University of Miami Law Review

Volume 69
Number 1 *Volume 69 Number 1 (Fall 2014)*

Article 10

10-1-2014

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Recommended Citation

Lindsay Macdonald, *Why the Rule-of-Law Dictates That the Exclusionary Rule Should Apply in Full Force to Immigration Proceedings*, 69 U. Miami L. Rev. 291 (2014)
Available at: https://repository.law.miami.edu/umlr/vol69/iss1/10

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Why the Rule-of-Law Dictates That the Exclusionary Rule Should Apply in Full Force to Immigration Proceedings

LINDSAY MACDONALD*

This article discusses how and why the exclusionary rule should apply in the immigration context. The first part of the article sets out the history of the exclusionary rule in immigration proceedings, starting prior to the Lopez-Mendoza *decision, moving to the decision itself, and then discussing how the lower courts have interpreted the decision. Next, the article examines how the cost-benefit analysis that the Supreme Court used in* Lopez-Mendoza *to determine that the exclusionary rule need not apply in removal hearings would come out much differently if the Court weighed those same factors today. The article then considers how the increased involvement of state and local law enforcement in the enforcement of immigration law has brought about even more changes to the immigration law landscape. The article concludes with the argument that the cost-benefit analysis should be abandoned when trying to determine whether the exclusionary rule should apply in immigration proceedings, and, instead, the exclusionary rule should apply in full force to immigration proceedings based on the application of the rule-of-law principles that the exclusionary rule was originally designed to protect.*

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I. INTRODUCTION

INS v. Lopez-Mendoza,[1] the case that sets out the parameters for application of the exclusionary rule in immigration proceedings, was decided in 1984—three decades ago. The Supreme Court's opinion in this case was the last time that the highest court in the nation weighed in on this subject.[2] To say that the immigration landscape has changed over the past thirty years is an understatement. The increase in the immigrant population alone paints a vivid picture. The unauthorized immigrant population has quadrupled since 1990[3] while the total number of legal immigrants has nearly doubled since the 1980s.[4] Both the number of annual removal proceedings[5] and immigration-related criminal prosecutions have increased significantly since 1984.[6]

1. 468 U.S. 1032 (1984).

2. *See* 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 (2010) ("The *Lopez-Mendoza* holding has shaped immigration procedure for over two decades . . . ."); *see also* Irene Scharf, *The Exclusionary Rule in Immigration Proceedings: Where It Was, Where It Is, Where It May Be Going*, 12 SAN DIEGO INT'L L.J. 53, 62 (2010) ("[T]he Supreme Court's rule in *Lopez-Mendoza* still governs removal proceedings . . . .").

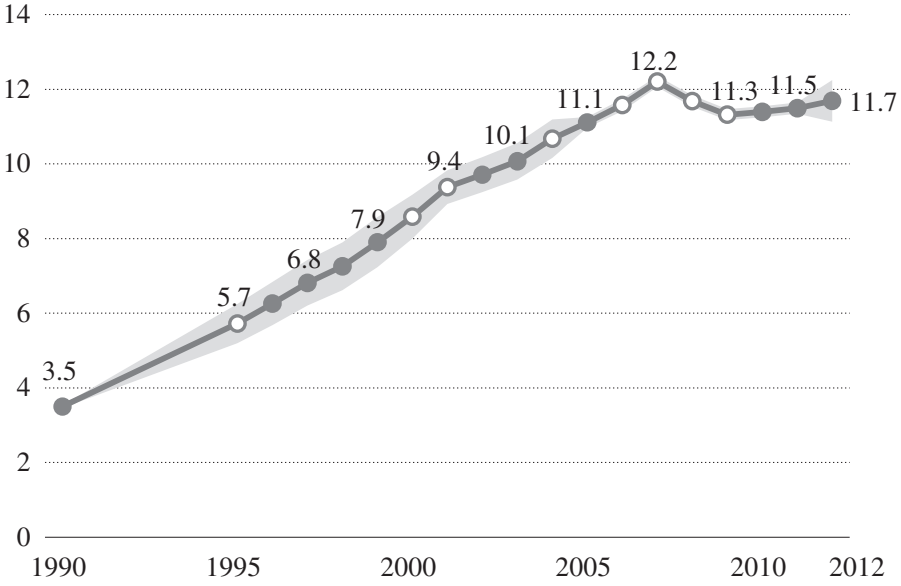
3. Jeffrey S. Passel et al., *Population Decline of Unauthorized Immigrants Stalls, May Have Reversed*, PEW RES. HISP. TRENDS PROJECT (Sept. 23, 2013), http://www.pewhispanic.org/2013/09/23/population-decline-of-unauthorized-immigrants-stalls-may-have-reversed/.

4. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2012 YEARBOOK OF IMMIGRATION STATISTICS 5 (2013), *available at* http://www.dhs.gov./sites/default/files/publications/ois_yb_2012.pdf.

5. The number of removal proceedings received annually has increased by more than 100,000 since the year 2000 and currently sits at around 310,000. *Compare* EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2000 STATISTICAL YEAR BOOK, at D1 (2001), *available at* http://www.justice.gov/eoir/statspub/SYB2000Final.pdf (showing that the total number of removal cases received by immigration courts in 2000 was 203,497), *with* EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2012 STATISTICAL YEAR BOOK, at C3 (2013), *available at* http://www.justice.gov/eoir/statspub/fy12syb.pdf (showing that the total number of removal cases received by immigration courts in 2012 was 310,455).

6. Transactional Records Access Clearinghouse, *Immigration Prosecutions at Record Levels in FY 2009*, TRAC IMMIGRATION (Sept. 21, 2009), http://trac.syr.edu/immigration/reports/218/.

FIGURE 1: ESTIMATES OF THE U.S. UNAUTHORIZED IMMIGRANT POPULATION, 1990–2012[7]



Additionally, the recent "border crisis" has reignited a passionate debate about the current issues facing our immigration system.[8] This debate further exemplifies the drastic changes that have occurred to our immigration system over the last thirty years.

Even the U.S. Supreme Court has recognized the change in the "landscape of federal immigration law."[9] In one of its most recent immigration decisions, *Padilla v. Kentucky*, the Court stated that defense attorneys have a duty to advise their clients of the immigration consequences of a criminal conviction or a guilty plea.[10] This decision indicates that the Court is starting to accept the idea that "deportation proceedings occupy a special territory in between civil and criminal proceedings."[11]

7. Figure 1 is derived from Pew Research Center estimates based on government data. *See* Passel et al., *supra* note 3. Estimates are in the millions. The shading surrounding the line indicates low and high points of the estimated 90% confidence interval.

8. Ann M. Simmons, *Flood of Children Across U.S. Border Reignites Immigration Debate,* L.A. TIMES (July 1, 2014, 5:41 PM), http://www.latimes.com/nation/nationnow/la-nn-na-immigration-chat-20140701-story.html.

9. Padilla v. Kentucky, 559 U.S. 356, 360 (2010).

10. *See id.* at 371 ("It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation . . . .").

11. *See* 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, 501 (2013).

The notion that immigration law and removal proceedings are now more "quasi-criminal" than civil is at the heart of the exclusionary rule debate.[12] The criminalization of immigration means that both the enforcement of immigration law and the punishment for immigration violations are much harsher than they were when *Lopez-Mendoza* was decided. Immigration law is often enforced through raids and other aggressive tactics.[13] Additionally, the increasing enforcement of immigration law by state and local law enforcement officers has contributed to the criminalization of immigration. Because of the manner in which immigration laws are currently enforced, deportation is now often thought of as punishment.[14] These trends exemplify the degree to which immigration law presently resembles criminal law. While much of the enforcement is now the same, the procedural protections have not followed.[15] Because the immigration landscape has changed so drastically in the past thirty years, the same, antiquated procedural schemes should no longer be used. As such, the exclusionary rule must be applied in full force to immigration proceedings in order to bring them in line with criminal prosecutions.

This article will discuss how and why the exclusionary rule should apply in full force in the immigration context. Part II of the article will set out the history of the exclusionary rule in immigration proceedings, starting prior to the *Lopez-Mendoza* decision, moving to the decision itself, and then discussing how the lower courts have interpreted it. Next, Part III will examine how the cost-benefit analysis that the Supreme Court used to determine that the exclusionary rule need not apply in removal hearings would come out much differently if the Court conducted the analysis today. Part IV will then consider how the involvement of state and local police officers has brought even more changes to immigration enforcement. Lastly, Part V will argue that these changes demonstrate that the cost-benefit analysis should be abandoned altogether. Instead, the exclusionary rule should apply in full force to immigration proceedings to advance the rule-of-law principles that the exclusionary rule was originally designed to protect.

12. *See* Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 332 (2000).

13. *See, e.g.*, Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1573–75 (2010).

14. The Supreme Court recognized this notion in *Padilla* when it stated that the "severity of deportation" makes it "the equivalent of banishment or exile." *Padilla*, 559 U.S. at 373.

15. *See* Elias, *supra* note 2, at 1143.

