ABSTRACT

This Comment sets forth the ways in which circumstances have changed since the Supreme Court’s decision foreclosing the blanket application of the exclusionary rule in immigration proceedings. It asserts that the exclusionary rule as conceived in the criminal context should be adopted in immigration enforcement because removal has effectively merged with the criminal punishment of individuals and, accordingly, can no longer be considered a civil penalty. Moreover, the changed circumstances of enforcement have led to widespread violations of the Constitution such that the exclusionary rule must be adopted.

Application of the Exclusionary Rule in Immigration Proceedings: Not Just Egregious Violations, Recommendations for Meaningful Protection of Civil Rights

I. INTRODUCTION

Early on a cold January morning in a quiet Oklahoma town, Carlos Estrada, his wife, and teenage son and daughter were asleep in their home of ten years when a team of ICE agents pounded on their front door.\(^1\) Hastily, Mr. Estrada answered the door, and agents entered the home.\(^2\) They handcuffed every member of the Estrada family and put them face down on the floor of their living room, guns drawn.\(^3\) Agents explained that Mr. Estrada had been under investigation for the last three years and showed Mr. Estrada surveillance pictures of himself at


\(^2\) *Id.*

\(^3\) *Id.*
his workplace from three years earlier. However, after agents compared an electronic fingerprint of Mr. Estrada with the man they were actually seeking, the agents realized that they had raided the wrong home, and targeted the wrong person. Even still, Mr. Estrada was ordered to produce a green card. He could not because he was a United States citizen. The Estrada family remained in handcuffs for another forty minutes before being released.

Stories like the Estradas’ are not rare; rather, tales of egregious violations of the civil rights of United States citizens and of noncitizens in the course of immigration enforcement are widespread. While the courts have applied the exclusionary rule in criminal law to deter the type of unlawful state action that traumatically affected the Estrada family, the Supreme Court has held that the rule will not generally apply to unlawful state action in the immigration enforcement context.

As an initial matter, it is important to note that legislative power and incident executive power is arguably at its height in the context of immigration law. Notwithstanding the general rule that the United States government is one of enumerated powers, the courts have resisted constitutional limitation of immigration laws basing this decision on the plenary power doctrine established in the case of Chae Chan Ping v. United States. There, the Supreme Court held that a federal law prohibiting immigration on the basis of race was permissible because the “power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United

4 Id.
5 Id.
6 Id.
7 Id.
8 Id.
11 130 U.S. 581 (1889).
States, as a part of those sovereign powers delegated by the Constitution.”

This holding and its progeny has established a nearly unassailable deference for Congress in immigration matters that has come to be called the plenary power doctrine.

Given the existence of the plenary power it is not surprising that the constitutional protections afforded persons in criminal proceedings do not generally extend into related immigration proceedings, opening the door to unlawful government action. For instance, while criminal suspects are guaranteed the Fifth Amendment right against self-incrimination and the right to an attorney in criminal proceedings, such rights are not as a matter of constitutional law afforded that same suspect should she be subject to the removal for related immigration reasons.

This outcome has been justified, in part, on the theory that removal from the country does not constitute a criminal punishment, but merely a civil one, the mere exercise of national sovereignty. This categorical approach, however, has lost legitimacy in an age where immigration law and criminal law, as a practical matter, have merged. The criminalization of immigration violations coupled with the inherently disruptive nature of physical removal from

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12 Id. at 581.
15 See, e.g., Fong Yue Ting v. United States, 149 U.S. 698 (1893) (holding that deportation is a civil matter such that criminal constitutional protections are not applicable).
the country challenges the assumption that immigration sanctions are civil and therefore require lesser standards of due process, or exemption from Constitutional limitation.\footnote{See generally Jacqueline Hagan et al., The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives, 88 N.C. L. REV. 1799 (2010).}

