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"The history of American freedom is, in no small measure, the history of procedure."[1]

INTRODUCTION

Within the last decade, the number of illegal aliens present in this country without proper documentation has increased dramatically.[2] The Immigration and Naturalization Service (INS), respon-

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1. Justice Frankfurter in Malinski v. New York, 324 U.S. 401, 414 (1945).

2. This phenomenon is attributable to Western Hemisphere quota restrictions adopted in the Act of October 3, 1965, 79 Stat. 911, *amending* 8

sible for enforcing the immigration laws, has been taxed in its effort to control the influx of undocumented aliens. Pressured by a citizenry protective of their magnetic labor market, the INS has striven to develop increasingly efficient tactics for the apprehension and deportation of illegal aliens. At their worst, these tactics have taken the form of "Gestapo-like" dragnets, carried on before dawn in factory dormitories.[3] Only slightly less unpalatable was the practice of detaining individuals in public places on the basis of their physical appearance.[4]

In response to the Service's sometimes overzealous approach to apprehension of aliens without proper status, the courts have set down standards by which INS enforcement practices are to be gauged.[5] This new substantive law is rooted in the fourth amendment, which protects people within the United States from illegal search and seizure by government officials. Basically, the decisions hold that an INS officer cannot interrogate an alien without reasonable suspicion of alienage based on articulable facts and may not search a vehicle without "probable cause," except at the border.

In practice, this recent development in the substantive law has afforded the alien a new opportunity to contest deportation. Now, the conscientious attorney will closely investigate the circumstances of the arrest, and if he discovers an impropriety which has violated his client's constitutional rights, he will attempt to have all evidence that stems from the illegal arrest suppressed during the deportation hearing. However, a major impediment to this new legal tactic is that despite the emergence of progressive and enlightened substantive law, there has been no correlative development in the procedure of the deportation hearing, the forum in which the substantive law is applied.

U.S.C. § 1151(a) (1952). Prior to that Act, there were no restrictions on the number of Western Hemisphere aliens, and legal entry was more readily available. The problem may now be compounded by the 20,000 per country limit imposed by the Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, § 3 (Oct. 20, 1976), *amending* Immigration and Nationality Act § 202, 8 U.S.C. 1152 (1970) [The Immigration and Nationality Act is hereinafter cited as I. & N. Act.] For a discussion of the 1976 Amendment, see *Afterword: The Immigration and Nationality Act Amendments of 1976*, 14 SAN DIEGO L. REV. 326 (1976).

3. *See* Illinois Migrant Council v. Pilliod, 398 F. Supp. 882 (N.D. Ill. 1975), in which such activities were enjoined.

4. *See* United States v. Brignoni-Ponce, 422 U.S. 873 (1975), in which mere appearance was rejected as justification for questioning and detaining individuals about their status within the United States.

5. *See generally* Fragomen, *Searching for Illegal Aliens: The Immigration Service Encounters the Fourth Amendment*, 13 SAN DIEGO L. REV. 82 (1975) [hereinafter cited as Fragomen, *Fourth Amendment*].

As will be discussed below, existing procedural requirements and regulations pursuant to section 242(b) of the Immigration and Nationality Act (Act)[6] provide no formal mechanism for invoking an alien's fourth amendment rights in deportation proceedings. The illegal arrest argument is thus an uphill and potentially dangerous struggle for the alien. This article will examine the obstacles and pitfalls which an alien will confront as he asserts his substantive fourth amendment rights.

THE SUBSTANTIVE LAW—A SUMMARY[7]

Section 287(a) of the Act authorizes INS officers to take certain

6. I. & N. Act, § 242(b), 8 U.S.C. 1252(b) (1970) establishes the minimum requirements for due process in deportation proceedings. The section also authorizes the Attorney General to set forth additional regulations concerning procedure. These additional regulations are found in 8 C.F.R. § 242 *et seq.* (1976).

7. For a fuller explication of the applicable substantive law, see Fragomen, *Fourth Amendment*; Recent Development, *Alien Checkpoints and the Troublesome Tetralogy:* United States v. Martinez-Fuerte, 14 SAN DIEGO L. REV. 257 (1976). In a recent decision, United States v. Martinez-Fuerte, 96 S. Ct. 3074 (1976), the Court held that a section 287(a)(1) interrogation could be carried out without reasonable suspicion at *permanent checkpoints*, because the Government's interest in expeditiously apprehending aliens outweighed the intrusion at a checkpoint which—unlike the interference perpetrated by roving patrols—is subjectively free of "generating . . . concern or even fright on the part of lawful travelers." *Id.* at 3083. Apparently, the Court believes that notice of impending interrogration diminishes the impact of the encroachment. However, it is clear from the facts of the *Martinez-Fuente* decision that the fixed check location would meet the "functional equivalency" criteria that would justify seizures. (The Court in *Martinez-Fuente* specifically noted that the checkpoints were at the junction of two highways leading from the border and at points not easily circumvented. These criteria are identical to the definition of "functional equivalent" articulated in United States v. Almeida-Sanchez, 413 U.S. 266 (1973). 96 S.Ct. at 3084 n. 15). Therefore, it is doubtful that this decision detracts from the broad effect of United States v. Brignoni-Ponce, 422 U.S. 873 (1975) in the border vicinity. (The Court explicitly said that their holding was "limited to the types of stops described in this opinion." 96 S. Ct. at 3087. For a discussion of the larger implications of *Brignoni-Ponce*, see Fragomen, *Fourth Amendment*, at 103-10, where the author argues that *Brigoni-Ponce* must be applied to other tactics (such as street encounters) which the INS practices. The basis for this argument is found in lower court decisions subsequent to *Brignoni-Ponce*, such as Cheung Tin Wong v. INS, 468 F.2d 1123 (D.C. Cir. 1972), and Illinois Migrant Council v. Pilliod, 398 F. Supp. 882 (N.D. Ill. 1975).) Moreover, there can be no doubt that this decision has no effect on street arrests and interrogations in urban areas. The Court in *Martinez-Fuerte* carefully noted the strategic

measures, without a warrant, which Congress believes will expedite the apprehension of "illegal aliens."[8] Section 287(a)(1)[9] empowers an agent to "interrogate any alien or person believed to be an alien as to his right to be" in this country. Section 287(a)(2)[10] permits a warrantless arrest of an alien who the INS officer believes is in the act of entering the United States illegally or is present illegally and will escape before a warrant may issue. Section 287(a)(3) authorizes vehicular searches without warrant, if the search takes place within a "reasonable distance" from the border.

In summary fashion, the substantive law applicable to section 287(a) is: First, a section 287(a)(1) interrogation may take place in an area other than the border or its functional equivalent only if the agent has reasonable grounds to suspect that the individual to be interrogated is an alien or, perhaps, is an illegal alien; second, a section 287(a)(3) search of vehicles is permissible only if the searching agent has probable cause to believe that the passengers are illegally in this country.

These substantive qualifications on an agent's authorization to use certain apprehension methods permit a new tactical approach for aliens in deportation hearings. The lawfulness of the interrogation or search must be inspected first and if improper, challenged during the course of the proceeding.

Procedural Law of Deportation Hearings

The Civil/Criminal Dichotomy

At the outset, the courts' view of deportation must be understood. Despite compassionate language that deportation is harsh punish-

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position and high success ratio of the checkpoints in question. These considerations, in combination with the Court's solicitousness for notice, indicate that random urban street interrogations, where agents stop pedestrians in subways or at factory gates, will not be tolerated unless "founded suspicion" can be shown. (It is equally doubtful that a permanent pedestrian checkpoint in lower Manhatten or any other urban area would be sanctioned. The Court wrote that the reasonableness of checkpoint stops "turns on factors such as the location and method of operation of the checkpoint." 96 S. Ct. at 3006. A checkpoint which seriously disrupts local activity (as would any fixed station in the middle of a city) would probably not be reasonable in its operation or location.)

8. I. & N. Act, § 287(a), 8 U.S.C. § 1357(a) (1970).

9. *Id.* § 1357(a)(1).

10. *Id.* § 1357(a)(2). Section 287(a)(2) does apply to this discussion, but the focus will be on sections 287(a)(1) and (3) merely because they come up more often. *See* Fragomen, *Fourth Amendment* 117.

ment, courts have consistently held that deportation is a civil proceeding.[11] The basis for this conclusion is that however harsh deportation may be, it is not punishment for a crime. In *Fong Yue Ting v. United States*,[12] the Supreme Court ruled that Congress, as spokesperson for a sovereign nation, has the power to exclude or expel aliens. The Court concluded that the conditions which require deportation in a particular case do not punish the individual deportee, but merely regulate the presence of aliens within our borders.[13] Later decisions have relied upon this reasoning as if it were a litany.[14]

It is inane to argue that from the deportee's perspective, he does not receive severe treatment. Long-time residents with roots and family here may be deported because of a few months' participation in the Communist Party which occurred years before.[15] More of-

11. In Ng Fung Ho v. White, 259 U.S. 276, 284 (1922), Justice Brandeis wrote that deportation may result in the loss "of all that makes life worth living." *See also* Fong How Tan v. Phelan, 333 U.S. 6, 10 (1948); Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947); Bridges v. Wixon, 326 U.S. 135, 147 (1945); Lennon v. INS, 527 F.2d 187, 193 (2d Cir. 1975); Lieggi v. INS, 389 F. Supp. 12, 17 (N.D. Ill. 1975), *rev'd*, 529 F.2d 530 (7th Cir. 1976). Commentators have expressed differing views about the soundness of classifying deportation as a civil penalty. *Compare*, Appleman, *Right to Counsel in Deportation Proceedings*, 14 SAN DIEGO L. REV. 130, 131-32 (1976), *with* Recent Development, *Deportation of an Alien for a Marijuana Conviction Can Constitute Cruel and Unusual Punishment*, Lieggi v. United States Immigration and Naturalization Service, 13 SAN DIEGO L. REV. 454, 456-58 (1976).

12. 149 U.S. 698 (1893).

13. The Court stated at 149 U.S. at 730:

> The order for deportation is not punishment for crime. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority, and through the proper departments has determined that his right to reside here shall depend. He has not, therefore, been deprived of life, liberty or property without due process of law . . . .

14. *E.g.*, Harisiades v. Shaughnessy, 342 U.S. 580 (1952); United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149 (1923); Bugajewitz v. Adams, 228 U.S. 585 (1913); Zakonaite v. Wolf, 226 U.S. 272 (1912). For criticisms of this view, see Note, *Resident Aliens and Due Process*, 8 VILL. L. REV. 566 (1963); Recent Development, *supra* note 11, at 454-58.

15. *E.g.*, Harisiades v. Shaughnessy, 342 U.S. 580 (1952), in which one alien, Mascitti, was deported for Communist Party membership that he had terminated sixteen years before a warrant for his deportation was issued.

ten, aliens who enter covertly and do not have proper documentation may suffer the consequences of deportation, which usually include a forfeiture of the possibility of ever being able to work or live in this country again. The courts, however, have not chosen to examine the issue of punishment from the eyes of the deported. Instead, they apparently have examined the intent of the lawmakers who drafted the statute.