II. HISTORY OF THE EXCLUSIONARY RULE IN IMMIGRATION PROCEEDINGS

A. *Pre*-INS v. Lopez-Mendoza

Prior to the Supreme Court's decision in *INS v. Lopez-Mendoza*, the exclusionary rule applied in deportation proceedings to exclude evidence unlawfully obtained by federal agents.[16] The Supreme Court had never specifically addressed the subject, but it had stated in dicta in *Bilokumsky v. Tod*[17] that it could be assumed that illegally obtained evidence must be excluded in removal proceedings.[18] The leading treatise on immigration law[19] and a number of lower courts[20] generally agreed with the Supreme Court's view that this type of evidence should be excluded.[21]

This stance changed,[22] however, in 1979 when the Board of Immigration Appeals ("BIA") held in *Matter of Sandoval*[23] that neither "legal [n]or policy considerations dictate the exclusion of unlawfully seized evidence from [removal] proceedings."[24] The BIA came to this decision after applying the cost-benefit analysis[25] first used in *United States v. Calandra*[26] and *United States v. Janis*.[27] After *Matter of Sandoval*, the BIA no longer considered the exclusionary rule to be mandatory in removal proceedings but did still periodically exclude evidence for more serious Fourth Amendment violations.[28] This decision also led the BIA

16. *See* Bernard A. Nigro, Jr., *The Exclusionary Rule in Administrative Proceedings*, 54 GEO. WASH. L. REV. 564, 572 (1986).

17. United States *ex rel* Bilokumsky v. Tod, 263 U.S. 149, 155 (1923).

18. *See* Rossi, *supra* note 11, at 487.

19. *See* CHARLES GORDON & HARRY N. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 5.2(c), at 5–31 (rev. ed. 1977) ("It is undisputed . . . that the Fourth Amendment prohibition against unreasonable searches and seizures applies in deportation proceedings, and that evidence obtained as the result of an unlawful search cannot be used.").

20. *See* Wong Chung Che v. INS, 565 F.2d 166, 169 (1st Cir. 1977) (holding that if evidence "was obtained through an illegal search, there is no authority of which we are aware that would make it admissible" in a deportation proceeding); *see also* Benita-Mendez v. INS, 707 F.2d 1107, 1109 (9th Cir. 1983), *modified*, 748 F.2d 539, 540 (9th Cir. 1984); *Ex parte* Jackson, 263 F. 110, 112–13 (D. Mont. 1920), *appeal dismissed*, 267 F. 1022 (9th Cir. 1920).

21. *See* Rossi, *supra* note 11, at 487–88.

22. *See* Nigro, *supra* note 16, at 572; Rossi, *supra* note 11, at 488.

23. Matter of Sandoval, 17 I. & N. Dec. 70 (BIA 1979).

24. *Id.* at 83.

25. *See* Rossi, *supra* note 11, at 488. The Court conducts the cost-benefit analysis by weighing the benefit, or the deterrence value, against the societal costs of applying the exclusionary rule in a particular instance. *See* United States v. Calandra, 414 U.S. 338, 349–51 (1974); United States v. Janis, 428 U.S. 433, 446–49 (1976).

26. 414 U.S. 338 (1974).

27. 428 U.S. 433 (1976).

28. *See* Rossi, *supra* note 11, at 488. For an example of a case where the BIA did exclude evidence, see Matter of Garcia, 17 I. & N. Dec. 319 (BIA 1980). In *Matter of Garcia*, the BIA excluded statements that were involuntarily made. *See id.*

to begin distinguishing between egregious and non-egregious violations.[29] This distinction was later incorporated into the *Lopez-Mendoza* opinion.[30] The Supreme Court's decision in *Lopez-Mendoza* was "the first time post-*Sandoval* that the Article III courts [squarely] addressed whether the Fourth Amendment exclusionary rule applie[d] in deportation proceedings."[31]

B. INS v. Lopez-Mendoza

In *Lopez-Mendoza*, the Supreme Court held for the first time that the exclusionary rule does not apply in civil deportation proceedings.[32] This case involved two individuals, Adan Lopez-Mendoza and Elias Sandoval-Sanchez, whose cases had been consolidated.[33] Immigration and Naturalization Service ("INS") agents arrested both respondents at their place of work.[34] In both cases, the agents did not have warrants and were essentially conducting a raid.[35] During questioning, both Lopez-Mendoza and Sandoval-Sanchez admitted their unlawful entry into the United States.[36] After Lopez-Mendoza's admission, the agents prepared an I-213 Record of Deportable Alien ("I-213") and an affidavit.[37] Lopez-Mendoza signed these papers, thereby acknowledging his Mexican nationality and illegal entry into the United States.[38] Lopez-Mendoza had a hearing before an immigration judge where he moved to terminate the proceedings based on his illegal arrest.[39] The judge held that the legality of the arrest was not relevant to the deportation hearing and refused to rule on it.[40] The judge then found Lopez-Mendoza deportable based on the I-213 and affidavit that he had signed.[41]

The BIA dismissed Lopez-Mendoza's subsequent appeal, agreeing with the immigration judge that the illegal arrest had no bearing on the deportation proceeding and noting that Lopez-Mendoza had not objected

29. *See* Rossi, *supra* note 11, at 489 ("[T]he BIA sought to distinguish between garden variety Fourth Amendment violations and those that were 'egregious' and violated notions of fundamental fairness under the Fifth Amendment.").

30. INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984); *see also* Rossi, *supra* note 11, at 489.

31. Rossi, *supra* note 11, at 490.

32. *Lopez-Mendoza*, 468 U.S. at 1034, 1041.

33. *Id.* at 1034. *See* Rossi, *supra* note 11, at 490.

34. *Lopez-Mendoza*, 468 U.S. at 1035–36.

35. *Id.*

36. *Id.* at 1035, 1037.

37. *Id.* at 1035.

38. *Id.*

39. *Id.*

40. *Id.* at 1035.

41. *Id.* at 1035–36.

to the admission of the I-213 or the affidavit.[42] The Court of Appeals for the Ninth Circuit then vacated the order of deportation and remanded for a determination of whether Lopez-Mendoza's Fourth Amendment rights had been violated.[43]

At his hearing, Sandoval-Sanchez moved to suppress the evidence against him as the fruit of an unlawful arrest, but the immigration judge rejected this claim.[44] Like in Lopez-Mendoza's case, the immigration judge found that the legality of the arrest was not relevant to the deportation hearing.[45] The judge found Sandoval-Sanchez deportable.[46]

The BIA dismissed Sandoval-Sanchez's subsequent appeal, stating that the circumstances of his arrest had not affected the voluntariness of his admission.[47] In this case, however, the Court of Appeals for the Ninth Circuit held that Sandoval-Sanchez's detention had violated the Fourth Amendment.[48] Because his statements were a product of his detention, the court held that they were barred by the exclusionary rule.[49] The deportation order was thus reversed.[50]

The Supreme Court began its analysis of the case by stating that "[a] deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry."[51] The Court went on to say that the purpose of deportation is not to punish past transgressions but to stop continuing violations of immigration law.[52] The Court then summarily disposed of Lopez-Mendoza's claim because he had only objected to being summoned to the deportation hearing and not to the evidence offered against him.[53] The Court stated that "[t]he

42. *Id.* at 1036.

43. *Id.* The court in *Lopez-Mendoza v. INS* stated, "[i]f the Fourth Amendment is to retain its vitality as guardian of the privacy of citizens and non-citizens alike, the federal judiciary must be constantly vigilant in ensuring adherence to its commands by those charged with enforcing our laws. We are convinced that the best and indeed the only realistic way to ensure that immigration officers respect the precious values embodied in the Fourth Amendment is to apply the exclusionary rule in deportation proceedings." Lopez-Mendoza v. INS, 705 F.2d 1059, 1075 (9th Cir. 1983), *rev'd*, 468 U.S. 1032 (1984).

44. *Lopez-Mendoza*, 468 U.S. at 1037.

45. *Id.*

46. *Id.* at 1038.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 1038.

51. *Id.*

52. *Id.* at 1039. After the Court's decision in *Arizona v. United States*, however, a violation of immigration law is no longer considered an ongoing crime. *See* Arizona v. United States, 132 S. Ct. 2492, 2505 (2012) ("As a general rule, it is not a crime for a removable alien to remain present in the United States.").

53. *Lopez-Mendoza*, 468 U.S. at 1040. In order for Lopez-Mendoza's claim to be viable, he would have needed to object to the "statements and other evidence obtained as a result of [his]

'body' or identity of a defendant in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest."[54] Unlike Lopez-Mendoza, Sandoval-Sanchez did object to the evidence offered against him.[55] Despite not being the named respondent, it was his claim that formed the basis for the remainder of the opinion.[56]

The Court decided to use the cost-benefit analysis laid out in *United States v. Janis*[57] to determine whether the exclusionary rule should apply to deportation proceedings.[58] In *Janis*, the question before the Court was whether the exclusionary rule should apply to a federal civil tax assessment proceeding to exclude evidence unlawfully seized by state, not federal, officials.[59] In that opinion, the Court stated that the benefit of applying the exclusionary rule was "to deter future unlawful police conduct" while the costs were the loss of probative evidence and other secondary costs associated with a less accurate adjudication.[60] The Court in *Janis* ultimately decided that the exclusionary rule should not apply in the federal civil tax assessment context.[61]

In *Lopez-Mendoza*, the Court began by looking at the benefit, or the deterrence value, of applying the exclusionary rule to deportation proceedings.[62] The Court identified two reasons why the deterrence value may be significant in deportation proceedings.[63] First, while the evidence collected could be excluded from parallel criminal prosecutions, which may supply some "residual deterrence," only a small percentage of immigration cases were criminally prosecuted.[64] This meant that an agent's primary objective was to use the evidence in the civil proceedings.[65] Second, a deportation proceeding was one of the instances where the exclusionary rule could be at its most effective because the same agency that arrested the unlawful immigrant also brought the deportation

unlawful, warrantless arrest" rather than just his "compelled presence" at the deportation hearing. *Id.*

54. *Id.* at 1039.

