Benefits

Reversal is an admittedly difficult task in light of the Supreme Court’s recent lack of enthusiasm over the exclusionary rule. *Pennsylvania Board of Probation and Parole v. Scott*²⁰⁴ and *Hudson v. Michigan*,²⁰⁵ for example, suggest that the rule should be the “last resort, not [the] first impulse.”²⁰⁶ *Hudson*, which considered the rule’s applicability to “knock and announce” rules, emphasized its “substantial social costs”²⁰⁷—“setting the guilty free and the dangerous at large,” as well as interfering with “truth-seeking and law enforcement objectives”—and cited the Court’s recent cautiousness in approaching application.²⁰⁸ Despite such guarded language, the test for applicability remains the same as in 1984. Suppression of illegally obtained evidence through the exclusionary rule is appropriate when “its remedial objectives are thought most efficaciously served”²⁰⁹—in other words, when the rule’s “deterrence benefits outweigh its substantial social costs.”²¹⁰ Examining the circumstances surrounding removal proceedings leads to the conclusion that the exclusionary rule would prevent Fourth Amendment violations by immigration officials, and that this deterrence outweighs the rule’s social costs.

1. Deterrence Benefits of the Exclusionary Rule

A calculation of the deterrence benefits of the exclusionary rule in removal proceedings involves a balancing test of its own. First, the likelihood of deterrence must be estimated by looking at the methods and context for alien apprehension and processing. One must then tailor that determination by looking

imposes limits on the operation of the police.”).

²⁰⁴ 524 U.S. 357 (1998).

²⁰⁵ 547 U.S. 586 (2006).

²⁰⁶ *Id.* at 591.

²⁰⁷ *Id.* at 590–91 (quoting *United States v. Leon*, 468 U.S. 897, 907 (1984)).

²⁰⁸ *Id.* at 591.

²⁰⁹ *Scott*, 524 U.S. at 363 (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

²¹⁰ *Hudson*, 547 U.S. at 591 (quoting *Scott*, 524 U.S. at 363) (internal quotation marks omitted).

at several factors that could potentially dampen the rule's effectiveness. Overall, deterrence is not significantly diminished by these factors, and the exclusionary rule emerges as an effective promoter of Fourth Amendment compliance in immigration enforcement.

a. The Likelihood of Deterrence

Since "the value of deterrence depends upon the strength of the incentive to commit the forbidden act,"²¹¹ the "intrasovereign" violation that occurs when an immigration official unlawfully apprehends an alien presents the exact situation in which the rule is most likely to be effective.²¹² A violation is "intrasovereign" when "the officer committing the unconstitutional search or seizure [is] an agent of the sovereign that [seeks] to use the evidence."²¹³ Here, DHS tasks agents with the investigation and apprehension of aliens and subsequently seeks to use that information in removal proceedings. An unlawful immigration arrest is therefore not only "intrasovereign," but also "intra-agency."²¹⁴

Aside from agency mechanics, the exclusionary rule's effectiveness rests on the premise that enforcement officers care about prosecutions and convictions.²¹⁵ As the *Lopez-Mendoza* majority recognized, an arresting immigration officer's "primary objective" will almost always be to gather information for a deportation proceeding.²¹⁶ This "zone of primary interest"²¹⁷ is parallel to a police officer's—the risk of having the suspect's case-in-chief fall apart due to exclusion deters Fourth Amendment violations no less in immigration investigations than in criminal investigations.²¹⁸ In this sense, the central role that deportation

²¹¹ *Id.* at 595.

²¹² *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1043 (1984).

²¹³ *United States v. Janis*, 428 U.S. 433, 455 (1976).

²¹⁴ Bernard A. Nigro, Jr., Note, *The Exclusionary Rule in Administrative Proceedings*, 54 GEO. WASH. L. REV. 564, 588 (1986).

²¹⁵ See LAFAVE, *supra* note 19, § 1.2(b).

²¹⁶ See *Lopez-Mendoza*, 468 U.S. at 1043.

²¹⁷ *Janis*, 428 U.S. at 458.

²¹⁸ See *Lopez-Mendoza*, 468 U.S. at 1053 (White, J., dissenting) ("Civil deportation proceedings are in no sense 'collateral.' . . . [B]ecause civil deportation proceedings are to INS agents what criminal trials are to police officers, I cannot agree [that application of the rule in such proceedings is unlikely to provide significant deterrence.]); *In re Sandoval*, 17 I. & N. Dec. 70, 97 (B.I.A. 1979) (Appleman, concurring in part and dissenting in part) ("[I]f the evidence is barred in

proceedings play in immigration enforcement distinguishes the situation from *Janis* and *Calandra*, which rested on the reasoning that exclusion in a collateral proceeding would not add any *additional* deterrence when exclusion in a criminal proceeding already deterred.²¹⁹ In fact, the exclusionary rule might be a more effective deterrent for ICE agents than for ordinary law enforcement officers, since ICE is now mandated to ensure that “every alien who has been ordered removed departs the United States as quickly as possible.”²²⁰ Immigration enforcement and removal are inextricably intertwined, providing fertile ground for the exclusionary rule to alter behavior.²²¹