Whether a statute is civil or criminal in nature presents deep philosophical questions. In cases which do not involve deportation, some courts have determined that a sanction must be considered punishment if its victim suffers deprivation.[16] Recent decisions, however, have held that a statute does not entail "punishment," and is therefore not criminal, unless Congress meant to punish those whom the statute affects.[17] Given the reasoning of *Fong Yue Ting* and its progeny that Congress meant to regulate, not to punish, pursuant to its sovereign powers, the syllogism almost binds deportation to the realm of civil proceedings.[18]

Actually, however, deportation is punishment, and Congress fully appreciates that fact. The Act contains several sections which provide relief from deportation: voluntary departure;[19] waiver of the section making fraud in obtaining a visa a deportable offense;[20] waiver of past and future inadmissibility;[21] and suspension of deportation.[22] The scheme for relief usually requires a strong showing by the alien that such relief is warranted by the equities of the particular case. As a jurisdictional prerequisite, the relief statutes establish requirements for an alien to apply for discretionary

16. *E.g.*, Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1868).

17. *See* Trop v. Dulles, 356 U.S. 86 (1953), and Kennedy v. Martinez-Mendoza, 372 U.S. 144 (1963), in which the Court was examining what it considered to be regulatory schemes on their face, but penal provisions in intent. Because the intent of the legislature was to punish, the Court in those cases said the statutes had a criminal nature.

18. The legislative history of the I. & N. Act, 8 U.S.C. § 1101 *et seq.* (1952), which consolidated all the laws on immigration, naturalization, and nationalization, does not explicitly indicate that Congress intended to attach either a penal or a civil nature to deportation. The section on historical background emphasizes the control and regulatory aspects of this exercise in sovereign power, and an argument from the legislative history that congressional intent *was* to punish seems all but foreclosed. *See* H. R. REP. No. 1365, 82d Cong., 2d Sess. 128 (1952); U.S. CODE CONG. & ADMIN. NEWS 1653 (1952).

19. I. & N. Act § 242(b), 8 U.S.C. § 1252(b) (1970) (voluntary departure before deportation proceeding); *id.* § 244(e), 8 U.S.C. § 1254(e) (voluntary departure during deportation proceedings).

20. *Id.* § 241(f), 8 U.S.C. § 1251(f).

21. *Id.* § 212(c), 8 U.S.C. § 1182(c).

22. *Id.* § 244(a), 8 U.S.C. § 1254(a).

treatment. For instance, in the case of voluntary departure, an alien cannot request discretionary consideration if he is found deportable because of criminal, prostitution, subversive, narcotics, or registration violations.[23] Moreover, if voluntary departure is requested during the deportation hearing, he must also demonstrate that for the five years preceding the hearing, he had a good moral character.[24] If an alien seeks suspension of deportation, he must show that he has been here a certain length of time (seven to ten years), that his deportation will work extreme hardship on his immediate family, and that he possessed a good moral character during his presence in the United States.[25]

The sense of both the relief provisions and the requirements which premise their applicability to a specific individual is transparent. If an individual is a criminal or what the statutes consider a socially undesirable element, he is not considered for relief from deportation. All other individuals have the privilege of appealing to the discretion of the immigration judge. The long-term effect of this distinction is that the former class of aliens (the criminals, etc.) will never return to this country, but the latter class (to whom, for example, voluntary departure is available) has good opportunity to return legally. It is thus obvious that in addition to establishing a general regulatory scheme, Congress intended to particularly punish those whom it considered morally bankrupt. Imprisonment[26] is a way to remove undesirable elements from society; no one questions that incarceration constitutes punishment.

23. *Id.* § 242(b), 8 U.S.C. § 1252(b); *id.* § 244(e), 8 U.S.C. § 1254(e).

24. *See* Roberts, *Sex and the Immigration Laws*, 14 SAN DIEGO L. REV. 9 (1976).

25. I. & N. Act § 244(a), 8 U.S.C. § 1254(a) (1970).

26. If an alien (who is not a convicted criminal, a political subversive, dangerous to the public welfare, a drug addict or trafficker, a pimp or prostitute), is able to convince the Attorney General that he is a person of good moral character, the Attorney General, in his discretion, may grant voluntary departure in lieu of deportation. Thus in the future the alien can reapply with better chances of admission. I. & N. Act § 244(e), 8 U.S.C. § 1254 (e) (1970). Nevertheless, deportation effectively bars the opportunity for subsequent legal reentry. This situation occurs because an alien who has been deported, as opposed to one who has departed voluntarily, needs special permission if he seeks to reenter the United States legally. *Id.* §§ (a) (16) & (17), 8 U.S.C. §§ 1182(a)(16) & (17). This permission is very difficult to obtain. However, voluntary departure does not have such far-reaching consequences. Only some aliens are deported, and those are aliens who have done deeds that society will not tolerate.

Permanent deportation is another way by which a society exorcizes similarly incorrigible elements. If Congress merely intended to regulate, it would not have discriminated among types of aliens. All aliens would have been eligible for relief of some sort, or none would be eligible. But Congress intended to implement an additional punishment in the form of permanent non-discriminatory deportation for those same types of people whom its criminal statutes have imprisoned. Under the test that congressional intent determines whether a statute is criminal, the statutes which provide for non-discriminatory deportation must be considered criminal.

Thus, although no one could argue with Congress's right to control aliens in this nation, the characterization of deportation as civil in nature is erroneous under the relevant test. This author contends that courts should abandon stale and senseless tradition and adopt a view of deportation hearings as criminal. However, if the courts will not concede changing the substantive nature of deportation from civil to penal, at least some of the procedural philosophy should be altered from civil to quasi-criminal in nature.

Fundamental Due Process

Although language in *Fong Yue Ting v. United States* intimates that due process may not be necessary in deportation cases,[27] the courts have uniformly held that an alien subject to deportation is constitutionally entitled to due process of law.[28]

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27. 149 U.S. 698 (1893). At 728, the Court wrote:
> For the reasons stated in the earlier part of this opinion [the Government as a sovereign is entitled to all recognized powers under international law], Congress, under the power to exclude or expel aliens, might have directed any Chinese laborer found in the United States without a certificate of residence, to be removed out of the country by executive officers, without judicial trial or examination, just as it might have authorized such officers absolutely to prevent his entrance into the country.

28. In Yamataya v. Fisher, 189 U.S. 86, 100-01 (1903) (The Japanese Immigrant Case), Justice Harlan wrote for the Court:
> But this Court has never held that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends . . . . Therefore, it is not competent for the Secretary of the Treasury or any executive officer . . . arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions

In 1952, the due process requirement was written into the statutory law.[29] Section 242(b) basically establishes that at a minimum, the rules which the Attorney General is authorized to establish for deportation proceedings must include: (1) reasonable notice to the alien of the charges against him and the place of hearing; (2) privilege for the alien to be represented by counsel at no expense to the Government;[30] (3) reasonable opportunity on the part of the alien to examine the evidence against him, present evidence in his behalf, and cross-examine Government witnesses; (4) a provision that no deportation order is valid unless based upon reasonable, substantial, and probative evidence.[31]

This statutory scheme, in combination with other sections of the Act, corresponds more closely to civil due process than to criminal due process. There is no jury trial.[32] The right to counsel is

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involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.

E.g., the Eighth Circuit summary of due process in Whitfield v. Hanges, 222 F. 745, 749 (8th Cir. 1915):

> Indispensable requisites of a fair hearing according to these fundamental principles are that the course of the proceedings shall be appropriate to the case and just to the party affected; that the accused shall be notified of the nature of the charge against him in time to meet it; that he shall have such an opportunity to be heard that he may, if he chooses, cross-examine the witnesses against him; that he may have time and opportunity, after all the evidence against him is produced and known to him, to produce evidence and witnesses to refute it; that the decision shall be governed by and based upon the evidence at the hearing, and that only; and that the decision shall not be without substantial evidence taken at the hearing to support it.

29. I. & N. Act § 242(6), 8 U.S.C. § 1252(b) (1970).

30. *See* Appleman, *supra* note 11, at 140-44.

31. Interestingly, this provision was passed in part to reject the Supreme Court's decision in Wong Yang Sung v. McGrath, 339 U.S. 33 (1950), that the procedure in deportation hearings must conform to the requirements of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1966). One marked difference between 242(b) and the Administrative Procedure Act is that section 242(b) allows one person to serve the dual role of the prosecutor and judge; section 5(c) of the Administrative Procedure Act, 5 U.S.C. § 554(c) (1966), requires separation of those roles. This difference is now academic because in 1957 the Attorney General restricted the role of the "inquiry officer" (judge) to that of a tribunal only, 8 C.F.R. § 242.8 (1976), and in 1962 formally established the position of the trial attorney (prosecutor), *id.* § 242.9. One may assume, however, that Congress, in the heyday of McCarthyism, was not disposed to liberalizing the deportation process to the extent that enlightened notions of due process obviously demand.

32. Preceding the passage of the Act, the Supreme Court in Carlson v.

termed a privilege for which the State will not bear expense.[33] Although it is now settled that the INS must prove deportability by "clear, unequivocal and convincing evidence,"[34] (a standard between the *beyond-a-reasonable-doubt* test appropriate in criminal trials and the *more-likely-than-not* standard of civil cases), a strong presumption of illegal alienage works against the silent alien. This presumption forces the alien to come forward or be deported on the basis of a statutory presumption. Such a dispositive presumption (actually a presumption of guilt) is impermissible in criminal cases.[35]

The INS, the immigration judges, the Board of Immigration Appeals (BIA), and the courts subscribe to the thesis that deportation and all the stages which bring it about (except for the Government's burden of evidential proof) are subject only to civil due process. The necessity for *Miranda* warnings in the apprehension stage of deportation has been rejected.[36] The right to remain silent without an adverse inference being drawn has been rejected.[37] And, in a sweeping statement, the Supreme Court ruled that the "constitutional safeguards for criminal prosecutions" are inapplicable in deportation proceedings.[38] As will be shown, this last statement is a vexatious obstacle for the alien who tries to argue that his apprehension was illegal, for the illegality of the arrest does not permit him to resist a deportation hearing from the outset. The courts,

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Landon, 342 U.S. 524, 537-38 (1952), considered this point important in determining the civil practice of deportation.

33. In addition to section 242(b)(2), section 292, I. & N. Act, 8 U.S.C. § 1362 (1970) provides:

> In any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

In criminal cases, Rule 44 of the *Federal Rules of Criminal Procedure* requires that every defendant have counsel, whether appointed by the state or privately retained, unless he specifically waives that right. This is obviously not the case in deportation proceedings. Rule 44 is constitutionally mandated under the sixth amendment, Johnson v. Zerbst, 304 U.S. 458 (1938); *see* Note, *supra* note 14, at 609-10.

34. Woodby v. INS, 385 U.S. 276, 286 (1966).

35. *See* Turner v. United States, 396 U.S. 398 (1970).

36. *See* Avila-Gallegos v. INS, 525 F.2d 666 (2d Cir. 1975); Chavez-Raya v. INS, 519 F.2d 397 (7th Cir. 1975); Trias-Hernandez v. INS, 528 F.2d 366 (9th Cir. 1975). In *Trias-Hernandez*, the court, referring to *Chavez-Raya*, wrote: "As outlined by the Seventh Circuit the substantial distinctions between a deportation proceeding and a criminal trial make *Miranda* warnings inappropriate in the deportation context . . . ." 528 F.2d at 368.

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

38. Abel v. United States, 362 U.S. 217, 237 (1960).

taking their lead from settled Supreme Court decisions in other areas, have established that an illegal arrest in itself does not terminate subsequent valid deportation proceedings.[39] Rather, the importance to the alien is that if he can show illegal apprehension, he may be able to suppress any evidence gained from the arrest as the fruit of the poisonous tree and consequently may thwart the Government's case. If the "safeguards of criminal prosecution" do not obtain, however, suppression will be difficult.

