

**“GOOD REASON TO BELIEVE”:  
WIDESPREAD CONSTITUTIONAL VIOLATIONS IN THE  
COURSE OF IMMIGRATION ENFORCEMENT AND THE  
CASE FOR REVISITING *LOPEZ-MENDOZA***

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In 1984, the United States Supreme Court held in *INS v. Lopez-Mendoza* that the exclusionary rule does not ordinarily apply to respondents in immigration proceedings. However, the Court suggested that its opinion about the applicability of the exclusionary rule might change if constitutional violations by immigration officers became a widespread problem. First, this Article proposes that constitutional violations by immigration officers have become both geographically and institutionally widespread in the years since *Lopez-Mendoza*. Second, this Article argues that immigration law and the practice of immigration enforcement have changed fundamentally in the twenty-five years since *Lopez-Mendoza* was decided, undermining the assumptions on which the majority in 1984 based its arguments against the use of the exclusionary rule. This Article concludes that, in the modern context, remaining faithful to *Lopez-Mendoza* requires the reintroduction of the exclusionary rule in immigration proceedings.

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## INTRODUCTION

*Our conclusions concerning the exclusionary rule’s value might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread.*<sup>1</sup>

On January 6, 1984, the Justices of the United States Supreme Court met in conference to decide whether to grant certiorari in *INS v. Lopez-Mendoza*,<sup>2</sup> an immigration case recently decided by the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit held that Immigration and Naturalization Service (INS) agents violated Adan Lopez-Mendoza’s Fourth Amendment rights, and the rights of another similarly situated plaintiff, Elias Sandoval-Sanchez, in the course of their immigration arrests, and therefore any evidence that the agents had gathered as a result of those unconstitutional arrests should be excluded from proceedings in accordance with the exclusionary rule.<sup>3</sup> The INS petitioned for certiorari, arguing that the Ninth Circuit’s holding should be reversed because the exclusionary rule—a fundamental procedural protection in the criminal context that, prior to the decision of the Board of Immigration Appeals (BIA) in *In re*

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

2. 705 F.2d 1059 (9th Cir. 1983).

3. *Id.* at 1061. In criminal proceedings in both state and federal courts, the exclusionary rule prohibits the introduction of evidence obtained in violation of the Fourth Amendment for the purpose of proving a defendant’s guilt. *See Mapp v. Ohio*, 367 U.S. 643, 654–55 (1961); *Weeks v. United States*, 232 U.S. 383, 398 (1914) (ruling that illegal evidence gathered by state officers cannot be used against defendants in federal court). The exclusionary rule similarly applies to Fifth Amendment violations in state and federal courts. *See Bram v. United States*, 168 U.S. 532, 548 (1897). It also applies to Sixth Amendment violations. *See Massiah v. United States*, 377 U.S. 201, 206–07 (1964) (excluding statements because they were deliberately elicited in violation of the defendant’s Sixth Amendment right to counsel). Should such illegally obtained evidence be improperly admitted at trial, the trial court’s finding of guilt must be reversed on appeal, unless the prosecution can prove that the error was harmless. *See Chapman v. California*, 386 U.S. 18, 23–24 (1967).

*Sandoval*<sup>4</sup> in 1979, also applied in immigration proceedings<sup>5</sup>—should not be applied in the immigration context.<sup>6</sup> As the Justices gathered to decide whether to take the case, Justice Harry Blackmun suggested that, because of “the small number of . . . suppression claims that were raised” in immigration proceedings, the Court should not grant certiorari.<sup>7</sup> In support of his argument, Justice Blackmun pointed out that from 1952–79 (during which the exclusionary rule had applied in deportation proceedings), fewer than fifty Fourth Amendment challenges to the introduction of evidence had been raised, which suggested that constitutional violations by INS officers did not constitute a widespread problem with which the Court should concern itself.<sup>8</sup>

Despite Justice Blackmun’s reservations, certiorari was granted.<sup>9</sup> The Court eventually ruled in favor of the INS, with Justice Sandra Day O’Connor writing a five-part opinion for the 5-4 majority<sup>10</sup> in which Justice Blackmun was the crucial fifth vote.<sup>11</sup> Parts I–IV of the *Lopez-Mendoza* opinion lay out the grounds for the majority’s decision that the exclusionary rule need not ordinarily apply in immigration proceedings.<sup>12</sup> However, Part V of the opinion<sup>13</sup> lists three circumstances in which the Court believed the application of the

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4. 17 I. & N. Dec. 70 (BIA 1979).

5. *See id.*

6. *See Lopez-Mendoza*, 468 U.S. at 1059 (White, J., dissenting) (“The simple fact is that prior to 1979 the exclusionary rule was available in civil deportation proceedings, and there is no indication that it significantly interfered with the ability of the INS to function.”).

7. Justice Harry Blackmun, Conference Notes, at 9 (handwritten) Jan. 6, 1984, 407/83-491, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C.

8. *See id.*; *see also Lopez-Mendoza*, 705 F.2d at 1071 (describing how, prior to the decision of the BIA in *In re Sandoval*, neither the BIA nor any court had held that the exclusionary rule did not apply in civil deportation proceedings, and observing that the Board in *In re Sandoval* noted that there were “fewer than fifty” BIA proceedings since 1952 in which motions had been made to suppress evidence on Fourth Amendment grounds). *In re Sandoval* was one of the two BIA cases that were consolidated into *INS v. Lopez-Mendoza*. *In re Sandoval*, 17 I. & N. Dec. 70 (BIA 1979).

9. *Lopez-Mendoza v. INS*, 464 U.S. 1037 (1984).

10. *See Lopez-Mendoza*, 468 U.S. at 1034.

11. *See infra* note 59.

12. *Lopez-Mendoza*, 468 U.S. at 1034–50.

13. Chief Justice Burger did not join Part V of the opinion, *see id.* at 1033, but it can still arguably be considered a “majority” opinion as, effectively, an 8-1 majority of members on the Court supported the idea of applying the exclusionary rule under these circumstances—the four out of five who joined that part of Justice O’Connor’s opinion, and the four dissenters who already thought that use of the exclusionary rule was justified. *See id.*

exclusionary rule *would* be justified in an immigration context: first (echoing the concerns previously expressed by Justice Blackmun), if there was “good reason to believe that Fourth Amendment violations by INS officers were widespread”;<sup>14</sup> second, if evidence against an immigration respondent was obtained as a result of egregious constitutional violations that were fundamentally unfair;<sup>15</sup> and third, if evidence was obtained as a result of constitutional violations that undermined the reliability of the evidence.<sup>16</sup>

The *Lopez-Mendoza* holding has shaped immigration procedure for over two decades, controlling the admission or suppression of evidence in all immigration proceedings before Executive Office of Immigration Review (EOIR) judges,<sup>17</sup> the BIA Appeals,<sup>18</sup> and federal courts of appeal across the country.<sup>19</sup> In many immigration proceedings, suppression and termination<sup>20</sup> are the only potential forms of relief available to a respondent. A motion to suppress evidence and terminate proceedings is therefore often not merely a procedural step, but rather the single determinative factor deciding whether an individual

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14. *Id.* at 1050.

15. *Id.* at 1050–51.

16. *Id.*

17. The EOIR is the administrative court in which immigration respondents are tried. There are fifty-six immigration courthouses in the United States. *See* USDOJ.gov, United States Department of Justice Executive Office of Immigration Review, <http://www.usdoj.gov/eoir> (last visited Dec. 2, 2008). EOIR decisions, which are typically unpublished, are appealable to the BIA. *Id.*

18. *See, e.g., In re Velasquez*, 19 I. & N. Dec. 377, 380 (BIA 1986); *In re Benitez*, 19 I. & N. Dec. 173, 175 (BIA 1984).

19. *See, e.g., Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006); *Martinez-Camargo v. INS*, 282 F.3d 487, 492 (7th Cir. 2002); *Orhorhaghe v. INS*, 38 F.3d 488, 503–04 (9th Cir. 1994).

20. In immigration proceedings, motions to suppress evidence and terminate proceedings may be filed by respondents who allege that immigration officials have committed constitutional and/or regulatory violations. Motions to suppress evidence may be filed in cases of alleged constitutional violations. Once such a motion has been granted, evidence obtained pursuant to the constitutional violation is excluded from the proceeding, and in the absence of further independently obtained evidence, a motion to terminate proceedings may be granted. Motions to terminate proceedings also may be brought by respondents alleging regulatory violations by immigration officials. Once such a motion is granted, proceedings are terminated. Termination of proceedings does not alter an individual's immigration status, but rather restores that individual to the situation that he or she was in prior to the arrest by immigration authorities. For a detailed account of the use of suppression and termination motions in immigration proceedings see IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK (11th ed. 2008).

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is removed from the United States or allowed to remain in the country.<sup>21</sup>

Immigration case law since 1984 clearly demonstrates the extent to which the BIA and the federal circuits continue to adhere to the guiding principles of *Lopez-Mendoza*, particularly when ruling on motions to suppress evidence and terminate proceedings. In recent years, the growing body of case law applying Part V of *Lopez-Mendoza* has garnered particular attention from jurists, activists and scholars, as different circuits have developed differing interpretations of the *Lopez-Mendoza* doctrine.<sup>22</sup> Courts of appeal have largely ignored the first, “widespread violation” prong of Part V of the *Lopez-Mendoza* holding,<sup>23</sup> and have instead devoted considerable attention to the last two prongs of Part V, producing careful and detailed analyses of what might constitute an “egregious constitutional violation,”<sup>24</sup> what might render that violation “fundamentally unfair,”<sup>25</sup> and what might meaningfully “undermine the reliability of evidence.”<sup>26</sup> As a result, a

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21. See U.S. DEP’T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2007 STATISTICAL YEAR BOOK REVIEW, at D2 (2008) [hereinafter EOIR FY 2007 STATISTICAL YEAR BOOK], available at <http://www.usdoj.gov/eoir/statpub/fy07syb.pdf> (showing the disposition of immigration cases for the years 2003–07 and the availability of different forms of relief).

22. See, e.g., *United States v. Oscar-Torres*, 507 F.3d 224, 228–30 (4th Cir. 2007); *Almeida-Amaral*, 461 F.3d at 234–35; *United States v. Bowley*, 435 F.3d 426, 430–31 (3d Cir. 2006); *United States v. Olivares-Rangel*, 458 F.3d 1104, 1111–12 (10th Cir. 2006); *Navarro-Chalan v. Ashcroft*, 359 F.3d 19, 22–23 (1st Cir. 2004); *Miguel v. INS*, 359 F.3d 408, 411 & n.3 (6th Cir. 2004); *Martinez-Camargo*, 282 F.3d at 492–93; *United States v. Guevara-Martinez*, 262 F.3d 751, 753–55 (8th Cir. 2001); *Velasquez-Tabir v. INS*, 127 F.3d 456, 459, 460 (5th Cir. 1997); *Orhorhaghe*, 38 F.3d at 501–03.

23. An exception to this general rule is a recent United States Court of Appeals for the Second Circuit case. See *Melnitsenko v. Mukasey*, 517 F.3d 42, 46–47 & n.6 (2d Cir. 2008).

24. See, e.g., Daniel P. Blank, *Suppressing Defendant’s Identity and Other Strategies for Defending Against a Charge of Illegal Reentry After Deportation*, 50 STAN. L. REV. 139, 161–62 (1997) (arguing that there is a firm distinction between conduct which is merely unlawful and that which reaches the “egregious” threshold); see also Jonathan L. Hafetz, *The Rule of Egregiousness: INS v. Lopez-Mendoza Reconsidered*, 19 WHITTIER L. REV. 843, 860–61 (1998) (arguing that, based on Ninth Circuit precedent, any arrest based on “racial appearance or [a] foreign sounding name is egregious”).

25. See, e.g., Judy C. Wong, Note, *Egregious Fourth Amendment Violations and the Use of the Exclusionary Rule in Deportation Hearings: The Need for Substantive Equal Protection Rights for Undocumented Immigrants*, 28 COLUM. HUM. RTS. L. REV. 431, 455–60 (1997) (summarizing lower court decisions finding that an immigration stop based exclusively on race was an egregious Fourth Amendment violation justifying the application of exclusionary rule).

26. See, e.g., Stephen C. Covell, Comment, *Gonzalez-Rivera v. INS: Possible New Conditions for the Exclusionary Rule in Civil Deportation Proceedings*, 9

body of immigration case law has gradually evolved wherein motions to suppress evidence and terminate removal proceedings<sup>27</sup> have been granted because of egregious constitutional and regulatory violations by Immigration and Customs Enforcement (ICE) agents.<sup>28</sup>

Courts ruling on suppression and termination motions consistently follow the Supreme Court's holding in *Lopez-Mendoza*.<sup>29</sup> In that spirit, this Article proposes that courts should revisit the first ground for suppression articulated by the *Lopez-Mendoza* majority: the existence of widespread constitutional or regulatory violations by immigration officers. This Article first demonstrates that considerations of whether Fourth Amendment violations by immigration officers were widespread deeply informed every step of the Court's handling of the *Lopez-Mendoza* case, from Justice Blackmun's initial inclination to deny certiorari through Justice O'Connor's final opinion. The Article then demonstrates that such violations are significantly more common today than they were twenty-five years ago and argues that for sound legal and policy reasons, keeping faith with *Lopez-Mendoza* may now require the reintroduction of the exclusionary rule in immigration proceedings.

Part I of this Article demonstrates the great significance of the widespread-violation issue to the *Lopez-Mendoza* majority. Using unpublished materials from the Blackmun archives, the Article traces the ways in which individual Justices' beliefs that violations of immigration respondents' constitutional rights were *not* widespread profoundly influenced the *Lopez-Mendoza* holding. Rereading the text of Justice O'Connor's majority opinion in conjunction with Justice Blackmun's records, as well as case law from the years immediately following the *Lopez-Mendoza* decision, the Article argues that three foundational beliefs underpinned the majority's opinion that constitutional violations by INS officers were unlikely to pose a widespread problem—a belief that immigration proceedings were

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GEO. IMMIGR. L.J. 855, 860 (1995) (discussing Ninth Circuit jurisprudence redefining what evidence may be of probative value).

27. Deportation proceedings are now frequently referred to as removal proceedings. See 8 U.S.C. §§ 1226, 1229 (2006) (using the term *removal* to include the deportation of noncitizens from the interior).

28. See, e.g., *In re Rabani*, Decision and Order of the Immigration Judge, at 17–19 (U.S. Dep't of Justice Executive Office for Immigration Review Oct. 3, 2007) (on file with author); *In re Herrera-Priego*, Decision and Order of the Immigration Judge (U.S. Dep't of Justice Executive Office for Immigration Review July 10, 2003) (on file with author).

29. See, e.g., *United States v. Navarro-Diaz*, 420 F.3d 581, 584–87 (6th Cir. 2005); *Velasquez-Tabir v. INS*, 127 F.3d 456, 459 (5th Cir. 1997); *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1448–52 (9th Cir. 1994).

“purely civil” rather than criminal in nature,<sup>30</sup> a belief that INS’s own rules and regulations would sufficiently deter officers from committing constitutional violations,<sup>31</sup> and a belief that adequate civil remedies were available to redress any wrongs that immigration respondents may have suffered.<sup>32</sup>

Part II explores the extent to which there has, nonetheless, been a marked increase in the number of allegations of violations of immigration respondents’ constitutional rights in the twenty-five years since *Lopez-Mendoza*. Drawing upon federal court cases, BIA holdings, complaints filed in immigration courts, testimony given to congressional hearings, and reports in the popular press, this Part examines the extent to which these constitutional violations cross geographical and institutional boundaries—that is, the extent to which these violations have become widespread.<sup>33</sup> This Part further argues that such violations have become so widespread that, in order to remain faithful to the Court’s argument in *Lopez-Mendoza*, the exclusionary rule should now be reintroduced in immigration proceedings.

Part III of this Article considers arguments against the reintroduction of the exclusionary rule currently advanced by scholars and government lawyers. Such arguments continue to be founded on the *Lopez-Mendoza* majority’s reasoning when they first held that the exclusionary rule need not apply; the civil or administrative nature of removal proceedings, the efficacy of ICE’s internal training, and the availability of alternative forms of relief. This Part also proposes that these arguments have been rendered increasingly irrelevant by developments in immigration and criminal law, changes in the practices of the INS (and its successor ICE), and the evolving realities of life for immigrant communities. In 2009, quarter-century-old arguments against the reintroduction of the exclusionary rule appear outdated and ultimately unpersuasive.

This Article concludes that, because so much has changed in the twenty-five years since *Lopez-Mendoza* was decided, the same principles of fundamental fairness and concern for the rule of law that animated the *Lopez-Mendoza* majority’s widespread-violation exception in 1984 now counsel the reintroduction of the exclusionary rule in immigration proceedings.

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

31. *Id.* at 1044–45.

