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Gonzalez-Rivera v. INS: An Unwarranted Application of the Exclusionary Rule to Civil Deportation Hearings

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Notes

GONZALEZ-RIVERA v. INS: AN UNWARRANTED APPLICATION OF THE EXCLUSIONARY RULE TO CIVIL DEPORTATION HEARINGS

I. INTRODUCTION

The Fourth Amendment protects persons within the United States from unreasonable government searches and seizures.[1] As a means of enforcing this constitutional protection, the judiciary created the exclusion-

1. U.S. CONST. amend. IV. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no [w]arrants shall issue, but upon probable cause, supported by [o]ath or affirmation and particularly describing the [p]lace to be searched, and the persons or things to be seized.

Id.

Undocumented immigrants are generally entitled to constitutional protection. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); *see also* Plyler v. Doe, 457 U.S. 202, 210 (1982) (recognizing that aliens are protected by Due Process Clause of Fifth and Fourteenth Amendments); Matthews v. Diaz, 426 U.S. 67, 77 (1976) (holding that Fifth Amendment protects undocumented persons from invidious discrimination by United States government); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (holding that Fifth and Sixth Amendments apply to undocumented aliens within United States). Furthermore, the United States Supreme Court has assumed that the Fourth Amendment applies to undocumented immigrants within United States territory. *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 261 (1990) (acknowledging that Supreme Court has not expressly held that Fourth Amendment applies to undocumented immigrants within United States territories). The Fourth Amendment, however, does not apply to undocumented immigrants who are involuntarily within United States territory. *Id.* at 274-75.

In *Verdugo-Urquidez*, the Supreme Court rejected Verdugo-Urquidez's claim that his Fourth Amendment rights were violated by the warrantless search of his Mexican residence by American officials. *Id.* The Court reasoned that undocumented persons receive constitutional protection only when they are voluntarily within the United States' territory and have developed "substantial connections" with the American community. *Id.* at 271. Because Verdugo-Urquidez was transported to the United States by Mexican officials due to his involvement in American drug smuggling activities, the Court concluded that he was not voluntarily within the United States and was not considered part of the class of "people" the Constitution was intended to protect. *Id.* at 272-73. Furthermore, the Supreme Court recognized that the Fourth Amendment applied only to government searches within United States territories. *Id.* at 266; *see also* Michael Scaperlanda, *The Domestic Fourth Amendment Rights of Aliens: To What Extent Do They Survive* United States v. Verdugo-Urquidez?, 56 MO. L. REV. 213 (1991) (discussing Fourth Amendment rights of undocumented immigrants and *Verdugo-Urquidez* case).

ary rule, which excludes illegally obtained evidence from criminal[2] and quasi-criminal proceedings.[3] In the context of civil deportation proceedings, however, a large class of people is prohibited from using the exclusionary rule to challenge the admissibility of illegally obtained evidence.[4]

In *Immigration & Naturalization Service (INS) v. Lopez-Mendoza*,[5] the United States Supreme Court held that the exclusionary rule generally does not apply to civil deportation hearings.[6] As a result of the Court's ruling, undocumented immigrants[7] cannot rely on the exclusionary rule at deportation hearings to suppress evidence obtained illegally from a vehicle stop or a border search.[8] Thus, in effect, the Fourth Amendment

2. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (acknowledging that exclusionary rule applies to state criminal proceedings through Due Process Clause of Fourteenth Amendment); Weeks v. United States, 232 U.S. 383, 398 (1914) (excluding illegally obtained documents from federal criminal proceeding).

3. *See* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 702 (1965) (recognizing that exclusionary rule applies to forfeiture proceedings that are quasi-criminal in nature). Forfeiture proceedings serve a penal function because they are instituted for the purpose of confiscating one's property as punishment for an offense committed. Boyd v. United States, 116 U.S. 616, 634 (1886). Consequently, forfeiture proceedings are "within the reason of criminal proceedings for all the purposes of the Fourth Amendment," including the exclusionary rule. *Id.* For further discussion of the exclusionary rule, see *infra* notes 19-41 and accompanying text.

4. *See, e.g.*, Immigration & Naturalization Services (INS) v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) (holding that exclusionary rule does not apply to civil deportation proceedings). For a discussion of the *Lopez-Mendoza* opinion, see *infra* notes 86-103 and accompanying text.

5. 468 U.S. 1032 (1984).

6. *Id. Lopez-Mendoza* did not impose an absolute prohibition on the use of the exclusionary rule in deportation proceedings. RICHARD D. STEEL, ON IMMIGRATION LAW § 14.17, at 34 (2d ed. 1994). Instead, the Court reserved judgment for cases involving egregious Fourth Amendment violations. *Lopez-Mendoza*, 468 U.S. at 1050.

7. For a discussion of the use of the term "undocumented immigrant," see David K. Chan, Note, *INS Factory Raids as Nondetentive Seizures*, 95 YALE L.J. 767, 767 n.2 (1986). This Note refers to illegal aliens as undocumented immigrants. An undocumented immigrant is a person who is working in the United States without authorization, who has overstayed his or her visa, who has entered the country without inspection or with false documents or who is otherwise acting in violation of immigration laws. Victor Romero, *Whatever Hapened to the Fourth Amendment?: Undocumented Immigrants' Rights After* INS v. Lopez-Mendoza *and* United States v. Verdugo-Urquidez, 65 S. CAL. L. REV. 999, 999 n.1 (1992). Although illegal entry into the United States is in violation of immigration laws, it is often encouraged by American employers and permitted through permissive border enforcement. *Id; see also Illegal Workers as Domestics: Uneasy Alliance*, N.Y. TIMES, Oct. 30, 1985, at C1 (recognizing domestic use of undocumented aliens and failure of INS to apprehend such persons at border); *The Immigration Mess (Both of Them)*, N.Y. TIMES, Oct. 22, 1985, at A38 (editorial) (suggesting that lax border enforcement coupled with American employers' encouragement for immigrant labor is possible cause for influx of undocumented persons into country).

8. *See Lopez-Mendoza*, 468 U.S. at 1050 (holding that exclusionary rule does not apply to deportation proceedings). For a discussion of the *Lopez-Mendoza* holding, see *infra* notes 86-103 and accompanying text.

does not provide undocumented immigrants with any practical protection against unreasonable government conduct.[9]

Despite this seemingly clear mandate from the Supreme Court, the Court of Appeals for the Ninth Circuit, in *Gonzalez-Rivera v. INS*,[10] held that the exclusionary rule applies to deportation proceedings under certain circumstances.[11] Relying on Supreme Court dictum from *INS v. Lopez-Mendoza*, the Ninth Circuit concluded that a stop based solely on an individual's Hispanic appearance was an "egregious" constitutional violation, commanding the use of the exclusionary rule at the petitioner's subsequent deportation hearing.[12] Although the Ninth Circuit sought to protect undocumented immigrants' Fourth Amendment rights by carving out an egregious violation exception to the *Lopez-Mendoza* rule, in realizing this objective, the court misinterpreted the Supreme Court's holding in *Lopez-Mendoza*.

This Note analyzes the correctness of the Ninth Circuit's decision in *Gonzalez-Rivera* in light of the Supreme Court's ruling in *Lopez-Mendoza*. Specifically, Part II reviews the history and purposes of the exclusionary rule.[13] Part III discusses the application of the Fourth Amendment to border searches and examines the use of the exclusionary rule in deportation hearings prior to the *Lopez-Mendoza* decision.[14] In addition, Part III provides an overview of the deportation process and explains the Supreme Court's holding in *Lopez-Mendoza*.[15] Part IV examines the Ninth Circuit's reasoning in *Gonzalez-Rivera*,[16] while Part V evaluates the court's decision and concludes that the court expanded the use of the exclusionary rule

9. *See* Henry G. Watkins, *The Fourth Amendment and the INS: An Update on Locating the Undocumented and a Discussion on Judicial Avoidance of Race-Based Investigative Targeting in Constitutional Analysis*, 28 SAN DIEGO L. REV. 499, 504 (1991) (arguing that government's broad power to enforce immigration laws diminishes undocumented immigrants' ability to rely on Fourth Amendment protection); *see also Lopez-Mendoza*, 468 U.S. at 1050 (assuming that Fourth Amendment protects undocumented persons but prohibiting use of exclusionary rule at deportation proceedings).

10. 22 F.3d 1441 (9th Cir. 1994). For a discussion of the facts and holding of *Gonzalez-Rivera v. INS*, see *infra* notes 136-203 and accompanying text.

11. *Id.* For a discussion of the majority and dissenting opinions in *Gonzalez-Rivera*, see *infra* notes 156-221 and accompanying text.

12. *Gonzalez-Rivera*, 22 F.3d at 1452. The court cited language in the *Lopez-Mendoza* opinion that reserved judgment for the issue of whether the exclusionary rule applied in situations involving "egregious" Fourth Amendment violations. *Id.* at 1448 (citing *Lopez-Mendoza*, 468 U.S. at 1050 (dictum)). This language was referred to as the "egregiousness conduct caveat." *Id.*

13. For a discussion of the exclusionary rule, see *infra* notes 19-41 and accompanying text.

14. For a discussion of the application of the Fourth Amendment to border searches and of the use of the exclusionary rule in deportation hearings, see *infra* notes 42-60 and 80-131, respectively, and accompanying text.

15. For a discussion of the deportation process and the *INS v. Lopez-Mendoza* decision, see *infra* notes 61-79 and 88-107, respectively, and accompanying text.

16. For a discussion of *Gonzalez-Rivera*, see *infra* notes 132-200 and accompanying text.

beyond the limitations set forth in *Lopez-Mendoza*.[17] Finally, Part VI considers the impact that the *Gonzalez-Rivera* opinion will have on future decisions involving the exclusionary rule and deportation proceedings.[18]

II. THE EXCLUSIONARY RULE

The Fourth Amendment protects the right of people to be free from unreasonable governmental intrusion.[19] A government search or seizure is unreasonable when it is not based on probable cause or a search warrant.[20] To safeguard the principles underlying the Fourth Amendment,

17. For a critical analysis of the *Gonzalez-Rivera* holding, see *infra* notes 222-37 and accompanying text.

18. For a discussion of the legal and social impact of *Gonzalez-Rivera*, see *infra* notes 238-51 and accompanying text.

19. U.S. CONST. amend IV. The Supreme Court has interpreted the phrase "the people" to include the class of persons "who are a part of a national community or who have otherwise developed sufficient connection with this country [the United States] to be considered part of that community." United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990). Although Fourth Amendment protection applies to undocumented persons voluntarily within the United States, it does not extend to government searches of their foreign residences. *Id.* at 274-75; *see also* Scaperlanda, *supra* note 1, at 221-27 (discussing Fourth Amendment rights of undocumented persons).

20. *See* Evelyn Aswad et. al., Project, *Investigation and Police Practices: Overview of the Fourth Amendment*, 82 GEO. L.J. 597, 597 (1994) (providing comprehensive discussion of Fourth Amendment jurisprudence). Probable cause is the degree or level of suspicion necessary to justify certain governmental interferences of Fourth Amendment rights. *Id.* at 602; *see also* Wong Sun v. United States, 371 U.S. 471, 479 (1963) (recognizing that arrest must be based on more than mere suspicion). Although probable cause is stated explicitly in the Fourth Amendment, it is undefined. U.S. CONST. amend IV. Probable cause is determined by the totality of the circumstances and is not reduced to a "neat set of legal rules." Illinois v. Gates, 462 U.S. 213, 232, 238 (1983).

The Fourth Amendment, interpreted literally, does not require a warrant or probable cause before conducting a search or seizure. *See* Carroll v. United States, 267 U.S. 132, 149 (1925) (acknowledging unreasonableness of warrantless search construed at time Fourth Amendment was adopted); United States v. Johnston, 876 F.2d 589, 595 (7th Cir.) (recognizing that nothing explicit in Constitution requires law enforcement officers to obtain search warrants) (Posner, J., concurring), *cert. denied*, 493 U.S. 953 (1989). However, the Supreme Court has imposed such requirements. *See* Katz v. United States, 389 U.S. 347, 357 (1967) (recognizing presumptive warrant requirement for searches and seizures); *Carroll*, 267 U.S. at 155-56 (recognizing probable cause as reasonableness standard for Fourth Amendment purposes).

There are many exceptions to the Fourth Amendment's search warrant and probable cause requirements. *See, e.g.*, Colorado v. Bertine, 479 U.S. 367, 372 (1987) (acknowledging inventory search exception to warrant requirement); United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985) (acknowledging executive authority to conduct warrantless search at border); New York v. Belton, 453 U.S. 454, 461 (1981) (permitting warrantless search incident to lawful arrest); Cupp v. Murphy, 412 U.S. 291, 293 (1973) (recognizing that exigent circumstances justify warrantless search); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (acknowledging that it is proper to conduct warrantless search if individual gives knowing and intelligent consent); Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971) (explaining plain-view exception to search warrant requirement); Terry v.

the judiciary created the exclusionary rule.[21]

The exclusionary rule prevents the government from presenting illegally obtained evidence in criminal and quasi-criminal proceedings.[22] By suppressing illegally obtained evidence, the exclusionary rule deters government officials from engaging in deliberate unlawful conduct.[23] While this deterrence rationale is proffered as the main objective of the exclu-

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Ohio, 392 U.S. 1, 30-31 (1968) (announcing "stop and frisk" exception to probable cause requirement); *Carroll*, 267 U.S. at 162 (holding warrantless search of vehicle valid when based upon probable cause to believe contraband inside). For a comprehensive discussion pertaining to these and other exceptions to the search warrant and probable cause requirements, see Aswad, *supra* at 624-98.

21. *See* Weeks v. United States, 232 U.S. 383, 394, 398 (1914) (recognizing excludability of illegally obtained evidence in federal proceeding); *see also* Mapp v. Ohio 367 U.S. 643, 655 (1961) (holding that exclusionary rule applies to state courts via Due Process Clause of Fourteenth Amendment).

Application of the exclusionary rule is not a constitutional right. United States v. Calandra, 414 U.S. 338, 348 (1974). The exclusionary rule was not created to remedy the injury to the search victim's privacy. *Id.* at 347; *see also* Linkletter v. Walker, 381 U.S. 618, 637 (1965) (holding that exclusionary rule cannot restore victims' "ruptured privacy"). Instead, it was created as a remedy to protect Fourth Amendment rights through its deterrent effect. *Calandra*, 414 U.S. at 338. By excluding valuable evidence from the accused's criminal trial, police officers are less likely to violate the Fourth Amendment when gathering probative evidence against the accused. *Id.* at 351; *see also* Elkins v. United States, 364 U.S. 206, 217 (1960) (recognizing deterrent purpose of exclusionary rule as means of compelling respect for Constitution).

22. *See* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 702 (1965) (using exclusionary rule in quasi-criminal forfeiture proceeding); *Mapp*, 367 U.S. at 660 (holding that exclusionary rule applies to state criminal trials); *Weeks*, 232 U.S. at 389 (holding that exclusionary rule applies to federal criminal proceeding).

23. *See* United States v. Leon, 468 U.S. 897, 906 (1984) (recognizing deterrent purpose of exclusionary rule); Stone v. Powell, 428 U.S. 465, 486 (1976) (noting primary justification for exclusionary rule is deterrence of police misconduct); United States v. Janis, 428 U.S. 433, 454 (1976) (prohibiting use of exclusionary rule in tax proceeding because it did not further deterrence rationale); *Calandra*, 414 U.S. at 347 (deeming deterrence of future misconduct as "prime purpose" of exclusionary rule); Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 413 (1966) (stressing deterrence rationale underlying exclusionary rule); *Mapp*, 367 U.S. at 656 (recognizing deterrence as purpose of exclusionary rule); *Elkins*, 364 U.S. at 217 (acknowledging that exclusionary rule removes incentive to disregard Constitution).

There are circumstances when excluding illegally obtained evidence does not significantly effectuate the deterrence rationale. *See* Deborah Conner, Project, *Investigations and Police Practices: Overview of the Fourth Amendment—The Exclusionary Rule*, 82 GEO. L.J. 597, 757-69 (1994) (discussing exceptions to exclusionary rule). Consequently, the Supreme Court has articulated exceptions to the exclusionary rule that permit admission of illegally obtained evidence at trial. *See Leon*, 468 U.S. at 913 (announcing "good faith" exception to exclusionary rule); Nix v. Williams, 467 U.S. 431, 446-48 (1984) (recognizing inevitable discovery exception to exclusionary rule); *Wong Sun*, 371 U.S. at 491 (articulating attenuation exception to exclusionary rule); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (acknowledging independent source exception to exclusionary rule). For a discussion of these judicially created exceptions to the exclusionary rule, see Conner, *supra*, at 757-66.

sionary rule, the rule also preserves judicial integrity by prohibiting the government from using the valuable, but illegally obtained evidence to secure a conviction.[24] Finally, the exclusionary rule is paramount in preserving the public's confidence in the criminal justice system.[25]

In deciding whether to apply the exclusionary rule, courts consider whether the benefits of deterring police misconduct outweigh the social costs of excluding the probative evidence from the trial or proceeding.[26] This balancing test was first used by the Supreme Court in *United States v. Calandra*[27] to prohibit application of the exclusionary rule to a grand jury proceeding.[28]

In *Calandra*, the Supreme Court rejected Calandra's argument that he did not have to testify at his grand jury proceeding because the questions were based on illegally seized evidence.[29] In holding that the exclusionary

24. *See* Henry L. Henderson, *Justice in the Eighties: The Exclusionary Rule and the Principle of Judicial Integrity*, 65 JUDICATURE 354, 355 (1982) (arguing that judicial integrity was original basis for exclusionary rule); *see also Mapp*, 367 U.S. at 659 (noting that government must observe its own laws). Courts cannot encourage or commit constitutional violations. *Janis*, 428 U.S. at 458-59 n.35. Admitting of illegally obtained evidence in criminal proceedings would "make the courts accomplices in the willful disobedience of [the] Constitution." *Elkins*, 364 U.S. at 223 (citing McNabb v. United States, 318 U.S. 332, 345 (1942)). In the Fourth Amendment context, judicial integrity is not promoted if admission of the illegally obtained evidence is likely to encourage future constitutional violations. *Janis*, 428 U.S. at 459 n.35.