THE CRIMINAL CONTEXT: "FRUIT OF THE POISONOUS TREE"

In criminal prosecutions, fourth amendment protection is properly given functional effect by excluding all evidence unlawfully obtained.[40] The first Supreme Court decision to articulate the exclusionary rule limited its application to the actual material gathered by the unlawful conduct of the arresting officer.[41] In *Silverthorne Lumber Co. v. United States*,[42] the Court reexamined the "poisonous fruit" doctrine and extended it to any evidence gathered as a result of unlawful conduct. A second aspect of the *Silver-*

39. Medina-Sandoval v. INS, 524 F.2d 658 (9th Cir. 1975); Guzman-Flores v. INS, 496 F.2d 1245 (7th Cir. 1974); Huerta-Cabrera v. INS, 446 F.2d 759 (7th Cir. 1972). In deportation proceedings the existence of the alien and the knowledge of this existence by the Service is in issue; this is unlike a criminal proceeding in which the question is merely linking the evidence to the defendant.

40. In Mapp v. Ohio, 367 U.S. 643, 657 (1961), the Court held that "the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendment . . . ."

41. Weeks v. United States, 232 U.S. 383 (1914).

42. 251 U.S. 385 (1920). Considering a Government attempt to use the knowledge obtained from unlawfully copying defendant's books to force defendant to produce those books, the Court wrote:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it *shall not be used at all.* Of course, this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.

Id. at 392 (emphasis added). In other words, the Court prohibited the Government from building on poisonous evidence in an effort to obtain admissible evidence. Any evidence stemming from information gained from unlawful conduct carried an irremediable taint and could not be heard by the Court. Not only was the "poisonous tree" excludable; so were its "fruits." *See also* United States v. Calandra, 414 U.S. 338 (1974).

thorne decision was that the Court *would* hear any evidence if it were independently obtained—that is, if its source was not directly or indirectly related to the illegal conduct of officials.

Application of the *Silverthorne* doctrine is still ambiguous. Recognizing the doctrine's potential for impeding the prosecution of criminals, the Supreme Court has called for a common-sense evaluation of the connection between tree and fruit. In *Nardone v. United States*,[43] the Court wrote that *Silverthorne* is good law, but "[a]s a matter of good sense, however, such connection [between the illegal conduct and the evidence which the Government intends to introduce] may have become so attenuated as to dissipate the taint." Practically, according to *Nardone*, the decision of admissibility or excludability must be the judge's.

Naturally, if the judge is to decide whether to admit evidence, there must be a set procedure by which he can hear all sides of the issue. The *Nardone* Court suggested a logical approach. The Court said that first the defendant wishing to suppress tainted evidence must prove by prima facie evidence that a substantial part of the evidence against him was fruit of the poisonous tree. The Government must then either rebut defendant's assertion about the arrest's legality or prove that the evidence came from an independent source. However, for this scheme to be workable, the courts have maintained that any admissions the defendant makes in support of his motion to suppress must be separated from the trial proper and must not be used by the Government later in the proceeding.[44]

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43. 308 U.S. 338, 341 (1939).

44. *E.g.*, Fowler v. United States, 239 F.2d 93, 95 (10th Cir. 1956); Safarik v. United States, 62 F.2d 892, 897-98 (8th Cir.), *reh'g denied*, 63 F.2d 369 (8th Cir. 1933). In Simmons v. United States, 390 U.S. 377 (1968), the Court considered defendant's appeal for reversal of a conviction which was based, in part, on admissions he had made in his unsuccessful motion to suppress evidence. The defendant was found guilty because his suitcase, filled with money taken from a bank robbery, was seized (illegally, according to the defendant) from a friend's house. In order to gain the requisite standing to assert the unlawfulness of the Government's action, the defendant had to admit to owning the suitcase.

(The courts have been careful to note that the rights protected by the fourth amendment are personal rights and may be asserted only by the person whose fourth amendment rights were actually violated by the search or seizure. *See* Jones v. United States, 362 U.S. 257 (1960); Goldstein v. United States, 316 U.S. 124 (1942). Thus in *Simmons* the only way defendant could find the requisite standing to argue the inadmissibility of the suitcase was to admit that it was his property, illegally searched and seized. *See* Note, *supra* note 14).

However, his motion to suppress was rejected; and under the rule applied by the lower courts, because defendant's motion to suppress failed, the ad-

However, the development of fourth amendment rights has had an uncertain impact on deportation cases. It is now well established that the exclusionary rule, generally regarded as applicable in criminal or "quasi-criminal" cases, is applicable also in deportation proceedings, notwithstanding the fact that such proceedings are universally categorized as civil. Perhaps under the intent standard, deportation is regarded for some purposes as quasi-criminal in nature.[45] Thus, in deportation hearings, the administrative tribunals have agreed to allow a motion to suppress tainted evidence.[46] However, they have rejected any attempts by an alien to ensure that the admissions he makes in arguing to suppress evidence will not be used against him.[47] In other words, because of the legal tautology that deportation is a civil proceeding and that civil pro-

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missions made in support of the motion could be—and in fact were—subsequently used by the Government. The Supreme Court reversed the conviction, holding that admissions made on behalf of a motion to suppress could not be used in a succeeding trial, regardless of the outcome of the suppression motion.

Essentially, the Court's reasoning is an exercise in sound logic. Given the fact that the only judicial vehicle by which a defendant can assert his fourth amendment protections in criminal prosecution is by motion to suppress—for which he needs standing—obviously he will be inhibited from using that vehicle if certain admissions necessary to its success may be used against him. In effect, under the lower court's ruling, defendant must risk sacrificing his fifth amendment privilege (the lower court argued that any admission waived the privilege) in order to make use of the protections guaranteed him by the fourth amendment. In no uncertain terms, the Court criticized and rejected this Hobbesian choice:

> In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another. We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt, unless he makes no objection.

390 U.S. at 394. This holding goes beyond the mere question of standing and encompasses *all* admissions made by defendant in his effort to demonstrate the unlawfulness of the Government's actions.

45. In One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700-01 (1965), the Court decided that a civil state statute requiring forfeiture of an automobile used for transporting liquor illegally was in fact quasi-criminal because the legislature's intent was to penalize a violation of the laws.

46. *See* note 117 *infra.*

47. For example, in *In re* Bulos, 16 I. & N. Dec. 691 (BIA 1976), the alien was denied a suppression hearing separate from the deportation hearing. Thus, if he attempted to testify about the illegality of the arrest on direct examination, he would waive his fifth amendment rights and be subject to cross-examination which might reveal alienage or bring about other costly admissions. *See* text accompanying notes 114-17 *infra.*

ceedings do not enjoy the full procedural safeguards of criminal prosecutions, the alien who faces deportation is seriously constrained from using the fourth amendment. The remainder of this article will deal specifically with how the fruit of the poisonous tree doctrine becomes an issue in a deportation case. As the reader will see, the only logical conclusion that can be drawn from the following discussion is that the procedure in deportation hearings must be altered so that the substantive rights of aliens can be protected.

Evidential Patterns in Illegal Arrest[48] Situations

Fruit of the Poisonous Tree in the Deportation Context

When aliens (respondents in deportation cases) attack the validity of an arrest, the Government may attempt to offer three categories of contended evidence. The first is evidence taken at the time of illegal interrogation and apprehension. The Government may try to present testimony or papers actually seized during the arrest. The second category is evidence which the alien may himself provide in admissions made during the course of the hearings. The INS uses such admissions to prove deportability and thus can avoid relying on INS evidence. The third category is evidence obtained from the Service's files of previous encounters with the same alien. The INS discovers an alien, perhaps by such illegal means as interrogation without founded suspicion, obtains his name, and then scans their computerized files to see if the individual has a prior record. If the alien does have a prior record, the INS presents the file as evidence of deportability.

These types of evidence possess their own aspects of the procedural obstacles to aliens who assert their fourth amendment protection in deportation cases. In the following discussion, they will be used as analytical tools outlining the procedural disadvantages that accrue to the alien who faces deportation.

Testimony at Time of Arrest

It is indisputable that discussions or testimony taken at the time of an arrest are inadmissible if the arrest was illegal.[49] The alien's

48. The term *illegal arrest* will be used hereinafter to mean illegal interrogation or detention. This conforms to the rule that a section 287(a)(1) interrogation, though not rising to the level of an arrest, is a seizure subject to the restraints of the fourth amendment. *See* Fragomen, *Fourth Amendment, supra* note 5, at 103-10.

49. In Huerta-Cabrera v. INS, 466 F.2d 759 (7th Cir. 1972), the court did not accept the alien's assertion that the arrest was illegal in fact. In a foot-

attorney must object to the evidence if it is to be excluded.[50] Naturally, the threshold issue when the INS offers evidence gathered at the time of arrest is the legality of the arrest itself. Besides the lack-of-founded-suspicion argument, attorneys have often tried to argue that failure to give a *Miranda*-type warning should invalidate all evidence obtained during the arrest. However, the courts have been unfavorably disposed to this argument.

Because a *Miranda* warning is confined to "custodial interrogation,"[51] the courts tend to disqualify section 287(a)(1) interrogations from that category of seizures which, in a criminal case, demand the *Miranda* cautions. Their reasoning is simply that section 287(a)(1) interrogations fall short of a full-blown arrest and are therefore noncustodial. This rationale is reinforced by the less stringent standard of "suspicion" (rather than "probable cause") which attaches to Section 287(a)(1) interrogations and by general language about the detention's brevity and minimal intrusiveness.[52]

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note, the opinion discussed what the result would be even if the arrest *were* illegal. The court rejected the notion that the illegality of the arrest terminates the proceedings on the ground that the alien's "body" was illegally obtained and thus neither it nor its testimony may be offered into evidence. The court said that "the mere fact that the authorities got the 'body' . . . illegally does not make the proceeding prosecuting him or deporting him the fruit of the poisonous tree. *This would not be a case of the use of evidence seized during the course of an illegal arrest.*" *Id.* at 761 n.5 (emphasis added). This last sentence suggests that evidence so illegally seized *would* be suppressed. *See also* Au Yi Lau v. INS, 445 F.2d 217 (D.C. Cir.), *cert. denied*, 404 U.S. 864 (1975); Cheung Tin Wong v. INS, 468 F.2d 1123 (D.C. Cir. 1972), both of which implicitly proceeded under the assumption that illegal arrests made inadmissible that evidence stemming directly therefrom.

50. The *Huerta-Cabrera* Court was also careful to note that five of the documents admitted did not involve statements taken or evidence received at the time of arrest. Another admitted document was illegally obtained, but counsel failed to object. 466 F.2d at 762 n.6.

51. In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court held that the Government may not use statements stemming from "custodial interrogation" unless it demonstrates that defendant was first warned of the consequences of those statements and advised of his right to counsel. "Custodial interrogation" was defined by the Court as questioning which takes place after the defendant has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Id.* at 444.