This conclusion is not altered by the shift in enforcement priorities that occurred with the birth of DHS in 2003.²²² ICE's main objective, for example—to “protect America and uphold public safety by targeting the people, money and materials that support terrorist and criminal activities”²²³—suggests that the majority of ICE agents are focusing on potential terrorists and predatory criminals. If this were true, and if such targets were being tried in criminal proceedings, exclusion of evidence in removal proceedings might not provide significant “additional” deterrence.²²⁴

the civil deportation proceedings, the consequences are grave enough that the deterrent effect is equivalent to that in a criminal proceeding stemming from the same breach of the law.”); Nigro, *supra* note 214 (“The connection between those who illegally obtain evidence and those who seek to use it in subsequent proceedings could not be more direct than the connection present in the context of deportation proceedings. . . . This identity of purpose substantially increases the deterrent effect of the exclusionary rule.”).

²¹⁹ See LAFAVE, *supra* note 19, § 1.3(b).

²²⁰ See ICE FISCAL YEAR 2006 ANNUAL REPORT, *supra* note 139, at 9.

²²¹ While many argue over the empirical evidence supporting the rule's deterrent effect, a widely regarded study of the Chicago Police Department and the city's court system found that the rule “dramatically improved police behavior.” Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. CO. L. REV. 75, 132 (1992).

²²² DHS's official mission is to “deter terrorist attacks and protect against and respond to threats and hazards to the Nation.” U.S. DEP'T OF HOMELAND SEC., SECURING OUR HOMELAND: U.S. DEPARTMENT OF HOMELAND SECURITY STRATEGIC PLAN 4 (2004), available at http://www.dhs.gov/xlibrary/assets/DHS_StratPlan_FINAL_spread.pdf.

²²³ ICE FISCAL YEAR 2006 ANNUAL REPORT, *supra* note 139.

²²⁴ See *United States v. Janis*, 428 U.S. 433, 443, 448 (1976) (stating that the rule is unnecessary in a civil tax proceeding because local law enforcement officials are already deterred by the possible exclusion of evidence in state and federal criminal trials).

DHS's professed mission, however, does not match its actual enforcement record. In the last three years, only 0.0015% of the individuals that DHS charged had claims of terrorism brought against them.²²⁵ Similarly, officials brought "national security" charges against only 0.014% of those individuals.²²⁶ Rather, the vast majority of individuals that DHS apprehended were charged with ordinary immigration violations, such as entering without inspection.²²⁷ The agency's frequent drumbeat against predatory crime also appears exaggerated. In fact, the proportion of cases involving criminal charges in Immigration Court actually decreased by ten percent between 1996 and 2006.²²⁸ In contrast, the total proportion of immigration charges during this same time period rose by over ten percent.²²⁹ DHS's "zone of primary interest,"²³⁰ therefore, continues to be the apprehension and removal of individuals illegally present in the United States. Moreover, to the extent that DHS has focused on bona fide terrorists and criminals, the agency has turned to immigration law and proceedings as catch-all enforcement and prosecution tools.²³¹ Suppression of evidence at removal proceedings would therefore effectively deter DHS agents in the majority of their enforcement activities.

b. Evaluating the Strength of Deterrence-Reducing Factors

The fact that the exclusionary rule is best suited for the immigration context needs to be weighed against several factors that potentially reduce the rule's deterrent effect. According to the *Lopez-Mendoza* majority, four factors outweighed the likelihood that the exclusionary rule would actually deter constitutional violations: (1) the INS had its own method of deterring Fourth Amendment violations, (2) immigration officials could sometimes prove alienage—and secure deportation—without relying on evidence obtained from an arrest, (3) few

²²⁵ TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, IMMIGRATION ENFORCEMENT: THE RHETORIC, THE REALITY (2007), <http://trac.syr.edu/immigration/reports/178/>. Of the fourteen terrorism charges brought against the twelve individuals during this time span, only four were sustained. *Id.*

²²⁶ *Id.*

²²⁷ *See id.*

²²⁸ *See id.*

²²⁹ *Id.*

²³⁰ *United States v. Janis*, 428 U.S. 433, 458 (1976).

²³¹ *See supra* notes 126–130 and accompanying text.

aliens actually challenged the lawfulness of their arrest, and (4) alternative remedies were available.²³² As Justice White pointed out in his dissent, however, none of these factors presents a “principled basis” to distinguish the rule’s deterrent effect in criminal proceedings from its effect in deportation proceedings.²³³ An analysis of each of these factors in light of the changes that have altered the immigration landscape similarly fails to alter the conclusion that the rule is an effective deterrent.

i. The Insufficiency of Institutional Self-Restraint

The belief that the INS’s own procedural safeguards were sufficient to accomplish the rule’s purpose—“perhaps [the] most important” factor in the Court’s deterrence analysis²³⁴—continues to be incorrect. Despite praising the INS’s disciplinary scheme, the Court could not point to a single incident in which the agency had actually punished an agent who had committed a Fourth Amendment violation.²³⁵ Similarly, while educational programs did exist to instruct agents in Fourth Amendment law, Justice White pointed out that their existence was evidence of the exclusionary rule’s effectiveness, not a reason to abandon it.²³⁶

After *Lopez-Mendoza*, it is hard to see why immigration officials would comply with the Fourth Amendment on their own volition.²³⁷ The consumption of immigration enforcement duties by the Department of Homeland Security has reaffirmed the conclusion that training and self-policing are insufficient deterrents to constitutional violations. DHS took over an agency whose internal complaint mechanisms already suffered deficiencies, such as jurisdictional overlap, lack of transparency, insufficient resources, and a lack of community outreach.²³⁸ The

²³² See *supra* notes 85–88 and accompanying text.

