CONVERGING SYSTEMS: HOW CHANGES IN FACT AND LAW REQUIRE A REASSESSMENT OF SUPPRESSION IN IMMIGRATION PROCEEDINGS

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INTRODUCTION

Thirty years ago in *Immigration & Naturalization Service v. Lopez-Mendoza*, the Supreme Court held that the Fourth Amendment's exclusionary rule is inapplicable in immigration proceedings because of

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the civil nature of those proceedings.[1] But a problem exists with that holding: unconstitutionally seized evidence may still form the basis for deportation, though that same evidence would be excluded in a criminal proceeding. Consider the case of Jeanini Almeida-Amaral, a Brazilian national whom police stopped and immediately arrested after he walked into a gas station parking lot and presented a Brazilian passport after police asked for identification.[2] Consider also Jorge Angel Puc-Ruiz, a Mexican national who was arrested after producing a valid state driver's license when police entered a restaurant and proceeded to request identification from patrons.[3] In both of these examples, any evidence gathered would be excluded in the criminal context.[4] And, although the Court has repeatedly found that Fourth Amendment principles must at least minimally apply in the enforcement of immigration statutes and regulations,[5] the majority holding in *Lopez-Mendoza* results in the introduction of unconstitutionally seized evidence in immigration proceedings.

In rejecting application of the exclusionary rule in immigration proceedings, the Court utilized the balancing test laid out in *United States v. Janis*, which requires weighing the social costs of applying the rule against the rule's likely deterrent effect.[6] When addressing immigration cases, the Supreme Court often walks a fine line between recognizing the specialized needs of immigration officers to stem the growing tide of immigration-related offenses and protecting constitutional rights of both aliens and citizens.[7] In *Lopez-Mendoza*, the Court

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1 INS v. Lopez-Mendoza, 468 U.S. 1032, 1034 (1984). It should be noted here that there are strong arguments that the underpinnings of the Court's decision were incorrect, and thus the entire decision should be revisited. Elizabeth A. Rossi, *Revisiting* INS v. Lopez-Mendoza*: Why the Fourth Amendment Exclusionary Rule Should Apply in Deportation Proceedings*, 44 COLUM. HUM. RTS. L. REV. 477 (2013).

2 Almeida-Amaral v. Gonzales, 461 F.3d 231, 232 (2d Cir. 2006).

3 Puc-Ruiz v. Holder, 629 F.3d 771, 775 (8th Cir. 2010). Days after the arrest, Puc-Ruiz received a ticket from the police claiming he violated a liquor license. However, the charge was dropped and the arrest was expunged for being based on false information and for a lack of probable cause. *Id.* at 776.

4 In *Almeida-Amaral*, the court specifically held that the facts surrounding the stop did not provide articulable suspicion for a stop and was a violation of the Fourth Amendment. 461 F.3d at 236. The court in *Puc-Ruiz* was less definitive and did not make a specific decision on a basic Fourth Amendment violation. However the underlying criminal action was dropped and record expunged by the municipal court based on a failure to provide evidence of probable cause for the arrest. 629 F.3d at 776.

5 *See infra* Part II.B.

6 428 U.S. 433, 448–50 (1976).

7 *See infra* Part II.B for a discussion of several cases in which the Supreme Court noted the ever-growing problem of unlawful immigration and the need to allow for questioning of aliens outside of the typical Fourth Amendment constructs.

held that these social costs outweighed any deterrent value.[8] In general, the Court relied heavily on three factors: (1) a lack of the rule's deterrent value in the context of what should be a simplistic immigration proceeding; (2) the intrasovereign nature of the immigration enforcement system; and (3) the vast numbers of arrests made by enforcement agents in a given year.[9]

Despite the decision's rigid approach, the blanket prohibition of the exclusionary rule in immigration proceedings has not produced a clear-cut rule for lower courts.[10] Instead, Part V of the opinion (joined by four of the five majority opinion Justices), which created a potential exception for violations that are "egregious" or in instances of widespread violations,[11] has produced unequal application results throughout the circuits.[12] Indeed, some circuits have held that the rule may be inapplicable, while another found that the "egregiousness" standard is met simply by a Fourth Amendment violation accompanied by "conduct a reasonable officer should have known would violate the Constitution."[13]

But consider how much has changed about the *Lopez-Mendoza* factors since 1984. First, with regard to immigration law's complexity, Congress has approved of at least two major pieces of legislation, along with hundreds of seemingly minor changes, since the Court's decision in 1984.[14] Initially, the structure of judicial proceedings was changed when Congress folded the traditional "exclusion" and "deportation" proceedings into a unified system labeled "removal proceedings," which resulted in a uniform application of procedural re-

8 *Lopez-Mendoza*, 468 U.S. at 1050.

9 *Id.* at 1043–50.

10 The majority opinion consisted of parts I–IV, and was issued by Justice Sandra Day O'Connor, and joined by four other Justices (Chief Justice Warren Burger, and Justices Harry Blackmun, Lewis F. Powell, and William Rehnquist). *Id.* at 1033. Justice O'Connor also delivered an opinion in Part V, for which three other Justices joined (Justices Blackmun, Powell, and Rehnquist). *Id.*

11 *Lopez-Mendoza*, 468 U.S. at 1050–51.

12 *See* Motions to Suppress in Removal Proceedings: A General Overview, AM. IMMIGR. COUNCIL, 1, 6–12, http://www.legalactioncenter.org/sites/default/files/motions_to_suppress_in_removal_proceedings-_a_general_overview_1-26-15_fin.pdf (last updated Jan. 26, 2015) (reviewing the varying stances of the circuit courts regarding exceptions to the prohibition).

13 Lopez-Rodriguez v. Mukasey, 536 F.3d 1012, 1016 (9th Cir. 2008). For a full discussion of how the various circuits have addressed the exception, see *infra* notes 201–17 and accompanying text.

14 Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA), Pub. L. 104–208, 110 Stat. 3009–546. IIRIRA was passed simultaneously with the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–132, 110 Stat. 1214. Jointly, these two statutes changed everything from criminal sanctions, grounds for deportation, and the judicial system.

quirements.[15] In addition, the substantive aspects of removal proceedings have been altered: For example, the legal analysis surrounding both the grounds for removal as well as the forms of relief requested has grown increasingly complex.[16]

Enforcement of immigration violations has also changed dramatically since the inception of what is now termed the "287(g) program," which allows for enforcement of federal immigration laws by local and state law enforcement agencies.[17] By delegating enforcement responsibility to state and local agencies, the federal enforcement arm of immigration has lost traditional control over training and discipline.[18] That modern problem contradicts the *Lopez-Mendoza* Court's focus on unified enforcement as a basis to exclude the exclusionary rule from immigration proceedings.[19]

These two changes together—the nature of immigration proceedings and increased enforcement possibilities—have also increased the deterrent value of the exclusionary rule in more subtle ways. In *Lopez-Mendoza*, the Court focused on the ratio of arrests to agents as the system existed in 1984, concluding that, at best, only twelve out of 500

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15 The new proceedings are described in the Immigration and Nationality Act (INA) of 1965 § 240, 8 U.S.C. § 1229(a) (2012). One issue highlighted by the Board of Immigration Appeals was the substantive and procedural rights disparity between the traditional exclusion/deportation proceedings, which resulted in an "entry doctrine" that amounted to increased rights for individuals that entered without inspection versus those that entered "lawfully." *In re* Romalez-Alcaide, 23 I&N Dec. 423, 442 (BIA 2002).

16 For an example of how forms of relief have been complicated, the REAL ID Act offers a prime example in the increased burden of proof, and credibility determination scheme laid out in INA § 208(b)(3) of the asylum statutes. REAL ID ACT of 2005, Pub. L. 109–13, 119 Stat. 203*; see also* Jennifer Lee Koh, *Rethinking Removability*, 65 FLA. L. REV. 1803 (2013).

17 Section 287(g) was added to INA through IIRIRA in 1996. Section 287(g) explicitly allows the federal government to "enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States . . . may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law." INA § 287(g)(1). Despite the existence of this statute for several years, the first agreement was not created until 2002. Randy Capps et al., *Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement*, MIGRATION POLICY INST. 9 (Jan. 2011).

18 Several reports have criticized oversight protocols of the program, including an internal report of the Department of Homeland Security. DEP'T OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, OIG-10-63, THE PERFORMANCE OF 287(G) AGREEMENTS (Mar. 2010), *available at* http:// www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-63_Mar10.pdf.

19 The Court focused on the INS's "comprehensive scheme for deterring Fourth Amendment violations" including training, investigation, and punishment as "perhaps [the] most important" factor in diluting the deterrent effect of the exclusionary rule in immigration proceedings. INS v. Lopez-Mendoza, 468 U.S. 1032, 1044–45 (1984).

arrests per year would even end up in immigration proceedings (the rest would be deported without a hearing).[20] Of those, said the Court, few would ever raise a Fourth Amendment claim.[21] But the ratio of agents to arrests has significantly decreased because of unified immigration proceedings, more individuals exercising their right to a removal hearing, and the addition of 287(g) programs.[22]

The exclusionary rule has developed similarly in both the criminal and immigration contexts. At the time of *Lopez-Mendoza*, the Court was also balancing the costs and benefits of applying the exclusionary rule in the criminal context in *United States v. Leon*.[23] In *Leon*, the Court held that the exclusionary rule should not apply if a Fourth Amendment violation occurs when an officer acted in reasonable reliance on a mistake by a neutral magistrate.[24] *Leon* was the first of many cases that began to chip away at the application of the exclusionary rule.[25] In *Herring v. United States*, a majority of the Court summarized the exclusionary rule application as "serv[ing] to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[26] Finally, in *Davis v. United States*, the Court further weakened the exclusionary rule by requiring

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20 *Id.* at 1044.

21 *Id.*

22 *See infra* Part III.2.C for a discussion of the impact of the increase in numbers of Immigration and Customs Enforcement agents, 287(g) agents, and the numbers of arrests.

23 468 U.S. 897, 909 (1984).

24 *Id.* at 922. In the companion case of *Massachusetts v. Sheppard*, the Court held that a similar good faith exception applied when an officer reasonably relied on a warrant issued by a neutral magistrate although the warrant was later found to be defective. 468 U.S. 981, 988 (1984).

25 Shortly after these cases, the Court held that warrantless searches based on legislation later found to be unconstitutional would not have sufficient deterrence of misconduct to justify use of the exclusionary rule. Illinois v. Krull, 480 U.S. 340, 353 (1987). Again in 1995, the Court used the reasoning from *Leon* to hold that an error by a court clerk that led to an arrest based on a faulty outstanding warrant (resulting in what amounted to a warrantless arrest) would similarly not have a sufficient deterrent effect. Arizona v. Evans, 514 U.S. 1, 14 (1995). In a more recent case, the Court used the social cost/deterrent effect balancing test in a more expansive situation; rather than citing to a lack of deterrence because of an error, the Court held that a constitutional violation in the *manner* of executing a warrant (failure to the knock-and-announce requirement) would lack sufficient deterrence to justify the suppression of evidence. Hudson v. Michigan, 547 U.S. 586, 595 (2006). In general, there are various ways in which the Fourth Amendment has lost force, including exceptions to situations in which a violation would occur, as well as exceptions to when the exclusionary rule should apply. This Article will focus mainly on the latter. Although the precise *reason* for the erosion of the exclusionary rule is up for debate, there is no question that the number of exceptions developed in recent decades has removed much of the exclusionary rule's bite. Christopher Slobogin, *The Exclusionary Rule: Is It On Its Way Out? Should It Be?*, 10 OHIO ST. J. CRIM. L. 341 (2013).

26 555 U.S. 135, 144 (2009).

courts to look at whether the Fourth Amendment violation occurred because law enforcement acted "deliberately, recklessly, or with gross negligence."[27] In his dissent, Justice Stephen Breyer summarily suggested that the case law trend is moving toward a Fourth Amendment that protects only against "those searches and seizures that are egregiously unreasonable."[28]

In light of the significant changes surrounding the exclusionary rule in both the criminal and immigration contexts, this Article makes two arguments. First, the factors related to legal complexity, enforcement, and ratio of agents to arrestees have changed to such a degree that the Court should re-examine whether to apply the exclusionary rule in immigration proceedings. Second, because the development of exclusionary rule case law in the criminal and immigration context has, in application, been converging towards a similar theme of requiring a level of egregiousness, the Court should apply the exclusionary rule in immigration proceedings precisely as it is already applied in criminal courts.

Part I discusses the analysis used in the *Lopez-Mendoza* decision. Part II considers the current state of the law, and argues that the three *Lopez-Mendoza* factors have significantly changed in the intervening years since the Supreme Court's original decision. Finally, Part III contends that the evolution of the exclusionary rule in both the immigration and criminal contexts is so similar that, assuming application of the exclusionary rule is appropriate in immigration proceedings, its application should follow the road already paved by its criminal counterpart.

I. *LOPEZ-MENDOZA* – APPLYING THE *JANIS* TEST IN IMMIGRATION COURT

In 1984, the Supreme Court took up the question of whether an individual in civil immigration removal proceedings should be afforded the right to suppress information obtained in violation of the Fourth Amendment.[29] The case, *INS v. Lopez-Mendoza*, involved two Mexican citizens who were issued orders of deportation by immigration judges in two separate hearings.[30] The individuals were arrested

27 131 S. Ct. 2419, 2428 (2011).