52. *E.g.*, Avila-Gallegos v. INS, 525 F.2d 666 (2d Cir. 1975); Nason v. INS, 370 F.2d, 865 (2d Cir. 1967); *In re* Yau, I.D. No. 2272 (BIA, March 19,

The main problem with the argument that section 287(a)(1) interrogations are noncustodial and therefore do not require *Miranda* warnings is that temporary interrogations pursuant to section 287 (a)(1) can easily turn into custodial interrogations because of the dynamics of a given case. For instance, in *In re Yau*,[53] an alien tried to elude agents looking for illegal aliens. However, the officers apprehended him. When asked for identification, the alien "voluntarily" led agents to his apartment, where he gave them a ship's landing pass. The majority of the BIA held that the entire encounter was in a noncustodial setting and did not amount to a section 287(a)(3) arrest. The concurring judge disagreed, writing that as time went on, the encounter became more custodial in nature. Which opinion was correct in that case is not a primary concern here. More important is the realization that section 287(a)(1) interrogations can become custodial in the course of the encounter and that their initial noncustodial nature cannot alone justify the absence of *Miranda* warnings.[54]

This conclusion is required in light of the circumstances of an alien in an unfamiliar land. In a street encounter, he will probably be alone with one or two strange men of apparent authority asking him pointed questions about his right to be here. It is not overstating the matter that his fear of authority, in combination with his unfamiliarity with the language and customs in this nation, will more readily promote a subjective feeling of restraint of freedom than would an identical encounter for a citizen. Consequently, the

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1974). In Brignoni-Ponce v. United States, 422 U.S. 873 (1975), the Court held that section 287(a)(1)

> interrogation constituted "seizure" as contemplated in the fourth amendment, and must therefore be reasonable. But because interrogation is brief and entails only a "modest" interference with an individual's liberty, the Court found that it need not be predicated on probable cause. Rather, the government interest can best be served with minimal intrusion on personal liberties if section 281(1) interrogation is founded on reasonable suspicion of illegal alienage. "Probable cause" is still necessary for a *search* of vehicles, however. United States v. Almeida-Sanchez, 413 U.S. 226 (1973); United States v. Ortiz, 422 U.S. 891 (1975).

53. I.D. No. 2272 (BIA, March 19, 1974).

54. The subtle notion of what constitutes *custody* is a problem which occurs often in criminal cases. *See, e.g.*, United States v. McDevitt, 508 F.2d 8 (10th Cir. 1974); United States v. Guana-Sanchez, 484 F.2d 590 (7th Cir. 1973). Although lack of *Miranda* warnings was not at issue in these cases, obviously where custodial settings obtain, even if there was no intention by the officers to hold in *custody*, *Miranda* warnings must be given. *See also* Cheung Tin Wong v. INS, 468 F.2d 1123 (D.C. Cir. 1972), in which "reasonable suspicion" rapidly gave rise to further information that the court held would justify forcible detention. There the alien responded to the agent's request for documents by stating that he had no papers; this answer allowed a more forcible detention.

line between custody and non-custody grows even thinner when an alien is concerned.[55]

In practice, the courts have avoided this sticky issue by resorting to the convenient dogma that deportation is civil and *Miranda* warnings are necessary only when a suspect faces criminal charges.[56] This simple solution also allows the INS to take an alien into custody without giving a *Miranda* warning. In the leading case, *Chavez-Raya v. INS*,[57] the Seventh Circuit considered a fact situation in which an alien was legally interrogated at the hotel in which he worked and arrested after producing an identifying green card (Alien Registration Card) which was not his own. He was then led to the agent's car and after further questioning, made admissions reflecting on his deportability. The court held that despite the absence of *Miranda* warnings, the custodial admissions could be used as evidence of deportability in the deportation hearing.[58]

The court could have relied exclusively on the "civil proceeding" litany. Instead, it went one step further and said that not only was a *Miranda* warning inappropriate, it was also misleading, given the absence of other safeguards to which an alien is not entitled. The court wrote that in light of special burdens which an alien must

55. Actually, the concept of *custody* is vague. The Supreme Court in *Miranda* said that custody occurs when a person is "deprived of his freedom of action in a significant way." 384 U.S. at 444. The courts have been hard-put to decide if an individual must be only a passive object of an official's custodial purpose or if an individual's own beliefs can contribute to a determination of whether he is in custody. The Fifth Circuit has arrived at four factors useful in determining custody. One of these is "subjective belief of defendant," and that factor has particular significance in the case of an alien. The other three factors are: probable cause to arrest; subjective intent of police; focus of the investigation. United States v. Carollo, 507 F.2d 50 (5th Cir. 1975). Of these three factors, "focus of the investigation" raises the most interesting questions, for an agent will always be investigating for exactly what he hopes to find—that is, deportability. Clearly, if the alien either refuses to answer or walks away, the agent's "founded suspicion" would be raised to "probable cause," and arrest would then be warranted. Thus, any response to an agent's question other than proof of legal presence must ultimately result in custodial apprehension. Consequently, a *Miranda* warning is especially required when an alien is to be interrogated.

56. *See* cases cited note 36 *supra*. *See also* United States v. Campos-Serrano, 430 F.2d 173 (7th Cir. 1970).

57. 519 F.2d 397 (7th Cir. 1975).

58. *Id.* at 402.

meet, advising him of any right to counsel or to remain silent might operate against him. We have already noted above that an alien facing deportation has been held to have no right to counsel; thus one important part of the *Miranda* warning would, according to the court, mislead.

The second component of the *Miranda* warning, which emphasizes the right to silence, might also mislead, according to the court. Once the deportation hearing begins, an alien may be required to show that he is legally present, subject to a presumption of illegality upon a failure to meet the burden,[59] to answer non-incriminatory questions about his alien status,[60] and suffer an adverse inference if he remains silent.[61] Although, as will be discussed, these points are all true for the deportation hearing, no reason exists that they should have any bearing on what occurs at the time of initial apprehension. Indeed, a *Miranda* warning would not mislead the alien, at least about silence; rather it would greatly aid his case by protecting him from making admissions under duress that will later return to haunt him. It must be concluded that *Chavez-Raya* and the cases which follow it are sound only because the civil proceeding litany was applied to bar the necessity for a *Miranda* warning in deportation cases.[62] As has been argued, however, this litany should be abandoned.

An ignored but important factor in determining whether to invoke the *Miranda* rule in the apprehension of aliens is whether that apprehension could entail subsequent criminal charges. Section 275

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59. I. & N. Act § 291, 8 U.S.C. § 1361 (1970). *See* text accompanying notes 81-85 *infra*. The Supreme Court ruled in 1923 that an alien facing deportation "is not protected by a presumption of citizenship comparable to the presumption of innocence in a criminal case." United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 154 (1923).

60. Laqui v. INS, 422 F.2d 807, 809 (7th Cir. 1967). This rule is entirely different from the situation of a criminal defendant who has no obligation at all to testify. *See* Garner v. United States, 501 F.2d 228 (9th Cir. 1974) *aff'd*, 96 S. Ct. 1178 (1976); United States v. Echeles, 352 F.2d 892 (7th Cir.), *reh'g denied*, Dec. 1, 1965 (en banc); C. McCormick, Evidence § 130 (1972 ed.); 8 J. Wigmore, Evidence § 2268 (McNaughton rev. 1961).

61. In United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149 (1923), Justice Brandeis reasoned that silence is a form of conduct which unless exercised pursuant to a fifth amendment privilege in a criminal situation can form a basis for an evidential inference. Because the alien failed to claim citizenship when the claim existed, Justice Brandeis found permissible an inference of alienage.

62. Of course, underlying the burdens imposed on aliens which are listed in notes 59-61 *supra*, is the civil proceeding dogma. So at best, *Chavez-Raya* was using the parcel to prove a part and making little new analysis of the deportation cases.

of the Act[63] is a penal provision which subjects to imprisonment or fine an alien who has *entered* the United States illegally, has *evaded* examination and inspection regulations upon entry, or has *misrepresented* a material fact in gaining entry. Section 276 subjects an alien, who has previously been deported and who has illegally reentered the country, to even graver criminal penalties.[64] These criminal charges are lodged at the discretion of the local immigration and federal law enforcement authorities. The frequency of prosecution varies from district to district. However, usually the INS decides whether to prosecute *after* apprehension of an individual. Thus, it is possible for an alien to be interrogated and apprehended without *Miranda* warnings, but nevertheless prosecuted in criminal proceedings.

Only one case has considered this situation. In *United States v. Campos-Serrano*,[65] the Court held that if an alien is apprehended under a strong suspicion that the alien actually committed a criminal offense, a *Miranda* warning must be given. The Court thus declared that the alien's arrest in that case was illegal because it was without the benefit of a *Miranda* warning. Because all interrogations must be premised on a founded suspicion of illegal status,[66] a logical extension of *Campos-Serrano* would require a *Miranda* warning for *all* interrogations except those in which it is suspected that the illegality does not derive from some sort of criminal entry or reentry, as provided in sections 275 or 276.

However, in the typical encounter before the interrogation ensues, an officer has no idea how the alien entered the United States. Thus, to maintain its prerogative of criminal prosecution, the INS, before any interrogation, must either discriminate among the various types of illegality of which it suspects a particular alien (an almost impossible task) or give *Miranda* warnings in every situation. It was doubtlessly this dilemma which led the Attorney General to promulgate a regulation that in the case of an arrest (presumably a custodial interrogation), the alien should be given a *Miranda*-type warning.[67] This regulation has not, however,

63. *See* 8 U.S.C. § 1325 (1970).
64. *Id.* § 1326 (1970).
65. 430 F.2d 173 (7th Cir. 1970).
66. *See* Illinois Migrant Council v. Pilliod, 398 F. Supp. 882 (N.D. Ill. 1975).
67. 8 C.F.R. § 287.3 (1976).

become an obligation on the part of the arresting officer.[68] We can only assume that a failure to give the *Miranda* warning will automatically exclude from evidence in a criminal proceeding any admissions made during the course of an arrest. Therefore, at least from the standpoint of flexible law enforcement, the arresting officer should always give a *Miranda* warning so as not to foreclose the Service's option of prosecution.

Nevertheless some authority exists that even if no *Miranda* warning were given, the evidence garnered from the apprehension may be used in a subsequent criminal prosecution. In *Abel v. United States*,[69] the Supreme Court ruled that evidence gathered pursuant to an administrative arrest warrant for deportation, less exacting than an analogous judicial warrant for criminal prosecution, could be used in a subsequent criminal trial for espionage so long as the administrative warrant was issued as a bona fide initial step in a deportation proceeding and not to gather evidence to be used in a criminal proceeding. Applied broadly, that holding might suggest that if an agent intended to merely pick up an alien for deportation and not for criminal prosecution, he could follow normal deportation procedure—that is, not give a *Miranda* warning—and the evidence he obtained could then be used in a criminal trial if his superiors decided to prosecute at a later time.

Such an application of *Abel* would totally nullify an alien's right to a *Miranda* warning if he were eventually prosecuted. *Campos-Serrano* suggests that an agent's "suspicion" of a criminal violation requires that a *Miranda* warning precede the arrest; *Abel* seems to suggest that intent of the arresting officer at the time of the arrest is more important. Practically, this author argues that either test would severely undermine the protections which must attend to criminal prosecutions. The standards are too nebulous, the pressures from above may too easily induce an arresting officer to cloud the circumstances and the actuality of his intent or suspicion. Clearly, *Abel* is out of line with the entire philosophy underlying *Miranda*; *Campos-Serrano* is only slightly better. Even if the courts do not abandon their civil proceeding litany, *Miranda* warnings should be given in order to protect the alien who may be subject to criminal prosecution.

Testimony During Deportation Hearings: The Fifth Amendment Becomes an Issue

When to Invoke the Fifth Amendment

The absence of the *Miranda* safeguards renders the position of

68. *See* Trias-Hernandez v. INS, 528 F.2d 366 (9th Cir. 1975).
69. 362 U.S. 217, 230 (1960).

the apprehended alien precarious. Nevertheless, an illegal arrest or interrogation will disqualify admissions made at the time of the arrest. An illegal arrest will not, however, automatically terminate the deportation hearing, and any admissions made in the hearing may be used by the Government as evidence of deportability.[70] This hornbook rule suggests that the proper procedural strategy for the alien is to plead the fifth amendment privilege whenever possible so as not to aid the Government in its case. The advisability of this strategy is even more pronounced if the alien plans to claim that the Service's evidence is tainted and inadmissible; it would be a fatal mistake to supply the Government with *any* untainted evidence. Also, although it is axiomatic that to invoke the fifth amendment protections an individual other than the criminally accused must make clear that he is relying on the privilege against self-incrimination,[71] it is absolutely critical for an alien to do so. The import of a clear fifth amendment privilege claim cannot be overemphasized.