32. *Id.* at 1045.

33. Part II of the Article also introduces recent case law from the Second Circuit that recognizes the potential validity of a widespread-violations claim. *See Melnitsenko v. Mukasey*, 517 F.3d 42, 46–47 & n.6 (2d Cir. 2008); *Pinto-Montoya v. Mukasey*, 540 F.3d 126, 130 & n.2 (2d Cir. 2008).

I. 1984: THE UNTOLD STORY OF THE WIDESPREAD-VIOLATIONS  
EXCEPTIONS IN *INS v. LOPEZ-MENDOZA*

A. *The Majority Opinion and the Role of the  
Widespread-Violations Exception*

Justice O'Connor's majority opinion in *INS v. Lopez-Mendoza* appears, on first reading, to be straightforward. The holding proceeds from the premise that the exclusionary rule is not a personal constitutional right, but rather a judicially created remedy designed to deter constitutional violations by law-enforcement officers.<sup>34</sup> As a consequence, it is appropriate to use a balancing test to determine whether the rule's value in deterring illegal searches and seizures outweighs the societal costs of its application.<sup>35</sup> Parts I–IV of the majority opinion carefully apply this balancing test.<sup>36</sup> On one side of the scale, five principal reasons render the exclusionary rule of limited use in deportation proceedings,<sup>37</sup> and on the other side of the scale, the societal costs of applying the rule in deportation proceedings may be high for four reasons.<sup>38</sup> Weighing these considerations led the Court to

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34. See *Lopez-Mendoza*, 468 U.S. at 1042 (“The exclusionary rule provides no remedy for completed wrongs; those lawfully in this country can be interested in its application only insofar as it may serve as an effective deterrent to future INS misconduct.”); see also *U.S. v. Leon*, 468 U.S. 897, 906 (1984).

35. This test was developed by the Court in *United States v. Janis*, 428 U.S. 433, 453–54 (1976).

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

37. The first of these principle is that “[a] deportation proceeding is a purely civil action . . .” *Id.* at 1038. The second is that “[t]he ‘body’ or identity of . . . [the] respondent . . . is never itself suppressible,” and even if an arrest is illegal, “evidence not derived directly from the arrest is sufficient” to uphold deportation. *Id.* at 1039, 1043. The third is that few aliens arrested request deportation hearings, and even “few[er] challenge the circumstances of their arrests,” so an “arresting officer is most unlikely to shape his conduct in anticipation of the exclusion of evidence at a formal deportation hearing.” *Id.* at 1044. The fourth is that the INS has its own rules and regulations that “require that no one be detained without reasonable suspicion of illegal alienage, and that no one be arrested unless there is an admission of illegal alienage or other strong evidence thereof.” *Id.* at 1044–45. The final principle is that the immigration enforcement is the provenance of a single agency under central federal control and engaged in repetitive operations, and thus declaratory relief is a possible remedy for respondents whose Fourth Amendment rights have been violated. *Id.* at 1045 (“The possibility of declaratory relief against the agency thus offers a means for challenging the validity of INS practices, when standing requirements for bringing such an action can be met).

38. The first cost is that an undocumented alien's continuing presence in the United States constitutes a crime. *Id.* at 1047 & n.3 (noting that the exclusion rule does not sanction continuing violations of the law, and the release of undocumented respondents from detention as a result of the application of the exclusionary rule “would clearly frustrate the express public policy against an alien's unregistered



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conclude that the costs outweighed the benefits, and therefore the exclusionary rule need not apply when immigration respondents' constitutional rights are violated.<sup>39</sup>

Part V, however, complicates the *Lopez-Mendoza* holding. Part V, as discussed earlier, sets forth three contexts in which the Court explains it would revisit its decision to preclude the use of the exclusionary rule in immigration proceedings—widespread violations of the Fourth Amendment, egregious violations that are fundamentally unfair, or violations of the Fourth Amendment that undermine the probative value of the evidence immigration agents have obtained.<sup>40</sup> Scholars have debated the significance of Part V of the *Lopez-Mendoza* holding and its interrelationship with Parts I–IV, attempting to gain insight into the majority's reasoning; this shared focus has not, however, led to consensus. Interpretations have been advanced presenting *Lopez-Mendoza* as either a decision intended to significantly curtail constitutional protections in immigration proceedings<sup>41</sup> or designed to champion the exclusionary rule.<sup>42</sup> Such arguments focus overwhelmingly on the egregiousness exception articulated in Part V, to the detriment of the widespread-violations argument.<sup>43</sup> As a consequence, they ignore the full significance of the widespread-violations exception, and fail to appreciate the full extent of the Court's attitude toward the potential utility and applicability of the exclusionary rule. This Article proposes a more complete interpretation of *Lopez-*

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presence in this country"). The second is that applying the exclusionary rule would slow down the currently streamlined immigration system because neither immigration judges nor immigration attorneys "are likely to be well versed in the intricacies of Fourth Amendment law." *Id.* at 1048. The third is that the vast number of aliens arrested each year, requiring immigration officers "to compile elaborate, contemporaneous, written reports detailing the circumstances of every arrest" would be unduly burdensome. *Id.* at 1049. The fourth is that the "crowded and confused circumstances" in which immigration officers apprehend a large number of aliens could result in the suppression of large amounts of information that had been obtained entirely lawfully. *Id.* at 1049–50 ("Though the INS agents are instructed to follow procedures that adequately protect Fourth Amendment interests, agents will usually be able to testify only to the fact that they followed INS rules. The demand for a precise account of exactly what happened in each particular arrest would plainly preclude mass arrests, even when the INS is confronted, as it often is, with massed numbers of ascertainably illegal aliens, and even when the arrests can be and are conducted in full compliance with all Fourth Amendment requirements.").

39. *Id.* at 1050.

40. *Id.* at 1050–51.

41. *See, e.g.,* William C. Heffernan, *The Fourth Amendment Exclusionary Rule as a Constitutional Remedy*, 88 GEO. L.J. 799 (2000).

42. *See, e.g.,* Nicolas J. Watkins & Joel Stewart, *Employer Sanctions Update and the Employer's Response*, 66 FLA. B.J. 60, 64–65 (1992).

43. *See, e.g., id.*

*Mendoza*, harmonizing the key arguments in Parts I–IV with Part V in a way that places particular emphasis upon the significance of the widespread-violations exception.

Three core precepts underpin Parts I–IV of the *Lopez-Mendoza* majority’s opinion. The first, shared by both the *Lopez-Mendoza* majority and dissent, is that deportation proceedings constitute purely civil as opposed to criminal actions.<sup>44</sup> The second, described by the Court as “perhaps [the] most important”<sup>45</sup> reason why the exclusionary rule need not apply in deportation proceedings, is a belief that the immigration service’s internal rules prohibit, and thus prevent, constitutional violations by immigration agents.<sup>46</sup> The majority opinion states that, because only INS agents who have been fully trained and well supervised take part in immigration-enforcement operations, the deterrent effect of the exclusionary rule is unnecessary in the immigration context.<sup>47</sup> The third and final fundamental reason underpinning Parts I–IV is a shared belief that the potential harms inflicted by INS agents if they violated a respondent’s constitutional rights could be addressed by the respondent bringing a civil suit and seeking declaratory relief.<sup>48</sup> Each of these reasons is used to justify the Court’s holding that the exclusionary rule need not apply in immigration proceedings, and each of these reasons implies that the Court believed that constitutional violations by immigration officers could not become sufficiently widespread to pose a serious problem.

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44. *Lopez-Mendoza*, 468 U.S. at 1038; *id.* at 1051 (Brennan, J., dissenting) (“[T]he exclusionary rule must apply in civil deportation proceedings.”). This conception of immigration law is, as will be discussed later, profoundly rooted in the circumstances and practices of the mid-1980s, rather than those that prevail currently. *See infra* text accompanying notes 205–232.

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

46. *Id.* at 1044–45. The Court suggests a number of reasons why the Justice Department’s internal enforcement mechanisms are likely to be the most effective means of censuring unconstitutional behavior by immigration officers and protecting immigration respondents’ constitutional rights: (1) policies requiring that evidence seized through intentionally unlawful conduct be excluded from use in proceedings, *id.* at 1045; (2) the “instruction and examination” of new immigration officers in Fourth Amendment law and provision of “periodic refresher courses in law” to experienced officers, *id.*; and (3) rules and regulations requiring “that no one be detained without reasonable suspicion of illegal alienage, and that no one be arrested unless there is an admission of illegal alienage or other strong evidence thereof.” *Id.* Even at the time the Court was writing, this last assertion was far from clear cut. *See, e.g., In re Toro*, 17 I. & N. Dec. 340, 342, 344 (BIA 1980) (finding that a vehicle stop based solely on the driver’s Latin appearance did not contravene fundamental fairness because the stop was made in good faith).

47. *See Lopez-Mendoza*, 468 U.S. at 1045.

48. *Id.* (“The possibility of declaratory relief against the agency thus offers a means for challenging the validity of INS practices, when standing requirements for bringing such an action can be met.”).

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*B. The Blackmun Papers' Insights into the  
Widespread-Violations Exception*

The Harry A. Blackmun Papers in the Library of Congress include materials retained by Justice Blackmun relating to every case that he heard while sitting on the Supreme Court. The *Lopez-Mendoza* folio<sup>49</sup> contains each of the seven drafts of Justice O'Connor's opinion, as well as memoranda drafted by each of the Justices pertaining to their vote, memoranda drafted by the Justices' law clerks, and handwritten notes made by Justice Blackman during both oral argument and the Justices' conferences. These materials obviously have no value as precedent, and do not by themselves constitute convincing evidence of which elements of their decision were most crucial to the *Lopez-Mendoza* majority. Nonetheless, they do provide a unique insight into the workings of the Court, particularly into the closed world of the Justices' deliberations in conference. Moreover, when read in conjunction with Justice O'Connor's majority opinion and subsequent case law, the Blackmun Papers suggest that the issue of whether or not constitutional violations by immigration officers were widespread was of significant importance to the Justices, and was both informed by, and informed, the primary holding of the case. Furthermore, the Blackmun Papers plausibly support the argument that the majority considered the civil nature of deportation proceedings, the efficacy of the INS's internal rules, and the availability of declaratory relief to be the three crucial reasons why constitutional violations by immigration officers would not become widespread, and, as a consequence, why the exclusionary rule need not apply.

The handwritten notes that Justice Blackmun took during the *Lopez-Mendoza* conference on April 20, 1984, strongly support the argument that Part V of the *Lopez-Mendoza* opinion plays a crucial role contextualizing the rest of the holding. Justice Blackmun's notes indicate that Justice O'Connor was deeply concerned from the outset with providing procedural protections for individuals whose constitutional rights had been seriously abrogated. According to Justice Blackmun's notes, Justice O'Connor believed that the Court "should not mandate the exclusionary rule here at least in the non-egregious situation,"<sup>50</sup> but that if an INS violation became "so severe as to be a

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49. 407/83-491, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C.

50. See Justice Harry Blackmun, Conference Notes (handwritten) April 20, 1984, 407/83-491, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C. [hereinafter Blackmun April 20 Conference Notes].

Fifth Amendment violation” she “would feel differently.”<sup>51</sup> Justice Blackmun observed that the issue of the severity and extent of Constitutional violations by INS agents was one that was “important for her,” underscoring the extent to which Justice O’Connor stressed this issue during the conference.<sup>52</sup>

Part V of Justice O’Connor’s opinion—which remained unchanged from the first to the final draft<sup>53</sup>—hints at the degree to which she (and the other members of the majority) remained committed to her initial view that in instances of serious or widespread constitutional violations by INS officers, the exclusionary rule should be available to provide immigration respondents with some degree of procedural protection. Justice O’Connor maintained this position over the objections of some members of her majority; Chief Justice Warren Burger apparently had no enthusiasm for any application of the exclusionary rule. Justice Blackmun’s notes indicate that the Chief Justice believed that “any expansion of the exclusionary rule is not good” and that the Court should therefore not “extend it here.”<sup>54</sup>

The Justices’ internal correspondence also supports an interpretation of Part V that underscores the significance of the widespread-violation exception. For example, Chief Justice Burger wrote to Justice O’Connor explaining that he would not be able to join in her opinion if she retained the widespread-violation exception because he believed it went “too far.”<sup>55</sup> Yet, Justice O’Connor did not alter the opinion. Justice Blackmun’s initial comments about whether or not the Court should grant certiorari hint that he may have provided the original impetus for the majority’s concern with whether constitutional violations were widespread.<sup>56</sup> This archival evidence strongly suggests

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51. *Id.*

52. *Id.*

53. Compare Justice O’Connor, 1st Draft *INS v. Lopez-Mendoza* (circulated June 1, 1984), 407/83–491, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C., with Justice O’Connor, 6th Draft *INS v. Lopez-Mendoza* (circulated June 22, 1984), 407/83–491, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C.

54. Blackmun April 20 Conference Notes, *supra* note 50. Justice Rehnquist apparently also argued during the conference that the Court should not “let the exclusionary rule spread”—but nonetheless joined in all of Justice O’Connor’s opinion. *Id.*

55. Letter from Chief Justice Warren Burger to Justice Sandra Day O’Connor, June 25, 1984, 407/83–491, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C.

56. See Preliminary Memorandum on *INS v. Lopez-Mendoza* from Kerri Bartlett, law clerk, to Justice Blackmun, Dec. 13, 1983, 407/83–491, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C. (“[S]ince 1952 there has been a total of fewer than fifty Fourth Amendment challenges to the admissibility of evidence in deportation proceedings.”).

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that the question of whether constitutional violations were widespread mattered considerably to the *Lopez-Mendoza* majority, and influenced their decision that the exclusionary rule need not apply in immigration proceedings.

Justice Blackmun's conference notes also suggest why the *Lopez-Mendoza* majority believed that constitutional violations by immigration officers were unlikely to become widespread. The notes, for example, highlight the great importance the Justices in the *Lopez-Mendoza* majority placed on what they perceived to be the purely civil nature of deportation proceedings. According to Justice Blackmun's notes, Justice Lewis Powell stated in the conference that he saw immigration proceedings as involving "deportation to native lands, not jailing,"<sup>57</sup> and Justice O'Connor believed "deportation is not criminal."<sup>58</sup> Justice Blackmun, the crucial fifth vote for the *Lopez-Mendoza* majority,<sup>59</sup> wrote before oral argument had taken place that a deportation proceeding "is a *civil* proceeding."<sup>60</sup> The Blackmun papers also contain Justice O'Connor's seven drafts of the opinion, each of which uses exactly the same language to describe deportation proceedings as "purely civil action[s]," the purpose of which was solely "to determine eligibility to remain in this country, not to punish an unlawful entry."<sup>61</sup> It is possible to trace the individual Justices' comments in conference about the distinction between civil and criminal proceedings through to the final opinion. For example, Justice Powell's view that deportation proceedings were not focused on "jailing," was reflected in the final opinion's emphasis upon the limited powers of immigration judges to

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57. Blackmun April 20 Conference Notes, *supra* note 50.

58. *Id.*

59. Upon receipt of Justice O'Connor's first draft of the *Lopez-Mendoza* opinion, one of Justice Blackmun's law clerks noted that "[o]bviously, SOC has circulated this draft to you because you are the fifth vote and she wants to nail down her Court." Memorandum from Anna Durand, law clerk, to Justice Blackmun, May 23, 1984, 407/83-491, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C.

60. Justice Harry Blackmun, Conference Notes (handwritten) April 18, 1984, 407/83-491, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C. According to Justice Blackmun's conference notes for April 20, 1984, Justice Marshall was the only Justice to argue that a deportation hearing was "*not* a civil proceeding." Blackmun April 20 Conference Notes, *supra* note 50.

61. Compare Justice O'Connor, 1st Draft *INS v. Lopez-Mendoza*, at 6 (circulated June 1, 1984), 407/83-491, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C., with Justice O'Connor, 6th Draft *INS v. Lopez-Mendoza*, at 6 (circulated June 22, 1984), 407/83-491, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C.

oppose punitive sanctions upon respondents,<sup>62</sup> and upon the prospective rather than retrospective mandate of immigration courts.<sup>63</sup>

The few mentions of internal INS procedures in Justice Blackmun's notes are also consistent with the opinion's explicit statement that the efficacy of INS internal guidelines was perhaps the most important reason for the court's opinion. According to Justice Blackmun, Chief Justice Burger believed that INS was "better than most police departments"<sup>64</sup> at preventing constitutional violations from occurring, whereas Justice Byron White believed the main reason to apply the exclusionary rule was "to keep officers within bounds."<sup>65</sup> While Justice Blackmun's notes contain few references to INS agents' behavior, nothing in his notes contradicts the importance of the Court's explicit statement in the final opinion that the efficacy of INS internal guidelines was perhaps the most important reason the Court believed that immigration respondents' rights could be safeguarded without applying the exclusionary rule in deportation proceedings.

