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”Good Reason to Believe”: Widespread
Constitutional Violations in the Course
of Immigration Enforcement and the
Case for Revisiting Lopez-Mendoza

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

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ABSTRACT

In 1984 the Supreme Court held in *INS v. Lopez-Mendoza* that the exclusionary rule did 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-four 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. The article therefore 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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¹ J.D. Candidate, Yale Law School, class of 2009. I am extremely grateful to Professor Michael Wishnie for his guidance and supervision of all aspects of this article, to Dean Harold Hongju Koh and Anna Durand Kraus (both, like Prof. Wishnie, former law clerks to Justice Blackmun) for their generosity and willingness to answer my questions about Justice Blackmun’s work and archives, to Rachel Bengtson of Centro Legal for sharing so many of her materials, to Ahilan Arulanantham of the ACLU of Southern California for discussing the practical application of this idea, and to Christopher Lasch, Hope Metcalf, Nicole Hallett, Anant Saraswat, Jane Lewis, Sara Edelstein, and, above all, Bram Elias, for their unending patience, advice and encouragement as this work on widespread violations took shape.

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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.”

INS v. Lopez-Mendoza.²

On January 6, 1984 the Justices of the Supreme Court of the United States met in conference to decide whether to grant certiorari in *INS v. Lopez-Mendoza*, an immigration case recently decided by the Ninth Circuit.³ The Circuit Court had 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.⁴ The INS petitioned for cert, 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 BIA’s decision in *Matter of Sandoval* in 1979, also applied in immigration proceedings⁵—should not be applied in the immigration context.⁶ As the Justices gathered to decide whether to take the case, one of their number, Justice Harry Blackmun,

² 468 U.S. 1032, 1050 (1984).

³ 705 F.2d 1059 (9th Cir. 1983)

⁴ 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 Weeks v. U.S.*, 232 U.S. 383, 398 (1914), *overruled on other grounds by Elkins v. U.S.*, 364 U.S. 206, 208 (1960) (illegal evidence gathered by state officers cannot be used against defendant in federal court); *Mapp v. Ohio*, 367 U.S. 643, 654-55 (1961). The exclusionary rule similarly applies for Fifth Amendment violations in state and federal courts, *see Bram v. U.S.*, 168 U.S. 532, 548 (1897); *Blackburn v. Ala.*, 361 U.S. 199, 205 (1960), and Sixth Amendment violations, *see U.S. v. Wade*, 388 U.S. 218, 237-39 (1967) (witness identification excluded because post-indictment lineup violated Sixth Amendment right to counsel); *see also Massiah v. U.S.*, 377 U.S. 201, 206-07 (1964) (statements excluded because they were deliberately elicited in violation of 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. Cal.*, 386 U.S. 18, 23-24 (1967); *see also Deck v. Mo.*, 544 U.S. 622, 630-34 (2005).

⁵ *Matter of Sandoval*, 17 I. & N.Dec. 70 (1979).

⁶ *See INS v. Lopez Mendoza*, 468 U.S. 1032, 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

suggested that because of “the small number of suppression claims that were raised” in immigration proceedings the Court should not grant cert.⁷ In support of his argument, Justice Blackmun pointed to the fact that in the period 1952 to 1979 (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.⁸

Despite Justice Blackmun’s reservations, cert was granted.⁹ 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 in which Justice Blackmun was the crucial fifth vote.¹⁰ Parts I to 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.¹¹ However, Part V of the opinion¹² lists three circumstances in which the Court believed the application of the 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 constitutional violations by immigration

interfered with the ability of the INS to function.”)

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

⁸ *Id.* See also 705 F.2d at 1071 (describing how prior to the decision of the Board of Immigration Appeals in *Matter of Sandoval*, 17 I. & N.Dec. 70 (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 *1059 grounds.) *Matter of Sandoval* was one of the two BIA cases that were consolidated into *INS v. Lopez Mendoza*.

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

¹⁰ *INS v. Lopez Mendoza*, 468 U.S. 1032 (1984)

¹¹ *Id.*

¹² Chief Justice Burger did not join in Part V of the opinion, 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. *INS v. Lopez-Mendoza*, 468 U.S. 1032

officers had become widespread;”¹³ second, if evidence against an immigration respondent was obtained as a result of egregious constitutional violations that were fundamentally unfair; and third, if evidence was obtained as a result of constitutional violations that undermined the reliability of evidence.¹⁴

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,¹⁵ the Board of Immigration Appeals (BIA),¹⁶ and Federal Courts of Appeal across the country.¹⁷ In many immigration proceedings, suppression and termination¹⁸ 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 is removed from the United States or allowed to remain in the country.¹⁹

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

¹³ *INS v. Lopez-Mendoza*, 468 U.S. at 1046.

¹⁴ *Id.*

¹⁵ The EOIR is the administrative court in which immigration respondents are tried. There are 56 immigration courthouses in the United States. EOIR decisions, which are typically unpublished, are appealable to the Board of Immigration Appeals (BIA).

¹⁶ *See, e.g. Matter of Velasquez*, 19 I. & N. Dec. 377 (1986); *Matter of Benitez*, 19 I. & N. Dec. 173 (1984).

¹⁷ *See, e.g. Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006); *Martinez-Camargo v. INS*, 282 F.3d 487 (7th Cir. 2002); *Orhorhaghe v. INS*, 38 F.3d 488, 503-04 (9th Cir. 1994).

¹⁸ 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 and the immigration proceedings may be terminated. 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 they were in prior to their arrest by immigration authorities.

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.²⁰ Courts of Appeal have largely ignored the first, “widespread violation” prong of Part V of the *Lopez-Mendoza* holding,²¹ and have instead devoted considerable attention the last two prongs of Part V, producing careful and detailed analyses of what might constitute an “egregious constitutional violation,”²² what might render that violation “fundamentally unfair,”²³ and what might meaningfully “undermine the reliability of evidence.”²⁴ As a result, a body of immigration case law has gradually evolved wherein motions to suppress evidence and terminate removal proceedings²⁵ have been granted because of egregious constitutional and regulatory violations by Immigration and Customs Enforcement (ICE) agents.²⁶

Courts ruling on Motions to Suppress and Terminate Removal Proceedings consistently

¹⁹ See U.S. Department of Justice, *Statistical Yearbook of the Executive Office for Immigration Review*, 2008 at D2 showing the disposition of immigration cases for the years 2003-2007 and the availability of different forms of relief.

²⁰ See, e.g. *Navarro-Chalan v. Ashcroft*, 359 F.3d 19 (1st Cir. Feb 25, 2004); *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006), *U.S. v. Bowley*, 435 F.3d 426, 430+ (3rd Cir.(Virgin Islands) Jan 26, 2006); *U.S. v. Oscar-Torres*, 507 F.3d 224 (4th Cir.(N.C.) Nov 08, 2007); *Velasquez-Tabir v. I.N.S.*, 127 F.3d 456, 459+ (5th Cir. Nov 07, 1997); *Miguel v. I.N.S.*, 359 F.3d 408, 2004 Fed.App. 0062P (6th Cir. Feb 26, 2004); *Martinez-Camargo v. INS*, 282 F.3d 487 (7th Cir. 2002); *U.S. v. Guevara-Martinez*, 262 F.3d 751 (8th Cir.(Neb.) Aug 20, 2001); *Orhorhaghe v. INS*, 38 F.3d 488, 503-04 (9th Cir. 1994); *U.S. v. Olivares-Rangel*, 458 F.3d 1104, 1105+ (10th Cir.(N.M.) Aug 11, 2006)

²¹ An exception to this general rule is a recent Second Circuit case, *Melnitsenko v. Mukasey*, 2008 U.S. App. LEXIS 2549, at *9 (2d Cir. Feb. 6, 2008).

²² See, e.g. David 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); see also Jonathan Hafetz, Note and Comment, *The Rule of Egregiousness: Lopez-Mendoza Reconsidered*, 19 Whittier L. Rev. 843 (1998).

²³ 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 the immigration stop based exclusively on race was an “egregious” Fourth Amendment violation justifying the application of exclusionary rule).

²⁴ See, e.g. Stephen C. Covell, Comment, *Gonzalez-Rivera v. INS: Possible New Conditions for the exclusionary rule In Civil Deportation Proceedings*, 9 Geo. IMMIGR. L.J. 855, 860 (1995) (discussing 9th Circuit jurisprudence redefining what evidence may be of “probative value.”)

²⁵ “Deportation” proceedings are now frequently referred to as “removal” proceedings. See 8 U.S.C. §§ 1226, 1229 (2000) (using the term “removal” to include the deportation of noncitizens from the interior)).

refer to the need to remain faithful to the Supreme Court’s holding in *Lopez-Mendoza*.²⁷ 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 cert through to 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.

The first section 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. Re-reading 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 “purely

²⁶ See *In re: Herrera-Priego*, US DoJ EOIR (New York, N.Y., July 10, 2003) (Lamb, IJ); *In re: Rabani*, USDOJ EOIR (New York, N.Y.)

²⁷ See, e.g. *U.S. v. Navarro-Diaz*, 420 F.3d 581, 584+, 2005 Fed.App. 0351P, 0351P+ (6th Cir.(Ohio) Aug 18, 2005); *Velasquez-Tabir v. I.N.S.*, 127 F.3d 456, 459 (5th Cir. Nov 07, 1997); *Gonzalez-Rivera v. I.N.S.*, 22 F.3d 1441, 1448+, 62 USLW 2675, 2675+ (9th Cir. Apr 28, 1994).

civil” rather than criminal in nature,²⁸ a belief that INS’s own rules and regulations would sufficiently deter officers from committing constitutional violations,²⁹ and a belief that adequate civil remedies were available to redress any wrongs that immigration respondents may have suffered.³⁰

Section II of this article explores the extent to which, nonetheless, there has been a marked increase in the number of allegations of violations of immigration respondents’ constitutional rights in the twenty-four 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 section of the article examines the extent to which these constitutional violations cross geographical and institutional boundaries – that is, the extent to which these violations have become “widespread.” This section of the article 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.

Section III of the article considers arguments against the reintroduction of the exclusionary rule currently advanced by scholars and government lawyers. Such arguments continue to be founded in 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 section of the article 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 2008, quarter-

²⁸ *INS v. Lopez-Mendoza*, 468 U.S. 1032

²⁹ *Id.*

³⁰ *Id.*

century old arguments against the reintroduction of the exclusionary rule appear outdated and ultimately unpersuasive.

