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THE EXCLUSIONARY RULE'S APPLICABILITY IN DEPORTATION HEARINGS: *INS v. LOPEZ-MENDOZA*

INTRODUCTION

The exclusionary rule prohibits the use of evidence obtained through a search or seizure that violates the fourth amendment.[1] Traditionally, the Board of Immigration Appeals (BIA)[2] applied the rule to civil deportation proceedings.[3] However, very few aliens challenged the introduction of evidence on fourth amendment grounds.[4] In 1979, the BIA reversed its former stance and held in *In re Sandoval*[5] that the rule would no longer apply. In *Lopez-Mendoza v. INS,*[6] the United States Court of Appeals for the Ninth Circuit overturned the BIA's decision. The Supreme Court reversed the Ninth Circuit's decision in *INS v. Lopez-Mendoza,*[7] the Supreme Court's first ruling on the applicability of the exclusionary rule in civil deportation proceedings.

The Supreme Court applied a cost-benefit analysis to determine whether the exclusionary rule should be applied in civil deportation proceedings. The Court found that the exclusionary rule does not significantly deter violations by Immigration and Naturalization Service (INS) officers. The Court balanced the minimal deterrence benefits of applying the rule against the significant costs of reducing the effective-

1. The fourth amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. The exclusionary rule deters violations of the fourth amendment by barring the use of evidence obtained through unreasonable searches and seizures. *See infra* notes 9-32 and accompanying text.

2. An alien who is suspected of being in the country illegally has a right to a deportation hearing before an immigration law judge of the Immigration and Naturalization Service (INS). 8 U.S.C. § 1252(b) (1982). The five-member Bureau of Immigration Appeals (BIA), which is separate from the INS, is an agency of the Department of Justice. 8 C.F.R. § 3.1 (1984). The BIA has appellate jurisdiction over the deportation decisions of INS immigration law judges. 8 C.F.R. § 3.1(b) (1984). For a complete discussion of the organizational structure of the agencies enforcing the immigration laws, see J. WASSERMAN, IMMIGRATION LAW AND PRACTICE 11-37 (3d ed. 1979).

3. *See infra* notes 45-48 and accompanying text.

4. Between 1952 and 1979, fewer than fifty challenges were brought. Lopez-Mendoza v. INS, 705 F.2d 1059, 1071 (9th Cir. 1983). This number seems small in light of the number of illegal aliens apprehended. Approximately fifty-thousand were apprehended in 1964. The number in 1979 was one million. A. LEIBOWITZ, IMMIGRATION LAW AND REFUGEE POLICY 6-1 (1983).

5. 17 I. & N. Dec. 70 (BIA 1979).

6. 705 F.2d 1059 (9th Cir. 1983), *rev'd*, 104 S. Ct. 3479 (1984).

7. 104 S. Ct. 3479 (1984).

ness of enforcing the immigration laws and concluded that the rule should not be applied.

This Note takes the position that the Court erred in finding that the exclusionary rule provides little deterrence in the deportation area and that it exaggerated the social costs of applying the rule. The exclusionary rule provides the deterrence that is needed for the protection of the fourth amendment rights and fifth amendment equal protection interests of aliens subject to civil deportation proceedings. The benefits of deterrence outweigh a realistic assessment of the rule's costs.

Section I presents the general background of the exclusionary rule and its application in civil deportation proceedings. Section II describes the facts and holding of *INS v. Lopez-Mendoza*. Section III analyzes the Court's decision.

I. THE EXCLUSIONARY RULE

A. APPLICATION IN CRIMINAL PROCEEDINGS

The exclusionary rule protects fourth amendment rights by barring the use in judicial and administrative proceedings of evidence obtained by an unlawful search or seizure.[8] Until recently, the rule was seen as a direct constitutional mandate. In its original formulation of the rule in *Weeks v. United States,*[9] the Supreme Court stated that the use of illegally obtained evidence in a federal court would produce "a denial of the constitutional rights of the accused."[10] Nearly fifty years later, when the Court extended the rule to the states in *Mapp v. Ohio,*[11] it still perceived the rule as "a clear, specific and constitutionally required . . . safeguard."[12] The *Mapp* Court also acknowledged the rule's use as a deterrent of governmental misconduct[13] and a means of preserving judicial integrity.[14] Justice Harlan, dissenting in *Mapp,* argued that the rule is not constitutionally compelled but is a federal remedy aimed at deterrence.[15] Later decisions increasingly emphasized the deterrence rationale without rejecting the rule's constitutional basis.[16]

8. *See generally* Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases,* 83 COLUM. L. REV. 1365 (1983).