Despite the general reticence of the courts to acknowledge constitutionally mandated protections in immigration, the United States Supreme Court in \textit{INS v. Lopez-Mendoza} recognized the possibility for limited application of the exclusionary rule in immigration proceedings despite their purported civil nature for violations of Fourth Amendment rights in 1984.\footnote{See Matter of Sandoval, 17 I&N Dec. 70 (BIA 1979) (determining that the rule will not operate in immigration proceedings).} Since then, several of the Circuit Courts have found occasion to interpret \textit{Lopez-Mendoza} and articulate its import in immigration proceedings, including the application of the rule in at least one appellate case.\footnote{See Almeida-Amaral v. Gonzales, 461 F.3d 231 (2d Cir. 2006) (adopting egregious violations exception); Puc-Ruiz v. Holder, 629 F.3d 771 (8th Cir. 2010) (same). 2d Cir. case; 9th Cir. case.} However, the exclusionary rule remains sparingly and inconsistently applied and, therefore, ineffective deterrent of government violations of the Constitution in immigration law.\footnote{Elias, \textit{supra} note 10, at 1109.}

This Comment explores the application of the exclusionary rule in the immigration context. It sets forth the ways in which circumstances have changed since the Supreme Court’s decision on the issue, circumstances that now require the Court’s initial decision be reevaluated. Ultimately, this Comment asserts that the exclusionary rule should be fully adopted in criminal immigration enforcement without imposing the more stringent “egregious violations” standard because removal has effectively merged with the criminal punishment of individuals and, accordingly, can no longer be considered a mere civil penalty.

Even if immigration proceedings continue to be recognized as civil in nature, the changed circumstances of immigration enforcement have led to geographically and institutionally
widespread violations of the Constitution such that the exclusionary rule must be adopted pursuant to the Supreme Court’s own reasoning in *Lopez-Mendoza*. The courts should expressly recognize criminal constitutional protections in the immigration context. The Constitution demands it.

II. OVERVIEW

a. What is the Exclusionary Rule?

The exclusionary rule is a “judicially created evidentiary doctrine designed to deter” Fourth, Fifth, and Sixth Amendment violations by “prohibiting the admission of illegally obtained evidence at trial.” While the rule has commonly been applied to remedy constitutional violations of all three of these Amendments and others, it first developed in response to Fourth Amendment search and seizure violations. It was in the context of an unlawful seizure of evidence in the case of *Weeks v. United States*, that the rule was explicitly adopted as the prime tool for protecting the constitutional right against unlawful searches and seizures by the federal government. The rule was later fully incorporated and applied to state governments in *Mapp v. Ohio*.

The Court in *Mapp* reaffirmed the policies undergirding the doctrine, that is, the preservation of judicial integrity and to “compel respect for . . . constitutional guarant[ies] . . . by removing the incentive to disregard” them. The Court continued, “[n]othing can destroy a

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25 *Id.*
government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.”

While the foundational policy rationale was the preservation of judicial integrity, over time, the emphasis shifted toward deterrence alone such that the Supreme Court in *United States v. Janis* declared that the “prime purpose of the rule, if not the sole one,’ is deterrence” of illegal state conduct. The Court in *Janis* further held that the applicability of the exclusionary rule to novel facts has become a question of competing interests resolved through the weighing of those interests through a balancing test. This test requires the consideration of the social costs of exclusion of probative evidence against the likelihood and importance of deterring illegal state conduct.

Determination of the social costs and deterrence value of the rule in particular circumstances is fact dependent such that the weighing of costs and benefits will differ under different circumstances. Accordingly, “despite its broad deterrent purpose, the rule does not proscribe the use of illegally seized evidence in all proceedings or against all persons, and its application has been restricted to those areas where its remedial objectives are thought most efficaciously served.” Generally, “the exclusionary rule applies only in criminal” proceedings.

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26 *Id.* at 648.
28 *Id.* at 447.
29 *Id.* at 447.
While the prophylactic effect of the rule has been challenged on grounds that it does not, in reality, deter police misconduct,\textsuperscript{33} it is a long established principle that despite the “absence of supportive empirical evidence, [the Supreme Court has] assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it.”\textsuperscript{34} Moreover, the deterrent effect is intended not only to apply to field officers, but also intended to “encourage those who formulate law enforcement policies . . . to incorporate [constitutional] ideals into their value system.”\textsuperscript{35} Thus, the deterrence rationale remains the bedrock principle for permitting the suppression of otherwise probative evidence at criminal trials.\textsuperscript{36}


Criminal constitutional protections of the Fourth, Fifth, and Sixth Amendments apply, contrary to popular belief, to all persons and not simply United States citizens.\textsuperscript{37} This rule is based on the express language of the Amendments, where, for example, the Fourth Amendment applies to “the people,” and the Fifth Amendment applies to all “accused” of a criminal violation regardless of citizenship.\textsuperscript{38} Thus, there has been little debate that aliens apprehended for crimes and subject to criminal prosecutions are entitled, like citizens, to the protection of the


\textsuperscript{35}Id.