55. *Id.* at 1040.

56. *Id.*

57. 428 U.S. 433 (1976).

58. *See Lopez-Mendoza*, 468 U.S. at 1041.

59. *Id.*; *see also Janis*, 428 U.S. at 434.

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

61. *Id.* at 1042. Through this holding, the Court began to craft a civil-criminal distinction within exclusionary rule jurisprudence. *See Janis*, 428 U.S. at 459–60 (1976) ("[T]he judicially created exclusionary rule should not be extended to forbid the use in the *civil* proceeding of one sovereign . . . of evidence illegally seized by a *criminal* law enforcement agent of another sovereign . . . .") (emphasis added).

62. *Lopez-Mendoza*, 468 U.S. at 1042.

63. *Id.*

64. *Id.* at 1042–43.

65. *Id.* at 1043.

action.[66]

Nonetheless, the Court went on to discuss several factors that reduced the deterrent effect.[67] First, deportation was possible when evidence independent from the arrest could still prove alienage.[68] As the Court previously noted, the person or identity of the respondent was not suppressible.[69] Additionally, the respondent's silence could be used as evidence of alienage, unlike in a criminal case where a defendant's silence could not be used as evidence of guilt.[70] Second, in the vast majority of cases, the circumstances surrounding the arrest were not challenged so officers were unlikely to base their conduct on possible exclusion at a future hearing.[71] Third, and according to the Court "perhaps most important," the INS had its own comprehensive scheme for deterring Fourth Amendment violations.[72] This scheme included "rules restricting stop, interrogation, and arrest practices," "instruction and examination in Fourth Amendment law" for immigration officers, and "a procedure for investigating and punishing [those] who commit Fourth Amendment violations."[73] The Court stated that "[t]he INS's attention to Fourth Amendment interests cannot guarantee that constitutional violations will not occur, but it does reduce the likely deterrent value of the exclusionary rule."[74] Lastly, the deterrent value of the exclusionary rule was further undermined by the availability of alternative remedies for those who suffer Fourth Amendment violations, such as civil suits or police disciplinary proceedings.[75]

Before discussing the social costs, the Court rejected the respondents' argument that the use of the exclusionary rule in deportation proceedings was necessary to protect the rights of all citizens, especially

66. *Id.* This is still true today although the name of the agency itself has changed. When *Lopez-Mendoza* was decided, the name of the agency was INS, or Immigration and Naturalization Service. Now it is referred to as ICE, or Immigration and Customs Enforcement. *See Overview*, ICE, http://www.ice.gov/about/overview/ (last visited Feb. 9, 2014).

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

68. *Id.*

69. *Id.*

70. *Id.* This statement is no longer entirely accurate. Shortly after the Court's decision in *Lopez-Mendoza*, the BIA in 1991 ruled that federal immigration authorities cannot meet their burden of proving alienage by relying on the respondent's silence alone. *See* Matter of Guevara, 20 I. & N. Dec. 238, 242 (BIA 1990) ("[T]he respondent's silence alone does not provide sufficient evidence, in the absence of any other evidence of record at all, to establish a prima facie case of alienage, sufficient to shift the burden of proof to the respondent . . . .").

71. *See Lopez-Mendoza*, 468 U.S. at 1044.

72. *Id.*

73. *Id.* at 1044–45.

74. *Id.* at 1045.

75. *Id.*; *see also* Nigro, *supra* note 16, at 582 (discussing alternative remedies for Fourth Amendment violations, such as 42 U.S.C. § 1983 and a *Bivens* action).

Hispanic-Americans.[76] The Court stated that those lawfully in the country are only interested in the exclusionary rule for its future deterrent effect because it provided no remedy for completed wrongs.[77] For the reasons previously discussed, the Court found that the application of the exclusionary rule in civil deportation proceedings would have little additional deterrent effect.[78] Therefore, it was unlikely to materially contribute to the protection of citizens' Fourth Amendment rights.[79]

The Court in *Lopez-Mendoza* next discussed the social costs associated with applying the exclusionary rule in deportation proceedings. It labeled these costs "both unusual and significant."[80] The first major cost discussed by the Court was that applying the exclusionary rule in the immigration context "require[d] the courts to close their eyes to [the] ongoing violations" that immigration proceedings were meant to prevent.[81] In a nod to one of its most famous jurists, Justice Cardozo,[82] 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."[83]

The second major cost discussed by the Court was that the application of the exclusionary rule would interfere with the then-"streamlined" deportation hearing system.[84] The Court quoted the BIA's prior assessment of applying the exclusionary rule to immigration proceedings, which stated that "[t]he ensuing delays and inordinate amount of time spent on such cases at all levels has an adverse impact on the effective administration of the immigration laws."[85] This situation was exacerbated by the high volume of arrests, which made it very difficult to record the precise circumstances of each arrest.[86] At the time, an officer simply completed an I-213, but a suppression hearing would have required more, including the officer's presence at the hearing.[87] Accord-

76. *See Lopez-Mendoza*, 468 U.S. at 1045–46.

77. *Id.* at 1046.

78. *Id.*

79. *Id.* ("Important as it is to protect the Fourth Amendment rights of all persons, there is no convincing indication that application of the exclusionary rule in civil deportation proceedings will contribute materially to that end.").

80. *Id.*

81. *Id.*

82. During his time on the New York Court of Appeals, then-Judge Cardozo famously stated that "[t]he criminal is to go free because the constable has blundered." People v. Defore, 150 N.E. 585, 587 (1926).

83. *See Lopez-Mendoza*, 468 U.S. at 1047.

84. *Id.* at 1048. At the time of the decision, the system was "streamlined to permit the quick resolution of very large numbers of deportation actions," on average six deportation hearings a day. *Id.*

85. *Id.* at 1048–49 (quoting Matter of Sandoval, 17 I. & N. Dec. 70, 80 (BIA 1979)).

86. *Id.* at 1049.

87. *Id.*

ing to the Court, the burden on officers would have frustrated the administration of the immigration laws.[88]

Finally, the Court examined how the application of the exclusionary rule could result in the suppression of large quantities of evidence that was obtained lawfully.[89] INS agents often conducted mass arrests under confusing circumstances, which made it difficult to ascertain the precise information necessary for a suppression hearing.[90] Instead, INS agents may only have been able to testify that they followed INS protocol.[91] The demand for an exact account of what happened at each arrest would have precluded mass arrests, even when the INS was faced with a group of illegal immigrants.[92] According to the INS, this difficulty could have arisen even if everything was done in compliance with the Fourth Amendment.[93]

Based on the above analysis of the costs and benefits, the Court determined that the exclusionary rule should not apply in civil deportation hearings.[94] The Court did, however, carve out two possible exceptions—the first being for "egregious violations of the Fourth Amendment or other liberties that might transgress the notions of fundamental fairness and undermine the probative value of the evidence obtained," and the second being "if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread."[95] The meanings of both of these exceptions have been the subject of much debate.[96]

C. *Post*-INS v. Lopez-Mendoza

In the wake of the *Lopez-Mendoza* ruling, the BIA began relying more heavily on the Fifth Amendment's Due Process Clause to adjudicate constitutional violations regarding fundamental fairness, even when the violations involved unreasonable searches and seizures.[97] However, when the BIA address Fourth Amendment claims, its approach is to apply the law of the federal court of appeals that governs in the jurisdic-

88. *Id.*
89. *See id.* at 1049.
90. *Id.* at 1049–50.
91. *Id.* at 1049.
92. *Id.* at 1049–50.
93. *Id.* at 1050.
94. *Id.*
95. *Id.* at 1050–51.
96. *See generally* Rossi, *supra* note 11, at 503–30 (discussing how the "egregious violations" exception has created more constitutional litigation, not less); Elias, *supra* note 2, at 1113–40 (discussing how the "widespread exception" has historically been forgotten but that recently more suppression motions have been based on this exception).
97. *See* Scharf, *supra* note 2, at 76.

tion from which the case arose.[98] Additionally, the courts of appeals began to weigh in on the meanings of the exceptions created in *Lopez-Mendoza*, leading to a variety of different interpretations for these exceptions.[99]

III. WHY THE COST-BENEFIT ANALYSIS USED IN *LOPEZ-MENDOZA* WOULD PRODUCE A DIFFERENT RESULT TODAY

In *Lopez-Mendoza*, the Supreme Court set out a multi-factor test with which it determined that the social costs of applying the exclusionary rule outweighed the benefits of excluding illicit evidence.[100] As discussed above, these factors were that 1) immigration proceedings are civil in nature; 2) the majority of individuals do not challenge the circumstances of their arrest; 3) internal deterrence mechanisms exist; and 4) alternative civil remedies are available.[101] However, these factors no longer weigh in the same direction because of the changes in "immigration jurisprudence [and] the practice of immigration enforcement" that have occurred over the past thirty years, in addition to the changing "realities of life for immigrant communities."[102] As a result of these changes, all four factors, if fairly and comprehensively assessed, would produce an entirely different result today.