Justice Blackmun's notes do, however, suggest that both the *Lopez-Mendoza* majority and the dissent were preoccupied by the issue of declaratory relief. This concern was evident during the majority opinion's drafting process,<sup>66</sup> as the opinion evolved in reaction to the criticisms leveled by the dissenting Justices. Justice John Paul Stevens apparently expressed concerns during the conference that declaratory relief would not be realistically attainable, even by full-fledged US citizens,<sup>67</sup> and Justice White's dissent (in which Justice Stevens joined) argued that:

The suggestion that alternative remedies, such as civil suits, provide adequate protection is unrealistic. Contrary 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

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62. The opinion notes that an immigration judge's "sole power 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." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).

63. *Id.* ("Past conduct is relevant only insofar as it may shed light on the respondent's right to remain.").

64. Blackmun April 20 Conference Notes, *supra* note 50.

65. *Id.*

66. The first draft of the opinion stated, "In addition, actions for constitutional torts remain open to those subject to unlawful searches and seizures." Justice O'Connor, 1st Draft *INS v. Lopez-Mendoza* at 6 (circulated June 1, 1984), 407/83-491, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C.

67. See Blackmun April 20 Conference Notes, *supra* note 50.

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.<sup>68</sup>

*C. Subsequent Case Law Interpreting Lopez-Mendoza*

The text of the majority opinion and the records from the Blackmun Papers support the argument that fundamental beliefs in the abiding civil nature of immigration proceedings, the efficacy of INS's internal rules, and the availability of declaratory relief underpinned the Court's holding in *Lopez-Mendoza* and informed its opinion that widespread violations of the Fourth Amendment were unlikely to occur. This interpretation of *Lopez-Mendoza* is further bolstered by the immigration case law of the 1980s, 1990s and early twenty-first century.

Circuit-court rulings in the years immediately following *Lopez-Mendoza*—particularly decisions that were published in the months immediately following the Supreme Court's ruling—emphasized the civil nature of deportation proceedings; the supposed efficacy of INS training and internal regulations as guarantors of rights; and the availability of other declaratory relief in other forums. A typical example of this post-*Lopez-Mendoza* approach is found in another case from 1984, *Adamson v. Commissioner*,<sup>69</sup> in which the Ninth Circuit acknowledged the Supreme Court's emphasis in *Lopez-Mendoza* upon the utility of internal rules and regulations as rights guarantors and held that internal training and regulation should be presumed to impart sufficient understanding of Fourth Amendment protections such that any well-trained government official's subsequent violation of the Fourth Amendment should be considered egregious.<sup>70</sup>

In the twenty-five years since *Lopez-Mendoza*, the United States Court of Appeals for the First,<sup>71</sup> Second,<sup>72</sup> Third,<sup>73</sup> Fourth,<sup>74</sup> Fifth,<sup>75</sup>

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

69. 745 F.2d 541 (9th Cir. 1984).

70. *Id.* at 545. See also Judge Pregerson's dissent in *Cervantes-Cuevas v. INS*, 797 F.2d 707, 712 (9th Cir. 1985), in which he notes that the Court suggested bad faith would be found if a reasonably competent officer would have believed the search to be illegal.

71. *Navarro-Chalan v. Ashcroft*, 359 F.3d 19, 22–23 (1st Cir. 2004).

72. *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006).

73. *United States v. Bowley*, 435 F.3d 426, 430 (3d Cir. 2006).

Sixth,<sup>76</sup> Seventh,<sup>77</sup> Eighth,<sup>78</sup> Ninth,<sup>79</sup> and Tenth Circuits<sup>80</sup> have each reached milestone decisions, refining their jurisdiction's interpretation of *Lopez-Mendoza*. Different circuits have emphasized some aspects of the *Lopez-Mendoza* holding and deemphasized others. For example, in some jurisdictions the Part V exceptions have been interpreted more broadly,<sup>81</sup> and in some they have been interpreted more narrowly.<sup>82</sup> But three consistent threads run through each opinion: an emphasis on the civil nature of immigration proceedings, a professed faith in ICE's internal regulations, and an acknowledgement that declaratory relief should be obtained in separate proceedings, not in immigration court. In each of the circuits, the vision and principles expressed by *Lopez-Mendoza* in 1984 have endured. However, although the arguments against the application of the exclusionary rule in immigration proceedings remain largely unchanged since 1984, other aspects of immigration jurisprudence and the circumstances of immigration respondents have changed radically in the twenty-five years since *Lopez-Mendoza* was decided. The next Part of this Article illustrates the extent to which the situation feared by the Court in *Lopez-Mendoza* has arisen, and violations of immigration respondents' constitutional rights have become widespread.

## II. 2009: THE WIDESPREAD OCCURRENCE OF CONSTITUTIONAL VIOLATIONS

In the twenty-five years since *Lopez-Mendoza*, as the policies and practices of immigration-enforcement agencies have changed radically,<sup>83</sup> respondents in immigration proceedings have argued with

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74. *United States v. Oscar-Torres*, 507 F.3d 224, 230 (4th Cir. 2007).

75. *Velasquez-Tabir v. INS*, 127 F.3d 456, 459 (5th Cir. 1997).

76. *Miguel v. INS*, 359 F.3d 408, 411 (6th Cir. 2004).

77. *Martinez-Camargo v. INS*, 282 F.3d 487, 492 (7th Cir. 2002).

78. *United States v. Guevara-Martinez*, 262 F.3d 751, 754 (8th Cir. 2001).

79. *Orhorhaghe v. INS*, 38 F.3d 488, 504 (9th Cir. 1994).

80. *United States v. Olivares-Rangel*, 458 F.3d 1104, 1106 (10th Cir. 2006).

81. *See, e.g., Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006) (holding that any arrest predicated on race is an arrest for "no reason at all" and is per se egregious); *Orhorhaghe*, 38 F.3d at 504 (holding that arresting an individual based on his "foreign sounding name" was egregious).

82. *See, e.g., United States v. Oscar-Torres*, 507 F.3d 224, 228 (4th Cir. 2007) (holding that illegally obtained fingerprints are admissible because they are identity related); *Olivares-Rangel*, 458 F.3d at 1106 (holding that under *Lopez-Mendoza* an individual may not challenge a court's jurisdiction over him because of an illegal arrest).

83. Restrictions on law-enforcement actions have lessened markedly in recent years. *See* Henry G. Watkins, *The Fourth Amendment and the INS: An Update on*



increasing frequency that evidence against them should be suppressed because it was obtained illegally by government officials whose actions violated the respondents' constitutional rights.

The arguments advanced by respondents in such cases have almost exclusively focused upon the last two exceptions to the inapplicability of the exclusionary rule provided by the Court in Part V of *Lopez-Mendoza*—namely, “egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.”<sup>84</sup> Interpreting BIA definitions of *egregiousness* that predated *Lopez-Mendoza*,<sup>85</sup> courts of appeal have developed differing standards of egregiousness and different definitions of what might transgress notions of fundamental fairness.<sup>86</sup>

By 2004, however, there were so many examples of motions to suppress argued on the grounds that individuals were seized on the basis of race alone—consistently understood as an egregious violation of the Fourth Amendment<sup>87</sup>—that one commentator suggested that suppression of evidence due to widespread violations of the Constitution might be warranted.<sup>88</sup> In 2008, an article in the American

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*Locating the Undocumented and a Discussion on Judicial Avoidance of Race-Based Investigative Targeting in Constitutional Analysis*, 28 SAN DIEGO L. REV. 499, 500 (1991); Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 519 (2004).

84. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050–51 (1984) (citing *Rochin v. California*, 342 U.S. 165 (1952)).

85. See, e.g., *In re Garcia*, 17 I. & N. Dec. 319, 321 (BIA 1980) (barring admission of involuntary statements); *In re Toro*, 17 I. & N. Dec. 340, 343 (BIA 1980) (“[T]he manner of seizing evidence [may be] so egregious that to rely on it would offend the fifth amendment’s due process requirement of fundamental fairness.”).

86. See, e.g., *Almeida-Amaral*, 461 F.3d at 235 (holding that if an individual is subjected to a seizure “for no reason at all” and the “seizure is sufficiently severe,” then it constitutes an egregious violation and the evidence resulting from the seizure should be suppressed); *Martinez-Camargo v. INS*, 282 F.3d 487, 492–93 (7th Cir. 2002) (recognizing the *Lopez-Mendoza* suppression rule but declining to exclude evidence on the facts of the case); *Ruckbi v. INS*, 285 F.3d 120, 125 (1st Cir. 2002) (same); *Westover v. Reno*, 202 F.3d 475, 479 (1st Cir. 2000) (same); *Orhorhaghe*, 38 F.3d at 503–04 (excluding evidence where an INS search and seizure was based solely on the person’s Nigerian sounding name); *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1452 (9th Cir. 1994) (excluding evidence where an INS search and seizure was based solely on the person’s Hispanic appearance); *Arguelles-Vasquez v. INS*, 786 F.2d 1433, 1435 (9th Cir. 1986) (same).

87. See, e.g., *Martinez-Camargo*, 282 F.3d at 492; *Orhorhaghe*, 38 F.3d at 503–04.

88. See Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1114 (2004) (presenting evidence of widespread racial discrimination in immigration enforcement such that “[u]nder the logic of *Lopez-Mendoza* itself, the exclusionary rule may now be appropriate in immigration proceedings”).

Bar Association Journal described a newly-emergent trend, whereby immigration practitioners were beginning to argue that constitutional violations by ICE have become so widespread that it may be necessary to revisit the Supreme Court's holding in *Lopez-Mendoza*.<sup>89</sup> This Part explores how and why violations of immigration respondents' rights have become widespread. The Compact Oxford English Dictionary defines *widespread* as "spread among a large number or over a wide area."<sup>90</sup> Accordingly, this Part considers the increase in the geographical ambit of allegations of violations of immigration respondents' rights and the increase in the number of institutional actors throughout the country involved in alleged incidences of constitutional violations.

*A. Constitutional Violations Have Become Geographically Widespread*

The Department of Justice's Executive Office of Immigration Review (EOIR) is responsible for maintaining records showing the disposition of immigration cases.<sup>91</sup> However, these records are too aggregated to provide an accurate indication of the number of motions to suppress and terminate filed and granted in immigration courts in the United States.<sup>92</sup> EOIR records show that between 1952 and 1979—the year that the *Lopez-Mendoza* respondents Adan Lopez-Mendoza and Elias Sandoval-Sanchez first appeared in immigration court—fewer than fifty motions to suppress evidence or terminate proceedings had ever

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89. Stephanie Francis Ward, *Illegal Aliens on I.C.E.: Tougher Immigration Enforcement Tactics Spur Challenges*, ABA JOURNAL, June 2008, at 44, 45, available at [http://www.abajournal.com/magazine/illegal\\_alien\\_on\\_ice](http://www.abajournal.com/magazine/illegal_alien_on_ice) ("Immigration lawyers say the searches have become both—widespread and egregious—and that it is time for the court to revisit *Lopez-Mendoza*.").

90. Askoxford.com, Definition of Widespread, [http://www.askoxford.com/concise\\_oed/widespread?view=uk](http://www.askoxford.com/concise_oed/widespread?view=uk) (last visited Nov. 21, 2008).

91. Each year the Executive Office of Immigration Review (EOIR) publishes a statistical yearbook providing a full report on all of its activities during the previous financial year. Data is available for the past twelve years, showing the number of individuals in immigration proceedings and the outcome of those proceedings; that is, the number of individuals removed, the number of individuals granted a form of relief (such as cancellation of removal), and the number of individuals whose termination proceedings were granted. See USDOJ.gov, Statistical Year Book, <http://www.uddog.gov/eoir/statpub/syb2000main.htm> (last visited Nov. 21, 2008) (displaying links to the Statistical Year Books from 2000–07).

92. For example, it is impossible to measure the number of motions to suppress and terminate brought by immigration respondents that have prevailed, not least because the vast majority of motions to terminate proceedings are *not* granted in response to respondents' motions to suppress, but rather in response to motions by ICE trial attorneys.

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been *filed* in immigration court.<sup>93</sup> Twenty-eight years later, in 2007 alone, 21,144 motions to terminate were *granted*.<sup>94</sup> These numbers are attention-grabbing; even assuming every single pre-1979 motion to terminate was granted, this would constitute at least a 10,000 fold increase in terminations annually, depending on what percentage of pre-1979 motions to terminate were eventually granted. But, this number is statistically meaningless due to different units of analysis, vastly different numbers of individuals in removal proceedings,<sup>95</sup> different agencies with responsibility for immigration enforcement,<sup>96</sup> and different security concerns,<sup>97</sup> all of which inform very different patterns of enforcement activity.<sup>98</sup>

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93. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1071 (1984) (describing how, prior to the decision of the BIA in *In re Sandoval*, 17 I. & N. Dec. 70 (BIA 1979), neither the BIA nor any court had held that the exclusionary rule did not apply in civil deportation proceedings, and observing that the Board in *Sandoval* noted that there were “fewer than fifty BIA proceedings since 1952” in which motions had been made to suppress evidence on Fourth Amendment grounds).

94. EOIR FY 2007 STATISTICAL YEAR BOOK, *supra* note 21, at D2 (showing the disposition of immigration cases for the years 2003–07 and the availability of different forms of relief).

95. U.S. DEP’T OF JUSTICE, INS, 1999 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 215 (2002), *available at* <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/1999/FY99Yearbook.pdf>. In 2007, there were 167,999 formal removals, compared to only 26,825 in 1979. Compare *id.* with EOIR FY 2007 STATISTICAL YEAR BOOK, *supra* note 21, at D2.

96. In 1979 the agency responsible for immigration enforcement was the INS, while today it is ICE.

97. The terrorist attacks of September 11, 2001 (9/11) have had a profound effect on immigration enforcement.

98. ICE’s Fugitive Operations Teams have undertaken a number of high-profile nationwide “enforcement operations,” such as Operation “Return To Sender,” *see* Press Release, U.S. Immigration and Customs Enforcement, More than 300 Arrested in ICE Operation Targeting Illegal Alien Fugitives and Immigration Violators in San Diego and Imperial Counties (Apr. 3, 2007), *available at* <http://www.ice.gov/pi/news/newsreleases/articles/070403sandiego.htm>; Operation “Cross-Check,” *see* Press Release, U.S. Immigration and Customs Enforcement, ICE Arrests 148 Immigration Violators, Criminals and Fugitives in Dallas (Apr. 27, 2007), *available at* <http://www.ice.gov/pi/news/newsreleases/articles/070427dallas.htm> (targeting individuals with any kind of criminal record); Operation “Community Shield,” *see* Press Release, U.S. Immigration and Customs Enforcement, 11 Arrested in Kenosha During ICE-led Operation Targeting Gang Members (Nov. 20, 2008), *available at* <http://www.ice.gov/pi/nr/0811/081120kenosha.htm> (targeting foreign-born alleged gang members). There are also workplace Enforcement Initiatives, such as Operation “Wagon-Train,” which targeted workers at six Swift plants located in Greeley, Colorado; Grand Island, Nebraska; Cactus, Texas; Hyrum, Utah; Marshalltown, Iowa; and Worthington, Minnesota, *see* Press Release, U.S. Immigration and Customs Enforcement, Worksite Enforcement: Operation Wagon Train (Mar. 1, 2007), *available at* <http://www.ice.gov/pi/nr/0811/081120kenosha.htm>.

In the absence of data systematically demonstrating an increasingly wide geographical spread of cases in which immigration judges held that immigration officers had violated respondents' constitutional rights, it is appropriate to consider the relevance of more episodic data, including affidavits provided to immigration courts in written complaints, sworn testimony given to Congressional hearings, and media accounts of ICE operations. These sources provide some indication of the geographical distribution of alleged violations of immigration respondents' constitutional rights and suggest a strikingly wide geographical ambit of reported allegations of constitutional violations by immigration agents and other law-enforcement officers engaged in immigration operations.<sup>99</sup> In 1986, just two years after *Lopez-Mendoza*, one commentator observed that there had already been an increase in Fourth Amendment violations by immigration officials.<sup>100</sup> Fifteen years later, in 2001, an INS report to the House Appropriations Committee highlighted racially biased, and therefore unconstitutional, enforcement of racially neutral policies.<sup>101</sup> Last year, organizations ranging from the United Nations<sup>102</sup> to the United Food and Commercial Workers International Union<sup>103</sup> undertook investigations into ICE misconduct and criticized ICE agents for their violation of individuals'

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99. See *infra* Appendix (showing the various locations of alleged constitutional violations).