9. 232 U.S. 383 (1914).

10. *Id.* at 398.

11. 367 U.S. 643 (1961).

12. *Id.* at 648. *See supra* Stewart, note 8, at 1380.

13. 367 U.S. at 651.

14. *Id.* at 659-60.

15. *Id.* at 680 (Harlan, J., dissenting).

16. In Alderman v. United States, 394 U.S. 165 (1969), the Court found that the extra deterrent value to be gained did not justify excluding probative evidence against the defend-

Finally, in *United States v. Calandra,*[17] the Court characterized the exclusionary rule as a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[18] The Court stated that "the purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim."[19] Later decisions quoted *Calandra*'s language and followed its approach.[20] The Court no longer regards the rule as a personal constitutional right. The Court now applies the rule on a case-by-case basis by weighing the benefit of the rule's deterrent effect[21] in a given context against the societal costs of the rule's application.[22]

The change in the rule's justification and the adoption of cost-benefit balancing make the rule vulnerable to erosion.[23] Chief Justice Burger expressed extreme dissatisfaction with the rule both before his appointment to the Court[24] and as Chief Justice.[25] Other justices have

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ant because of a violation of a constitutional right of his co-conspirator. *Id.* at 174-75. In Linkletter v. Walker, 381 U.S. 618 (1965), the Court reaffirmed the *Mapp* view of the rule as "an essential part of both the Fourth and Fourteenth Amendments," *id.* at 634, but found that *Mapp*'s deterrent purpose would not be served by applying the rule retrospectively. *Id.* at 636-37.

17. 414 U.S. 338 (1974).

18. *Id.* at 348.

19. " '[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late.' " *Id.* at 347 (quoting Linkletter v. Walker, 381 U.S. 618, 637 (1965)).

20. *See, e.g.,* Stone v. Powell, 428 U.S. 465, 486 (1976) (little additional deterrence to be gained by use of rule in a federal habeas corpus review of state convictions); United States v. Janis, 428 U.S. 433, 446 (1976) (deterrent benefit not strong enough to justify excluding from a federal civil proceeding evidence illegally seized for a state criminal proceeding); United States v. Peltier, 422 U.S. 531, 538-39 (1975) (policies underlying exclusionary rule did not require retroactive application of holding that warrantless automobile search was unconstitutional).

21. Earlier the Court referred to "the imperative of judicial integrity" as a second benefit to be gained by applying the exclusionary rule. Elkins v. United States, 364 U.S. 206, 222 (1960). " '[A] conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law.' " *Id.* at 223 (quoting McNabb v. United States 318 U.S. 332, 345 (1943)). More recent opinions, however, take the position that this factor plays a limited role in the justification of the exclusionary rule. *See, e.g.,* Stone v. Powell, 428 U.S. 465, 485 (1976).

22. The Court set out the framework for this balancing in United States v. Janis, 428 U.S. 433, 447-60 (1976). Although *Janis* was a civil proceeding, the framework is equally applicable to criminal proceedings. United States v. Leon, 104 S. Ct. 3405, 3412 (1984).

23. Commentators have expressed concern that erosion may ultimately lead to total abolition of the rule, especially given the likelihood of President Reagan's appointment of conservative justices to the Court. *See, e.g.,* Vitiello & Burger, *Mapp's Exclusionary Rule: Is the Court Crying Wolf?,* 86 DICK. L. REV. 15, 15-19 (1981).

24. Burger, *Who Will Watch the Watchman?,* 14 AM. U.L. REV. 1, 10 (1964) ("[S]ociety must inquire whether the Suppression Doctrine has in fact accomplished its stated purpose of deterrence and meet the frustrated and plaintive cry that 'There *must* be a better way to do it.' ").

25. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting) (rule is "conceptually sterile and practically inef-

also expressed dissatisfaction with the rule and indicated a willingness to change the rule or dispose of it.[26] Objections to the rule focus primarily on the high societal costs of releasing defendants[27] and on the rule's questionable deterrence value.[28] "The debate within the Court on the exclusionary rule has always been a warm one,"[29] but the trend toward narrowing the rule has been clear. The Burger Court's growing resistance to the rule led to the adoption of a "good faith" exception. In *United States v. Leon,*[30] which was handed down on the same day as the *Lopez-Mendoza* decision, the Court held that the exclusionary rule does not apply when police officers acted in reasonable reliance on a warrant issued by a neutral magistrate but later found

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fective" as deterrent); Stone v. Powell, 428 U.S. 465, 500 (1976) (Burger, C.J., concurring) (rule is "Draconian, discredited device in its present absolutist form").

26. Justices Rehnquist and Blackmun joined the Chief Justice's reference to the holding in Ybarra v. Illinois, 444 U.S. 85 (1979), as "another manifestation of the practical poverty of the judge-made exclusionary rule." 444 U.S. at 97 (Burger, C.J., dissenting). Justice White first indicated his willingness to modify *Mapp* in Stone v. Powell, 428 U.S. 465, 537-38 (1976) (White, J., dissenting). Justice Powell expressed an interest in developing a sliding scale approach to fourth amendment violations in Brown v. Illinois, 422 U.S. 590, 609-612 (1975) (Powell, J., concurring in part). *See also* Schneckloth v. Bustamonte, 412 U.S. 218, 266-71 (1973) (Powell, J., concurring) (questioning rule's effectiveness as a deterrent and emphasizing that rule's value varies according to the setting); California v. Minjares, 443 U.S. 916, 927 (1979) (Rehnquist, J., dissenting from denial of stay) ("It would be quite rational, I think, for the criminal trial to take place either without any application of the exclusionary rule in either federal or state cases, or at least without any application in state cases.").

27. Public and political outcry is strong when violent criminals return to the streets because of police error. *See* Goodpaster, *An Essay on Ending the Exclusionary Rule,* 33 HASTINGS L.J. 1065, 1085 (1982); Stewart, *supra* note 8, at 1393.

28. The deterrence value of the rule is difficult to prove or disprove; studies have addressed the question, but the results are open to doubt. *See* United States v. Janis, 428 U.S. 433, 449-54 & n.22 (1976). The Court found itself in "no better position" than it had been in 1960, when it stated in Elkins v. United States, 364 U.S. 206, 218 (1960):

> Empirical statistics are not available to show that the inhabitants of states which follow the exclusionary rule suffer less from lawless searches and seizures than do those of states which admit evidence unlawfully obtained. Since as a practical matter it is never easy to prove a negative, it is hardly likely the conclusive factual data could ever be assembled.

Janis, 428 U.S. at 453. *See also* Canon, *The Exclusionary Rule: Have Critics Proven That It Doesn't Deter Police?,* 62 JUDICATURE 398 (1979) (evidence is inconclusive; rule's success rate varies among cities); Schlesinger, *The Exclusionary Rule: Have Proponents Proven That It Is a Deterrent to Police?,* 62 JUDICATURE 404 (1979) (rule's proponents have not sustained burden of proving its effectiveness).

29. United States v. Janis, 428 U.S. 433, 446 (1976). In Mapp v. Ohio, 367 U.S. 643 (1961), the Court decided by a 5-4 majority to extend the exclusionary rule to the states. This split is indicative of exclusionary rule decisions. *See, e.g.,* Irvine v. California, 347 U.S. 128 (1954) (5-4 decision; five opinions filed); Elkins v. United States, 364 U.S. 206 (1960) (5-4 decision); United States v. Calandra, 414 U.S. 338 (1974) (6-3 decision). One commentator stated, "the Burger Court has responded to fourth amendment challenges with doctrinal schizophrenia, obscuring as a result the actual theoretical or ideological basis for its exclusionary rulings." Burkoff, *The Court that Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine,* 58 OR. L. REV. 151, 191 (1979).