A. *The Criminalization of Immigration Law*

In 1984, when *Lopez-Mendoza* was decided, the Court characterized deportation proceedings as "purely civil action[s]."[103] Today that is no longer the case because of the increasing criminalization of immigration laws that has occurred over the past thirty years.[104] This criminalization occurred through "the creation of new immigration-related crimes, an increase in the minimum and maximum sentences of existing immigration crimes, an increase in the fines imposed on immigrant

98. *See id.* at 82.

99. *See id.* at 62–63. *Compare* Kandamar v. Gonzales, 464 F.3d 65, 71 (1st Cir. 2006) (stating that an egregious violation is characterized by "threats, coercion, or physical abuse"), *with* Gonzalez-Rivera v. INS, 22 F.3d 1441, 1449 (9th Cir. 1994) (stating that any bad faith violation of the Fourth Amendment is an egregious violation). For a complete discussion of the different approaches to the egregious violation exception, see Rossi, *supra* note 11, at 526–30; Scharf, *supra* note 2, at 62–69.

100. *Lopez-Mendoza*, 468 U.S. at 1038, 1043–45.

101. *See supra* Part II.B.

102. *See* Elias, *supra* note 2, at 1141.

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

104. *See* Elias, *supra* note 2, at 1141–46. *See generally* Ira Kurzban, *Criminalizing Immigration Law*, *in* 42ND ANNUAL IMMIGRATION & NATURALIZATION INSTITUTE 321 (2009) (reflecting on the history of criminalizing immigration law and the current paradigm of criminalizing civil conduct in immigration law).

defendants, and far greater numbers of prosecutions being brought for the commission of all immigration-related crimes."[105] While the change occurred over a number of years, the events of September 11, 2001 accelerated it.[106] After September 11, immigration prosecutions increased continually, reaching their highest point in fiscal year 2013 at nearly 100,000 prosecutions.[107] Additionally, immigration prosecutions now make up the largest single category of federal prosecutions per month.[108]

The harsh tactics used to enforce civil immigration law also exemplify its criminalization.[109] For example, militarized raids are often conducted to round up individuals that entered the country unlawfully.[110] Once apprehended, those challenging their deportations are held in harsh conditions that are similar to prison.[111] In fact, detainees are often housed in county jails, sometimes even in the general population.[112]

105. *See* Elias, *supra* note 2, at 1142. *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8, 18, and 28 U.S.C.) (rendering individuals convicted of minor crimes with sentences of less than five years eligible for deportation); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified as amended in scattered sections of 8, 18, 28, and 42 U.S.C.) (making it a criminal offense for a noncitizen to attempt an unlawful reentry into the United States after having been convicted of three misdemeanors involving either drugs or crimes against the person); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7345, 102 Stat. 4181, 4471 (1988) (codified as amended at 1028 U.S.C. § 1326) (increasing the criminal sentences for the offenses of unlawful reentry after deportation, if deportation resulted from a felony (more if the underlying crime was an "aggravated felony")); 8 U.S.C. §§ 1282, 1325–28 (2006) (increasing criminal fines for certain immigration-related crimes).

106. *See* Elias, *supra* note 2, at 1143.

107. Transactional Records Access Clearinghouse, *At Nearly 100,000 Immigration Prosecutions Reach All-time High in FY 2013*, TRAC IMMIGRATION (Nov. 25, 2013), http://trac.syr.edu/immigration/reports/336/.

108. Transactional Records Access Clearinghouse, *Prosecutions for October 2013*, TRAC REPORTS (Jan. 13, 2014), http://trac.syr.edu/tracreports/bulletins/overall/monthlyoct13/fil/.

109. *See* Chacón, *supra* note 13, at 1574.

110. *Id.* at 1574–75. *See, e.g.*, BESS CHIU ET AL., CARDOZO IMMIGRATION JUSTICE CLINIC, CONSTITUTION ON ICE: A REPORT ON IMMIGRATION HOME RAID OPERATIONS 13–14, 19 (2009) *available at* http://cw.routledge.com/textbooks/9780415996945/human-rights/cardozo.pdf ("[I]n Minnesota, the news reported that ICE agents showed up wearing bulletproof vests and armed with guns. They pushed their way into homes and terrified the children."). For further examples of aggressive enforcement tactics, see *id.* at 17–22.

111. *See* Chacón, *supra* note 13, at 1577–79; *see also* Hannah Rappleye & Lisa Riordan Seville, *Flood of Immigrant Families at Border Revives Dormant Detention Program*, NBC NEWS (July 25, 2014, 5:39 AM), http://www.nbcnews.com/storyline/immigration-border-crisis/flood-immigrant-families-border-revives-dormant-detention-program-n164461 (discussing that the current "border crisis" is "prompting the Obama administration to revive a much-criticized detention program that previously led to children and their parents being held for extended periods of time in harsh prison-like conditions").

112. *See The Money Trail,* DETENTION WATCH NETWORK, http://www.detentionwatchnetwork.org/node/2393 (last visited July 31, 2014) ("[Sixty-seven percent] of immigrants in administrative ICE custody are housed in local facilities, often alongside prisoners serving criminal sentences.").

Immigration detainees are held in prison-like conditions, and often treated like criminal detainees, despite the fact that in the majority of cases there are no criminal charges at stake.[113] The use of these methods makes present enforcement of immigration laws much more like criminal enforcement than civil enforcement.[114]

Lastly, the criminalization of immigration law is exemplified by the fact that deportation is much more like a form of punishment[115] now than it was when *Lopez-Mendoza* was decided.[116] In fact, some amendments to our immigration laws seem to have been passed with the intent to punish.[117] For example, through the passage of the Illegal Immigration Reform and Immigrant Responsibility Act[118] ("IIRIRA"), Congress intended to deport individuals for prior offenses even if courts might determine that there is a legitimate reason for them to stay.[119] Because of this, some of the new rules destroy families and remove individuals who are making contributions to society.[120] These rules constitute punishment because they do not leave the courts any discretion to decide whether to allow individuals to stay,[121] nor do they give serious consideration to family rights, which have been recognized as fundamental by United States courts and international tribunals.[122] The new rules promulgated by Congress have made the statutory framework itself

Additionally, the growth of the private prison industry over the past thirty years evidences the criminalization of immigration law. *See id.*; Chacón, *supra* note 13, at 1578.

113. *See* Chacón, *supra* note 13, at 1578.

114. *Id.* at 1574, 1577.

115. In *Fong Yue Ting*, one of the Supreme Court's early immigration cases, the Court stated that "[t]he order of deportation is not a punishment for crime." Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893). Approximately fifty years later, the Court had changed its mind, stating in *Bridges v. Wixon* that, "[t]hough deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted." Bridges v. Wixon, 326 U.S. 135, 154 (1945).

116. *See* Chacón, *supra* note 13, at 1573–74.

117. *See* Pauw, *supra* note 12, at 333–34 ("The legislative history underlying IIRIRA reveals that the criminal grounds of deportation were expanded in order to punish offenders. According to Senator Roth, for example, IIRIRA expanded the grounds of deportation 'to include more crimes punishable by deportation.' Senator Abraham described the sentiments underlying IIRIRA as follows: 'You don't shut down the borders. What you do is you say we're going to apply the criminal laws more harshly.'").

118. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8, 18, and 28 U.S.C.).

119. *See* Pauw, *supra* note 12, at 334.

120. *See id.* at 335.

121. *See id.*

122. *See id.* at n.159. *But see* Fiallo v. Bell, 430 U.S. 787 (1977) (holding that a statute that discriminates against the illegitimate children of fathers who are United States citizens does not violate equal protection); Harisiades v. Shaughnessy, 342 U.S. 580, 590–91 (deciding that there was no violation of due process even though deportation imposes hardship on families); Knauff v.

penal.[123]

Unfortunately, the increase in the criminalization of immigration law has not been coupled with a corresponding increase in procedural protections for those in deportation proceedings, thus creating an imbalance, or an "asymmetric incorporation of criminal justice norms."[124] In order to rectify this imbalance, we must recognize that immigration proceedings are at least "quasi-criminal" in nature.[125] We must also reject the all-or-nothing approach for determining whether deportation proceedings are civil or criminal and provide a middle ground where at least some constitutional protections apply.[126] The middle ground should apply when the purpose of the sanction is punitive as opposed to remedial, and it ought to protect an individual's Fourth Amendment rights because it is unacceptable for a punishment to be imposed based on illegally obtained evidence.[127] However, there may be other rights afforded to criminal defendants that do not need to be included in the middle ground—for example, the right to a jury trial.[128]

B. *The Increase in Motions to Suppress*

When the Court decided *Lopez-Mendoza* in 1984, it cited the lack of challenges to arrests as one of the reasons why the deterrence value of using the exclusionary rule in immigration proceedings would be low.[129] There is no longer a lack of challenges to arrests, however, as motions to suppress are being filed with increased frequency.[130] According to a study conducted by the Cardozo School of Law, there was a nine-fold increase in the filing of suppression motions from 2006 to 2009 com-

Shaughnessy, 338 U.S. 537, 544–46 (1950) (holding that the exclusion from the United States of the wife of a veteran who was a United States citizen did not violate due process).