As we have seen, deportation hearings are traditionally regarded as civil in nature. As a civil defendant, the alien does not enjoy that component of the fifth amendment privilege which dismisses a criminal defendant from any obligation to take the stand and have questions put to him. Instead, the fifth amendment applies to an alien facing deportation only insofar as it applies to an ordinary witness—that is, the alien, like a witness, must subject himself to questions and may refuse to answer only those questions which are self-incriminatory.[72]

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70. *See* Avila-Gallegos v. INS, 525 F.2d, 666 (2d Cir. 1975); Guzman-Flores v. INS, 496 F.2d 1245 (7th Cir. 1975); Medina-Sandoval v. INS, 524 F.2d 658 (9th Cir. 1975); Huerta-Cabrera v. INS, 466 F.2d 759 (7th Cir. 1972). All these cases reject the proposition that the *presence* of the alien can be suppressed as *evidence* gathered by an illegal arrest. They follow the general rule that an illegal arrest does not prevent a valid proceeding. *See* Frisbie v. Collins, 342 U.S. 519 (1952). *But cf.* Comment, United States v. Toscanino: *An Assault on the* Ker-Frisbie *Rule*, 12 SAN DIEGO L. REV. 865 (1975).

71. Full discussion on this axiom is beyond the scope of this article. However, generally, failure of people who are not criminal defendants to invoke the fifth amendment either has been termed *waiver* of the privilege or the admissions, made in lieu of a claim of privilege have been termed *voluntary* admissions not made under the type of compulsion which the fifth amendment was designed to prohibit. *See* Garner v. United States, 501 F.2d 228 (9th Cir. 1975), *aff'd*, 96 S. Ct. 1178 (1976).

72. The commentators have organized the classifications of the fifth

In reality, the analogy between an ordinary witness and an alien facing deportation is attenuated because the possible detriment which each would face by failing to invoke the privilege is unequal. If a witness failed to claim the privilege, any single admission would not immediately or necessarily entail criminal prosecution. However, a mistake by an alien during deportation proceedings may in rapid succession yield findings and events leading to his deportation. Therefore, the stakes for an alien are very high.

In the first place, an alien must make certain that the immigration judge understands he is pleading the fifth amendment. Translations of the fifth amendment into several languages are recommended so that the official interpretor will unmistakably convey the alien's message to the immigration judge. Failure to make the fifth amendment assertion known or indeed failure to make the assertion at all will be treated as conduct which can support an adverse inference.[73]

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amendment privilege as extending either to the "criminally accused" or to "witnesses." Criminal defendants enjoy the full effect of the privilege. C. McCORMICK, EVIDENCE, § 116 (1972). The protections of witnesses are more limited. *See* 8 J. WIGMORE, EVIDENCE § 2268 (McNaughton rev. 1961). The most articulated dicta on this matter is language in Garner v. United States, 501 F.2d 228 (9th Cir. 1975), *aff'd*, 96 S. Ct. 1178 (1976).

73. This was the ruling in United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149 (1923), and later in United States *ex rel.* Vajtauer v. Commissioner, 273 U.S. 104 (1927). In both cases the Supreme Court reviewed trials in which the alien had stood mute without invoking the fifth amendment in the face of questions regarding his deportability.

In *Bilokumsky*, the alien was called as a witness, but stood mute to all questions. His strategy was apparently to thwart the Government's attempt to prove his alienage and thus prevent deportation. The Court, however, read his silence as evidence, interpreting it as conduct allowing an inference to be drawn. Noting that the proceeding was civil in nature and that testimony about alienage could not incriminate the respondent, the Court allowed an adverse inference of non-citizenship to be drawn from the respondent's silence. The adverse inference was drawn because under the circumstances, it behooved respondent to give positive testimony of citizenship if he were able.

Vajtauer extended *Bilokumsky* by holding that a failure to invoke the privilege not only would allow an inference about non-incriminatory facts (alienage), but would also allow an inference about potentially incriminatory facts that could serve as a basis for deportation. In *Vajtauer*, the Government argued that the alien was deportable because he was seditious. When questioned about his alleged treacherous activities, the alien refused to answer any inquiries until the Government had put forward its full case. The lower court had permitted an inference (augmenting other evidence) which favored the Government's contention to be drawn from the alien's silence. The alien appealed, claiming that seditiousness is a criminal offense and that he had a right to remain silent in any proceeding so as not to incriminate himself. The Court disagreed, saying that an alien in a de-

The largest hurdle in pleading the fifth amendment for any individual other than the criminally accused is to demonstrate that his silence is in regard to a fact which may tend to incriminate him. A wooden view of deportation proceedings as civil would preclude the fifth amendment privilege unless other sections in the Act made criminal those offenses on which deportation may be based. In fact, the Act does provide criminal penalties for various forms of illegal entry.[74] In addition, other bases for deportation involve anti-social behavior which often entails potential or actual criminal consequences.[75] Also, various statutes make it a criminal offense to have knowingly misrepresented facts to an official in the procurement of any entry document.[76] Because any alien who has overstayed his entry visa or who has acted inconsistently with his ascribed status may be subject to prosecution for initial fraud or misrepresentation in its procurement, that individual might also be subject to criminal consequences from admissions made in the deportation hearing.[77] In short, the bulk of deportation cases involve

portation hearing must invoke the fifth amendment privilege if he wishes to avoid adverse inferences.

In combination, these cases say several things about the procedure of deportation hearings. First, they impliedly affirm the proposition that an alien must take the stand and subject himself to the Government's questioning. As noted, this proposition proceeds from the concept that an alien in a deportation proceeding is a civil defendant, not a criminally accused. Second, the decisions permit an inference to be drawn from silence which, in the context of the deportation hearing, will usually work against the alien. This is obviously not the case in a criminal trial, in which the privilege of a defendant not to take the stand is effectuated by a car on any inference to be drawn therefrom. Third and most importantly, these cases effectively compel the alien to explicitly plead the fifth amendment whenever he can.

74. I. & N. Act § 275, 8 U.S.C. § 1325 (1970). Note that these provisions do not apply to people who entered legally, but whose visas or permits subsequently expired. It could be argued, but would be contrary to accepted administrative practice, that these individuals would be barred from invoking the fifth amendment, for they are not subject to criminal liability for any matter about which they would testify in a deportation hearing.

75. Section 241(a), *id.*, 8 U.S.C. § 1251, sets forth who shall be deported. Those deportable for reasons which may involve criminal prosecution are pimps or prostitutes, sexual deviants, active seditious elements, ex-convicts, narcotics addicts and traffickers, illegal alien smugglers, and conspirators against the law. *See also Afterword, supra* note 2.

76. *See* 18 U.S.C. § 1546 (1970). *See also id.* §§ 1001, 1543, 1544.

77. For instance, all aliens applying for nonimmigrant visas—*e.g.*, to study or visit—must represent that they do not intend to work while in this country. If an individual overstays his visa and is found working in the United States, it is possible for the Government to bring prosecution

instances in which the potential for incrimination is high. Therefore, the BIA and the courts have long sanctioned an individual's right to plead the fifth amendment in any type of deportation case,[78] and the rule should be considered settled.

Doubtlessly, this sanctioning of the exercise of the fifth amendment also emerges from a visceral appreciation of the harshness of deportation and its quasi-criminal nature. Immigration proceedings involve important constitutional rights such as procedural due process. If aliens were forced to answer any question posed to them in the course of the proceedings, or if negative inferences were properly drawn from the failure to answer,[79] the plethora of rights loosely described as procedural due process would be rendered meaningless. The argument articulated in this article that deportation is more criminal than civil in nature obviously supports those authorities which hold that aliens may plead the fifth amendment in every deportation case.

The first question that a respondent in a deportation hearing will be asked is what his name is. If he answers, the Government may have gone far in proving its case. For instance, if the alien is one who has been to the United States and subjected to deportation proceedings previously, or for any other reason is one on whom the Government has files, all the Government needs to do to establish alienage is to put the files into the record. As will be demonstrated, after the Government shows alienage, the burden of proving the legality of his presence shifts to the respondent and is subject to an adverse presumption. Thus, by merely proving alienage, the

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for fraudulent misrepresentation to an official in the visa procurement process. Thus, admitting any fact regarding alienage in a deportation hearing based on overstayed visas may tend to incriminate.

78. Vleros v. INS, 387 F.2d 921, 922 (7th Cir. 1967) (aliens accused of illegal entry may plead the fifth amendment); Vlisides v. Holland, 245 F.2d 812 (D.C. Cir. 1957) (implicitly approved respondent's invocation of fifth amendment in deportation hearing for overstayed visa but found that Service offered enough evidence on its own to support deportation); *In re* Bulos, 16 I. & N. Dec. 691 (BIA, 1976); *In re* Tsang, 14 I. & N. Dec. 1 (BIA, 1973); *In re* Lam, I.D. No. 2157 (BIA, 1972) (allowed a fifth amendment privilege claim despite fact that aliens were deportable only for overstaying temporary permits).

79. Several courts have suggested that the privilege may be claimed, but that an adverse inference may be drawn from its invocation. *E.g.*, Hyun v. Landon, 219 F.2d 404 (9th Cir.), *aff'd by equally divided Court*, 350 U.S. 990 (1955); United States *ex rel.* Zapp v. District Director, 120 F.2d 762 (2d Cir. 1941); Caetano v. Shaughnessy, 133 F. Supp. 211 (S.D.N.Y. 1955). There is little justification for this conclusion except for the civil proceeding argument which should not reflect on the real possibility of criminal consequences.

Government hurdles a large issue. Naturally, past files cannot be introduced unless linked to the respondent, and it is in this regard that an alien's disclosure of his name will facilitate the Government's burden.

Convincing a judge that stating one's name will tend to incriminate is not an easy task. The respondent would have to argue that stating his name would help to prove his alienage and that proof of alienage is a necessary predicate of any of the criminal liabilities of which he could be accused. In other words, the respondent would contend that his name may incriminate him because it is a link in the chain of evidence needed to prosecute him.[80]

The importance to the alien of being able to claim fifth amendment privilege so that he does not aid the Government in demonstrating alienage is clear. Section 291 of the Act[81] provides that in any deportation proceeding against any person, that person will have the burden to show the time, place, and manner of his entry into the United States. The statute further provides that a failure to sustain the burden will raise a presumption that the individual is in the United States in violation of law. The courts have placed a judicial gloss on section 291 requiring the Government to prove alienage before the burden of showing the legality of entrance shifts to the respondent. This gloss rested on the proposition that alienage is a jurisdictional fact, and no order of deportation may issue unless that fact is proven.[82] After alienage is established, however, the burden shifts to respondent according to the statutory

80. This elusive concept of the chain of evidence is discussed in Malloy v. Hogan, 378 U.S. 1 (1964), and in Hoffman v. United States, 341 U.S. 479 (1951). *See also* California v. Byers, 402 U.S. 424 (1971). There the Court ruled constitutional a California statute which required a motorist involved in an accident to stop and give his name and address. One reason that the Court upheld the statute's constitutionality was that the statute involved an area which was "essentially non-criminal and regulatory." Superficially, this description fits the Act. But the Court also noted that the success of the statute was dependent on self-reporting, that the possibility of incrimination was unsubstantial, and that the statute was directed at "the public at large," and not at a "highly selective group inherently suspect of criminal activities." *Id.* at 427-32. None of these factors is present in the Act. Thus *Byers*, if anything, supports a respondent's privilege not to give his name in a deportation hearing.