28 *Id.* at 2440 (emphasis omitted) (Breyer, J., dissenting).

29 INS v. Lopez-Mendoza, 468 U.S. 1032, 1034 (1984).

30 *Id.* at 1034–36. Both cases arose out of the Ninth Circuit. *Id.* The first case, *Lopez-Mendoza*, originated in a California immigration court; the second, *Sandoval-Sanchez*, originated in a Washington immigration court. *Id.* Both individuals challenged the introduction of evidence under the Fourth Amendment. *Id.* The immigration courts in both cases denied the challenges and ultimately ordered both individuals deported. *Id.* The

under different circumstances, but both subsequently admitted illegal entry into the United States.[31] Both men objected to the legality of their arrests in immigration court.[32] Immigration judges in both hearings found that the legality of the arrests irrelevant and therefore ordered both men deported.[33] Both men appealed the deportation order to the Board of Immigration Appeals, which sustained the orders and reasoning of the lower court.[34] Both men again appealed, this time to the Ninth Circuit.[35] The Ninth Circuit reversed by hold-

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factual situations surrounding their arrests varied, though both were arrested during workplace raids. *Id.* at 1035–36. In Lopez-Mendoza's case, the INS, operating on a tip, did not have an arrest warrant and were denied entry to the building by the owner of the business during work hours. *Id.* at 1035. Despite this refusal, the INS proceeded onto the property and began to question Lopez-Mendoza. *Id.* He admitted his name, Mexican citizenship, and lack of family ties in the United States. *Id.* Based on this information, the INS arrested Lopez-Mendoza and took him to INS offices for further questioning. *Id.* During this subsequent questioning, Lopez-Mendoza admitted that he had entered the United States without authorization. *Id.* The INS officers prepared an I–213 Record of Deportable Alien form, and dictated an affidavit that Lopez-Mendoza subsequently signed. *Id.* During immigration court, he objected to the legality of the arrest, but the immigration judge ruled that such issue was irrelevant in immigration court. *Id.*

The INS similarly arrested Sandoval-Sanchez at work during an immigration raid. *Id.* at 1036. In this case, the INS did receive permission from the manager on duty. *Id.* Agents stationed themselves at the entrance to the plant to observe "passing employees who averted their heads, avoided eye contact, or tried to hide themselves in a group." *Id.* at 1036–37. They then questioned the individuals and if they were unable to respond to general questions in English or "otherwise aroused [the agent's] suspicions" they were questioned about their immigration status. *Id.* at 1037. The agents did not recall Sandoval-Sanchez's questioning specifically but stated that they were "certain that no one was questioned about his status unless his actions had given the agents reason to believe that he was an undocumented alien." *Id.* Sandoval-Sanchez maintains he was never told of his right to remain silent. *Id.* In immigration court, Sandoval-Sanchez objected to the legality of his arrest, but the immigration judge first ruled that the arrest was not illegal, and alternatively that such issue was not relevant. *Id.*

31 *Id.* at 1035, 1037.

32 *Id.* Sandoval-Sanchez also objected to his admission of illegal entry, but Lopez-Mendoza did not. *Id.* at 1040.

33 *Id.* at 1034.

34 *Id.*

35 *Lopez-Mendoza*, 468 U.S. at 1034. Immigration proceedings are administrative court proceedings housed within the Executive Office of Immigration Review. 8 C.F.R. § 1003.0(a) (2004). The trial stage is set before immigration judges in courts that are located throughout the United States. 8 C.F.R. § 1003.9(d) (2007). Appeals are then taken to the next level, the Board of Immigration Appeals, 8 C.F.R. § 1003.1(b) (1997), and are typically based on briefs, rather than oral argument. *See* 8 C.F.R. § 1003.1(e)(7)–(8) (1997) (providing that oral argument before a panel of Board members is not given as of right, but as a matter of discretion). The Board of Immigration Appeals is located in Arlington, Virginia, and all immigration court appeals throughout the country are centralized there. *Id.* However, for the next level of review, the circuit courts, jurisdiction lies with the circuit in which the immigration proceedings originated. Immigration and Nationality Act, Pub. L. No. 82–414 INA § 242, 66 Stat. 163, 208–210 (1952) (codified as amended at 8 U.S.C. § 1252(b)(2)).

ing that the Fourth Amendment exclusionary rule applied in immigration court.[36] The Supreme Court reviewed the case using the *Janis* balancing test and ultimately held that the exclusionary rule does not apply to civil immigration proceedings.[37]

This Part will discuss the application of the *Janis* test in *Lopez-Mendoza*. Section A gives a brief overview of how immigration proceedings were structured at the time of the *Lopez-Mendoza* decision. Section B reviews the Supreme Court's decision to use the *Janis* test, and then discusses the application of the test.

A. Background on Immigration Proceedings

In order to fully understand the effect of suppression in immigration proceedings, some background related to the structure of immigration proceedings at the time of the *Lopez-Mendoza* decision is required. Immigration proceedings are civil cases, adjudicated by imimmigration judges within an administrative agency.[38] Immigration proceedings are divided into two separate phases: first, the determination of whether an individual is deportable from the United States, and then whether they are eligible for a form of relief from deporta-

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36 *Id.* The immigration judge in Sandoval-Sanchez's case made a finding on the legality of the arrest, so the Ninth Circuit was able to make a substantive ruling in his case, finding that the immigration judge erred, and that the arrest and subsequent admission should be suppressed. *See id.* at 1037–38 (discussing the Ninth Circuit's reasoning for its decision with respect to Sandoval-Sanchez's case). Since the immigration judge had avoided the substantive issue of the legality of arrest in Lopez-Mendoza's case, the Ninth Circuit reversed the order of deportation and remanded back to the court to undergo the analysis. *Id.* at 1035–36.

37 *See id.* at 1042 ("Applying the *Janis* balancing test to the benefits and costs of excluding concededly reliable evidence from a deportation proceeding, we therefore reach the same conclusion as in *Janis* [that the exclusionary rule should not apply to these proceedings]."). Justice O'Connor wrote the opinion for Parts I–IV in which Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist joined; and Part V for which only Blackmun, Powell, and Rehnquist joined. *See id.* at 1034 (noting the justices who joined with respect to each part of the opinion). Justices Brennan, White, Marshall, and Stevens all filed dissenting opinions. *Id.* at 1051–61 (containing the various dissenting opinions).

38 8 C.F.R. § 1003.14 (2012). The Executive Office for Immigration Review ("EOIR") was created in 1983, just before the Supreme Court decision in *Lopez-Mendoza*. *See* 48 Fed. Reg. 8038, 8038–40 (Feb. 25, 1983) (to be codified at 8 C.F.R. pts. 1, 3, 100) (announcing the creation of the EOIR). It is important to note that the cases on review in *Lopez-Mendoza* were adjudicated under the former structure of the INS that included special inquiry officers within the INS, rather than Administrative Law Judges within EOIR. However, these changes were made well before the case was briefed and argued before the Supreme Court. The case was argued on Wednesday, April 19, 1984. *Lopez-Mendoza*, 468 U.S. at 1032.

tion.[39] Further, there were two types of proceedings: the first, exclusion proceedings, applied to individuals who were seeking admission to the United States; the second, deportation proceedings, to those who had either entered the United States without inspection, or to those who had entered lawfully but were charged with violating the terms of their stay in the United States.[40]

In an exclusion proceeding, the burden is on the alien to demonstrate that they are eligible to enter the country.[41] In a deportation proceeding, the initial burden is placed on the government to show by "clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true."[42] In order to meet this burden, a finding of deportation must be based on "reasonable, substantial, and probative evidence."[43] Note that the different burdens of proof in these two proceedings have a profound effect on certain constitutional rights.[44] For instance, although an individual may rely on the Fifth Amendment to remain silent about potential information lead-

39 *See* INA § 240(a)(1) (codified as 8 U.S.C. 1229a(a) (2006)) (determining deportabilitiy); *see also* INA § 240(c)(4) (codified as 8 U.S.C. 1229a(c)(4) (2006)) (governing applications for relief from deportation).

40 Although those not practicing in immigration court colloquially refer to all immigration proceedings as "deportation," it is important to distinguish the legal terms for proceedings. As discussed here, the actual proceedings pre-1996 were termed "exclusion/deportation," while after 1996 and the statutory revamp of IIRIRA, the proceedings were unified into what are called "removal proceedings." For a more in-depth explanation of these proceedings, see THOMAS ALEINIKOFF, DAVID MARTIN, HIROSHI MOTOMURA, AND MARYELLEN FULLERTON, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 1147–48, 1158–1773 (7th ed. 2011).

41 *See In re* Singh, 21 I&N Dec. 427, 431 n.4 (BIA 1996) ("The burden in exclusion proceedings is ordinarily upon the applicant to establish that he is admissible to the United States."); *see also* INA, Pub. L. No. 82–414, § 291, 66 Stat. 163, 234–35 (1952) (codified as amended at 8 U.S.C. § 1361 (1994)). Although courts often cite to the United States Code when referring to the Immigration and Nationality Act (found in Chapter 8), this Article cites directly to the INA because it has not been incorporated into the Code as positive law. *See* Positive Law Codification, OFFICE OF THE LAW REVISION COUNSEL, http://uscode.house.gov/codification/legislation.shtml (last visited Feb. 21, 2015, 5:10 PM) (indicating non-positive law titles in the Code, including Title 8).

42 Woodby v. INS, 385 U.S. 276, 286 (1966); *see also* 8 C.F.R. § 240.8(a) (1997) ("A respondent charged with deportability shall be found to be removable if the Service proves by clear and convincing evidence that the respondent is deportable as charged."). This would require the government to demonstrate respondent's alienage, and to provide some evidence that he or she was not lawfully present. *See* INA § 240(c)(3) (2004) (articulating the kind of evidence the government must present to meet its burden).

43 INA, Pub. L. No. 82–414, § 242(b)(4), 66 Stat. 163, 210 (1952) (codified as amended at 8 U.S.C. § 1252(b)(7)(B)).

44 *See In re* Castellon, 17 I&N Dec. 616, 620 (BIA 1981) (citing *In re* Cenatice, et al., 16 I&N Dec. 162 (BIA 1977)) ("[A]pplicants for admission in exclusion proceedings do not ordinarily enjoy the same constitutional rights that are available to aliens who have made an entry into the United States.")

ing to a criminal prosecution,[45] an immigration judge may draw an adverse inference from this silence.[46] Thus, mere silence in an exclusion proceeding could lead to a finding against the alien because the burden is on the alien to present evidence of lawful presence in the country.[47] However, in a deportation proceeding, because the burden is on the government to prove unlawful presence in the country, a statement of silence could still lead to the government failing to meet the burden for deportation if no other evidence is introduced.[48]

In both deportation and exclusion proceedings, once the first phase of the hearing is complete and the individual is found to be either excludable or deportable, the individual is then allowed to request relief from deportation from the United States.[49] Although the Court was not faced with the issue of forms of relief in *Lopez-Mendoza*, it is important to note that an individual in deportation proceedings was eligible for a number of additional forms of relief than an individual in exclusion proceedings.[50] Decisions from the immigration

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45 *See In re* R-, 4 I&N Dec. 720, 721 (BIA 1952) ("The fifth amendment to the Constitution of the United States protects a witness testifying in deportation proceedings from giving evidence which would tend to show his guilt under a Federal criminal statute.") (citations omitted).

46 *See In re* Guevara, 20 I&N Dec. 238, 241 (BIA 1991) ("[U]nder certain circumstances, an adverse inference may indeed be drawn from a respondent's silence in deportation proceedings.").

47 *See id.* at 241–42 (citing United States v. Sing Tuck, 194 U.S. 161 (1904)) (discussing exclusion proceedings and noting that "when confronted with evidence of, for example, the respondent's alienage, the circumstances of his entry, or his deportability, a respondent who remains silent may leave himself open to adverse inferences, which may properly lead in turn to a finding of deportability against him").

48 *Id.* at 242 (finding that the holdings of cases in the context of exclusion proceedings "by no means mitigate the clear requirement . . . that the burden of proof in deportation proceedings is upon the Service to establish the alienage of the respondent, and ultimately his deportability, by evidence that is clear, unequivocal, and convincing").

49 There are various forms of relief found throughout the INA, ranging from voluntary departure, which simply allows the individual to voluntarily leave the country without an order of deportation and the accompanying penalties, to asylum, which eventually allows the individual to become a lawful permanent resident. *See* INA, Pub. L. No. 82–414, § 242(b)(1), 66 Stat. 163, 210 (codified as amended at 8 U.S.C. § 1252(b) (1994)) (providing for voluntary departure for alien under deportation proceedings); INA § 208 (codified as amended at 8 U.S.C. § 1158 (1994)) (allowing aliens physically present in the United States to apply for asylum); INA §§ 242(b)(1), 208 (1994). The forms of relief from deportation are located throughout the INA and come in the form of waivers (such as section 212(c) or 212(h)) or substantive relief (such as asylum under section 208). *See* Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 441 n.19 (1992) (discussing the major forms of relief available in deportation proceedings).