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

I. 1984: THE UNTOLD STORY OF THE "WIDESPREAD VIOLATIONS" EXCEPTION 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.³¹ As a consequence, it is appropriate to use a "balancing test"³² to determine whether the rule's value in deterring illegal searches and seizures outweighs the societal costs of its application. Parts I-IV of the majority opinion carefully apply this balancing test. On one side of the scale, five principal reasons render the exclusionary rule of limited use in deportation proceedings,³³ and on the other side of the scale,

³¹ See also *U.S. v. Leon*, 468 U.S. 897, 906 (1984)

³² Developed by the Court in *United States v. Janis*, 428 U.S. 433 (1976)

³³ (i) A deportation proceeding is a "purely civil" action. *Lopez-Mendoza*, 468 U.S. at 1032 (ii) "The person and identity of the respondent are not themselves suppressible," and even if an arrest is illegal, "evidence not derived directly from the arrest is sufficient" to uphold deportation. *Id.* (iii) Few aliens arrested request deportation hearings, and even fewer challenge the circumstances of their arrest, an arresting officer is "most unlikely to shape his conduct in anticipation of the exclusion of evidence at a formal deportation hearing." *Id.* at 1044-45. (iv) 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 1045. (v) Immigration enforcement is the provenance of a single agency under central federal control and engaged in repetitive operations, declaratory relief is a possible remedy for respondents whose Fourth Amendment Rights have been violated. *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. Cf. *INS v. Delgado*,

the societal costs of applying the rule in deportation proceedings may be high for four reasons;³⁴ weighing these considerations led the Court to conclude that the costs outweighed the benefits, and therefore the exclusionary rule need not apply when immigration respondents' constitutional rights are violated.

Part V, however, complicates the *Lopez-Mendoza* holding. Part V, as discussed *supra*, 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.³⁵ Scholars have debated the significance of Part V of the *Lopez-Mendoza* holding and its interrelationship with Parts I-IV, attempting to gain insights 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 proceedings³⁶ or designed to champion the exclusionary rule.³⁷ Such arguments

466 U.S. 210 (1984).”)

³⁴ (i) An undocumented alien's continuing presence in the United States constitutes a “crime,” *Lopez-Mendoza*, 468 U.S. at 1047 (noting that that the exclusionary 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 presence in this country,”); (ii) 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; (iii) 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; and (iv) the crowded and confused circumstances in which immigration officers apprehended large numbers of aliens could result in the suppression of large quantities of lawfully obtained information. *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.”)

³⁵ *Id.* at 1050.

³⁶ See, e.g. William C. Heffernan, *The Fourth Amendment exclusionary rule as a Constitutional Remedy*, 88 GEO. L.J. 799 (2000).

³⁷ See, e.g. Nicolas J. Watkins and Joel Stewart, *Employer Sanctions Update and the Employer's Response*, 66 MAY FLA. B. J. 60 (1992).

focus overwhelmingly on the “egregiousness” exception articulated in Part V, to the detriment of the “widespread violations” argument.³⁸ 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 towards the potential utility and applicability of the exclusionary rule. This article proposes a more complete interpretation of *Lopez-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 sections 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.³⁹ The second, described by the Court as “perhaps [the] most important”⁴⁰ 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.⁴¹ 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

³⁸ *Id.*

³⁹ *Lopez-Mendoza*, 468 U.S. at 1032. *Id.* at 1051 (Brennan J. dissenting) (arguing that “the exclusionary rule must apply in civil deportation proceedings.”) This conception of immigration law is, as I will discuss later, profoundly rooted in the circumstances and practices of the mid-1980s. *See* discussion *infra* at ___.

⁴⁰ *Lopez-Mendoza*, 468 U.S. at 1044.

⁴¹ *Id.* 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, including: policies requiring that evidence seized through intentionally unlawful conduct be excluded from use in proceedings, *Id.* at 1045; the “instruction and examination” of new immigration officers “in Fourth Amendment law” and provision of “periodic refresher courses in law” to experienced officers. *Id.* at 1044; and 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.* *Matter of Toro*, 17 I & N Dec. 341-44 at 344 (BIA 1980), which found 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 in accordance with pre-*Brignoni-Ponce* INS policy).

in the immigration context.⁴² 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.⁴³ 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.

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* folio⁴⁴ 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, memos 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 the 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,

⁴² *Id.* at 1044.

⁴³ "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." *Lopez-Mendoza*, 468 U.S. at 1045.

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.⁴⁵ 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,"⁴⁶ but that if an INS violation became "so severe as to be a Fifth Amendment violation" she "would feel differently."⁴⁷ 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.⁴⁸

Part V of Justice O'Connor's opinion – which remained unchanged from the first to the final draft⁴⁹ - 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

⁴⁴407/83-491, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C. .

⁴⁵ 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 Conference Notes, April 20, 1984, 407/83-491].

⁴⁶ Blackmun Conference Notes, April 20, 1984, 407/83-491. (emphasis in the original). .

⁴⁷ *Id.*

⁴⁸ *Id.*

with some degree of procedural protection. Justice O'Connor maintained this position over the objections of some members of her majority; Chief Justice 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."⁵⁰

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."⁵¹ Yet, Justice O'Connor did not alter the opinion. Justice Blackmun's initial comments about whether or not the Court should grant cert hint that he may have provided the original impetus for the majority's concern with whether or not constitutional violations were "widespread."⁵² This archival evidence strongly suggests 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

⁴⁹ *Id.*

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.

⁵¹ 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.

⁵² Justice Harry Blackmun, Dec. 31, note accompanying Preliminary Pool Memorandum by Kerri Bartlett, Dec. 13, 1983 ("[S]ince 1952 there has been a total of fewer than fifty Fourth amendment challenges to the admissibility of evidence in deportation proceedings."), 407/83-491, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C.

proceedings. According to Justice Blackmun’s notes, Justice Powell stated in the conference that he saw immigration proceedings as involving “deportation to native lands, not jailing” and Justice O’Connor believed “deportation is not criminal.”⁵³ Justice Blackmun, the crucial fifth vote for the *Lopez-Mendoza* majority,⁵⁴ wrote before oral argument had taken place that a deportation proceeding “is a *civil* proceeding.”⁵⁵ 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 “to determine eligibility to remain in this country, not to punish an unlawful entry.”⁵⁶ It is possible to trace through to the final opinion the individual Justices’ comments in conference about the distinction between “civil” and criminal proceedings—such as Justice Powell’s view that deportation proceedings were not focused on “jailing,” which was reflected in the final opinion’s emphasis upon the limited powers of immigration judges to impose punitive sanctions upon respondents,⁵⁷ and the prospective rather than retrospective mandate of immigration courts.⁵⁸

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

⁵³ 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 Conference Notes, April 20, 1984, 407/83-491].

⁵⁴ Upon receipt of Justice O’Connor’s first draft of the *Lopez-Mendoza* opinion, one of Justice Blackmun’s law clerks noted that “Obviously, SOC has circulated this draft to you because you are the fifth vote and she wants to nail down her Court.” Anna Durand, memo to Justice Blackmun, May 23, 1984, 407/83-491, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C. .

⁵⁵ Justice Harry Blackmun, Pre-Argument Notes (handwritten) April 18, 1984, 407/83-491, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C. (emphasis in the original). According to Justice Blackmun’s conference notes, Thurgood Marshall was the only Justice to argue that a deportation hearing was “*not* a civil proceeding.” Blackmun Conference Notes, April 20, 1984, 407/83-491. (emphasis in the original) .

⁵⁶ *Id.*

⁵⁷ 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.” *Lopez-Mendoza*, 468 U.S. at 1038.

“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”⁵⁹ at preventing constitutional violations from occurring, whereas Justice White believed the main reason to apply the exclusionary rule was “to keep officers within bounds.”⁶⁰ 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 had to believe 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 also the dissent were preoccupied by the issue of declaratory relief. This concern was evident during the majority opinion’s drafting process,⁶¹ as the opinion evolved in reaction the criticisms leveled by the dissenting Justices. Justice Stevens apparently expressed concerns during the conference that declaratory relief would not be realistically attainable, even by fully fledged US citizens,⁶² 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 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

⁵⁸ “Past conduct is relevant only insofar as it may shed light on the respondent’s right to remain.*Id.* (internal citations omitted)

⁵⁹ Blackmun Conference Notes, April 20, 1984, 407/83-491. (emphasis in the original) .

⁶⁰ Blackmun Conference Notes, April 20, 1984, 407/83-491. (emphasis in the original). .

⁶¹ The first draft of the opinion also stated “In addition, actions for constitutional torts remain open to those subject to unlawful searches and seizures.” Justice Sandra Day O’Connor, First Draft, *INS v. Lopez-Mendoza*, circulated Jun. 1, 1984, 407/83-491, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C. (emphasis in the original) (citations omitted) .

⁶² Blackmun Conference Notes, April 20, 1984, 407/83-491. (emphasis in original). .

the Nation's immigration laws.⁶³

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 the Court's 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*, 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.⁶⁴

⁶³ *Lopez-Mendoza*, 468 U.S. at 1055

⁶⁴ *Adamson v. Commissioner*, 745 F.2d 541, 544-45 (9th Cir.1984); *See also* Judge Pregerson's dissent in, *Cervantes-Cuevas v. INS*, in which he notes that the Court suggested that bad faith would be found if a reasonably competent officer would have believed the search to be illegal. *Cervantes-Cuevas v. INS*, 797 F.2d 707, 712 (9th Cir.1985)(Pregerson, J., dissenting).

In the twenty-four years since *Lopez-Mendoza*, the First,⁶⁵ Second,⁶⁶ Third,⁶⁷ Fourth,⁶⁸ Fifth,⁶⁹ Sixth,⁷⁰ Seventh,⁷¹ Eighth,⁷² Ninth,⁷³ and Tenth Circuits⁷⁴ 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,⁷⁵ and in some they have been interpreted more narrowly.⁷⁶ 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 the *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-four years since *Lopez-Mendoza* was decided. The next section of this article illustrates the extent to which, as a consequence, the situation feared by the Court in *Lopez-Mendoza* has arisen, and violations of immigration respondents’ constitutional rights have become widespread.