Historically, the judicial integrity argument was "uppermost in the minds of the framers of the rule." *Calandra*, 414 U.S. at 357-59 (Brennan, J., dissenting). Commentators argue, however, that the Supreme Court has overlooked the judicial integrity rationale and has replaced it with the deterrence rationale. *See* Bernard A. Nigro, Jr., *The Exclusionary Rule in Administrative Proceedings*, 54 GEO. WASH. L. REV. 564, 567-70 (1986) (noting that opponents of exclusionary rule advanced deterrence rationale, weakening judicial integrity objective).

25. *See* Mitchell Barnes Davis & Kathleen B. Simon, Comment, *The Exclusionary Rule in INS Deportation Hearings: A New Look at the Lopez-Mendoza Cost-Benefit Analysis After the 1986 Immigration Reform and Control Act*, 23 LAND & WATER L. REV. 537, 539-40 (1988) (discussing scope of exclusionary rule). Admitting illegally obtained evidence in criminal proceedings risks undermining the people's trust in the government. *Calandra*, 414 U.S. at 357 (1974) (Brennan, J., dissenting).

26. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1042-50 (1984) (applying cost-benefit analysis in deciding that exclusionary rule does not apply to deportation hearing); *Leon*, 468 U.S. at 906-08 (concluding that evidence obtained pursuant to good faith Fourth Amendment violation should not be excluded because cost of exclusion outweighed benefit of deterrence); *Janis*, 428 U.S. at 454 (prohibiting application of exclusionary rule to tax proceeding because cost outweighed benefit); *Calandra*, 414 U.S. at 355 (recognizing that adverse effect of exclusionary rule on grand jury proceeding outweighed benefit of deterrence).

27. 414 U.S. 338 (1974).

28. *Id.* at 352. The United States District Court for the Northern District of Ohio and the United States Court of Appeals for the Sixth Circuit had upheld Calandra's motion to suppress the illegally seized evidence from the grand jury hearing. *Id.* at 342. The Supreme Court, however, reversed those decisions. *Id.* at 354-55.

29. *Id.* Respondent Calandra's place of business was searched illegally by federal agents pursuant to an invalid search warrant. *Id.* at 342. The warrant was

rule did not apply to the grand jury hearing, the Court determined that the benefits of using the rule did not outweigh the potential harm caused to the investigative function of the grand jury.[30] In making this evaluation, the Court reasoned that using the rule would "seriously impede" the grand jury procedure by promoting adjudication of issues traditionally reserved for trial, by causing unnecessary delay and disruption, and by requiring extended litigation of "tangential issues" unrelated to the grand jury's primary investigative objective.[31] Against these significant costs, the Court weighed the minimal benefits of deterring police misconduct associated with the rule's application.[32] Specifically, the Court presumed that any beneficial deterrent effect would be focused narrowly on investigative conduct directed solely towards discovering evidence for use in grand jury proceedings, not criminal trials.[33] Furthermore, the Court emphasized that any incentive to violate the Fourth Amendment to obtain evidence for a grand jury proceeding is "substantially negated" by the inadmissibility of the same evidence at the subsequent criminal trial.[34]

The *Calandra* balancing test was later used by the Supreme Court in *United States v. Janis*[35] to prohibit the use of the exclusionary rule at a federal civil proceeding.[36] In *Janis*, state officials illegally seized evidence that

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issued without probable cause and the search exceeded the scope of the warrant. *Id.*

30. *Id.* at 349. The primary function of the grand jury is not to adjudicate guilt, but to determine whether a crime was committed and whether a criminal trial should take place. *Id.* at 343.

31. *Id.* at 349. Grand jury proceedings do not use the same evidentiary rules that govern criminal trials. *Id.* at 343. Therefore, the Court concluded that use of the exclusionary rule would "unduly interfere with the effective and expeditious discharge of the grand jury's duties." *Id.* at 350. Because Calandra had not been indicted, application of the exclusionary rule would deny the grand jury the opportunity to hear testimony necessary to conduct its investigation. *Id.* at 352-53 n.8. Moreover, because Calandra had failed to make his suppression motion prior to the proceeding, the grand jury hearing was interrupted, causing unnecessary delay. *Id.* at 353 n.8.

32. *Id.* at 351. Although the Court recognized the importance of suppressing illegally obtained evidence in the context of a criminal trial, it acknowledged that extending the exclusionary rule to grand jury proceedings would not justify the social costs of exclusion in that context. *Id.* The Court noted that it was unrealistic to expect that the same deterrence benefits derived from the exclusionary rule achieved at criminal trials would be achieved in the context of grand jury proceedings. *Id.*

33. *Id.* The Court was uncertain whether application of the exclusionary rule would have any deterrent effect on police misconduct. *Id.*

34. *Id.* It is unlikely that a prosecutor would request an indictment when a conviction could not be obtained because of the suppression of the illegally obtained evidence. *Id.*

35. 428 U.S. 433 (1976).

36. *Id.* at 448-60. Janis argued that the evidence seized by the state officer, who relied on a defective warrant, should be excluded from a federal tax proceeding. *Id.* at 447. The precise issue in *Janis* was whether "evidence seized by a state criminal law enforcement officer in good faith, but nonetheless unconstitutionally, was inadmissible in a civil proceeding by or against the United States." *Id.* at 434.

the Internal Revenue Service (IRS) subsequently used as the basis for a tax assessment against Janis.[37] Applying a cost-benefit analysis, the Court concluded that the exclusionary rule was inapplicable in the context of the civil proceeding because the social costs of excluding valuable evidence outweighed the benefits of deterrence.[38] The Court reasoned that excluding illegally obtained evidence from federal proceedings in which state officials had no interest would not deter future misconduct by those state agents.[39] After considering the insignificant benefits of deterrence, the Court determined that the costs of excluding "relevant and reliable evidence" were greater.[40] However, in holding that the exclusionary rule did not apply in the context of an intersovereign violation, the *Janis* Court expressly reaffirmed the importance of the deterrence rationale underlying the use of the exclusionary rule.[41]

III. THE FOURTH AMENDMENT, ROVING BORDER PATROL SEARCHES AND THE USE OF THE EXCLUSIONARY RULE IN DEPORTATION HEARINGS

A. *Searching for Undocumented Persons at the Border*

Although the Fourth Amendment protects the rights of undocumented immigrants within the United States,[42] they are not afforded full

37. *Id.* at 433-36. Janis' person and residence were searched pursuant to a defective search warrant. *Id.* The warrant failed to provide sufficient details about the independent reliability of the information supplied by informants. *Id.* at 437-38. The state officials, however, relied in good faith on the facially valid warrant. *Id.* at 447. All of the evidence obtained pursuant to the defective warrant was used by the IRS as the basis for Janis' tax assessment. *Id.* at 439.

38. *Id.* at 454. The Court concluded that there was not a "sufficient likelihood" of deterring the state police officers' future conduct by excluding the unlawfully seized evidence. *Id.*

39. *Id.* at 453-54. Because the imposition of the exclusionary rule in the context of an intersovereign violation "falls outside the offending officer's zone of primary interest," any deterrence benefit is insignificant. *Id.* at 458. The Court also noted that the state officers were already "punished" in the sense that the illegally seized evidence was inadmissible at any state criminal proceeding against Janis. *Id.* at 448.

40. *Id.* at 448-49. The public's interest in effective law enforcement is hampered by the use of the exclusionary rule because relevant evidence is excluded from the accused's trial. *Id.*

41. *Id.* at 446 (relying on United States v. Calandra, 414 U.S. 338, 347 (1974)). Because the exclusionary rule is a remedial device, it is applicable in instances where its objectives are "most efficaciously served." *Calandra*, 414 U.S. at 348. It is unnecessary, therefore, to "adopt every proposal that might deter police misconduct." *Id.* at 350.

42. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1032 (1984) (assuming that Fourth Amendment rights apply to undocumented persons within United States). *But see* United States v. Verdugo-Urquidez, 494 U.S. 259, 272-73 (1990) (distinguishing *Lopez-Mendoza* on grounds that undocumented person must have voluntary presence in and substantial connection to United States to receive Fourth Amendment protection).

Fourth Amendment protection at United States borders.[43] In an effort to protect United States territories and to prevent the illegal entry of persons into the United States, government officials have greater power to search and seize at the border and its "functional equivalent."[44] Government agents are not required to have probable cause or a search warrant to conduct routine border searches.[45] However, searches beyond routine

43. *See* Watkins, *supra* note 9, at 503 (discussing exemptions from Fourth Amendment probable cause and search warrant requirements). Border searches are not "embraced within the prohibition of the [Fourth Amendment]." Carroll v. United States, 267 U.S. 132, 150 (1924).

44. Watkins, *supra* note 9, at 503. The Commerce Clause, granting Congress the power to "regulate Commerce with foreign nations," is the source of the government's power to conduct border searches and seizures. U.S. CONST. art. I, § 8, cl. 3; *see also* United States v. Montoya De Hernandez, 473 U.S. 531, 537-38 (1985) (recognizing Commerce Clause as government's authority to search at border). Moreover, the federal government has the power to exclude aliens from the country. Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973) (citing Chae Chan Ping v. United States, 130 U.S. 581, 603-04 (1889)). In exercising this power, the government may conduct searches of "individuals or conveyances seeking to cross [the] border." *Almeida-Sanchez*, 413 U.S. at 272. INS agents have the authority to search persons and their effects if there is "reasonable cause to suspect" that an individual is excludable and a search would reveal probative evidence. 8 U.S.C. § 1357(c) (1994).

This power to conduct border searches based upon less than a showing of probable cause also exists at the functional equivalent of the border. *Almeida-Sanchez*, 413 U.S. at 272. The "functional equivalent" of the border is defined as an established station near the border, a location marking the connection of two or more roadways extending from the border or the arrival site of a nonstop flight from another country. *Id.* at 273. Lower courts have further defined what constitutes the functional equivalent of the border. *See* United States v. Johnson, 991 F.2d 1287, 1290 (7th Cir. 1993) (recognizing international airport as functional equivalent of border for passengers on nonstop international flight); United States v. Hill, 939 F.2d 934, 938 (11th Cir. 1991) (considering search of car 1.5 miles from airport terminal functional equivalent of border); United States v. Emmens, 893 F.2d 1292, 1294-95 (5th Cir.) (acknowledging first practical detention point as functional equivalent of border), *cert. denied*, 498 U.S. 812 (1990); United States v. Jackson, 825 F.2d 853, 860 (5th Cir. 1987) (en banc) (defining functional equivalent of border as place of international traffic), *cert. denied*, 484 U.S. 1011, 1019 (1988); United States v. Gaviria, 805 F.2d 1108, 1112-13 (2d Cir. 1986) (designating final destination point as functional equivalent of border), *cert. denied*, 481 U.S. 1031 (1987); United States v. Dobson, 781 F.2d 1374, 1376 (9th Cir. 1986) (allowing functional equivalent of border search of boat coming from international waters into United States waters).

45. *See Montoya de Hernandez*, 473 U.S. at 537 (recognizing that Fourth Amendment requires border detention based on reasonable suspicion); United States v. Martinez-Fuerte, 428 U.S. 543, 562 (1976) (holding that neither probable cause nor individualized suspicion is required to stop at fixed border checkpoint); Terry v. Ohio, 392 U.S. 1, 20-22 (1968) (acknowledging that less intrusive detention requires less than probable cause); *see also* Kirsten M. Eriksson, Project, *Investigation and Police Practices: Overview of the Fourth Amendment*, 82 GEO. L.J. 597, 678-82 (1994) (analyzing border search exception).

While probable cause is not required to conduct routine border stops or searches, there is no explicit rule for determining what renders a border search routine or nonroutine. *See id.* at 679. The courts of appeals consider the degree of intrusiveness of the search before deeming it routine or nonroutine. *Id.* at 678.

custom detentions must be based upon a reasonable suspicion of smuggling or other wrongdoing.[46]

While at permanent border checkpoints, government officials may stop a vehicle for brief questioning of its passengers without an individualized suspicion of wrongdoing,[47] a roving Border Patrol stop must be based upon reasonable suspicion that the automobile contains undocumented persons.[48] For example, in *United States v. Brignoni-Ponce*,[49] the Supreme Court held that a roving INS Border Patrol may stop a vehicle only if the patrol person has "specific articuable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicle contains aliens."[50] While it is permissible to stop individual vehicles for a

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Examples of nonintrusive searches include searches of luggage, persons, personal effects and vehicles. *Id.* at 678-79. Generally, courts do not find the government's conduct intrusive enough to be considered nonroutine. *Id.* at 679 n.315. For a brief overview of the type of searches that courts of appeals have deemed nonroutine, see *id.* at 679 n.314.

At permanent checkpoints created to search for undocumented persons, immigration officers do not need individualized suspicion or probable cause to search or stop an individual. *Martinez-Fuerte*, 428 U.S. at 562. Individuals may also be referred to secondary checkpoints for further investigation without probable cause or reasonable suspicion. *Id.* at 563. Any detention beyond what is permissible at a routine checkpoint, however, requires a finding of probable cause or consent. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975) (requiring probable cause or consent for detention beyond routine roving patrol stop).

46. *See Montoya de Hernandez*, 473 U.S. at 541 (holding that detention of person at border, beyond routine custom search, must be justified by reasonable suspicion of wrongdoing); *see also* Eriksson, *supra* note 45, at 678-82 (discussing border search exception).

47. *Martinez-Fuerte*, 428 U.S. at 562; *see also* Eriksson, *supra* note 45, at 681 (discussing standards required for border search of undocumented persons). Referral of motorists to a secondary checkpoint, without reasonable suspicion, is also constitutional. *Martinez-Fuerte*, 428 U.S at 563.

48. *See Brignoni-Ponce*, 422 U.S. at 882 (announcing requirement of reasonable suspicion that vehicle contains undocumented person for roving patrol stops). A roving Border Patrol stop is generally a brief detention of a vehicle that includes a visual inspection of the parts of the vehicle that can be seen by a person standing alongside of the car and brief questioning about the legality of the occupant's presence in the United States. *Id.* at 880.

49. 422 U.S. 873 (1975).

50. *Id.* at 884. Reasonable suspicion is based on an objective standard. Nicacio v. INS, 797 F.2d 700, 705 (9th Cir. 1985). The officer's experience is an influential factor in the development of a reasonable suspicion. *Brignoni-Ponce*, 422 U.S. at 885; *see also* United States v. Lopez-Martinez, 25 F.3d 1481, 1486 (10th Cir. 1994) (considering INS officer's 18 years of experience and prestigious position as Border Patrol agent in deciding that reasonable suspicion existed). But, it cannot be used to give agents unlimited discretion in making stops. *Nicacio*, 797 F.2d at 705.

The reasonable suspicion standard is required to justify the detention because automobile stops are "seizures" within the context of the Fourth Amendment. *Id.* The *Brignoni-Ponce* Court justified its holding that roving patrol stops need to be based only on reasonable suspicion by acknowledging the limited nature of the stop, the public's interest in curbing illegal immigration and the lack of practical alternatives for patrolling the border. *Brignoni-Ponce*, 422 U.S. at 881.

brief inspection based upon reasonable suspicion that the vehicle contains undocumented aliens, any further detention must be based upon probable cause or consent.[51]

Although the *Brignoni-Ponce* Court recognized that facts amounting to less than probable cause may justify a roving patrol stop, it was unwilling to grant INS agents unlimited discretion in stopping vehicles at border points.[52] Therefore, in announcing the reasonable suspicion standard for roving patrol stops, the Court proffered the following factors as relevant in forming reasonable suspicion: the characteristics of the area in which the vehicle was encountered, the area's proximity to the border, the officer's experience with alien traffic, recent information about illegal border crossings, the driver's behavior, physical aspects of the vehicle, the passengers' appearance and traffic patterns.[53] In assessing these characteristics, the government official is entitled to rely upon his or her experience in detecting illegal entry and smuggling.[54]

The factors set forth by the *Brignoni-Ponce* Court acknowledge that an individual's ethnic appearance is a relevant factor in forming reasonable suspicion; however, a stop based solely on a passenger's ethnicity is unconstitutional.[55] In *Brignoni-Ponce*, INS agents stopped a vehicle based solely

51. *Brignoni-Ponce*, 422 U.S. at 881-82. Detention beyond routine questioning about the passengers' citizenship, immigration status and any suspicious circumstances must be based on probable cause or consent. *Id.* Before a roving patrol officer can conduct a search, however, probable cause, consent or an exception to the search warrant requirement must exist. *Id; see also* Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) (holding that search not at functional equivalent of border required probable cause or consent).

52. *Brignoni-Ponce*, 422 U.S. at 882. The Court emphasized that the Fourth Amendment reasonableness requirement demands that INS Border Patrol officers do not act with unlimited discretion in the context of border stops. *Id.* The reasonable suspicion standard protects border residents from indiscriminate governmental interference and safeguards the public's interest in effective law enforcement. *Id.* at 883.

53. *Id.* at 884-85. Vehicles that appear crowded, heavily weighted or have hatchbacks or large compartments are often viewed as having characteristics that form part of the officer's suspicion. *Id.* at 885. Also, an individual's haircut, facial expression, eye contact or erratic and evasive behavior, taken together, may support a reasonable suspicion. *Id; see also* Eriksson, *supra* note 45, at 682 n.332 (listing courts of appeals cases finding reasonable suspicion based on variety of factors).