50 For instance, while asylum under § 208 was available in both exclusion and deportation proceedings, voluntary departure and suspension of deportation was only available in de-

court are directly appealed to the Board of Immigration Appeals (BIA).[51]

In order to address the propriety of using the exclusionary rule in *Lopez-Mendoza*, the Court first looked to how the two individuals attempted to invoke the rule during the first phase of immigration proceedings.[52] In the first case, Lopez-Mendoza argued the illegality of the arrest led to his placement in immigration court, and objected only to the fact of initiation of proceedings against him.[53] The Court quickly dispensed of his case by holding that even if the exclusionary rule applied in immigration court, the outcome would not have changed his case.[54] The Court reasoned that because Lopez-Mendoza objected only to the initiation of proceedings, and not to the evidence presented against him, use of the exclusionary rule would not benefit him.[55]

Sandoval-Sanchez, however, objected not only to the proceedings, but also to the evidence presented against him—namely, the I-213 that formed the basis for his arrest and statements made during the arrest.[56] The Court recognized that Sandoval-Sanchez's objection to the evidence offered against him was properly within the purview of the exclusionary rule, as both statements and evidence obtained in violation of the Fourth Amendment would be excluded if the conduct in question had a substantial connection to the unlawful con-

portation proceedings. INA, Pub. L. No. 82–414 § 242(b)(1), 66 Stat. 163, (codified as amended at 8 U.S.C. § 1252 (1994)); INA, Pub. L. No. 82–414 § 244, 66 Stat. 163, (codified as amended at 8 U.S.C. § (1994)); INA §§ 242(b)(1), 244 (1994).

51 8 C.F.R. 1240.15.

52 INS v. Lopez-Mendoza, 468 U.S. 1032, 1040 (1984).

53 *Id.*

54 *Id.*

55 *Id.* Prior cases, both in criminal as well as civil forfeiture proceedings, have held that the identity, or "body," of an individual is a fact that is not suppressible under the exclusionary rule. *Id.* at 1039–40.

56 *See id.* at 1037–38, 1040 (describing the initial proceedings in Sandoval-Sanchez's case). An I–213 is a Record of Deportable Alien, which is "essentially a recorded recollection of a conversation with the alien" by the examining officer. Bustos-Torres v. INS, 898 F.2d 1053, 1056 (5th Cir. 1990).

duct.[57] The question therefore became whether, and to what extent, the exclusionary rule applied to immigration proceedings.[58]

B. Application of the Exclusionary Rule in Civil Proceedings: The Janis *Test*

In order to assess whether the exclusionary rule should apply in immigration proceedings, the Court began by determining the nature of the proceeding, finding it to be "a purely civil action to determine eligibility to remain in the country, not to punish an unlawful entry."[59] In comparing immigration court proceedings to the criminal system, the Court indicated that the only issue adjudicated in the immigration context is whether the individual should be deported, rather than a determination of guilt for potential criminal violations related to immigration (such as unlawful entry).[60] Citing multiple cases, the Court observed that constitutional protections in criminal proceedings do not automatically extend to immigration proceedings.[61] In addition, the Court observed, the burden of proof in immigration court is significantly different from the "beyond a reasonable doubt" burden in the criminal context.[62] The INS has the burden to demonstrate identity and alienage based on "reasonable, substantial, and probative evidence" for an alien who entered the

57 *See Lopez-Mendoza*, 468 U.S. at 1040–41 (citing Wong Sun v. United States, 371 U.S. 471 (1963)) ("The general rule in a criminal proceeding is that statements and other evidence obtained as a result of an unlawful, warrantless arrest are suppressible if the link between the evidence and the unlawful conduct is not too attenuated."); *see also* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that "all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court"); Weeks v. United States, 232 U.S. 383, 398 (1914) (establishing the exclusionary rule).

58 *See Lopez-Mendoza*, 468 U.S. at 1041 ("The reach of the exclusionary rule beyond the context of a criminal prosecution . . . is less clear . . . . [T]he court has never squarely addressed the question before.").

59 *Id.* at 1038. The Supreme Court has long held that deportation is not a punishment, but instead "removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare." Fong Yue Ting v. United States, 149 U.S. 698, 709 (1893). For a discussion of deportation as punishment, see Sarah Paige, *Deportation, Due Process, and Deference: Recent Developments in Immigration Law*, 22 COLUM. J. OF POL. & SOC'Y 149, 179–82 (2011).

60 *See Lopez-Mendoza*, 468 U.S. at 1038 ("The judge's sole power [in a deportation hearing] is to order deportation; the judge cannot adjudicate guilt or punish the respondent for any crime related to unlawful entry into or presence in this country.").

61 *Id.* at 1038–39. *See, e.g.*, Galvan v. Press, 347 U.S. 522, 531 (1954) (finding no application of *Ex Post Facto* Clause to deportation); United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 157 (1923) (finding rule excluding involuntary confessions not applicable in deportation hearings); Navia-Duran v. INS, 568 F.2d 803, 808 (1st Cir. 1977) (finding no requirement of *Miranda* warnings in deportation case).

62 *Lopez-Mendoza*, 468 U.S. at 1039 (citation omitted).

country unlawfully.[63] The burden then shifts to the alien to prove any eligibility for relief from deportation.[64] Based on these facts, the Court held that the system was purely civil.[65] Accordingly, the Court concluded that the *Janis* test should be utilized to determine whether the exclusionary rule applies to immigration proceedings.[66]

The Court acknowledged that the reach of the exclusionary rule outside of the criminal context was "less clear" and had "never [been] squarely addressed."[67] The Court turned to the framework set out in *United States v. Janis*, noting that, although the test was imprecise, it created the necessary tools for weighing social benefits against social costs.[68] In *Janis,* the Court indicated that any balancing must recognize that the "prime purpose" of the exclusionary rule "is to deter future unlawful police conduct."[69] After weighing the benefits and costs in that case, the Court held the exclusionary rule inapplicable because it was not necessary to deter the actors through exclusion of evidence in a civil hearing.[70] After all, reasoned the Court, the exclusionary rule already renders unlawfully seized evidence unavailable in any state or federal criminal trial.[71] Put differently, the Court thought that there would be no benefit in deterrence, but a significant cost in loss of evidence. In relying on the *Janis* balancing in *Lopez-Mendoza*,

63 *Id.*

64 *See* 8 U.S.C. § 1229a(c)(2)(A) (2012) ("In the proceeding the alien has the burden of establishing—(A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible . . . .").

65 *Lopez-Mendoza*, 468 U.S. at 1038.

66 *See id.* at 1042 (applying the *Janis* balancing test). However, it is important to note that the Justices made a leap in logic by stating that simply because several criminal constitutional protections do not apply in a civil context, that the proceeding was meant to be only a streamlined process of eligibility to remain in this country and "nothing more." *See id.* at 1039 ("In short, a deportation hearing is intended to provide a streamlined determination of eligibility to remain in this country, nothing more."). Although this Article discusses only the evolution of immigration law and increasing complexity since *Lopez-Mendoza*, courts have long stated that deportation proceedings are far from a non-complex, "streamlined" process. *See infra* Part II.A.2.

67 *Lopez-Mendoza*, 468 U.S. at 1041. The Court noted that the issue had been discussed in a prior case, *Bilokumsky*, 263 U.S. at 155, wherein the Court "assumed" evidence obtained in violation of the Fourth Amendment would be excluded from a hearing within the Department of Labor. However, that case did not expressly analyze whether the rule *should* be applied. *Lopez-Mendoza*, 468 U.S. at 1041.

68 *Id.*

69 United States v. Janis, 428 U.S. 433, 446 (1976) (quoting United States v. Calandra, 414 U. S. 338, 347 (1974)).

70 *Id.* at 454.

71 *Id.* at 446–47.

the Court solidified an actual test to determine to what extent the exclusionary rule would apply in the civil context.[72]

To apply the test in *Lopez-Mendoza*, the Court first assessed the deterrent value of the exclusionary rule in immigration proceedings, highlighting six major factors: (1) the primary objective of the enforcement agents; (2) whether the enforcement agents are within the same agency initiating proceedings; (3) what effect the suppression will have on the proceedings; (4) current use of the suppression doctrine; (5) internal agency procedures for addressing Constitutional violations; and (6) alternative remedies available.[73]

The Court recognized that two factors favored use of the exclusionary rule in the immigration system. First, although immigration proceedings are often viewed as the civil complement to a potential criminal trial (e.g., unlawful entry),[74] the Court noted that only "a very small percentage" of the individuals in immigration proceedings are actually prosecuted criminally.[75] Thus, immigration enforcement agents primarily seek to use evidence gained from arrests in the civil immigration proceedings.[76] Excluding evidence in an immigration proceeding would result in a high level of deterrence, as it would be the only venue in which the evidence is presented.[77] Second, the same agency[78] that effectuates an arrest will also decide whether to initiate immigration proceedings.[79] Key in this factor is the intrasovereign nature of the violation: The agency that seeks to benefit from the evidence is the same agency that controls the agents gathering the evidence.[80] The Court held that against this backdrop, suppressing evidence would serve as an effective deterrent because of the direct and negative consequence to both the officers and the agency collecting the evidence.[81]

In addition to analyzing if exclusion would deter agents from committing Fourth Amendment violations, the Court noted a sec-

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72 *Lopez-Mendoza*, 468 U.S. at 1041.

73 *Id.* at 1042–45.

74 The INA provides for both civil and criminal penalties for various infractions. For instance, unlawful entry can result in a criminal charge under § 275, as well as a charge of inadmissibility in immigration proceedings under § 212.

75 *Lopez-Mendoza*, 468 U.S. at 1042–43.

76 *Id.* at 1043.

77 *Id.* at 1042–43.

78 At the time of the *Lopez-Mendoza* decision, immigration enforcement, prosecution, and adjudication were each carried out by the Immigration and Nationality Service. INA §§ 235, 239 (1996).

79 *Lopez-Mendoza*, 468 U.S. at 1043.

80 *See id.* at 1043; *see also Janis*, 428 U.S. at 455.

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

ondary test in civil court exclusion cases—that is, whether social costs associated with exclusion are properly outweighed by individual privacy benefits.[82] In the case of immigration proceedings, the Court determined that the costs to society were high, thus resulting in little benefit.[83] The main cost with applying the exclusionary rule, according to the Court, was the prospect of a large undocumented population and the need to address this problem.[84] Particularly problematic for the Court was the nature of immigration laws governing undocumented presence.[85] Given that unlawful presence in the country is a continuing violation, the Court compared release from immigration court to forcing law enforcement agents to return unlawful explosives, drugs, or firearms to individuals if seized in violation of the Fourth Amendment. [86] In a reference to Justice Benjamin Cardozo's oft-cited quotation from *People v. Defore*, the Court stated that "[t]he constable's blunder may allow the criminal to go free, but we have never suggested that it allows the criminal to continue in the commission of an ongoing crime."[87]

The only societal benefit the Court addressed in its opinion was the need to protect the constitutional rights of both documented immigrants and citizens.[88] Although a "legitimate and important concern," said the Court, it quickly rejected the argument because those present *lawfully* would not benefit from suppression; after all, they cannot be placed in deportation proceedings.[89] Thus, the only additional Fourth Amendment protection available to these individuals would be to deter INS agents from arresting them, which the Court had already discussed as being ineffectual due to the vast number of arrests made by each agent.[90]

In assessing the factors that would decrease the deterrent effect of the use of the exclusionary rule, the Court noted three factors: (1) the streamlined nature of immigration proceedings, (2) the INS's in-

82 *See id.* at 1046.

83 *Id.* at 1047–48.

84 In discussing the number of undocumented immigrants present, as well as the number arrested each year, the Court discussed "the staggering dimension of the problem that the INS confronts." *Id.* at 1049.

85 *Id.* at 1046.

86 *See id.* at 1046. Unlawful presence is a violation of the civil portion of the INA and is considered "continuing" as long as the individual does not have status. INA § 212(a)(6)(A). As civil violation of the INA, it is the basis for institution of immigration proceedings. INA §§ 239–40.

87 *Lopez-Mendoza*, 468 U.S. at 1047 (quoting People v. Defore, 242 N.Y. 13, 21 (1926)).

88 *See id.* at 1045.

89 *Id.* at 1045–46.

90 *See infra* notes 99–101.

ternal control over Fourth Amendment violations, and (3) the lack of individual deterrent effect on any given agent within the INS because of the large numbers of arrests made by each agent.[91] Regarding the streamlined nature of immigration proceedings, the Court stressed the need to maintain a simplified hearing process for determining whether an individual should be removed from the United States.[92] To support this idea, the Court cited to *In re Sandoval*, in which the BIA stated that immigration hearings typically involve "simple factual allegations and matters of proof."[93] As such, immigration judges would not likely be familiar with "the intricacies of Fourth Amendment law."[94] The Court further stated that the fast-paced and simplified nature of the apprehension, hearing, and deportation of individuals should excuse enforcement agents from the need to "compile elaborate, contemporaneous, written reports detailing the circumstances of every arrest."[95]

Another important factor in the Court's analysis was that INS had developed its own internal "comprehensive scheme for deterring Fourth Amendment violations . . . ."[96] Included in this comprehensive scheme were: internal regulations, initial training, continuing education, and an internal process for investigation and punishment for violations.[97] Because INS agents were the only individuals charged with enforcing civil immigration law, and each one was subject to this comprehensive scheme of training and investigation, adding the exclusionary rule would not likely result in increased deterrence of unconstitutional behavior.[98]

The Court also noted that the number of arrests that result in hearings (versus individuals that voluntarily depart) did not support the notion that any individual agent would be affected in a significant enough manner to cause a change in behavior.[99] Based on numbers provided by the agency in appellate briefs, each agent arrests about 500 people per year.[100] Of those arrested in any given year, about

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91 *Lopez-Mendoza*, 468 U.S. at 1043–48.