100. See Katharine Auchincloss Lorr, *Employer Sanctions and the Fourth Amendment: Lessons from OSHA for the Immigration Bar*, 4 GEO. IMMIGR. L.J. 1, 57 (1990) (quoting the court in *Int. Molders' & Allied Workers' Local Union v. Nelson*, 799 F.2d 547, 551 (9th Cir. 1986) that they had found an "evident systematic policy and practice of fourth amendment violations" by the INS, including extensive evidence of INS agents "exceeding official policy").

101. See Wishnie, *supra* note 88, at 1106-07 (citing Letter from Janis A. Sposato, Acting Assistant Att'y Gen., to Rep. Wolf, Chair, Subcomm. on the Dep'ts of Commerce, Justice and State, the Judiciary, and Related Agencies, of the House Comm. on Appropriations (Sept. 21, 2001) (noting disproportionately higher rates of referrals of Asians, African-Americans, and Hispanics for secondary inspection based on a review of over five million primary inspections at JFK Airport)).

102. U.N. Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development* 16, U.N. Doc A/HRC/7/12/Add.2 (Mar. 5, 2008) (prepared by Jorge Bustamante) (noting increased workplace and household raids by ICE agents who have "frequent disregard of due process"); *id.* at 17 ("The Special Rapporteur heard accounts from victims that ICE officials entered their homes without a warrant, denied them access to lawyers or a phone to call family members and coerced them to sign 'voluntary departure' agreements.").

103. See N.C. Aizenman, *Immigration Agency Accused of Illegal Searches*, WASH. POST, Feb. 26, 2008, at A4 (reporting that members of a private commission accused ICE of routinely violating Fourth Amendment rights during workplace raids, such as by misusing a warrant to arrest a limited number of workers in the hope of catching other undocumented people in the area).

constitutional rights. Concern about the extent to which law-enforcement officers are violating immigration respondents' constitutional rights even prompted a congressional hearing to investigate allegations of ICE misconduct.<sup>104</sup>

In May 2006, ICE launched "Operation Return to Sender," a nationwide initiative designed to apprehend fugitive aliens.<sup>105</sup> Over 23,000 individuals have been arrested by ICE Fugitive Operation Teams (FOTs) in a series of raids on homes and offices.<sup>106</sup> The majority of those arrested in these raids were not fugitive aliens for whom the ICE FOTs had arrest warrants, but rather individuals categorized by ICE as "collateral arrests"—individuals who happened to be present at the site of a FOT raid, and about whom, prior to their warrantless arrests, ICE typically held no information.<sup>107</sup> In the two years since "Operation Return to Sender" began, allegations that ICE FOTs have committed a wide range of constitutional violations have been made in a variety of cases, civil complaints,<sup>108</sup> notarized affidavits,<sup>109</sup> testimony given at Congressional hearings, and media reports in Arizona,<sup>110</sup> California,<sup>111</sup> Colorado,<sup>112</sup> Connecticut,<sup>113</sup>

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104. On February 13, 2008, the House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law held a hearing on "Problems with ICE Interrogation, Detention, and Removal." *Problems with ICE Interrogation, Detention, and Removal Procedures: Hearing Before the H. Subcomm. on Immigration, Citizenship, Refugees, Border Security, and Int'l Law of the H. Comm. on the Judiciary*, 110th Cong., (Feb. 13, 2008), available at [http://judiciary.house.gov/hearings/hear\\_021308.html](http://judiciary.house.gov/hearings/hear_021308.html).

105. See Press Release, U.S. Immigration and Customs Enforcement, *supra* note 98.

106. See Jesse McKinley, *San Francisco Bay Area Reacts Angrily to Series of Immigration Raids*, N.Y. TIMES, Apr. 28, 2007, at A14.

107. See, e.g., Tom Lochner, *Civil Rights Advocates Question Actions of Immigration Agents*, OAKLAND TRIB., Mar. 10, 2007 ("In Contra Costa County from Jan. 8 to 19, Return to Sender resulted in 119 arrests, including 20 people on the deportation list, a ratio of about five collateral arrests for every 'target' according to figures supplied by ICE."); Elliot Spagat, *Immigrants Are 'Collateral Arrests'*, S. FLA. SUN-SENTINEL, Apr. 6, 2007, at 3A. (reporting that "collateral arrests" made up 59 percent of all arrests in Dallas and El Paso, Texas, 54 percent in New York City, and 57 percent in San Diego).

108. Many of the civil complaints and notarized affidavits referenced in this Section were collated by Rachel Bengtson of Centro Legal, Inc. in St. Paul, Minnesota. The author is extremely grateful to Ms. Bengtson for sharing her research.

109. *Id.*

110. See *Florence Immigrant & Refugee Rights Project: Hearings Before Subcomm. on Immigration, Citizenship, Refugees, Border Security, and Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. (Feb. 13, 2008) [hereinafter Hartzler Testimony] (written testimony of Kara Hartzler, Esq.), available at <http://judiciary.house.gov/hearings/pdf/Hartzler080213.pdf>.

111. See Complaint for Violations of the Fourth and Fifth Amendments to the United States Constitution, *Reyes v. Alcantor*, No. 07-cv-02271 (N.D. Cal. filed Feb.

Florida,<sup>114</sup> Georgia,<sup>115</sup> Illinois,<sup>116</sup> Iowa,<sup>117</sup> Maryland,<sup>118</sup>  
 Massachusetts,<sup>119</sup> Minnesota,<sup>120</sup> Missouri,<sup>121</sup> Nebraska,<sup>122</sup> New Jersey,<sup>123</sup>

14, 2008) (on file with author); Complaint for Declaratory and Injunctive Relief, *National Lawyers Guild et al. v. Chertoff et al.*, No. 08-01000 (C.D. Cal. filed Feb. 14, 2008) (on file with author); Paloma Esquivel, *Civil Rights Groups Allege Immigrant Workers Were Denied Rights*, L.A. TIMES, Feb. 15, 2008, at B5.

112. See Petition for Writ of Habeas Corpus, *Yarrito v. Meyers*, No. 06-CV-2494 (D. Colo. filed Dec. 13, 2006) (on file with author).

113. See Complaint, *Barrera v. Boughton*, No. 3:07-cv-01436 (D. Conn. filed Nov. 26, 2007) (on file with author); Complaint, *El Badrawi v. DHS*, No. 3:07-cv-01074, ¶ 5 (D. Conn. filed July 13, 2007) (on file with author); Complaint, *Danbury Area Coal. for the Rights of Immigrants v. DHS*, No. 3:06-cv-01992 (D. Conn. filed Dec. 14, 2006) (on file with author).

114. See Damien Cave, *States Take New Tack on Illegal Immigration*, N.Y. TIMES, June 9, 2008, at A1 (“At Red Barn Barbecue, witnesses said that skin color clearly influenced police procedure. When several officers visited and saw no one who was Hispanic in the kitchen, they moved on. ‘We offered to give them records, and they said, ‘No, it’s not necessary,’” said Randy Brochu, whose family owns the business.”).

115. See *Problems with ICE Interrogation, Detention, and Removal Procedures: Hearings Before the H. Subcomm. on Immigration, Citizenship, Refugees, Border Security and Int’l Law of the H. Comm. on the Judiciary*, 110th Cong. (Feb. 13, 2008), available at <http://judiciary.house.gov/hearings/pdf/Mancha080213.pdf> [hereinafter Mancha Testimony] (statement of Marie Justeen Mancha); Complaint, *Mancha v. ICE*, No. 06-cv-12650 (N.D. Ga. filed Nov. 1, 2006) (on file with author).

116. See Kari Lydersen, *Abuses Alleged During Immigration Raids*, IN THESE TIMES, May 2007, at 11.

117. See *Problems with ICE Interrogation, Detention, and Removal Procedures: Hearings Before the H. Subcomm. on Immigration, Citizenship, Refugees, Border Security and Int’l Law of the H. Comm. on the Judiciary*, 110th Cong. (Feb. 13th, 2008), available at <http://judiciary.house.gov/hearings/pdf/Graves080213.pdf>, [hereinafter Graves Testimony] (statement of Michael Graves, Member of UFCW, Local 1149).

118. See Justin Fenton & Kelly Brewington, *46 Held in Immigration Sweep*, BALT. SUN, July 1, 2008, at 1B.

119. See *Aguilar v. ICE*, 510 F.3d 1 (1st Cir. 2007); Motion for Temporary Restraining Order and Preliminary Injunction and Emergency Motion for Expedited Hearing, *Sandoval v. ICE*, No. 07-cv-10471 (D. Mass. filed Mar. 8, 2007) (on file with author).

120. See Plaintiffs’ Complaint for Declaratory and Injunctive Relief and Damages, *Barrera v. DHS*, No. 07-cv-03879, ¶ 1 (D. Minn. filed Sept. 4, 2007) (on file with author).

121. See Complaint, *Asamoah-Boadu v. Missouri*, No. 07AC-CC00983 (Mo. Cir. Ct. filed Oct. 25, 2007).

122. See Complaint, Class Action Request for Injunctive Relief and Damages, Jury Demand on Damage Claims, *United Food & Commercial Workers Int’l Union v. DHS*, No. 07-cv-00188, ¶ 22 (N.D. Tex. filed Sept. 12, 2007) (on file with author).

123. See Affidavit of Gonzalo Juarez, ¶¶ 7–8, 10, 20 (June 27, 2007) (on file with author).

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New Mexico,<sup>124</sup> New York,<sup>125</sup> North Carolina,<sup>126</sup> Ohio,<sup>127</sup> Rhode Island,<sup>128</sup> Tennessee,<sup>129</sup> Texas,<sup>130</sup> and Washington.<sup>131</sup>

The ways in which ICE agents are alleged to have violated the Fourth and Fifth Amendment rights of immigration respondents are as varied as the locations in which the violations are alleged to have occurred. Pretextual traffic stops are alleged to have been employed in Danbury, Connecticut;<sup>132</sup> Bexar, Texas;<sup>133</sup> and Whatcom County,

124. See Plaintiffs' Complaint for Damages to Remedy Civil Rights Violations and Common Law Torts, *Border Network for Human Rights v. County of Otero*, No. 07-cv-01045, ¶¶ 1-4 (D.N.M. filed Oct. 17, 2007) (on file with author); Complaint, *Daniel T. ex rel. Robinson v. Border Network for Human Rights v. County of Otero*, No. 07-cv-01044 (D.N.M. filed Oct. 17, 2007) (on file with author).

125. See *In re Rabani*, Decision and Order of the Immigration Judge, *supra* note 28; *In re Herrera-Priego*, Decision and Order of the Immigration Judge, *supra* note 28; Class Action Complaint, *Aguilar v. ICE*, No. 07-cv-08224, ¶¶ 1-3 (S.D.N.Y. filed Sept. 20, 2007) (on file with author); Motion to Suppress and/or Terminate Proceedings for Violations of the Fourth and Fifth Amendments and Agency Regulations and Memo of Points and Authorities, *In re Chicas Moran* (U.S. Dep't of Justice, Executive Office for Immigration Review July 20, 2007) (on file with the author); Motion to Suppress and/or Terminate Proceedings for Violations of the Fourth and Fifth Amendments and Agency Regulations and Memo of Points and Authorities, *In re Lopez Ramos* (U.S. Dep't of Justice Executive Office for Immigration Review July 20, 2007) (on file with author); Nina Bernstein, *Raids Were a Shambles, Nassau Complains to U.S.*, N.Y. TIMES, Oct. 3, 2007, at B1.

126. See Steven Greenhouse, *U.S. Officials Defend Ploys to Catch Immigrants*, N.Y. TIMES, Feb. 11, 2006, at A8 (describing ICE agents' impersonation of federal health and safety officials as a ruse to detain and arrest undocumented workers).

127. See Plaintiff-Intervenor's Motion for a Temporary Restraining Order and Preliminary Injunction, *Martinez v. Chertoff*, No. 07-cv-00722 (S.D. Ohio Sept. 10, 2007) (on file with author).

128. See Karen Lee Ziner, *ACLU Sues State Police*, PROVIDENCE J., Jan. 9, 2007, at B1 (describing the ACLU's claim that state troopers "knew or should have known that the search, seizure and detention of the plaintiffs were without reasonable or probable cause, and were therefore unlawful under the circumstances").

129. See Motion to Suppress Evidence and Terminate Proceeding with Supporting Memorandum of Law, *In re Cervantes-Valerio* (U.S. Dep't of Justice Executive Office for Immigration Review Oct. 23, 2007); Jury Demand, *Flores-Morales v. George*, No. 07-cv-0050, ¶ 1 (M.D. filed Tenn. July 5, 2007) (on file with author).

130. See Complaint, Class Action Request for Injunctive Relief and Damages, Jury Demand on Damage Claims, *United Food & Commercial Workers Int'l Union v. DHS*, No. 07-cv-00188 (N.D. Tex. filed Sept. 12, 2007) (on file with author); Affidavit of Jose Ordonez-Salanec, ¶¶ 8, 10 (May 22, 2007) (on file with author).

131. See *In re X*, Order of the Immigration Judge (U.S. Dep't of Justice Executive Office for Immigration Review Feb. 8, 2008) (on file with author).

132. See Complaint, *Barrera v. Boughton*, *supra* note 113 ("One Plaintiff in this action was unlawfully arrested by DPD for a civil immigration violation after a pretextual and race-based traffic stop, transferred to ICE custody, and eventually deported.").

Washington.<sup>134</sup> Warrantless home invasions are alleged to have been undertaken in Willmar, Minnesota;<sup>135</sup> Newark, New Jersey;<sup>136</sup> and Otero, New Mexico.<sup>137</sup> Illegal workplace seizures are alleged to have been undertaken in Los Angeles, California;<sup>138</sup> Worthington, Minnesota;<sup>139</sup> and Goldsboro, North Carolina.<sup>140</sup> Illegal racial profiling is alleged to have been used to target individuals in Florence, Arizona;<sup>141</sup> Jacksonville, Florida;<sup>142</sup> and Memphis, Tennessee.<sup>143</sup> Unnecessary force is alleged to have been used during arrests in Chicago, Illinois;<sup>144</sup> Anne Arundel County, Maryland;<sup>145</sup> Hicksville, New York;<sup>146</sup> and Maury County, Tennessee.<sup>147</sup> United States citizen

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133. See Affidavit of Jose Ordonez-Salanec, *supra* note 130, ¶ 1 (“At the time of my arrest [by the Border Patrol], I had violated no traffic law, all of the inspection stickers on the vehicle that I was driving were current, and there were no warrants for my arrest that would have justified the stop and arrest.”).

134. See *In re X*, Order of the Immigration Judge, *supra* note 131, at 2 (“[T]he respondent daughters were the subjects of a racially motivated traffic stop by a deputy sheriff . . .”).

135. See Plaintiffs’ Amended Complaint for Declaratory and Injunctive Relief and Damages, *Arias v. ICE*, 07-cv-001959, ¶ 1 (D. Minn. filed July 27, 2007) (on file with author).

136. See Affidavit of Gonzalo Juarez, *supra* note 123, ¶ 7 (“The officer told me to ‘come inside.’ He did not ask me for permission to enter. I never gave permission for him to enter.”).

137. See Plaintiffs’ Complaint for Damages to Remedy Civil Rights Violations and Common Law Torts, *Border Network for Human Rights v. County of Otero*, *supra* note 124, ¶ 12 (“Defendants began targeting Hispanic families in their own homes by initiating random sweeps of trailers in the area . . .”).

138. See Esquivel, *supra* note 111.

139. See Plaintiffs’ Complaint for Declaratory and Injunctive Relief and Damages, *Barrera v. DHS*, *supra* note 120, ¶ 24.

140. See Greenhouse, *supra* note 126 (describing ICE agents’ impersonation of federal health and safety officials as a ruse to detain and arrest undocumented workers).

141. See Hartzler Testimony, *supra* note 110.

142. See *In re Rabani*, Decision and Order of the Immigration Judge, *supra* note 28 (“[Respondent] did not see them question a single person other than himself . . . . He believes they approached him because of his Middle Eastern appearance.”).

143. See Motion to Suppress Evidence and Terminate Proceeding with Supporting Memorandum of Law, *In re Cervantes-Valerio*, *supra* note 129, at 2, 6–7.

144. See Lyderson, *supra* note 116, at 11 (describing how one woman “was invasively strip-searched, and told the process was a search for hidden drugs. She was handcuffed so tightly that it left marks on her wrists, she says, and she was unable to get pain medication for severe tendonitis in her ankle”).

145. See Fenton & Brewington, *supra* note 118 (describing a pregnant woman being shoved roughly).

146. See Motion to Suppress and/or Terminate Proceedings for Violations of the Fourth and Fifth Amendments and Agency Regulations and Memo of Points and Authorities, *In re Chicas Moran*, *supra* note 125, at 3 (“[A]s I was about to leave for my job . . . I was stopped inside my apartment by about five armed men. These men threw me and my roommates down on the floor and handcuffed us.”).