54. *Brignoni-Ponce*, 422 U.S. at 885; *see also Lopez-Martinez*, 25 F.3d at 1486 (giving weight to INS agent's 18 years of experience as relevant factor in forming reasonable suspicion). While the officer's experience is an influential factor in the development of reasonable suspicion, it cannot be used to give agents unlimited discretion in making stops. *Nicacio*, 797 F.2d at 705.

55. *Brignoni-Ponce*, 422 U.S. at 886; *see also Nicacio*, 797 F.2d at 704 (holding that more than ethnic appearance and presence in area frequently traveled by undocumented immigrants is required to justify vehicle stop). Racial appearance, however, is a probative factor in the search for undocumented persons. *Brignoni-Ponce*, 422 U.S. at 886-87; *see also* Robert A. Culp, Note, *The Immigration and Naturalization Service and Racially Motivated Questioning: Does Equal Protection Pick Up Where The Fourth Amendment Left Off?*, 86 COLUM. L. REV. 800, 807 (1986) (arguing that

on the three passengers' Mexican ancestry and arrested Brignoni-Ponce for knowingly transporting undocumented persons into the United States.[56] In rejecting the government's argument that the passengers' Mexican appearance alone justified the stop, the Court stated that although the likelihood that an Hispanic looking person is an undocumented immigrant is "high enough to make [Hispanic] appearance a relevant factor, . . . standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens."[57] Therefore, in determining whether reasonable suspicion exists for a roving border patrol stop, courts must consider the totality of the circumstances.[58]

The *Brignoni-Ponce* factors are not an exhaustive list of what characteristics may form the basis for reasonable suspicion.[59] When, however, a roving Border Patrol officer has reasonable suspicion to stop a vehicle and

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racially motivated questioning violates equal protection absent proof of reasonable suspicion of illegal alienage). *But see* United States v. Ojebode, 957 F.2d 1218, 1233 (5th Cir. 1992) (holding that border search predominantly based upon ethnic appearance is constitutional), *cert. denied*, 113 S. Ct. 1291 (1993).

56. *Brignoni-Ponce*, 422 U.S. at 875. The other passengers were arrested for their illegal status. *Id.* The passengers argued that because they were illegally detained, their confessions and status as undocumented immigrants should have been suppressed. *Id.* The INS agents admitted that they detained the vehicle solely because of the occupants' ethnic appearance. *Id.* According to Justice Douglas, the stop was a "patent violation of the Fourth Amendment." *Id.* at 888 (Douglas, J., concurring).

57. *Id.* at 886-87. The Court emphasized that many native-born or naturalized citizens have physical characteristics identifiable with Mexican descent. *Id.* at 886. The government argued, however, that in a location at or near the border, one's Mexican ancestry alone justified the belief that he or she was an undocumented immigrant. *Id.* at 877. The government's argument focused on the public's need to prevent the illegal entry of millions of undocumented persons into the United States, the effect of which creates competition among legal residents for jobs and social services. *Id.* at 878-79. The government believed that preventing illegal entry of undocumented persons outweighed any liberty interests the individuals may have had. *Id.* at 878-79.

58. *See id.* at 885 n.10 (noting that reasonable suspicion depends on totality of circumstances and is not limited to factors and cases cited within opinion). Usually clothing, appearance, accent and one's reaction to confrontation are factors that are considered in establishing reasonable suspicion. *Id.* at 885. In another case, the following factors, considered together, were found sufficient to support a finding of reasonable suspicion: traveling on a route known to be used by alien smugglers, failure to acknowledge the approaching Border Patrol car, swerving while being followed by INS agents, traveling in a heavily weighted car and Hispanic appearance. United States v. Rodriguez-Sanchez, 23 F.3d 1488, 1493 (9th Cir. 1994). However, accelerating when passing a Border Patrol car is not conclusive that a reasonable suspicion of alien smuggling exists. United States v. Garcia-Camacho, 53 F.3d 244, 248 (9th Cir. 1995). Since the *Gonzalez-Rivera* ruling, failure to make eye contact is no longer accorded any weight in justifying reasonable suspicion for a roving Border Patrol stop. *Id.* (citing Gonzalez-Rivera v. INS, 22 F.3d 1441, 1446 (9th Cir. 1994)); *see also* STEEL, *supra* note 6, § 14.17, at 14-32 (recognizing differences among courts as to what constitutes reasonable suspicion).

59. *Brignoni-Ponce*, 422 U.S. at 885 n.10. For a list of the *Brignoni-Ponce* factors, see *supra* note 58.

the officer subsequently obtains sufficient proof of illegal alienage, the undocumented person is then subject to deportation.[60] The next section discusses the deportation process and the use of illegally obtained evidence in deportation proceedings.

B. *The Deportation Process*

Deportation proceedings are commenced upon the issuance of an Order to Show Cause (OSC).[61] The OSC notifies the respondent of the pending charges, contains factual allegations informing the respondent of the alleged unlawful act and requires the respondent to show cause for nondeportability.[62] The OSC must also inform the respondent of his or her rights.[63] After the OSC is issued, the fact-finding process begins.[64]

The deportation process consists of three levels of adjudication or review.[65] The first stage is the "trial level," presided over by an Immigration

60. *See generally* 8 U.S.C. § 1251 (1994). Persons who are excludable at the time of entry into the United States are subject to deportation. *Id.* Section 1251 includes as extensive list of other circumstances that can subject an undocumented immigrant to deportation. *See id.*

61. 8 C.F.R. § 242.1(a) (1994). Deportation is the removal of an alien from the United States to the country from which he or she came. BLACK'S LAW DICTIONARY 438 (6th ed. 1990). Deportation is a means of prohibiting the continuation of a crime. INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984). It does not impose punishment. *Id; see also* Frederic J. Giordano, Note, United States v. Lopez-Vasquez: *How Much Process is Due? Mass Deportation Hearings and Silence as a Waiver of the Right to Appeal*, 22 BROOK. J. INT'L L. 481, 483 (1994). Furthermore, deportation hearings determine eligibility to remain in the United States and there is no adjudication as to the respondent's guilt. *Lopez-Mendoza*, 468 U.S. at 1038.

62. 8 C.F.R. § 242.1(b) (1994). The OSC must contain the statutory provisions alleged to have been violated and the legal authority under which the proceeding is conducted. *Id.* Facts proffered to allege illegal alienage include non-United States citizenship, place of birth, present country of citizenship and the date and place of respondent's last entry into the country. STEEL, *supra* note 6, § 14.18, at 34-35.

63. STEEL, *supra* note 6, § 14.18, at 36. Respondents are entitled to procedural due process. *Id.* § 14.23(b), at 55; *see also* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) (discussing historical development of due process and constitutional rights of undocumented persons). The respondent is advised that anything he or she says may be used against him or her, and is also advised of the availability of "free legal service programs." 8 C.F.R. § 242.1(c) (1994). Delivery of the OSC must be achieved by personal service if possible. *Id.* Otherwise, it can be sent via certified mail to the respondent or to his or her counsel. *Id; see also* STEEL, *supra* note 6, § 14.18, at 36 (discussing procedure for issuing OSC). Failure to appear at a deportation hearing without reasonable cause after full notice of the pending charges results in an absentia hearing—a determination of deportability without the undocumented immigrant present. 8 U.S.C. § 1252(b)(1994).

64. STEEL, *supra* note 6, § 14.18, at 36. Official proceedings begin upon the issuance of the OSC. *Id.*

65. *See* Patricia J. Schofield, Note, *Evidence in Deportation Hearings*, 63 TEX. L. REV. 1537, 1543-45 (1985) (discussing deportation process).

Judge (IJ).[66] At this stage, the government has the burden of proving that the respondent is a deportable alien, based on "reasonable, substantial, and probative evidence"[67] that is "clear, unequivocal, and convincing."[68] After the government makes this showing, the burden shifts to the respondent to prove nondeportability.[69] Then, based on the pleadings and the evidence proffered, the IJ makes a determination of whether the respondent is deportable.[70] After a finding that the respondent is deportable, he or she may submit an application to the IJ for discretionary relief.[71] The IJ will issue a final decision after considering the undocumented immigrant's application for relief.[72]

The second phase of the deportation process, which can be initiated by either party, is an administrative appeal to the Bureau of Immigration Appeals (BIA).[73] The BIA may decide legal and factual questions, but its review is limited to matters contained within the record.[74] Briefs may be submitted and oral arguments may be requested, but the BIA does not

66. 8 U.S.C. § 1252(b). The IJ is referred to as the Special Inquiry Officer. *Id.* At this stage, the respondent is given a reasonable opportunity to examine the evidence offered against him or her, to cross-examine witnesses presented by the government and to introduce evidence on his or her own behalf. *Id.* The hearing is held in the district of the respondent's arrest or residence, and is often held in the repondent's home. Davis & Simon, *supra* note 25, at 542.

67. 8 U.S.C. § 1252(b)(4); *see also* INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984) (acknowledging burden of proof to support deportation order); Woodby v. INS, 385 U.S. 276, 285 (1966) (holding that deportation not ordered unless proven by clear, unequivocal and convincing evidence).

68. STEEL, *supra* note 6, § 14.24, at 59. A "Record of Deportable Alien" (I-213 Form), prepared prior to the hearing by the INS investigator, is sufficient to prove alien status. *Id.* at 61. Because the deportation hearing is an administrative proceeding, the ordinary rules of evidence are not rigidly enforced. *See* Schofield, *supra* note 65, at 1543 (discussing admissibility of hearsay in deportation hearings).

69. STEEL, *supra* note 6, § 14.24, at 60. To rebut the presumption of illegal alienage, respondent has the burden of proving time, place and manner of entry into the United States. 8 U.S.C. § 1361 (1994).

70. 8 U.S.C. § 1252(b)(4) (1994). Not all deportable aliens are actually deported. 8 U.S.C. § 1254(e). The Attorney General may permit voluntary departure by the respondent or respondent may apply for discretionary relief. *Id.*

71. 8 C.F.R. § 242.17 (1994). Forms of relief include suspension of deportation, withholding deportation, voluntary departure, waiver of deportation, creation of record of lawful admission on the basis of an intention to marry a United States citizen and asylum. *Id.*

72. 8 C.F.R. § 242.18 (1994); *see also* Davis & Simon, *supra* note 25, at 543. The decision must contain a discussion of evidence and findings of deportability, unless deportability is conceded. 8 C.F.R. § 242.18(a).

73. 8 C.F.R. §§ 3.1(b)(2), 242.21 (1994); *see also* Davis & Simon, *supra* note 25, at 543 (discussing deportation process). The powers of the BIA are delegated by the Attorney General. Schofield, *supra* note 65, at 1544. On appeal, the BIA may decide factual and legal issues, but deference is given to the IJ's factual findings. *Id.*

74. Schofield, *supra* note 65, at 1544-45. Also, respondent may be represented by an attorney during the BIA proceedings. *Id.* at 1545.

hear testimony.[75] Furthermore, the BIA cannot reverse credibility determinations made by the IJ without sufficient reason.[76]

Finally, after the respondent exhausts all administrative remedies in the first two stages, he or she may seek further review in a federal court of appeals.[77] The scope of judicial review by the court of appeals is limited to determining whether the finding of deportation was based on "reasonable, substantial, and probative evidence."[78] However, the evidence admitted at deportation hearings and reviewed by the courts is generally not limited by the Fourth Amendment protection against unreasonable searches and seizures.[79]

C. *Application of the Exclusionary Rule to Deportation Hearings*

Although the Supreme Court sought to protect immigrants from indiscriminate governmental interference by imposing the "reasonable suspicion" standard for roving border patrol stops,[80] the Court's efforts and objectives have been diminished because the exclusionary rule does not apply to deportation hearings.[81] Traditionally the exclusionary rule was

75. *Id.* The BIA generally limits its review to matters that appear in the record. *Id.* at 1544-45.

76. STEEL, *supra* note 6, § 14.25, at 64. Considerable weight is given to the IJ's credibility and evidentiary determinations. *Id.*

77. Schofield, *supra* note 65, at 1545. Errors that were not preserved before the IJ and the BIA cannot be raised on appeal. *Id.*

78. 8 U.S.C. § 1105(a)(4) (1994); *see also* Paointhara v. INS, 708 F.2d 472, 474 (9th Cir. 1983) (acknowledging limited role of court in reviewing deportation order). The burden of proof is "strenuous." *Id.* After all administrative and judicial remedies available to the respondent have been exhausted, the INS has six months to effect deportation. Davis & Simon, *supra* note 25, at 543.

79. *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032, 1051 (1984) (prohibiting application of exclusionary rule to suppress evidence obtained pursuant to Fourth Amendment violation). *But see* STEEL, *supra* note 6, § 14.25, at 65 (acknowledging that Supreme Court has not announced absolute admissibility of illegally obtained evidence at deportation hearings). For a discussion of the facts and holding of *INS v. Lopez-Mendoza*, see *infra* notes 86-107 and accompanying text.

80. United States v. Brignoni-Ponce, 422 U.S. 873, 883 (1975).

81. *See Lopez-Mendoza*, 468 U.S. at 1034 (admitting illegally obtained evidence at deportation hearing); Quintana v. INS, No. 93-70407, 1994 U.S. App. LEXIS 33731, at *4 (9th Cir. Nov. 30, 1994) (holding that absent evidence of egregious violation, exclusionary rule is not applicable to deportation hearing); Mendoza-Solis v. INS, 36 F.3d 12, 14 (5th Cir. 1994) (recognizing that exclusionary rule is not applicable to deportation proceeding); Cervantes-Cuevas v. INS, 797 F.2d 707, 710 (9th Cir. 1983) (admitting evidence at deportation hearing without ruling that stop was legal or illegal); Benitez-Mendez v. INS, 760 F.2d 907, 910 (9th Cir. 1983) (admitting illegally obtained evidence at deportation hearing). *But see* Orhorhaghe v. INS, 38 F.3d 488, 505 (9th Cir. 1994) (granting motion to suppress evidence acquired pursuant to egregious constitutional violation). For a discussion of the *Orhorhaghe* case, see Joseph J. Migas, *Exclusionary Remedy Available in Civil Deportation Proceedings for Egregious Fourth Amendment Violations*, 9 GEO. IMMIG. L.J. 207 (1995); *see also* Gonzalez-Rivera v. INS, 22 F.3d 1441, 1452 (9th Cir. 1994) (excluding illegally obtained evidence derived from "egregious constitutional violation" from deportation hearing).

applied to deportation hearings,[82] but in 1979, in *In re Sandoval*,[83] the BIA held that this practice was improper and prohibited the use of the exclusionary rule at deportation hearings.[84] In the *Sandoval* opinion, the BIA reasoned that the social costs of excluding valuable evidence outweighed the minimal deterrent effect exclusion would have on INS conduct.[85] Five

82. *See* Nigro, *supra* note 24, at 572 (discussing history of exclusionary rule in context of deportation hearing). In 1893, the Supreme Court recognized that deportation was not a form of criminal punishment. *See* Fung Yue Ting v. United States, 149 U.S. 698, 709 (1893) (recognizing that deportation is removal without punishment because presence of undocumented person within United States is inconsistent with public policy). However, the exclusionary rule was still used in deportation proceedings despite the Supreme Court's earlier characterization of deportation hearings as civil proceedings. *See Ex Parte* Jackson, 263 F. 110, 112-113 (D. Mont.) (deeming deportation proceeding unfair and invalid when based upon illegally seized evidence), *appeal dismissed sub. nom.* Andrews v. Jackson, 267 F. 1022 (9th Cir. 1920); United States v. Wong Quong Wong, 94 F. 832, 833-34 (D. Vt. 1899) (acknowledging that Fourth Amendment protects undocumented persons and excludes illegally acquired evidence from deportation hearing).

By the early 1920s, it was assumed that evidence obtained through an illegal search and seizure could not support deportation. United States *ex. rel* Bilokumsky v. Tod, 263 U.S. 149, 155 (1923); *see also* Wong Chung Che v. INS, 565 F.2d 166, 169 (1st Cir. 1977) (excluding illegally obtained evidence from deportation hearing based on assumption that such evidence is inadmissible); *In re* Sandoval, 17 I. & N. Dec. 70, 93 (BIA 1979) (concurring opinion) (acknowledging that prior to 1979, INS assumed exclusionary rule applied to deportation hearings). *See generally* Lopez-Mendoza v. INS, 705 F.2d 1059, 1063-65 (9th Cir. 1983) (discussing history of exclusionary rule in deportation proceedings), *rev'd*, 468 U.S. 1032 (1984).

83. 17 I. & N. Dec. 70 (BIA 1979).

84. *Id.* at 82-83. In *Sandoval*, the BIA addressed the issue of whether the exclusionary rule applied to deportation hearings. *Id.* at 75. The BIA acknowledged that prior to 1979, only two reported district court cases ordered exclusion of illegally obtained evidence. *Id.* at 74 n.4 (citing *Ex Parte Jackson*, 263 F. at 112-113 (excluding illegally seized pamphlets from deportation hearing) and *Wong Quong Wong*, 94 F. at 832 (prohibiting admission of illegally seized letters at deportation hearing)). Furthermore, there was no reported case law examining the merits of excluding evidence from deportation hearings. *In re Sandoval*, 17 I. & N. at 75. Instead, courts either assumed that the exclusion of unlawfully obtained evidence was constitutionally required, or else failed to consider the issue. *Id; see also Wong Chung Che*, 565 F.2d at 169 (assuming exclusionary rule applied to deportation proceedings without considering merits of application).