⁶⁵ *Navarro-Chalan v. Ashcroft*, 359 F.3d 19 (1st Cir. Feb 25, 2004)

⁶⁶ *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006)

⁶⁷ *U.S. v. Bowley*, 435 F.3d 426, 430 (3rd Cir.(Virgin Islands) Jan 26, 2006)

⁶⁸ *U.S. v. Oscar-Torres*, 507 F.3d 224 (4th Cir.(N.C.) Nov 08, 2007)

⁶⁹ *Velasquez-Tabir v. I.N.S.*, 127 F.3d 456, 459 (5th Cir. Nov 07, 1997)

⁷⁰ *Miguel v. I.N.S.*, 359 F.3d 408, 2004 Fed.App. 0062P (6th Cir. Feb 26, 2004)

⁷¹ *Martinez-Camargo v. INS*, 282 F.3d 487 (7th Cir. 2002)

⁷² *U.S. v. Guevara-Martinez*, 262 F.3d 751 (8th Cir.(Neb.) Aug 20, 2001)

⁷³ *Orhorhaghe v. INS*, 38 F.3d 488, 503-04 (9th Cir. 1994)

⁷⁴ *U.S. v. Olivares-Rangel*, 458 F.3d 1104, 1105+ (10th Cir.(N.M.) Aug 11, 2006)

⁷⁵ *See, e.g. Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006), *Orhorhaghe v. INS*, 38 F.3d 488, 503-04 (9th Cir. 1994)

⁷⁶ *See, e.g. U.S. v. Oscar-Torres*, 507 F.3d 224 (4th Cir.(N.C.) Nov 08, 2007); *U.S. v. Guevara-Martinez*, 262 F.3d 751 (8th Cir.(Neb.) Aug 20, 2001); ; *U.S. v. Olivares-Rangel*, 458 F.3d 1104, 1105+ (10th Cir.(N.M.) Aug 11, 2006)

II. 2008: THE WIDESPREAD OCCURRENCE OF CONSTITUTIONAL VIOLATIONS

In the twenty four years since *Lopez-Mendoza*, as the policies and practices of immigration enforcement agencies have changed radically, respondents in immigration proceedings have argued, with increasing frequency, that evidence against them should be suppressed because it was obtained illegally by government officials whose actions violated the respondents' constitutional rights.⁷⁷

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.”⁷⁸ Interpreting Board of Immigration Appeals definitions of “egregiousness” that pre-dated *Lopez-Mendoza*,⁷⁹ Courts of Appeal have developed differing standards of “egregiousness” and different definitions of what might transgress “notions of fundamental fairness.”⁸⁰

⁷⁷ See Michael J. Wishnie, *Emerging Issues For Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497 (2004); Henry G. Watkins, *The Fourth Amendment and the INS: An Update on Locating the Undocumented and a Discussion on Judicial Avoidance of Race-Based Investigative Targeting in Constitutional Analysis*, 28 SAN DIEGO L.REV. 499 (1991)

⁷⁸ *Lopez-Mendoza*, 468 U.S. at 1050-51 (citing *Rochin v. California*, 342 U.S. 165 (1952)).

⁷⁹ See e.g. *In re Toro*, 17 I. & N. Dec. 340, 343 (BIA 1980) (“the 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”); *In re Garcia*, 17 I. & N. Dec. 319, 321 (BIA 1980) (barring admission of involuntary statements).

⁸⁰ See, e.g. *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006) (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); *Orhorhaghe v. INS*, 38 F.3d 488, 503-04 (9th Cir. 1994) (excluding evidence where INS search and seizure based solely on person's Nigerian sounding name); *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1452 (9th Cir. 1994) (same); *Arguelles-Vasquez v. INS*, 786 F.2d 1433, 1435 (9th Cir. 1986) (same), vacated as moot, 844 F.3d 700 (9th Cir. 1988). See also *Martinez-Camargo v. INS*, 282 F.3d 487 (7th Cir. 2002) (recognizing *Lopez-Mendoza* suppression rule but declining to exclude evidence on facts of case); *Westover v. Reno*, 202 F.3d 475 (1st Cir. 2000) (same); *Ruckbi v. INS*, 285 F.3d 120, 125 (1st Cir. 2002) (same).

By 2004, however, there were so many examples of Motions to Suppress being argued on the grounds that individuals were seized on the basis of race alone—consistently understood as an “egregious” violation of the Fourth Amendment⁸¹—that one commentator suggested that suppression of evidence due to “widespread violations” of the Constitution might be warranted.⁸² This year, the American Bar Association noted an emergent trend of immigration practitioners arguing that constitutional violations by Immigrations and Customs Enforcement (ICE) have become so widespread that it may be necessary to revisit the Supreme Court’s holding in *Lopez-Mendoza*.⁸³ This section of the article 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.”⁸⁴ Accordingly, this section of the article 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.⁸⁵ However,

⁸¹ See, e.g. *Martinez-Camargo v. INS*, 282 F.3d 487 (7th Cir. 2002); *Orhorhaghe v. INS*, 38 F.3d 488, 503-04 (9th Cir. 1994).

⁸² See Michael Wishnie, *State and Local Police Enforcement of Immigration Laws*, 4 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”).

⁸³ Stephanie Frances Ward, *Illegal Aliens on I.C.E.: Tougher Immigration Enforcement Tactics Spur Challenges* ABA Journal 2008 available at 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*.”)

⁸⁴ Available at <http://www.askoxford.com/dictionaries/>

⁸⁵ 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 are available for the past 12 years, showing the number of individuals in immigration proceedings and the outcome of those proceedings, i.e. the number of

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.⁸⁶ 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 50 Motions to Suppress Evidence and Terminate Proceedings had ever been *filed* in Immigration Court.⁸⁷ Twenty eight years later, in 2007 alone, 21,144 Motions to Terminate were *granted*.⁸⁸ 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 statistically meaningless, due to different units of analysis, vastly different numbers of individuals in removal proceedings,⁸⁹ different agencies with responsibility for immigration enforcement,⁹⁰ and different security concerns,⁹¹ all informing very different patterns of enforcement activity.⁹²

individuals removed, the number of individuals granted a form of relief (such as cancellation of removal), and the number of individuals whose to Terminate proceedings were granted.

⁸⁶ 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.

⁸⁷ 705 F.2d at 1071 (describing how prior to the decision of the Board of Immigration Appeals in *Matter of Sandoval*, 17 I. & N.Dec. 70 (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 *1059 grounds.)

⁸⁸ See U.S. Department of Justice, *Statistical Yearbook of the Executive Office for Immigration Review*, 2008 at D2 showing the disposition of immigration cases for the years 2003-2007 and the availability of different forms of relief.

⁸⁹ 26,825 in 1979, compared to 222,618 in 2007. U.S. Department of Justice, *Statistical Yearbook of the Executive Office for Immigration Review*, 2008; U.S. Department of Justice, 1999 *Statistical Yearbook of the Immigration and Naturalization Service* 2002 at 215.

⁹⁰ INS in 1979, ICE in 2007.

⁹¹ Pre- and post-9/11

⁹² For example, ICE’s nationwide Fugitive Operations Teams Operations, such as Operation “Return To Sender” (See Immigration & Customs Enforcement News Release, More than 300 arrested in ICE operation targeting illegal alien fugitives and immigration violators in San Diego and Imperial Counties, Apr. 3, 2007 at <http://www.ice.gov/pi/news/newsreleases/articles/>), Operation “Cross-Check” (targeting individuals with any kind

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.⁹³ 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.⁹⁴ Fifteen years later, in 2001 an INS report to the House of Representatives Appropriations Subcommittee highlighted racially biased, and therefore unconstitutional, enforcement of facially neutral policies.⁹⁵ This year, organizations ranging from the United Nations⁹⁶ to the United Food and Commercial Workers International Union⁹⁷

of criminal record) Operation "Community Shield" (targeting foreign-born alleged gang members) or 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.

⁹³ See Appendix: Map of the United States Showing Locations of Alleged Constitutional Violations

⁹⁴ See Lorr, *Employer Sanctions and the Fourth Amendment: Lessons from OSHA for the Immigration Bar*, 4 GEO. IMMIG. L.J. 1 (1990), citing *Int. Molders & Allied Workers' Local U. v. Nelson*, 799 F.2d 547 (9th Cir.1986), in which the court found an "evident systematic policy and practice of fourth amendment violations" by the INS, including extensive evidence of INS agents "exceeding official policy."

⁹⁵ See Letter from Janis A. Sposato, Acting Assistant Attorney General for Administration, to Rep. Eolf, Chair, Subcte. on the Depts. of Commerce, Justice and State, the Judiciary, and Related Agencies, Cte. on Appropriations (Sept. 21, 2001) (noting disproportionately higher rates of referrals of Asian, Blacks, and Hispanics for secondary inspection based on a review of over five million primary inspections at JFK Airport).

⁹⁶ See Special Rapporteur Jorge Bustamante: Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Addendum to Report of Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante U. N. Doc A/HRC/7/12/Add. 2 (Mar. 5, 2008) at 16 (increasing workplace and household raids by ICE agents have "frequent disregard of due process") 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 call to family members and coerced them to sign voluntary departure agreements.")

have undertaken investigations into ICE misconduct and criticized ICE agents for their violation of individuals' constitutional rights. Concern about the extent to which law enforcement officers are violating immigration respondents' constitutional rights has prompted a Congressional hearing to investigate allegations of ICE misconduct.⁹⁸

In May 2006, ICE launched "Operation Return to Sender," a nationwide ICE initiative designed to apprehend "fugitive aliens."⁹⁹ Over 23,000 individuals have been arrested by ICE Fugitive Operation Teams (FOTs) in a series of raids on homes and offices.¹⁰⁰ 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 happen to be present at the site of a FOT raid, and about whom, prior to their warrantless arrests, ICE typically held no information prior to their warrantless arrest.¹⁰¹ In the two years since "Return to Sender" began, allegations that ICE FOTs have committed a wide range of constitutional violations have been made in civil complaints,¹⁰² notarized affidavits,¹⁰³ testimony

⁹⁷ See N.C. Aizenman, *Immigration Agency Accused of Illegal Searches*, WASH. POST (Feb. 26, 2008), page A04 (members of private commission accused ICE of routinely violating Fourth Amendment rights during workplace raids such as by misusing warrant to arrest a limited number of workers to arrest and detain everyone in the workplace with the hope of catching other undocumented people in the area).

⁹⁸ 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." See <http://judiciary.house.gov/Oversight.aspx?ID=410> (last visited Mar. 10, 2008)

⁹⁹ See Immigration & Customs Enforcement News Release, More than 300 arrested in ICE operation targeting illegal alien fugitives and immigration violators in San Diego and Imperial Counties, Apr. 3, 2007 at <http://www.ice.gov/pi/news/newsreleases/articles/070403sandiego.htm>

¹⁰⁰ See Jesse McKinley, San Francisco Bay Area Reacts Angrily to Series of Immigration Raids, N.Y. TIMES, Apr. 28, 2007 at ___.

¹⁰¹ See, e.g. Tom Lochner, Civil Rights Advocates Question Actions of Immigration Agents, OAKLAND TRIB., Mar. 10, 2007 at ___ ("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.") See also Bill O. Hing, *Immigration Attorney Harassed at Home*, Immigration Daily, Mar. 18 2008 at <http://www.ilw.com/articles/2008,0318-hing.shtm> (copying a complaint made by an immigration attorney who was threatened in his home in which the attorney writes "This incident also appears to be just one example of a pattern of constitutional violations in recent times by ICE officers, suggesting the agency has adopted a policy of aggressive violations of constitutional rights in its enforcement efforts.")