30. 104 S. Ct. 3405 (1984).

invalid.[31] The good faith exception can be viewed as the culmination of reliance on deterrence as the rationale for the exclusionary rule.[32]

B. Application in Deportation and Other Civil Proceedings

Although the Supreme Court has never applied the exclusionary rule in a civil case,[33] it has not stated that the rule is unsuitable for use in civil cases simply because they are civil.[34] In *United States v. Janis*,[35] the Court applied the balancing test in a civil context for the first time. It held that the costs of applying the rule outweigh the benefits when the offending officer and the entity seeking to introduce the illegally obtained evidence are agents of different sovereigns.[36] The Court reserved the question whether the balancing test could lead to a

31. Justice White, writing the majority opinion in this 6-3 decision, reasoned that the exclusionary rule cannot deter reasonable mistakes. If police officers reasonably believed that the procedures they followed were correct, their future behavior would be unaffected by a decision that the warrant they used was defective. Justice White had previously set forth this position in Stone v. Powell, 428 U.S. 465, 537-42 (1976) (White, J., dissenting), and in Illinois v. Gates, 103 S. Ct. 2317, 2336-47 (1983) (White, J., concurring).

The reasonable belief exception drew heated public debate because it was seen as the most drastic alteration of the exclusionary rule since its establishment. *See* N.Y. Times, July 6, 1984, at B-16, col. 1 (ABA Journal poll found split decision by the Court reflected a similar split among the nation's lawyers); Kamisar, N.Y. Times, July 11, 1984, at A-25, col. 1 (establishment of exception brings rule one step closer to its ultimate demise).

32. "It now appears that the Court's victory over the Fourth Amendment is complete. That today's decision represents the piece de resistance of the Court's past efforts cannot be doubted. . . ." United States v. Leon, 104 S. Ct. at 3430 (Brennan, J., dissenting).

33. In *Janis*, the Court noted that it had never applied the exclusionary rule to a civil proceeding. 428 U.S. at 447. That is still true. The Court granted certiorari to determine whether the rule applied in a civil liquor license revocation hearing, but the issue became moot when the licensed establishment went out of business. Board of License Comm'rs, 105 S. Ct. 685 (1984). The Court applied the exclusionary rule in a non-criminal proceeding for forfeiture of an article used in violation of the criminal law in One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965), relying on the fact that "forfeiture is clearly a penalty for the criminal offense." *Id.* at 701.

34. The strongest objection to use of the rule in criminal trials, that high social costs will result when criminal defendants are released because of police error, does not apply in the civil sphere. *See supra* note 27. Most civil defendants, illegal aliens in particular, pose little danger to the community. *See infra* notes 124-25 and accompanying text.

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

36. In *Janis*, a state police officer obtained evidence of the defendant's bookmaking activity pursuant to a defective warrant. *Id.* at 434-38. The officer notified an IRS agent that the defendant had been arrested for bookmaking, and the agent assessed wagering taxes against the defendant. *Id.* at 436. The issue on certiorari was whether the evidence illegally seized by the state police was excludable in a federal civil proceeding brought by the IRS. The Court weighed the benefit of deterrence of future violations that the rule would provide in this context against the societal cost to the enforcement of valid laws. *Id.* at 454. It found the deterrence benefit to be "highly attenuated when the 'punishment' imposed upon the offending criminal enforcement officer is a removal of that evidence from a civil suit by or against a different sovereign." *Id.* at 458. It also found that the existing deterrence effected by exclusion of the evidence from both state and federal criminal trials made further exclusion less valuable. *Id.*

different result when the violation is intrasovereign.[37]

The courts of appeals routinely exclude illegally seized evidence in civil proceedings.[38] For example, in *Knoll Associates, Inc. v. FTC,*[39] the Seventh Circuit excluded improperly seized documents from an FTC hearing. The court emphasized the fourth amendment's guarantee of the people's right "to be secure in their persons, houses, papers, and effects."[40] The court concluded that this right is not affected by the nature of the proceeding.[41] Similarly, in *Rogers v. United States,*[42] the First Circuit excluded illegally seized liquor from use in a civil suit by the government to recover customs duties.