92 *Id.* at 1048–49.

93 *Id.* (quoting *In re* Sandoval, 17 I&N 70, 80 (1979).

94 *Id.* at 1048.

95 *Id.* at 1049.

96 *Id.* at 1044. The Court admitted that an internal scheme does not guarantee compliance with the Fourth Amendment but noted that "[d]eterrence must be measured at the margin." *Id.* at 1045.

97 *Id.* at 1045.

98 *Id.*

99 *Id.* at 1044.

100 *Id.* (citation omitted).

97.5% agree to leave without a hearing in a procedure known as "voluntary departure."[101] Of the remaining 2.5%, few challenge their arrests and instead seek a form of relief from deportation in immigration court.[102]

The data therefore reveals that even if 25% of those who pursue proceedings filed motions to suppress, then objections would occur in only three out of 500 arrests.[103] In the past thirty years, fewer than fifty cases raised a Fourth Amendment challenge to the introduction of evidence at the BIA level, and only two of those applied to the exclusionary rule.[104]

Finally, the Court noted that even if a respondent were allowed to suppress evidence gathered during an arrest, a removal hearing would likely still proceed because of evidentiary rules, burdens of proof, and the inability to utilize other criminally related constitutional doctrines.[105] As Lopez-Mendoza's case demonstrated, the "body" is not suppressible under criminal, let alone civil, court cases.[106] The Court reasoned that the presence of the respondent in court, coupled with both the low statutory burden on the government and the ability to draw an adverse inference from silence, would result in sufficient evidence to move forward in an immigration proceeding even if certain evidence was suppressed.[107]

In what was to become the most litigated aspect of the case, the widespread violations and egregiousness exception, Justice Sandra Day O'Connor included a single paragraph in Part V of the opinion, which only four of the five majority opinion Justices joined.[108] In this single paragraph, Justice O'Connor left open a crack in immigration-related litigation by stating that the holding of the Court dealt only with "peaceful arrests" and not "egregious violations of Fourth

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101 *Id.* An individual can choose to leave the United States voluntarily without invoking their right to immigration proceedings. INA § 240B(a), 8 U.S.C. § 1229c(a) (2006); C.F.R. § 240.25.

102 *Lopez-Mendoza*, 468 U.S. at 1044.

103 *See id.*

104 *Id.*

105 *Id.* at 1043–44.

106 *Id.* at 1039.

107 *Id.* at 1043–44. *See supra* notes 41–45 and accompanying text, for a discussion on the burden of proof and the Fifth Amendment right to remain silent in immigration proceedings.

108 *Lopez-Mendoza*, 468 U.S. at 1050–51 (acknowledging that the majority's "conclusion concerning the exclusionary rule's value might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread," and noting that this case did not "deal [] with egregious violations of Fourth Amendment or other liberties").

Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained."[109] Furthermore, Justice O'Connor noted that the Court's decision could be swayed "if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread."[110]

II. REASSESSING SOCIAL COST AND DETERRENCE BENEFITS

Both immigration and criminal suppression law have undergone substantial changes since the *Lopez-Mendoza* case. In the nearly thirty years since the decision, the changes to both aspects of the law are too numerous to discuss in one article.[111] This Part discusses how changes related to the process in immigration proceedings and the structure of enforcement have fundamentally altered three of the main factors the Court pointed to as decreasing the deterrence value of the exclusionary rule in *Lopez-Mendoza*. Section A discusses how intervening legislation has changed the nature of the judicial system through unification of the deportation proceeding and increased complexity in the law during both phases of the proceeding (determination of deportation and requests for relief). Section B focuses on how the use of state and local law enforcement has watered down the comprehensive scheme the Court pointed to in assessing the INS's ability to self-regulate violations. And finally Section C addresses how the introduction of these changes has drastically decreased the number of arrests each agent has, resulting in an increase of individual deterrent effect of the exclusionary rule.

A. Nature of Immigration Proceedings

Out of the many changes to the immigration system since *Lopez-Mendoza*, there are three pieces of legislation that have had the larg-

109 *Id.*

110 *Id.* at 1050.

111 For example, there are over 100 pieces of legislation since 2000 that have amended the INA to some degree or another. Some of these pieces were directed at specific groups of people, such as lawful permanent residence for members of the Armed Forces. Act of Nov. 23, 2011, Pub. L. NO. 112–58, 125 Stat. 747. Others saw more sweeping changes throughout the statute, with changes to various immigration definitions and benefits. *See, e.g.*, Child Status Protection Act of 2002, Pub. L. NO. 107–208, 116 Stat. 927 (redefining whether an alien is a child for the purposes of classification as an "immediate relative"). This legislation contained mainly employer sanctions and discrimination issues, but also saw the first major "legalization" of unlawful presence. Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, 100 Stat. 3359.

est impact: the Immigration Act of 1990,[112] and the 1996 dual legislation found in the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), the Antiterrorism and Effective Death Penalty Act ("AEDPA").[113] This Section first reviews how IIRIRA made significant changes to the process in deportation proceedings, then focuses on how all three of these pieces of legislation increased the complexity of the nature of immigration law.

1. *From Exclusion and Deportation to Removal*

IIRIRA made a fundamental change to the deportation process as described in Part I of this Article. Rather than two separate types of proceedings—exclusion and deportation—IIRIRA folded them together into one "removal proceeding."[114] By creating unified removal proceedings, Congress essentially eliminated any procedural distinction between those who entered with documentation and those who did not in order to streamline the deportation process.[115] The unified removal proceeding follows many of the same procedures as the old form of deportation hearings (as opposed to exclusion proceedings).[116] Once an individual comes to the attention of Immigration and Customs Enforcement ("ICE"), they are issued a Notice to Ap-

112 Immigration Act of 1990, Pub. L. NO. 101–649, 104 Stat 4978.

113 Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. NO. 104–208, 110 Stat. 3009–546. IIRIRA was passed simultaneously with the Antiterrorism and Effect Death Penalty Act of 1996, Pub. L. NO. 104–132, 110 Stat. 1214. Jointly, these two statutes changed everything from criminal sanctions, to grounds for deportation, and the judicial system. Although these changes are the most significant for purposes of this article, it should be noted that extensive changes were made after 1984 and before IIRIRA. *See* Kati L. Griffith, *Perfecting Public Immigration Legislation: Private Immigration Bills and Deportable Lawful Permanent Residents*, 18 GEO. IMMIGR. L.J. 273, 289–90 (2004) (discussing the state of immigration law prior to 1996).

114 IIRIRA §§ 304, 308 (codified at INA §§ 239, 240C, and INA §§ 238–240, 240C). In addition to the unified removal proceedings, IIRIRA created "expedited removal" which applies to anyone attempting to enter the country without documentation or using false documents, and to unlawful entrants within the border zone. IIRIRA § 302 (codified at INA § 235). Although this Article focuses on the internal procedure of removal proceedings, it should be noted that expedited removal is the subject of scrutiny by scholars for lack of constitutional protections. *See* Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475, 520–29 (2013) (arguing that stipulated removal orders run afoul of due process).

115 *See* Patricia Flynn & Judith Patterson, *Five Years Later: Fifth Circuit Case Law Developments Under the Illegal Immigration Reform and Immigrant Responsibility Act*, 53 BAYLOR L. REV. 557, 561 (2001) ("[T]o streamline the removal process, IIRIRA provided for limited judicial review [and] expedited removal proceedings (removal without a hearing before an immigration judge) . . . ." (footnotes omitted)).

116 IIRIRA §§ 304, 308 (codified at INA § 239–40) (describing the procedures for removal proceedings).

pear ("NTA").[117] The NTA will provide factual allegations, including alienage, as well as charges of removability.[118] The charges will fall into one of two categories: either deportability or inadmissibility.[119] If an individual is charged with deportability, they have been admitted to the United States in some status (entered with a temporary or permanent visa) and their status is called into question.[120] If an individual is charged with inadmissibility, they did not enter the United States in any status and are undocumented.[121]

In removal proceedings, the government has the initial burden to demonstrate deportability.[122] For those aliens charged with removability, the government must demonstrate alienage and that the alien is deportable under immigration laws by "clear and convincing evidence."[123] For those aliens charged with inadmissibility, the government must only demonstrate alienage, and then the alien must show clearly and beyond a doubt that they are not inadmissible.[124] If the individual is shown to be either inadmissible or deportable, they can then apply for any number of forms of relief from removal.[125] It is, of course, the individual's burden to demonstrate not only eligibility for

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117 IIRIRA § 304 (codified at INA § 239(a)(1)).

118 *Id.*

119 *See* 8 U.S.C. § 1182 (2012) (describing classes of inadmissible aliens); *see also* 8 U.S.C § 1227 (2012) (describing classes of deportable aliens). Although the procedure is unified into removal proceedings, the distinction between inadmissibility and deportability mirror the old system's distinction between exclusion proceedings and deportation proceedings. *See* Dana Leigh Marks and Denise Noonan Slavin, *A View Through the Looking Glass: How Crimes Appear from the immigration court Perspective,* 39 FORDHAM URB. L.J. 91, 96 n.21 (2011) (noting that, despite the unification of exclusion proceedings and deportation proceedings into removal proceedings, "in many ways the procedures remain substantially unchanged as there are still significant legal distinctions between those individuals who are seeking admission as opposed to those who have already entered the country, either legally or illegally").

120 Any violation of the terms of an individual's stay can lead to this, including overstaying a temporary visa, or the commission of specific types of crimes. 8 U.S.C. § 1227(a) (2012). Nonimmigrants are typically given a specific period of time to remain in the United States. 8 U.S.C. § 1227 (b), (d) (2012). Any violation of the grounds of deportability will lead to the institution of removal proceedings. INA § 237(a)(2008) (codified as 8 U.S.C. § 1227(a) (2012)).

121 The section of the INA that applies to these individuals is the section that applies to any individual seeking entrance, or admission, into the country. INA § 212(a) (codified as 8 U.S.C. § 1182 (2013). The INA sets up a legal fiction that, although the individual is in the United States, they are not "legally" present. *Id.*

122 IIRIRA § 304 (codified at INA § 240(c)(3)).

123 *Id.*

124 This burden applies to both arriving aliens and aliens present without admission or parole. *Id.* § 304 (codified at INA § 240(c)(2)(A)–(B)).

125 REAL *ID* Act of 2005, Pub. L. No. 109–13, § 101(d), 119 Stat. 302, 304 (codified as amended at INA § 240(c)(4)).

the form of relief, but also that they merit a favorable exercise of discretion on the part of the immigration judge.[126]

As with the prior deportation hearings, the current immigration court is set up as an adversarial bench hearing.[127] There is an impartial immigration judge, charged with upholding the immigration statutes.[128] The two parties are the alien, or respondent, and the government, represented by the Litigation Unit of ICE.[129] During the master calendar, the preliminary hearing, the respondent pleads to the charges listed in the NTA.[130] The Respondent can either admit the allegations or concede the charges and state the form of relief they seek, or she can deny the allegations and charges, and request a contested removability hearing.[131] Then an individual calendar hearing is set to hear the merits[132] of the case (either the form of the relief, or accuracy of charges).[133] Since the Federal Rules of Civil Procedure and the Federal Rules of Evidence do not apply in immigration court, the governing body of the agency has issued an immigration court Practice Manual, which serves to function in place of these rules.[134] Individuals in court must abide by these rules, which pertain to court appearances, filing deadlines, forms of motion, and procedures for filing.[135]

2. *Complexity*

Judges have often recognized the complexity of immigration law, pointing to both the intricacy of procedure, as well as challenges as-

126 *Id.* (codified as amended at INA §§ 240(c)(4)(B), 240(c)(4)(A)(ii).

127 Proceedings to Determine Removability of Aliens in the United States, 8 C.F.R. 1240.1(c) (2015).

128 Immigration judges are charged with many general judicial duties such as administering oaths, receiving evidence, and issuing subpoenas, but are also granted the right and duty to interrogate, examine, and cross-examine witnesses. *See* IIRIRA § 304 (codified at INA § 240(b)) (articulating immigration judges' roles and responsibilites).

129 *See* 8 C.F.R. 1240.2 (2007) ("Service counsel shall present on behalf of the government . . . .").

130 8 C.F.R. 1240.10(a). The NTA is divided into three main sections: The first contains factual allegations that allege country of birth and citizenship, date of entry, manner of entry, and any facts related to the violation of status or undocumented entry; the second section charges either removability or inadmissibility, as discussed above; the third section contains information on service of the NTA. IIRIRA § 304 (codified at § 239(a)(1)).

131 8 C.F.R. 1240.10(c).

132 *Id.*

133 *Id.* at § 1240.11.

134 *See immigration court Practice Manual*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm (last updated Oct. 2013) (providing guidelines for immigration court proceedings).