In reaching its decision, the BIA focused on the civil nature of the proceeding and considered whether applying the exclusionary rule would further its deterrence objective. *In re Sandoval*, 17 I. & N. at 76-77. The BIA used the *Janis-Calandra* balancing test to decide that the costs of exclusion outweighed the benefits of deterrence. *Id.* at 77-84. For a discussion of the *Janis-Calandra* balancing test, see *supra* notes 27-41 and accompanying text.

85. *In re Sandoval*, 17 I. & N. at 83. Because the government can establish deportability with knowledge only of the alien's identity, and the alien cannot be excluded from the hearing, the BIA concluded that application of the exclusionary rule would have no deterrent effect on INS conduct. *Id.* at 79. The BIA evaluated the minimal deterrence benefits against the significant costs of exclusion. *Id.* at 81. These costs included an undue burden on immigration procedures and the implicit sanctioning of continuing violations of immigration laws. *Id.* Moreover, the BIA recognized possibile alternate remedies that made application of the exclusionary rule unnecessary. *Id.*

years later, in *INS v. Lopez-Mendoza*,[86] the Supreme Court affirmed the BIA's holding that the exclusionary rule does not apply to deportation hearings.[87]

In *Lopez-Mendoza*, respondents Sanchez-Sandoval and Lopez-Mendoza challenged their deportation orders, arguing that their admissions of illegal alienage should have been excluded from their deportation hearings because the confessions were obtained pursuant to illegal arrests.[88] In concluding that the exclusionary rule was inapplicable to deportation proceedings, the *Lopez-Mendoza* Court characterized deportation hearings as "purely civil," and emphasized that the evidentiary protections that applied to criminal proceedings did not apply in a civil context.[89] Furthermore, the Court applied the balancing test set forth in *United States v. Janis*,[90] weighing the social costs of exclusion against the benefits of deterrence, to conclude that the exclusionary rule did not apply to deportation hearings.[91]

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86. 468 U.S. 1032 (1984).

87. *Id.* at 1042. In making this decision, the Supreme Court reversed a Ninth Circuit ruling. *Id.* at 1051. The Ninth Circuit had reversed the BIA's ruling, stating that "the best and indeed the only realistic way to ensure that immigration officers respect the precious values embodied in the Fourth Amendment is to apply the exclusionary rule in deportation proceedings." Lopez-Mendoza v. INS, 705 F.2d 1059, 1075 (9th Cir. 1983), *rev'd*, 468 U.S. 1032 (1984). Consequently, the Ninth Circuit reversed Sanchez-Sandoval's (not related to the respondent in *In re Sandoval*) deportation order and remanded Lopez-Mendoza's order for a determination of whether a Fourth Amendment violation had occurred. *Id.*

88. *Lopez-Mendoza*, 468 U.S. at 1034-35. INS agents questioned and arrested Lopez-Mendoza at his workplace after they entered the premises without a search or arrest warrant and against the will of the store owner. *Id.* at 1035. Lopez-Mendoza admitted his illegal status after he was arrested. *Id.* Similarly, INS agents arrested Sanchez-Sandoval at his workplace. *Id.* at 1037. INS agents questioned Sanchez-Sandoval because of his evasiveness when he noticed the INS officers in the doorway. *Id.* Sanchez-Sandoval admitted his illegal status after he requested a deportation hearing. *Id.*

89. *Id.* at 1038. The Court distinguished deportation proceedings from criminal trials by emphasizing that criminal trials adjudicate the respondent's guilt, whereas deportation hearings determine "eligibility to remain in this country." *Id.* Furthermore, unlike criminal trials, deportation hearings do not impose punishment on the respondent. *Id.* Therefore, because the purpose of deportation is not penal, the protections that apply in a criminal proceeding do not apply to the deportation process. *Id; see also* Abel v. United States, 362 U.S. 217, 237 (1960) (recognizing that deportation proceedings are not "subject to the same constitutional safeguards [as] criminal prosecutions").

90. 428 U.S. 433 (1976). For a discussion of the *Janis* ruling, see *supra* notes 35-41 and accompanying text.

91. *Lopez-Mendoza*, 468 U.S. at 1041-50. The majority noted that the deterrence value, while insignificant in *Janis*, is more substantial in the context of a deportation proceeding because of the intra-agency relationship between the offending officers and the immigration agency. *Id.* at 1042. However, because the benefits were not substantial enough to outweigh the costs of exclusion, the Court reached the same conclusion as the *Janis* Court. *Id.* Nevertheless, Justices White and Brennan argued that the majority's cost-benefit analysis was incorrect. *Id.* at

The Court proffered four reasons why in the context of deportation hearings, the deterrent value of the exclusionary rule was significantly reduced.[92] First, the Court believed that because deportability can be proven by evidence independent of the arrest, the legality of the arrest was irrelevant.[93] Second, the Court noted that very few undocumented persons actually challenge deportation orders based on Fourth Amendment grounds, making it unlikely that immigration agents would alter their behavior to avoid potential application of the exclusionary rule.[94] Third, because the Immigration and Naturalization Service (INS) already had its own scheme for deterring Fourth Amendment violations, application of the exclusionary rule was unnecessary.[95] Last, the Court reasoned that the availablilty of alternative remedies, such as civil or criminal sanctions

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1051-60 (White and Brennan, J., dissenting). For a discussion of the *Janis* balancing test, see *supra* notes 36-41 and accompanying text.

92. *Lopez-Mendoza*, 468 U.S. at 1043-45. Justice Brennan disagreed with the majority's emphasis on the deterrence rationale as a justification for the exclusionary rule. *Id.* at 1051 (Brennan, J., dissenting). Instead, Justice Brennan acknowledged that the Fourth Amendment was the basis for the exclusionary rule. *Id.* (Brennan, J., dissenting). Justice Brennan also argued that immigration agents should be treated similarly to other federal agents in that they must comply with the requirements of the Fourth Amendment. *Id.* at 1052 (Brennan, J., dissenting). He further argued that the type of proceeding in which the illegally obtained evidence was to be used should not affect the agent's responsibility in upholding the Constitution. *Id.* (Brennan, J., dissenting).

93. *Id.* at 1043. The person and identity of an undocumented person are not suppressible. *Id; see also* United States v. Guzman-Bruno, 27 F.3d 420, 421 (9th Cir.), *cert. denied*, 115 S. Ct. 451 (1994) (recognizing that identity of defendant is not suppressible). Therefore, the INS can prove alien status from evidence gathered independently of the illegal arrest. *Lopez-Mendoza*, 468 U.S. at 1043.

94. *Lopez-Mendoza*, 468 U.S. at 1044. At the time, INS statistics indicated that in the course of one year, fewer than 2.5% of the undocumented persons apprehended requested a formal deportation hearing. Lopez-Mendoza v. INS, 705 F.2d 1059, 1071 n.17. (9th Cir. 1983), *rev'd*, 468 U.S. 1032 (1984). Of the few persons who requested a deportation hearing, very few challenged the legality of their arrest. *Lopez-Mendoza*, 468 U.S. at 1044. As the majority opinion noted: " '[T]he BIA was able to find only two reported immigration cases since 1899 in which the [exclusionary] rule was applied to bar unlawfully seized evidence, only one other case in which the rule's application was specifically addressed, and fewer than fifty BIA proceedings since 1952 in which a Fourth Amendment challenge to the introduction of evidence was even raised.' " *Id.* (quoting *Lopez-Mendoza*, 705 F.2d at 1071). Therefore, considering the unlikelihood of the arrest being challenged, the Court concluded that INS agents would not alter their behavior in anticipation that the evidence would be excluded. *Id.*

95. *Lopez-Mendoza*, 468 U.S. at 1044. The INS also has procedures for penalizing officers who behave unlawfully. *Id.* at 1045. The INS demands that no person be detained without reasonable suspicion of illegal alienage. *Id.* Furthermore, INS agents cannot arrest an individual without an admissiion of illegal alienage or strong evidence of illegal status. *Id.* Finally, INS agents take courses and examinations in Fourth Amendment law. *Id.* While the majority deemed these procedures as "perhaps most important" for deterring Fourth Amendment violations, the opinion failed to cite incidents in which these schemes were used. *See id.* at 1044, 1054 (White, J., dissenting) (criticizing majority's analysis).

against the agent, further undermined the deterrent value of the exclusionary rule.[96]

The Supreme Court also considered the social costs of applying the exclusionary rule to deportation proceedings.[97] First, the effect of applying the exclusionary rule required the courts "to close their eyes to ongoing violations of the law."[98] Furthermore, applying the exclusionary rule would significantly complicate the "simple" and "streamlined" deportation system.[99] Finally, the Court concluded that with respect to the apprehension of over one million undocumented persons each year, expecting immigration agents to provide written details of each arrest and to attend suppression hearings would severely burden the administration of immigration laws.[100]

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96. *Id.* at 1045. The majority argued that the possibility of declaratory relief against the federal agency was a sufficient means of challenging the legality of INS procedures. *Id.* However, alternative remedies are often an unrealistic solution for an undocumented alien. *Id.* at 1055 (White, J., dissenting). For example, once an undocumented immigrant is deported to his or her native country, he or she is no longer in a position to file a civil suit in a United States federal court. *Id.* (White, J., dissenting). In addition, undocumented persons are often uneducated or cannot speak English well, making it difficult or impossible to take advantage of the alternative remedies the majority discussed. *Id.* (White, J., dissenting). Furthermore, because the circumstances of mass immigration arrests make it difficult for the INS to account for each individual arrest, necessary information would be unavailable to the undocumented immigrant in bringing a civil suit. *Id.* at 1059 (White, J., dissenting). Finally, because of these reasons, the federal government is unlikely to "fear" the threat of a civil suit by an undocumented alien. *Id.* (White, J., dissenting).

97. *Id.* at 1046-50. The Court recognized that the social costs of applying the exclusionary rule to deportation proceedings are "unusual and significant." *Id.* at 1046.

98. *Id.* at 1046. Because Sandoval-Sanchez was an unregistered person, his presence in the United States was criminal. *Id.* at 1047. The Court reasoned that exclusion of the evidence proving his illegal alienage enabled him to continue his criminal activity by remaining in the country. *Id.* at 1047. However, the dissent recognized that the offense is committed at the time of entry, and that the Immigration and Nationality Act does not consider illegal alienage a continuing offense. *Id.* at 1056-57 (White, J., dissenting).

99. *Id.* at 1048. The Court argued that if Fourth Amendment issues were raised at deportation proceedings, attention would be diverted from the main issue of determining deportability and instead would focus on the legality of the search or seizure. *Id.* at 1048-49. Also, the majority assumed that deportation hearing judges and most attorneys are not well-versed in Fourth Amendment law; a fact that could could disrupt the efficiency of the deportation process. *Id.* at 1048. However, there was no evidence indicating that application of the exclusionary rule interfered with deportation hearings or with the INS' ability to function prior to 1979. *Id.* at 1059 (White, J., dissenting).

100. *Id.* at 1049. An I-213 Form (Record of Deportable Alien) is sufficient to prove the government's case at a deportation hearing. *Id.* Suppression hearings, however, would require more proof than an I-213 Form, thereby increasing the administrative burden on the deportation process. *Id.* The Court argued that due to the chaotic circumstances of mass immigration arrests, INS officers would be unable to prove the legality of the arrests. *Id.* Agents would be able to testify to the fact of the arrest, not to the precise details of the arrest. *Id.* Therefore, the

After concluding that the exclusionary rule was inapplicable to deportation hearings because the social costs outweighed the benefits of deterrence, a plurality of the Court limited the scope of its decision by reserving judgment for cases that presented a "good reason to believe that Fourth Amendment violations by INS officials were widespread."[101] In carving out this limitation, the plurality Court emphasized that its holding "[did] not deal . . . with *egregious violations* of Fourth Amendment or other liberties that might *transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.*"[102] This limitation, although dictum, is perhaps the most significant aspect of the *Lopez-Mendoza* opinion.[103]

As an example of the type of egregious violation that may warrant application of the exclusionary rule to immigration hearings, the Court cited *Rochin v. California.*[104] In *Rochin*, police officers obtained probative evidence of Rochin's drug involvement by forcing him to ingest an emetic solution to induce vomiting so they could recover recently swallowed morphine capsules.[105] The facts of *Lopez-Mendoza*, unlike those of *Rochin*, how-

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Court reasoned that the INS agents' failure to provide a precise account of an individual arrest that occurred during a mass arrest might result in the exclusion of lawfully obtained evidence. *Id.* at 1049-50.

101. *Id.* at 1050 (dictum) (citation omitted). This limitation was supported by Justices O'Connor, Blackmun, Powell and Rehnquist. *Id.* In making this statement, the Court admitted that its conclusions concerning the limited value of the exclusionary rule at deportation hearings "might change" if widespread evidence existed to show that INS agents were violating the Fourth Amendment. *Id.* In proffering this reservation, the Court cited United States v. Leon, 468 U.S 897 (1984). *Id.* In *Leon*, the Court pledged to reconsider the good-faith exception to the exclusionary rule if there was a substantial change in law enforcement officers' compliance with Fourth Amendment requirements. *Leon*, 468 U.S. at 928 (Blackmun, J., concurring).

102. *Lopez-Mendoza*, 468 U.S. at 1050-51 (emphasis added) (dictum). This Note refers to Part V of the Supreme Court opinion as the "egregious conduct limitation." *Id.*

103. Chief Justice Burger was the only member of the majority who did not join Part V of the decision. *Id.* at 1050-51. It was likely that the dissenters would have supported the limitation of the majority's opinion. *See* Watkins, *supra* note 9, at 552 n.296 (arguing that dissenters wanted full effect of exclusionary rule and would have supported dictum).

104. *Lopez-Mendoza*, 468 U.S. at 1051 (citing Rochin v. California, 342 U.S. 165 (1952). In *Rochin*, the Supreme Court excluded probative evidence that was illegally obtained because the method used "shocked the conscience" of the Court. 342 U.S. at 172. Besides *Rochin*, the *Lopez-Mendoza* Court also cited to an INS interim decision in carving out the egregious conduct limitation. *Lopez-Mendoza*, 468 U.S. at 1051 n.5 (citing *In re* Toro, 17 I. & N. Dec. 340, 343 (BIA 1980)). In acknowledging *Toro*, the Court noted that the BIA approved exclusion of illegally obtained evidence if the circumstances surrounding the arrest or interrogation would render its use "fundamentally unfair," in violation of the due process requirements of the Fifth Amendment. *Id.*

105. *Rochin*, 342 U.S. at 166. Based on limited knowledge that Rochin was selling drugs, police officers entered his home and forced their way into his bedroom. *Id.* at 166. When Rochin was asked about two capsules lying on the night stand beside his bed, he put them in his mouth and swallowed them. *Id.* After the officers struggled unsuccessfully to extract the evidence from Rochin's mouth,

ever, involved "the exclusion of credible evidence gathered in connection with *peaceful arrests*."[106] Therefore, in *Lopez-Mendoza*, the Court held that suppression was unnecessary.[107] Lower courts, however, were left with the task of deciding how to apply the *Lopez-Mendoza* "egregious conduct limitation."

D. *Application of the* Lopez-Mendoza *Egregious Conduct Limitation*

Several federal courts have applied *Lopez-Mendoza* specifically to prohibit the use of the exclusionary rule at civil deportation hearings.[108] Others have applied *Lopez-Mendoza* to proscribe the use of the exclusionary rule in the context of nondeportation civil proceedings.[109] The United States Court of Appeals for the Ninth Circuit, however, has applied *Lopez-Mendoza* in the context of both deportation and nondeportation proceedings.[110]

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they handcuffed him and took him to a nearby hospital. *Id.* One of the officers directed a physician to pump Rochin's stomach to induce vomiting. *Id.* Upon doing so, the capsules were recovered and served as the chief evidence in Rochin's drug conviction. *Id.* The Supreme Court, however, reversed Rochin's conviction because the government's conduct violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 174.

106. *Lopez-Mendoza*, 468 U.S. at 1051 (emphasis added). For a discussion of the facts of *Lopez-Mendoza*, see *supra* note 88 and accompanying text.

107. *Id.* The *Lopez-Mendoza* Court noted, however, that if INS misconduct were a widspread problem, the exclusionary rule might be an appropriate tool for curbing such behavior. *Id.* at 1050.

108. *See* Mendoza-Solis v. INS, 36 F.3d 12, 14 (5th Cir. 1994) (recognizing "well established" rule that exclusionary rule does not apply to deportation hearing); Mineo v. INS, No. 93-1631, 1994 U.S. App. LEXIS 3269, at *5 (4th Cir. Feb. 24, 1994) (holding that absent proof of egregious violation, exclusionary rule is inapplicable to deportation hearing); Bauge v. INS, 7 F.3d 1540, 1543 (10th Cir. 1993) (acknowledging that exclusionary rule does not ordinarily apply to deportation hearings); Patel v. INS, 790 F.2d 720, 721 (8th Cir. 1986) (upholding BIA ruling that exclusionary rule does not apply to deportation proceeding).

109. *See* Trinity Ind., Inc. v. Occupational Safety and Health Review Comm'n, 16 F.3d 1455, 1462 (6th Cir. 1994) (acknowledging that exclusionary rule does not apply to OSHA proceedings with respect to enforcement actions regarding correction of health and safety violations); Pennsylvania Steel Foundry & Mach. Co. v. Secretary of Labor, 831 F.2d 1211, 1219-20 (3d Cir. 1987) (prohibiting application of exclusionary rule to suppress violations of agency procedural regulation); Smith Steel Casting Co. v. Brock, 800 F.2d 1329, 1331 (5th Cir. 1986) (concluding that exclusionary rule does not extend to OSHA proceedings that correct violations of heath and safety standards); Burka v. New York City Transit Auth., 747 F. Supp. 214, 220 (S.D.N.Y. 1990) (citing *Lopez-Mendoza* for proposition that exclusionary rule does not apply to disciplinary or employment related decisions).