²³³ *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1053 (1984) (White, J., dissenting).

²³⁴ See *id.* at 1044–45 (majority opinion).

²³⁵ *Id.* at 1054 (White, J., dissenting).

²³⁶ *Id.* at 1055; see also Silas Wasserstrom & William J. Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?*, 22 AM. CRIM. L. REV. 85, 129 (1984) (“Eliminating the exclusionary rule because law enforcement agencies have instituted administrative mechanisms for punishing [F]ourth [A]mendment violations is like cutting off a diabetic’s insulin supply because his illness seems to be under control.”).

²³⁷ See Nigro, *supra* note 214, at 589.

²³⁸ See Stephen A. Rosenbaum, *Keeping an Eye on the I.N.S.: A Case for Civilian Review of Uncivil Conduct*, 7 LA RAZA L.J. 1, 9–10 (1994). The author noted that ten

increasing preference for security and expediency over adherence to traditional constitutional mandates suggests that sufficient self-restraint is even less likely under DHS's watch.

An analysis of DHS's internal constitutional safeguards confirms this. Responsibility for constitutional compliance within the department is statutorily delegated to the Office for Constitutional Rights and Civil Liberties ("CRCL").²³⁹ The CRCL's mission is "to assist the dedicated men and women of [DHS] in securing our country while preserving our freedoms and our way of life."²⁴⁰ The CRCL has four main objectives: (1) to provide proactive advice to help shape policy, (2) to investigate complaints by the public against department officials, (3) to provide leadership regarding equal employment opportunity programs, and (4) to serve as an information and communication liaison with the public.²⁴¹ The Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004²⁴² clarified CRCL's role, mandating that the President appoint the head of the CRCL and expanding the office's oversight and investigatory abilities.²⁴³ While the creation of CRCL is certainly a step in the right direction, a closer inspection of its training and disciplinary mechanisms raises doubts that the current system sufficiently deters constitutional violations.²⁴⁴

On the educational level, constitutional compliance initiatives appear cosmetic. The CRCL created a "Civil Liberties University," which provides educational training to Department employees through computer programs and the Internet. As an example of such training, CRCL noted the availability of a twelve

years earlier, the U.S. Commission on Civil Rights had acknowledged "serious problems in the INS complaint review procedures." *Id.* at 3. Almost none of the Commission's recommendations, however, had been implemented. *Id.*

²³⁹ See 6 U.S.C. § 345(a)(4) (Supp. IV 2004).

²⁴⁰ OFFICE FOR CIVIL RIGHTS & CIVIL LIBERTIES, U.S. DEP'T OF HOMELAND SEC., ANNUAL REPORT TO CONGRESS 2005-2006 1 (2007), available at <http://www.dhs.gov/xlibrary/assets/crcl-fy0506annualreport.pdf>.

²⁴¹ *Id.*

²⁴² Pub. L. No. 108-458, 118 Stat. 3638 (codified as amended in scattered sections of the U.S.C.).

²⁴³ OFFICE FOR CIVIL RIGHTS & CIVIL LIBERTIES, U.S. DEP'T OF HOMELAND SEC., *supra* note 240.

²⁴⁴ As a preliminary matter, the CRCL had only twenty positions one year after its creation; thirteen of these were dedicated to the Equal Employment Opportunity Program. See Daniel W. Sutherland, Office for Civil Rights & Civil Liberties, U.S. Dep't of Homeland Sec., Remarks at the Heritage Foundation Lecture (July 1, 2004), http://www.dhs.gov/xabout/structure/editorial_0505.shtm.

minute web and computer-based training video on basic Arab-American and Muslim-American culture, a twenty-five minute tutorial to commemorate Constitution Day, several “educational posters,” and an hour-long training session on how to interact with Muslim Americans.²⁴⁵ CRCL’s Congressional Report failed to mention, however, whether the hour and thirty-seven minutes of training—not counting poster-viewing time—was mandatory, instead remarking that the programs were “accessible.”²⁴⁶ Concern over the mandatory nature of such training, of course, presumes that its substance actually deters constitutional violations. To the contrary, CRCL acknowledged that an instructor in a course on Muslim and Arab culture taught by a “DHS Component” “painted a picture in which all Arab Americans and Muslim Americans [were] potential terrorists.”²⁴⁷ This type of incident, while obviously an anomaly, highlights the “startling” implication of the *Lopez-Mendoza* majority’s conclusion that courts should “defer to law enforcement officers’ superior understanding of constitutional principles.”²⁴⁸