Before *INS v. Lopez-Mendoza,* the Supreme Court did not confront the issue of the exclusionary rule's applicability to deportation proceedings. However, the Court had stated in dicta that "it may be assumed"[43] that the rule applies. This was thought to be the rule. Several lower courts refused to admit illegally obtained evidence in deportation proceedings.[44] The major treatise in immigration law states that the exclusionary rule's application to deportation proceedings is "undisputed."[45] The BIA assumed "in countless cases"[46] that the rule applied. In virtually all of those cases, however, the BIA found that the arrest leading to the evidence was legal or that independent, untainted evidence was sufficient to uphold the deportation order.[47] The BIA's 1979 decision in *In re Sandoval* was the first

37. "The seminal cases that apply the exclusionary rule to a civil proceeding involve intrasovereign violations, a situation we need not consider here." *Id.* at 456. Deportation proceedings such as the one in *Lopez-Mendoza* are not only intrasovereign but intra-agency. INS arresting officers are the same officials who bring deportation actions; their primary objective in seizing evidence is to use it in civil deportation proceedings.

38. The Ninth Circuit *Lopez-Mendoza* opinion lists a number of these cases. 705 F.2d at 1070-71. n.15.

39. 397 F.2d 530 (7th Cir. 1968).

40. *Id.* at 534.

41. "We must not be misled by the legal classification of the nature of the proceeding." *Id.*

42. 97 F.2d 691 (1st Cir. 1938).

43. United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 155 (1923).

44. *See* Wong Chung Che v. INS, 565 F.2d 166, 169 (1st Cir. 1977) (if an alien's landing permit was obtained "through an illegal search, there is no authority of which we are aware that would make it admissible."); *Ex parte* Jackson, 263 F. 110, 112-13 (D. Mont. 1920), *appeal dismissed sub nom.* Andrews v. Jackson, 267 F. 1022 (9th Cir. 1920) ("the deportation proceedings [were] unfair and invalid, in that they [were] based upon evidence and procedure that violate the search and seizure and due process clauses of the Constitution."); United States v. Wong Quong Wong, 94 F. 832, 834 (D. Vt. 1899).

45. 1A C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 5.2c, at 5-31 (rev. ed. 1977). *Accord,* J. WASSERMAN, IMMIGRATION LAW AND PRACTICE 145 (1973).

46. *In re* Sandoval, 17 I & N Dec. 70, 93 (Applemen, dissenting in part, concurring in part) (BIA 1979).

47. *See, e.g., In re* Perez-Lopez, 14 I & N Dec. 79 (BIA 1972) (after suppression of illegally obtained evidence and termination of proceeding, case re-opened based on an independent tip; BIA upheld resulting deportation order, refusing to allow alien to gain

holding by any judicial or administrative body that the exclusionary rule did not apply to deportation proceedings.[48]

II. *INS v. Lopez-Mendoza*: FACTS AND HOLDING

On June 23, 1977, INS officers entered the Pasco, Washington plant where Sandoval-Sanchez[49] worked. The officers did not have a search warrant, but they did have company the permission of company officials to question employees.[50] While standing at the plant's main entrance during a shift change, the officers asked innocuous questions in English to workers who aroused their suspicion. Those who did not respond were interrogated in Spanish about their right to be in the United States. The officers detained some individuals for further questioning and transported thirty-seven workers to the county jail for processing.[51] About one-third chose to depart voluntarily for Mexico and were processed immediately and placed on a bus.[52] Sandoval-Sanchez exercised his right to a deportation hearing. Dur-

"permanent residence" because of one fourth amendment violation). These cases are listed in Brief for Respondents at 67-68, n.47-48, INS v. Lopez-Mendoza, 104 S. Ct. 3479 (1984).

48. The BIA addressed the question as one of first impression in *In re* Sandoval because past decisions had not analyzed the appropriateness of the rule's application. 17 I & N Dec. 70, 75 (BIA 1979). The BIA attached great significance to the classification of deportation proceedings as civil rather than criminal. *Id.* at 76-77. Even after *In re* Sandoval, the BIA has continued to exclude illegally obtained evidence in certain circumstances. In *In re* Garcia, 17 I & N Dec. 319 (BIA 1980), the BIA held that due process required exclusion from the record of an alien's admissions because the INS had violated his fifth amendment rights by refusing his repeated requests for a lawyer, holding him incommunicado and failing to inform him of his right to a hearing. Because the admissions were the sole evidence supporting deportability, the proceedings were terminated. *See also In re* Garcia-Flores, 17 I & N Dec. 325, 327 (BIA 1980) (violation of a regulatory requirement that an alien be advised of his right to an attorney can result in exclusion of alien's statement from evidence).