135 *Id.*

sociated with statutory interpretation and knowledge of the regulatory system.[136] The complexity of the laws has, on occasion, led to misunderstandings and even mistakes in court decisions.[137] Although there are a significant number of factors that have altered the immigration process since *Lopez-Mendoza*, changes in the substance of the law for the two-step process in immigration court (both the initial finding of inadmissibility/deportability and the potential forms of relief) have made a major impact on the increasing complexity of the adjudication process.[138] There are numerous ways in which the law has changed, but this Article will focus on three: the increasing of the number and nature of the grounds of inadmissibility and removability, changes in both the forms of relief available and the legal analysis used to make eligibility determinations, and structural changes to the immigration court that increased federal litigation.

The Immigration Act of 1990 was the first massive overhaul of the immigration system after the *Lopez-Mendoza* case.[139] Among other changes, the Act expanded the definition of criminal grounds of deportability, including controlled substance violations and crimes of violence, while also foreclosing any form of discretionary relief from

136 Circuit courts often express dismay at the labyrinthine laws that make up the immigration system. *See, e.g.*, Michele Kim, *The Complexity of Immigration Law*, IMMIGRATION DAILY, http://www.ilw.com/articles/2006,1215-kim.shtm (last visited Feb. 12, 2015) (providing a collection of quotations from the Second, Fifth, Ninth, and Eleventh circuits relating to this complexity). For example, in a decision pre-dating *Lopez-Mendoza*, the Second Circuit noted that "[t]he Tax Laws and the Immigration and Nationality Acts are examples we have cited of Congress's ingenuity in passing statutes certain to accelerate the aging process of judges." Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977).

137 David A. Isaacson, *If Even the Chief Justice Can Misunderstand Immigration Law*, THE INSIGHTFUL IMMIGRATION DAILY BLOG, CYRUS D. MEHTA & ASSOCIATES, PLLC (June 3, 2011), http://blog.cyrusmehta.com/2011/06/if-even-chief-justice-can-misunderstand.html (describing the failure of the majority in *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) to understand that the INA allows for work authorization to individuals that have been ordered removed by an immigration judge).

138 Many commentators and scholars have pushed for a massive reorganization of the immigration system, pushing some aspect of the adjudicative process to traditional Article I, or Article III courts. *See* Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L. J. 1635, 1640 (2010); National Association of immigration judges, *Improving Efficiency and Ensuring Justice in the immigration court System, Before the S. Comm. on the Judiciary*, May 18, 2011; LENNI B. BENSON & RUSSELL R. WHEELER, ENHANCING QUALITY AND TIMELINESS IN IMMIGRATION REMOVAL ADJUDICATION, REPORT FOR THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 117 (June 7, 2012).

139 Immigration Act of 1990, Pub.L. 101–649, 104 Stat. 4978. Although the 1986 IRCA made significant changes to the employment aspect of immigration and contained a major legalization aspect, the Immigration Act of 1990 made more pervasive changes including creating and changing the basis for many temporary and permanent visas, along with creating additional grounds for relief from deportation. *Id.* at. §§ 101–02, 111, 121, 301–03.

deportation.[140] IIRIRA, coupled with the Antiterrorism and Effective Death Penalty Act, again made a major change in the grounds of deportability, most notably by expanding the definition of "aggravated felony," a ground that not only results in deportation, but also results in ineligibility for most forms of relief in immigration.[141]

As the grounds for deportability have increased, so too has the complexity of the legal analyses surrounding the application of these grounds and eligibility for forms of relief. The increasing grounds of criminal basis for removability have inexorably tied the immigration system to criminal case law.[142] Although that relationship would seem to decrease complexity by allowing the immigration system to directly import legal analysis from the criminal system, it has on occasion resulted in an *increase* in complexity when immigration adjudicators elect to alter the criminal analysis.[143]

Despite this increasing complexity in immigration proceedings, the BIA was reduced in number and type of review. The BIA, the appellate body located within the immigration system, had grown to twenty-three judges who were responsible for reviewing all appeals from immigration proceedings appeals.[144] In 2002, the Attorney

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140 INA §§ 212(a)(2)(A)(i)(II) and 212(a)(2)(C)(i) both contain provisions for inadmissibility based on the definition of controlled substances in 21 U.S.C. § 802. One of the aggravated felonies triggering deportability is a crime of violence defined in 18 U.S.C. § 16. INA § 101(a)(43)(F).

141 *See* Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 111–14 (1998); *cf.* INA §§ 237(a)(2) and 101(a)(43) (defining aggravated felony).

142 The most obvious way this is found is within the INA itself. Many of the aggravated felonies are defined through the federal criminal code. INA §§ 101(a)(43)(A),(U). For instance, one of the enumerated aggravated felonies is a crime of violence "as defined in section 16 of title 18." 101(a)(43)(F). Well over half of the enumerated aggravated felonies contain such a reference. INA §§ 101(a)(43)(B)–(F), (H)–(M), (P).

143 A timely example of this is the battle surrounding the categorical analysis. Although traditionally applied in the immigration context as laid out in *Taylor v. United States*, 495 U.S. 575 (1990), the Attorney General issued *In re Silva-Trevino*, 24 I&N Dec. 687, 700, 704 (A.G. 2008), adding the ability for judges to consider "additional evidence" in certain circumstances. Jennifer Koh offers a more in-depth discussion of this case, and the impact of the recent Supreme Court decisions on the analysis, along with a discussion of complexity of deportability and forms of relief. Koh, *supra* note 16, at 1830–36. For an example of how forms of relief have been complicated, the REAL *ID* Act offers a prime example in the increased burden of proof, and credibility determination scheme laid out in INA § 208(b)(3) of the asylum statutes. For further discussion of the complexity of the asylum standard, *see* Anna O. Law, *The Ninth Circuit's Internal Adjudicative Procedures and Their Effect on Pro Se and Asylum Appeals*, 25 GEO. IMMIGR. L.J. 647, 653–57 (2011).

144 8 C.F.R. § 1003.1 (2008); Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,878 (Aug. 26, 2002) (codified at 8 C.F.R. § 1003 (2008)).

General introduced an initiative referred to as "streamlining."[145] This initiative resulted in a massive restructuring of the BIA, moving from twenty-three judges to eleven.[146] Further, while the practice in the past had been to have a three-judge panel review most cases, this initiative provided for the majority of cases to be reviewed by a single member.[147] Practitioners, scholars, and immigration judges criticized this new structure as creating a mere rubber stamp at this appellate level, resulting in record numbers of appeals in nearly every circuit around the country.[148] Wait times in immigration courts have steadily been rising, despite a decrease in charging documents being issued by ICE.[149]

B. Internal Control

Another major shift in the immigration process since *Lopez-Mendoza* is how civil immigration law is enforced.[150] When the *Lopez-Mendoza* decision came out, law enforcement and immigration agencies believed that although local law enforcement had the power to arrest based on federal criminal immigration law, federal officers ex-

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145 Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,881 (Aug. 26, 2002) (codified at 8 C.F.R. § 1003 (2008)).

146 Id.; see also Dory Mitros Durham, The Once and Future Judge: The Rise and Fall (and Rise?) of Independence in U.S. Immigration Courts, 81 NOTRE DAME L. REV. 655, 682–83 (2006).

147 8 C.F.R. § 1003.1(a) (2008).

148 For a comprehensive discussion of this phenomenon, including statistics related to increases in appeals, increasing summary affirmances at the Board level, and decreasing grants of forms of relief, *see* ANNA O. LAW, THE IMMIGRATION BATTLE IN AMERICAN COURTS 144–155 (2010); *see also* Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I immigration court*, 13 BENDER'S IMMIGRATION BULLETIN 3, 9 (2008); Margot K. Mendelson, *Constructing America: Mythmaking in U.S. Immigration Courts*, 119 YALE L.J. 1012, 1038 (2010); John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 6–7 (2005); Veena Reddy, *Judicial Review of Final Orders of Removal in the Wake of the Real ID Act*, 69 OHIO ST. L.J. 557, 596 (2008).

149 The average wait time in showing a steading increase in at least the past five years from 447 days in 2010 to 597 days in 2015. *Immigration Court Backlog Tool*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, *http://trac.syr.edu/phptools/immigration/court_backlog/* (last visited March 20, 2015). In addition, new case openings have steadily decreased since 2010 from 247,000 per year to a projected 221,500 per year in 2015. *New Filings Seeking Removal Orders in immigration courts through February 2015*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE http://trac.syr.edu/phptools/immigration/charges/apprep_newfilings.php (last visited Mar. 20, 2015).

150 As argued, *infra*, the creation of programs allowing state and local law enforcement is responsible for this change. INA § 287(g) (codified at 8 U.S.C. § 1357).

clusively enforced civil immigration law.[151] Of course, the law did not prohibit INS officers from requesting aid from local law enforcement in an action, such as a raid, where the officers were "acting under the direction of INS officers."[152] However, despite these powers of arrest or work under the direct supervision of INS officers, local law enforcement were not explicitly provided with enforcement capability for civil immigration law and, more importantly, were still required to comply with the Fourth Amendment.[153]

Shortly after the passage of the Immigration Reform and Control Act of 1986, the former INS began to formally create ties to local law enforcement agencies through the creation of the Institutional Removal Program ("IRP") and the Alien Criminal Apprehension Program ("ACAP").[154] These programs were merged into a single program—the Criminal Alien Program ("CAP")—in 2007, and continue to operate within the federal, state, and local prison system to identify convicted foreign-born individuals.[155] In addition to this program,

151 The distinction between enforcement of the criminal and the civil provisions was broadly discussed in an Office of Legal Counsel memo which found that local law enforcement is preempted by a "pervasive regulatory scheme" as analyzed in *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983). Memorandum from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel to Joseph R. Davis, Assistant Director, Federal Bureau of Investigation, Re: Handling of INS Warrants of Deportation in Relation to NCIC Wanted Person File at 5 (Apr. 11, 1989); *see* United States v. Cruz, 559 F.2d 300, 301 (5th Cir. 1977) (although initially stopped for a traffic violation, arrest and conviction were made on federal criminal law); United States v. Contreras-Diaz, 575 F.2d 740, 745 (9th Cir. 1978) (permitting detention by local law enforcement based on reasonable suspicion of violation of federal criminal law).

152 Zepeda v. INS, 753 F.2d 719, 732 (9th Cir. 1983).

153 *See* United States v. Perez-Castro, 606 F.2d 251, 253 (9th Cir. 1979) ("The Government may not successfully assert that the illegal act was done by state or local officers and therefore the statements subsequently taken are admissible in a federal prosecution, without concern as to the method by which they were obtained.").

154 US Immigration and Customs Enforcement, *Secure Communities Fact Sheet* 3, Mar. 28, 2008 (on file with author) [hereinafter S-Comm Fact Sheet]. IRP was a program that screened convicted aliens serving sentences and attempted to initiate removal proceedings prior to the end of their sentences. *Id.* Federal correctional facilities were required to report foreign born convicts, but the program relied on voluntary reporting from state and local facilities. Immigration and Naturalization Service Institutional Removal Program Audit Report [hereinafter IRP Audit Report], Sept. 2002 (on file with author). ACAP was a similar program that was meant to cover institutions not covered by IRP. S-Comm Fact Sheet at 3. These programs were highly criticized as being inconsistent in enforcement and, as such, lacked wide-level effectiveness. *See* Permanent Subcommittee on Investigations of the Committee on Governmental Affairs of the United States Senate, *Criminal Aliens in the United States Report*, 104–48, Apr. 7, 1995; IRP Audit Report. These programs were merged into a single program—the Criminal Alien Program in 2007. S-Comm Fact Sheet at 3.

155 *Criminal Alien Program*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/criminal-alien-program/ (last visited Apr. 4, 2015).

Immigration and Customs Enforcement[156] created Secure Communities in 2008.[157] Under this program, upon arrest and fingerprinting, local, state, and federal jurisdictions are required to submit the fingerprints to a Department of Homeland Security database, where the agency can then determine if the individual is also subject to removal.[158] Although initially there was some controversy over whether the program was voluntary or mandatory on the part of local, state, and federal criminal jurisdictions, the program is now active in every jurisdiction in the United States.[159]

Perhaps most transformative to the enforcement regime, however, was the creation of "287(g)" programs, authorized in IIRIRA. So termed because they are described in section 287(g) of the INA, agreements under these programs provide for state and local enforcement entities to receive "delegated authority for immigration enforcement."[160] The program contains requirements for officer participation,[161] and provides for a four-week training program.[162]

This explicit delegation of authority erased any question of whether local agencies could enforce civil immigration law. To clarify this shift in enforcement, the Department of Justice Office of Legal Counsel issued a memorandum finding that state and local law enforcement were not preempted from enforcing the civil aspects of immigration law.[163] This memorandum modified the 1989 memorandum issued by the same department which had indicated these agencies *were* preempted from enforcing immigration law.[164]

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156 In 2002, the enforcement and benefits branches of the former Immigration and Naturalization Service were folded into the new Department of Homeland Security. Homeland Security Act of 2002, Pub. L. 107–296, 116 Stat. 2135. The new benefits branch was named the Citizenship and Immigration Service, while enforcement was divided into Immigration and Customs Enforcement (for internal operations) and Customs and Border Protection (for border operations). *Id.* The immigration court system remained under the Department of Justice.

157 *Secure Communities*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/ (last visited Apr. 4, 2015).

158 *Id.*

159 *Secure Communities Activated Jurisdictions*, US IMMIGRATION AND CUSTOMS ENFORCEMENT (Jan. 22, 2013) (on file with author).