123. *See* Pauw, *supra* note 12, at 338.

124. *See* Elias, *supra* note 2, at 1143; *see also* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 472 (2007) ("A pattern has emerged: Those features of the criminal justice model that can roughly be classified as enforcement have indeed been imported. Those that relate to adjudication—in particular, the bundle of procedural rights recognized in criminal cases—have been consciously rejected. . . . [I]mmigration law has been absorbing the theories, methods, perceptions, and priorities of the criminal enforcement model while rejecting the [highly protective] criminal adjudication model in favor of a civil regulatory regime.").

125. Pauw, *supra* note 12, at 323.

126. *See id.* at 319.

127. *See generally id.* at 325–44 (discussing the difference between remedial measures and punitive measures and why constitutional protections are necessary when a sanction is punitive).

128. U.S. CONST. amend. VI.

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

130. *See* Elias, *supra* note 2, at 1124–25 ("[R]espondents in immigration proceedings have argued with increasing frequency that evidence against them should be suppressed because it was obtained illegally by government officials whose actions violated the respondents' constitutional rights.").

pared to an equal period of time immediately preceding 2006.[131]

The Cardozo study also offered insight as to why there has been such an increase in suppression motions. First, the study found that Immigration and Customs Enforcement ("ICE") agents often fail to obtain lawful consent before entering a home.[132] Second, the data indicates that there is a high percentage of collateral arrests, meaning that ICE agents are arresting other individuals in addition to their original targets.[133] The "high percentage of collateral arrests is consistent with allegations that ICE agents are using home raids for purported targets as a pretext to enter homes and illegally seize mere civil immigration violators, in order to meet inflated arrest expectations."[134] Additionally, the majority of arrest records provided no basis for the initial seizure, despite the requirement that ICE have some reasonable suspicion.[135] Lastly, the data reveals a troubling trend of racial profiling,[136] specifically toward Hispanic individuals, who are overrepresented in the collateral arrests category.[137] Constitutional violations such as these by ICE officers are likely the reason for the increase in suppression motions.[138]

C. *The Inadequacy of ICE's Own Regulations as a Deterrent*

In its opinion in *Lopez-Mendoza*, the Supreme Court cited the existence of ICE's own standards and policies as a reason why the application of the exclusionary rule to deportation hearings was unnecessary.[139] Nevertheless, these policies have proven to be ineffective.[140] In fact, even at the time that *Lopez-Mendoza* was decided, Justice White, in his dissent, pointed out that the government was unable to provide even one

131. *See* CHIU, *supra* note 110, at 13–14. The raw numbers are five motions pre-2006 and forty-eight motions post-2006. The year 2006 was chosen because that is when Immigration and Customs Enforcement ("ICE") instituted its new arrest performance expectations. To understand how this data was collected, see *id.* at 13.

132. *See id.* at 10.

133. *See id.* at 11.

134. *Id.*

135. *See id.*

136. Racial profiling is a factor used to determine whether an "egregious violation" has occurred. *See, e.g.*, Ghysels-Reals v. U.S. Att'y Gen., 418 F. App'x 894, 895 (11th Cir. 2011).

137. *See* CHIU, *supra* note 110, at 12.

138. For various examples of ICE misconduct, see *id.* at 17–22. One example from North Bergen, New Jersey in 2008 involved a tenant who opened her door, and then ICE agents searched her entire apartment without permission. This individual was eventually arrested even though she had recently been granted legal immigration status and had documents to prove it. *Id.* at 17. Another more violent example states that "ICE agents took out their guns, banged on a door, and forced their way [into the home] once the tenant opened the door to find out who was there. ICE agents entered illegally and searched the home." *Id.* at 19.

139. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1044–45 (1984).

140. *See* Elias, *supra* note 2, at 1146–50.

example where the ICE regulations had been used.[141] As discussed above, ICE agents are too frequently failing to obtain consent to enter homes, detaining people without reasonable suspicion, and engaging in racial profiling—all of which go against their regulations.[142]

In addition to these issues, the ICE training scheme that the *Lopez-Mendoza* majority emphasized as helping "to ensure that immigration officers adhered to their regulations" has not been successful.[143] One case in particular exemplifies the problems with ICE's training procedures:

> [Pedro] Guzman, a U.S. citizen with learning difficulties, was apprehended by the Los Angeles police on a trespassing and vandalism charge, handed over to ICE, and mistakenly deported to Mexico. Guzman survived for three months wandering along the border, eating garbage and bathing in the Tijuana River before finally convincing a border official to allow him to reenter the United States.[144]

This example demonstrates "the extent to which ICE's training procedures fail to guarantee that immigration officers will follow the agency's guidelines and therefore fail to prevent violations of individuals' constitutional rights."[145]

In response to the allegations that ICE is not following its own regulations, ICE claims that the INS regulations no longer apply to them because ICE is "a new, distinct agency that need not adhere to INS legacy subregulatory rules and guidelines."[146] The immigration defense bar vehemently opposes this position.[147] The argument between these parties shows how much the regulation of immigration proceedings has changed since the *Lopez-Mendoza* decision.[148] Regardless of whether the regulations no longer apply to ICE or are simply not being followed,

141. *See Lopez-Mendoza*, 468 U.S. at 1054 (White, J., dissenting).

142. *See supra* Part III.B; *see also* Elias, *supra* note 2, at 1147–48. These regulations include "rules restricting stop, interrogation, and arrest practices," "instruction and examination in Fourth Amendment law" for immigration officers, and "a procedure for investigating and punishing [those] who commit Fourth Amendment violations." *Lopez-Mendoza*, 468 U.S. at 1044–45.

143. *See* Elias, *supra* note 2, at 1148.

144. *Id.* at 1148–49.

145. *Id.* at 1148.

146. *Id.* at 1149.

147. *See id.* The immigration defense bar is likely correct because the Homeland Security Act of 2002, which created the Department of Homeland Security ("DHS"), reassigned all of INS's detention and removal duties to DHS. *See* 6 U.S.C. § 251 (2012) ("[T]here shall be transferred from the Commissioner of Immigration and Naturalization to the Under Secretary for Border and Transportation Security all functions performed under . . . [t]he detention and removal program."). In addition, ICE's argument "directly contravenes one of the guiding principles of administrative law." Elias, *supra* note 2, at 1149 n.248.

148. *See* Elias, *supra* note 2, at 1149 (discussing that the argument between ICE and the immigration defense bar demonstrates "the degree to which regulatory oversight of immigration enforcement has changed since *Lopez-Mendoza* was decided in 1984").

it is clear that they are not effectively deterring ICE agents from committing Fourth Amendment violations like the *Lopez-Mendoza* Court thought they would.

D. *The Unavailability of Alternative Remedies*

Another reason cited by the Court in *Lopez-Mendoza* for not applying the exclusionary rule to immigration proceedings was the availability of alternative remedies that could be used by immigrants to cure a constitutional violation.[149] However, alternative remedies have actually proven to be largely unavailable to those in removal proceedings.[150] Justice White discussed this in his *Lopez-Mendoza* dissent, stating that the idea that civil suits provide protection is "unrealistic."[151] He went on to explain that:

> [c]ontrary to the situation in criminal cases, once the Government has improperly obtained evidence against an illegal alien, he is removed from the country and is therefore in no position to file civil actions in federal courts. Moreover, those who are legally in the country but are nonetheless subjected to illegal searches and seizures are likely to be poor and uneducated, and many will not speak English. It is doubtful that the threat of civil suits by these persons will strike fear into the hearts of those who enforce the Nation's immigration laws.[152]

While Justice White foreshadowed the problems with alternative remedies in 1984, the situation of undocumented immigrants has only worsened since then.[153] The immigrant population is more vulnerable, isolated, and legally marginalized than it was in 1984.[154] This is largely because of two occurrences—the Supreme Court ruling in *United States v. Verdugo-Urquidez*[155] and September 11, 2001.[156] In *Verdugo-Urquidez*, the Supreme Court narrowed the class of people protected by the Fourth Amendment, stating that "the people protected by the Fourth Amendment . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connections with the country to be considered part of that community."[157] After this

149. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1045 (1984).

150. *See* Matthew S. Mulqueen, *Rethinking the Role of the Exclusionary Rule in Removal Proceedings*, 82 ST. JOHN'S L. REV. 1157, 1194 (2008); *see also* Nigro, *supra* note 16, at 587 ("Alternative remedies, such as Bivens-type damage actions, do not protect Fourth Amendment rights as effectively as the exclusionary rule does.").

151. *Lopez-Mendoza*, 468 U.S. at 1055 (White, J., dissenting).

152. *Id.*

153. *See* Elias, *supra* note 2, at 1151.

154. *See id.*

155. 494 U.S. 259 (1990).

156. *See id.* at 265; *see also* Elias, *supra* note 2, at 1151.