\textsuperscript{36}Id.


\textsuperscript{38}Cole, \textit{supra} note 47, at 370.
Constitution. Not surprisingly, given the fact that noncitizens are entitled to constitutional protection, the courts have applied the exclusionary rule in noncitizen criminal cases.

By contrast, there has been debate over the last three decades about the applicability of these constitutional rights in the context of immigration proceedings. Initially, however, the exclusionary rule was assumed to operate in such proceedings. It was only in 1979 that the Board of Immigration Appeals, the executive appellate body charged with reviewing immigration court decisions, in the precedential case of In re Sandoval, conclusively determined that the rule would have no deterrent effect in the immigration context and, in any event, would not apply in a civil “deportation proceeding.” The Supreme Court finally took up the issue itself in the 1984 case of INS v. Lopez Mendoza.

In Lopez-Mendoza, the Court answered the question of “whether an admission of unlawful presence in this country made subsequent to an allegedly unlawful arrest must be excluded as evidence in a civil deportation hearing.” Ultimately, applying the Janis balancing test, the Court concluded that deportation hearings generally would not warrant application of the rule, that is, the deterrent value does not outweigh the social cost of application.

In Lopez-Mendoza the Court first determined, importantly, that a deportation hearing is “purely a civil action . . . not to punish an unlawful entry, though entering or remaining

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39 Id.
43 Mulqueen, supra note 25, at 1166.
44 Lopez-Mendoza, 468 U.S. at .
45 Id. at 1034.
46 Id.
unlawfully in this country is itself a crime.”47 As a civil matter, then, the Court applied the Janis balancing test to determine the applicability of the exclusionary rule outside the criminal context.48 Ultimately, the Court found, citing that the social costs of applying the exclusionary rule in the immigration context were too high to warrant its application.49

Nevertheless, the Court, in Part V of the opinion joined by eight of the justices, provided that its 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 . . . [and] we do not deal here with egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.”50 This is the language with which the various circuit courts have struggled to understand and apply. Notably, the Court left open the door to potential future application of the rule recognizing the possibility of changed circumstances that could someday require its application to remedy widespread violations.

c. Circuit Court Approaches to the Lopez-Mendoza Egregious Violations Exception.

Following the Supreme Court’s decision in Lopez-Mendoza, the circuit courts that have had occasion to address suppression issues have developed two tests to determine whether state conduct rises to the level of egregiousness sufficient to overcome the general bar against the rule’s operation in the immigration context and require exclusion of evidence under the Lopez-Mendoza egregiousness exception.51 The first approach, adopted by the First,52 Second,53

47 Id. (emphasis added).
48 Id. at 1041.
50 Lopez-Mendoza, 468 U.S. at 1050–51.
51 See Mahoney, supra note 15, at 2.
52 See Kandamar v. Gonzales, 464 F.3d 65, 66 (1st Cir. 2006) (stating that the Supreme Court left only a “glimmer of hope of suppression” in removal proceedings); Mahoney, supra note 15, at 10.
Eighth, and now, Third Circuits look to the conduct of the offending government agents. Generally, the conduct-based approach is highly fact-dependent and limits application of the exclusionary rule in a way unknown in the criminal context.

The Ninth Circuit alone has adopted the second bad faith approach which provides that government action will constitute an egregious violation only where the offending officers acted in objective bad faith. While a showing of objective bad faith ostensibly appears to impose a stricter standard than that of the conduct-based approach, the Ninth Circuit has been criticized for its decision because it permits a relatively small unlawful government act to lead to exclusion if that conduct is proven to be intentional.