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children are alleged to have been detained by armed officers in San Rafael, California;<sup>148</sup> New Haven, Connecticut;<sup>149</sup> and Reidsville, Georgia.<sup>150</sup> Respondents were allegedly denied access to counsel in Greeley, Colorado;<sup>151</sup> New Bedford, Massachusetts;<sup>152</sup> and Cactus, Texas.<sup>153</sup> Individuals are alleged to have been stopped and questioned without reasonable suspicion in Twin Falls, Idaho;<sup>154</sup> New York, New York;<sup>155</sup> and Richmond, Rhode Island;<sup>156</sup> and detained without probable cause in Marshalltown, Iowa;<sup>157</sup> Grand Island, Nebraska;<sup>158</sup> and East Hampton, New York.<sup>159</sup>

This sample is based upon cases currently pending before immigration courts and courts of appeal, as well as findings in favor of

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147. See Jury Demand, *Flores-Morales v. George*, *supra* note 129.

148. See Complaint for Violations of the Fourth and Fifth Amendments to the United States Constitution, *Reyes v. Alcantor*, *supra* note 111, ¶¶ 4, 11 (“[Kebin Reyes] . . . is seven years old . . . Defendants told Kebin that he would only need to stay at the ICE office for an hour or two. Instead, they held him in a locked room all day against his will. Kebin thought he was in jail. Defendants refused to give Kebin any food, other than bread and water. Kebin was hungry and crying. He did not know when he would be free to leave.”).

149. See Nina Bernstein, *Promise of ID Cards Is Followed by Peril of Arrest for Illegal Immigrants*, N.Y. TIMES, July 23, 2007.

150. See Complaint, *Mancha v. ICE*, *supra* note 115, ¶¶ 24–29; Mancha Testimony, *supra* note 110, at 35.

151. See Petition for Writ of Habeas Corpus, *Yarrito v. Meyers*, *supra* note 112, ¶¶ 11, 13.

152. See Petition for Writ of Habeas Corpus and Complaint for Declaratory & Injunctive Relief, *Sandoval v. ICE*, No. 07-cv-10471 (D. Mass. Filed Mar. 8, 2007) (on file with author).

153. See Complaint, Class Action Request for Injunctive Relief and Damages, Jury Demand on Damage Claims, *United Food & Commercial Workers Int’l Union v. DHS*, *supra* note 130, ¶¶ 22, 24, 27.

154. See Ward, *supra* note 89, at 47. (“In Twin Falls, Idaho, for example, immigration lawyers allege that [Customs and Border Protection] officers in 2007 approached shoppers at a warehouse grocery store, asking to see documentation. The business, WinCo Foods, is popular with the area’s Latino residents, and some say that individuals were stopped without probable cause.”).

155. See *In re Herrera-Priego*, Decision and Order of the Immigration Judge, *supra* note 125.

156. See Ziner, *supra* note 128 (describing the ACLU’s claim that state troopers “knew or should have known that the search, seizure and detention of the plaintiffs were without reasonable or probable cause, and were therefore unlawful under the circumstances”).

157. See Graves Testimony, *supra* note 117, at 38 (“There was no legitimate reason. There was no probable cause. Our plant—our workplace—had been transformed into a prison or detention center.”).

158. See Plaintiff-Intervenor’s Motion for a Temporary Restraining Order and Preliminary Injunction, *Martinez v. Chertoff*, *supra* note 127, ¶¶ 23, 25.

159. See Nina Bernstein, *Immigration Raids Single Out Hispanics*, *Lawsuit Says*, N.Y. TIMES, Sep. 21, 2007, at B3.

immigration respondents in immigration and federal court. While some of the allegations detailed in the pending cases included in this sample may not ultimately be proven, this sample at the very least demonstrates that over the last two-year period, immigration-enforcement officers have consistently been accused of engaging in behavior that threatens immigration respondents' constitutional rights.<sup>160</sup>

One possible explanation for the increase in the number of motions to suppress and terminate filed in immigration court might be increased activism by members of the immigration-defense bar, rather than increased unconstitutional conduct by ICE. However, such an explanation misapprehends the role played by immigration lawyers. For a variety of reasons, including language barriers and a lack of financial resources, the overwhelming majority of immigration respondents never have the opportunity to consult with an attorney. A report released by the National Immigrant Justice Center (NIJC) in 2008 suggests that language difficulties prevent immigration respondents from fully comprehending or realizing this right.<sup>161</sup> This is not a new phenomenon; research undertaken in 2001 found that 90 percent of persons detained in immigration custody were unable to retain counsel to represent them.<sup>162</sup>

The number of individuals detained for civil immigration violations has increased sharply in the past seven years. According to Secretary of Homeland Security Michael Chertoff's recent testimony to the House Judiciary Committee, ICE removed more than 280,000 individuals from the United States during the 2007 fiscal year.<sup>163</sup> The overwhelming majority of these respondents were not represented by legal counsel,<sup>164</sup> leaving them "at a painful disadvantage when trying to present their cases to judges and opposing counsel who possess years of experience in immigration law."<sup>165</sup> As Justice White noted in his *Lopez-Mendoza*

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160. See *infra* Appendix.

161. *Language Barriers May Lead Immigrants to Waive Right to Hearing Before Deportation*, IMMIGRANTJUSTICE.ORG, June 3, 2008, <http://www.immigrantjustice.org/news/detention/stiporders>.

162. Hartzler Testimony, *supra* note 110, at 17; Elizabeth Amon, *INS Fails to See the Light*, NATIONAL L.J., Mar. 5, 2001, at A1.

163. *U.S. Dep't of Homeland Security Oversight Hearing Before the H. Comm. on the Judiciary*, 110th Cong., at 8 (Mar. 5, 2008), available at [www.dhs.gov/xnews/testimony/testimony\\_1204746985090.shtm](http://www.dhs.gov/xnews/testimony/testimony_1204746985090.shtm) [hereinafter Chertoff Testimony] (statement of Michael Chertoff, Secretary, U.S. Dep't of Homeland Security). ICE claims that slightly fewer individuals (276,912) were removed during the same period. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FY07 ACCOMPLISHMENTS, available at <http://www.ice.gov/doclib/pi/news/factsheets/fy07accomplshmntsweb.pdf>.

164. Hartzler Testimony, *supra* note 110, at 17.

165. *Id.*

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dissent, individuals placed in proceedings without the advice of a trained legal professional are highly unlikely to comprehend the extent to which their constitutional rights have been violated, and even less likely to realize that they are able to petition the immigration court to suppress any evidence obtained as a result of the arresting law-enforcement officers' illegal actions.<sup>166</sup> Given the limited role of the immigration bar, formal allegations of ICE misconduct brought during immigration proceedings may significantly underreport the actual incidence of unconstitutional activity by ICE. In the words of Professor Dan Kanstroom, "What we're seeing in court is really just the tip of the iceberg."<sup>167</sup>

*B. Constitutional Violations Have Become Institutionally Widespread*

Since September 11, 2001, one particular development in law-enforcement officers' interaction with immigrants has had a considerable impact upon the frequency of the violation of immigration respondents' constitutional rights—the involvement of state and local police in immigration enforcement.<sup>168</sup> In 2002, the Department of Justice abandoned its longstanding practice of separating INS's civil enforcement of immigration laws from the criminal-law enforcement mandate of state and local police.<sup>169</sup> The rationale given for this radical departure from previous practice<sup>170</sup> was that police assistance was required to further the administration's "war on terror."<sup>171</sup>

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

167. Ward, *supra* note 89, at 50.

168. See, e.g., Wishnie, *supra* note 88, at 1085–88. Paradoxically, state and local police officers well versed in Fourth Amendment rights in a criminal context do not appear to apply the same standards when engaged in immigration enforcement activities. *Id.* at 1102–03.

169. See Marcus Stern & Mark Arner, *Police May Gain Power to Enforce Immigration: Plan Has Local Officers, Rights Groups on Edge*, SAN DIEGO UNION-TRIB., Apr. 3, 2002, at A1 (reporting on the U.S. Department of Justice's Office of Legal Counsel's reversal of long-standing legal tradition); Cheryl W. Thompson, *Some Envision Police Role in Immigration Issues*, ORLANDO SENTINEL, APR. 4, 2002, at A7 (same).

170. See Teresa Wynn Roseborough, *Assistance by State and Local Police in Apprehending Illegal Aliens*, 19 Op. Off. Legal Counsel 26, 26–27 (1996), available at [www.usdoj.gov/olc/immstopo1a.htm](http://www.usdoj.gov/olc/immstopo1a.htm) (describing the role previously played by state and local police with respect to immigration enforcement).

171. See Attorney General John Ashcroft, Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002), available at <http://www.usdoj.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm> (revealing that, in the wake of 9/11, the Office of Legal Counsel had concluded state and local police possess "inherent authority" to enforce immigration laws).

The so-called “war on terror” was invoked in 2001, 2002 and 2003 to justify the entry of increasing quantities of civil immigration-infraction information into the National Crime Information Center (NCIC) computer database.<sup>172</sup> Local and state police throughout the United States regularly use the NCIC to run background checks on individuals whom they encounter in the course of their work, including those questioned during routine traffic stops.<sup>173</sup> Individuals who are arrested and detained because of their NCIC record have little recourse to challenge its contents, and in some cases have been denied the opportunity to examine the record.<sup>174</sup>

The involvement of local police forces in immigration enforcement is far from uniform. Almost seventy different U.S. jurisdictions, ranging from Alaska to California to Connecticut, have promulgated local rules prohibiting local police officers from inquiring into an individual’s immigration status.<sup>175</sup> However, even in localities with rules or regulations prohibiting the use of local resources to enforce federal immigration law, some individual law-enforcement officers nonetheless run background checks on criminal suspects using the

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172. See Wishnie, *supra* note 88, at 1086 (“In the AAI [Absconder Apprehension Initiative], the Service has begun reviewing the files of absconders to enter appropriate records into the National Crime Information Center (NCIC) database . . .”).

173. See Nina Bernstein, *Challenge in Connecticut Over Immigrants’ Arrest*, N.Y. TIMES, Sept. 26, 2007, at B1; see also Nina Bernstein, *Crime Database Misused for Civil Issues, Suit Says*, N.Y. TIMES, Dec. 17, 2003, at A34 (reporting on arrests in New York, Los Angeles, Boston, and other cities); Cam Simpson et al., *Immigration Crackdown Shatters Muslims’ Lives*, CHI. TRIB., Nov. 16, 2003, at C1 (reporting on the arrest of Amir Shah, a car wash supervisor found sleeping in a car waiting for business to open, by Schaumburg, Illinois, police officers, on the basis of Shah’s old deportation order).

174. See Complaint, *El Badrawi v. DHS*, *supra* note 113, ¶¶ 139–40.

175. See OR. REV. STAT. § 181.850 (2001); H.R.J. 22, 23rd Leg., 1st Sess. (Alaska 2001), available at <http://www.legis.state.ak.us/pdf/23/Bills/HJR022C.pdf>; Detroit, Michigan, Local Res. (Dec. 2002), available at <http://www.aclu.org/safefree/resources/17086res20021206.html>; New Haven, Connecticut, Police Dep’t Gen. Order No. 06-2 (Dec. 2006), available at <http://www.newhavenindependent.org/archives/upload/2006/12/NHPDGeneralOrder.doc>; City and County of San Francisco, Bd. of Supervisors Res. No. 389-02 (June 2002), available at <http://www.democracyinaction.org/dia/organizationsORG/NILC/images/SanFranciscopdf.pdf>; Philadelphia City Solicitor Memorandum to All City Commissioners and Department Heads (Oct. 2003); National Immigration Law Center, *Laws, Resolutions and Policies Instituted Across the U.S. Limiting Enforcement of Immigration Laws by State and Local Authorities*, NILC.ORG, April 2008, [http://www.nilc.org/immlawpolicy/LocalLaw/locallaw\\_limiting\\_tbl\\_2008-04-15.pdf](http://www.nilc.org/immlawpolicy/LocalLaw/locallaw_limiting_tbl_2008-04-15.pdf); For more information about different local initiatives to combat the encroachment of federal immigration enforcement, see generally <http://www.aclu.org/safefree/resources>.

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NCIC and hand detainees over to ICE.<sup>176</sup> Moreover, law-enforcement authorities in some jurisdictions have actively sought to expand the role they play in immigration enforcement, either by developing independent local-enforcement policies<sup>177</sup> or by arranging for local police to be “deputized” as immigration agents under section 287(g) of the Immigration and Nationality Act.<sup>178</sup>

Since ICE launched its section 287(g) program in 2002, thirty-eight memoranda of agreement with state and local law-enforcement agencies to participate in the program have been promulgated.<sup>179</sup> In 2007, ICE agents trained 426 state and local law-enforcement officers to undertake immigration enforcement.<sup>180</sup> In March 2008, Secretary Chertoff claimed that in the previous two years, 287(g) agreements had accounted for the identification of approximately 26,000 individuals for potential deportation.<sup>181</sup> At the same time, local and state police officers in countless other jurisdictions *without* any formal 287(g) agreement with ICE also continue to enforce immigration law through ad hoc inquiries and periodic use of the NCIC to run checks on individuals detained for nonimmigration infractions.<sup>182</sup> In her recent testimony to the House Subcommittee on Immigration regarding the inquiry into

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176. See, e.g., Ted Robbins, ‘America’s Toughest Sheriff’ Takes on Immigration, NPR.ORG, Mar. 10, 2008, <http://www.npr.org/templates/story/story.php?storyId=88002493> (“Though the Phoenix Police Department has a policy of not asking citizenship on arrest, down at the county jail, which houses prisoners from a number of jurisdictions, it’s a different matter. Every single person who is booked—regardless of the charge—is asked their citizenship and social security number. Officials then look them up in the federal Immigration and Customs Enforcement, or ICE, database.”).

177. See Kareem Fahim, *Immigration Referrals by Police Draw Scrutiny*, N.Y. TIMES, Mar. 23, 2008, at A21 (describing New Jersey State Attorney General Milgram’s aggressive immigration referral policy).

178. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 133, 110 Stat. 3009-562, 3009-563 (codified at 8 U.S.C. § 1357(g)) (adding section 287(g) to the Immigration and Nationality Act). Section 287(g) authorizes the Attorney General to enter into agreements with state and local law-enforcement agencies, permitting designated officers to perform immigration law-enforcement functions, pursuant to a Memorandum of Agreement, provided that these officers receive appropriate training and function under the supervision of ICE officers. *Id.*

179. Chertoff Testimony, *supra* note 163; see also Jennifer V. Hughes, *Police Seek Help in Criminal Deportation*, N.Y. TIMES, Feb. 24, 2008, at WE2.

180. Chertoff Testimony, *supra* note 163.

181. *Id.*

182. See ICE.gov, ICE Factsheet, ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS), <http://www.ice.gov/pi/news/factsheets/access.htm> (last visited Dec. 2, 2008); see also ICE.gov, ICE Factsheet, Law Enforcement Support Center, <http://www.ice.gov/pi/news/factsheets/lesc.htm?searchstring=NCIC> (last visited Dec. 2, 2008).

alleged constitutional violations by ICE, attorney Kara Hartzler argued that this inconsistent pattern of enforcement often results in serious errors that cause lasting harm to the individuals involved.<sup>183</sup>

The complexities and inconsistencies of the current system of immigration enforcement—where state and local actors who were previously discouraged from enforcing immigration laws are now encouraged to do so,<sup>184</sup> individual officers who once believed that they should enforce immigration laws are now told that they should not,<sup>185</sup> and some police officers receive immigration training and others do not<sup>186</sup>—may help explain the increased incidence of allegations of violations of immigration respondents' constitutional rights.<sup>187</sup>

The rapid growth in the number of 287(g) agreements or local ad hoc initiatives in the past two years<sup>188</sup> may also have contributed to the disproportionately rapid increase in the number of constitutional violations that have been reported by immigration respondents during the same period. Indeed, almost all of the examples of constitutional violations discussed in this Article arose during arrests and detentions that occurred during the last eighteen months.<sup>189</sup> The situation has become so acute that at least one court of appeals has begun, *sua sponte*, to refer to the possibility that widespread violations of constitutional rights may be occurring. In early February 2008, the United States Court of Appeals for the Second Circuit in *Melnitsenko v. Mukasey*<sup>190</sup> stated that establishing that an alleged constitutional violation was widespread could be grounds for suppression of evidence in removal proceedings, even though no widespread-violation claim had been made by the litigants in that case.<sup>191</sup> The Second Circuit reiterated

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183. See Hartzler Testimony, *supra* note 110, at 4 (“When local law enforcement untrained in immigration issues attempt to enforce complex immigration laws, errors often result. Sometimes these errors can lead to the detention of persons who are not deportable; other times, these mistakes can cause grave, long-term harm to the person involved.”).