157. *Verdugo-Urquidez*, 494 U.S. at 265 (internal quotations omitted).

ruling, there was much debate over the applicability of Fourth Amendment protections to legal residents and undocumented immigrants in both criminal and civil proceedings.[158] Some courts have gone so far as to hold that noncitizens have no Fourth Amendment rights.[159] Without any Fourth Amendment rights, noncitizens have no standing to sue for a civil remedy. Therefore, interpretations of this sort render noncitizens powerless to seek any type of civil relief, like Justice White discussed in his *Lopez-Mendoza* dissent.[160]

After September 11, "a number of statutory measures and agency schemes were introduced that further restricted the rights of aliens held by the federal government."[161] Moreover, the 1996 amendments to the Immigration and Nationality Act curtailed immigration respondents' access to meaningful judicial review.[162] Additionally, as Justice White noted, immigrants are often deported before they even have the chance to seek any alternative remedies.[163] In effect, this fact makes civil remedies useless to undocumented immigrants in deportation proceedings.[164] Further, a civil remedy would not redress the injury to the respondent because it would provide monetary damages but not afford the individual the right to stay in the country.[165] Immigration respondents already lacked means to vindicate their constitutional rights in 1984, and these opportunities have become even more limited in 2014.[166]

IV. How the Involvement of State and Local Police Officers in Immigration Enforcement Further Modifies the *Lopez-Mendoza* Cost-Benefit Analysis

In 1984, when *Lopez-Mendoza* was decided, the primary enforcers of immigration law were federal immigration agents.[167] Today, how-

158. *See* Elias, *supra* note 2, at 1151.

159. *See id.* at 1152; *see, e.g.*, United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254, 1255 (N.D. Utah 2003) ("The court concludes that as a previously-removed alien felon, Esparza-Mendoza cannot assert a violation of the Fourth Amendment because he is not one of 'the People' the Amendment protects.").

160. *See* Elias, *supra* note 2, at 1152; *see also* INS v. Lopez-Mendoza, 468 U.S. 1032, 1055 (1984) (White, J., dissenting).

161. *See* Elias, *supra* note 2, at 1152.

162. *See id.* at 1153.

163. *See Lopez-Mendoza*, 468 U.S. at 1055 (White, J., dissenting).

164. *See* Mulqueen, *supra* note 150, at 1194; Chiu, *supra* note 110, at 25. *See also* Scott E. Sundby, *Everyman's Exclusionary Rule: The Exclusionary Rule and the Rule of Law (or Why Conservatives Should Embrace the Exclusionary Rule)*, 10 Ohio St. J. Crim. L. 393, 406 n.49 (2013) (discussing the ineffectiveness of alternative remedies even in the criminal context).

165. Oral Argument at 31:07–32:35, Andres Jimenez-Domingo v. U.S. Att'y Gen., No. 12-14048 (11th Cir. Dec. 5, 2013).

166. *See* Elias, *supra* note 2, at 1154.

167. *See* Chacón, *supra* note 13, at 1579 (stating that local and state police involvement in immigration enforcement is a "relatively recent development").

ever, states and localities have increasingly taken on the role of enforcing immigration law,[168] making such enforcement part of the officers' "zone of primary interest."[169] State and local law enforcement of federal immigration law occurs "through formal agreements under Section 287(g) of the Immigration and Nationality Act; through participation in Secure Communities and the Criminal Alien Program; through state laws such as those enacted in Arizona, Alabama, and elsewhere; and through policies promoted by local mayors, sheriffs, and police chiefs."[170] In a recent study, twelve percent of police chiefs "reported that their local governments 'expect their department to take a proactive role in deterring unauthorized immigration in all of [the department's] activities.'"[171] Additionally, a nationwide survey of police chiefs found that eighty-seven percent of large city police departments and eighty-nine percent of county sheriff's offices check the immigration status of people arrested for a violent crime.[172] Even in the event of an arrest for a non-violent crime with no prior record, fifty-one percent of large city police departments and sixty-seven percent of county sheriff's offices check the immigration status of the individual arrested.[173]

A. *Additional Modifications to the Lopez-Mendoza Cost-Benefit Analysis*

The increase in state and local law enforcement involvement in immigration law significantly changes the Court's cost-benefit analysis from *Lopez-Mendoza* in ways that go beyond the reasoning discussed above.[174] First, the involvement of these officers itself enhances the criminalization of immigration law because they are supposed to enforce state criminal law, not federal immigration law.[175] Because they spend

168. LEGAL ACTION CTR., MOTIONS TO SUPPRESS IN REMOVAL PROCEEDINGS: CRACKING DOWN ON FOURTH AMENDMENT VIOLATIONS BY STATE AND LOCAL LAW ENFORCEMENT OFFICERS 9 (2013), *available at* http://www.legalactioncenter.org/sites/default/files/motions_to_suppress_in_removal_proceedings-_cracking_down_on_fourth_amendment_violations.pdf ("In recent years, numerous states, and even some localities, have taken a strong interest in assisting the federal government with immigration enforcement.") [hereinafter PRACTICE ADVISORY].

169. United States v. Janis, 428 U.S. 433, 458 (1976); *see, e.g.*, ARIZ. REV. STAT. ANN. § 11-1051(B) (2010); ALA. CODE § 31-13-12 (2011); GA. CODE ANN. § 17-5-100(b) (2012).

170. *See* PRACTICE ADVISORY, *supra* note 168, at 1.

171. Paul G. Lewis et al., *Why Do (Some) City Police Departments Enforce Federal Immigration Law? Political, Demographic, and Organizational Influences on Local Choices*, 23 J. PUB. ADMIN. RES. & THEORY 1, 11–12 (2013).

172. *See* Monica Varsanyi et al., *Immigration Federalism: Which Policy Prevails?*, MIGRATION POLICY INSTITUTE (Oct. 2012), http://www.migrationinformation.org/Feature/display.cfm?ID=909.

173. *See id.*

174. *See supra* Part III.

175. *See* CHIU, *supra* note 110, at 26 (discussing how the perceived or actual cooperation between ICE and local law enforcement has made the job of local police officers more difficult).

more time in the community, local law enforcement officers build a relationship of trust with immigrants, but enforcing immigration law puts this relationship at risk.[176] Enforcing immigration law also hinders the police's ability to achieve their primary goal, crime reduction.[177] Undocumented immigrants will not be willing to report crimes to the police if they are concerned about possible immigration consequences.[178] Additionally, police training leads officers to use criminal enforcement methods, which are likely to be harsher in nature.

Next, the ICE internal rules, which have proven to be ineffective for ICE,[179] do not apply to local law enforcement officers.[180] Therefore, the only way to deter local law enforcement is through the same deterrence method used when enforcing criminal law—the exclusionary rule. This will protect all individuals, including citizens, from being targeted by local police officers as undocumented individuals.[181] Despite Section 287(g) agreements, local law enforcement officers are not well trained in federal immigration law, thus making it even more difficult for them to properly enforce it.[182] Lastly, the disjointed enforcement of immigration law by a number of different state and local law enforcement agencies makes it difficult to identify a central authority against which to file civil suits.[183] Moreover, this fragmented enforcement of immigration law cre-

176. *See* Lewis et al., *supra* note 171, at 4, 10 ("Since the emergence of community policing as a professional philosophy, police have sought to gain the trust and confidence of local community members by emphasizing close communication and collaboration between police and residents, an approach that has become the archetype for police work."). For a more complete discussion of the community policing model, see generally BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, UNDERSTANDING COMMUNITY POLICING: A FRAMEWORK FOR ACTION (1994), *available at* https://www.ncjrs.gov/pdffiles/commp.pdf.

177. *See* CHIU, *supra* note 110, at 14.

178. *See id.*

179. *See supra* Part III.C.

180. *See* PRACTICE ADVISORY, *supra* note 168, at 2 (suggesting that local law enforcement officers are only subject to federal regulations if acting under a Section 287(g) agreement, a formal agreement between the federal government and state or local law enforcement officers that enables those officers to perform duties of federal immigration officers).

181. *See, e.g.*, Lewis et al., *supra* note 171, at 4 (stating that racial profiling is an issue with local law enforcement of immigration law); *see also* Maria João Guia, *Crimmigration, Securitisation and the Criminal Law of the Crimmigrant*, *in* SOCIAL CONTROL AND JUSTICE 17, 20, 34–35 (Maria João Guia et al. eds., 2013) (discussing that the immigrant is a "target of permanent suspicion").

182. *See* PRACTICE ADVISORY, *supra* note 168, at 13 ("[S]tate and local law enforcement officers who are not operating under a Section 287(g) agreement do not receive federal immigration training.").

183. *See id.* ("Where state and local officers detain or arrest an individual for suspected immigration violations, [ ] there is no 'agency under central federal control,' that can be held accountable. Without a single target for declaratory relief, few tools are available to deter constitutional violations other than the exclusionary rule.").

ates confusion and "promotes inconsistent enforcement practices."[184]

B. *How the* Janis *Balancing Test is Distinguishable in the Immigration Context*

In *United States v. Janis*, the Supreme Court decided that the exclusionary rule should not be applied in a federal civil tax proceeding to evidence illegally obtained by state law enforcement officers.[185] The Court determined that applying the exclusionary rule would be inappropriate because there would be a minimal deterrent effect on the state officials from excluding the evidence.[186] The Court discussed three reasons for applying the "silver platter" doctrine in this context.[187] The reasons cited were the following: (1) "a state court had already suppressed the evidence from a state criminal tax proceeding"; (2) "state officers did not care very much about the outcome of federal civil tax proceedings, and therefore would not be prone to committing constitutional violations in order to obtain evidence for those proceedings"; and (3) "even if state officers did care about the outcome of federal proceedings, the suppression of evidence in a federal criminal trial would suffice to deter state officer misconduct."[188]

In *Lopez-Mendoza*, the Court applied the same cost-benefit analysis from *Janis* to the immigration context.[189] There are several reasons, however, why local immigration enforcement is different from local or state tax enforcement.[190] These differences make it inappropriate to apply the *Janis* balancing test, and in turn the silver platter doctrine, to immigration proceedings.