DHS’s investigatory and disciplinary mechanisms have similarly failed to deter constitutional violations. Aside from the CRCL, complaints of misconduct by immigration officials can be directed to ICE’s Office of Professional Responsibility (“OPR”), OPR field offices, or DHS’s Office of the Inspector General (“OIG”).²⁴⁹ Even if investigators substantiate misconduct, however, serious discipline is unlikely. After the creation of DHS, for example, ICE failed to provide the OIG with the disciplinary status of Reports of Investigation (“ROI”), leading to concerns that substantiated allegations of employee misconduct “were not receiving timely or effective attention with a probable erosion of good discipline.”²⁵⁰ A subsequent review confirmed that ICE’s discipline procedures suffered several deficiencies, including lack of a central tracking system for reports of

²⁴⁵ OFFICE FOR CIVIL RIGHTS & CIVIL LIBERTIES, U.S. DEP’T OF HOMELAND SEC., *supra* note 240, at 27–28.

²⁴⁶ *Id.* at 27.

²⁴⁷ *Id.* at 39.

²⁴⁸ *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1058 (1984) (White, J., dissenting).

²⁴⁹ OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., OIG-06-57, A REVIEW OF IMMIGRATION AND CUSTOMS ENFORCEMENT DISCIPLINE PROCEDURES 4 (2006) [hereinafter OIG REVIEW OF ICE DISCIPLINE PROCEDURES], available at http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_06-57_Aug06.pdf.

²⁵⁰ *Id.* at 1–2.

misconduct, unexplained delays in processing substantiated complaints, and a lack of consistency in the proposal and application of penalties.²⁵¹ Officials adjudicated only twenty-nine percent of the ROIs completed between January 2003 and August 2005, for example.²⁵² The longer a substantiated complaint lingers, the harder it becomes to justify significant punishment,²⁵³ lessening any deterrent effect the system might have. Moreover, the possibility that similarly situated officers within the same unit could engage in similar misconduct, yet receive different penalties,²⁵⁴ suggests that officers do not have a clear sense of the consequences that a constitutional violation may bring. Indeed, in this type of “‘good old boys’ network . . . certain infractions were simply made to go away.”²⁵⁵

While the report cited planned improvements, the problems illustrate the lethargic manner in which agencies can be expected to develop effective self-disciplinary remedies. This institutional inertia is especially pronounced in the immigration context. First, there is little incentive to change course when overly aggressive and improper enforcement accomplishes DHS’s goals. In some instances, institutional self-interest can be augmented through the political process.²⁵⁶ Aliens, however, are almost completely disconnected from representational politics, and therefore have little say in enforcement policy.

ii. Proving Alienage Without Investigatory Evidence

While the removal of some aliens without the use of investigatory evidence does decrease the likelihood of deterrence, it does not completely diminish the rule’s deterrent effect. Admissible evidence could potentially include subsequent voluntary admissions of alienage or independently obtained documents proving removability, including birth certificates

²⁵¹ See *id.* at 8.

²⁵² *Id.* at 1–2.

²⁵³ See *id.* at 11. One case, for example—involving the “*Phoenix Five*”—took four to five years to adjudicate, without a sufficient explanation for the delay. *Id.*

²⁵⁴ See *id.* at 13.

²⁵⁵ *Id.* at 17.

²⁵⁶ See *Wolf v. Colorado*, 338 U.S. 25, 31 (1949) (noting that “the internal discipline of the police, *under the eyes of an alert public opinion*” served as an alternative remedy to Fourth Amendment violations by state police officers (emphasis added)), *overruled by Mapp v. Ohio*, 367 U.S. 643 (1961).

indicating foreign birth.²⁵⁷ The situation is analogous to criminal proceedings, however, when conviction is often possible despite suppression of illegally obtained evidence.²⁵⁸ While the rule may not deter violations in every situation, “the effort to depreciate [their] worth makes [such violations] less of an incitement than [they] might be.”²⁵⁹ The absence of the rule, on the other hand, allows the government to pay “premium prices for evidence branded with the stamp of unconstitutionality.”²⁶⁰

Moreover, the strength of this deterrent-reducing factor depends on how broadly one interprets *Lopez-Mendoza*'s statement that “[t]he ‘body’ or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest.”²⁶¹ The Eighth and Tenth Circuits, for example, have held that this language means simply that an individual may not challenge a court’s jurisdiction over his or her body.²⁶² *Lopez-Mendoza* therefore does not foreclose challenges to the admissibility of “identity-related evidence.”²⁶³ Such evidence obtained subsequent to an illegal search and seizure will come into trial only if it is sufficiently attenuated “to be purged of the primary taint” of the Fourth Amendment violation.²⁶⁴ The government’s ability to secure removal despite an illegal search and seizure, therefore, is far from guaranteed. Lastly, an increase in the government’s ability to secure removal can simply be viewed as a decreased social cost.²⁶⁵

²⁵⁷ See Henry G. Watkins, *The Fourth Amendment and the INS: An Update on Locating the Undocumented and a Discussion on Judicial Avoidance of Race-Based Investigative Targeting in Constitutional Analysis*, 28 SAN DIEGO L. REV. 499, 572–82 (1991).