While the circuit split on the issue of how and when the exclusionary rule will apply in immigration proceedings is clearest when comparing the conduct-based and bad-faith approaches, the split runs deeper. The subtle differences articulated by the various conduct-based approach circuit courts creates discord in the law and confusion for immigration judges, immigration enforcement, citizens and noncitizens affected by the immigration system.

III. DISCUSSION

This Section argues that the egregious violation exception to the general bar on the application of the exclusionary rule in immigration proceedings has failed to abate sufficiently the violations of civil rights that occur in the course of immigration proceedings. It then argues that the Supreme Court should adopt the exclusionary rule in removal proceedings resulting from

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53 See Almeida-Amaral v. Gonzales, 461 F.3d 231 (2d Cir. 2006).
54 Puc-Ruiz v. Holder, 629 F.3d 771 (8th Cir. 2010).
55 Oliva-Ramos, 694 F.3d at 280.
56 See, e.g., Westover v. Reno, 202 F.3d 475 (1st Cir. 2000).
57 Lopez-Rodriguez v. Mukasey, 536 F.3d 1012 (9th Cir. 2008).
58 See generally Mahoney, supra note 15, at 12 (providing a summary of the criticism of the bad-faith approach).
59 See Mahoney, supra note 15, at 13 (stating that the split has left “Judges to decide ever more common motions to suppress without clear guidance.”).
60 Scharf, supra note 52, at 62.
criminal law infractions because the traditional characterization of removal proceedings and its potentially catastrophic consequences as merely civil is obsolete in light of the merging of criminal and immigration law. It should follow that because removal proceedings and removal itself cannot be considered merely a civil procedure and civil penalty, that the exclusionary rule must operate in removal proceedings as it does in criminal proceedings.

Even if the Supreme Court refuses to recognize the practical reality that removal proceedings are inextricably part of the criminal process today, the increased evidence of geographically and institutionally widespread civil rights violations in immigration enforcement has shifted the original Lopez-Mendoza balance such that the Court must apply the exclusionary rule in removal proceedings in order to deter these violations.

d. The Egregious Violations Exception is Insufficient

Despite the Supreme Court’s recognition that evidence obtained through egregious violations of constitutional rights warrant the application of the exclusionary rule, and the circuit courts’ recognition of that exception to the general bar on the application of the rule, this narrow standard has done little to deter civil rights violations. Abusive raids continue to occur in circuits that have yet to acknowledge the egregious violations exception.61 Even in jurisdictions that have acknowledged the exception, violations persist.62 Moreover, of the four circuits recognizing the exception, just one has itself granted a motion for suppression, thereby giving scant fact-based guidance to law enforcement, immigration judges, and those affected by enforcement.63 Further still, the conduct-based approach for determining egregiousness is often too difficult a

63 “The Ninth Circuit is the only circuit to have actually granted a motion to suppress in removal proceedings.” Augus, supra note 89, at 3.
standard to meet, where in many cases even where a violation has, in fact, occurred the courts have been unwilling to label it egregious.\textsuperscript{64} In order to deter effectively continuing violations, the Court must reassess its holding in \textit{Lopez-Mendoza} in light of the changed circumstances in immigration law and its enforcement and adopt the use of the exclusionary rule in its full form in at least those removals resulting from the conviction or admission of a crime for which removal is a consequence.\textsuperscript{65}

\textbf{e. Changed Circumstances: Effacing the Civil/Criminal Distinction}

Circumstances have changed dramatically since the Court’s decision in \textit{Lopez-Mendoza} such that the Supreme Court must reevaluate its 1984 opinion. Perhaps most importantly, immigration law has since converged with criminal law thereby eviscerating the categorical civil and criminal distinction on which the Court relied in \textit{Lopez-Mendoza}.\textsuperscript{66} “Immigration law today is clothed with so many attributes of criminal law that the line between them has grown indistinct.”\textsuperscript{67} The merger of these two substantive fields of law has occurred in three respects, “(1) the substance of immigration law and criminal law increasingly overlaps, (2) immigration enforcement has come to resemble criminal law enforcement, and (3) the procedural aspects of prosecuting immigration violations have taken on many of the earmarks of criminal procedure,” except recognition of the exclusionary rule for various constitutional violations.\textsuperscript{68}

\textsuperscript{64} Carcamo v. Holder, No. 11-3860 (8th Cir. 2012) (upholding the decision to deny suppression of evidence obtained after intentional, unreasonable search).