184. See Hughes, *supra* note 179.

185. See, e.g., New Haven, Connecticut, Police Dep’t Gen. Order No. 06-2 (Dec. 2006), available at <http://www.newhavenindependent.org/archives/upload/2006/12/NHPDGeneralOrder.doc>.

186. See Hartzler Testimony, *supra* note 110, at 4.

187. Indeed, this exact turn of events was predicted by Professor Michael Wishnie, who, writing in 2003, suggested that “in a post-September 11 world in which the current administration has summoned state and local police untrained in the complexities of immigration law to the task of immigration enforcement, there is strong reason to expect that Fourth Amendment violations by police will become ‘widespread.’” Wishnie, *supra* note 88, at 1114.

188. See *supra* text accompanying notes 175–183.

189. See *supra* text accompanying notes 105–159.

190. 517 F.3d 42 (2d Cir. 2008).

191. *Id.* at 46–47.

this point in August 2008 in *Pinto-Montoya v. Mukasey*,<sup>192</sup> in which the Court noted that it was unable to consider a widespread-violation claim because petitioners had only raised the claim on appeal, but suggested that, had the claim been administratively exhausted, it would have been appropriate for the Court to consider.<sup>193</sup>

In common with the Second Circuit, the Ninth Circuit has also considered an increasing number of suppression cases in recent months and has recognized that, in many circumstances, violations of immigration respondents' constitutional rights may warrant suppression of evidence and termination of proceedings. In one recent case, *Lopez-Rodriguez v. Mukasey*,<sup>194</sup> the Ninth Circuit held that it was appropriate to apply the exclusionary rule and suppress evidence obtained against immigration respondents that was the fruit of an illegal home raid.<sup>195</sup> In so ruling, the court held that the mere fact that law-enforcement officers had entered the respondent's home without a warrant, consent or exigent circumstances rendered the officers' actions per se egregious.<sup>196</sup> Judge Jay Bybee, concurring in the opinion, noted that the definition of *egregious* articulated in the holding of *Lopez-Rodriguez* and the decisions rendered in other similar Ninth Circuit cases had "set us on a collision course with the Supreme Court"<sup>197</sup> as well as other circuits.<sup>198</sup> A circuit split has clearly emerged, suggesting that the Supreme Court may soon be asked to grant certiorari to consider current understanding of the precedent of *Lopez-Mendoza* and reconsider the currency and efficacy of the exclusionary rule in immigration proceedings.

Constitutional violations should therefore now be considered as both *geographically* widespread—ranging widely across geographical boundaries—and *institutionally* widespread—the result of behavior by law-enforcement officers operating at the federal, state and local levels. The *Lopez-Mendoza* Court stated that "[o]ur conclusions concerning the exclusionary rule's value might change, if there developed good

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192. 540 F.3d 126 (2d Cir. 2008).

193. *Id.* at 130 n.2 ("In their submissions to the Court, petitioners argue for the first time that Fourth Amendment violations by immigration authorities are so widespread as to make exclusion appropriate in these circumstances. Because they did not raise the issue before the BIA, it has not been exhausted and is therefore not appropriately before us.").

194. 536 F.3d 1012 (9th Cir. 2008).

195. *Id.* at 1018–19.

196. *Id.*

197. *Id.* at 1019–20 (Bybee, J., concurring).

198. *See id.* at 1020 n.1 (Bybee, J., concurring) (describing the differences between the standard for egregiousness in the Ninth Circuit when contrasted to the First and Second Circuits).

reason to believe that Fourth Amendment violations by INS officers were widespread.”<sup>199</sup> The current pattern of immigration enforcement strongly suggests that this may now be the case, and recent case law emerging from different circuits suggests that now may be the time for the Supreme Court to revisit its decision in *Lopez-Mendoza* in light of those changed circumstances.

### III. 1984–2009: THE EROSION OF THE FOUNDATIONS OF *LOPEZ-MENDOZA*

In the face of this widespread increase in the number of reports of violations of immigration respondents’ constitutional rights, the U.S. government, as well as some commentators and scholars, argue that the exclusionary rule need not be reintroduced in immigration proceedings.<sup>200</sup> The rationale advanced by opponents of the use of the exclusionary rule in immigration proceedings typically mirrors the text of the *Lopez-Mendoza* opinion: first, they argue that immigration proceedings are civil in nature and therefore immigration respondents do not need the full protections of the criminal-justice system;<sup>201</sup> second, they argue that immigration officers undergo extensive training which ensures that they avoid violating respondents’ rights;<sup>202</sup> and finally, they suggest that other remedies are available to individuals with a genuine grievance against the authorities.<sup>203</sup> However, while

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

200. A wider debate is also currently taking place about the applicability of the exclusionary rule in criminal proceedings. Recently there have been articles in the media suggesting that the Supreme Court should reconsider whether to continue to employ the exclusionary rule in criminal proceedings. See, e.g., Adam Liptak, *U.S. Stands Alone in Rejecting All Evidence When Police Err*, N.Y. TIMES, July 19, 2008, at A1. Speculation about the Supreme Court’s attitude toward the exclusionary rule has increased since certiorari was granted in *United States v. Herring*, 492 F.3d 1212 (11th Cir. 2007), a case which addresses whether the deterrent effect of excluding evidence obtained as a result of negligent error by law-enforcement personnel outweighs the costs of excluding such evidence, or whether the good-faith exception to the exclusionary rule should be extended. *Id.* Although this wider debate about the exclusionary rule raises a number of important questions, it is beyond the scope of this Article.

201. See Ward, *supra* note 89, at 50. Michael Neifach, ICE’s principal legal advisor, reiterated this stance in a recent article, claiming that “[a] deportation hearing is purely a civil action to determine a person’s eligibility to remain in this country . . . . Therefore the purpose of the hearing is not to punish past crime but rather the continuing violation of immigration laws.” *Id.*

202. *Id.*

203. See Matthew S. Mulqueen, Note, *Rethinking the Role of the Exclusionary Rule in Removal Proceedings*, 82 ST. JOHN’S L. REV. 1157, 1194–95 (2008) (arguing that, despite jurists and commentators’ arguments to the contrary, alternative remedies are inadequate).



these three arguments may have resonated in 1984—although there is also some suggestion that, even then, they were not universally accepted<sup>204</sup>—they no longer appear to be in step with immigration jurisprudence, the practice of immigration enforcement, or the realities of life for immigrant communities in 2009. The third and final Part of this Article will explore the changes that have occurred over the past twenty-five years and will demonstrate why the most frequently raised arguments against the reintroduction of the exclusionary rule in immigration proceedings are now unavailing.

### *A. The Criminalization of Civil Deportation Proceedings*

The Court's neat distinction in *Lopez-Mendoza* between civil and criminal proceedings relied upon longstanding notions that, because the costs and consequences for respondents in civil proceedings were much lower than for criminal defendants, procedural protections deemed vital in the criminal-justice system were less important in civil proceedings.<sup>205</sup> However, in the twenty-five years since the Court's decision in *Lopez-Mendoza*, the boundary line between civil and criminal immigration proceedings has become increasingly blurred.<sup>206</sup>

204. See Ward, *supra* note 89, at 50 ("When *Lopez-Mendoza* was decided, complaints about government immigration arrest practices were similar to those of today, according to Mary L. Heen, who argued the Supreme Court case on behalf of Lopez-Mendoza and the other detainees. Even then there was a concern, Heen says, that as immigration enforcement efforts increased, the sweeps became too broad, violating the rights of citizens and lawful residents. 'We knew that there was cause for skepticism about alternatives such as internal INS training and disciplinary processes being an effective deterrent against Fourth Amendment violations,' says Heen, who is now a professor at the University of Richmond School of Law.").

205. See, e.g., *In re Winship*, 397 U.S. 358, 371–72 (1970) (Harlan, J., concurring) ("[T]he reason for different standards of proof in civil as opposed to criminal litigation [is] apparent. In a civil suit between two private parties for money damages, for example, we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor . . . . In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty."). Harlan's view has its roots in longstanding common-law traditions of procedural safeguards in criminal trials, for, as Blackstone wrote, "better that ten guilty persons escape, than that one innocent suffer." 4 WILLIAM BLACKSTONE, COMMENTARIES \*352.

206. See, e.g., Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 660 (2003); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006) (exposing a common link that has increasingly come to unite these two once discrete fields of law); see also Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 671 (1997) ("Increasingly, the United States has looked to the criminal law to address the problem of undocumented immigration."). Recent scholarship suggests that

This line blurring has led to the creation of new immigration-related crimes,<sup>207</sup> an increase in the minimum and maximum sentences for existing immigration crimes,<sup>208</sup> an increase in the fines imposed on immigrant defendants,<sup>209</sup> and far greater numbers of prosecutions being brought for the commission of all immigration-related crimes.<sup>210</sup> Recent data suggest that immigration-related cases account for the largest single category of federal prosecutions, constituting 57 percent of all new federal criminal cases in March 2008.<sup>211</sup> Localities throughout the United States have also introduced an unprecedented number of measures designed to criminalize an undocumented individual's mere

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this line blurring is not just visible in immigration law and criminal law, but also apparent in the intersection of many other aspects of criminal and civil procedure. *See* Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79 (2008).

207. *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8, 18 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 (codified as amended in scattered sections of 8, 18, 28, 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); Immigration Act of 1990, Pub. L. No. 101-649, § 121(b)(3), 104 Stat. 4978, 4989 (codified as amended at 8 U.S.C. § 1325(d)) (imposing criminal penalties on those who establish commercial enterprises for the purpose of evading immigration laws).

208. *See, e.g.*, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 60024, 108 Stat. 1796, 1981 (codified as amended at 8 U.S.C. § 1324) (enhancing penalties for smuggling noncitizens); *id.* § 130001(b), 108 Stat. at 2023 (codified as amended at 8 U.S.C. § 1326(b)(1)) (establishing criminal penalties for noncitizens who attempt to reenter the United States unlawfully 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 (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")).

209. *See, e.g.*, 8 U.S.C. §§ 1282, 1325-28 (2006) (increasing criminal fines for certain immigration-related crimes).

210. Justice Department statistics show an almost tripling of prosecutions for immigration felonies and class A misdemeanors from 1984-94. *See* Helen Morris, *Zero Tolerance: The Increasing Criminalization of Immigration Law*, 74 INTERPRETER RELEASES 1317, 1318 (1997) (showing an increase of immigration felonies and Class A misdemeanors prosecuted in federal court from 1,186 in 1984 to 3,477 in 1994); *see also* Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11<sup>th</sup> "Pale of Law,"* 29 N.C. J. INT'L L. & COM. REG. 639, 655 (2004) ("The total number of prosecutions for immigration offenses has risen dramatically in the past decade from 14,854 in 1994 to 23,852 in 2002.").

211. *See* Julia Preston, *More Illegal Crossings Are Criminal Cases, Group Says*, N.Y. TIMES, June 18, 2008, at A14.

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presence.<sup>212</sup> Commentators have characterized this trend as the “criminalization of immigration law,”<sup>213</sup> or “crimmigration.”<sup>214</sup> This trend has accelerated markedly in the wake of September 11, 2001,<sup>215</sup> reaching its apex this year with the Justice Department’s recent announcement that criminal immigration cases filed by the federal government in February 2008 accounted for a majority of all new Justice Department prosecutions nationwide.<sup>216</sup>

Yet, while the immigration-law system has adopted many of the punitive attributes of the criminal-law system, such as harsher sentences, higher fines, and greater numbers of federal prosecutions, it has failed to adopt the procedural checks and balances that protect criminal defendants from arbitrary or unconstitutional applications of the law. This imbalance has been described as an “asymmetric incorporation of criminal justice norms”<sup>217</sup> into the immigration-law system.<sup>218</sup> As Professor Stephen Legomsky explains:

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

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212. Damian Cave, *Local Officials Adopt New, Harder Tactics on Illegal Immigrants*, N.Y. TIMES, June 9, 2008, at A1 (“In 2007, 1,562 bills related to illegal immigration were introduced nationwide and 240 were enacted in 46 states, triple the number that passed in 2006, according to the National Conference of State Legislatures. A new law in Mississippi makes it a felony for an illegal immigrant to hold a job. In Oklahoma, sheltering or transporting illegal immigrants is also a felony.”).

213. See Miller, *supra* note 206, at 617 (defining the *criminalization of immigration law* as “a general way of describing the closer relationship that has developed” between the criminal justice and immigration systems); see also Morris, *supra* note 210, at 1317 (“One of the most striking aspects of immigration law in the past decade is its increased criminalization.”).

214. Stumpf, *supra* note 206, at 368.

215. See, e.g., Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 83–95 (2005) (exploring post-9/11 changes in the interaction between criminal and immigration regulations).

216. Spencer S. Hsu, *Immigration Prosecutions Hit New High: Critics Say Increased Use of Criminal Charges Strains System*, WASH. POST, June 2, 2008, at A1. This trend is a result of “Operation Streamline,” a new initiative in which prosecutors file minor criminal charges against any individuals detained while attempting to cross the border, thereby criminalizing ostensibly civil deportation proceedings. *Id.*

217. Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 523 (2007).

218. *Id.* at 471 (“There is an embryonic literature on the growing convergence of two critical regulatory regimes—criminal justice and immigration control.”); see also Kevin R. Johnson, *The End of “Civil Rights” as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1499–1505 (2002).

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 criminal adjudication model in favor of a civil regulatory regime.<sup>219</sup>

The stakes are no longer significantly lower in the immigration-law system than in the criminal-justice system. As Legomsky argues, “When the personal stakes are high, the risk of error should be kept correspondingly low. Asymmetric incorporation has given immigration law precisely the opposite.”<sup>220</sup>

The absence of the exclusionary rule in immigration proceedings may be particularly harmful for individuals facing criminal prosecution who are subsequently put into immigration proceedings, or vice versa. For many immigration respondents who are also criminal defendants, the line between criminal and immigration proceedings has become so blurred as to be meaningless. A recent case in Oklahoma, *Ochoa v. Bass*,<sup>221</sup> indicates the extent to which the distinction between immigration and criminal proceedings has also become hazy for members of the judiciary.<sup>222</sup> Oklahoma County District Judge Jerry D. Bass decided to question criminal defendants on trial for rape, assault and battery, and cocaine possession about their immigration status.<sup>223</sup> The criminal defendants were not facing any immigration charges.<sup>224</sup> Nonetheless, “[a]s a result of that questioning Judge Bass, *sua sponte*, entered orders committing the custody of each Petitioner to the county sheriff” on immigration, rather than criminal, grounds.<sup>225</sup> When challenged, Judge Bass argued that this behavior was justified because of a local requirement that “all agencies within this state . . . fully cooperate with federal immigration authorities in the enforcement of federal immigration laws.”<sup>226</sup>

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219. Legomsky, *supra* note 217, at 472.

220. *Id.* at 524.

221. 2008 OK CR 11, 181 P.3d 727.

222. *See id.*

223. *Id.* ¶¶ 1–4.

224. *See id.*

225. *Id.* ¶¶ 4–5.

226. *Id.* ¶¶ 5–7 (citing Oklahoma Taxpayer and Citizen Protection Act of 2007, 2007 Okla. Sess. Laws ch. 112, § 2, at 547). A considerable number of jurisdictions have similar local reporting requirements. *See* NAT’L IMMIGRATION FORUM, IMMIGRATION LAW ENFORCEMENT BY STATE AND LOCAL POLICE (2007), *available at* <http://www.immigrationforum.org/documents/TheDebate/EnforcementLocalPolice/Backgroundunder-StateLocalEnforcement.pdf>. Many more require local police officers to check on the immigration status of individuals in police custody. *See, e.g.*, Jerry Markon, *Judge Dismisses Suit on Illegal Immigration: Crackdown Could Still Face*

*Ochoa* demonstrates that immigration status can and does fundamentally affect the outcomes for defendants facing criminal charges. Even more far reaching is the effect that criminal history, or evidence gathered in the course of a criminal investigation, can have upon the outcomes for respondents in removal proceedings. Under amendments to the Immigration and Nationality Act (INA),<sup>227</sup> any criminal history (no matter how minor) may affect whether an individual detained by ICE is eligible to be released on bond, the amount of the bond, the opportunities for relief available to that individual, and the likelihood that the individual will be deported.<sup>228</sup> Furthermore, even if the only criminal allegations against an immigration respondent arise solely from evidence obtained during an illegal search and seizure by immigration authorities, and criminal charges cannot be brought because the exclusionary rule prevents the presentation of that evidence to a criminal court, that allegation is still admissible “collaterally” in immigration court.<sup>229</sup>

Alternatively, even immigration respondents who appear likely to prevail in motions to suppress and terminate proceedings because of constitutional violations by the law-enforcement officers who arrested them may nonetheless be charged with committing criminal offenses,

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*Challenge*, WASH. POST, Dec. 1, 2007, at B3 (reporting about Prince William County’s “crackdown on illegal immigration, which requires police to check the immigration status of people in custody”).

227. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified in scattered sections of 8 U.S.C.); Immigration Marriage Fraud Act Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537; Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, (as amended by the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359).

228. See Immigration and Nationality Act of 1952, § 240(a), Pub. L. No. 82-414, 66 Stat. 204 (as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009; the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272; and the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified at 8 U.S.C. § 1229)); see also Immigration and Nationality Act of 1952, § 245, Pub. L. No. 82-414, 66 Stat. 217 (as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009; the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272; and the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified at 8 U.S.C. § 1255)).

229. See, e.g., *Navarro-Chalan v. Ashcroft*, 359 F.3d 19, 22–23 (1st Cir. 2004) (holding that police actions were not egregious violations of Fourth Amendment, so the exclusionary rule did not apply in deportation proceedings); *U.S. v. Del Toro Gudino*, 376 F.3d 997, 1001 (9th Cir. 2004) (holding that a defendant’s identity was not suppressible); *U.S. v. Perez-Perez*, 337 F.3d 990, 994 (8th Cir. 2003) (holding that information regarding a defendant’s identity was not suppressible); see generally *The Exclusionary Rule*, 36 GEO. L.J. ANN. REV. CRIM. PROC. 193 (2007).

even when the only evidence available was a fruit of the original, allegedly illegal, immigration arrest. This is exactly what happened in a recent case in Minnesota in which respondents testified in immigration court about numerous constitutional violations committed by police officers at the time of their arrest.<sup>230</sup> As respondents were leaving the immigration court building, they were rearrested by the very same police officers on criminal charges based solely upon evidence gathered during the first, allegedly unconstitutional, immigration arrest.<sup>231</sup> This state of affairs is a far cry from the “purely civil action” to which the *Lopez-Mendoza* majority held that the exclusionary rule need not apply.<sup>232</sup>

*B. The Inefficacy of ICE’s Internal Rules as a Deterrent*

In 1984, the Supreme Court placed great faith in the efficacy of INS internal rules and procedures to deter immigration officials from violating respondents’ constitutional rights. In the twenty-five years since *Lopez-Mendoza* was decided, the Justice Department’s internal regulations have failed to prevent behavior by immigration officers that violates the Fourth and Fifth Amendments.<sup>233</sup> ICE inherited a number of regulations from its predecessor, INS, that are designed to protect respondents in immigration proceedings from being subjected to unconstitutional searches, seizures, arrests, and detentions.<sup>234</sup> Nonetheless, a considerable number of cases have been litigated in

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230. See Email from Rachel Bengtson, Immigration Attorney, Centro Legal, Inc. in St. Paul, MN to National Immigration Project (Mar. 4, 2008, 14:28 CST) (“Our client . . . described how, when he came to the door in his undergarments at 6:00 in the morning, opened the door less than a foot and looked out, he saw 5 men reaching for their guns as they pushed open the side door to his house and forced their way inside. He also described how ICE agents took him into an empty bedroom, turned off the lights and shut the door to interrogate him. One agent picked up a wooden bench and slammed it down on the floor inches away from his face and said, ‘tell me the truth!’ Although the testimony made clear numerous Constitutional violations committed by ICE officers during the raid, our clients were nevertheless arrested afterward. The Willmar police department, who we are also suing for participating in the home invasion raids, has charged both of our clients with forgery and identity theft, based on the evidence illegally obtained by ICE.”).

231. See *id.*

232. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038, 1050–51 (1984).

233. See, e.g., Michael J. Wishnie, *Introduction—The Border Crossed Us: Current Issues in Immigrant Labor*, 28 N.Y.U. REV. L. & SOC. CHANGE. 389, 392–93 (2004) (presenting evidence that “INS regularly raids worksites engaged in a labor controversy” in violation of agency guidelines, contradicting “the *Lopez-Mendoza* majority’s premise that agency rules alone adequately deter abusive INS raid practices”).

234. See 8 C.F.R. §§ 287.1–.12 (2008).

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which the complainants allege that ICE agents have disregarded these regulations and constitutional violations have occurred.

Regulations prohibit ICE agents from using unreasonable and disproportionate force during the interrogation, arrest, and detention of a suspect.<sup>235</sup> Yet, in the past two years a number of complaints have been filed alleging that ICE agents and law-enforcement officers used unreasonable and disproportionate force during the interrogation, arrest, and detention of civil immigration suspects.<sup>236</sup> Regulations state that individuals may not be detained and subjected to custodial interrogation in the absence of reasonable suspicion that they have committed an immigration violation.<sup>237</sup> Yet, in the same two-year period, a small but significant number of motions to suppress evidence and terminate proceedings have been brought by respondents alleging that they were detained by immigration officers who could not have had any reasonable suspicion to believe that they had committed immigration infractions.<sup>238</sup> Regulations specify that ICE officers may

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235. *Id.* § 287.8(a)(iii) (obligating ICE agents to use “the minimum non-deadly force necessary to accomplish the officer’s mission and shall escalate to a higher level of non-deadly force only when such higher level of force is warranted by the actions, apparent intentions, and apparent capabilities of the suspect, prisoner, or assailant”).

236. *See, e.g.*, Motion to Suppress and/or Terminate Proceedings for Violations of the Fourth and Fifth Amendments and Agency Regulations and Memo of Points and Authorities, *In re Chicas Moran*, *supra* note 125 (“[A]s I was about to leave for my job . . . I was stopped inside my apartment by about five armed men. These men threw me and my roommates down on the floor and handcuffed us.”). Other suits have been filed alleging that ICE agents and law-enforcement officers used force, or displays of force, to enter residential premises without consent. *See* Jury Demand, *Flores-Morales v. George*, *supra* note 129; Plaintiff-Intervenor’s Motion for a Temporary Restraining Order and Preliminary Injunction, *Martinez v. Chertoff*, *supra* note 127.

237. 8 C.F.R. § 287.8(b)(1) (“An immigration officer, like any other person, has the right to ask questions of anyone as long as the immigration officer does not restrain the freedom of an individual, not under arrest, to walk away.”); *id.* § 287.8(b)(2) (stipulating that an immigration officer may briefly detain an individual only if the officer “has a reasonable suspicion, based on specific articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is an alien illegally in the United States”).

238. *See, e.g.*, Motion to Suppress Evidence and Terminate Proceeding with Supporting Memorandum of Law, *In re Cervantes-Valerio*, *supra* note 129 (“[T]here was no reasonable basis for the initial decision to follow the Respondent, or continuing to follow the Respondent for ten (10) miles, or conducting a custodial interrogation of the Respondent.”); Affidavit of Jose Ordonez-Salanec, *supra* note 130, ¶ 1 (“At the time of my arrest [by the Border Patrol], I had violated no traffic law, all of the inspection stickers on the vehicle that I was driving were current, and there were no warrants for my arrest that would have justified the stop and arrest.”); Graves Testimony, *supra* note 117, at 2–3 (“There was no legitimate reason. There was no probable cause. Our plant—our workplace—had been transformed into a prison or detention center.”).

not enter residential premises without either a judicially approved search warrant or consent by the occupants of the premises.<sup>239</sup> Yet, in many recent cases, immigration respondents have filed motions to suppress evidence obtained during illegal, warrantless, and nonconsensual searches of their homes.<sup>240</sup> In one instance an ICE agent, when asked to produce a valid search warrant before entering residential premises, informed the inhabitants (incorrectly) that he did not need a search warrant to enter their home.<sup>241</sup>

The *Lopez-Mendoza* majority emphasized the training scheme adopted by INS to ensure that immigration officers adhered to their regulations,<sup>242</sup> and present-day advocates of ICE similarly argue that ICE's current training regime deters violations of immigration respondents' fundamental rights.<sup>243</sup> This claim is not borne out by recent case law. The case of Pedro Guzman provides a particularly salient example of 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. 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.<sup>244</sup> Guzman survived for three months wandering along the border, eating garbage and bathing in the Tijuana River before finally convincing a

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239. 8 C.F.R. § 287.8(f)(2) ("An immigration officer may not enter into . . . a residence including the curtilage of such residence . . . for the purpose of questioning the occupants . . . concerning their right to be or remain in the United States unless the officer has either a warrant or the consent of the owner or other person in control of the site to be inspected.").

240. See, e.g., Complaint, *Mancha v. ICE*, *supra* note 115, ¶¶ 24–34; Mancha Testimony, *supra* note 115; Affidavit of Gonzalo Juarez, *supra* note 123, ¶¶ 2–4, 7–9 ("The officer told me to 'come inside.' He did not ask me for permission to enter. I never gave permission for him to enter."); Plaintiffs' Complaint for Damages to Remedy Civil Rights Violations and Common Law Torts, *Border Network for Human Rights v. County of Otero*, *supra* note 124, ¶ 10 ("Defendants began targeting Hispanic families in their own homes by initiating random sweeps of trailers in the area . . .").

241. Ward, *supra* note 89, at 44 ("When federal immigration and local Minnesota law enforcement agents entered several homes in Willmar in which undocumented workers were thought to be living, they were asked to show a search warrant. 'We don't need one,' was one agent's response during last year's raid, according to a wrongful search action filed last April by 53 plaintiffs in federal court in Minneapolis.").

242. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1043 (1984) ("New immigration officers receive instruction and examination in Fourth Amendment law, and others receive periodic refresher courses in law.").

243. See Ward, *supra* note 89, at 47.

244. See Randal C. Archibold, *Deported in Error, Missing and Months Later Home*, N.Y. TIMES, Aug. 8, 2007, at A16.



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border official to allow him to reenter the United States.<sup>245</sup> Guzman's case is but one of many examples of U.S. citizens being inadvertently deported.<sup>246</sup> Professor Kanstroom has characterized this phenomenon as indicative of the "basic lack of care" that ICE is taking in this, and other areas—including adherence to the Fourth and Fifth Amendments—when conducting immigration raids.<sup>247</sup>

ICE's institutional response to these allegations of violations of INS legacy rules and regulations is that INS regulations are no longer relevant. In at least one case, ICE attorneys argued that ICE agents are not legally bound by INS rules and regulations because ICE is a new, distinct agency that need not adhere to INS legacy subregulatory rules and guidelines.<sup>248</sup> The immigration-defense bar has vigorously opposed this argument.<sup>249</sup> The arguments made by both sides in this dispute indicate the degree to which regulatory oversight of immigration enforcement has changed since *Lopez-Mendoza* was decided in 1984. If the immigration-defense bar is correct, the regulations relied upon by the *Lopez-Mendoza* majority to serve as a check against unconstitutional conduct by immigration officers are currently failing to perform that function. If ICE's attorneys are correct, the INS regulations designed to prevent violations of immigration respondents'

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245. See Jacqueline Stevens, *Amid Anti-Immigrant Fervor, ICE Deporting More American Citizens*, NATION, Nov. 5, 2008, available at <http://www.alternet.org/immigration/87467>.

246. See *id.*

247. Ward, *supra* note 89, at 47 (reporting that Kanstroom emphasized Guzman's case is far from unique in that "[w]e're finding more cases of U.S. citizens who get swept up in these raids, and it indicates the basic lack of care the agency is taking . . . . If they're deporting U.S. citizens by mistake, it's not a stretch to assume they're making other mistakes as well").

248. See Response to Motion to Suppress Evidence and Terminate, *In re X*, at 25–26 (U.S. Dep't of Justice Executive Office for Immigration Review Nov. 28, 2007) (on file with author) (claiming that ICE was not bound by rules mandating respect for immigration suspects' constitutional rights laid out in INS Manual M-69 because the manual was "an outdated publication . . . belonging to an abolished agency . . ."). The argument that ICE need not adhere to its predecessor agency's rules and regulations directly contravenes one of the guiding principles of administrative law, in accordance with which the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (which created the Department of Homeland Security) transferred *all* of INS's detention and removal functions to DHS. See *id.* § 441, 116 Stat. at 2192 (codified as amended in 6 U.S.C. § 251) ("[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 the following programs . . . . The detention and removal program.").

249. See, e.g., Respondent's Reply to the Government's Brief Opposing the Suppression of Evidence and Opposing Termination of Removal Proceedings, *In the Matter of X*, at 43–44 (U.S. Dep't of Justice Executive Office for Immigration Review Feb. 25, 2008) (on file with author).

constitutional rights, and relied on by the Court in *Lopez-Mendoza* to perform that function, are no longer in force. In either case, at least some of the ground on which the *Lopez-Mendoza* majority rested in 1984 has worn away by 2009.

In reaction to the proliferation of regulatory violations by immigration officers, some courts of appeal and immigration courts have acknowledged that, in cases where regulations or rules that implicate fundamental constitutional rights have been violated, immigration proceedings should be terminated.<sup>250</sup> However, the BIA and courts in other jurisdictions continue to adhere to the strict standard established in *Lopez-Mendoza* of allowing proceedings to continue and individuals to be deported, even when immigration officers have disregarded their own rules and regulations and violated respondents' Fourth and Fifth Amendment rights.<sup>251</sup>

### *C. The Inadequacy of Civil Suits as a Remedy*

In 1984, Justice White, writing in dissent in *Lopez-Mendoza*, observed that "[t]he suggestion that alternative remedies, such as civil suits, provide adequate protection is unrealistic" because of the powerlessness of poor, uneducated individuals who are harmed by constitutional violations that occur in the course of immigration enforcement.<sup>252</sup> Justice White's words have proven to be prescient.<sup>253</sup> Although the arguments advanced by government officials about the availability of alternative remedies for wronged immigration respondents remain largely the same today as they were in 1984, the

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250. See *Singh v. U.S. Dep't of Justice*, 461 F.3d 290, 296–97 (2d Cir. 2006); see also *In re Herrera-Priego*, Decision and Order of the Immigration Judge, *supra* note 125, at 21–24 (finding that ICE's violation of an internal operations instruction that was transferred to the Special Agent's Field Manual and that was designed to protect Respondent's fundamental rights is grounds for termination of proceedings).

251. See, e.g., *In re Hernandez*, Interim Decision #3265, 21 I. & N. Dec. 224, 228 (BIA 1996) (holding that an "Immigration Judge, where possible, can and should take corrective action short of termination of the proceedings" where there has been a violation of a DHS regulation).

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

253. In a case brought just one year after *Lopez-Mendoza* was decided, in which an application was made for injunctive relief against repeated home invasions by immigration officers, the court granted the relief, noting that damage actions were especially unlikely to be brought because of the vulnerability of the population involved. See *LaDuke v. Nelson*, 762 F.2d 1318 (9th Cir. 1985) (dealing with a suit against INS officials by migrant farm workers, alleging that the INS regularly searched migrant housing without warrants or even articulable suspicion that illegal aliens were present).

situation of the respondents themselves has changed radically over the past twenty-five years.

The vulnerability, social isolation and legal marginalization of immigrant communities has increased since 1984, with marked increases occurring in two distinct phases.<sup>254</sup> The first phase began in 1990 when the Supreme Court ruled in *United States v. Verdugo-Urquidez*,<sup>255</sup> and the second phase began in late 2001, in the aftermath of the terrorist attacks of 9/11.<sup>256</sup> The jurisprudential and statutory developments during these two periods have made it harder for an immigration respondent whose constitutional rights have been violated to seek redress through civil proceedings.

In *Verdugo-Urquidez*, the Supreme Court held that the Fourth Amendment did not necessitate suppression of evidence obtained by U.S. law-enforcement officers during an illegal, warrantless search of a Mexican citizen's home in Mexico.<sup>257</sup> Chief Justice Rehnquist, writing for the majority, claimed 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 connection with this country to be considered part of that community."<sup>258</sup>

In the wake of *Verdugo-Urquidez*, the applicability of Fourth Amendment protections to both legal residents and undocumented immigrants in criminal and civil proceedings has been questioned by some courts.<sup>259</sup> Scholarly debate over the applicability of the *Verdugo-Urquidez* holding to proceedings involving undocumented individuals present in the United States has been even more extensive and heated.<sup>260</sup>

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254. See generally Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667 (2003). Part III.C of this Article owes a considerable debt to Professor Wishnie's scholarship in this area.

255. 494 U.S. 259 (1990).

256. See generally Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. DAVIS L. REV. 609 (2005); Raquel Aldana & Sylvia R. Lazos Vargas, "Aliens" in Our Midst Post-9/11: *Legislating Outsiderness Within the Borders*, 38 U.C. DAVIS L. REV. 1683 (2005).

257. *Verdugo-Urquidez*, 494 U.S. at 259.

258. *Id.* at 265.

259. See, e.g., *United States v. Guitterez*, No. CR 96-40075 SBA, 1997 U.S. Dist. LEXIS 16446, at \*16-18 (N.D. Cal. 1997) (citing *Verdugo-Urquidez* in denying motion to suppress on grounds that criminal defendant was an undocumented immigrant and not covered by the Fourth Amendment); *Torres v. State*, 818 S.W.2d 141, 143 n.1 (Tex. App. 1991) (citing *Verdugo-Urquidez* and holding undocumented defendant may not raise a Fourth Amendment objection to search or seizure).