81. 8 U.S.C. § 1361 (1970).

82. *See* United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 153 (1923).

scheme.[83] Thus, it is good advice for an alien to plead the fifth amendment at the outset, so as to not aid the Government in proving alienage and thereby bring the burden of proving legality upon himself.

The quantum of proof which the Government must offer to show alienage is a settled issue. One court has explicitly stated that the Government need show alienage by a mere preponderance of the evidence and holdings of other courts indicate adoption of a similar standard.[84] Thus, the alien must proceed carefully. Documents and files indicating alienage may be used if the Government can link them to the respondent; if respondent fails to invoke the fifth amendment but remains silent, his conduct will generate a probative inference of alienage. Only through successful use of the fifth amendment can the alien properly shift the burden to the Government.

However, assertion of the fifth amendment privilege to the question of the respondent's name may involve a major peril. Many immigration judges take the position that if the alien does not state his name, the court does not know who is before it, and consequently, the proceedings cannot take place. Moreover, because the judge does not know the identity of the alien, he will not set bond and may place whoever is before him in custody with no bond. Of course, this puts the alien in an impossible dilemma. If he refuses to state his name, he is subject to indefinite incarceration. If he does state his name and the INS has prior records which show his alienage, the section 291 presumption is activated even if he asserts his fifth amendment privilege as to all subsequent questions.

It is submitted that this is an insidious and illegal practice by the judge for purposes of the proceeding. For instance, linking the respondent to the hearing notice through fingerprints is possible, for they are always taken upon arrest prior to the institution of deportation proceedings. The link could also be established by stipulation to proceed without conceding the respondent's identity because that is the very question at issue. In many cases, the INS has no prior record pertaining to the alien, and thus knowledge of his name provides no useful link. In that case, the fifth amendment

83. See Vlisidis v. Holland, 245 F.2d 812 (3d Cir. 1957), for an explicit holding to that effect.

84. United States *ex rel.* Ulmer v. Phillips, 24 F. Supp. 115 (D.C. Mont. 1938). For instance, the Supreme Court in United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149 (1923), stated that unprivileged silence permits an inference of alienage, which was enough to support a finding of alienage in that case.

would first be appropriate in response to an inquiry regarding the respondent's birthplace.[85]

The primary significance of section 291 is, of course, not the judicial interpretation that alienage must be proven by the Government. Rather, its greatest import is the fact that its presumption of illegal presence presents an ominous and probably unconstitutional burden on aliens in deportation proceedings. It is for this reason that respondent must try to prevent a showing of alienage which automatically triggers the presumption.

Section 291

If respondent's fifth amendment argument does not prevent the Government's showing alienage, the alien's attorney must then attack the legality of the presumption in section 291. There are various grounds for such an attack. First, the statute's presumption of illegal presence absent evidence to the contrary is, in effect, a presumption of guilt which, unless factually valid, would be unconstitutional in a criminal or quasi-criminal trial. Second, the presumption forces an alien who has entered illegally either to testify about the circumstances of his entry and thereby run the risk of incriminating himself or to stand on his fifth amendment privilege against incriminatory statements but risk deportation for so doing. Third, the presumption does not satisfy the burden of proof which must be met by the Government. Fourth, if an illegal arrest has occurred, invocation of the presumption totally nullifies the existence of the fourth amendment constitutional protections for the alien. An unlawful interrogation or search would be disregarded once alienage was shown and the presumption effectuated.

Section 291 is Unconstitutional as a Criminal Statute

In *Turner v. United States*,[86] the Supreme Court evaluated the constitutionality of a criminal statute which contained the presumption that possession of heroin or cocaine entailed knowledge that the drug was illegally imported unless defendant could prove

85. If an individual admits to a foreign birthplace, the Service can easily trace his name to see whether he has become a naturalized citizen. If he has not, then of course he is an alien, and section 291 jurisdiction is proven.
86. 396 U.S. 398 (1970).

otherwise. One of the elements of the offense barred by the statute was knowledge of the illegal importation. The Court found the presumption constitutional as to heroin because it is a well-documented fact that no heroin is produced in this country, and therefore one in possession must know that the drug's origin is outside United States borders. Possession of cocaine, however, did not justify a presumption of defendant's knowledge of importation because cocaine can be and is produced nationally. Thus, as to cocaine, the presumption was unconstitutional according to the Court.[87]

In a footnote, the Court criticized the Government's notion that the presumption (possession means knowledge), if factually invalid, nevertheless puts the defendant to his burden so that his failure to testify will dispose of the case.[88] The Court implied that if the defendant were forced to rebut an invalid presumption at his peril, he would be unconstitutionally deprived of his right not to testify, and the Government would be impermissably relieved of its obligation to prove defendant's guilt. In the case of heroin, the presumption was found valid, and it was as if the Government had given evidence proving its case. The defendant then had the option to rebut this relevant and probative evidence. But the presumption for cocaine was not valid, and hence the Government had to offer other evidence of knowledge before the defendant would be required to speak out or remain silent at his peril. Until that extra evidence was offered, the defendant would not jeopardize his position by silence, despite the invalid presumption contained in the statute.

Section 291 is subject to similar analysis. Under section 291, if alienage is proven, illegal presence will be presumed unless the respondent proves otherwise. An examination of the factual validity of this presumption readily reveals its fallaciousness. All aliens are not illegally present, and to presume illegality from alienage ignores reality. Under the *Turner* rule then, section 291 does not stand up. If the contention is correct that deportation is quasi-criminal in nature, section 291 is thus unconstitutional. This conclusion is not diminished in any way by the rulings already discussed which held that silence, not founded on fifth amendment privilege, permits an adverse inference supporting deportability.[89]

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87. The presumption about heroin is valid only as a permissive one, which the jury could reject if it so desired. C. McCormick, Evidence § 346 (1972 ed.).

88. *Id.* § 407 n.8.

89. *E.g.*, Vajtauer v. Commissioner, 273 U.S. 103 (1927); *see* text accompanying notes 72 & 73 *supra.*

There, at least, evidence other than an invalid congressional presumption was before the court; the respondents' in-court conduct betrayed susceptibility to the Government's contentions. Section 291, however, seeks to replace all evidence so that the Government need only show alienage to win its case.

Section 291 is Unconstitutional as a Civil Statute

Even in a strictly civil setting where results are less intrusive than in criminal or deportation proceedings, statutory presumptions are subject to attack if they are irrebutable. Thus, in *Cleveland Board of Education v. LaFleur*,[90] a school board ruling that teachers *must* leave their posts in their fifth month of pregnancy was ruled constitutionally unsound because of the implicit irrebutable presumption that all women are unfit to teach when five months pregnant. Such irrebutable presumptions could not be used to deprive individuals of their freedoms and liberties without due process, according to the Court. Although on its face, section 291 seems to provide for rebuttal and thus meets the constitutionality test for civil statutes, in fact, rebuttal is often precluded.

Section 291 calls upon a proven alien either to reveal the circumstances of his entry or to risk deportation. To explain the circumstances of entry, however, may in some cases lead to a criminal prosecution for violation of section 275, which prohibits illegal entry.[91] Thus, testimony about the circumstances of entry is incriminatory and is precisely the type of information about which an

90. 414 U.S. 634 (1974). However, the status of the irrebutable presumption analysis as a premise for constitutional adjudication is in a tremendous state of flux. The theory has engendered considerable criticism from both the Court and the commentators. *Compare* Weinberger v. Salfi, 422 U.S. 749, 772, (1975) (extension of the irrebutable presumption theory would result in a "virtual engine of destruction"); Note, *The Irrebutable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974); Note, *Irrebutable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975), *with* Tribe, *From Environmental Foundations to Constitutional Structures: Learning from Nature's Future*, 84 YALE L.J. 545 (1975); Comment, *In re* Lisa R.—*Limiting the Scope of the Conclusive Presumption Doctrine*, 13 SAN DIEGO L. REV. 377 (1975). The scope of this article precludes an extensive discussion of the constitutional theory here. Instead, the argument will only be highlighted as a possible approach. But any attorney who tries to cut down section 291 as an irrebutable presumption should be aware that the theory is a cumbersome axe.

91. 8 U.S.C. § 1325 (1970).

alien may claim privilege. A claim of privilege, however, will in this case trigger the presumption, and the alien will be found deportable.

This dilemma directs us back to the *LaFleur* holding, which deemed unconstitutional irrebuttable presumptions that impinge on the freedom and liberty of individuals in a noncriminal context.[92] A fundamental question arises in light of that ruling. Is a presumption in fact rebuttable if the rebuttal will incriminate? The author contends that it is unreasonable to answer that rebuttal is possible even though criminal indictment might ensue. The purpose of the fifth amendment cannot be so obtusely disregarded. Realistically, rebuttal is foreclosed, and the holding in *LaFleur* indicates that even in a civil context such a presumption is unconstitutional. Simply stated, the presumption in section 291 is effectively irrebutable and thus void of due process[93] because rebuttal necessarily risks the equally grave consequences of criminal conviction.

Section 291 is a Weak Evidential Assumption

In addition to the serious constitutional infirmities, section 291 makes little sense from an evidential perspective. The Supreme Court in *Woodby v. INS*[94] quantified the burden of proof which the INS must meet to support a finding of deportability. The Court said that the Government must establish its allegations of deportability by "clear, unequivocal and convincing evidence."[95] The Court recognized that this was a more exacting standard of proof than that necessary in a civil negligence case, and it has been regarded as approaching the standard for criminal convictions.[96] Although *Woodby* did not involve section 291 on its face, the Court specifically stated that this demanding standard of proof applies to *all* deportation cases.[97] Consequently, the appropriate question in light of *Woodby* is whether the presumption of section 291, which is indisputably fallacious, can alone satisfy the requirements that an alien may be found deportable only on the basis of "clear, unequivocal and convincing" evidence.

It defies all rational thought to maintain that a factually deficient presumption can, with nothing more, furnish any modicum

92. 414 U.S. at 646.
93. Due process, which includes the opportunity to present one's evidence, is necessary in deportation proceedings. *See* text accompanying notes 27-31 *supra*.
94. 385 U.S. 276 (1966).
95. *Id.* at 285-86.
96. *Id.* at 286.
97. *Id.* at 286 n.19.

of probative evidence. The courts must come to the realization that if the INS offers nothing but proof of alienage, it cannot rely, as an evidential matter, on a presumption that the alien is here illegally.

It is likely that the evidential and constitutional fragility on which section 291 rests is the reason the INS almost always attempts to offer proof in addition to the section 291 presumption to show deportability. Section 291 is simply too ripe for challenge to be relied on exclusively. Nevertheless the section always "lurks in the wings" and is used as a standby in the event the Service's other evidence is inconclusive. More alarming is the custom of the immigration judges to state in their opinion that the Government's evidence in such-and-such a case is enough to demonstrate deportability, *but even if it were not,* section 291 could be relied on to find the alien deportable.[98] Only the judge himself knows whether this kind of statement is merely surplusage, or whether it reveals a tinge of uncertainty expunged by the buttressing effect of an unconstitutional statute. For the sake of judicial integrity, section 291 should not have any impact on the course of a deportation proceeding.