110. *See* Lopez v. INS, No. 93-70447, 1994 U.S. App. LEXIS 37283, at *5 (9th Cir. Dec. 28, 1994) (prohibiting application of exclusionary rule to deportation hearing absent proof of egregious violation); Quintana v. INS, No. 93-70407, 1994 U.S. App. LEXIS 33731, at *4 (9th Cir. Nov. 30, 1994) (holding that absent egregious violation, exclusionary rule inapplicable at deportation hearing); Orhorhaghe v. INS, 38 F.3d 488, 493, 503 (9th Cir. 1994) (concluding that reliance on ethnic sounding name for basis of Fourth Amendment seizure was unlawful and excluding evidence from subsequent deportation hearing); Cervantes-

For example, in *Adamson v. Commissioner*,[111] the Ninth Circuit relied on *Lopez-Mendoza* to prohibit application of the exclusionary rule to a federal tax proceeding.[112] In *Adamson*, state police officers gave illegally seized documents, which formed the basis of a tax assessment levied against Adamson, to the IRS and the Drug Enforcement Administration (DEA).[113] In holding that the exclusionary rule did not apply to Adamson's tax proceeding, the Ninth Circuit focused on the offending officer's lack of bad faith in violating Adamson's Fourth Amendment rights.[114] More importantly, the court emphasized that if there had been a deliberate, bad faith constitutional violation, the exclusionary rule would have applied to the civil proceeding pursuant to the *Lopez-Mendoza* egregious conduct limitation.[115] Therefore, the *Adamson* court adopted a bad faith standard to determine whether a constitutional violation was sufficiently egregious to mandate exclusion of the unlawfully obtained evidence at the search victim's civil proceeding.[116]

Cuevas v. INS, 797 F.2d 707, 711 (9th Cir. 1985) (prohibiting use of exclusionary rule absent proof that governmental conduct undermined credibility of evidence); Garrett v. Lehman, 751 F.2d 997, 1005 (9th Cir. 1985) (holding that exclusionary rule does not apply to military proceedings); Garcia-Franco v. INS, 748 F.2d 518, 518 (9th Cir. 1984) (holding exclusionary rule is inapplicable at deportation hearing); Benitez-Mendez v. INS, 760 F.2d 907, 910 (9th Cir. 1984) (prohibiting use of exclusionary rule at deportation hearing despite illegal arrest); Adamson v. Commissioner, 745 F.2d 541, 544-46 (9th Cir. 1984) (prohibiting application of exclusionary rule to tax proceeding).

111. 745 F.2d 541 (9th Cir. 1984).

112. *Id.* at 545. The issue in *Adamson* was whether the exclusionary rule barred the IRS from using the evidence that was unlawfully obtained by state police officers. *Id.* at 543.

113. *Id.* at 544. Adamson was not charged with any crime as a result of the search or arrest. *Id.* The IRS, however, levied a tax assessment against Adamson based on the illegally seized documents, a prior narcotics conviction and her failure to pay taxes. *Id.*

114. *Id.* at 545-46. Using an objective standard to evaluate the officer's conduct, the Ninth Circuit concluded that the officers did not intentionally violate Adamson's Fourth Amendment rights, and that "a reasonable police officer would have believed that the search was legal." *Id.* at 546. Looking for an escaped suspect from an earlier bank robbery, Seattle police officers went to Adamson's hotel responding to a tip from a hotel maid that a bank bag was found in one of the rooms. *Id.* at 543. The officers searched Adamson's hotel room and arrested her without a warrant. *Id.* After finding large sums of money and narcotics, the officers sealed the room and applied for a warrant. *Id.*

115. *Id.* at 545. In citing *Lopez-Mendoza*, the court noted that preserving judicial integrity was the underlying justification for the exclusion of evidence obtained pursuant to a bad faith violation. *Id.* at 545-46.

116. *Id.* at 545. A bad faith violation occurs when one deliberately violates the Fourth Amendment or engages in conduct a reasonable officer should know is in violation of the Constitution. *Id.* In adopting a bad faith standard, the *Adamson* court interpreted the *Lopez-Mendoza* dictum as an implicit recognition that in the case of an egregious violation, the exclusionary rule must apply to protect judicial integrity. *Id.* at 545-46. In acknowledging the purposes underlying the exclusionary rule, the court stated that, "we know from the language in *Lopez-Mendoza* that deterrence is not the only consideration. The Court has never abandoned its pro-

The Ninth Circuit has also applied *Lopez-Mendoza* to prohibit the use of the exclusionary rule at deportation hearings.[117] In *Benitez-Mendez v. INS*,[118] INS Border Patrol agents detained and questioned Benitez-Mendez at his workplace without reasonable suspicion and arrested him when he failed to provide sufficient proof of legal status.[119] Although the court concluded that Benitez-Mendez was unlawfully detained, the evidence obtained pursuant to the illegal detention was admitted at his deportation hearing.[120] Without any analysis or reasoning, the court offered *Lopez-Mendoza* as its sole justification for admitting the illegally seized evidence.[121]

However, two years later in *Cervantes-Cuevas v. INS*,[122] the Ninth Circuit provided its reasons for prohibiting the use of the exclusionary rule at a deportation hearing.[123] Cervantes-Cuevas was stopped by INS agents after he drove slowly by their patrol car and then immediately accelerated.[124] He was arrested and confessed to his status as an illegal alienage.[125] In rejecting Cervantes-Cuevas' claim that his admission was

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nouncement . . . that in addition to deterrence, the exclusionary rule serves the vital function of preserving judicial integrity. . . . Federal courts cannot countenance deliberate violations of basic constitutional rights." *Id.* (citations omitted); *see also* United States v. Leon, 468 U.S. 897, 916-17 (1984) (noting fortitude of judicial integrity rationale); Elkins v. United States, 364 U.S. 206, 222-23 (1960) (recognizing importance of judicial integrity objective underlying exclusionary rule).

117. For a list of Ninth Circuit decisions prohibiting the use of the exclusionary rule at deportation hearings, see *supra* note 110 and accompanying text.

118. 760 F.2d 907 (9th Cir. 1983).

119. *Id.* at 908. The agents detained Benitez-Mendez when the field-workers surrounding him fled after noticing the officers' presence. *Id.* Benitez-Mendez remained in the field after the other workers fled. *Id.* After Benitez-Mendez was arrested, he confessed to having entered the country illegally. *Id.* The court concluded that the INS Border Patrol agents stopped Benitez-Mendez without reasonable suspicion that he was an undocumented immigrant. *Id.* at 909.

120. *Id.* at 910. Benitez-Mendez's confession was recorded on an I-213 Form and was admitted as evidence of deportability at his immigration hearing. *Id.* at 908.

121. *Id.* at 909-10 (citing INS v. Lopez-Mendoza, 468 U.S. 1032 (1984)). The Ninth Circuit granted rehearing of the *Benitez-Mendez* case in light of the Supreme Court's holding in *Lopez-Mendoza*. *Id.* As a result of the *Lopez-Mendoza* holding, however, the Ninth Circuit was permitted to admit the illegally obtained evidence at Benitez-Mendez's deportation hearing. *Id.* at 910.

122. 797 F.2d 707 (9th Cir. 1985).

123. *Id.* at 709-11. Although the majority relied on *Benitez-Mendez* in making its decision, unlike the *Benitez-Mendez* court, the *Cervantes-Cuevas* court articulated the reasoning underlying its decision. *Id.* at 710.

124. *Id.* at 708. As part of the INS operation, information that persons appeared to accelerate after passing INS Border Patrols was passed via radio to agents who were expected to detain such persons. *Id.*

125. *Id.* Cervantes-Cuevas did not allege that his statements were coerced or were a product of duress. *Id.*

inadmissible because it was obtained pursuant to an unlawful arrest,[126] the court concentrated upon the alleged egregiousness of the officers' conduct rather than simply citing to the general *Lopez-Mendoza* principle that the exclusionary rule did not apply to deportation hearings.[127] The court, however, interpreted the *Lopez-Mendoza* egregious conduct limitation narrowly, focusing upon whether the officer's unlawful conduct undermined the probative value of the evidence obtained.[128] Because Cervantes-Cuevas had not demonstrated that his confession was the product of duress or coercion, the Ninth Circuit concluded that the probative value of the evidence was not undermined, and therefore, its admissibility at the deportation hearing was unaffected.[129] It was not until 1994, in *Gonzalez-Rivera v. INS*,[130] that the Ninth Circuit held that the exclusionary rule applied to deportation hearings.[131]

IV. *GONZALEZ-RIVERA V. INS*: AN EXPANSION OF THE SUPREME COURT'S EGREGIOUS CONDUCT LIMITATION

In *Gonzalez-Rivera v. INS*,[132] the Ninth Circuit held that a race-based Border Patrol stop was an egregious constitutional violation, that warranted application of the exclusionary rule at the respondent's deportation proceeding.[133] In doing so, the Ninth Circuit sought to protect undocumented persons from indiscriminate and unlawful INS conduct.[134] However, in relying on the *Lopez-Mendoza* egregious conduct limitation to

126. *Id.* Cervantes-Cuevas argued that his detention and arrest were not based on reasonable suspicion, but the court concluded that they were constitutional. *Id.* at 709-10. The court determined that relevant factors existed to support a reasonable suspicion. *Id.* at 710. For example, the officers were aware that in the area patrolled, undocumented immigrants often fled in cars after noticing a Border Patrol vehicle. *Id.* Also, 500 undocumented persons were arrested within one week in the same area. *Id.* Furthermore, the INS Border Patrol was investigating areas known to be highly populated with undocumented persons. *Id.*

127. *Id.* at 710-11. Before reaching the egregious conduct issue, the court acknowledged that despite the alleged illegality of petitioner's arrest, his statement was admissible at the deportation hearing pursuant to *Lopez-Mendoza*. *Id.* at 710 (following Benitez-Mendez v. INS, 760 F.2d 907, 910 (9th Cir. 1983)).

128. *Id; see also* Daniel J. Kiley, Note, *Application of the Exclusionary Rule to Deportation Cases Involving Egregious Fourth Amendment Violations*—Arguelles-Vasquez v. INS, 19 ARIZ. ST. L.J. 543, 553 (1986-87) (discussing *Cervantes-Cuevas* court's interpretation of *Lopez-Mendoza* dictum).

129. *Cervantes-Cuevas*, 797 F.2d at 711. The court did not suppress Cervantes-Cuevas' admission of undocumented status because there was no proof to cast doubt on the probative value of his statements. *Id.*

130. 22 F.3d 1441 (9th Cir. 1994).

131. *Id.* at 1448-52. For a discussion of the *Gonzalez-Rivera* decision, see *infra* notes 156-203 and accompanying text.

132. 22 F.3d 1441 (9th Cir. 1994).

133. *Id.* at 1452. For the facts of *Gonzalez-Rivera*, see *infra* notes 136-55 and accompanying text.

134. *See id.* at 1454 (Choy, J., dissenting) (recognizing majority's goal of deterring impermissible INS stops based on race).

justify expansion of the scope of the exclusionary rule, the court misconstrued the *Lopez-Mendoza* language beyond its intended meaning.[135]

A. Gonzalez-Rivera v. INS: *The Race-Based Stop*

On January 17, 1988, an INS roving Border Patrol noticed an automobile driven by two Hispanic-looking men on Interstate Highway 805, a well-known immigrant smuggling corridor outside of San Diego, California.[136] The passenger was Mario Gonzalez-Rivera (Gonzalez) and the driver was his father.[137] There was nothing suspicious about their vehicle or the manner in which it was driven.[138] The two men were on their way to work.[139]

The INS officers, suspicious of the passengers, drove the Border Patrol car alongside the vehicle so that Officer Salvador Wilson's window was even with the passenger window where Gonzalez was sitting.[140] When Gonzalez and his father noticed the Border Patrol car, they turned their heads to look at the vehicle and then turned away.[141] After several minutes, Officer Wilson observed that both passengers remained staring straight ahead, refusing to further acknowledge the presence of the Border Patrol car.[142] Wilson testified that Gonzalez appeared nervous, had a dry mouth and was blinking excessively.[143]

Based on the passengers' nervousness and Hispanic appearance, the officers pulled the car over to investigate.[144] Officer Wilson testified that

135. *Id.* (Choy, J., dissenting). The dissent argued that the majority complicated the egregious conduct limitation and elevated it into a "rule almost categorically contrary to the holding in *Lopez-Mendoza.*" *Id.* (Choy, J., dissenting).

136. Petitioner's Opening Brief at 6, Gonzalez-Rivera v. INS, 22 F.3d 1441 (9th Cir. 1994) (No. 92-70492) [hereinafter Petitioner's Brief].

137. *Gonzalez-Rivera*, 22 F.3d at 1443.

138. *Id.* The car appeared to be an older model Chevy or Oldsmobile. Petitioner's Brief, *supra* note 136, at 5. It had a valid license plate, was registered, was not in violation of any vehicle codes and was traveling within the speed limit. *Id.* at 5-6.

139. *Id.* Both men were wearing "International House of Pancakes" uniforms. *Id.*

140. Petitioner's Brief, *supra* note 136, at 7. The two cars were about two to three feet apart. *Id.*

141. *Gonzalez-Rivera*, 22 F.3d at 1444. Officer Wilson first testified that neither Gonzalez-Rivera nor his father aknowledged the Border Patrol car when it drove up to their vehicle. *Id.* at 1443. After reviewing the I-213 Form, however, Officer Wilson testified that when both men saw the patrol car, they "turned, *they turned and looked at us,* and right away turned their heads, and just sat straight." *Id.* at 1443-44 (emphasis in original).

142. Respondent's Opening Brief at 7, Gonzalez-Rivera v. INS, 22 F.3d 1441 (9th Cir. 1994) (No. 92-70492) [hereinafter Respondent's Brief]. Because Wilson's experience led him to believe that people who have nothing to hide acknowledge Border Patrol cars, he concluded that the two men were nervous. *Gonzalez-Rivera*, 22 F.3d at 1444.

143. *Gonzalez-Rivera*, 22 F. 3d at 1443. Wilson made these conclusions without attempting to talk to Gonzalez or his father. Petitioner's Brief, *supra* note 136, at 7.

144. *Gonzalez-Rivera*, 22 F.3d at 1443.

he stopped the car based on the following five factors: (1) the passengers' Hispanic appearance, (2) their failure to acknowledge the patrol car by looking straight ahead, (3) Gonzalez's "dry mouth," (4) Gonzalez's excessive blinking and (5) both of the passengers' nervous appearance.[145] Moreover, Officer Wilson admitted that generally he stopped vehicles when the passengers appeared to be of Hispanic descent and displayed nervousness, but stated that "he never stopped anyone based solely upon their Latin appearance."[146]

Gonzalez's father had the proper immigration documents necessary to prove his legal presence in the United States.[147] Gonzalez did not have similar documents, however, so he was taken to the Border Patrol office at Campo, California and was arrested.[148] Subsequently, Gonzalez admitted his status as an illegal alien and the date and place of his illegal entry, which was recorded on an I-213 Form.[149] Following his arrest, Gonzalez requested a deportation hearing.[150]

Prior to the hearing, Gonzalez filed a motion to suppress the evidence contained in the I-213 Form, arguing that he was stopped based solely on his Hispanic appearance and that such conduct constituted an egregious Fourth Amendment violation.[151] At the hearing, the Immigration Judge concluded that Gonzalez's stop was an egregious Fourth Amendment vio-

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145. *Id.* The INS also argued that the fact that Gonzalez-Rivera was wearing a baseball cap added to Wilson's conclusion that there was a reasonable suspicion that Gonzalez-Rivera was an undocumented immigrant. *Id.* at 1444.

146. Excerpts of Record at 2, Gonzalez-Rivera v. INS, 22 F.3d 1441 (9th Cir. 1994) (No. 92-70492) (BIA 1992) [hereinafter Excerpts]. Officer Wilson stated that he stopped Gonzalez's vehicle mainly because of the passengers' nervous demeanor, but denied ever stopping a person based solely on Latin appearance. *Id.* Officer Wilson had 11 years experience as an immigration agent. Respondent's Brief, *supra* note 142, at 5.

147. *Gonzalez-Rivera*, 22 F.3d at 1433. For a description of the deportation process, see *supra* notes 61-79 and accompanying text.

148. *Id.*; Excerpts, *supra* note 146, at 6. Gonzalez admitted his illegal status while in custody. Respondent's Brief, *supra* note 142, at 8. A Record of Deportable Alien (I-213 Form) was filed, containing the information obtained as a result of the stop. *Gonzalez-Rivera*, 22 F.3d at 1443.

149. Respondent's Brief, *supra* note 142, at 8. Gonzalez admitted that he entered the United States without inspection near San Ysidro, California on January 7, 1988. Excerpts, *supra* note 146, at 6. Officer Wilson stated that he did not use physical force or coercion in obtaining Gonzalez's statement. *Id.* at 2. After sufficient evidence was obtained proving Gonzalez's illegal status, the INS issued an Order to Show Cause. *Id.* at 1.

150. *Gonzalez-Rivera*, 22 F.3d at 1443. Respondent had the choice of voluntary departure or a deportation hearing to determine if the evidence was sufficient to justify his deportation. Respondent's Brief, *supra* note 142, at 8.