¹⁰² Many of the civil complaints and notarized affidavits that I refer to in this section were collated by Rachel Bengtson of Centro Legal, Inc. in St. Paul, MN. I am extremely grateful to Ms. Bengtson. for sharing her research with me.

given to Congressional hearings, and media reports in Arizona,¹⁰⁴ California,¹⁰⁵ Colorado,¹⁰⁶ Connecticut,¹⁰⁷ Florida,¹⁰⁸ Georgia,¹⁰⁹ Idaho,¹¹⁰ Illinois,¹¹¹ Iowa,¹¹² Maryland,¹¹³ Massachusetts,¹¹⁴ Minnesota,¹¹⁵ Missouri,¹¹⁶ Nebraska,¹¹⁷ New Jersey,¹¹⁸ New Mexico,¹¹⁹ New York,¹²⁰ North Carolina,¹²¹ Ohio,¹²² Rhode Island,¹²³ Tennessee,¹²⁴ Texas,¹²⁵ and Washington.¹²⁶

¹⁰³ *Id.*

¹⁰⁴ Written Testimony Kara Hartzler, Esq. Florence Immigrant & Refugee Rights Project U.S. House of Representatives Subcommittee on Immigration February 13, 2008 at <http://judiciary.house.gov/media/pdfs/Hartzler080213.pdf> [hereinafter Hartzler Testimony]

¹⁰⁵ *Reyes v. ICE*, No. 07-cv-02271 (N.D.Cal.) (complaint filed April 26, 2007) (on file with author); *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. [hereinafter Esquivel, *Immigrant Workers were Denied Rights*]

¹⁰⁶ *Yarrito v. Meyers*, No. 06-CV-2494 (D. Colo. filed Dec. 13, 2006) (on file with author).

¹⁰⁷ *Barrera v. Boughton*, No. 3:07-cv-01436 (D.Conn.) (amended complaint filed Nov. 26, 2007); *DACORIM v. DHS*, No. 3:06-cv-01992 (D.Conn.) (complaint filed Dec. 14, 2006); *El Badrawi v. DHS*, No. 3:07-cv-01074 (D.Conn.) (complaint filed July 13, 2007)

¹⁰⁸ See Damian Cave, *States Take New Tack on Illegal Immigration*, N. Y. TIMES, June 9, 2008. (“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.”)

¹⁰⁹ *Mancha v. ICE*, No. 06-cv-12650 (N.D.Ga.) (complaint filed Nov. 1, 2006) (on file with author); Mancha Testimony, *supra* n. 95.

¹¹⁰ See Cave, *supra*, n. 106.

¹¹¹ See Kari Lyderson, *Abuses Alleged During Immigration Raids, In These Times*, Apr. 23, 2007 at ___.

¹¹² Graves Testimony, *supra* n. 92.

¹¹³ See Justin Fenton & Kelly Brewington, *46 Held in Immigration Sweep*, BALTIMORE SUN, July 9, 2008.

¹¹⁴ *Aguilar v. ICE*, No. 07-1819, *Aguilar v. ICE*, 510 F.3d (1st Cir. 2007) (on file with author); *Sandoval v. ICE*, 1:07-cv-10471-RGS (D. Mass.) (complaint filed Mar. 8, 2007) (on file with author).

¹¹⁵ *Barrera v. DHS*, No. 07-cv-03879 (D.Minn.) (complaint filed Sept. 4, 2007) (on file with author).

¹¹⁶ *Asamoah-Boadu v. Missouri*, No. 07AC-CC00983 (Mo. Cir. Ct., filed 10/25/07)

¹¹⁷ *UFCW v. Chertoff*, No. 07-cv-00188 (N.D.Tex.) (class action complaint filed Sept. 12, 2007) (on file with author);

¹¹⁸ Affidavit of Gonzalo Juarez of Newark, NJ, *supra* n.82.

¹¹⁹ *Border Network for Human Rights v. County of Otero; Daniel T. v. Board of Commissioners of the County of Otero* (D.N.M.) (Complaint filed October 17, 2007) (on file with author).

¹²⁰ *In re: Herrera-Priego; In re: Rabani; Aguilar v. ICE*, No. 07-cv-08224 (S.D.N.Y.) (complaint filed Sept. 20, 2007) and supporting affidavits (on file with author); Chicos Moran Motion, *supra*, n. 90; *Motion to Suppress & Affidavit filed in Immigration Court for Carlos Lopez Ramos*, US DoJ New York, NY (on file with author); Nina Bernstein, *Raids were a Shambles, Nassau Complains to U.S.*, N.Y. TIMES, Oct. 3, 2007

¹²¹ See Stephen Greenhouse, *U.S. Officials Defend Ploy to Catch Immigrants*, N.Y. TIMES, Feb. 11, 2006 at ___ (describing ICE agents’ impersonation of federal health and safety officials as a ruse to detain and arrest undocumented workers).

¹²² *Martinez, et. al v. Chertoff, et. al*, No. 07-722 (S.D. Ohio) (complaint filed Aug. 31, 2007) (on file with author).

¹²³ See Karen Lee Ziner, *ACLU Sues State Police*, PROVIDENCE J., Jan. 9, 2007 at ___, available at http://www.projo.com/news/content/RIACLU_SUIT9_01-09-07_AG3PUSQ.2c7d941.html (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.”)

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,¹²⁷ Bexar, Texas¹²⁸ and Whatcom County, Washington.¹²⁹ Warrantless home invasions are alleged to have been undertaken in Willmar, Minnesota,¹³⁰ Newark, New Jersey,¹³¹ and Otero, New Mexico.¹³² Illegal workplace seizures are alleged to have been undertaken in Los Angeles, California,¹³³ Worthington, Minnesota,¹³⁴ and Goldsboro, North Carolina.¹³⁵ Illegal racial profiling is alleged to have been used to target individuals in Florence, Arizona,¹³⁶ Jacksonville, Florida,¹³⁷ and Memphis, Tennessee.¹³⁸ Unnecessary force is

¹²⁴ Motions to Suppress and Terminate, Memorandum of Law, and Supporting Affidavit for Roberto Cervantes, *supra* n. 80; Flores-Morales v. George and ICE, No. 07-cv-00050 (M.D.Tenn.) (complaint filed July 27, 2007) and supporting affidavits (on file with author).

¹²⁵ *UFCW v. Chertoff*, No. 07-cv-00188 (N.D.Tex.) (class action complaint filed Sept. 12, 2007) (on file with author); *Affidavit of Jose Ordonez Salanec of TX* *supra* n. 80.

¹²⁶ *Matter of X* (Seattle, WA Immigration Court Feb. 8 2007).

¹²⁷ *Barrera v. Boughton* at 3. (“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.”)

¹²⁸ *Affidavit of Jose Ordonez Salanec of TX*, *supra* n.80 at 1 (on file with author). (“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.”)

¹²⁹ *Matter of X* (Seattle, WA Immigration Court Feb. 8 2007) at 2. (“[T]he respondent daughters were the subjects of a racially motivated traffic stop by a deputy sheriff.”)

¹³⁰ *Arias v. ICE*, No. 07-cv-01959 (D.Minn.) (complaint filed July 27, 2007) (on file with author).

¹³¹ Affidavit of Gonzalo Juarez of Newark, NJ, *supra* n. 82 at 2 (“The officer told me to ‘come inside.’ He did not ask me for permission to enter. I never gave permission for him to enter.”)

¹³² *Border Network for Human Rights v. County of Otero* (“Defendants began targeting Hispanic families in their own homes by initiating random sweeps of trailers in the area.”)

¹³³ See Esquivel, *Immigrant Workers were Denied Rights*, *supra* n. 133.

¹³⁴ *Barrera v. DHS* at 7.

¹³⁵ See Stephen Greenhouse, *U.S. Officials Defend Ploy to Catch Immigrants*, N.Y. TIMES, Feb. 11, 2006 at ___ (describing ICE agents’ impersonation of federal health and safety officials as a ruse to detain and arrest undocumented workers).

¹³⁶ Hartzler Testimony, *supra* n. 132 at 3 (“During the raid at the Swift plant in Worthington on December 12, 2006, the ICE agents involved arrested the plaintiffs without probable cause, unlawfully confined the plaintiffs against their will at the Swift plant, subjected the plaintiffs to searches and interrogations without advising them of their constitutional rights, used racial epithets directed at the plaintiffs and others of Latin descent, and otherwise insulted, abused and humiliated the plaintiffs on account of their race.”)

¹³⁷ *In re: Rabani*, at 4 (on file with author) (“[Respondent] did not seem them question a single person other than himself . . . He believes they approached him because of his Middle Eastern appearance.”)

¹³⁸ Motions to Suppress and Terminate, Memorandum of Law, and Supporting Affidavit of Roberto Cervantes Valerio *supra* n. 80.

alleged to have been used during arrests in Chicago, Illinois,¹³⁹ Anne Arundel County, Maryland,¹⁴⁰ Hicksville, New York,¹⁴¹ and Maury County, Tennessee.¹⁴² U.S. citizen children are alleged to have been detained by armed officers in San Rafael, California,¹⁴³ New Haven, Connecticut¹⁴⁴ and Reidsville, Georgia.¹⁴⁵ Respondents were allegedly denied access to counsel in Greeley, Colorado,¹⁴⁶ New Bedford, Massachusetts,¹⁴⁷ and Cactus, Texas.¹⁴⁸ Individuals are alleged to have been stopped and questioned without reasonable suspicion in Twin Falls, Idaho,¹⁴⁹ New York, New York,¹⁵⁰ Butler County, Ohio,¹⁵¹ and Richmond, Rhode Island,¹⁵² and

¹³⁹ See Kari Lyderson, *Abuses Alleged During Immigration Raids*, *In These Times*, Apr. 23, 2007 at __ (describing how one woman was “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.”)

¹⁴⁰ See Justin Fenton & Kelly Brewington, 46 held in immigration sweep, *Baltimore Sun*, July 9, 2008 (describing a pregnant woman being shoved roughly.)

¹⁴¹ Chicos Moran Motion, *supra*, n. 90 at 3 (“[A]s I was about to leave for my job . . . I was stopped inside my apartment for about five armed men. These men threw me and my roommates on the floor and handcuffed us.”)

¹⁴² *Flores-Morales v. George and ICE*, No. 07-cv-00050 (M.D.Tenn.) (complaint filed July 27, 2007) and supporting affidavits (on file with author);

¹⁴³ *Reyes v. ICE*, No. 07-cv-02271 (N.D.Cal.) (complaint filed April 26, 2007) at 1-2 (on file with author) (“[Kebin] . . . is seven years old. . . . Defendants told Kebin that he would only need to stay at the ICE officer 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.”)