\textsuperscript{65} See Padilla v. Kentucky, 130 S.Ct. 1473, 1478 (2010) (recognizing that a guilty plea in criminal case led to automatic deportation).

\textsuperscript{66} See generally Stumpf, supra note 19.

\textsuperscript{67} Id. at 376. See also Mulqueen, supra note 25, at 1171 (providing an overview of the “criminalization of immigration.”).

\textsuperscript{68} Stumpf, supra note 19, at 381. See also Teresa A. Miller, \textit{Citizenship & Severity: Recent Immigration Reforms and the New Penology}, 17 GEO. IMMIGR. L.J. 611, 612 (2003) (describing the effect that immigration reform has had in “enhance[ing] the role of law enforcement,” and criminal penalty in immigration).
First, the substantive law of immigration and criminal law has merged significantly over
the last several decades.\textsuperscript{69} Until the 1920s, the United States did little to extricate persons
entering the country without inspection.\textsuperscript{70} Instead, the government sought to deport only those
aliens who had been convicted in the United States for crimes of moral turpitude, serious crimes
including drug trafficking, rape, and murder.\textsuperscript{71}

Congress, however, has progressively enlarged the list of crimes for which an alien could
be deported.\textsuperscript{72} In addition to the growing number of crimes for which removal is an additional
penalty, Congress has now criminalized what were previously only civil immigration
violations.\textsuperscript{73} There is an array of minor crimes that can place an individual in removal
proceedings including “minor possession of drugs, petty theft, shoplifting, jumping a subway
turnstile, and pulling someone’s hair.”\textsuperscript{74} Additionally immigration law has been used
pretextually to accomplish government goals that would otherwise violate the Constitution.\textsuperscript{75}

Second, immigration enforcement has come to resemble general law enforcement.\textsuperscript{76} In
fact, “the immigration enforcement arms of DHS constitute the largest armed federal law
enforcement body.”\textsuperscript{77} Alarmingly, immigration prosecutions outnumber all other types of

\begin{itemize}
  \item \textsuperscript{69} Stumpf, supra note 19, at 381. See also Stumpf, \textit{Doing Time: Crimmigration Law and the Perils of Haste}, 58 UCLA L. REV. 1705, 1726 (2011) (providing information regarding the intersection of criminal and immigration law).
  \item \textsuperscript{70} Stumpf, \textit{supra} note 19, at 382.
  \item \textsuperscript{71} \textit{Id}.
  \item \textsuperscript{72} \textit{Id}.
  \item \textsuperscript{73} \textit{Id}.
  \item \textsuperscript{74} \textit{Id}.
  \item \textsuperscript{75} \textit{Id}.
  \item \textsuperscript{76} \textit{Id}.
  \item \textsuperscript{77} \textit{Id}.
\end{itemize}
federal criminal prosecutions, including prosecutions for drugs and weapons violations.”

Additionally, “enforcement has also begun to break down the traditional divide between federal control over immigration and state dominance of criminal law.” This divide has been bridged, in part, by the use of section 287(g) agreements which permit local police to enforce federal immigration law. These agreements have been subject to wide criticism due to the potential for local law enforcement to use immigration law as a pretext for general law enforcement.

Third, immigration law procedure increasingly parallels criminal law, though they defer, importantly, in that significant constitutional limitations remain absent for immigration proceedings. Like in criminal proceedings, immigration proceedings require the presentation of evidence, and the role of prosecutor and adjudicator. Additionally, while an alien is awaiting disposition of her case, she may be detained at an immigration detention facility, much like a criminal defendant might be held at a jail.