151. *Gonzalez-Rivera*, 22 F.3d at 1443. Prior to his deportation hearing, at a master calendar hearing, Gonzalez also denied the allegations in the Order to Show Cause, denied deportability, invoked his Fifth Amendment right to remain silent, moved to suppress Officer Wilson's testimony as a fruit of an unlawful seizure and applied for voluntary departure. *Id;* Excerpts, *supra* note 146, at 7.

lation and granted the motion to suppress.[152] But on appeal, the BIA reversed.[153] Gonzalez then sought relief in the federal courts.[154] The Ninth Circuit held that Gonzalez's race-based stop was an egregious Fourth Amendment violation, warranting the application of the exclusionary rule at his deportation hearing.[155]

B. *The Majority Opinion*

In reversing the BIA's dismissal of Gonzalez's motion to suppress, the *Gonzalez-Rivera* majority first examined the Fourth Amendment violation issue.[156] Judge Nelson, using an objective standard, evaluated the factors used by the immigration officer to form a reasonable suspicion for stopping Gonzalez.[157] The Ninth Circuit concluded that no reasonable officer

152. *Gonzalez-Rivera*, 22 F.3d 1444. The Immigration Judge suppressed Officer Wilson's testimony pertaining to what he learned as a result of the unlawful detention. *Id.*

153. *Id.* The INS appealed to the BIA, alleging that the stop was not based solely on Gonzalez's appearance, that the officer's conduct was not an egregious constitutional violation and that Gonzalez did not present a prima facie case of a Fourth Amendment violation. *Id.* In reversing the Immigration Judge's ruling, the BIA granted Gonzalez thirty days in which to depart the country voluntarily. *Id.* The BIA held that Gonzalez's failure to offer evidence that the I-213 Form was erroneous or contained information obtained as a result of coercion or duress, permitted admission of the form as trustworthy evidence. Respondent's Brief, *supra* note 142, at 9. In concluding that Gonzalez failed to present a prima facie case of a Fourth Amendment violation, the BIA failed to address the issue of whether the officer's conduct constituted an egregious Fourth Amendment violation. *Id.* at 9-10.

154. *Gonzalez-Rivera*, 22 F.3d at 1444. The Ninth Circuit had jurisdiction over the appeal pursuant to 8 U.S.C. § 1105(a) (1988). *Gonzalez-Rivera*, 22 F.3d at 1444.

155. *Id.* at 1452. Therefore, the petition for review was granted and the matter was remanded to the BIA for further proceedings. *Id.*

156. *Id.* at 1445. The first issue addressed was whether Gonzalez presented a prima facie case of a Fourth Amendment violation. *Id.* at 1444-45. This issue was reviewed *de novo* and the underlying facts were reversable only if no reasonable fact-finder could agree with the BIA. *Id.* at 1444 (relying on INS v. Elias-Zacarias, 502 U.S. 478, 483-84 (1992)). Because the INS failed to raise the issue of a Fourth Amendment violation at the initial hearing, any claim pertaining to the defect of Gonzalez's case was waived. *Id.* The Ninth Circuit ultimately concluded that the issue of whether Gonzalez presented a prima facie case of a Fourth Amendment violation was irrelevant. *Id.* at 1445. This Note addresses only the egregious violation and exclusionary rule issues. For a discussion of the egregious conduct analysis and the exclusionary rule holding, see *infra* notes 170-203 and accompanying text.

157. *Id.*, at 1446-47. The objective standard was announced in United States v. Rocha-Lopez, 527 F.2d 476, 477 (9th Cir. 1975), *cert. denied*, 425 U.S. 977 (1976). The officer's "rational inferences" must be based upon objective facts that are capable of rational explanation. Nicacio v. United States, 797 F.2d 700, 705 (9th Cir. 1985).

The issue of reasonable suspicion is also a question of law and was reviewed *de novo*. *Gonzalez-Rivera*, 22 F.3d at 1445 (relying on *Elias-Zacarias*, 502 U.S. at 481). The factual determinations of the Immigration Judge were given substantial weight over those of the BIA because there was disagreement as to a factual issue. *Id.* (relying on Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951)) and McMullen

could have relied on the factors Wilson used to establish a reasonable suspicion before stopping Gonzalez.[158] For example, the court emphasized that failure to make eye contact could not support a reasonable suspicion and disregarded this factor as a matter of law.[159]

The court also disregarded Wilson's observation that Gonzalez had a dry mouth as a basis for reasonable suspicion for two reasons.[160] First, the court reasoned that an officer traveling in a patrol car at normal highway speed could not possibly have observed whether someone had a dry mouth, especially if the person was not even looking at the car.[161] Second, the court noted that a dry mouth could not have supported the inference that Gonzalez was nervous because there was no objective indication that the two characteristics went hand in hand.[162] Furthermore, the majority concluded that Wilson's assertion that Gonzalez was nervous was merely an "unsupported intuition."[163] Finally, the court determined that because the INS failed to offer objective evidence that blinking is a sign of

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v. INS, 658 F.2d 1312, 1318 (9th Cir. 1981), *aff'd on other grounds*, 480 U.S. 421 (1987)).

158. *Gonzalez-Rivera*, 22 F.3d at 1446. The reasonable suspicion standard was set forth in United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975). For a discussion of *Brignoni-Ponce*, see *supra* notes 50-60 and accompanying text.

The court deemed the passengers' alleged nervous appearance as Wilson's conclusion rather than a factor. *Gonzalez-Rivera*, 22 F.3d at 1446. The Ninth Circuit also agreed with the Immigration Judge's determination that the stop was based solely on Gonzalez's Hispanic appearance. *Id.* The five factors proffered by the INS were disregarded as a matter of law because of their low probative value. *Id.* For a list of the factors Officer Wilson relied on to stop Gonzalez-Rivera, see *supra* note 141 and accompanying text.

159. *Gonzalez-Rivera*, 22 F.3d at 1446-47; *see also Nicacio*, 797 F.2d at 704 (reaffirming that failure to make eye contact is not indicative of undocumented status); United States v. Munoz, 604 F.2d 1160, 1161 (9th Cir. 1979) (asserting that failure to glance at or to evade agents not basis for reasonable suspicion); United States v. Lopez, 564 F.2d 710, 712 (5th Cir. 1977) (maintaining that failure to make eye contact may be "rule rather than the exception"); United States v. Mallides, 473 F.2d 859, 861 (9th Cir. 1973) (acknowledging that failure to look at passing Border Patrol car not basis for reasonable suspicion); People v. Williams, 97 Cal. Rptr. 815, 816 (Ct. App. 1971) (holding that passenger quickly looking at patrol car then turning away did not provide grounds for detention).

160. *Gonzalez-Rivera*, 22 F.3d at 1447. According to the majority, "Wilson's claim strain[ed] for credulity." *Id.*

161. *Id.*

162. *Id.* The INS failed to introduce objective evidence that people who are nervous have dry mouths. *Id.* A reasonable fact-finder could not believe that Wilson detected the moisture level inside Gonzalez's mouth. *Id.*

163. *Id.* Wilson's inference that Gonzalez had a dry mouth and was therefore nervous, was "at best based on a subjective intuition about how people psychologically manifest their mental state." *Id.* The court went on to emphasize that "subjective feelings do not provide any rational basis for separating out the illegal aliens from the American citizens and legal aliens." *Id.*

nervousness, the government was not permitted to rely on Gonzalez's excessive blinking as a basis for reasonable suspicion in making the stop.[164]

The majority also criticized the immigration agents for failing to consider several relevant factors that weighed against finding reasonable suspicion.[165] For instance, Gonzalez and his father were wearing "International House of Pancakes" uniforms.[166] Therefore, the court reasoned that the officer could have inferred that Gonzalez-Rivera and his father worked in the United States.[167] Also, there was nothing suspicious about the automobile that would have allowed the officers to assume that Gonzalez or his father were hiding illegal immigrants in the trunk.[168] Finally, neither Gonzalez nor his father evaded the officers.[169]

After concluding that the immigration officers stopped Gonzalez based solely on his Hispanic appearance, the Ninth Circuit considered whether the conduct was an "egregious" Fourth Amendment violation.[170] In examining this issue, the court recognized that *Lopez-Mendoza* did not hold that the exclusionary rule could never apply to deportation hearings,[171] and focused on the egregious conduct limitation set forth in *Lopez-Mendoza*.[172]

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164. *Id.* The court refused to accord any any weight to Gonzalez's excessive blinking because both blinking and not blinking can be one of the factors that justify a reasonable stop. *Id.*

165. *Id.* Giving sufficient weight to the factors Officer Wilson recited as the basis for reasonable suspicion would have "put the officers in a classic 'heads I win, tails you lose' position [and] the driver, of course, can only lose." *Id.* (citation omitted).

166. *Id.* Officer Wilson noticed that Gonzalez was wearing a baseball cap that had no insignia and was dressed in a light shirt and pants. Petitioner's Brief, *supra* note 136, at 7. However, there was no indication from the record that Wilson noticed Gonzalez's work uniform. *Id.*

167. Gonzalez-Rivera v. INS, 22 F.3d 1441, 1447 (9th Cir. 1994). The INS agents either failed to consider or ignored this significant factor. *Id.*

168. *Id.* Immigrants often enter the United States illegally by hiding in trunks or large compartments of sedans. *See, e.g.*, Brignoni-Ponce v. United States, 422 U.S. 873, 885 (1975) (recognizing that characteristics of vehicle may justify suspicion because car is frequently used to conceal alien smuggling). For a list of some of the characteristics of a vehicle that may justify reasonable suspicion, see *supra* note 53 and accompanying text.

169. *Gonzalez-Rivera*, 22 F.3d at 1446. The passengers' alleged failure to make eye contact with the agents did not support a finding of reasonable suspicion. *Id.*

170. *Id.* at 1448-52. Although the officer's conduct was unreasonable, the court had to apply the *Janis* balancing test to determine whether it was appropriate to apply the exclusionary rule in the context of the deportation hearing. *Id.* at 1448. For a discussion of the *Janis* balancing test, see *supra* notes 38-40 and accompanying text.

171. *Id.* at 1448. For a discussion of the *Lopez-Mendoza* opinion, see *supra* notes 87-107 and accompanying text.

172. *Id.* at 1448 (citing INS v. Lopez-Mendoza, 468 U.S. 1032, 1050-51 (1984)). The Ninth Circuit referred to this portion of the Supreme Court opinion as a "caveat." *Id.* For a discussion of the egregious conduct limitation set forth in *Lopez-Mendoza*, see *supra* notes 101-06 and accompanying text.

The court also relied on *Adamson v. Commissioner* to decide that the exclusionary applied to Gonzalez's deportation hearing.[173] In *Adamson*, the Ninth Circuit stated in dicta that a bad faith Fourth Amendment violation was an egregious violation that warranted the use of the exclusionary rule in a civil tax proceeding.[174] Therefore, by relying on *Adamson*, the *Gonzalez-Rivera* court had to use the bad faith standard to answer the threshold question of whether Gonzalez suffered an egregious Fourth Amendment violation.[175]

To answer this question, the Ninth Circuit examined *Lopez-Mendoza* and *Adamson* together.[176] In doing so, the majority distinguished the egregious conduct described in *Lopez-Mendoza* from conduct that the Ninth Circuit considered egregious.[177] For example, in *Lopez-Mendoza* the Supreme Court cited *Rochin v. California*,[178] which involved the forcible ingestion of an emetic solution against Rochin's will to recover highly probative evidence of his narcotics involvement as an example of egregious conduct.[179] The Ninth Circuit however, had not limited egregiousness to instances of physical brutality, such as that which occurred in *Rochin*.[180] Instead, adhering to a broader application, the *Gonzalez-Rivera* majority emphasized that all Fourth Amendment violations are egregious when evidence is obtained in bad faith—through " 'deliberate violations of the [F]ourth [A]mendment, or by conduct a reasonable officer should have known is in violation of the Constitution.' "[181]

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173. *Id.* at 1449 (citing Adamson v. Commissioner, 745 F.2d 541 (9th Cir. 1984)). Although *Adamson* prohibited the use of the exclusionary rule at a federal tax proceeding, the *Gonzalez-Rivera* court relied on a similar rationale to support its holding. *Id.* at 1448-49. For a discussion of the *Adamson* case, see *supra* notes 111-16 and accompanying text.

174. *Adamson*, 745 F.2d at 545 (dictum). For a discussion of the *Adamson* holding, see *supra* notes 114-16 and acompanying text.

175. *Gonzalez-Rivera*, 22 F.3d at 1449. Whether the conduct of the INS agents was sufficiently egregious to warrant application of the exclusionary rule is a question of law and was reviewed *de novo*. *Id.* (citing United States v. McConney, 728 F.2d 1195, 1200 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984)).

176. *Id.*

177. *Id.* For a discussion of the *Lopez-Mendoza* egregious conduct limitation, see *supra* notes 101-07 and accompanying text. Also, for a discussion of cases in which the Ninth Circuit examined the egregiousness of alleged constitutional violations, see *supra* notes 110 and 127-29 and accompanying text.

178. Lopez-Mendoza v. INS, 468 U.S. 1032, 1050 (1986) (citing Roching v. California, 342 U.S. 165 (1952)).

179. *Roching*, 342 U.S. at 172. For a discussion of the facts and holding of *Rochin*, see *supra* note 105 and accompanying text.

180. *Gonzalez-Rivera*, 22 F.3d at 1449 (relying on Adamson v. Commissioner, 745 F.2d 541, 545 n.1 (9th Cir. 1984)). Reliance on an ethnic-sounding name "as a shorthand for likely illegal conduct" is an egregious Fourth Amendment violation. Orhorhaghe v. INS, 38 F.3d 488, 497-98 (9th Cir. 1994).

181. *Gonzalez-Rivera*, 22 F.3d at 1449 (quoting *Adamson*, 745 F.2d at 545) (emphasis omitted). This statement is the Ninth Circuit's definition of "egregious conduct." *Adamson*, 745 F.2d at 545. The *Gonzalez-Rivera* court acknowledged that the BIA also adopted a reasonableness standard to determine whether a bad faith vio-

Next, the court advanced three reasons why the bad faith standard was appropriate in the context of race-based stops.[182] First, because federal courts cannot encourage impermissible uses of race, reliance on ethnicity as the sole factor in the creation of a reasonable suspicion of criminal conduct was intolerable.[183] The court compared the immigration officers' action to a facial racial classification and concluded that in an equal protection context, it was presumptively invalid.[184] Second, the court reasoned that because INS agents were trained in Fourth Amendment law and INS policy prohibited race-based stops, it could be inferred that any constitutional violation was deliberate.[185] Finally, applying a rea-

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lation occurred. *Gonzalez-Rivera*, 22 F.3d at 1449 (referring to *In re* Toro, 17 I. & N. Dec. 340, 343 (BIA 1980)). In the case of *Toro*, the BIA applied an objective standard to determine whether an arresting officer acted in good faith in stopping Toro because of her ethnic appearance. *Toro*, 17 I. & N. Dec. at 343. The BIA admitted the evidence that resulted from the race-based stop, but at the time the conduct in question occurred, the Supreme Court had not yet articulated the reasonable suspicion standard for roving patrol stops. *Id; see also* United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (holding that roving Border Patrol stops must be based on reasonable suspicion). Furthermore, INS policies did not prohibit race based stops when *Toro* was decided. *But see Gonzalez-Rivera*, 22 F.3d at 1449 n.6 (noting that officers responsible for making race-based stop acted in bad faith if they could not have reasonably believed they were acting in accordance with United States Constitution).

182. *Gonzalez-Rivera*, 22 F.3d at 1449-50. The court emphasized that it was only determining whether the race-based stop was a bad faith violation. *Id.* at 1449. The court did not attempt to establish a standard for determining bad faith violations in other contexts. *Id.* However, the court emphasized that all bad faith violations were egregious. *Id.* at 1449 n.5.

183. *Id.* at 1449-50. In advancing this argument, the Ninth Circuit recognized that historically, racial oppression has been regarded as the "most serious threat to fundamental fairness." *Id.* at 1449.

184. *Id.* at 1450. In denouncing racial classifications, the court relied on Supreme Court and Ninth Circuit precedent. *Id.* at 1450 (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., concurring) (stating that racial discrimination is "illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society") (citations ommited)); Frazer v. United States, 18 F.3d 778, 785 (9th Cir. 1994) (recognizing that "as a nation we have acted decisively to remove all vestiges of racial discrimination"); *see also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (emphasizing that law based on race, alienage or national origin reflects prejudice); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 485 (1982) (acknowledging that racial classification is presumptively invalid) (citing Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1974)).

185. *Gonzalez-Rivera*, 22 F.3d at 1450. The Supreme Court considered this same reasoning, but determined that the social costs of excluding evidence outweighed any deterrence benefit and prohibited the application of the exclusionary rule to deportation hearings. INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984). The Ninth Circuit, however, justified its decision that the INS agents acted in bad faith by emphasizing that they should have known that the factors relied on to justify Gonzalez's stop were not probative of reasonable suspicion. *Gonzalez-Rivera*, 22 F.3d at 1451. For a discussion of the Supreme Court's decision in *Lopez-Mendoza*, see *supra* notes 86-107 and accompanying text.

sonableness standard for bad faith conduct permitted the Ninth Circuit to forego examination of the offending officer's subconscious prejudices.[186]

After concluding that the officers acted in bad faith, the majority rejected the INS's argument that conduct cannot be considered egregious unless it both transgresses fundamental notions of fairness and undermines the probative value of the evidence obtained.[187] The INS argued that even assuming that Officer Wilson's stop of Gonzalez was fundamentally unfair, the evidence should not have been excluded because the manner in which it was obtained did not undermine its probative value.[188] However, the Ninth Circuit emphasized that under *Lopez-Mendoza* and Ninth Circuit precedent, a fundamentally unfair Fourth Amendment violation is egregious, regardless of the probative value of the evidence obtained.[189] The majority explained that the Supreme Court's citation to *Rochin* implied that a violation can be egregious without undermining the probative value of the evidence obtained.[190] Thus, after concluding that the race-based stop was an egregious violation, the court did not examine whether the probative value of the evidence was undermined.[191]

Furthermore, in dismissing the government's argument, the majority relied on the need to preserve judicial integrity in cases of egregious Fourth Amendment violations.[192] Moreover, the court emphasized that

186. *Gonzalez-Rivera*, 22 F.3d at 1450. The court wanted to avoid examination of the INS officers' subjective awareness of his or her personal prejudices in determining whether the offending officer's conduct was egregious. *Id.* Because racial stereotypes unconsciously affect the decision making process, INS agents sometimes use ethnic appearance as a "proxy" for illegal conduct without being aware of their subconscious prejudices. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (arguing that unconscious racial motivations result in racially discriminatory behavior).