160 *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Feb. 24, 2014), http://www.ice.gov/287g/.

161 Requirements include: US citizenship, a federal background investigation, one year experience as a law enforcement officer, and no pending disciplinary actions. *Id.*

162 The training program is held at the Federal Law Enforcement Training ICE Academy. *Id.*

163 Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to the Attorney General (Apr. 3, 2002) (regarding non-preemption of the authority of state and local law enforcement officials to arrest aliens for immigration violations).

164 *See* Kmiec, *supra* note 151.

Despite the training programs for both 287(g) officers and local agents participating in the Secure Communities program, localities around the country have reported widespread racial profiling issues.[165] Sheriff Joe Arpaio in Arizona is an example often cited for this proposition.[166] Initially under the auspices of a section 287(g) agreement, Sheriff Arpaio instituted practices such as targeting Latino neighborhoods for raids and discriminating against Latinos at vehicle checkpoints.[167] Although Sheriff Arpaio is a fairly extreme example, jurisdictions that participate in these programs nevertheless "have abnormally high rates of non-criminal deportations."[168] In addi-

165 *Faces of Racial Profiling*, RIGHTS WORKING GROUP 1 (Sept. 2010). Despite being forced to comply with the program, officials in Massachusetts and New York, including the governors of those states, are opposed to Secure Communities, citing encouragement of racial profiling and eroded trust in law enforcement. Julia Preston, *Despite Opposition, Immigration Agency to Expand Fingerprint Program*, N.Y. TIMES (May 11, 2012), http://www.nytimes.com/2012/05/12/us/ice-to-expand-secure-communities-program-in-mass-and-ny.html?_r=0.

166 *See generally* Memorandum from Thomas E. Perez, Assistant Attorney General, Civil Rights Division to William R. Jones, Jr., Counsel for Maricopa County Sheriffy's Office, Re: United States' Investigation of the Maricopa County Sheriff's Office, *at* 5–6 (Dec. 15, 2011), http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf; Steven W. Bender, *Gringo Alley*, 454 U.C. DAVIS L. REV. 1925, 1935 (2012); Tom Gaynor, *Joe Arpaio to Fight Racial Profiling Monitor Ruling*, THE HUFFINGTON POST (Nov. 1, 2013), http://www.huffingtonpost.com/2013/11/01/joe-arpaio-racial-profiling_n_4195208.html. When faced with the controversy, DHS initially required him to sign a "watered-down" version in 2009. When this failed to curb his actions, DHS was eventually forced to withdraw the agreement altogether in 2011. Jeremy Duda, *Homeland Security Revokes 287(g) Agreements in Arizona*, ARIZ. CAPITOL TIMES (June 25, 2012), http://azcapitoltimes.com/news/2012/06/25/homeland-security-revokes-287g-immigration-check-agreements-in-arizona/.

167 Memorandum from Thomas E. Perez, Assistant Attorney General, Civil Rights Division to William R. Jones, Jr., Counsel for Maricopa County Sheriffy's Office, Re: United States' Investigation of the Maricopa County Sheriff's Office, 6–9 (Dec. 15, 2011), *available at* http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf. Sheriff Arpaio's actions eventually led to a finding of racial profiling by the DOJ Civil Division, a revocation of the 287(g) agreement by ICE, and class action lawsuit. *Id.*; *see also* Melendres v. Arpaio, 989 F. Supp. 2d 822, 902 (D. Ariz. 2013); Press Release, U.S. Dep't of Homeland Sec., Statement by Secretary Janet Napolitano on DOJ's Findings of Discriminatory Policing in Maricopa County (Dec. 15, 2011), http://www.dhs.gov/news/2011/12/15/secretary-napolitano-dojs-findings-discriminatory-policing-maricopa-county; Faces of Racial Profiling, RIGHTS WORKING GROUP 6, (Sept. 2010).

168 NAT'L COMMUNITY ADVISORY REPORT, RESTORING COMMUNITY, 10 (2011). The national average for noncriminal deportation is 29%. Some jurisdictions are reporting rates as high as 50%. There is also a plethora of information about decreasing arrest rates for criminal charges and rising response times that immigration advocates allege have occurred since the institution of 287(g) in some jurisdictions. For instance, arrest rates plunged from a 10.5% rate in 2005 pre-287(g) to 2.5% in 2007 in Maricopa County. Andrea Nill, *What Happens When Local Cops Become Immigration Agents?*, IMMIGRATION POLICY CENTER (Aug. 6, 2008), http://www.immigrationpolicy.org/just-facts/what-happens-when-local-cops-become-immigration-agents.

tion, some of these jurisdictions report a high rate of arrest for minor crimes for racial minorities despite the fact that these programs are created to capture serious criminal offenders.[169] The high rate of noncriminal deportations coupled with the increased numbers of arrests for minor traffic violations in jurisdictions using 287(g) and Secure Communities has led some commentators to surmise that these programs create an incentive for local police officers to profile minorities outside of the criminal context.[170]

In addition to potential racial profiling issues, other studies have found that ICE enforcement demonstrates a pattern and practice of Fourth Amendment violations.[171] The increase in claims of Fourth Amendment violations has prompted a corresponding increase in scholarly commentary about the issue.[172]

C. Individual Deterrent Effect

The last major issue that the Court noted in *Lopez-Mendoza* as a factor that reduced the deterrent effect of the exclusionary rule in immigration proceedings was the effect of deterrence on individual immigration agents.[173] The Immigration and Naturalization Service

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169 Faces of Racial Profiling, supra note 165 at 6–7.

170 *See id.* at 6, 38–39; CENTER FOR CONSTITUTIONAL RIGHTS, Rights Groups Release Documents from U.S. Immigration and Customs Enforcement (ICE) Agency FOIA Lawsuit (Aug. 10, 2010); Trevor Gardner II and Aarti Kohi, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program*, THE CHIEF JUSTICE EARL WARREN INSTITUTE ON RACE, ETHNICITY, AND DIVERSITY 8 (Sept. 2009) (finding that the institution of the C.A.P. program in Irvine, Texas, resulted in a substantial rise in traffic arrests and arrests for petty misdemeanor offenses); *Under Siege: Life for Low-Income Latinos in the South*, SOUTHERN POVERTY LAW CENTER 2 (Apr. 2009) (describing various methods of racial profiling including roadblocks in predominantly Latino areas but citing to lack of data and refusal to respond for requests for information by localities as a common cause of lack of substantial evidence of racial profiling); Deborah M. Weissman, et al., *The Policies and Politics of Local Immigration Enforcement Laws: 287(g) Program in North Carolina*, AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA LEGAL FOUNDATION 29–29 (Feb. 2009) (discussing targeting minorities in traffic stops and the vast resources transferred to capture people under 287(g)); RESTORING COMMUNITY, *supra* note 168, at 7 (citing Chris Burbank, Chief of Police for Salt Lake City).

171 Brief for Oliva-Ramos as Amici Curiae Supporting Petitioner, Oliva-Ramos v. Attorney General of the United States, 694 F.3d 259 (3d Cir. 2012) (No. 10–3849); Bess Chiu, et al., *Constitution on ICE: A Report on Immigration Home Raid Operations*, CARDOZO IMMIGRATION JUSTICE CLINIC 3 (2009).

172 Stella Burch Elias, "Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza, 2008 WIS. L. REV. 1109, 1112 (2009); see also Brief for Maria Argueta as Amici Curiae Supporting Petitioner, Maria Argueta v. U.S. Immigration and Customs Enforcement, 643 F.3d 60 (3d Cir. 2011) (No. 10–1479).

173 *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1044 (1984).

did not regularly publish statistical information related to arrests, cases, and dispositions during the period prior to the 1984 *Lopez-Mendoza* decision.[174] However, from the information provided in both the Supreme Court's opinion and the briefs by both parties, some information related to the percentage of arrests per individual agent can be extrapolated.

In 1983, the estimated number of deportable aliens apprehended was 1,106,683.[175] From that information, the *Lopez-Mendoza* Court determined, given the rate of apprehension and number of INS agents, that each INS agent apprehended approximately 500 individuals per year.[176] One would therefore estimate that approximately 2,213 agents were active in the field during this time frame.

Of the individuals arrested per year during the early 1980s, 97.5% agreed to voluntary departure, meaning that they chose not to exercise their right to a hearing and voluntarily left the country.[177] Accordingly, roughly 27,667 individuals sought either to contest the grounds of their deportation or seek relief before an immigration judge. In contrast, only a negligible number of arrestees would even see a courtroom: for each agent, only twelve out of the 500 arrested.

Compare the 1983 statistics to those from 2012. In 2012, the number of aliens apprehended by immigration enforcement was only 643,474.[178] Although it is unclear how many arrests each immigration enforcement agent made, the initial assessment below will use the number of individuals each agency employs. There were approximately 21,000 Border Patrol agents,[179] over 20,000 ICE employees,[180]

174 The Department of Homeland Security now houses the archives for the then-INS. *Yearbook of Immigration Statistics*, DEPARTMENT OF HOMELAND SECURITY, http://www.dhs.gov/yearbook-immigration-statistics (last visited Apr. 4, 2015). The author found Statistical Yearbooks dating back to 1996, but no consistent source for prior years. Since that time, however, INS, now DHS, has maintained detailed information in their annual Statistical Yearbook. *Id.* The adjudication branch of then-INS, now EOIR, maintains historical Statistical Yearbooks dating back to 2000. *Id.* Further, the statistical information cited in the *Lopez-Mendoza* opinion referred to information provided by the INS in appellate briefs rather than independent reports. *Lopez-Mendoza*, 468 U.S. at 1044.

175 U.S. Gov't of Accountability Office, Immigration: An Issue Analysis of an Emerging Problem (Sept. 1985).

176 *Lopez-Mendoza*, 468 U.S. at 1044 (citing Lopez-Mendoza v. INS., 705 F.2d 1059, 1071 n.17); Petitioner's Brief at 38.

177 *Id.*

178 *Enforcement Actions*, 2012 YEARBOOK IMMIGR. STAT. (DEP'T. HOMELAND SEC.) 91, *available at* http://www.dhs.gov/publication/yearbook-2012.

179 Boots on the Ground or Eyes in the Sky: How Best to Utilize the National Guard to Achieve Operational Control: Hearing Before the Subcomm. on Border and Maritime Security of the H. Comm. On Homeland Security, 112th Cong. 16 (2012) (prepared statement of R. Vitiello, Deputy Chief of U.S. Customs and Border Protection Office, and Martin Vaughan, Exec. Dir. of Office of Air and Marine Southwest Border Operations).

and 1,500 officers trained and certified by under the 287(g) program.[181] In the same year, 410,753 cases were initiated in the immigration court. [182] Of those, 317,930 moved forward to a full hearing,[183] while 26,635 immediately forwent proceedings and opted for voluntary departure. [184] Put in this way, the numbers demonstrate that arrests per agent have drastically decreased since 1983, and the number of voluntary departure cases has significantly decreased.

Year	**1984**	**2012**[185]
Apprehensions	1,106,683	643,474
Agents	2,213	42,300
Arrests per Agent	500	15
Cases	27,667	410,753
Voluntary Departures	1,079,016	259,356[186]
Percent Voluntary Departure	97.5%	40%

To be fair, it is clear that not every employee in ICE and CBP are active agents in the field; however, even if only 50% of employees are

180 *Occupations*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/careers/occupations (last visited Feb. 10, 2015).

181 *Fact Sheet: Updated Facts on ICE's 287(g) Program*, DEPARTMENT OF HOMELAND SECURITY (June 18, 2013), http://www.ice.gov/news/library/factsheets/287g-reform.htm.

182 Executive Office for Immigration Review, FY 2012 Statistical Year Book B2 fig.1. (2013) [hereinafter EOIR 2012 Year Book].

183 EOIR 2012 YEAR BOOK B4 tbl.1A. The remaining types of cases are divided into bonds (78,065) and motions (14,758). *Id.*

184 EOIR 2012 YEAR BOOK Q1 tbl.15. It should be noted that these numbers are not completely compatible. It would be impossible to determine what percentage of the cases actually received in 2012 resulted in voluntary departure because statistics on specific cases are not published in the Year Book. However, the number of voluntary departure decisions per year tends to hover around 26,000 for each of the past five years presented in the table.

185 The Department of Homeland Security and Executive Office for Immigration Review provide annual Statistical Yearbooks. Although EOIR has a 2013 update, the most recent data for DHS is in 2012. In order to maintain consistency in numbers, all data was pulled from the 2012 yearbooks for both agencies. In addition, statistical information provided by the agencies in recent years provide similar outcomes. *See generally* EOIR STATISTICS YEARBOOKS, *http://www.justice.gov/eoir/statspub/syb2000main.htm*; DEPARTMENT OF HOMELAND SECURITY, *Yearbook of Immigration Statistics*, *http://www.dhs.gov/yearbook-immigration-statistics*.

186 Number was derived from adding the number of voluntary departure orders issued plus the difference between the number of individuals apprehended and the number of cases initiated.

responsible for arrests, the number of arrests per agent is still a drastic decrease from that in 1983.[187]

One could argue that the use of state and local enforcement officers actually decreases the deterrent effect in a traditional sense because they are not vested in the civil immigration proceedings.[188] However, 287(g) agents *are* agents of ICE for the purposes of enforcement; they have a memorandum of understanding, and there is some level of training through the federal programs. To the extent that they are operating under both criminal and civil law, they cannot pick and choose which one they are at a given moment. By acting as agents of both, the agents become vested in both the criminal and civil aspects of the arrest.