49. There were two respondents: Lopez-Mendoza and Sandoval-Sanchez (not the same party as in *In re* Sandoval). Both contended that their arrests violated the fourth amendment. Lopez-Mendoza, however, objected only to being summoned to a deportation hearing following an unlawful arrest, not to the use of the evidence that was a fruit of the arrest. The Supreme Court thus decided Lopez-Mendoza's case on the basis of the rule that the "identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of unlawful arrest[.]" 104 S. Ct. at 3485. Analysis of the ruling on Lopez-Mendoza's claim is beyond the scope of this Note. Sandoval-Sanchez, on the other hand, challenged the admission of evidence at his deportation hearing. This Note addresses only the Court's holding on Sandoval-Sanchez's claim.

50. *Id.* at 3483. The INS may conduct factory searches without a search warrant if the owner or manager consents. *See* INS v. Delgado, 104 S. Ct. 1758 (1984). In *Delgado* the Court held that factory "surveys" involving individual questioning of employees are not a seizure of the workforce under the fourth amendment unless the circumstances are so intimidating that a reasonable person would believe he is not free to leave. Probable cause to suspect illegal presence in the factory is still required for arrest of an employee.

51. *Lopez-Mendoza*, 104 S. Ct. at 3483.

52. *Id.* at 3483-84. Individuals detained on suspicion of illegal alienage have a right to a deportation hearing. Alternatively, they can choose to return home without further proceedings. 8 C.F.R. § 242.5(a)(2) (1984); *see* 2 GORDON & ROSENFIELD, *supra* note 45, § 7.2, at 7-15-7-31.

ing further questioning, he admitted unlawful entry.[53]

At his deportation hearing, Sandoval-Sanchez contended that the written record of his admission[54] should be suppressed as the fruit of an unlawful arrest.[55] The immigration judge rejected Sandoval-Sanchez's claim that he was illegally arrested, but ruled in the alternative that the legality of the arrest was not relevant to the deportation hearing because of the civil nature of the proceedings.[56] He issued a deportation order under 8 U.S.C. § 1251(a)(2).[57] The BIA held on appeal that Sandoval-Sanchez's statements were voluntary and not the fruit of the arrest. The Board thus did not find it necessary to address

53. Sandoval-Sanchez later contended that he was not aware of his right to remain silent. *Lopez-Mendoza*, 104 S. Ct. at 3484. Courts have held that the absence of a Miranda warning does not render a voluntary statement inadmissible in a deportation case. *See* Avila-Gallegos v. INS, 525 F.2d 666, 667 (2d Cir. 1975) (Miranda warnings not required either before alien is taken into custody or after arrest); Chavez-Raya v. INS, 519 F.2d 397, 402 (7th Cir. 1975) ("In deportation proceedings, however—in light of the alien's burden of proof, the requirement that the alien answer nonincriminating questions, the potential adverse consequences to the alien of remaining silent, and the fact that an alien's statement is admissible in the deportation hearing despite his lack of counsel at the preliminary interrogation—*Miranda* warnings would be not only inappropriate, but could also serve to mislead the alien.") However, the court in Navia-Duran v. INS, 568 F.2d 803, 808 (1st Cir. 1977), stated that although *Miranda* warnings are not required, their absence may be relevant in assessing the voluntariness of a statement.

54. Form I-213 (Record of Deportable Alien) contains information on alienage, whether the alien is subject to deportation, whether he will depart without deportation proceedings, and whether he should be arrrested or released. *See* Wasserman, *supra* note 2, at 233-36. An officer completed INS Form I-213 on the basis of Sandoval-Sanchez's answers to questions about his immigration status; the form indicated that Sandoval-Sanchez was a native of Mexico and had entered the U.S. "without inspection." Lopez-Mendoza v. INS, 705 F.2d at 1062.