187. *Gonzalez-Rivera*, 22 F.3d at 1451 (recognizing that "fundamentally unfair" violation is egregious under *Lopez-Mendoza* without analyzing probative value of evidence obtained).

188. *Id.* The government argued that the dictum was to be taken as a two-part test; the illegally obtained evidence must have been seized in a manner that both transgressed fundamental notions of fairness and undermined its probative value. *Id.*

189. *Id.* The Ninth Circuit reasoned that the Supreme Court's citation to *Rochin* in the context of the egregious conduct limitation was inherently inconsistent, because the evidence in *Rochin* was obtained in an unconstitutionally unfair manner, yet its probative value was not affected. *Id.* The Ninth Circuit also noted that the BIA suggested that evidence obtained through an egregious violation may be excluded despite its probative value. *Id.* (citing *In re* Toro, 17 I. & N. Dec. 340, 343 (BIA 1980)).

190. *Id.* The evidence at issue in *Rochin* had a high probative value despite the fundamentally unfair manner in which it was obtained. *Id.*

191. *Id.* at 1451-52. In effect, the majority substituted an "or" for an "and," changing the meaning of the Supreme Court dictum. *See id.* at 1453 (Choy, J., dissenting) (recognizing majority's dissociation of prongs).

192. *Id.* at 1451. Justice Tang wrote a concurring opinion to emphasize that the judiciary cannot be used to sanction racism. *Id.* at 1452 (Tang, J., concurring). If the court permitted the government to use evidence obtained through racially

Lopez-Mendoza required that courts account for judicial integrity when deciding whether to apply the exclusionary rule.[193] The court noted that the probative value of evidence obtained through a bad faith violation could not possibly outweigh the need for judicial sanction.[194] The majority rejected the government's argument because the government's position thwarted the judicial integrity objective by forcing the judiciary to overlook constitutional violations when the illegally seized evidence was suficiently probative.[195]

Finally, the court further bolstered its reasoning by distinguishing its own circuit court precedent.[196] In presenting the case, the INS relied on *Cervantes-Cuevas v. INS*,[197] to argue that the evidence obtained from Gonzalez's race-based stop was admissible because the officer's unlawful conduct did not undermine the probative value of the evidence obtained.[198] However, the majority distinguished *Cervantes-Cuevas* by noting that the *Cervantes-Cuevas* court was not confronted with the specific question of whether evidence obtained through an egregious Fourth Amendment violation was admissible at a deportation hearing.[199] Furthermore, the petitioner in *Cervantes-Cuevas* did not suffer an egregious violation because his detention was based upon legitimate factors other than Hispanic appearance.[200]

The court also distinguished *Benitez-Mendez v. INS*[201] on similar grounds. Because *Benitez-Mendez* had not explicitly decided whether the exclusionary rule applied in the context of a race-based Border Patrol

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discriminatory treatment, the judiciary would be participating in discrimination. *Id.* (Tang, J., concurring).

193. *Id.* According to the majority, *Lopez-Mendoza* and *Adamson* require application of the exclusionary rule when judicial integrity is implicated. *Id.*

194. *Id.* at 1451 (relying on Adamson v. Commissioner, 745 F.2d 541, 546 (9th Cir. 1984)).

195. *Id.* In effect, the INS argued that as long as the evidence had significant probative value, the manner in which it was obtained was irrelevant. *Id.*

196. *Id.* at 1451-52 n.9. For a discussion of Ninth Circuit precedent, see *supra* notes 111-29 and accompanying text.

197. 797 F.2d 707 (9th Cir. 1985). For a discussion of the *Cervantes-Cuevas* decision, see *supra* notes 122-29 and accompanying text.

198. *Gonzalez-Rivera*, 22 F.3d at 1451-52.

199. *Id.* at 1452 n.10. Instead, in *Cervantes-Cuevas*, the issue was whether the illegal detention undermined the probative value of the evidence obtained. *Cervantes-Cuevas*, 797 F.2d at 709.

200. *Gonzalez-Rivera*, 22 F.3d at 1451-52. The *Cervantes-Cuevas* court held that assuming petitioner was unlawfully detained, without proof casting doubt on the probative value of the evidence obtained, it would still be admissible at the deportation hearing. *Cervantes-Cuevas*, 797 F.2d at 711.

201. 760 F.2d 907 (9th Cir. 1983). *Benitez-Mendez* did not address whether the exclusionary rule applied in cases involving race-based stops. *Gonzalez-Rivera*, 22 F.3d at 1451 n.9. For a discussion of the *Benitez-Mendez* holding, see *supra* notes 118-21 and accompanying text.

stop, the majority concluded that it was not useful precedent.[202] By distinguishing its own precedent on narrow grounds and by expanding the intended meaning of the *Lopez-Mendoza* dictum, the majority held that the exclusionary rule was applicable to Gonzalez-Rivera's deportation hearing.[203]

C. *Judge Choy's Dissenting Opinion*

In a dissenting opinion, Judge Choy argued that *Lopez-Mendoza* precluded the majority's decision.[204] First, Judge Choy asserted that the facts of *Gonzalez-Rivera* and *Lopez-Mendoza* were similar in that the unlawful arrests of the undocumented persons were peaceful and in both cases credible evidence was obtained.[205] In acknowledging the similarities between the two cases, Judge Choy contended that *Gonzalez-Rivera* "falls squarely within the rule, rather than any untested exception, stated in *INS v. Lopez-Mendoza.*"[206] Furthermore, the dissent advanced the same public policy concerns that *Lopez-Mendoza* proffered against application of the exclusionary rule at deportation proceedings.[207] After weighing the marginal deterrence benefit against the significant costs of excluding the evidence, the dissent concluded that it was inappropriate to use the exclusionary rule at Gonzalez's deportation hearing.[208]

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202. *Gonzalez-Rivera*, 22 F.3d at 1451 n.9. Nevertheless, the majority approved of the *Benitez-Mendez* holding that any Fourth Amendment violation will not automatically "trigger" application of the exclusionary rule. *Id.* The dissent argued, however, that because of the factual similarities between *Benitez-Mendez* and *Gonzalez-Rivera*, the *Benitez-Mendez* decision had great precedential value. *Id.* at 1453-54 (Choy, J., dissenting).

203. *Id.* For a discussion of the *Gonzalez-Rivera* holding, see *supra* notes 156-202 and accompanying text.

204. *Id.* at 1452 (Choy, J., dissenting). Judge Choy agreed with the court's conclusion as to the prima facie Fourth Amendment violation issue. *Id.* (Choy, J., dissenting).

205. *Id.* at 1453 (Choy, J., dissenting). The two cases involved unlawful detentions based on legitimate factors other than Hispanic appearance and peaceful arrests. *Id.*

206. *Id.* at 1452 (Choy, J., dissenting). Judge Choy described the Ninth Circuit's interpretation of the egregiousness limitation as "creative." *Id.* at 1454 (Choy, J., dissenting).

207. *Id.* at 1453 (Choy, J., dissenting). The dissent emphasized the concerns of interfering with administrative efficiency, sacrificing probative evidence and burdening the enforcement of immigration laws as reasons against applying the exclusionary rule. *Id.* (Choy, J., dissenting); *see also* Lopez-Mendoza v. INS, 468 U.S. 1032, 1048-49 (1984) (noting that occasional use of exclusionary rule will significantly burden INS procedures and lead to suppression of lawfully obtained evidence). For a discussion pertaining to the *Lopez-Mendoza* opinion, see *supra* notes 86-107 and accompanying text.

208. *Gonzalez-Rivera*, 22 F.3d at 1453-54 (Choy, J., dissenting); *see also Lopez-Mendoza*, 468 U.S. at 1041 (stating that application of exclusionary rule depends on weighing benefits of deterrence against social costs of exclusion). Judge Choy argued that the use of the exclusionary rule in deportation proceedings would adversely interfere with the already backlogged immigration caseload. *Gonzalez-Rivera*, 22 F.3d at 1453 (Choy, J., dissenting). Judge Choy also recognized the im-

The dissent also scrutinized the majority's use of Ninth Circuit precedent in supporting its decision.[209] Specifically, Judge Choy criticized the majority's reliance on *Adamson v. Commissioner*.[210] Because *Adamson* dealt with a tax proceeding, the dissent argued that its reasoning was not applicable to Gonzalez's deportation hearing.[211] Instead, the dissent asserted that the majority should have relied on *Benitez-Mendez* as controlling precedent.[212]

Moreover, Judge Choy criticized the majority's analysis of the *Lopez-Mendoza* dictum referring to egregious violations.[213] The dissent recognized that the "egregiousness test" consisted of two prongs—the fundamental fairness element and the probative value element.[214] Judge Choy argued that the majority failed to consider both prongs together, and in "decoupling" them, expanded the category of violations beyond those intended by the Supreme Court.[215]

Although the dissent conceded that *Lopez-Mendoza* invited the Ninth Circuit to interpret the egregious exception dictum, the dissent argued that the majority failed to consider the peacefulness aspect of Justice

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portance of maintaining an unencumbered system, especially with regard to ordinary "run of the mill" cases, such as *Gonzalez-Rivera*. *Id.* (Choy, J., dissenting).

209. *Gonzalez-Rivera*, 22 F.3d at 1453-54 (Choy, J., dissenting).

210. *Id.* at 1453 (Choy, J., dissenting) (citing Adamson v. Commisioner, 745 F.2d 541 (9th Cir. 1984)). Although the dissent criticized the use of *Adamson*, Judge Choy conceded that the *Adamson* dictum pertaining to the bad faith violation provided some support for the majority's result, but such support was minimal because of the factual differences between the cases. *Id.* (Choy, J., dissenting).

211. *Id.* (Choy, J., dissenting). The dissent argued that *Adamson* was not valuable precedent for the majority because it dealt with a different institutional setting and because the *Adamson* court ultimately concluded that the exclusionary rule did not apply. *Id.* (Choy, J., dissenting).

212. *Id.* at 1453 (Choy, J., dissenting). According to Judge Choy, *Benitez-Mendez* and *Lopez-Mendoza* precluded the majority's opinion. *Id.* (Choy, J., dissenting). For a discussion of these decisions, see *supra* notes 118-21 and 86-107, respectively, and accompanying text. Judge Choy believed that the factual similarities between *Benitez-Mendez* and *Gonzalez-Rivera* required the court to prohibit the use of the exclusionary rule at Gonzalez's hearing. *Id.* at 1453-54 (Choy, J., dissenting). Judge Choy argued that *Benitez-Mendez* was too readily dismissed by the majority. *Id.* at 1454 n.1 (Choy, J., dissenting).

In responding to Judge Choy's argument, the majority distinguished *Benitez-Mendez* in a footnote. *Id.* at 1451 n.9. The majority noted that *Benitez-Mendez* did not examine whether the INS conducted a race-based stop, but instead, whether there was a Fourth Amendment violation. *Id.*

213. *Id.* at 1453 (Choy, J., dissenting).

214. *Id.* (Choy, J., dissenting). The dissent accused the majority of "inferr[ing] that the [Supreme] Court inadvertently drafted in the conjunctive the fundamental fairness and probative value prongs of the egregiousness test." *Id.* (Choy, J., dissenting).

215. *Id.* (Choy, J., dissenting). The dissent argued that the majority expanded the egregious exception to acts other than those inferred by the citation to *Rochin*. *Id.* at 1454 (Choy, J., dissenting).

O'Connor's opinion.[216] Instead, the majority considered Gonzalez's "uneventful detention" egregious because he was stopped in bad faith and expanded the egregiousness exception to encompass all bad faith conduct.[217] Judge Choy argued that the *Lopez-Mendoza* dictum meant that the exclusionary rule was inapplicable to deportation hearings unless the INS engaged in unpeaceful tactics that were both fundamentally unfair and undermined the probative value of the evidence obtained.[218]

Finally, Judge Choy asserted that the majority failed to choose the most appropriate solution for the deterrence of future INS misconduct.[219] The dissent argued that injunctive relief would discourage INS officers from conducting race-based stops more so than the application of the exclusionary rule to deportation proceedings.[220] Also, Judge Choy believed

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216. *Id.* at 1454 (Choy, J., dissenting). In the dictum pertaining to the egregiousness exception, Justice O'Connor included the following statement: "At issue here is the exclusion of credible evidence gathered in connection with peaceful arrests by INS officers. We hold that evidence derived from such arrests need not be suppressed in an INS civil deportation hearing." INS v. Lopez-Mendoza, 468 U.S. 1032, 1051 (1984) (dictum). This section of the opinion was supported by a plurality of the Justices. *Id.* at 1034.

217. *Gonzalez-Rivera*, 22 F.3d at 1454 (Choy, J., dissenting). The dissent did not believe that the expansion of the dictum was permitted by Supreme Court or Ninth Circuit precedent. *Id.* (Choy, J., dissenting); *see, e.g., Lopez-Mendoza*, 468 U.S. at 1034 (prohibiting application of exclusionary rule to deportation proceeding); Cervantes-Cuevas v. INS, 797 F.2d 707, 711 (9th Cir. 1985) (recognizing that exclusionary rule applies if probative value of illegally obtained evidence is undermined); Benitez-Mendez v. INS, 760 F.2d 907, 910 (9th Cir. 1985) (holding that exclusionary rule did not apply to deportation hearing despite illegal seizure). The dissenting argument predicted that because of the majority's expansive interpretation of *Lopez-Mendoza*, INS behavior that should not be condoned, but is not necessarily egregious under the intended meaning of *Lopez-Mendoza*, would result in the suppression of valuable evidence. *Gonzalez-Rivera*, 22 F.3d at 1454 (Choy, J., dissenting).

Judge Choy also recognized that judicial integrity and the Fourth Amendment would be more fully protected using injunctive relief. *Id.* (Choy, J., dissenting). Justice O'Connor, however, failed to include a discussion of the judicial integrity objective in *Lopez-Mendoza*. *Id.* at 1454 (Choy, J., dissenting); *see Lopez-Mendoza*, 468 U.S. at 1051 (egregious conduct limitation) (dictum). The dissent argued that this omission was deliberate. *Gonzalez-Rivera*, 22 F.3d at 1454 (Choy, J., dissenting).

218. *Gonzalez-Rivera*, 22 F.3d at 1454 (Choy, J., dissenting). The dissent interpreted the egregiousness limitation as a two part test. *See id.* at 1453 (Choy, J., dissenting) (disagreeing with majority's "decoupling" of test).

219. *Id.* at 1454-55 (Choy, J., dissenting). Although the dissent agreed with the majority's goal of deterring INS misconduct, Judge Choy believed that the majority "pursue[d] a path" that was prohibited by both Supreme Court and Ninth Circuit precedent. *Id.* at 1454 (Choy, J., dissenting).

220. *Id.* (Choy, J., dissenting). The dissent asserted that the majority should have followed *Nicacio* and considered injunctive relief. *Id.* at 1454-55 (Choy, J., dissenting) (discussing Nicacio v. INS, 768 F.2d 1133, 1140 (9th Cir. 1985)). In *Nicacio*, the Ninth Circuit upheld a district court injunction that enjoined warrantless investigatory stops of the Hispanic community. 768 F.2d at 1139-40. Furthermore, the injunction required INS agents to record all stops. *Id.* Judge Choy believed that if the majority had chosen this solution, then records would be available to document widespread INS violations. *Gonzalez-Rivera*, 22 F.3d at 1455

that the majority's solution "elevate[d] the egregiousness exception" to a rule inconsistent with Supreme Court precedent and complicated the *Lopez-Mendoza* limitation by requiring an examination of the INS agents' objective good or bad faith conduct.[221]

V. *GONZALEZ-RIVERA V. INS:* AN ERRONEOUS APPLICATION OF THE *LOPEZ-MENDOZA* EGREGIOUS CONDUCT LIMITATION

The Ninth Circuit interpreted the Supreme Court dictum in *Lopez-Mendoza* beyond its intended meaning by relying on *Lopez-Mendoza* to support, rather than to preclude, Gonzalez-Rivera's argument to suppress the evidence.[222] The Ninth Circuit failed to consider the entire section of the *Lopez-Mendoza* decision regarding the egregious conduct limitation.[223] Although the egregiousness limitation set forth in *Lopez-Mendoza* has more than one interpretation, a reasonable interpretation must take into consideration the entire text of the dictum—not just certain parts that support the court's intended result.[224]

After concluding that the race-based stop was an egregious Fourth Amendment violation, the *Gonzalez-Rivera* majority failed to consider how the immigration agents' misconduct affected the probative value of the evidence obtained.[225] The *Lopez-Mendoza* egregious conduct limitation focused both on the actual conduct of the offending officers *and* its effect on the probative value of the evidence obtained.[226] Moreover, the Ninth Circuit previously had interpreted the *Lopez-Mendoza* egregious conduct limitation as a conjunctive, two part test.[227] If the court had remained consistent with its own precedent and considered both parts of the

(Choy, J., dissenting). Such evidence, documenting INS misconduct, could be used to reevaluate the *Lopez-Mendoza* holding. *Id.*

221. *Gonzalez-Rivera*, 22 F.3d at 1454 (Choy, J., dissenting).

222. *Id.* at 1448-52. For a discussion of the majority's interpretation of the *Lopez-Mendoza* dictum, see *supra* notes 170-80 and 187-95 and accompanying text.