²⁵⁸ See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1054 (1984) (White, J., dissenting) (“[I]n many [criminal] cases even though some evidence is suppressed a conviction will nonetheless be obtained.”).

²⁵⁹ LAFAVE, *supra* note 19, § 1.2(b), at 35.

²⁶⁰ *Id.*

²⁶¹ *Lopez-Mendoza*, 468 U.S. at 1039 (majority opinion).

²⁶² See *United States v. Olivares-Rangel*, 458 F.3d 1104, 1111 (10th Cir. 2006); *United States v. Guevara-Martinez*, 262 F.3d 751, 754 (8th Cir. 2001). *But see* *United States v. Guzman-Bruno*, 27 F.3d 420, 422 (9th Cir. 1994) (denying suppression of an individual’s identity or government files).

²⁶³ *Olivares-Rangel*, 458 F.3d at 1111.

²⁶⁴ See *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

²⁶⁵ See *Wasserstrom & Mertens*, *supra* note 236, at 128.

iii. Voluntary Departure, Expedited Removal, and Challenging Unlawful Arrests

The infrequency of alien challenges to unlawful arrests similarly fails to compel the conclusion that the exclusionary rule would not significantly deter Fourth Amendment violations. As a preliminary matter, any current lack of challenge is undoubtedly a result of the rule's absence; logic dictates that the rule's presence would increase the number of motions to suppress. As with proving alienage, the fact that some aliens might still elect voluntary departure—or will have no opportunity to challenge their arrest due to expedited removal²⁶⁶—is analogous to criminal proceedings, when the overwhelming prevalence of plea bargaining ensures that only a small percentage of prosecutions will reach the trial stage.²⁶⁷ Moreover, while the majority of aliens continue to depart voluntarily, the percentage of formal removal proceedings has steadily increased over the past ten years.²⁶⁸ The number of voluntary departures in 2005 was approximately six percent greater than in 1984, the year *Lopez-Mendoza* was decided; the number of formal removals, on the other hand, grew by over 1,000 percent.²⁶⁹ Formal removal proceedings now account for approximately one-fifth of all aliens expelled.²⁷⁰ Most of the aliens who do elect voluntary departure are Mexican nationals caught at the border.²⁷¹ Similarly, expedited removal is only used for aliens arriving at the border or port of entry, or those who are encountered close to the border within fourteen days of entry.²⁷² While border enforcement

²⁶⁶ See 8 U.S.C. § 1225(b)(1)(A)(i) (2000).

²⁶⁷ See Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 698 (2002) (noting that more than ninety percent of all criminal prosecutions determined on the merits are convictions, with more than ninety percent of those resulting from guilty pleas); Yale Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories,"* 53 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 171, 179 (1962) (noting that the California Attorney General believed that the overwhelming number of pleas stemmed from the rule's refreshing effect on constitutional compliance).

²⁶⁸ See CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS: IMMIGRATION ENFORCEMENT WITHIN THE UNITED STATES 16 (2006) [hereinafter CRS REPORT], available at http://assets.opencrs.com/rpts/RL33351_20060406.pdf.

²⁶⁹ See OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T. OF HOMELAND SEC., 2005 YEARBOOK OF IMMIGRATION STATISTICS 95 tbl.38 (2006), available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS_2005_Yearbook.pdf.

²⁷⁰ See *id.*

²⁷¹ See *id.* at 96 tbl.39 & n.2.

²⁷² See CRS REPORT, *supra* note 268, at 11.

presents Fourth Amendment concerns of its own, it is distinct from the type of internal community-based enforcement that has become more prevalent in recent years. A border patrol officer is almost guaranteed a positive outcome; an ICE officer raiding a factory or entering an alien's home, on the other hand, is much more likely to worry about the possibility of exclusion.

iv. The Adequacy of Alternative Remedies

While the Court has shown an increasing preference for civil and criminal suits as deterrents, as well as reliance on the increasing professionalism of police forces, aliens can rely on neither. As *Hudson* noted, "the sins and inadequacies of a legal regime that existed almost half a century ago"²⁷³—including lack of relief under civil rights statutes²⁷⁴ and cases such as *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*²⁷⁵—have been largely remedied for U.S. citizens. Aliens do not enjoy the fruits of this judicial renaissance. First, unlike criminal defendants, aliens who have been illegally apprehended and removed from the country are "in no position to file civil actions in federal courts."²⁷⁶ Second, immigration officials are unlikely to be scared by the proposition of suits from aliens who remain illegally in the country, since many are poor, uneducated, do not speak English, lack access to legal assistance, and are hesitant to assert themselves in such a public manner.²⁷⁷ Finally, DHS has not demonstrated the sort of professionalism the *Hudson* majority presumed sufficient to constrain constitutional violations—which in any case is likely a product of the exclusionary rule.²⁷⁸

Reliance on these remedies is insufficient because both the institution that requires deterrence and the political forces that dictate policy can prevent the plans from being put into place, or can turn safeguards into mere paper procedures.²⁷⁹ This concern is particularly apparent in immigration enforcement because

²⁷³ See *Hudson v. Michigan*, 547 U.S. 586, 597 (2006).