55. INS v. Lopez-Mendoza, 104 S. Ct. at 3484. Sandoval-Sanchez's arrest would have been legal only if the officers had had probable cause to suspect illegal alienage. *See* Draper v. United States, 358 U.S. 307 (1959). A lesser standard of "reasonable suspicion" is sufficient to justify brief investigative stops. The "reasonable suspicion" standard was first set out in Terry v. Ohio, 392 U.S. 1 (1967). The standard is objective, measuring when a police officer would reasonably believe an offense had been committed. Due weight is given "to the specific reasonable inferences which [an officer] is entitled to draw from the facts in light of his experience." *Id.* at 27. *See also* United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1974) ("when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate"). However, Sandoval-Sanchez's detention and transportation to the jail constituted an arrest. *See* Dunaway v. New York, 442 U.S. 200, 212 (1979) (when a person is transported to a police station and placed in an interrogation room, the detention, in contrast to a less intrusive brief stop, is "in important respects indistinguishable from a traditional arrest" and must be supported by probable cause).

The standards to be met in INS arrests vary according to the context and location of the officers' actions. The Court requires probable cause for an actual arrest or intrusive detention. *See* Draper v. United States, 358 U.S. 307 (1959). Reasonable suspicion is accepted for less intrusive actions such as investigatory stops in the immediate border area. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 557-60 (1976).

56. *Lopez-Mendoza*, 104 S. Ct. at 3484.

57. Lopez-Mendoza v. INS, 705 F.2d at 1060. In deportation proceedings involving illegal entry into the country, the government must prove alienage. The burden then shifts to the alien, who must prove his legal status in the United States. 8 U.S.C. § 1351 (1982).

the legality of the arrest or the applicability of the exclusionary rule.[58]

The Court of Appeals for the Ninth Circuit reversed the deportation order.[59] The court held that Sandoval-Sanchez's admission of alienage was the fruit of an illegal arrest[60] and that the fourth amendment exclusionary rule bars the use of illegally obtained evidence in a civil deportation hearing. The court reached this decision by balancing deterrence benefits against societal costs.[61]

A divided Supreme Court reversed the Court of Appeals. The majority, in an opinion by Justice O'Connor, determined that the "unusual and significant"[62] social costs of applying the exclusionary rule in deportation proceedings outweigh the rule's deterrence value.

Four justices dissented. Of the dissenters, Justice White[63] was closest to the majority in his approach. He agreed that the exclusionary rule's benefits must be balanced against its costs,[64] but disagreed with the majority's assessment of the benefits and costs in deportation proceedings.[65]

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58. *Lopez-Mendoza,* 104 S. Ct. at 3483; *In re* Sandoval-Sanchez, No. A22 346 925 (BIA, Feb. 21, 1980).

59. Lopez-Mendoza v. INS, 705 F.2d 1059 (9th Cir. 1979), *rev'd,* 104 S. Ct. 3479 (1984).

60. In addition to holding that the officers had not met the probable cause standard required for an arrest, the court doubted the sufficiency of the officers' suspicion of Sandoval-Sanchez's illegal alienage to justify even a brief investigative stop. The testifying officer could not remember Sandoval or describe his behavior; it was not clear which of the two arresting officers had selected him for detention. *Id.* at 1062.

61. The Ninth Circuit carefully followed the steps the Supreme Court laid out in United States v. Janis. *See supra* notes 34-37 and accompanying text.

62. *Lopez-Mendoza,* 104 S. Ct. at 3488.

63. *Id.* at 3491-95 (White, J., dissenting).

64. *Id.* Justice Brennan, on the other hand, argued that the exclusionary rule is a constitutional right directly required by the fourth amendment, regardless of its effectiveness as a deterrent. *Id.* at 3491 (Brennan, J., dissenting). In his dissent in United States v. Leon, 104 S. Ct. at 3430, Justice Brennan offered a more detailed analysis of "the Court's gradual but determined strangulation of the rule," explaining that

> because seizures are executed principally to secure evidence, and because such evidence generally has utility in our legal system only in the context of a trial supervised by a judge, it is apparent that the admission of illegally obtained evidence implicates the same constitutional concerns as the initial seizure of that evidence.