While the Supreme Court in *Lopez-Mendoza* ultimately held that removal is a civil matter, in other cases, it has acknowledged the disruptive nature of removal, a penalty with potentially “grave” consequences, and sometimes more grave than incarceration. The “criminalization of

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79 Stumpf, supra note 19, at 389.
80 Chacon, supra note 15, at 1582–86.
81 See Chacon, supra note 15, at 1616 (stating “it is . . . unsurprising that state and local participation in immigration enforcement pursuant to section 287(g) agreements has generated criticisms.”).
82 Stumpf, supra note 19, at 391. See also Kohli, supra note 115, at 4 (noting that “individuals who enter deportation proceedings through Secure Communities and similar programs experience even more limited due process rights and protections.”).
83 Stumpf, supra note 19, at 391.
84 Id.
immigration” has moved removal from what was once, perhaps accurately, considered a “civil proceeding” with civil consequences closer to traditional criminal punishment.\textsuperscript{86}

The Court itself has recognized that “[d]eportation . . . is a grave sanction,” and that “this Court has long recognized, ‘[t]hat deportation is a penalty-at times a most serious one—cannot be doubted.’”\textsuperscript{87} “Deportation places the liberty of an individual . . . at stake [and] [t]hough deportation is not technically a criminal proceeding, it visits a great hardship on the individual.”\textsuperscript{88} It has a “far harsher impact . . . than many [criminal] punishment[s] [since] [u]prooting the alien from home, friends, family, and work would be severe regardless of the country to which the alien was being returned; breaking these attachments inflicts more pain than preventing them from being made.”\textsuperscript{89}

That removal often follows a conviction of or admission to a gamut of crimes of varying severity, the contention that removal is a mere civil penalty cannot stand.\textsuperscript{90} The integration of criminal and immigration law has effaced the traditional characterization of removal proceedings’ as merely civil such that the exclusionary rule must be adopted to deter the state from engaging in practices that are unlawful under criminal law, but tolerated in immigration law. This Comment urges the Supreme Court to acknowledge these changed circumstances and sanction the use of the exclusionary rule to deter unlawful state conduct in removal proceedings instituted as a result of criminal immigration enforcement action.

\paragraph{f. Widespread Violations of Civil Rights have Altered the Balance}


\textsuperscript{87} Am.-Arab Anti-Discrimination Comm., 525 U.S. at 497–98 (1999).

\textsuperscript{88} \textit{Id.} at 498 (citing G. Neuman, \textit{Strangers to the Constitution: Immigrants, Borders, and Fundamental Law} 162 (1996)) (internal quotations omitted).


\textsuperscript{90} See Padilla, 130 S.Ct. at 1483 (recognizing the grave immigration consequences that a criminal conviction may have).
Even if the Court refuses to recognize that the line between criminal law and immigration law has effectively vanished, the existence of widespread civil rights violations requires the Court to revisit the issue of the applicability of the exclusionary rule in immigration proceedings pursuant to its decision in *Lopez-Mendoza*. Again, the Court reserved the right to revisit the exclusionary rule in immigration proceedings stating that “[o]ur 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.”

The modern immigration enforcement regime has, in fact, engendered widespread violations of citizen and non-citizen constitutional rights. The conflation of substantive and procedural aspects of criminal and immigration law coupled with the inherently disruptive nature of immigration enforcement has resulted in ambiguities regarding the proper bounds of criminal law and immigration law. Without guidance from the Supreme Court regarding this boundary, if one exists at all, immigration enforcement authorities readily violate the civil rights of United States citizens and noncitizens. An examination of the Secure Communities immigration enforcement program provides a poignant illustration of the geographic breadth of the problem.

The program has had a “troubled history” since its inception. When the program debuted, it was adopted in just fourteen jurisdictions, but since has expanded to forty four states and territories, DHS further plans to expand its reach to all United States jurisdictions by the end

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92 *Lopez-Mendoza*, 468 U.S. at 1050.
94 See *supra* notes 117–23 and accompanying text.
95 See *supra* notes 106–27 and accompanying text.
96 See Secure Communities, IMMIGRATIONS CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/ (last visited, May 1, 2013) (providing general information regarding the program).
of 2013. The report, additionally, provides several key finds including that approximately 3,600 United States citizens have been arrested by ICE agents under the program; and eighty three percent of those arrested through the program are placed in ICE detention facilities compared with sixty two percent of the general population. More alarming, however, is that although ICE claims to prioritize the removal of severe criminal offenders over non-criminals and lesser criminal offenders, more than half of those removed had no criminal convictions or only minor criminal convictions including traffic violations.