²⁷⁴ See 42 U.S.C. § 1983 (2000).

²⁷⁵ 403 U.S. 388 (1971).

²⁷⁶ See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1055 (1984) (White, J., dissenting).

²⁷⁷ See *id.*

²⁷⁸ See *infra* note 319 and accompanying text; *supra* Part III.B.1.b.i.

²⁷⁹ See Kamisar, *supra* note 14, at 138; Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 848–49 (1994).

aliens are disconnected from the political process.²⁸⁰ The exclusionary rule, on the other hand, “is a remedy that judges control and can apply ‘without being dependent upon the actions of other branches of government.’”²⁸¹ This independence ensures integrity in judicial decisions and the legal system at large. The exclusionary rule, of course, need not shove these alternative remedies to the side. Rather, the rule can work in conjunction with them to create a more stable deterrent framework.

The inadequacy of alternative remedies is, in fact, strong support for the rule’s necessity. The most compelling evidence for the exclusionary rule’s deterrent effect, some have argued, can be seen in state police forces’ reactions to *Mapp v. Ohio*.²⁸² Following application of the federal exclusionary rule in *Weeks*, the states had five decades in which to develop any rule they desired to control police activity, yet “not one of the twenty-four states that still admitted illegally seized evidence on the eve of *Mapp* had developed an effective alternative to the rule.”²⁸³ Rather, *Mapp* “create[d] tidal waves and earthquakes,”²⁸⁴ requiring top to bottom retraining to those engaged in basic enforcement functions, as if police forces and prosecutors “had made a belated discovery that the [F]ourth [A]mendment applied” to them.²⁸⁵ Application of the exclusionary rule in removal proceedings would create similar tremors throughout DHS—a catalyst for significant institutional change in Fourth Amendment compliance.

2. The Exclusionary Rule’s Social Costs

The potential social costs of suppressing probative evidence of guilt must be weighed against the likelihood that the exclusionary rule would deter Fourth Amendment violations. The *Lopez-Mendoza* majority raised several legitimate concerns,

²⁸⁰ See *supra* note 256 and accompanying text.

²⁸¹ Kamisar, *supra* note 14, at 138 (quoting Morgan Cloud, *Judicial Review and the Exclusionary Rule*, 26 PEPP. L. REV. 835, 838 (1999)).

²⁸² 367 U.S. 643 (1961).

²⁸³ Kamisar, *supra* note 14, at 127.

²⁸⁴ *Id.* at 124 (emphasis omitted) (quoting Michael Murphy, Police Commissioner of New York City at the time *Mapp* was decided). Kamisar notes that the reactions of William Parker, the Los Angeles Chief of Police, and Arlen Specter, then an assistant district attorney in Philadelphia, were quite similar. *Id.* at 125.

²⁸⁵ *Id.* at 124 (quoting Richard Uviller, a prosecutor at the time *Mapp* was decided).

including judicial sanctioning of continuing violations of immigration law and complications in administrative and enforcement procedures.²⁸⁶ While the exclusionary rule is admittedly far from perfect, the insufficiency of the alternatives demonstrates that it is also the “only game in town.”²⁸⁷ The protection of individual liberty always entails acceptance of some costs,²⁸⁸ but analysis shows that they are not as severe in the instant case as the *Lopez-Mendoza* majority believed.

a. *Direct Costs*

i. Letting Aliens Free and Condoning Continuing Crimes

The most frequent argument against the exclusionary rule—and one that the *Lopez-Mendoza* majority saw as a major contributor to the situation’s “unusual and significant” social costs²⁸⁹—is that “[t]he criminal is [let] free because the constable has blundered.”²⁹⁰ Several studies in the criminal sector have found that the percentage of lost cases due to suppression, though, may not be very high.²⁹¹ Moreover, the highly visible nature of the process may actually benefit the system by allowing courts a window into the practical consequences of their constitutional jurisprudence.²⁹² In this sense, the rule serves to check a counter-majoritarian judiciary who might otherwise over-restrict police conduct, resulting in a doctrine in harmony with the necessities of practice.²⁹³ This is particularly true in the immigration context, when the unique role of race and ethnicity in enforcement, as well as the frequency and confusion of mass arrests, make constitutional line-drawing more difficult.²⁹⁴ The exclusionary rule lets some criminals walk free, but only to create a more fine-tuned system that does a better job of “protect[ing] the privacy of us all.”²⁹⁵

²⁸⁶ See *supra* notes 90–95 and accompanying text.

²⁸⁷ See Steiker, *supra* note 279, at 851.

²⁸⁸ See *id.* at 820.

²⁸⁹ *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1046 (1984).

²⁹⁰ *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (Cardozo, J.).

²⁹¹ See Kamisar, *supra* note 14, at 131 & nn.58–59.

²⁹² See William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL’Y 443, 448 (1997).