The Fourth Amendment, the Fifth Amendment, and Section 291

Much of the preceding discussion purposely treated the deportation hearings as distinct from the illegal arrest that predicate it. Consequently, the criticism of the section 291 presumption and the approval of extending fifth amendment privileges to all deportation hearings are appropriate in instances of legal arrest. But the argument above is even more compelling if the deportation hearing is based on an illegal arrest. In that case, an alien who has been arrested in violation of his fourth amendment right against illegal seizure may be brought into a hearing and forced either to answer questions which may lead to his deportation or to remain silent and consequently be found deportable. It requires little intellectual effort to see that an alien's fourth amendment protections are thereby rendered meaningless.

By stating his name and thus providing a link to INS records independently obtained, the alien who has been illegally arrested

98. *See, e.g., In re* Bulos, 16 I. & N. Dec. 691 (BIA, 1976); *In re* Tang, 13 I. & N. Dec. 691 (BIA, 1971).

would implicitly admit alienage and trigger section 291. Thus, unless he were entitled to plead the fifth amendment on this most basic of questions, the fourth amendment protections which extend to him would simply not matter because they would not help to thwart his deportation. The rule that an illegal arrest does not terminate valid proceedings requires that an alien make himself available to answer questions. But if he is compelled to answer questions (or if an adverse inference is drawn from his claim to the privilege), he will almost certainly be found deportable, given section 291. Consequently, although protected in theory from illegal interrogation and arrest, the alien soon learns that procedural practices will render his protection judicially hollow. Such procedural maneuvering around guaranteed constitutional protection is intolerable.

The same argument applies to the presumption of illegality in section 291. After a showing of alienage, the alien is trapped. Thus, regardless of the fact that his arrest was illegal, the presumption will dictate his deportation. The presumption thus wipes out any opportunity for the alien to benefit from his fourth amendment protection. Perhaps more importantly, however, section 291 nullifies the deterrent impact which the fourth amendment is designed to have on the excesses of the INS. In other words, given the presumption and its quick route to a finding of deportability, the INS may make illegal arrests without adverse consequences accruing to the INS.[99] Substantive law designed to protect individuals from governmental over-reaching is a mirage unless it has teeth. Section 291 knocks the teeth out of the fourth amendment protection as it applies to aliens. The author submits that the substantive law of illegal arrest in deportation cases did not merely pay lip service to the rights of aliens, but rather contemplated making the fourth amendment protection effectual. The offensive parts of section 291 may not, in short, be given effect when an illegal arrest has been made.

Voluntary Departure

The special circumstances which circumscribe voluntary departure testimony will be briefly noted. Voluntary departure is provided for in section 244(a) of the Act[100] and is an alternative to

99. Of course, the alien could always institute a civil suit against the INS as in Wolf v. Colorado, 338 U.S. 25 (1949), but the likelihood of that is so slim that the INS would never be deterred. The alien will be in any event deported and will have little time to institute a suit. Also, the expense may be too great.

100. 8 U.S.C. § 1254 (1970). *See* Wasserman, *Practical Aspects of Repre-*

deportation. Aliens present in the United States illegally will try to obtain a grant of voluntary departure in lieu of deportation because it is less likely than deportation to foreclose later, legal reentry.[101] There are no hard and fast success formulas for winning a voluntary departure order, for it is given solely at the discretion of the immigration judge. Generally, the judge focuses on the equities of each individual case in an attempt to determine whether a grant of voluntary departure is warranted.

In the course of requesting a voluntary departure order, some admissions about alienage and illegal status will doubtless be made. The problem the alien faces is to ensure that his admissions in these hearings are not used by the Government as evidence in its deportation prosecution.

The BIA has ruled on two separate occasions that any testimony given in support of an application for voluntary departure will not be used to prove deportability at the hearing-in-chief.[102]

Unfortunately, the BIA's clear disposition has not entirely filtered downward to the immigration judges. References are often

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senting an Alien at a Deportation Hearing, 14 SAN DIEGO L. REV. 111, 120-21 (1976); Comment, *Suspension of Deportation: Illusory Relief, id.* at 229.

101. In this context, *see* text accompanying notes 20-26 *supra*. *See also* C. GORDON & H. ROSENFIELD, IMMIGRATION & NATIONALITY LAW § 7.2(a) (rev. ed. 1975).

102. In *In re* Lam, I.D No. 2157 (BIA, 1972), the respondent, who was pleading the fifth amendment in answer to questions involving deportation, decided not to jeopardize his deportation proceedings by making any admissions in a voluntary departure application. Instead, he refused to testify for voluntary departure purposes until a decision on deportation was made. The BIA found that he had thereby forfeited his right to request voluntary departure, for his fear that testimony given for voluntary departure purposes could be used as evidence of deportability was unfounded. The BIA noted that the pertinent Federal Regulation, 8 C.F.R. § 242.17(d) (1976), says that "voluntary departure" evidence is not a "concession of alienage or deportability." BIA concluded from this language that testimony given on behalf of voluntary departure may not be used to defeat a respondent's defense in the deportation proceeding. A second case, *In re* Bulos, 14 I. & N. Dec. 691 (BIA, 1972), stated the matter more affirmatively. The BIA said:

> The testimony of a respondent in connection with his application for the privilege of voluntary departure may or may not touch upon alienage and deportability. In any case, such testimony must not be used for the purpose of either establishing or confirming alienage or deportability.

Id. at 695.

made to voluntary departure admissions in support of findings of deportability. Appeals are available, but it is preferable that initial determinations by the immigration judge be in accordance with the law; availability of appeal is no excuse for poor decisions.

Documents and Records from INS Files: Suppression and How the Fourth Amendment Protection is Given Effect

We have seen that in deportation hearings, evidence taken at the time of an illegal arrest is inadmissable but that the existence of *Miranda* warnings has not been adjudged a necessary element for legal arrests. We have also seen that certain presumptions and premises which attend to the deportation hearing itself are questionable in any context, but are particularly insidious when an illegal arrest has occurred. However, still to be examined is perhaps the most serious retardent to an effective exercise of the substantive rights which the fourth amendment guarantees to aliens. This obstacle is an absence of provision for a separate suppression hearing. The problems that such omission raises is best demonstrated by taking as an example a favorite method of the INS to prove alienage and deportability: the introduction into evidence of the contents of its files on an individual.

The Use of Files

Typically, in a street encounter or factory dragnet, an alien is apprehended and requested to give his name and to produce identification and documents showing his right to be here. Because no *Miranda* warning is required,[103] it is highly likely that the alien will surrender the requested information. The INS then prepares and sends to the alien an *Order to Show Cause*, which contains allegations reflecting on the individual's deportability and notifies the individual that he should appear at a hearing to show why he should not be deported.[104] If the original arrest was illegal, neither admissions nor documents obtained at the time of apprehension may be used by the INS to prove alienage or deportability.[105] This rule explains why the alien's invocation of the fifth amendment during the hearing has such great significance.[106]

Nevertheless, the illegal arrest is not void of usefulness to the INS. By learning the alien's name when he was apprehended, the

103. *See* text accompanying notes 48-69 *supra.*
104. *See generally* C. GORDON & H. ROSENFIELD, *supra* note 101, § 5.3.
105. *See* text accompanying note 49 *supra.*
106. *See* text accompanying notes 70-85 *supra.*

INS can reach into their computerized files and see if they can uncover further evidence of the individual's alienage. The agency will probably succeed. The INS has files on virtually every alien who has entered legally at some time in his life. In addition, files are kept on every alien who at some time was a subject of deportation proceedings.[107] Consequently, the likelihood that any alien apprehended will have some record in the INS computer is very high. Having obtained their past files and ascertained that the individual has not acquired citizenship, the INS then has solid proof of alienage to present at the deportation hearing. Section 291 is invoked, and the unlawfulness of the arrest is swept aside by the swift implementation of the presumption.[108]

The alien's only hope for salvation is in the contention that the Service's files are directly forthcoming from discoveries made during the illegal arrest and are thus inadmissible fruits of the poisonous tree.[109] The argument would have to be fashioned in this manner: The individual was "seized" unlawfully; during the course of the illegal seizure, certain facts, including the individual's name, were revealed to the authorities but are obviously fruits of the poisonous tree; use of these facts in any way—*e.g.*, to turn up more evidence—further taints the new evidence; the name, unlawfully obtained, was used by the INS to request its computers to provide further information; therefore, the further information is also tainted and inadmissible.

The BIA has problems with this argument.[110] On the one hand, it has argued that the INS was already in possession of the files prior to the arrest, and therefore, it is easily concluded that the files were "discovered" independently of the illegal arrest. Thus, the files are not tainted and are admissible.[111] On the other hand,

107. H. MURPHY, WHERE'S WHAT, SOURCES OF INFORMATION FOR FEDERAL INVESTIGATION 228-50 (1975). According to the author, an officer of the Central Intelligence Agency who compiled this book under a Brookings Institution Grant, the Service's Master Index contains 40,000,000 documents and is augmented by 3,000,000 new documents per year. *Id.* at 237, 242.

108. *See* text accompanying notes 86-98 *supra.*

109. *See* text accompanying notes 40-48 *supra* for a discussion of the fruit of the poisonous tree.

110. *See* dicta in *In re* Yau, I.D. No. 2272 (BIA, March 19, 1974). *See also In re* Melara, Civil No. A-1953 2024 (N.Y., April 25, 1975).

111. This seems to be the reasoning behind the dicta in *In re* Yau, I.D. No. 2272 (BIA, March 19, 1974).

it has asserted that respondent's argument does nothing more than try to suppress from evidence the physical presence of the respondent as fruit of the poisonous tree. Because an illegal arrest does not terminate subsequent proceedings, and thus the body must come before the tribunal, there is little logic in rejecting the admission of any files pertaining to the body before the court.[112]

Both of these arguments are flawed. First, the possession of forty million files, none of which is distinguishable from the other without some further information (such as an illegally obtained name), can hardly justify the conclusion that one of these files is within independent access of the agency.[113] Although data processing makes almost all information possessable in the crude sense of the word, a *key* is needed to make the information usable. The author argues that that key may not be illegally obtained evidence.

Several authorities agree with the evaluation that mere possession does not necessarily entail availability and that unless evidence is independently available, it cannot be considered independently obtained.[114]

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112. This must have been the reasoning in *In re* Melara, Civil No. A-19532024 (N.Y., April 25, 1975), in which the BIA cited Guzman-Flores v. INS, 496 F.2d 1245 (7th Cir. 1974), as authoritative support for rejection of respondent's contention. *Guzman-Flores*, however, stands only for the proposition that the "physical presence" of an illegally arrested individual cannot be suppressed so as to invalidate the proceedings. The Government in that case was nevertheless obliged to *identify* the "body" before the tribunal, for identity does not flow from simple physical presence. Obviously *Guzman-Flores* did not sanction every type of identifying device, and certainly not that which flows from the illegal arrest. Instead, the court carefully noted that the identifying evidence was *not* illegal fruit, but rather was the plaintiff's own admission in that case.

113. The only way an official may locate the file he wants is to *"furnish as much information as possible,* particularly [the alleged alien's] full name, citizenship and date of birth." H. MURPHY, *supra* note 107, at 229 (emphasis added).