III. THE CONVERGENCE OF THE EXCLUSIONARY RULE

Fourth Amendment case law has also continued to evolve since *Lopez-Mendoza*. The Supreme Court has increased the types of exceptions to search warrants in a shift towards concern for safety of both enforcement officers and the public.[189] As the number of search warrant exceptions has grown, the Court has also reduced the impact of the exclusionary rule.[190] In fact, some commentators have sounded the death knell for the exclusionary rule as an option to redress Fourth Amendment violations.[191] Section A of this Part reviews the historical use of the exclusionary rule in immigration proceedings, and then discusses how each circuit has addressed the "widespread violations and egregiousness" language of the *Lopez-Mendoza* plurality. Section B gives a brief overview of the development of the exclusionary rule in the criminal context.

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187 Even if only half of the employees are active agents, there would only be 30 arrests per agent. Another interesting way to view the data is that even if only 287(g) program agents were involved in the apprehensions, the number of arrests per agent would still be below 500 (494).

188 The Eighth Circuit tangentially addressed this issue in *Lopez-Gabriel v. Holder*, finding that the deterrent effect would be too attenuated, however that was not in the context of 287(g). 653 F.3d 683, 686 (8th Cir. 2011). The Court noted that there was no evidence that the state officer "acted solely on behalf of the United States." *Id.*

189 Rather than a presumption of a constitutional violation, the Supreme Court has moved towards a balancing analysis. Alec Rice, Note, *Brave New Circuit: Creeping Towards DNA Database Dystopia in* U.S. v. Weikert, 14 ROGER WILLIAMS U. L. REV. 691, 699–709 (2009).

190 Slobogin, *supra* note 25, at 343.

191 *Id.*

A. The State of the Exclusionary Rule in Immigration Court

The lower court in *Lopez-Mendoza* noted that since 1899, there were only two cases in which suppression was applied; and that since 1952, fewer than fifty immigration cases have included a suppression issue.[192] But the history of the Fourth Amendment in immigration courts is more complex.[193] In early cases, the BIA struggled to determine what role the law of unreasonable search and seizures should play in immigration proceedings. At first, it relied on an early habeas corpus claim when finding that individuals were protected by the exclusionary rule, though "possibly to a lesser extent than if this were a criminal prosecution."[194] Motions to suppress in the immigration context at that time often relied on one of two theories: INS agents

192 Lopez-Mendoza v. INS, 705 F.2d 1059, 1071 (9th Cir. 1983). This claim must be taken in context. In the immigration court system, the substance of a claim is not recorded in any fashion unless it is appealed to the Board of Immigration Appeals. Even once transcribed and sent to the BIA, there are no statistics related to how many of the cases appearing before the Board raised a suppression claim. Within this structure, on average, only 1–2% of cases are ever appealed to the BIA, resulting in the substance of a case coming to light. Of those, only .1–.15% are actually published. The result is that out of the nearly 250,000 cases completed annually by the immigration court, only an average of thirty to forty lead to published cases, about .01–.02% of all immigration cases. On average that means of the approximately 250,000 cases per year that the BIA hears, only thirty to forty cases will be published. In 1984, only thirty-one cases were published within the BIA.

193 Rebecca Chiao, *Fourth Amendment Limits on Immigration Law Enforcement*, 92–3 IMMIGR. BRIEFINGS 20 (Feb. 1992). By the time of the 1984 *Lopez-Mendoza* decision, the Supreme Court had already begun to erode application of the Fourth Amendment in immigration-related criminal cases. United States v. Jackson, 825 F.2d 853, 865 (5th Cir. 1987) (limiting the application at the border and its equivalent); United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976) (allowing for fixed check-points absent reasonable suspicion). Although beyond the scope of this Article, it is noteworthy that the Supreme Court has issued several decisions impacting the relationship between the Fourth Amendment and immigration-related issues. For instance, the Court noted that although the INA sets out standards for the ability to question and search aliens based on civil immigration issues, they are still tempered by the requirements in the Fourth Amendment. Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973). A large source of these cases surround the definition of the "border" and factors to take into account in determining reasonable suspicion of illegal entry. United States v. Brignoni-Ponce, 422 U.S. 873, 885–87 (1975).

194 *In re* D-M-, 6 I&N Dec. 726, 730 (BIA 1955) (citing United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149 (1923)). It should be noted here that the *Bilokumsky* case was a landmark for civil immigration cases in several ways. Not only did the case, at least provisionally, address the use of the exclusionary rule in deportation proceedings, the case also addressed several issues comparing the civil-based immigration proceeding to criminal cases. *Bilokumsky*, 263 U.S. at 153–57. The Court first noted that there is no equivalent of the presumption of innocence (or presumption of citizenship) that there is in criminal cases. *Id.* at 154. Further, the Court noted that the there is nothing preventing a tribunal from drawing an adverse inference from an individual claiming the Fifth Amendment right against self-incrimination. *Id.* Lastly the Court found that the rule excluding involuntary confessions had no application in the civil immigration proceedings. *Id.* at 157.

either violated the Fourth Amendment prohibition against unlawful search and seizure, or they violated regulatory provisions of the INA.[195]

Under the first theory, the BIA often applied a criminal law analysis to determine whether an unreasonable search and seizure had occurred.[196] Although some of the cases followed the criminal analysis through to the end, many of them found application of the exclusionary rule unnecessary because any unlawful activity did not affect the case's ultimate disposition.[197] In other instances, the BIA rested its decision not on an analysis of an unreasonable search and seizure, but rather on the regulatory scheme of the INA.[198] As with claims under the Fourth Amendment, motions to suppress under the regulatory scheme were rarely granted, although for different reasons; in these cases, the threshold for allowing a stop is so low that most warrantless law enforcement conduct easily passed muster.[199]

Since the *Lopez-Mendoza* decision, lower court analysis of when and whether to apply the exclusionary rule has changed. Largely to blame is the language in Part V of Justice O'Connor's opinion, which suggested the propriety of exclusion in the context of "egregious violations of the Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative

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195 *See* U.S. Dep't of Justice, Immigration and Naturalization Service, The Law of Arrest, Search, and Seizure for Immigration Officers, Manual No. M–69, at II–4 (1993) (explaining the law regarding civil arrests).

196 In *In re Lennon*, the BIA, somewhat belatedly given the number of cases that had already been heard on the merits, confirmed that motions to suppress can be heard in a quasi-judicial hearings like the immigration court. 15 I&N Dec. 9, 12 (BIA 1974). While many cases, such as *In re Doo*, addressed the substantive analysis of whether there was an unlawful search and seizure, the majority of the published cases tackled the more procedural question of the burden of proof. 13 I&N Dec. 30, 31–32 (BIA 1968). *In re Tang* settled once and for all that the respondent must support a motion to suppress with proof that establishes a prima facie case before the burden shifts to the INS to justify the manner in which the evidence was obtained, explicitly borrowing the test from criminal law analysis. 13 I&N Dec. 691, 692 (BIA 1971).

197 For example, in *In re Gonzalez*, the respondent argued that he was illegally arrested, and thus the proceedings against him were unlawful. 16 I&N Dec. 44, 45 (BIA 1976). However, respondent had already admitted to his identity, and his wife testified that the application with the necessary information related to alienage and grounds of deportation was his, corroborating the government's assertion of his deportability. *Id.* at 46.

198 *In re Au* is the first case to discuss the interaction between the two analyses. 13 I&N Dec. 294, 299–300 (BIA 1969). As noted in that case, often the two theories must often be viewed at the same time. *Id.* What may be found to be unlawful under the Fourth Amendment may pass muster under the INA § 287(a)(1), which allows a much broader range of activities with a lower burden on agents for searches and seizures.

199 *Id.* at 300 ("A suspicion can be [a] reasonable one if no more appears than that the person approached is in an area in which illegal aliens are found.").

value of the evidence obtained . . . "; application of that specific language has caused a circuit split.[200]

Four circuits (the Fourth, Fifth, Seventh, and Tenth Circuits) have not taken up the issue directly, although they have recognized, to some degree, that the language of the plurality may have some force. Neither the Fourth nor Fifth Circuit has specifically addressed whether they recognize Justice O'Connor's so-called "egregious exception." Moreover, neither circuit has explained what would actually constitute egregiousness; rather, both circuits confusingly have case law that omit the egregiousness language and case law that cite to it—sometimes in the very same case.[201] The Tenth Circuit lacks cases that discuss exclusion solely within the Fourth Amendment context but in one case it did mention the prohibition on the use of the rule in immigration proceedings.[202]

The Seventh Circuit has flirted with the possibility of applying the egregiousness exception. In most cases discussing the prohibition, the Court has cited to the Justice O'Connor's exception, and notes that the court "left open the possibility" that the rule "*may apply*" if there are egregious violations.[203] Indeed, in one case, the Seventh Circuit actually went through an analysis of whether the conduct in question actually rose to the level of egregiousness, but found that it involved mere minor physical abuse and aggressive questioning.[204] In a recent criminal sentencing case, however, the court showed less inclination to use the exception when dismissing an argument for an

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200 INS v. Lopez-Mendoza, 468 U.S. 1032, 1050–51 (1984. *Compare* United States v. Sanders, 743 F.3d 471, 473 (7th Cir. 2014) (dismissing the exception in the criminal sentencing context as a reserved question rather than a holding) *with* Gonzalez-Rivera v. INS, 22 F.3d 1441, 1448 (9th Cir. 1994) (applying the test to find a racially-based stop falls under the egregious constitutional violation exception).

201 Initially, the Fourth Circuit indicated that it need not consider egregious violations; however, a later Fourth Circuit decision states that "Lopez-Mendoza establishes that the exclusionary rule does not apply in civil deportation proceedings." United States v. Oscar-Torres, 507 F.3d 224, 230 (4th Cir. 2007). *But see* Mineo v. INS, 19 F.3d 11, 1994 WL 65051, at *2 (4th Cir. Feb. 24, 1994) (assuming that the exclusionary rule applied where there were "egregious constitutional violations" that would render the evidence "fundamentally unfair."). *See also* Odukwe v. INS, 977 F.2d 573 (Table), 1992 WL 301941, at *1 (4th Cir. Oct. 22, 1992). The Fifth Circuit has noted the exception in several unpublished cases, but not in the one published case on the issue. Santos v. Holder, 506 F. App'x 263, 264 (5th Cir. 2013); Escobar v. Holder, 398 F. App'x 50, 54 (5th Cir. 2010); Gonzalez-Reyes v. Holder, 313 F. App'x 690, 695 (5th Cir. 2009); Mendoza-Solis v. INS, 36 F.3d 12, 14 (5th Cir. 1994).

202 United States v. Olivares-Rangel, 458 F.3d 1104, 1115 n.9 (10th Cir. 2006).

203 Gutierrez-Berdin v. Holder, 618 F.3d 647, 652 (7th Cir. 2010) (emphasis added); *see also* Wroblewska v. Holder, 656 F.3d 473, 477–78 (7th Cir. 2011); Krasilych v. Holder, 583 F.3d 962, 967 (7th Cir. 2009).

204 *Gutierrez-Berdin*, 618 F.3d at 652.

exception in the sentencing context. It therefore held that although the court "reserved decision" on the exception, it said only "we have explained why reserving a question does not equal a holding[.]"[205]

Two circuits have adopted Justice O'Connor's exception but have yet to apply it. The Sixth Circuit, for example, follows the exception but has not applied it or defined what constitutes "egregious."[206] The First Circuit has similarly adopted the exception, but has not explained what "egregiousness" means.[207]

Four circuits take a wider view of Justice O'Connor's exception by both adopting and applying egregiousness.[208] The Second Circuit, for instance, discussed the egregious exception in several cases that fleshed out the analysis, allowing for suppression in situations that amount to a Fourth Amendment violation in addition to a court-defined aggravated factor.[209] In doing so, the Court read the *Lopez-Mendoza* plurality opinion to allow for exclusion where either (1) the violation created a fundamentally unfair situation, or (2) the violation undermined the reliability of the evidence.[210] The court assesses

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205 United States v. Sanders, 743 F.3d 471, 473 (7th Cir. 2014).

206 The Sixth Circuit explicitly recognized the exception in *United States v. Navarro-Diaz*, 420 F.3d 581, 587 (6th Cir. 2005) (The Supreme Court qualified its holding when it stated in the last paragraph of *Lopez-Mendoza* that "we do not deal here with egregious violations of the Fourth Amendment or other liberties that might transgress notions of fundamental fairness" (quoting INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984)). However, it was not necessary in that case to discuss what the meaning of "egregious" in this context means. *Id.* (explaining that in *Lopez-Mendoza* the cases highlighted by the court were clearly egregious). It should further be noted that despite this recognition, lower courts in the Sixth Circuit have still failed to apply the exception. United States v. Wellons, No. 05–80810, 2013 WL 357831 at *2 (E.D. Mich. Jan. 29, 2013) (finding that the Sixth Circuit has not recognized the exception).

207 The Court initially recognized the exception in *Navarro-Chalan v. Ashcroft*, 359 F.3d 19, 22–23 (1st Cir. 2004) (recognizing the exclusionary rule). Although the circuit has noted the exception in one other published case, it has not expounded upon the initial recognition. Kandamar v. Gonzales, 464 F.3d 65, 70 (1st Cir. 2006) (applying the egregious exclusion).