In 2012 alone ICE removed 409,849 individuals, a record high. Analysis of government immigration data reveals that in 2012, 834 citizens were targeted for detention through the issuance of detainers against them. This data “indicates that a substantial number of U.S. citizens may be affected,” by immigration enforcement actions. Of course, “[i]t is illegal for DHS to detain U.S. citizens, and to do so is significant violation of their constitutional rights.” Additionally, eighty two United States citizens were determined to be wrongfully detained at an Arizona immigration detention facility for an average of one year before being released in 2011. With an estimated persistent rate of one to two percent of wrongful detention of United States citizens by immigration authorities, and a daily immigration

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98 Id. at 3. Secure Communities was instituted by DHS in 2008 and intended to be the “new face of immigration enforcement.” Id.
99 Id. Researchers also found that the “dataset suggests that [a group of United States citizens] were wrongfully apprehended for civil deportation.” Id.
100 Kohli, supra note 114, at 1.
101 Id. at 3.
103 Who Are the Targets of ICE Detainers, TRAC IMMIGRATION (Feb. 20, 2013) http://trac.syr.edu/immigration/reports/310/.
104 Id.
105 Preston, supra note 142. See generally Stevens, supra note 14 (providing an explanation of the phenomenon).
106 Stevens, supra note 14, at 628, 632.
detention population of nearly 34,000 spread over 350 facilities across the country,\textsuperscript{107} it is highly likely that the problem of unlawful detention spans the entire geography of the nation. Not surprisingly, the breadth of these violations is mirrored by widespread institutional deficiencies.

The geographic breadth of the violations is paralleled by institutional problems and illustrative is the increased use of the National Crime Information Center to database civil immigration infractions (hereinafter “NCIC”).\textsuperscript{108} While the NCIC is intended “to provide a computerized database for ready access by a criminal justice agency making an inquiry and for prompt disclosure of information in the system from other criminal justice agencies about crimes and criminals,”\textsuperscript{109} it has been used to document civil immigration infractions and used by local law enforcement as the basis for arrest and detention of persons.\textsuperscript{110} Even in jurisdictions that prohibit local police from using NCIC for these purposes, some police nevertheless do.\textsuperscript{111} Other intuitional problems include the lack of required immigration training for local police enforcing immigration laws pursuant to duly executed section 287(g) agreements.\textsuperscript{112} A DHS audit of the Secure Communities program in 2012, for instance, revealed that in approximately six percent of cases, agents failed to properly document data regarding enforcement actions, and in three percent of cases, agent enforcement actions did not align with ICE enforcement policies.\textsuperscript{113}

Perhaps the most explicit evidence of the breadth of the institutional deficiencies is the discovery of two internal ICE memoranda setting arrest quotas and urging ICE agents to increase

\textsuperscript{107} Immigration and Custom Enforcement Detention Bedspace Management, DEP’T OF HOMELAND SEC. OFFICE OF INSPECTOR GEN. 1, 2 (Apr. 2009), http://www.oig.dhs.gov/assets/Mgmt/OIG_09-52_Apr09.pdf.

\textsuperscript{108} Id. at 1136.


\textsuperscript{110} Elias, supra note 10, at 1136.

\textsuperscript{111} Id.

\textsuperscript{112} Id. at 1137.

their arrests.\textsuperscript{114} In one memorandum, the head of ICE detention and removal operations, wrote that “despite record deportations of criminals, the overall number of removals was down . . . [and that] total deportations were set to barely top 310,000, well under the Agency’s goal of 400,000.”\textsuperscript{115} This memorandum continued to detail strategies that field agents should employ to meet the Agency’s numerical goal.\textsuperscript{116} Similarly, in 2006, a memorandum from ICE officials was sent to ICE fugitive operations teams increasing the then annual arrest quota from 125 to 1,000 per team.\textsuperscript{117} Thus, evidence suggests that civil rights violations are geographically widespread, and engendered by institutionally widespread procedural deficiencies and poor oversight.\textsuperscript{118}