First, evidence for a federal civil tax proceeding can also be suppressed in a state criminal tax proceeding.[191] Local law enforcement would likely be deterred by suppression in the state case, meaning that there would be "limited additional deterrent benefit" from suppression in the federal civil proceeding.[192] Unlike in the tax context, however, there are no parallel state immigration proceedings because the federal gov-

184. Linda Reyna Yanez & Alfonso Soto, *Local Police Involvement in the Enforcement of Immigration Law*, 1 HISP. L.J. 9, 31 (1994).

185. *See* United States v. Janis, 428 U.S. 433, 459–60 (1976).

186. *See* PRACTICE ADVISORY, *supra* note 168, at 8.

187. *See id.* at 9. The silver platter doctrine is the concept that evidence seized by state or local law enforcement officers in violation of the Fourth Amendment can still be used in federal proceedings. *See* Janis, 428 U.S. at 444. This doctrine has since been held not to apply in federal criminal proceedings. *See* Elkins v. United States, 364 U.S. 206, 223 (1960).

188. *See* PRACTICE ADVISORY, *supra* note 168, at 9.

189. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1041 (1984).

190. *See* PRACTICE ADVISORY, *supra* note 168, at 9.

191. *See id.*

192. *Id.*

ernment has the sole power to impose immigration penalties.[193] Therefore, the only proceeding in which the evidence can be used is the federal proceeding.[194] Thus, to deter the local law enforcement officer, the evidence collected must be suppressed in the federal proceeding.

Second, while state and local officers are rarely interested in tax proceedings, many state and local law enforcement officers "have taken a strong interest in assisting the federal government with immigration enforcement."[195] Because of the interest in enforcing immigration law, state and local officers are "likely to be motivated to obtain evidence that could be used in an immigration removal proceeding."[196] As such, suppressing illegally obtained evidence in immigration proceedings will likely have a significant deterrent effect for state and local law enforcement officers.[197]

Third, in the tax context, the suppression of illegally seized evidence in a federal *criminal* trial would be a sufficient deterrent for state or local officers.[198] As such, "[t]here would be limited additional deterrent benefit from suppressing evidence in federal *civil* proceedings."[199] This reasoning does not apply to the immigration context, however, because the illegally seized evidence is more often than not used in a civil deportation hearing rather than a federal criminal proceeding.[200] State officers understand that any evidence they obtain is more likely to be used in civil rather than criminal proceedings.[201] Therefore, to be an effective deterrent, the evidence must be suppressed in the civil proceeding.[202] Relying on suppression in any related criminal proceeding is not effective.[203]

V. WHY THE COST-BENEFIT ANALYSIS SHOULD NOT BE USED TO DETERMINE WHETHER THE EXCLUSIONARY RULE SHOULD APPLY TO IMMIGRATION PROCEEDINGS

The cost-benefit analysis performed by the Supreme Court in *Lopez-Mendoza* would have a much different outcome if performed today.[204] This discrepancy shows that if a cost-benefit analysis was ever

193. *See id.*
194. *See id.*
195. *See id.*
196. *See id.*
197. *See id.*
198. *See id.*
199. *See id.* (emphasis added).
200. *See id.*
201. *See id.*
202. *See id.*
203. *See id.*
204. *See supra* Part III.

an effective form of evaluation for this issue, it no longer is.[205] Additionally, the Court's analysis in *Lopez-Mendoza* should have remained as persuasive as when the case was decided if the exclusionary rule was still not appropriate in removal proceedings. However, it has not.[206] Therefore, a cost-benefit analysis should no longer be used to determine the application of the exclusionary rule for two reasons. First, it should not be used because of the inherent problems with balancing tests.[207] Second, it should not be used because relying almost exclusively on the deterrent effect to analyze the benefits of the exclusionary rule misunderstands the foundations of the rule itself.[208]

A. *The Inherent Issues with Balancing Tests*

Balancing tests are a relatively new form of analysis used by the courts; there is no real historical foundation for such methods in the courts' early rulings.[209] Balancing tests were first incorporated into the courts' jurisprudence in 1939.[210] The balancing test was essentially a "judicial creation" as the "Constitution does not state balancing tests should be used to interpret it."[211]

As Justice Brennan aptly stated in *New Jersey v. T.L.O.*,[212] the problem with balancing tests is that they are "not a neutral, utilitarian calculus but an unanalyzed exercise of judicial will."[213] This is because the imprecise nature of legal balancing allows judges to insert their per-

205. This conclusion is in line with the general decline and criticism of the balancing test announced in *Mathews v. Eldridge*, 424 U.S. 319 (1976); *see infra* Part V.A.

206. *See supra* Part III.

207. *See generally* Christopher J. Schmidt, *Ending the* Mathews v. Eldridge *Balancing Test: Time for a New Due Process Test*, 38 SW. L. REV. 287, 288–94 (2008) (discussing the lack of historical foundation for and practical problems with balancing tests); Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976) (discussing why the *Mathews* approach is subjective and impressionistic).

208. *See generally* Sundby, *supra* note 164 (explaining that "when rule-of-law principles are used as the prism through which the exclusionary rule is viewed, the exclusionary rule's fundamental value to our criminal justice system becomes far more compelling," and that these rule-of-law principles provide reasons for everyone (even its critics) to embrace the exclusionary rule).

209. *See* Schmidt, *supra* note 207, at 289.

210. *See* Frank N. Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 N.Y.U. L. REV. 16, 18 (1988) (citing Schneider v. State, 308 U.S. 147, 161–65 (1939)) (determining the genesis of balancing tests to be 1939).

211. *See* Schmidt, *supra* note 207, at 289; *see also* Konigsberg v. State Bar, 366 U.S. 36, 61–68 (1960) (Black, J., dissenting) (discussing why the application of the First Amendment should not be subject to a balancing test); Barenblatt v. United States, 360 U.S. 109, 138–39, 143–44 (1959) (Black, J., dissenting) (accord).

212. 469 U.S. 325 (1985).

213. *Id.* at 369 (Brennan, J., dissenting).

sonal views into the balancing tests.[214] In addition, legal interests do not have real, measurable weight in the way that physical objects placed on a scale do, making it difficult for the interests on either side of the scale to be compared to each other.[215] A legal balancing scale is thus an ineffective tool because it cannot physically tilt one way or the other to determine which weight is greater.[216] Without this physical tilting, there is no way to completely eliminate human error.[217] Furthermore, "since balancing tests are not true mathematical or economic equations, there is no way to check or prove a court's answer as one can do in true mathematical problems and solutions."[218] Additionally, there are often merits to both sides, making it even more complicated to weigh them against each other.[219] These issues often force the court to "'measure the unmeasurable [and] compare the incomparable.'"[220]

In addition to the physical limitations of legal balancing scales, "the utilitarian calculus tends, as cost-benefit analyses typically do, to 'dwarf soft variables' and to ignore complexities and ambiguities."[221] In using a utilitarian calculus, "the Court may define the relevant costs and benefits too narrowly."[222] Even if the costs and benefits are sufficiently broad, the calculus asks "unanswerable questions," such as what is the social value and the social cost of applying the exclusionary rule in deportation proceedings.[223] This is an unanswerable question because there is no technique to measure the associated costs and benefits with one hundred percent accuracy. Lastly, the utilitarian calculus may not allow for the constitutionally relevant questions to be answered.[224] The protections of the Fourth Amendment have been interpreted to involve individual rights, so weighing the social values and costs collectively cannot determine whether these rights will effectively be protected.[225]

Another issue that arises specifically when dealing with an individ-

214. *See* Schmidt, *supra* note 207, at 291–92. *See also* Bernard Schwartz, *Cost-Benefit Analysis in Administrative Law: Does it Make Priceless Procedural Rights Worthless?*, 37 AD. L. REV. 13–14 (1985) ("Just as each utilitarian would apply the 'greatest happiness of the greatest number' principle according to his own subjective judgment of the pains and pleasures involved, so each judge employing [cost benefit analysis] will use his own individual calculus in weighing the procedural rights at issue." (internal citation omitted)).

215. *See* Schmidt, *supra* note 207, at 290.

216. *See id.*

217. *See id.*

218. *See id.*; *see also* Stephen E. Gottlieb, *The Paradox of Balancing Significant Interests*, 45 HASTINGS L.J. 825, 842 (1994).

219. *See* Schmidt, *supra* note 207, at 290.

220. *Id.* at 291.

221. *See* Mashaw, *supra* note 207, at 48.

222. *Id.*

223. *Id.*

224. *See id.*

225. *See id.* at 49; *see also* Schwartz, *supra* note 214, at 14.

ual right like the one protected by the exclusionary rule is that the costs are much easier to quantify than the benefits.[226] In fact, it is virtually impossible to measure most procedural rights in monetary terms, but it is not nearly as difficult to measure the costs of protecting those rights.[227] As such, the cost-benefit analysis will always tend to weigh in favor of the cost side of the scale.[228] The result is that the law is "drawn into a curious world where the 'costs' of excluding illegally obtained evidence loom to exaggerated heights and where the 'benefits' of such exclusion are made to disappear with a mere wave of the hand."[229]

For these reasons, the same balancing test used in *Lopez-Mendoza* would produce a much different result today.[230] This inconsistency demonstrates the problems with a cost-benefit analysis. It is one reason why the balancing test should no longer be used to determine the application of the exclusionary rule to immigration proceedings.