¹⁴⁴ See Betsy Yagla, *Voices of the Immigrants*, *NEW HAVEN ADVOCATE*, Aug. 16, 2007, available at <http://www.newhavenadvocate.com/article.cfm?aid=2508>.

¹⁴⁵ *Mancha v. ICE*, No. 06-cv-12650 (N.D.Ga.) (complaint filed Nov. 1, 2006) (on file with author); *Mancha Testimony*, *supra* n. 95.

¹⁴⁶ *Yarrito v. Meyers*, No. 06-CV-2494 (D. Colo. filed Dec. 13, 2006) (on file with author).

¹⁴⁷ *Sandoval v. ICE*, 1:07-cv-10471-RGS (D. Mass.) (complaint filed Mar. 8, 2007) (on file with author).

¹⁴⁸ *UFCW v. Chertoff*, No. 07-cv-00188 (N.D.Tex.) (class action complaint filed Sept. 12, 2007) (on file with author)

¹⁴⁹ “In Twin Falls, Idaho, for example, immigration lawyers allege that CBP 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.” Damian Cave, *States Take New Tack on Illegal Immigration*, *N. Y. Times*, June 9, 2008.

¹⁵⁰ *In re: Herrera-Priego*.

¹⁵¹ *Martinez, et. al v. Chertoff, et. al*, No. 07-cv-722 (S.D. Ohio) (complaint filed Aug. 31, 2007) (on file with author).

(The Sheriff’s deputies in the Southern District of Ohio . . . drive around town arresting “foreign” looking and sounding individuals.”)

¹⁵² See Karen Lee Ziner, *ACLU Sues State Police*, *PROVIDENCE J.*, Jan. 9, 2007 at __, available at http://www.projo.com/news/content/RIACLU_SUIT9_01-09-07_AG3PUSQ.2c7d941.html (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.”)

detained without probable cause in Marshalltown, Iowa,¹⁵³ Grand Island, Nebraska,¹⁵⁴ and East Hampton, New York.¹⁵⁵

This sample is based upon cases currently pending before immigration courts and courts of appeal, as well as findings in favor of 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, in a number very different locations throughout the country.¹⁵⁶

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.¹⁵⁷ Research undertaken in 2001 found that ninety percent of persons detained in immigration custody did not have counsel because they are unable to afford a lawyer to represent them.¹⁵⁸

¹⁵³ "There was no legitimate reason. No probable cause. Our plant – our workplace – had been transformed into a prison or detention center." Graves Testimony, *supra* n. 92.

¹⁵⁴ *UFCW v. Chertoff*, No. 07-cv-00188 (N.D.Tex.) (class action complaint filed Sept. 12, 2007) (on file with author);

¹⁵⁵ See Nina Bernstein, *Immigration Raids Single out Hispanics, Law Suit Says*, N. Y. TIMES, Sep. 21, 2007 at ___.

¹⁵⁶ See Appendix: Map of the United States Showing Locations of Alleged Constitutional Violations.

¹⁵⁷ National Immigrant Justice Center, Report, Language Barriers May Lead Immigrants to Waive Right to Hearing Before Deportation, June 3, 2008 at <http://www.immigrantjustice.org/news/detention/stiporders>.

¹⁵⁸ Elizabeth Amon, *INS Fails to See the Light*, NATIONAL L.J., Mar. 5, 2001 at A1.

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 of Representatives Committee on the Judiciary, ICE removed more than 280,000 individuals from the United States during the 2007 financial year.¹⁵⁹ The overwhelming majority of these respondents were not represented by legal counsel,¹⁶⁰ 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."¹⁶¹ As Justice White noted in his *Lopez-Mendoza* 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.¹⁶² 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 Dan Kanstroom, "[w]hat we're seeing in court is really just the tip of the iceberg."¹⁶³

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

¹⁵⁹ Michael Chertoff Testimony to U.S. House of Representatives Committee on the Judiciary, Mar. 5, 2008, available at <http://www.aila.org/content/default.aspx?bc=1019/6712/12178/24852> (last visited Mar. 10, 2008) ; see also U.S. Immigration and Customs Enforcement, FY07 Accomplishments, available at <http://www.ice.gov/doclib/pi/news/factsheets/fy07accomplshmntsweb.pdf> (last visited Mar. 10, 2008)

¹⁶⁰ Hartzler Testimony, *supra* n. 132 at 9.

¹⁶¹ *Id.*

¹⁶² See generally discussion of Justice White's dissent in *Lopez-Mendoza*, *supra* at 24, n. 91

immigration enforcement.¹⁶⁴ 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.¹⁶⁵ The rationale given for this radical departure from previous practice¹⁶⁶ was that police assistance was required to further the administration's "war on terror."¹⁶⁷

The so-called war on terror was also invoked in 2001, 2002 and 2003 to justify the entry of increasing quantities of civil immigration infraction information into the National Crime Information Center [hereinafter NCIC] computer database.¹⁶⁸ Local and state police throughout the United States routinely 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.¹⁶⁹ Individuals who are arrested and detained because of their NCIC record have little recourse to

¹⁶³ Ward *supra*, n.83 (quoting Dan Kanstroom).

¹⁶⁴ 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. See e.g. Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004) [hereinafter Wishnie, *State and Local Police Enforcement*];

¹⁶⁵ 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 new conclusion of U.S. DOJ Office of Legal Counsel); Cheryl W. Thompson, *INS Role for Police Considered; U.S. Eyes State, Local Help in Enforcing Immigration Laws*, WASH. POST, APR. 4, 2002, at A15 (same).

¹⁶⁶ The previous, policy of the DOJ was set forth in an Office of Legal Counsel memorandum. Memorandum from Seth Waxman, Associate Deputy Attorney, to the U.S. Attorney for the Southern District of California (Feb. 5, 1996), at www.usdoj.gov/olc/immstopo1a.htm (last visited Mar. 10, 2008).

¹⁶⁷ See Attorney General John Ashcroft, Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002) (at <http://www.usdoj.gov/ag/speeches/2002/060502agpreparedremarks.htm>) [hereinafter Ashcroft, NSEER Remarks] (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).

¹⁶⁸ Wishnie, *State and Local Police Enforcement*, *supra* n. 107 at ___, citing Unified Agenda: Statement of Regulatory Priorities, 67 Fed. Reg. 74,158, 74,159 (Dec. 9, 2002) ("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..."); Chris Adams, *INS To Put in Federal Criminal Databases the Names of People Ordered Deported*, WALL ST. J., Dec. 6, 2001, at A22 (reporting statement of Commissioner and agency spokesperson that INS will start data entry "immediately," but task will take six to twelve months).

¹⁶⁹ See Nina Bernstein, *Challenge in Connecticut Over Immigrants' Arrest*, N.Y. TIMES, Sept. 26, 2007 at ___. See also, Nina Bernstein, *Crime Database Misused for Civil Issues, Suit Says*, N.Y. TIMES, Dec. 17, 2003, at A10 (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 A1 (reporting on arrest of Amir Shah, car wash supervisor found sleeping in car waiting for business to open, by Shaumburg, Illinois, police officers, on basis of Shah's old deportation order).

challenge its contents, and in some cases have been denied the opportunity to examine the record.¹⁷⁰

The involvement of local police forces in immigration enforcement is far from uniform. Almost 70 different US jurisdictions, ranging from the State of Alaska, to San Francisco, California, to New Haven, Connecticut, have promulgated local rules prohibiting local police officers from inquiring into an individual's immigration status.¹⁷¹ 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 NCIC and hand detainees over to ICE.¹⁷² Moreover, law enforcement authorities in some jurisdictions have actively sought to expand the role that they play in immigration enforcement, either by developing independent local enforcement policies,¹⁷³ or by arranging for local police to be "deputized" as immigration agents under Section 287(g) of the Immigration and Nationality Act.¹⁷⁴ Since Section 287(g) was introduced in 2002, ICE has

¹⁷⁰ See *El Badrawi v. DHS*, No. 3:07-cv-01074 (D.Conn.) (complaint filed July 13, 2007)

¹⁷¹ See National Immigration Law Center, *Laws, Resolutions and Policies Instituted Across the U.S. Limiting Enforcement of Immigration Laws by State and Local Authorities*, Oct. 11, 2007 at http://www.nilc.org/immlawpolicy/LocalLaw/locallaw_limiting_tbl_2007-10-11.pdf; State of Alaska House Joint Resolution 22 (5/03); State of Oregon Statute 181.850 (2001); City and County of San Francisco, Board of Supervisors Resolution No. 389-02 (6/02); Gen. Order 06-22. New Haven Police Dep't Service (Sept. 22, 2006); Detroit Michigan Local Resolution (12/02); Philadelphia City Solicitor Memorandum to All City Commissioners and Department Heads (10/03). For more information about different local initiatives to combat the encroachment of federal immigration enforcement, see generally <http://www.aclu.org/safefree/resources/>

¹⁷² See, e.g. Ted Robbins, *America's Toughest Sheriff Takes on Immigration*, NPR Morning Edition, Mar. 10, 2008 at <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 change — is asked their citizenship and social security number. Officials then look them up in the federal Immigration and Customs Enforcement, or ICE, database.")

¹⁷³ See *Martinez, et. al v. Chertoff, et. al*, No. 07-722 (S.D. Ohio) (complaint filed Aug. 31, 2007) (describing how a "local sheriff, acting as the mouthpiece of a powerful local politician, has been engaged in a campaign that blames all the problems of the country, including crimes, on what he calls "illegal aliens" resulting in the round-up by the sheriff's deputies of 160 individuals). See also Karen Fahim, *Immigration Referrals by Police Draw Scrutiny* N.Y. TIMES, Mar. 23, 2008 at ___ (describing New Jersey State Attorney General Milgram's aggressive immigration referral policy).

¹⁷⁴ The Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of September 30, 1996, added Section 287(g) to the Immigration and Nationality Act (INA). Section 287(g) authorizes the Secretary DHS to enter

signed 38 memoranda of agreement (MOAs) with state and local law enforcement agencies to participate in the program.¹⁷⁵ In 2007, ICE agents trained 426 state and local law enforcement officers to undertake immigration enforcement.¹⁷⁶ In March 2008, Secretary Chertoff claimed that in the previous two years, 287(g) agreements have accounted for the arrest and detention of approximately 26,000 individuals.¹⁷⁷ 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 non-immigration infractions.¹⁷⁸ In her recent testimony to the House of Representatives Subcommittee on Immigration’s inquiry into alleged constitutional violations by ICE, Florence Project Attorney Kara Hartzler argued that this inconsistent pattern of enforcement often results in serious errors that cause lasting harm to the individuals involved.¹⁷⁹

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,¹⁸⁰ where individual officers who once believed that they should enforce immigration laws are now told that they should not,¹⁸¹ where some

into agreements with state and local law enforcement agencies, permitting designated officers to perform immigration law enforcement functions, pursuant to a Memorandum of Agreement (MOA), provided that these officers receive appropriate training and function under the supervision of ICE officers.