With this evidence, it appears that the deterrent value of the exclusionary rule, today, outweighs its social costs. First, the likelihood of deterrence of unlawful immigration enforcement conduct is high for federal ICE agents, local law enforcement, and the enforcement officials who set agency policies. Among the factors that the Court in \textit{Lopez-Mendoza} cited that lessened the deterrent effect at that time was that government agents were not likely to alter their behavior due to the low number of contested removal hearings.\textsuperscript{119} Today, however, more than half of all removals are contested, thus, suppression of unlawfully obtained evidence would likely now have an impact on field agent behavior.\textsuperscript{120} Additionally, local law enforcement that now uses immigration charges to detain and remove persons would be wary to engage in unlawful conduct knowing that any evidence seized as a result of that conduct would be equally

\textsuperscript{115} \textit{Id}. (internal quotations omitted).
\textsuperscript{116} \textit{Id}.
\textsuperscript{117} \textit{Id}.
\textsuperscript{118} Elias, \textit{supra} note 10, at 1140.
\textsuperscript{119} See Melissa Crow, \textit{Lopez-Mendoza Reconsidered: The Changing Face of Immigration Enforcement}, AMER. IMMIGR. LAWYERS ASS’N (Dec. 18, 2012), http://www.ailaslipinionblog.org/ (providing that today, more than ninety percent of removals are contested).
\textsuperscript{120} \textit{Id}.
inadmissible for removal purposes as it would be for criminal prosecution purposes. 121 Finally, in the Court’s initial formulation, it neglected to consider the deterrent effect of suppression on the policymakers which has been a factor in determining the deterrent value in other contexts. 122

Second, the social costs of the rule’s application have lessened. While the Court in Lopez-Mendoza focused on the social cost of permitting a released alien whose mere presence in the United States unlawfully constituted an ongoing crime, 123 it neglected to consider the social costs of failure to abate civil rights violations. 124 Justice White’s dissent in Lopez-Mendoza noted that the law provides that entry without inspection constitutes a misdemeanor, but that the crime does not continue after the initial entry. 125 Moreover, the unlawful presence of an individual in the United States imposes little immediate costs, 126 though her removal requires public financial expenditure 127 and causes detriment to the community in which she lived. 128

These considerations tip the scales such that the deterrent value now outweighs the social costs. Notwithstanding the evidence of widespread violations, critics of the exclusionary rule often cite the availability of alternate remedies to unlawful state action, and ICE’s ability to police itself as reasons for its inapplicability in immigration law.

IV. CONCLUSION

The twenty nine years since the Supreme Court initially decided that the exclusionary rule would not apply in removal proceedings has seen the unprecedented integration of criminal

121 See supra notes 114–16 and accompanying text.
123 Lopez-Mendoza, 468 U.S. at 1039.
124 Mulqueen, supra note 25, at 1199.
125 Lopez-Mendoza, 468 U.S. at 1057 (White, J., dissenting).
127 See, e.g., Griggs, supra note 102, at 62 (providing that the cost of one raid cost $5.2 million dollars).
128 See Mulqueen, supra note 25, at 1199 (stating that unlawful enforcement tactics raise economic and safety concerns as well).
and immigration law, and the growth of widespread civil rights violations in the course of its enforcement. The impact of these developments plays out in the lives of thousands of Americans and noncitizens in stories like that of the Estrada family with which this Comment began. Such stories are too frequent and must be deterred.

As this Comment hoped to make clear, the confluence of criminal and immigration law has undercut the now decades old assumption that removal proceedings and removal are merely civil in nature. This alone suggests that the exclusionary rule must operate; however, even if removal remains a civil action, the now copious evidence of widespread violations requires the Supreme Court to reevaluate its initial decision in Lopez-Mendoza. The deterrence value of the application of the exclusionary rule now outweighs its social cost. In fact, the social cost of failure to deter civil rights violations is untenable; the Court should require the operation of the exclusionary rule in immigration proceedings to suppress unlawfully obtained evidence.