B. *The Abandonment of the Original Purpose of the Exclusionary Rule*

Aside from the issues with balancing tests in general, using a balancing test to assess the applicability of the exclusionary rule to immigration proceedings misinterprets the original purpose of the exclusionary rule. Cost-benefit analysis was not originally a part of the exclusionary rule calculus.[231] It only became a part of the equation when the courts applied the exclusionary rule outside of its traditional criminal setting.[232] The exclusionary rule was initially created to promote rule-of-law principles, such as judicial integrity and the protection of the rights of the ordinary citizen.[233] The exclusionary rule promotes judicial integrity by providing the judiciary with a tool to carry out its constitutional

226. *See* Schwartz, *supra* note 214, at 14.

227. *See id.*

228. *See id.*

229. United States v. Leon, 468 U.S. 897, 929 (1984) (Brennan, J., dissenting). *See also* Schwartz, *supra* note 214, at 14.

230. *See supra* Part III.

231. *See* Sundby, *supra* note 164, at 396.

232. *See id.* Cost-benefit analysis did not surface in exclusionary rule cases until the 1960s, nearly seventy-five years after the exclusionary rule first appeared. *Boyd v. United States*, 116 U.S. 616 (1886), is generally cited as the first exclusionary rule case, while the deterrence rationale did not surface until *Wolf v. Colorado*, 338 U.S. 25 (1949). *See id.* at 395 n.9, 396 n.13; *see also* Scott E. Sundby & Lucy B. Ricca, *The Majestic and the Mundane: The Two Creation Stories of the Exclusionary Rule*, 43 TEX. TECH. L. REV. 391, 433 (2010).

233. *See* Weeks v. United States, 232 U.S. 383, 393 (1914); *see also* Nigro, *supra* note 16, at 567; Boyd v. United States, 116 U.S. 616, 635 (1886); Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting). Sundby states that "the rule of law at its most basic embodies the idea that no one is above the law, even those in positions of government authority, and that the legitimacy of our system of laws depends on the ability of ordinary citizens to invoke the law on their behalf in everyday courts." Sundby, *supra* note 164, at 399.

duties.[234] These duties include keeping "the other branches within their proper constitutional bounds" and preventing government misbehavior from gaining "even the slightest foothold."[235] By giving the Fourth Amendment meaning to everyone[236] and allowing ordinary people to bring law enforcement practices out from the shadows,[237] the exclusionary rule also protects the ordinary citizen. As originally conceived, the exclusionary rule is more like the "constitutional enforcement rule," holding government actors accountable to the Constitution to protect its underlying long-term values.[238] The exclusionary rule in this form is also a recognition of the fact that the long-term interests that it protects are more important than the short-term effects of letting a criminal go free.[239] In other words, "the concern over how the government obeys the law means that we are willing to risk letting someone who commits a crime walk free lest a broader commitment to the rule of law be jeopardized."[240] Viewed in this way, the value of the exclusionary rule is not as a protection to an individual defendant but instead as a safeguard to society as a whole.

Despite these origins, by the 1980s, the deterrence rationale became the main justification for the exclusionary rule, eliminating the other bases.[241] When deterrence became the main focus, many felt that the exclusionary rule turned into a "necessary evil" as opposed to a positive force that was meant to uphold American legal values, such as judicial integrity and protection of the ordinary citizen.[242] One of the issues with the "deterrence focus" is that it focuses on the exclusionary rule as applied to a specific case whereas rule-of-law principles, such as judicial integrity and protection of the ordinary citizen, focus on the larger values at stake.[243] In other words, the rule-of-law approach looks at the

234. *See* Sundby, *supra* note 164, at 403. For a thorough discussion of the judicial integrity rationale for the exclusionary rule, see generally Andrew E. Taslitz, *Hypocrisy, Corruption, and Illegitimacy: Why Judicial Integrity Justifies the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 419 (2013).

235. *See* Sundby, *supra* note 164, at 403–04.

236. *See id.* at 407.

237. *See id.* at 410.

238. *See id.* at 399–400.

239. *See id.* at 400–01.

240. *See id.* at 400 (internal quotations omitted).

241. *See id.* at 396; *see also* Nigro, *supra* note 16, at 568 ("The Supreme Court introduced the deterrence rationale in *Wolf v. Colorado*, which extended the application of the Fourth Amendment to the states."). *See, e.g.*, United States v. Calandra, 414 U.S. 338 (1974) (using a deterrence-focused cost-benefit analysis to determine whether the exclusionary rule should apply to grand jury proceedings); Stone v. Powell, 428 U.S. 465 (1976) (using a deterrence-focused cost-benefit analysis to determine whether the exclusionary rule should apply to habeas corpus).

242. *See* Sundby, *supra* note 164, at 397.

243. *See id.* at 402–11. *See also* Taslitz, *supra* note 234, at 456 ("The rule of law includes, among other things, these concepts: (1) having a government that limits its own power by abiding

exclusionary rule from the perspective of the citizen and her rights and not just the police officer and the drug dealer.[244]

The Court did not discuss the exclusionary rule in the immigration context until 1984 when the Court had already shifted its focus to deterrence.[245] As such, the Court in *Lopez-Mendoza* relied heavily on the deterrence rationale and used a cost-benefit analysis to determine whether the exclusionary rule should be applied to immigration proceedings.[246] This is why the exclusionary rule has run into such resistance in the immigration context—because the Court did not keep in mind the legal principles that the exclusionary rule was originally meant to protect, rule-of-law principles like judicial integrity, protection of the ordinary citizen, and belief in the larger legitimacy of adjudication.[247] In his *Lopez-Mendoza* dissent, Justice Marshall stated:

> [A] sufficient reason for excluding from civil deportation proceedings evidence obtained in violation of the Fourth Amendment is that there is no other way to achieve "the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government."[248]

The Court's focus on applying the exclusionary rule as "an indirect effort to punish" immigration officials led it to believe that the costs of the exclusionary rule were too high and that there were other forces in place to provide deterrence.[249] If "properly understood as a manifestation of our system's rule-of-law principles," then the necessity of applying the exclusionary rule to immigration proceedings becomes much clearer as "an expression of bedrock constitutional values."[250]

Immigration judges could promote judicial integrity by applying the exclusionary rule in removal proceedings, thus preventing ICE officers and local law enforcement officers from being above the law, as they often are now.[251] By enforcing the Fourth Amendment rights of

by standing laws; (2) fostering equality before the law, meaning at a minimum that government officials and other powerful persons are treated the same by the law as are ordinary folk; and (3) achieving enforced human rights.").

244. *See* Sundby, *supra* note 164, at 399.

245. *See id.* at 396.

246. *See supra* Part II.B.

247. *See* Sundby, *supra* note 164, at 402–11.

248. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1060–61 (1984) (Marshall, J., dissenting) (citing United States v. Calandra, 414 U.S. 338, 357 (1974)).

249. *See* Sundby, *supra* note 164, at 416.

250. *Id.* at 417.

251. *See supra* Part III.A.

society's most legally vulnerable, immigration courts would also be protecting the Fourth Amendment rights of all individuals.[252] As Justice Traynor stated in *People v. Cahan*, "how short the step is from lawless although efficient enforcement of the law to the stamping out of human rights."[253] When viewing the exclusionary rule in this way, it becomes clear that the rule should apply in removal proceedings to uphold these rule-of-law principles. While the Court has distanced itself from the rule-of-law rationale, "the exclusionary rule is not, and was never intended to be, a matter of 'deterrence.' "[254] To rest the whole reason for not applying the exclusionary rule to immigration proceedings on deterrence is to not understand the exclusionary rule in the first place. For these reasons, the exclusionary rule should apply to immigration proceedings.

VI. Conclusion

The reasons to apply the exclusionary rule in the immigration context are two-fold. First, the Court's decades-old analysis in *Lopez-Mendoza* would produce the opposite result today. Because of the criminalization of immigration law, respondents in immigration proceedings face the same potential issues and penalties as defendants in criminal proceedings. As such, the exclusionary rule should be applied uniformly in both the criminal and immigration context. Second, the rule-of-law principles from which the exclusionary rule originated dictate its application. There has been scholarship in the criminal law community suggesting that we return the exclusionary rule to its rule-of-law origins based on the demand for judicial integrity and the need to protect the rights of all citizens.[255] Doing the same in immigration proceedings would eliminate the need for the cost-benefit analysis used in *Lopez-Mendoza*. Appreciating and employing rule-of-law principles, the exclusionary rule should apply to immigration proceedings in full force.

252. *See* Elias, *supra* note 2, at 1151.

253. 44 Cal. 2d 434, 447 (1955).

254. *See* Milton Hirsch, *Big Bill Haywood's Revenge: The Original Intent of the Exclusionary Rule*, 22 St. Thomas L. Rev. 35, 85 (2009).

255. *See, e.g.*, *id.* at 86; Sundby, *supra* note 164, at 414–17.