¹⁷⁵ Michael Chertoff Testimony to U.S. House of Representatives Committee on the Judiciary, Mar. 5, 2008, at 12, available at <http://www.aila.org/content/default.aspx?bc=1019/6712/12178/24852> (last visited Mar. 10, 2008); See also Jennifer V. Hughes, *Police Seek Help in Criminal Deportation*, N.Y. TIMES, Feb. 24, 2008; Peter Whoriskey, States, *Counties Begin to Enforce Immigration Law*, WASH. POST, Sept. 27, 2006.

¹⁷⁶ Michael Chertoff Testimony to U.S. House of Representatives Committee on the Judiciary, Mar. 5, 2008, at 12, available at <http://www.aila.org/content/default.aspx?bc=1019/6712/12178/24852> (last visited Mar. 10, 2008).

¹⁷⁷ *Id.*

¹⁷⁸ See Jennifer Ludden, *Local Police Taking On Immigration Enforcement*, All Things Considered, NPR, Jan. 11, 2008.

¹⁷⁹ See Hartzler Testimony, *supra* n. 132 at ___ (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.”)

¹⁸⁰ See, e.g. Jennifer V. Hughes, *Police Seek Help in Criminal Deportation*, N.Y. TIMES, Feb. 24, 2008; Peter Whoriskey, States, *Counties Begin to Enforce Immigration Law*, WASH. POST, Sept. 27, 2006.

¹⁸¹ See, e.g. Gen. Order 06-22. New Haven Police Dep’t Service (Sept. 22, 2006).

police officers receive immigration training and others do not¹⁸²—may help explain the increased incidence of allegations of violations of immigration respondents’ constitutional rights.¹⁸³

The rapid growth in the number of 287(g) agreements or local ad-hoc initiatives in the past two years¹⁸⁴ 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 13 months.¹⁸⁵ The situation has become so acute that Courts of Appeal, *sua sponte*, have begun to refer to the possibility that “widespread violations” of constitutional rights may be occurring. In early February 2008, for example, the Second Circuit in *Melnitsenko v. Mukasey*¹⁸⁶ reiterated 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.¹⁸⁷

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

¹⁸² See generally Hartzler Testimony, *supra* n. 132.

¹⁸³ Indeed, this exact turn of events was predicted by 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, *State and Local Police Enforcement*, *supra* n. 107.

¹⁸⁴ See discussion *supra* pp. 36-37.

¹⁸⁵ See discussion *supra* pp. 29-35.

¹⁸⁶ 2008 U.S. App. LEXIS 2549 (2d Cir. Feb. 6, 2008)

¹⁸⁷ *Melnitsenko v. Mukasey*, 2008 U.S. App. LEXIS 2549, at *9 (2d Cir. Feb. 6, 2008)

Amendment violations by INS officers were widespread,”¹⁸⁸ and the current pattern of immigration enforcement strongly suggests that this may now be the case

III. FROM 1984 TO 2008: 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 US government, as well as some commentators and scholars, argue that the exclusionary rule need not be reintroduced in immigration proceedings. The rationale advanced by proponents of this position 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;¹⁸⁹ second, they argue that immigration officers undergo extensive training which ensures that they avoid violating respondents’ rights;¹⁹⁰ third, and finally, they suggest that other remedies are available to individuals with a genuine grievance against the authorities.¹⁹¹ However, while these three arguments may have resonated in 1984 – although there is also some suggestion that, even then, they were not universally accepted¹⁹² – they no longer appear to be in step with immigration jurisprudence, the practice of immigration

¹⁸⁸ 468 U.S. at 1050.

¹⁸⁹ Michael Neifach, ICE’s principal legal adviser 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,” Neifach says. “Therefore the purpose of the hearing is not to punish past crime but rather the continuing violation of immigration laws.” Ward *supra* n.83.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² “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.” *Id.*

enforcement, or the realities of life for immigrant communities in the year 2008. This third and final section of the article will explore the changes that have occurred over the past twenty-four 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.¹⁹³ However, in the twenty four years since the Court’s decision in *Lopez-Mendoza*, the boundary line between “civil” immigration proceedings and “criminal” proceedings has become increasingly blurred.¹⁹⁴ This line-blurring has led to the creation of new immigration-related crimes,¹⁹⁵ an increase in the minimum and maximum sentences for existing

¹⁹³ See, e.g. concurring opinion of Justice Harlan in *In Re Winship*, 397 U.S. 358, 370-72 (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.” WILLIAM BLACKSTONE, 4 COMMENTARIES *358.

¹⁹⁴ For scholarly analysis of this phenomenon, see, for example, Teresa A. Miller, *Citizenship and Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 660 (2003) [hereinafter Miller, *Citizenship and Severity*]; Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006) (exposing a common link, rooted in membership theory, 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.”).

¹⁹⁵ See, e.g. Immigration Act of 1990 § 121(b)(3), 8 U.S.C. § 1325(d) (2000) (imposing criminal penalties on those who establish commercial enterprises for the purpose of evading immigration laws); 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); Illegal

immigration crimes,¹⁹⁶ an increase in the fines imposed on immigrant defendants,¹⁹⁷ and far greater numbers of prosecutions being brought for the commission of all immigration-related crimes.¹⁹⁸ Recent data suggest that immigration-related cases account for the largest single category of federal prosecutions—constituting fifty-seven percent of all new federal cases in 2007.¹⁹⁹ Localities throughout the United States have also introduced an unprecedented number of measures designed to criminalize an undocumented individual’s mere presence.²⁰⁰ Commentators have characterized this trend as the “criminalization of immigration law,”²⁰¹ or “crimmigration.”²⁰² This trend has accelerated markedly in the wake of September 11, 2001,²⁰³ reaching its apex this year, with the Justice Department’s recent announcement that criminal

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

¹⁹⁶ See, e.g. Anti-Drug Abuse Act of 1988 § 7345, 8 U.S.C. § 1326 (2000) (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”)); Violent Crime Control and Law Enforcement Act of 1994 § 60024, 8 U.S.C. § 1324 (2000) (enhancing penalties for smuggling noncitizens); id. § 130001(b), 8 U.S.C. § 1326(b)(1) (2000) (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); id. 30009, 18 U.S.C. §§ 1541-47 (2000) (increasing penalties for passport and visa fraud).

¹⁹⁷ See, e.g. Immigration Act of 1990, § 543(b), 8 U.S.C. §§ 1282, 1325-28 (increasing criminal fines for certain immigration related crimes).

¹⁹⁸ Justice Department statistics show almost a tripling of prosecutions for immigration felonies and class A misdemeanors from 1984 to 1994. See Morris, *supra* note 56, at 1318 (showing an increase of immigration felonies and Class A misdemeanors prosecuted in federal court from 1,186 in 1984 to 3,377 in 1994); see also Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th “Pale of Law,”* 29 N.C. J. INT’L L. & COM. REG. 639, 655 (2004) (“[t]he total number of prosecutions for immigration offenses has risen dramatically in the past decade from 14,845 in 1994 to 23,852 in 2002.”).

¹⁹⁹ See Julia Preston, *More Illegal Crossings are Criminal Cases, Group Says*, N.Y. Times June 18, 2008.

²⁰⁰ According to the New York Times, 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. See Damian Cave, *States Take New Tack on Illegal Immigration*, N. Y. TIMES, June 9, 2008.

²⁰¹ See Miller, *Citizenship and Severity*, *supra* note 58, at 617 (defining the term “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 Helen Morris, *Zero Tolerance: The Increasing Criminalization of Immigration Law*, 74 INTERPRETER RELEASES 1317, 1317 (Aug. 29, 1997) (“One of the most striking aspects of immigration law in the past decade is its increased criminalization.”).

²⁰² Stumpf, *supra* note 57, at 368.

²⁰³ 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).

immigration cases filed by the federal government now account for a majority of all new Justice Department prosecutions nationwide.²⁰⁴

Yet, while the immigration law system has adopted many of the punitive attributes of the criminal law system – 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” into the immigration law system.²⁰⁵ As 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 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.²⁰⁶

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.”²⁰⁷

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

²⁰⁴ Spencer S. Hsu, *Immigration Prosecutions Hit New High*, WASH. POST, June 2, 2008 at A1. As Hsu notes, 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.

²⁰⁵ Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms* 64 WASH. & LEE L. REV. 469 (2007) (“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 (2002).

²⁰⁶ *Id.*

defendants, the line between criminal and immigration proceedings has become so blurred as to be meaningless. A recent case in Oklahoma, *Ocha v. Bass*,²⁰⁸ indicates the extent to which the distinction between immigration and criminal proceedings has also become hazy for members of the judiciary. 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. The criminal defendants were not facing any immigration charges. 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.²⁰⁹ 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.”²¹⁰

Ocha v. Bass 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 the Immigration and Nationality Act, 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.²¹¹ Furthermore, even if the only allegations that an immigration respondent is guilty of criminal

²⁰⁷ *Id.* 525

²⁰⁸ 2008 OK CR 11; 2008 Okla. Crim. App. LEXIS 8

²⁰⁹ *Id.* at *4.

²¹⁰ *Id.* at *6 (citing 2007 Okla. Sess. Laws ch. 112, § 2, at 546.) A considerable number of jurisdictions have similar local reporting requirements. Many more require local police officers to check on the immigration status of individuals in police custody. See, e.g. Prince William's crackdown on illegal immigration, which requires police to check the immigration status of people in custody. Jerry Markon, *Judge Dismisses Suit On Illegal Immigration: Crackdown Could Still Face Challenge*, WASH. POST, Dec. 1, 2007 at B3.

²¹¹ See Immigration and Nationality Act (INA) § 240A; see also INA § 245 (codified at 8 U.S.C. 1255)

misconduct 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.²¹²

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 offences – 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. As respondents were leaving the immigration court building, they were re-arrested by the very same police officers, on criminal charges based solely upon evidence gathered during the first, allegedly unconstitutional immigration arrest.²¹³ 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.²¹⁴

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

²¹² See, e.g., *Navarro-Chalan v. Ashcroft*, 359 F.3d 19, 22 (1st Cir. 2004) (police actions were not egregious violations of 4th Amendment, so exclusionary rule did not apply in deportation proceedings); *U.S. v. Perez-Perez*, 337 F.3d 990, 994 (8th Cir. 2003) (information regarding defendant's identity and presence in United States not suppressible); *U.S. v. Del Toro Gudino*, 376 F.3d 997, 1001 (9th Cir. 2004) (same). See generally, Investigation and Police Practices, *The exclusionary rule*, 36 GEO. L.J. ANN. REV. CRIM. PROC. 193 (2007)

²¹³ See email from Rachel Bengston, Staff Attorney Centro Legal, Inc. in St. Paul, MN (Mar. 4, 2008) (“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.”)