²⁹³ *Id.* at 447; see also LAFAYE, *supra* note 19, § 1.2(a), at 28.

²⁹⁴ See *Lopez-Mendoza*, 468 U.S. at 1049–50; Hafetz, *supra* note 109, at 861–66 (describing immigration officials’ use of race in stopping individuals).

²⁹⁵ *Arizona v. Hicks*, 480 U.S. 321, 329 (1987); see also Potter Stewart, *The Road*

The fact that a released alien would immediately continue violating the immigration laws does distinguish removal from regular criminal procedures. Even if society must accept the occasional sanctioning of a continuing crime, however, letting a status²⁹⁶ criminal go free imposes far less cost than letting a murderer, rapist, or other violent criminal back onto the streets.²⁹⁷ In this sense, the choice between lawbreaking police and lawbreaking aliens²⁹⁸ is easier in the immigration setting. Allowing some aliens to remain in the country illegally, where they have potentially strong family, economic, and community ties, seems a fair trade for ensuring individual liberties for the entire population. Maintaining these community bonds in order to effectively combat more serious crimes makes this tradeoff even more worthwhile.²⁹⁹ The exclusionary rule is intended to protect society as a whole—not the alien in whose case the rule applies.³⁰⁰ Although the wrongdoer is the most immediate and visible beneficiary, the larger systemic benefits render this cost acceptable.³⁰¹

ii. Administrative Inconvenience

Arguments citing administrative incapacity and inconvenience are similarly unpersuasive. Before *Lopez-Mendoza*, when courts and lawyers assumed that the exclusionary rule applied to deportation proceedings, the immigration system had little problem handling cases.³⁰² In the

to *Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1393 (1983) (noting that catching fewer criminals was a “price the framers anticipated and were willing to pay to ensure the sanctity of the person, the home, and property against unrestrained governmental power”).

²⁹⁶ See *United States v. Mejia*, 278 F. Supp. 2d 55, 60 (D. Mass. 2003) (noting that the goal of 8 U.S.C. § 1326 was to deter recidivism, and remarking that the reason for initial deportation has no bearing on the nature of the offense); see also *In re Sandoval*, 17 I. & N. Dec. 70, 81 (B.I.A. 1979) (“We do not suggest that the ‘cost’ of an alien’s continued unlawful presence is in any way comparable to the ‘cost’ of allowing a criminal to go free . . .”).

²⁹⁷ See *Hudson v. Michigan*, 547 U.S. 586, 595 (2006) (noting the “grave adverse consequence[s] . . . of releasing *dangerous* criminals into society” (emphasis added)).

²⁹⁸ See Roger B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 330 (1973).

²⁹⁹ See *infra* notes 314–319 and accompanying text.

³⁰⁰ See Dworkin, *supra* note 298, at 330–31.

³⁰¹ See *id.*

³⁰² See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1058–59 (White, J., dissenting)

years following *Lopez-Mendoza*, courts have adjudicated motions to suppress the fruits of “egregious” Fourth Amendment violations.³⁰³ While immigration judges currently face overwhelming caseloads and less than adequate resources,³⁰⁴ the optimal solution to these problems is to strengthen agency resources—not to ignore untidy problems. Similarly, the contention that it is “administratively inconvenient” for DHS agents to distinguish constitutional violations because of the “crowded and confused circumstances” that surround many ICE arrests³⁰⁵—“perhaps the most outrageous aspect of the [*Lopez-Mendoza*] decision”³⁰⁶—amounts to a rejection of the Fourth Amendment itself rather than a rejection of the exclusionary rule.³⁰⁷ Crafting a workable system for the courts and enforcement officials is certainly not an easy task. But

[t]he concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government.³⁰⁸

Given the importance of the Fourth Amendment, such subordination of constitutional rights to expediency constitutes plain neglect of duty.³⁰⁹

b. Cost-Reducing Factors and Indirect Costs

Several factors further lessen the cost of suppressing evidence. First, the *Lopez-Mendoza* majority failed to take into account the good faith exception to the rule explicated in *United States v. Leon*³¹⁰ and *Massachusetts v. Sheppard*.³¹¹ The

(“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.”).

³⁰³ See *supra* notes 101–108 and accompanying text.

³⁰⁴ See Nina Bernstein, *New York's Immigration Courts Lurch Under a Growing Burden*, N.Y. TIMES, Oct. 8, 2006, § 1, at 1; Julia Preston, *Wide Disparities Found in Judging of Asylum Cases*, N.Y. TIMES, May 31, 2007, at A1.

³⁰⁵ *Lopez-Mendoza*, 468 U.S. at 1059; *id.* at 1049–50 (majority opinion).

³⁰⁶ LAFAVE, *supra* note 19, at 247.

³⁰⁷ See *Lopez-Mendoza*, 468 U.S. at 1059 (White, J., dissenting).

³⁰⁸ *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion).

³⁰⁹ *Lopez-Mendoza*, 468 U.S. at 1060.

³¹⁰ 468 U.S. 897 (1984).