260. See, e.g., Matthew B. Kurek, *United States v. Guitterez: A Functional Approach to a Vexing Issue*, 30 U. TOL. L. REV. 359, 381 (1999) (criticizing the "significant voluntary connections" test of *Verdugo-Urquidez* as inconsistent); Victor

The most far-reaching interpretation of *Verdugo-Urquidez* would suggest that noncitizens have no Fourth Amendment rights.<sup>261</sup> Such an interpretation would render noncitizens powerless to seek declaratory relief for alleged Fourth Amendment violations by law-enforcement officers and would dispel the *Lopez-Mendoza* majority's argument that declaratory relief constitutes an adequate alternative to the exclusionary rule. Even more attenuated interpretations of *Verdugo-Urquidez* lend at least some degree of support to Justice White's position in his dissent in *Lopez-Mendoza* that relatively powerless immigration respondents would have difficulty vindicating their Fourth Amendment rights through a civil process rather than through the protections provided by the exclusionary rule.<sup>262</sup>

In the wake of 9/11, a number of statutory measures and agency schemes were introduced that further restricted the rights of aliens held by the federal government.<sup>263</sup> However, the Supreme Court's jurisprudence during the 1990s also reflected a diminishing concern

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C. Romero, *The Domestic Fourth Amendment Rights of Undocumented Immigrants: On Gutterez and the Tort Law/Immigration Law Parallel*, 35 HARV. C.R.-C.L. L. REV. 57, 60-61 (2000) (suggesting that *Verdugo-Urquidez* affects the application of the Fourth Amendment to noncitizens facing prosecution in United States courts); Michael Scaperlanda, *The Domestic Fourth Amendment Rights of Aliens: To What Extent Do They Survive* *United States v. Verdugo-Urquidez?*, 56 MO. L. REV. 213, 228 (1991) (criticizing the textual exegesis of the *Verdugo-Urquidez* plurality as "strained" and in contradiction with earlier Supreme Court precedent); René L. Valladares & James G. Connell, III, *Search and Seizure Protections for Undocumented Aliens: The Territoriality and Voluntary Presence Principles in Fourth Amendment Law*, 34 AM. CRIM. L. REV. 1293, 1295, 1333 (1997) (acknowledging that various commentators have "properly criticized" *Verdugo-Urquidez* and "[t]he existence of a Fourth Amendment violation must be determined from the circumstances of the search, and not from the immigration status of the person searched"); Joseph Ricchezza, Note, *Are Undocumented Aliens "People" Persons Within the Context of the Fourth Amendment?*, 5 GEO. IMMIGR. L.J. 475, 499 (1991) (describing the reasoning of *Verdugo-Urquidez* as a "morass").

261. At least one court has gone nearly this far. See *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."). For a discussion of the implications of this decision, see M. Isabel Medina, *Ruminations on the Fourth Amendment: Case Law, Commentary, and the Word "Citizen"*, 11 HARV. LATINO L. REV. 189 (2008).

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

263. See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT ACT), Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of U.S.C.); National Security Entry-Exit Registration System, 8 C.F.R. § 264.1 (2008); Memorandum from the Deputy Attorney Gen. to Comm'r Immigration and Naturalization Serv. 1-2, (Jan. 25, 2002), available at <http://news.findlaw.com/hdocs/docs/doj/abscndr012502mem.pdf>.

with the violation of aliens' constitutional rights. For example, in *Reno v. American-Arab Anti-Discrimination Committee*,<sup>264</sup> the Court held that First Amendment arguments were unavailing when made by immigrants singled out for deportation on the basis of disfavored speech and associational activities.<sup>265</sup> Professor Michael Wishnie argues that *Verdugo-Urquidez* may also have influenced both the *Reno* holding and the post-9/11 legislation,<sup>266</sup> permitting deportation of immigrants on the grounds of speech,<sup>267</sup> political affiliation,<sup>268</sup> and family connections.<sup>269</sup>

In the twenty-five years since *Lopez-Mendoza*, statutory provisions and case law have eroded almost all of the options for meaningful judicial review that were once available to immigration respondents whose constitutional rights have been violated. The 1996 amendments to the INA limited judicial review of removal proceedings, leaving the petition-for-review process as the primary opportunity for recourse.<sup>270</sup> The Court's construction of INA section 242(g) in *Reno*

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264. 525 U.S. 471 (1999).

265. *Id.* at 471; *see also* Maryam Kamali Miyamoto, *The First Amendment After Reno v. American-Arab Anti-Discrimination Committee: A Different Bill of Rights for Aliens?*, 35 HARV. C.R.-C.L. L. REV. 183, 205 (2000) ("[In *Reno* the Court] implied that aliens who were unlawfully present in the United States did not enjoy the protection of the First Amendment.").

266. Wishnie, *supra* note 254, at 682–83 (discussing the USA PATRIOT ACT).

267. *Id.* (citing *Reno*, which rejected a challenge to deportation of Palestinian activists based on speech and associational activities).

268. *Id.* at 683 (citing 8 U.S.C. § 1182(a)(3)(B)(i)(V) (establishing "membership" in certain organizations as grounds for inadmissibility); *id.* § 1182(a)(3)(B)(iv)(IV)–(V) (defining *to engage in terrorist activity* as including solicitation of funds or recruitment of personnel)).

269. *Id.* ("[Any alien who] is the spouse or child of an alien who is inadmissible [as terrorist] . . . is inadmissible." (quoting 8 U.S.C. § 1182(a)(3)(B)(i)(VII))). These modern antiterrorism immigration provisions follow a long, often shameful, history of singling out immigrants for deportation based on their disfavored speech or association. *See, e.g., Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (rejecting a First Amendment challenge to the deportation of alleged members of the Communist Party); *Bridges v. Wixon*, 326 U.S. 135 (1945) (vacating a deportation order that had been based on a labor activist's alleged membership in and affiliation with Communist Party); *Schneiderman v. United States*, 320 U.S. 118 (1943) (invalidating denaturalization proceeding brought on grounds that citizen was a Communist at the time of application for citizenship); *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904) (rejecting a First Amendment challenge to an exclusion order against an anarchist).

270. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 381(a), 110 Stat 3009-546, 3009-650 (revising section 279 of the INA, which is codified at 8 U.S.C. § 1329 and which some courts had previously held was an independent cause of action against the INS); *id.* § 306(b)(9) (amending INA § 242(b)(9)); *see generally* Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29

effectively ruled out First Amendment actions by immigration respondents.<sup>271</sup> In 2008, the Bush administration argued that INA section 242 prevents immigration respondents from bringing *Bivens* claims for damages,<sup>272</sup> and the Second Circuit found that it does not have jurisdiction to hear claims under the Torture Victim Protection Act by nonresident aliens who were mistreated by U.S. officials and removed to nations where they were subjected to torture.<sup>273</sup> The opportunities available to immigration respondents to vindicate their constitutional rights by bringing a civil action were already scant in 1984 and have become even more so in 2009.<sup>274</sup>

In the years since *Lopez-Mendoza*, immigrant groups have become increasingly disconnected from the American legal system. Whether or not Justice White was correct in observing that it was unrealistic in 1984 to expect that financially disadvantaged individuals, with limited English skills and fear of the authorities, would be willing to come forward and seek recompense for wrongs they had suffered by bringing civil suits,<sup>275</sup> there is no doubt that in the post-9/11 environment (which has stripped immigrant communities of many of the protections they previously enjoyed), Justice White's concerns are even more relevant.

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CONN. L. REV. 1411 (1997); Lenni B. Benson, *The "New World" of Judicial Review of Removal Orders*, 12 GEO. IMMIGR. L.J. 233 (1998); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000); Hiroshi Motomura, *Judicial Review in Immigration Cases After AADC: Lessons from Civil Procedure*, 14 GEO. IMMIGR. L.J. 385 (2000); Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963 (2000).

271. 525 U.S. 471, 471 (1999).

272. See Answer, *Barrera v. Boughton*, No. 3:07-cv-01436 (D. Conn. filed Nov. 26, 2007) (on file with author); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

273. *Arar v. Ashcroft*, 532 F.3d 157, 162–64 (2d Cir. 2008). Arar, a dual citizen of Syria and Canada, alleged that he was mistreated by U.S. officials in the United States and removed to Syria with the knowledge or intention that Syrian authorities would interrogate him under torture. *Id.* at 162–63. He brought an action against the United States and various U.S. officials pursuant to the Torture Victim Protection Act and the Fifth Amendment to the U.S. Constitution. *Id.* at 163. The Second Circuit held that the court lacked subject matter jurisdiction to reach Arar's other claims. *Id.* at 164.

274. Although there are incidences of individuals seeking redress, they appear to be limited to the wealthy few able to afford legal representation. Ward, *supra* note 89, at 49 ("Philip Kim Hwang, a San Francisco lawyer who practices with the Lawyers' Committee for Civil Rights, says over the last 10 years his organization has settled eight lawsuits alleging officer misconduct against the federal immigration authorities, resulting in plaintiffs being awarded a total of \$642,500 in claims . . . . 'In most cases they don't formally acknowledge that there was wrongdoing but they pay out a significant amount, which is the government's de facto acknowledgment that there was a mess-up,' Hwang says.").

275. See *supra* text accompanying note 107.

## CONCLUSION

Justice Blackmun's initial ambivalence about granting certiorari in *Lopez-Mendoza* suggests that, in 1984, immigration may not have been an overriding concern for the Court or the nation. The situation could not be more different today. The majority of new cases filed by federal prosecutors in March 2008 were immigration related.<sup>276</sup> A comprehensive immigration-reform package, described by President Bush's Press Secretary Scott McClellan as a "top priority" in 2006,<sup>277</sup> failed in 2007 after a Senate vote in which, as the Washington Post reported, "The most dramatic overhaul of the nation's immigration laws in a generation was crushed . . . in the Senate, with the forces of the political right and left overwhelming a bipartisan compromise on one of the most difficult issues facing the country."<sup>278</sup> In May 2006, hundreds of thousands of protestors marched in demonstrations throughout the United States urging immigration reform, including a group of about 300,000 people in Chicago and a group of over 400,000 in Los Angeles.<sup>279</sup> In terms of jurisprudence, legislation, and popular opinion, immigration enforcement is one of the preeminent issues facing America today.

Immigration law is intimately concerned with human rights and human freedom. It is not merely instrumental, but is also expressive and self-definitional. As Professor Peter Schuck writes, "[I]mmigration law reflects some of our most deeply held values concerning community, self-definition, national autonomy, and social justice . . . diminution of its legitimacy entails a profound, perhaps irretrievable loss."<sup>280</sup> This point is not lost on critics of the current immigration regime. A recent editorial in the New York Times observed that "the true cost" of constitutional violations occurring in the course of immigration-enforcement operations "is to the national

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276. See Preston, *supra* note 211.

277. See Carl Hulse & Sheryl Gay Stolberg, *Senators to Reignite Debate on Immigration*, N. Y. TIMES, Apr. 24, 2006, at A15.

278. Jonathan Weisman, *Immigration Bill Dies in Senate*, WASH. POST, June 29, 2007, at A1. In the past three years four major comprehensive immigration-reform bills have failed. See Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong.; Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong.; Secure America and Orderly Immigration Act, S. 1033, 109th Cong. (2005); Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. Three less-than-comprehensive immigration-reform bills have also failed. See STRIVE Act of 2007, H.R. 1645, 110th Cong.; SKIL Act of 2006, S. 2691, 109th Cong.; DREAM Act, S. 1545, 108th Cong. (2003).

279. See *Thousands March for Immigrant Rights*, CNN.COM, May 1, 2006, <http://www.cnn.com/2006/US/05/01/immigrant.day/index.html>.

280. PETER SCHUCK, CITIZENS, STRANGERS, AND IN-BETWEENS 72 (1998).

identity: the sense of who we are and what we value. It will hit us once the enforcement fever breaks, when we look at what has been done and no longer recognize the country that did it.”<sup>281</sup>

In 1984, the Supreme Court held in *INS v. Lopez-Mendoza* that the exclusionary rule need not apply in immigration proceedings. The Court reached this decision because it believed that immigration proceedings were civil in nature and lacked the harsh penalties of criminal law,<sup>282</sup> because the immigration service’s internal rules might adequately deter Fourth Amendment violations by immigration officers,<sup>283</sup> and because respondents whose rights were violated could seek recompense in civil proceedings.<sup>284</sup> However, as this Article has demonstrated, in the twenty-five years since *Lopez-Mendoza*, the legal and political landscape has shifted so radically and the situation of immigration respondents has changed so markedly that each of these three foundational precepts no longer applies. Immigration proceedings have become increasingly interwoven with the criminal-law system.<sup>285</sup> ICE officers across the country are disregarding their internal rules and engaging in widespread violations of individuals’ constitutional rights.<sup>286</sup> Those targeted by immigration agents or police officers enforcing immigration laws are vulnerable and socially marginalized, and therefore highly unlikely to turn to the legal system to seek recompense for any wrongs they have suffered.<sup>287</sup> As a result, constitutional violations by law-enforcement officers have spread throughout the nation, growing rapidly in the last two years and crossing geographical and institutional boundaries with increasing frequency.<sup>288</sup> One consequence of this proliferation of constitutional violations is that different circuits have adopted divergent approaches to the application of the exclusionary rule in immigration proceedings.<sup>289</sup> This circuit split invites the Supreme Court to grant certiorari and reconsider the ruling that it made twenty-five years ago in *INS v. Lopez-Mendoza*.

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281. Editorial, *The Great Immigration Panic*, N.Y. TIMES, June 3, 2008, at A22.

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

283. *Id.* at 1045 (commenting that INS rules plainly “require that no one be detained without reasonable suspicion of illegal alienage, and that no one be arrested unless there is an admission of illegal alienage or other strong evidence thereof”).

284. *Id.* at 1032. *But see id.* at 1055 (White, J., dissenting); *supra* Part III.C.

285. *See supra* Part III.A.

286. *See supra* Part III.B.

287. *See supra* Part III.C.

288. *See supra* Part II.

289. *See supra* text accompanying notes 190–198.



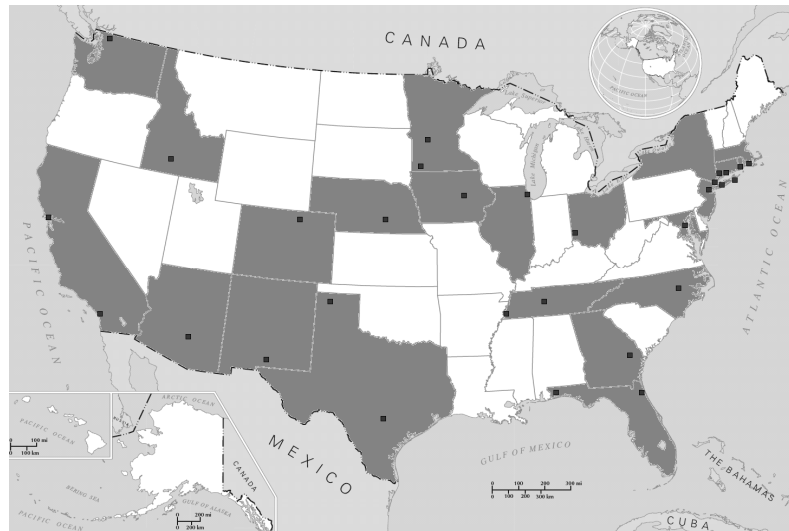
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*Good Reason to Believe*

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This Article began with Justice Blackmun's observation that fewer than fifty allegations of constitutional violations in twenty-seven years probably did not constitute a severe enough problem to warrant the Supreme Court granting certiorari. The number of allegations of constitutional violations in 2009—crossing geographical and institutional boundaries—no longer poses an insignificant problem, but rather a widespread problem of exactly the magnitude Justice Blackmun and his colleagues had in mind when they joined Part V. Much has changed since 1984, but *Lopez-Mendoza* is still the principal case controlling the inclusion or exclusion of evidence in immigration proceedings. Applying the principles of *Lopez-Mendoza*, in light of the many changes of the previous twenty-five years—most notably the widespread violations of immigration respondents' constitutional rights, the breakdown of the distinction between civil immigration and criminal proceedings, the decreased efficacy of ICE's internal regulations, and the diminishing availability of declaratory relief for noncitizens—it is now time to revisit the holding of *Lopez-Mendoza* and reintroduce the exclusionary rule in immigration proceedings.

APPENDIX: MAP OF THE UNITED STATES SHOWING  
LOCATIONS OF ALLEGED CONSTITUTIONAL VIOLATIONS



Underlying basemap available at <http://www.nationalatlas.gov>

- States in which alleged ICE violations have occurred
- Sites of alleged ICE violations