²¹⁴ *Lopez-Mendoza*, 468 U.S. at 1038.

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-four years since *Lopez-Mendoza* was decided, the Justice Department's internal regulations have failed to prevent behavior by immigration officers that violate the Fourth and Fifth Amendments.²¹⁵ 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.²¹⁶ Nonetheless a considerable number of cases have been litigated in 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 interrogation, arrest, and detention of a suspect.²¹⁷ 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.²¹⁸ Regulations state that individuals may not be detained and subjected to custodial interrogation in the absence of "reasonable suspicion" that they have committed an

²¹⁵ See, e.g. Michael Wishnie, *Introduction -- The Border Crossed Us: Current Issues in Immigrant Labor*, 28 REV. L. & SOC. CHG. 389, 392 (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").

²¹⁶ 8 C.F.R. § 287 *et seq.*

²¹⁷ 8 C.F.R. § 287.8(a)(ii) (obligating ICE agents to use "the minimum non-deadly force necessary to accomplish the officer's mission [which] 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.")

²¹⁸ See, e.g. *Motion to Suppress & Affidavit filed in Immigration Court for Dionisio Chicas Moran*, US DoJ New York, NY at 3 ("[A]s I was about to leave for my job . . . I was stopped inside my apartment for about five armed men. These men threw me and my roommates on the floor and handcuffed us.") [hereinafter *Chicas Moran Motion*]; *Flores-Morales v. George and ICE*, No. 07-cv-00050 (M.D.Tenn.) (complaint filed July 27, 2007) and supporting affidavits ; *UFCW v. Chertoff*, No. 07-cv-00188 (N.D.Tex.) (class action complaint filed Sept. 12, 2007)

immigration violation.²¹⁹ Yet, in the same two year period a small but significant number of motions to suppress evidence and terminate proceedings have been won 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.²²⁰ Regulations specify that ICE officers may not enter residential premises without either a judicially-approved search warrant or consent by the occupants of the premises.²²¹ Yet, in many recent cases immigration respondents have filed motions to suppress evidence obtained during illegal, warrantless and nonconsensual searches of their homes.²²² In one instance an ICE agent, when asked to produce

²¹⁹ 8 C.F.R. § 287.8(b)(1) (providing that “[a]n 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.”); 8 C.F.R. § 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.”)

²²⁰ See, e.g. Motions to Suppress and Terminate, Memorandum of Law, and Supporting Affidavit filed in Immigration Court for Roberto Cervantes Valerio of Memphis, TN (“[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 of TX* at 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.”); Testimony of Michael Graves, Member of the United Food and Commercial Workers International Union (UFCW), Local 1149 Before The Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law For the Hearing: “ICE Interrogation, Detention, Removal Issues” February 13th, 2008 at <http://judiciary.house.gov/OversightTestimony.aspx?ID=1278> (“There was no legitimate reason. No probable cause. Our plant – our workplace – had been transformed into a prison or detention center.”) [hereinafter Graves testimony]

²²¹ 8 C.F.R. § 287.8(f)(2) (stating that “[a]n 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.”)

²²² See, e.g. See Declaration of X, Feb. 19, 2008, in support of Motion to Suppress and Terminate Proceedings filed in Hartford EOIR Feb. 25, 2008 ; *Mancha v. ICE*, No. 06-cv-12650 (N.D.Ga.) (complaint filed Nov. 1, 2006) ; Testimony of Marie Justeen Mancha before the House Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law Hearing on: “Problems with ICE Interrogation, Detention, and Removal Procedures” February 13, 2008 at <http://judiciary.house.gov/OversightTestimony.aspx?ID=1277> [hereinafter Mancha Testimony]; Affidavit filed in Immigration Court for Gonzalo Juarez of Newark, NJ at 2 (“The officer told me to ‘come inside.’ He did not ask me for permission to enter. I never gave permission for him to enter.”); *Border Network for Human Rights v. County of Otero*, No. 07-cv-10145 (D.N.M.) (complaint filed October 17, 2007) at 4 (“Defendants began targeting Hispanic families in their own homes by initiating random sweeps of trailers in the area.”)

a valid search warrant before entering residential premises, informed the inhabitants (incorrectly) that he did not need a search warrant to enter their home.²²³

The *Lopez-Mendoza* majority emphasized the training scheme adopted by INS to ensure that immigration officers adhered to their regulations,²²⁴ and present-day advocates of ICE similarly argue that ICE's current training regime deters violations of immigration respondents' fundamental rights.²²⁵ 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 United States citizen with learning difficulties, was apprehended by the Los Angeles police on a trespassing charge, handed over to ICE and mistakenly deported to Mexico. Guzman survived for three months wandering along the border, eating garbage and bathing in the Tijuana River, before finally convincing a border official to allow him to re-enter the United States.²²⁶ Guzman's case is but one of many examples of U.S. citizens being inadvertently deported.²²⁷ Dan 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.²²⁸

²²³ "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." Ward, *supra* n.78.

²²⁴ "New immigration officers receive instruction and examination in [Fourth Amendment](#) law, and others receive periodic refresher courses in law." *Lopez-Mendoza*, 468 U.S. at 1045.

²²⁵ See Ward, *supra* n. 83.

²²⁶ See Randall C. Archibold, *Deported in Error, Missing and Months Later Home*, N. Y. TIMES, Aug. 8 2007.

²²⁷ For a comprehensive discussion of this phenomenon, see Jacqueline Stevens, *Amid Anti-Immigrant Fervor, ICE Deporting More American Citizens*, THE NATION, June 10, 2008.

²²⁸ Dan Kanstroom argues that Guzman's case is far from unique. "We'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," Kanstroom says. "If they're

ICE's institutional response to these allegations that violations of INS legacy rules and regulations are presently occurring is to argue that INS regulations are no longer relevant. In at least one case, ICE attorneys have argued that ICE agents are not legally bound by INS rules and regulation because ICE is a new, distinct agency that need not adhere to INS legacy sub-regulatory rules and guidelines.²²⁹ The immigration defense bar has vigorously opposed this argument.²³⁰ 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' 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 2008.

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

deporting U.S. citizens by mistake, it's not a stretch to assume they're making other mistakes as well.'” Ward, *supra* n.83.

²²⁹ See Government Response to Respondent's Motion to Suppress Evidence and Terminate, Matter of X, EOIR Hartford CT, Feb. __ 2008, at 26 (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”) . This directly contravenes one of the guiding principles of administrative law, In accordance with which, the Homeland Security Act of 2002, Pub. L. 107-296 (2002), which created the Department of Homeland Security, transferred *all* of legacy INS's detention and removal functions to DHS. See 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 . . . (2) The detention and removal program.”).

²³⁰ See Respondent's Answer to Government Response to Respondent's Motion to Suppress Evidence and Terminate, Matter of X, EOIR Hartford CT, Mar. __ 2008

proceedings should be terminated.²³¹ However, the BIA and courts in other jurisdictions continue to adhere to the strict standard established in *Lopez-Mendoza*, and allow proceedings to continue and allow individuals to be deported, even when immigration officers have disregarded their own rules and regulations and violated respondents' Fourth and Fifth Amendment rights.²³²

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.²³³ Justice White’s words have proved to be prescient.²³⁴ 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 situation of the respondents themselves has changed radically over the past twenty-four years.

²³¹ See e.g. *Singh v. U.S. Department of Justice*, 461 F.3d 290, 296-97 (2d Cir. 2006) (violations of regulations or rules implicating fundamental rights warrant termination). See also *In re: Herrera-Priego* (ICE’s violation of an internal operations instruction that was transferred to the Special Agent’s Field Manual and which was designed to protect Respondent’s fundamental rights is grounds for termination of proceedings).

²³² See, e.g. *Matter of Hernandez*, 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 proceedings where there has been a violation of a DHS regulation).

²³³ *Lopez-Mendoza*, 468 U.S. at 1055 (White, J., dissenting).

²³⁴ 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 granting the relief noted that damage actions were especially unlikely to be brought because of the poverty and vulnerability of the population involved. *LaDuke v. Nelson*, 762 F.2d 1318 (9th Cir.1985), modified, 796 F.2d 309 (9th Cir.1986) (In which a class of migrant farm workers sued INS officials, alleging that the INS regularly searched migrant housing without warrants or even articulable suspicion that illegal aliens were present). Accord *Nicacio v. INS*, 797 F.2d 700, 702 (9th Cir.1985).

The vulnerability, social isolation and legal marginalization of immigrant communities have increased since 1984, with marked increases occurring in two distinct phases.²³⁵ The first phase began in 1990 when the Supreme Court ruled in *United States v. Verdugo-Urquidez*,²³⁶ and the second phase began in late 2001, in the aftermath of the terrorist attacks of 9/11.²³⁷ 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 United States law enforcement officers during an illegal, warrantless search of a Mexican citizen's home in Mexico.²³⁸ 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."²³⁹

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.²⁴⁰ Scholarly debate over the applicability of the *Verdugo-Urquidez*

²³⁵ See Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667 (2003) [hereinafter Wishnie, *Right to Petition*]. Section III.C of my article owes a considerable debt to Professor Wishnie's scholarship in this area.

²³⁶ *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

²³⁷ See generally Susan 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?* U.C. DAVIS L. REV. 609 (2005); Rachel Aldana & Sylvia Vargas, "Aliens" in our Midst Post-9/11: *Legislating Outsiderness Within the Borders*, 38 U.C. DAVIS L. REV. 1683 (2005);.

²³⁸ *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

²³⁹ *Id.* at 265.