223. *See Gonzalez-Rivera*, 22 F.3d at 1454 (Choy, J., dissenting) (arguing that majority failed to consider entire context of egregious conduct limitation). The relevant portion of the *Lopez-Mendoza* limitation states that the Supreme Court was not considering "egregious violations . . . that might transgress notions of fundamental fairness *and* undermine the probative value of the evidence obtained." INS v. Lopez-Mendoza, 468 U.S. 1032, 1050-51 (1984) (emphasis added).

224. *See Gonzalez-Rivera*, 22 F.3d at 1454 (Choy, J., dissenting) (noting that majority failed to consider the *Lopez-Mendoza* dictum concerning peaceful arrests).

225. *Id.* (Choy, J., dissenting). Evidence obtained via a peacful arrest has a high probative value. The court failed to examine the probative value element of the egregious conduct limitation. *Id.* (Choy, J., dissenting).

226. *Id.* at 1453 (Choy, J., dissenting). By failing to consider both prongs of the limitation, the majority expanded the category of egregious violations beyond acts of physical brutality. *Id.* (Choy, J., dissenting).

227. *See* Cervantes-Cuevas v. INS, 797 F.2d 707, 711 (9th Cir. 1985) (holding that failure to prove that INS conduct undermined probative value of evidence precluded use of exclusionary rule at deportation hearing); Benitez-Mendez v. INS, 760 F.2d 907, 909-10 (9th Cir. 1985) (prohibiting application of exclusionary rule because there was no evidence that INS acted unpeacefully). For a discussion

Supreme Court's dictum, the majority could not have found that Officer Wilson's conduct affected the probative value of the evidence obtained. There were no facts suggesting that Gonzalez's statements were made involuntarily or under duress.[228] For example, Officer Wilson did not use physical force, duress or coercion in stopping Gonzalez or in questioning him about his legal status.[229]

Also, in relying on the citation to *Rochin v. California*[230] to justify a disjunctive interpretation of the Supreme Court's dictum, the majority ignored Justice O'Connor's clarification of the language's meaning.[231] Following the citation to *Rochin*, Justice O'Connor stated that "[a]t issue here is the exclusion of credible evidence gathered in connection with peaceful arrests . . . . We hold that evidence derived from such arrests need not be suppressed in an INS civil deportation hearing."[232] In failing to consider these final sentences of the opinion, the majority misinterpreted the dictum and expanded its meaning beyond the Supreme Court's intentions.[233] The peacefulness aspect of the egregiousness dictum should have been a significant part of the majority's analysis.[234] Furthermore, Ninth Circuit precedent had not deemed unlawful, peaceful arrests sufficiently egregious to warrant application of the exclusionary rule to deportation hearings.[235]

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of the facts and rationale of these holdings, see *supra* notes 122-29 and 118-21 respectively, and accompanying text.

228. Respondent's Brief, *supra* note 142, at 12. Absent proof casting doubt on the probative value of the evidence obtained, the exclusionary rule is not applicable. *See Cervantes-Cuevas*, 797 F.2d at 711 (holding that exclusionary rule is inapplicable at deportation hearing absent proof casting doubt on credibility of evidence); *Benitez-Mendez*, 760 F.2d at 910 (holding that exclusionary rule inapplicable at deportation hearing).

229. Respondent's Brief, *supra* note 142, at 12.

230. 342 U.S. 165 (1952). The reference to *Rochin*, in the context of the two-part test, can reasonably lead to an inference that the exclusionary rule warrants application only if the INS' conduct is egregious *or* if the probative value of the evidence is undermined. *See id.* at 172-73 (reversing conviction despite highly probable evidence of guilt because government conduct was outrageous and shocking). However, the entire dictum does not support this interpretation. *See Gonzalez-Rivera*, 22 F.3d at 1454 (Choy, J., dissenting) (arguing that majority misconstrued Supreme Court dictum).

231. *Gonzalez-Rivera*, 22 F.3d at 1454 (Choy, J., dissenting). The dissent afforded greater weight to Justice O'Connor's phrasing of the limitation. *See id.* (Choy, J., dissenting).

232. INS v. Lopez-Mendoza, 468 U.S. 1032, 1051 (1984).

233. *Gonzalez-Rivera*, 22 F.3d at 1454 (Choy, J., dissenting). In essence, the Ninth Circuit substituted an "or" for an "and" in the *Lopez-Mendoza* dictum. *See id.* at 1453 (recognizing majority's "decoupling" of prongs); *see also* Orhorhaghe v. INS, 38 F.3d 488, 501-03 (9th Cir. 1994) (holding that violation can be egregious without undermining probative value and is excludable at deportation hearing).

234. *See Gonzalez-Rivera*, 22 F.3d at 1454 (Choy, J., dissenting) (recognizing importance of nature of conduct).

235. *See* Cervantes-Cuevas v. INS, 797 F.2d 707, 711 (9th Cir. 1985) (prohibiting use of exclusionary rule to bar evidence obtained from illegal arrest unless government conduct undermined probative value of evidence); Benitez-Mendez v.

By eliminating the probative value test and the peacefulness of the arrest issue from the egregious conduct analysis, the Ninth Circuit replaced the Supreme Court's intentions with its own bad faith standard for egregious conduct.[236] In doing so, the majority used evidentiary rules applicable in criminal proceedings, despite the classification of deportation hearings as civil matters.[237]

VI. THE CONSEQUENCES OF *GONZALEZ-RIVERA V. INS*

The Ninth Circuit unequivocally acknowledged that the government's conduct will be carefully scrutinized in the context of roving border patrol searches in an effort to protect the constitutional rights of undocumented persons.[238] The consequences of this decision, however, will affect the judiciary, the government and the Hispanic community. As undocumented persons become more aware of their constitutional rights, it is likely that many more will try to challenge the admissibility of evidence obtained pursuant to roving border patrol stops at their deportation hearings.[239]

INS, 760 F.2d 907, 910 (9th Cir. 1985) (affirming that unconstitutional arrest did not bar evidence from deportation hearing). For a discussion of these cases, see *supra* notes 122-29 and 118-21, respectively, and accompanying text. Because the facts surrounding the arrests in *Cervantes-Cuevas, Benitez-Mendez* and *Gonzalez-Rivera* were similar in that there was no indication of unpeacefulness on the government's behalf, the Ninth Circuit should have reached the same conclusion in each case. *See Gonzalez-Rivera*, 22 F.3d at 1454 (Choy, J., dissenting) (recognizing *Gonzalez-Rivera* as inconsistent with precedent).

236. *Gonzalez-Rivera*, 22 F.3d at 1454 (Choy, J., dissenting); *see also* Adamson v. Commissioner, 745 F.2d 541, 545 (9th Cir. 1984) (using bad faith standard to determine conduct was egregious). The Ninth Circuit departed from the *Lopez-Mendoza* holding by substituting the *Leon* good faith standard for determining whether conduct was egregious. Respondent's Petition for Rehearing En Banc at 14, Gonzalez-Rivera v. INS, 22 F.3d 1441 (9th Cir.) (No. 92-70492), *reh'g denied*, 37 F.3d 1421 (1994) [hereinafter Respondent's Petition for Rehearing]. For a discussion of the *Adamson* facts and holding, see *supra* notes 111-16 and accompanying text.

237. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1034 (1984) (deeming deportation hearings civil in nature).

238. *Gonzalez-Rivera*, 22 F.3d at 1454 (Choy, J., dissenting). By expanding the category of egregious violations, the majority "inflate[d] this limitation to such an extent that even . . . comparatively pedestrian violations . . . would merit suppression of derivative evidence." *Id.* (Choy, J., dissenting).

239. *See* Respondent's Petition for Rehearing, *supra* note 236, at 3 (recognizing negative impact of exclusionary rule on deportation hearings). Respondent argued that the *Gonzalez-Rivera* decision could adversely affect INS procedure by possibly encouraging undocumented persons to contest the legality of their arrests. *Id.* The government argued that the consequences of *Gonzalez-Rivera* will "paralyze the administration of immigration laws." *Id.*

Estimates indicate that nearly 96% of undocumented persons apprehended in 1992 were Mexican citizens. *Id.* (citing 1992 Statistical Yearbook of the INS). The government predicted that if only a small percentage of those persons challenged their arrests by claiming they were stopped based solely on their ethnic appearance, the burden on the administration of immigration laws would be severe. *Id.*

It is likely that *Gonzalez-Rivera* will have a positive effect on government conduct by serving as an additional deterrent to curb unlawful INS conduct. Since the implementation of the Immigration Reform and Control Act (IRCA) of 1986, the Immigration and Control Act of 1990 and the implementation of the "war on drugs" during the 1980s, there have been more aggressive attempts to control immigration into the United States.[240] The current anti-immigrant climate present in some parts of the nation may have been a stimulus for the government's recent violations of undocumented persons' constitutional rights.[241] Therefore, applying the exclusionary rule to deportation hearings may result in fewer egregious violations because INS agents will not want valuable evidence suppressed due to their unlawful conduct. Hopefully, because of this improved behavior on behalf of the government there will be fewer challenges to INS practices by undocumented persons.

The *Gonzalez-Rivera* decision will also affect the judiciary. First, *Gonzalez-Rivera* may encourage the courts of appeals to give greater deference to judicial integrity when deciding similar cases. It is also likely that future cases dealing with INS roving patrol arrests will be scrutinized more carefully to determine whether the stop was truly race-based, or whether it was justified by specific articuable facts. Most importantly, *Gonzalez-Rivera* has the potential to be instrumental in forcing the Supreme Court to revisit its holding in *Lopez-Mendoza*.[242] *Lopez-Mendoza* was a five-to-four decision, with only a plurality of the Court supporting the egregious conduct limitation.[243] While it is difficult to predict how the Supreme Court would currently decide this issue, it is possible that *Lopez-Mendoza* could be

240. *See* Romero, *supra* note 7, at 1000-01 (arguing that hostile attitudes towards aliens are reflected in United States policies); *see also* Lenni B. Benson, *By Hook or By Crook: Exploring the Legality of an INS Sting Operation*, 31 SAN DIEGO L. REV. 813 (1994) (discussing undercover INS operations and rights of aliens); Giordano, *supra* note 61, at 481 (arguing that American hostility towards immigrants is due to struggling economy, high rate of unemployment and fear of job competition with immigrants). *See generally* Michael J. Nunez, *Violence at Our Border: Rights and Status of Immigrant Victims of Hate Crimes and Violence Along the Border Between the United States and Mexico*, 43 HASTINGS L.J. 1573 (1992) (discussing violence at United States borders against immigrants).

241. *See* Michelle A. Heller, *Stemming the Tide (Can You Spot the Illegal Immigrant?)*, HISPANIC MAG., Apr. 1994, at 20-26 (suggesting anti-immigration attitude is fueling discrimination based on Hispanic appearance). There have been several recent instances in which the INS has detained Hispanic citizens based on their appearance. *Id.* at 20-22. In one situation, the Mayor of Southern California City of Pomona was pulled over by INS agents based on his close fit with an illegal immigrant profile—overalls and an old truck. *Id.* at 22; *see also* Nunez, *supra* note 240 (discussing violence against undocumented immigrants).

242. *Gonzalez-Rivera* 22 F.3d at 1421. The Ninth Circuit rejected the government's petition for rehearing en banc. *Id.* Therefore, it is possible that if petitioned for certiorari, the Supreme Court will resolve the inconsistency that has developed among the federal courts as to the applicability of the exclusionary rule to deportation hearings.

243. INS v. Lopez-Mendoza, 468 U.S. 1032, 1034 (1984). For a discussion of the egregious conduct limitation, see *supra* notes 101-07 and accompanying text.

overturned. Of the nine Justices who currently occupy the bench, only two participated in the *Lopez-Mendoza* opinion—Justice O'Connor, who wrote the majority opinion, and Justice Stevens who was one of the four dissenters. The other seven Justices have not had the opportunity to decide this issue.

Justice Kennedy, however, as a Ninth Circuit judge, filed a dissent in *United States v. Penn*[244] stating that, "[t]he rigidities of the exclusionary rule, and the occasional frustration caused by its enforcement, should not obscure the fact that determinations of [F]ourth [A]mendment reasonableness must be made independently of the question whether exclusion of the evidence is undesirable for other reasons."[245] This opinion gives some indication that Justice Kennedy may not agree with the strict cost-benefit analysis that was applied in *Lopez-Mendoza*. Furthermore, in *United States v. Munoz*,[246] Justice Kennedy reversed a conviction based on evidence acquired as a result of a racially-motivated patrol stop.[247] These opinions indicate that if given the opportunity, Justice Kennedy might support overturing *INS v. Lopez-Mendoza*.

While *Gonzalez-Rivera* demonstrates a strong commitment to protecting undocumented persons' constitutional rights and may have some beneficial effects on INS conduct, the legal analysis is somewhat flawed. Absent a compelling reason, precedent must be followed.[248] The majority, however, failed to adhere to relevant Ninth Circuit and Supreme Court precedent. In deciding cases, judges are expected to adhere to the well-established doctrine of stare decisis and rule in accord with pre-exsiting precedent.[249] Although the *Gonzalez-Rivera* holding did not specifically overrule precedent, the majority misinterpreted and unreasonably distinguished relevant case law to reach an unintended result. Although the

244. 647 F.2d 876, 888 (9th Cir.) (Kennedy, J., dissenting), *cert. denied*, 449 U.S. 903 (1980).

245. *Id.* (Kennedy, J., dissenting). In *Penn*, the Ninth Circuit held that there was no Fourth Amendment violation when police bribed the defendant's five-year-old child in an effort to seize narcotics. *Id.* at 880. Accordingly, the court reversed the district court's granting of a motion to suppress the evidence. *Id.* at 885.

246. 604 F.2d 1160 (9th Cir. 1979). In *Munoz*, two vehicles traveling in tandem were stopped because the drivers appeared Latin or Mexican and the occupants of the cars failed to look at the agents. *Id.* at 1161. These facts did not support a reasonable suspicion of wrongdoing to justify the stop of the first vehicle. *Id.* After the first car was stopped, however, undocumented immigrants were spotted in the other vehicle. *Id.* Upon this sighting, reasonable suspicion existed to stop the second car, given the inference that the cars were traveling together. *Id.*

247. *Id.* at 1161. The court held that Latin appearance and failure to look at INS patrol car did not support reasonable suspicion. *Id.*

248. Amy L. Padden, *Overruling Decisions in the Supreme Court: The Role of a Decisions's Vote, Age and Subject Matter in the Application of Stare Decisis After* Payne v. Tennessee, 82 GEO. L.J. 1689, 1689 (1994). For an in-depth discussion of the doctrine of stare decisis, see *supra* at 1691-96.

249. *See generally* Erin O'Hara, *Social Constraint or Implicit Collusion?: Toward a Game Theoretic Analysis of Stare Decisis*, 24 SETON HALL L. REV. 736, 736 (1993) (discussing why judges follow doctrine of stare decisis).

holding of *Gonzalez-Rivera* provides greater protection for undocumented immigrants, the outcome does not justify the means used by the majority.

Aside from failing to adhere to pre-exisiting case law, the majority relied heavily on Supreme Court and Ninth Circuit dictum.[250] As a result, the *Gonzalez-Rivera* holding has the potential of being easily distinguished or overturned.[251] Furthermore, because the holding is fact-specific, it is possible that other circuits will not regard it as valuable precedent.

VII. CONCLUSION

Because deportation proceedings are civil in nature, the same evidentiary rules that apply to criminal proceedings should not apply to deportation hearings.[252] Nevertheless, the Ninth Circuit expanded the use of the exclusionary rule to civil deportation hearings.[253] In doing so, the court unreasonably interpreted Supreme Court dictum beyond its intended meaning and disregarded relevant Ninth Circuit precedent.[254]

Although *Gonzalez-Rivera* protects undocumented immigrants' constitutional rights, it is inconsistent with Supreme Court and Ninth Circuit precedent. By decoupling the egregious conduct limitation in *Lopez-Mendoza*, the Ninth Circuit expanded the meaning of "egregious conduct" to include peaceful, race-based roving border patrol stops by the INS. Moreover, the *Gonzalez-Rivera* court imposed an objective bad-faith standard for the determination of egregious behavior—a standard not contemplated by the Supreme Court.[255]

While *Lopez-Mendoza* permits the government to benefit from evidence obtained in a fundamentally unfair and discriminatory manner, it is the Supreme Court's responsibility to interpret the law and overrule precedent so that the constitutional rights of all persons within United States boundaries are protected. It is possible that if a case similar to *Gonzalez-Rivera* were argued before the current Supreme Court, the egregious conduct limitation would be expanded beyond mere dictum. However, until

250. For a discussion of the Ninth Circuit's reasoning, see notes 156-203 and accompanying text.

251. *See* Quintana v. INS, 27 F.3d 1401 (9th Cir. 1994) (acknowledging *Gonzalez-Rivera* holding but admitting voluntary confession at deportation hearing obtained pursuant to a racially motivated stop).

252. INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984). For a discussion of why application of the exclusionary rule to deportation hearings is inappropriate, see *supra* notes 89-100 and accompanying text.

253. Gonzalez-Rivera v. INS, 22 F.3d 1441, 1452 (9th Cir. 1994). For a discussion of the majority's holding, see *supra* notes 156-203 and accompanying text.

254. *See id.* at 1448-52 (interpreting egregious conduct exception without reference to peacefulness of arrest or to probative value of evidence obtained).

255. *See id.* at 1449-52 (arguing that race-based stop done in bad faith is egregious constitutional violation). *But see id.* at 1454 (Choy, J., dissenting) (stating that majority's decision is inconsistent with Supreme Court precedent).

this is done, lower courts must not intentionally misinterpret existing law to achieve a result unintended by the Supreme Court.

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