208 It is important to note that this line of cases maintains that, while the characterization of Part V is technically correct in that only four of the five majority Justices joined in that section, since the remaining four Justices dissented on the premise that the exclusionary rule should apply without restriction, a full eight Justices agreed with the premise that the exclusionary rule should apply in cases involving widespread violations or in egregious circumstances. *See* Oliva-Ramos v. Attorney General, 694 F.3d 259, 271, 274–75 (3d Cir. 2012) (explaining that all eight Justices thought that the exclusionary rule should apply in deportation proceedings involving egregious violations); Puc-Ruiz v. Holder, 629 F.3d 771, 778 n.2 (8th Cir. 2010).

209 Almeida-Amaral v. Gonzales, 462 F.3d 231, 235 (2d Cir. 2006); Cotzojay v. Holder, 725 F.3d 172, 179 (2d Cir. 2013); Pretzantzin v. Holder, 736 F.3d 641, 646 (2d Cir. 2013).

210 Almeida-Amaral v. Gonzales, 461 F.3d 231, 235 (2d Cir. 2006). The court noted that although the Supreme Court used the conjunctive "and" when discussing these violations,

both scenarios on a case-by-cases basis by considering four factors: intentionality of violation; whether the seizure was gross or unreasonable; evidence of threats, coercion, physical abuse, or unreasonable shows of force; and whether the arrest or seizure was based on race or ethnicity.[211]

The Third Circuit follows the Second Circuit's analysis.[212] Although the Eighth Circuit initially adopted the Second Circuit's test,[213] recent Eighth Circuit cases call into question whether it would apply the Second Circuit's egregiousness test.[214]

The most expansive view for the egregious exception is in the Ninth Circuit.[215] In evaluating egregiousness, the court contemplates whether the "evidence [was] obtained by deliberate violations of the Fourth Amendment, or by conduct a reasonable officer should have known is in violation of the Constitution . . . ."[216] This wide view assesses whether a violation exists and, if so, moves on to considering whether there was a degree of culpability in the conduct of the officer.[217]

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because the Court cited to two separate lines of cases, it intended to use the disjunctive "or," creating two separate areas in which the exclusionary rule can be applied. *Id.* at 234.

211 Cotzojay v. Holder, 725 F.3d 172, 182 (2d Cir. 2013). The Court noted that there are no hard and fast rules related to these factors: On one hand the test is not so concrete as to *require* any of the factors (such as physical force); on the other, certain factors do not create a *per se* presumption of a factor (a home invasion, for instance, would require additional factors to demonstrate fundamental unfairness). *Id* at 182–83; Pretzantzin v. Holder, 736 F.3d 641, 646 (2d Cir. 2013); Oliva-Ramos v. Attorney General, 694 F.3d 259, 278–79 (3d Cir. 2012)

212 *Oliva-Ramos*, 694 F.3d at 278.

213 *Puc-Ruiz*, 629 F.3d at 778–79 (applying the egregiousness exception).

214 Since its 2010 decision, the Court has consistently used language to distance itself from an express adoption of the egregious exception. Lopez-Gabriel v. Holder 653 F.3d 683, 686 (8th Cir. 2011) ("[T]he application of the exclusionary rule to an immigration case involving such violations has not been resolved in this circuit."); Lopez-Fernandez v. Holder, 735 F.3d 1043, 1046 (8th Cir. 2013) ("We need not decide today whether to join other circuits in holding that an egregious Fourth Amendment violation affirmatively compels exclusion in a removal proceeding because the Petitioners have not alleged an egregious violation").

215 Gonzalez-Rivera v. INS, 22 F.3d 1441, 1448–49 (9th Cir. 1994) (explaining that all bad faith actions require the exclusionary rule in civil cases).

216 *Id.* at 1448.

217 Although all cases in the two decades since *Gonzalez-Rivera* have recognized the exception, there has been some criticism of the line of reasoning. *See e.g.* Lopez-Rodriguez v. Holder, 560 F.3d 1098, 1100 (9th Cir. 2009) (denying rehearing *en banc*) (Bea, J., dissenting (with O'Scannlain, Tallman, Bybee, & Callahan, JJ.) (stating that the line of cases erred first in bifurcating the egregious exception, and second by focusing on the *knowledge* of officers rather than their *conduct*)).

B. The Exclusionary Rule in Criminal Proceedings

Since its creation, the exclusionary rule has garnered many critics who argue that the result of exclusion—freeing guilty defendants—is too great a consequence for a Fourth Amendment violation. In addition, opponents argue that the main rationale for the rule, to deter officer malfeasance, is not a sufficient basis to justify its grave consequences.[218]

After the Supreme Court's decision in *Mapp v. Ohio* to apply the exclusionary rule to the states, the rule increasingly became the subject of Supreme Court litigation.[219] Through a series of cases in the 1970s, the Court both steadily eroded the substance of the warrant requirement by creating several exceptions,[220] and simultaneously began to limit application of the exclusionary rule.[221]

Scholars and the judiciary alike have revisited use of the exclusionary rule as a remedial measure in the decades since *Mapp*.[222] Scholars have, for example, noted that changing jurisprudence surrounding the use of the exclusionary rule is now properly viewed in light of the *purpose* of the remedy.[223] Early cases saw citation to high

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218 Tonja Jacobi, *The Law and Economics of the Exclusionary Rule,* 87 NOTRE DAME L. REV. 585, 652–53 (2011); Richard E. Meyers II, *Fourth Amendment Small Claims Court*, 10 OHIO ST. J. CRIM. L. 571, 574 (2013); L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669, 671 (1998).

219 Slobogin, *supra* note 25, at 346 (explaining a string of Supreme Court decisions).

220 Among the most notable of these include the development of the Terry stop (allowing for a brief stop and frisk if conduct leads an officer to reasonably believe that criminal activity may be afoot, that there is a weapon, and that the individual is presently dangerous), and approval of discretionless checkpoints, including those for checking immigration status. Terry v. Ohio, 392 U.S. 1, 25–26 (1968); United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976). Exceptions to the warrant requirement for both searches and seizures are numerous. United States v. Place, 462 U.S. 696, 706 (1983) (allowing for exigent circumstances); Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) (holding that there is no requirement to demonstrate individual knew of right to withhold consent to search); Carroll v. United States, 267 U.S. 132, 156 (1925) (creating the automobile exception).

221 In fact, 1984, the same year as the *Lopez-Mendoza* case, saw three major cases limiting the exclusionary rule in the criminal realm including the good faith rule, inevitable discovery, and the later-obtained warrant exception. United States v. Leon, 468 U.S. 897, 920 (1984) (adopting a good faith rule); Nix v. Williams, 467 U.S. 431, 444 (1984) (adopting an inevitable discovery exception to the exclusionary rule), Segura v. United States, 468 U.S. 796, 810 (1984) (adopting a later-obtained warrant exception to the exclusionary rule).

222 Keith A. Fabi, The Exclusionary Rule: Not the "Expressed Juice of the Wolly-Headed Thistle," 35 BUFF. L. REV. 937, 942 (1986).

223 Robert M. Bloom & David H. Fentin, *"A More Majestic Conception": The Importance of Judicial Integrity in Preserving the Exclusionary Rule*, 13 U. PA. J. CONST. L. 47, 50–52 (2010) (examining the history of the rule from the perspective of a remedy); Scott E. Sundby & Lucy B. Ricca, *The Majestic and the Mundane: The Two Creation Stories of the Exclusionary Rule*,

ideals related to "judicial integrity" in urging the importance of consequences being attached to Fourth Amendment violations.[224] Jurisprudence, however, evolved to viewing the exclusionary rule as a "judicially created remedy".[225] In fact, *Lopez-Mendoza* and its forerunner, *Janis*, were both part of a larger change in analysis seen in the 1980s.[226] These cases, analyzing the application of the rule in noncriminal cases, focus on a sterile analysis of the likelihood of deterrence and social costs, rather than the overarching principle of ensuring "judicial integrity."[227]

Application of the exclusionary rule by the Supreme Court steadily decreased during the 1990s and early 2000s. Then came *Herring v. United States* in 2009, which held that the exclusionary rule would not provide a sufficient level of deterrence for mistakes made by the police as a result of negligence.[228] Although some view the holding narrowly, scholars have opined that the subsequent case of *Davis v. United States* points to a more broad reading.[229] In a review of past cases, the Court focused on the *conduct* of the officers in each case.[230] The

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43 TEX. TECH L. REV. 391, 394 (2010) (explaining the history of the rule); Thomas K. Clancy, *The Fourth Amendment's Exclusionary Rule as a Constitutional Right*, 10 OHIO ST. J. CRIM. L. 357, 366 (2013) (explaining the post-*Mapp* debate about the purpose of the rule).

224 Two cases most often cited for containing language to the constitutionality of the rule and to judicial integrity are *Weeks* and *Mapp*. Weeks v. United States, 232 U.S. 383, 393 (1914) (referring frequently to the Constitution); Mapp v. Ohio, 367 U.S. 643, 660 (1961) (emphasizing judicial integrity). These two cases embody the original theory of the exclusionary rule. Robert M. Bloom & David H. Fentin, *"A More Majestic Conception": The Importance of Judicial Integrity in Preserving the Exclusionary Rule*, 13 U. PA. J. CONST. L. 47, 50–53 (2010).

225 Language describing the rule as a judicially created remedy, rather than a matter of judicial integrity, was first seen in *United States v. Calandra*. 414 U.S. 338, 348 (1974) ("[T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."). This shift in focus allowed the Court to move the analysis away from enforcing a constitutional right to making a determination of whether exclusion would exact a strong enough "punishment" to deter misconduct by police. *See* Clancy, *supra* note 223, at 389.

226 The 1984 case of *United States v. Leon* saw the first inception of the "good faith" doctrine that now dominates exclusionary rule jurisprudence. 468 U.S. 897, 900 (1984). As with *Lopez-Mendoza*, *Leon* saw the Court move towards an analysis of a balancing test of deterrence and social costs. *Id.* at 910.

227 See Justice Ginsburg's dissent in which she refers to "a more majestic conception" of the Fourth Amendment. Herring v. United States, 555 U.S. 135, 151 (2009).

228 *Id.* at 145 (applying an objective deterrence analysis).

229 131 S. Ct. 2419, 2423–24 (2011) (holding that the exclusionary rule does not apply when a search is based on an objectively reasonable reliance on appellate precedent); *see* Clancy, *supra* note 223, at 378 (arguing that *Davis* gave wide applicability to the rule established in *Herring*).

230 *Herring*, 555 U.S. at 143–44.

majority opinion then summarized the exclusionary rule application as "serv[ing] to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[231] Thus, the Court broadened the social cost versus deterrence analysis by moving from focusing on whether there was an objective good faith error, to determining whether an officer was negligent.[232]

Two years later, the Court had occasion to assess the exclusionary rule again in *Davis v. United States*.[233] Unlike the officer in *Herring*, who relied on an erroneous police database, the officer in *Davis* was relying on circuit court precedent allowing for searches of vehicles after arrest.[234] The Supreme Court later found such searches to be a violation of the Fourth Amendment when the arrestee is not within reaching distance of the vehicle,[235] but the Court in *Davis* held that because the search was initially conducted in "objectively reasonable reliance" on appellate precedent, the exclusionary rule would not deter future Fourth Amendment violations.[236] In doing so, the Court reinforced the culpability standard set out in *Herring*, focusing not only on deterrence and societal costs, but wrapping the deterrence side of the test in a cloak of culpability and objective reasonableness.[237]

CONCLUSION

Given the significant changes in both immigration proceedings and enforcement since the decision in *Lopez-Mendoza*, the Supreme Court's concern about keeping immigration proceedings "simple" to enable swift adjudication in an administrative court no longer holds weight. Immigration proceedings have become increasingly complex as a result of changes to the structure of the proceedings, as well as to the substance of grounds of deportation and forms of relief.[238] Further, the widespread use of state and local law enforcement for immigration purposes has altered both the number of agents enforcing immigration and decreased the amount of oversight for these agents.

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231 *Id.* at 150–51 (citations omitted).

232 Shima Baradaran, *Rebalancing the Fourth Amendment,* 102 GEO. L.J. 1, 13 n.65–66 (2013).

233 131 S. Ct. 2419 (2011).

234 *Id.* at 2426.

235 Arizona v. Gant, 556 U.S. 332, 351 (2009).

236 *Davis*, 131 S. Ct. at 2434.

237 *Id.* at 2429.

238 Indeed, the Court's decision in *Lopez-Mendoza* has actually led to further complication of the court system, as evidenced by the numerous circuit court opinions devoting significant amounts of published cases to the issue.

In addition, because the development of exclusionary rule case law in the criminal and immigration context have, in application, been converging towards a similar theme of requiring a level of egregiousness, the Court should apply the exclusionary rule in immigration proceedings precisely as it is already constructed in criminal courts. The decisions in *Herring* and *Davis*, which focused on the balancing of costs and deterrence, coupled with a focus on the culpability of the enforcement agent, mirrors exactly the approach the Ninth Circuit has used in the immigration context. A consistent approach to the exclusionary rule in both contexts would centralize the analysis and allow for consistent application in the immigration context.