114. In Au Yi Lau v. INS, 445 F.2d 217 (D.C. Cir. 1971), aliens who were respondents in a deportation proceeding protested that their arrest was illegal. The court found that the arrest in question was legitimate in fact. It felt compelled, however, to respond to the Government's secondary argument which was that even if the arrests were illegal, deportation was in order, because documentary evidence which the Government offered in the form of seaman's landing permits from their files was *independently* obtained. The court stated in a footnote that it was "unable" to conclude that the Government's claims were "well taken." In this connection the court noted: "We think it not unlikely that their [the file's] availability may have been dependent upon determining what date and in what place petitioner entered the country." *Id.* at 224.

Similarly, in *In re* Perez-Lopez, I.D. No. 2132 (BIA, 1972), the immigration judge terminated deportation proceedings on the ground that evidence was illegally obtained from an alien's living quarters and "used as leads to ob-

The BIA's second assertion that the respondent's attempt to exclude INS files from evidence is tantamount to suppressing the physical presence of the individual is equally suspect. Although it is true that an illegal seizure does not erase the knowledge that there is somebody who may be illegally present in this country, and hence does not terminate the proceeding against that individual,[115] the knowledge of that individual's physical presence says nothing about the identity of the individual. Yet it is exactly that identity, and not the mere knowledge of his existence, which is critical to the INS case. Thus an attempt to suppress evidence flowing from illegally obtained knowledge of identity in no way resembles an attempt to suppress the illegal physical presence of some nameless individual. Even if we concede that physical presence cannot be suppressed so as to end the hearing before it begins, that concession bears no relationship to the question of the individual's identity, which, when Government files may be used, is the crux of the entire proceeding. The BIA has failed to distinguish between the circumstantial issue of "presence," which cannot be suppressed because the Government's interest in ejecting illegal aliens as a class is great (thus the hearing must proceed), and the pivotal issue of identity, which if illegally obtained and then used to trace new information violates an individual's constitutional protection. This blurring of issues invalidates the BIA's argument; the mere perception that a body exists does not tell us the individual's name. If the name is all that is important, the name must be legally obtained.

The Suppression Hearing

In theory then, a rational and convincing way does exist to shield an alien from any ill effects of the illegal arrest. The courts have yet to accept the argument regarding the excludability of Government files, but a case on point is now pending before the Second Circuit.[116] However, one more serious impediment stands in the way of an alien's successful suppression of illegally obtained evi-

tain evidence from [INS] and State Department files." *Id.* The conclusion in both of these cases is well-reasoned. Efficient record-keeping should not be permitted to strip the law of its logic and thereby undercut the fourth amendment protection.

115. Guzman-Flores v. INS, 496 F.2d 1245 (7th Cir. 1974); Huerta-Cabrera v. INS, 466 F.2d 759 (7th Cir. 1972).

116. Melara-Esquivel v. INS, Civil No. 76-4111 (2d Cir., filed 1976).

dence. This obstacle is that there are no provisions for the separation of a suppression hearing from the deportation hearing-in-chief.

Suppression of illegally obtained evidence, which is a mandated safeguard in criminal cases, is also available to the alien in deportation proceedings, despite the civil characterization of the proceedings.[117] Thus, as in criminal trials,[118] the respondent in a deportation hearing must initiate the procedure by which he protects his fourth amendment rights. He must offer facts which on their face indicate unlawful conduct in order to put the Government to its burden of demonstrating the legality of its actions. In a typical case, the alien submits an affidavit asserting, for example, that he was walking down the street alone when he was stopped by two strange men who inquired about a street address. After replying correctly and in good English, he was interrogated about his citizenship. On its face, the affidavit demonstrates that to the knowledge of the respondent, there was no reason for suspicion and that the arrest was therefore illegal. Thus, any evidence flowing therefrom must be suppressed.

The Government then attempts to rebut the contention urged by respondent. Because the respondent has raised the issue, he is sub-

117. In Illinois Migrant Council v. Pilliod, 398 F. Supp. 882 (N.D. Ill. 1975), in which future injunctive relief against unlawful official action was requested, the court explicitly recognized that suppression applies to deportation hearings. The court stated:

> Were this a criminal case or a deportation proceeding (as all of the reported cases [of official overreaching] in this area have been), the decisional processes would be completed. Any evidence —tangible or testimonial . . . derived from the obviously unlawful steps . . . would be ordered suppressed.

Id. at 897-98. *See also* note 49 *supra*, which contains an explanation that the courts have expressed agreement that evidence flowing from illegal arrest is inadmissible. Logically, if evidence is inadmissible, it is excludable, and excludability is effectuated by suppression. Therefore, the cited decisions implicitly accept the notion of suppression in deportation hearings. The BIA itself has endorsed the determination that illegally obtained evidence must be suppressed and has even established a procedure by which that may be effectuated.

In *In re* Tang, 13 I. & N. Dec. 691 (BIA, 1971), the BIA outlined the proper procedure as follows:

> One who raises the claim must come forward with proof establishing a prima facie case before the [INS] will be called upon to assume the burden of justifying the manner in which it obtained its evidence.

Id. at 692. The BIA then went on to note parenthetically that their rule was similar to the one which prevails in criminal matters. Two years later, a second BIA decision cited *In re Tang* for the proposition that the rule concerning motions to suppress, "which applies in criminal cases, has been adopted for use in deportation hearings." *In re* Tsang, 14 I. & N. Dec. 1, 2 (1973).

118. *See* text accompanying notes 40-47 *supra*.

ject to cross-examination of which the Government will certainly take advantage. After moving peremptorily through most of the affidavit, the Service's attorney will focus on the exchange which took place in regard to citizenship. The trial attorney will probably dwell particularly on respondent's response to the agent's question about place of birth. At this point the respondent is cornered. He may not plead the fifth amendment because he raised the issue, and the Government must have its chance to cross-examine.[119] Nevertheless, if he answers the question and thus reveals that at the time of the arrest he admitted to a foreign birthplace, he himself has presented the court with some evidence of alienage which the Government could not have offered if the arrest was, in fact, illegal.[120] Because proof of alienage leads in rapid steps to a finding of deportability, the respondent, by trying to give practical impact to his fourth amendment protection, has gravely undercut his chances for successfully defending against the charge of deportability.

Such a sequence of events is entirely unjustifiable and has been described as impermissible in criminal trials.[121] Any admissions made in support of a motion to suppress may not be used by a prosecutor in a criminal trial to prove his case-in-chief. The Supreme Court in *Simmons v. United States*[122] stated with cogent absoluteness that fourth amendment protection must not be compulsorily bartered away for the fifth amendment privilege. An illegally arrested individual is entitled to the protections flowing from both the fourth and fifth amendments, and there is no room for equivocation.

Nevertheless, the deportation authorities have continually refused to guarantee that admissions made in an attempt to suppress evidence will not affect their decision about deportability.[123] They uninspiredly stand on thin legal and constitutional ground, referring

119. *See generally* C. MCCORMICK, EVIDENCE § 132 (1972 ed.); 8 J. WIGMORE, EVIDENCE §§ 2276(b) & 2277 (McNaughton rev. 1971).

120. Although determining the exact probative value of that evidence is difficult, the answer is a prior admission under circumstances in which he had no reason to lie, and perhaps has enough probative value to meet the preponderance of the evidence as to alienage. *See* note 84 *supra.*

121. *See* text accompanying notes 40-44 *supra.*

122. 390 U.S. 377 (1968). *See* note 44 *supra.*

123. *E.g.*, Record at 3, *In re* Melara, Civil No. A-19532024 (N.Y., April 25, 1975).

to the absence of provisions for separate suppression hearings in the *Regulations* or mechanically invoking the dogma that suppression hearings are mandated by the *Federal Rules of Criminal Procedure* and are not applicable to civil hearings. Such myopic reasoning deprives the illegally arrested alien from ever making use of his fourth amendment protections. According to the immigration authorities, if an alien wants to make an issue of illegal arrest, he must do so at the peril of making admissions as deleterious as the illegal evidence that he wishes to suppress. Unless this gross procedural dilemma is abrogated by the recognition that suppression hearings are necessarily separable from deportation hearings, the substantive law will be more fiction than fact. To avoid this consequence, the Attorney General must promulgate regulations directing the immigration judges to allow separate suppression hearings.

Conclusion

The foregoing is best characterized as a legal critique of deportation proceedings. Starting from the premise that aliens, like all other residents, are protected from illegal seizure and arrest, the article has highlighted the deficiencies of an obsolete procedural system which frustrates the applicable substantive law. These deficiencies are justified in the eyes of the authorities by a petrified and abstruse view of deportation proceedings as civil in nature. However, regardless of the nature of deportation proceedings, the non-compulsory treatment of *Miranda* warnings, the equivocating attitude toward fifth amendment privilege, the section 291 presumption, the use of Government files as evidence, and the absence of provision for a separate suppression hearing all militate against the efficacy of the applicable substantive law. The author's position is that from a legal standpoint, substantive law is paramount and procedure must accommodate its goals. The fourth amendment was simply not designed to be circumvented by dubious procedural rules.

There is, of course, another way to approach the entire topic of deportation proceedings. Putting aside the legalistic argument that procedure must follow substance, one may confine one's evaluation to public policy. Adopting such a perspective may lead to the conclusion that ejecting aliens who we know (by illegal means or otherwise) are here illegally is a priority which should not be compromised. Changing the procedure, according to this view, will simply "tighten the noose" even more around the Government's

neck in deportation proceedings.[124] Therefore, it should not be done.

However, public policy is not constructed in a vacuum. Even if an observer has little compassion for the protections which the Constitution extends to illegal aliens and would sacrifice these for the sake of efficient administration, he must not fail to take cognizance of the larger implications. The Supreme Court has made this observation about the procedural aspects of the fourth amendment:

> In sum, the [exclusionary] rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.[125]

The thrust of this thought requires us to look beyond the individual who is the target of the proceedings, despite the fact that he may be an obvious criminal or a deportable alien, and to consider the impact of illegal arrest on society. It would be a bleak society that sanctioned its agents' random interrogations and seizure of individuals on the street.

Minorities in this country would suffer the most abuse. The spectre of Mexican Americans, Puerto Ricans, Chinese Americans and legitimate immigrant or non-immigrant aliens being stopped virtually anywhere, at any time is obnoxious to our free society. Yet, because the substantive law is stripped of the procedural mechanisms to implement it, no incentive exists for over-zealous investigations of the INS not to pursue the most efficient course of illegal arrest. If the INS is allowed to *succeed* (in terms of the crude bureaucratic standard of the number of apprehensions and deportations per year) despite illegal arrests, it is pure fancy to assume that the agency will not pursue a tacit policy of illegal apprehension. Although administrative efficiency is a valid goal for a modern, integrated society, quality of life should not be compromised for its sake. The Second Circuit placed the entire matter in perspective when it wrote:

> The problem of immigration is one of national concern. The adverse economic impact caused by illegal aliens is substantial and well-documented. But to respond to the problem by water-

124. *See* dissent of Justice Clark in Woodby v. INS, 385 U.S. 276, 287 (1966) (dissenting opinion).
125. United States v. Calandra, 414 U.S. 338, 348 (1974).

> ing down . . . the Fourth Amendment is most surely to take the lowest constitutional road.[126]

In order to avoid such a consequence and to preserve this nation's commitment to the constitutional high-road, the procedure in deportation hearings must be brought more into line with the substantive law. We have argued that this can be justified because deportation hearings are quasi-criminal in nature and should thus be accorded all the safeguards which attend criminal proceedings. Alternatively, if the dogma of civil proceedings is not to be abandoned, the courts should at least shape the pertinent procedural rules to uphold the purposes and spirit of the substantive law.

126. United States v. Barbera, 514 F.2d 294, 301-02 (2d Cir. 1975).