³¹¹ 468 U.S. 981 (1984).

exception dictates that “the exclusionary rule should not be applied when the officer conducting the search acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate that subsequently is determined to be invalid.”³¹² Similarly, several of the deterrent-reducing factors cited by the *Lopez-Mendoza* majority can actually be categorized as cost-reducing factors because of the dampening effect they have on the likelihood of suppression. The infrequency of motions to suppress prior to 1979, for example, is testimony to the small likelihood of vast numbers of “criminals” walking free. The fact that removability can sometimes be proven without resort to evidence obtained through illegal search and seizure likewise lessens the rule’s negative impact.³¹³

The most significant social costs involved in the analysis emanate not from the rule’s presence, but from its absence. Recent home and workplace raids have terrorized immigrant families, forcing many into hiding and destroying trust in law enforcement officials.³¹⁴ Similar reactions have resulted from local ordinances directed at illegal immigrants,³¹⁵ raising both economic and safety concerns. First, intimidating enforcement campaigns can seriously hurt business owners and the wider communities in which aliens live.³¹⁶ Second, the hostility that accompanies home and workplace raids can hamper more important law enforcement objectives by destroying the bonds that local officers have developed with immigrant populations.³¹⁷ This results in diminished cooperation with the police, making it more difficult to solve violent crimes.³¹⁸

In New York, for example, local police and county officials were so disturbed by the aggressive and undisciplined tactics of ICE officers that they withdrew support midway through a joint anti-gang operation and wrote a letter to DHS Secretary Michael

³¹² *Sheppard*, 468 U.S. at 987–88.

³¹³ See Wasserstrom & Mertens, *supra* note 236, at 128.

³¹⁴ See Susana Enriquez, *Families Protest Immigration Raids*, NEWSDAY, Sept. 28, 2007, at A21; Forester, *supra* note 145.

³¹⁵ See Ken Belson & Jill P. Capuzzo, *Town Rethinks Laws Against Illegal Immigrants*, N.Y. TIMES, Sept. 26, 2007, at A1.

³¹⁶ See *id.*; Steven Greenhouse, *Immigrant Crackdown Upends a Slaughterhouse’s Work Force*, N.Y. TIMES, Oct. 12, 2007, at A1.

³¹⁷ See Megan Matteucci, *Deportation Fears Hinder Police Investigations*, SAVANNAHNOW, Oct. 7, 2007, <http://new.savannahnow.com/node/371509>.

³¹⁸ See *id.*

Chertoff requesting an investigation into “serious allegations of misconduct and malfeasance.”³¹⁹ Among the allegations were that ICE agents refused to check arrest targets with local police intelligence files, had incorrect or outdated addresses for ninety of the ninety-six warrants for street gang members, sought a twenty-eight-year-old defendant using a photograph of the boy taken at age seven, displayed a “cowboy” mentality, and drew their weapons on local officers.³²⁰ This type of overzealous enforcement exposes residents and officers to immediate physical danger and undermines long-term community cooperation.

CONCLUSION

While innovative strategies, techniques, and institutions are undoubtedly necessary to counter the new problems facing our nation, the tendency to segregate and vilify that has accompanied the immigration system’s recent transformations is neither necessary nor wise. As the country continues to debate immigration’s proper role in our social, cultural, and political framework, we must pay special care to crafting an approach that ensures optimal protection for the values and ideals that define our nation. The criminalization of immigration—with a zero-tolerance approach to the eradication of national security threats and the maintenance of an identifiable American culture—presents one side of this concern. The tendency to pull up and tighten the covers of the American social fabric, however, can also have the unfortunate effect of blinding us to the deterioration of the very same values and liberties we seek to protect.

The exclusionary rule’s absence from removal proceedings invites immigration officials to disregard the Fourth Amendment. This invitation has become increasingly attractive as the immigration problem—and the enforcement apparatus

³¹⁹ See Nina Bernstein, *Immigrant Workers Caught in a Net Cast for Gangs*, N.Y. TIMES, Nov. 25, 2007, § 1, at 41; Nina Bernstein, *Raids Were a Shambles, Nassau Complains to U.S.*, N.Y. TIMES, Oct. 3, 2007, at B1 [hereinafter Bernstein, *Raids Were a Shambles*]; Press Release, Thomas R. Suozzi, Nassau County Executive, Suozzi and Mulvey Call for Federal Investigation of Immigration and Customs Enforcement (ICE) Raids in Nassau (Oct. 2, 2007) [hereinafter Suozzi and Mulvey Call for Federal Investigation], <http://www.nassaucountyny.gov/agencies/CountyExecutive/NewsRelease/2007/10-2-2007.html>.

³²⁰ See Bernstein, *Raids Were a Shambles*, *supra* note 319; Suozzi and Mulvey Call for Federal Investigation, *supra* note 319.

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created to solve it—have grown over the past two decades. The drastic changes that compel a reexamination of the exclusionary rule also dictate the opposite outcome to the cost-benefit analysis that *INS v. Lopez-Mendoza* engaged in over twenty years ago. Readopting the exclusionary rule will have a profound effect not only on the mechanics of government operations, but also on the way in which we view the alien in society. Neither change will be easy, but the landscape that emerges will provide more liberty for us all.