²⁴⁰ See, e.g., *United States v. Vilar*, No. S3 05-CR-621 (KMK), 2007 U.S. Dist. LEXIS 26993 (S.D.N.Y. Apr. 4, 2007); *United States v. Bin Laden*, 126 F. Supp. 2d 264 (S.D.N.Y. 2000); see also *United States v. Barona*, 56 F.3d 1087, 1093-94 (9th Cir. 1995) (noting that post *Verdugo-Urquidez*, the applicability of the Fourth Amendment even to lawful resident aliens is "yet to be decided"); *United States v. Guitterez*, 18 Immigr. Rep. (MB) A3-26, A3-31 (N.D. Cal. 1997) (citing *Verdugo-Urquidez* in denying motion to suppress on grounds that criminal defendant was undocumented immigrant and not covered by Fourth Amendment), available at 1997 U.S. Dist. LEXIS 16446, *16-

holding to proceedings involving undocumented individuals present in the United States has been even more extensive and heated.²⁴¹ The most far-reaching interpretation of *Verdugo-Urquidez* would suggest that non-citizens have no Fourth Amendment rights.²⁴² Such an interpretation would render non-citizens 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 for 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.²⁴³

In the wake of 9/11 a number of statutory measures and agency schemes were introduced

17, vacated, 983 F. Supp. 905, 912-16 (N.D. Cal. 1998) (reversing prior ruling and holding undocumented defendant may invoke Fourth Amendment), rev'd on other grounds, 203 F.3d 833 (9th Cir. 1999) (unpublished table decision), available at 1999 U.S. App. LEXIS 32230; *Torres v. State*, 818 S.W.2d 141, 143 n.1 (Tex. Crim. App. 1991) (citing *Verdugo-Urquidez* and holding undocumented defendant may not raise Fourth Amendment objection to search or seizure), rev'd en banc on other grounds, 825 S.W.2d 124 (Tex. Crim. App. 1992).

²⁴¹ See, e.g., Corey M. Then, Note, *Searches and Seizures of Americans Abroad: Re-Examining the Fourth Amendment's Warrant Clause and the Foreign Intelligence Exception Five Years After United States v. Bin Laden*, 55 DUKE L.J. 1059 (2006); Victor Romero, *The Domestic Fourth Amendment Rights of Undocumented Immigrants: On Guitterez and the Tort Law/Immigration Law Parallel*, 35 HARV. C.R.-C.L. L. REV. 57, 60-61 (2000) (suggesting that *Verdugo-Urquidez* affects application of the Fourth Amendment to noncitizens facing prosecution in United States courts); Rene 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* because "[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"; 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); Matthew B. Kurek, Note, *United States v. Guitterez: A Functional Approach to a Vexing Issue*, 30 U. TOL. L. REV. 359, 381 (1999) (criticizing the "substantial connection" test of *Verdugo-Urquidez* as "inconsistent"); 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").

²⁴² At least one court has gone nearly this far. See *United States v. Esparza-Mendoza*, 265 F. Supp. 2d 1254, 1271-73 (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 [Isabel Medina, Latinos and the Law Symposium: Ruminations on the Fourth Amendment: Case Law, Commentary, and the Word "Citizen"](#) 11 HARV. LATINO L. REV. 189 (2008)

that further restricted the rights of “aliens” held by the federal government.²⁴⁴ The Supreme Court’s jurisprudence during the post-9/11 era similarly reflects a diminished concern with the violation of “aliens” constitutional rights. For example, in *Reno v. American-Arab Anti-Discrimination Committee*, 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.²⁴⁵ Michael Wishnie argues that *Verdugo-Urquidez* may also have influenced both the *Reno v. American-Arab Anti-Discrimination Committee* holding and the post-9/11 legislation,²⁴⁶ permitting deportation of immigrants on the grounds of speech,²⁴⁷ political affiliation²⁴⁸ and family connections.²⁴⁹

In the twenty-four 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

²⁴³ *Lopez-Mendoza*, 468 U.S. at 1055 (White, J., dissenting).

²⁴⁴ See Uniting and Supporting America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of U.S.C.); Absconder Apprehension Initiative, Deputy Attorney General Releases Internal Guidance for ‘Absconder’ Apprehensions, 79 Interpreter Releases 261, 261 (2002); National Security Entry-Exit Registration System (“NSEERS”) 8C.F.R. §264.1 (2008).

²⁴⁵ 525 U.S. 471 (1999). See also 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 v. American-Arab Anti-Discrimination Committee*, the Court] implied that aliens who were unlawfully present in the United States did not enjoy the protection of the First Amendment.”)

²⁴⁶ Wishnie, *Right to Petition*, *supra* n. ___ at ___, discussing the Uniting and Supporting America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of U.S.C.).

²⁴⁷ *Id.* Citing *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 491-92 (1999) (rejecting challenge to deportation of Palestinian activists based on speech and associational activities).

²⁴⁸ *Id.* Citing 8 U.S.C. § 1182(a)(3)(B)(i)(V) (2000) (establishing “membership” in certain organizations as grounds for inadmissibility); § 1182(a)(3)(B)(iv)(IV)-(V) (defining to “[e]ngage in terrorist activity” as including solicitation of funds or recruitment of personnel).

²⁴⁹ *Id.* citing § 1182(a)(3)(B)(i)(VII) (“[Any alien who] is the spouse or child of an alien who is inadmissible [as terrorist] is inadmissible”). 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 First Amendment challenge to deportation of alleged members of Communist Party); *Bridges v. Wixon*, 326 U.S. 135 (1945) (vacating deportation order that had been based on 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 Communist at time of application for citizenship); *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904)

to the INA limited judicial review of removal proceedings, leaving the petition-for-review process as the primary opportunity for recourse.²⁵⁰ The Court's construction of INA § 242(g) in *Reno v. American-Arab Anti-Discrimination Committee* effectively ruled out First Amendment actions by immigration respondents.²⁵¹ In 2008, the Bush administration has argued that INA §242 prevents immigration respondents from bringing Bivens claims for damages,²⁵² and the Second Circuit has found that it does not have jurisdiction to hear claims under the Torture Victim Protection Act by non-resident aliens who were mistreated by US officials and removed to nations where they were subjected to torture.²⁵³ 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 2008.²⁵⁴

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,

(rejecting First Amendment challenge to exclusion order against anarchist).

²⁵⁰ See INA 242(b)(9), (g); revisions to INA 279 (which some courts had previously held was an independent cause of action against the INS) and 2005 REAL ID Act changes to INA 242. See generally, Lenni B. Benson, *The New World of Judicial Review of Removal Orders*, 12 GEO. IMMIGR. L.J. 233 (1998); Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411 (1997); 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).

²⁵¹ 525 U.S. 471 (1999).

²⁵² *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

²⁵³ *Arar v. Ashcroft*, ___F.3d ___, 2008 WL 2574470 (2d Cir., June 30, 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. He brought an action against the United States and various U.S. officials pursuant to the Torture Victim Protection Act, 28 U.S.C. § 1350 note ("TVPA"), and the Fifth Amendment to the U.S. Constitution. The Court of Appeals held that the court lacked subject matter jurisdiction to reach *Arar's* other claims.

²⁵⁴ Although there are incidences of individuals seeking redress, they appear to be limited to the wealthy few able to afford legal representation. "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

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,²⁵⁵ 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.

CONCLUSION

Justice Blackmun's initial ambivalence about granting cert 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 2007 were immigration-related.²⁵⁶ A comprehensive immigration reform package, described by President Bush's Press Secretary Scott McClellan as a "top priority" in 2006,²⁵⁷ failed in 2007 after a Senate vote in which, as the Washington Post reported, "[t]he 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."²⁵⁸ In May 2006 hundreds of thousands of protestors marched in demonstrations throughout the United States, urging immigration reform, including

amount, which is the government's de facto acknowledgment that there was a mess-up," Hwang says." Ward, *supra* n.78.

²⁵⁵ *Supra* at 24 and n. 101.

²⁵⁶ See Julia Preston, More Illegal Crossings are Criminal Cases, Group Says, N.Y. TIMES, June 18, 2008.

²⁵⁷ See Carl Hurlse & Sheryl Gay Stolberg, *Senators to Reignite Debate on Immigration Reform*, N. Y. TIMES, Apr. 24, 2006.

²⁵⁸ 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. Sensenbrenner Bill. House Resolution 4437 of the 109th Congress, the Border Protection, Anti-terrorism, and Illegal Immigration Control Act of 2005; McCain-Kennedy Senate Bill 1033 of the 109th Congress, the Secure America and Orderly Immigration Act; The Specter Bill. Senate Bill 2611 of the 109th Congress, the Comprehensive Immigration Reform Act of 2006; Senate Bill 1348 of the 110th Congress, the Comprehensive Immigration Reform Act of 2007, The Secure Borders, Economic Opportunity and Immigration Reform Act of 2007). Three less than comprehensive immigration reform bills, have also failed. DREAM Act (2001-2007) (introduced in the 108th Congress as S. 1545 and H.R. 1684, in the 109th as S. 2075 and H.R. 5131, and in the 110th as S. 774 and H.R. 1275); SKIL Bill (2006); STRIVE Act (2007),.

groups of over 300,000 people in Chicago and over 400,000 in Los Angeles.²⁵⁹ In terms of jurisprudence, legislation, and popular opinion, immigration enforcement is one of the pre-eminent 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 Peter Schuck writes, “immigration 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.”²⁶⁰ 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 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.”²⁶¹

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,²⁶² because the immigration service’s internal rules might adequately deter Fourth Amendment violations by immigration officers,²⁶³ and because respondents whose rights were violated could

²⁵⁹ See CNN, Thousands March for Immigrant Rights, May 1, 2006 at <http://www.cnn.com/2006/US/05/01/immigrant.day/index.html>.

²⁶⁰ PETER SCHUCK, CITIZENS, STRANGERS, AND IN-BETWEENS 72 (1998)

²⁶¹ Op-Ed, *The Great Immigration Panic* N.Y. TIMES, June 3, 2008.

²⁶² *Lopez-Mendoza*, 468 U.S. at 1050.

²⁶³ 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.” *Lopez-Mendoza*, 468 U.S. at 1045

seek recompense in civil proceedings.²⁶⁴ However, as this article has demonstrated, in the 24 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.²⁶⁵ ICE officers across the country are disregarding their internal rules and engaging in widespread violation of individuals' constitutional rights.²⁶⁶ 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.²⁶⁷ As a consequence, 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.²⁶⁸

This article began with Justice Blackmun's observation that fewer than 50 allegations of constitutional violations in twenty seven years probably did not constitute a severe enough problem to warrant the Supreme Court granting cert. The number of allegations of constitutional violations in 2008—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 of *INS v. Lopez-Mendoza*. 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 four years—most notably

²⁶⁴ *But see* Justice White's dissent, *Lopez-Mendoza*, 468 U.S. at 1055 (discussed *supra* at 24 n. 101).

²⁶⁵ *See* discussion *supra* at 13-16.

²⁶⁶ *See* discussion *supra* at 17-21.

²⁶⁷ *See* discussion *supra* at 21-24.

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 non-citizens—it is now time to revisit the holding of *Lopez-Mendoza* and reintroduce the exclusionary rule in immigration proceedings.

²⁶⁸ See discussion *supra* at 24-37.

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