Id. at 3432. He argued that by "drawing an artificial line" between constitutional responsibilities of the police and the courts, the majority reflected an "impoverished understanding of judicial responsibility in our constitutional scheme." *Id.* at 3433. This Note does not take a position on the question whether the exclusionary rule is required by the fourth amendment or is applicable only when the deterrence value of applying the rule outweighs the social costs. *See supra* notes 9-22 and accompanying text. Rather, the position of this Note is that a correct balancing of costs and benefits would require application of the exclusionary rule in deportation proceedings. This position would leave the Court's deterrence approach to the rule intact.

65. *Id.* at 3491-95. Justice Stevens joined all but one part of Justice White's dissent. *Id.* at 3496 (Stevens, J., dissenting). He did not join the part relying on United States v. Leon because the Court had not yet applied that case's rule to warrantless searches. Justice Marshall filed a separate dissent agreeing with Justice White's analysis but arguing that

III. ANALYSIS

The Supreme Court's opinion in *Lopez-Mendoza* appeared on the same day as a controversial decision lessening the rule's effect in criminal trials, *United States v. Leon*.[66] In deciding *Lopez-Mendoza,* the Court acknowledged neither a general dissatisfaction with the rule[67] nor a desire to avoid inconsistency with *Leon*[68] as factors in its decision that the rule is inapplicable in deportation proceedings. However, it was predictable that the Court would not extend the rule to civil proceedings while simultaneously limiting the rule's traditional applications.[69]

A. CIVIL/CRIMINAL DISTINCTION

The Court pointed out that deportation is "a purely civil action."[70] After noting various protections available to the criminal defendant but not applicable in a deportation hearing, the Court stated that "a deportation hearing is intended to provide a streamlined determination of eligibility to remain in this country, nothing more."[71] The Court explained that unlike a criminal trial, a deportation proceeding looks prospectively and puts little weight on past conduct. Past conduct is of limited relevance in a deportation proceeding because deportation is not punishment for unlawful entry.[72] The opinion is not clear as to whether the Court attributes controlling significance to the civil/criminal distinction.[73]

The civil/criminal distinction should not be of controlling significance. Commentators have argued that deportation should be reclassified as a criminal or quasi-criminal proceeding[74] and that

such analysis should be unnecessary because the rule is constitutionally mandated. *Id.* at 3495 (Marshall, J., dissenting).

66. *See supra* note 31 and accompanying text.

67. *See supra* notes 23-29 and accompanying text.

68. A different result in *Lopez-Mendoza* would have been consistent with *Leon*; Justice White wrote both the majority opinion in *Leon* carving out a good faith exception to the exclusionary rule and a strong dissent in *Lopez-Mendoza.*

69. The dissenting opinion in the Ninth Circuit case pointed out, "[i]t is . . . remarkable that the majority has [held that the exclusionary rule applies to deportation proceedings] at a time when the United States Supreme Court has raised questions as to whether [the exclusionary rule as it applies to criminal trials should be modified]." 705 F.2d at 1075 (Alarcon, J., dissenting).

70. 104 S. Ct. at 3484-85.

71. *Id.*

72. *Id.*

73. The Court did not state that the exclusionary rule is inapplicable simply because deportation hearings are civil proceedings, but looked at other characteristics of deportation proceedings. *See infra* Section III(B)(1), (3).

74. *See* Comment, *The Exclusionary Rule in Deportation Proceedings,* 14 U.C.D. L. REV. 955, 959-64 (1981) (stressing punitive effect of deportation on alien); Fragomen, *Procedural Aspects of Illegal Search and Seizure in Deportation Cases,* 14 SAN DIEGO L. REV. 151, 154-58 (1963) (relying on statutory distinctions among types of aliens); Navasky,

deportation defendants should be afforded the full range of constitutional rights applicable to such proceedings.[75] The commentators focus on the effect of deportation on the alien.[76] The courts' "civil" classification, on the other hand, focuses on the government's intention in initiating the proceedings, reasoning that deportation is a simple exercise of the sovereign power to expel those who do not comply with the immigration laws.[77] The civil or criminal nature of a pro-

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Deportation as Punishment, 27 U.M.K.C. L. REV. 213, 232 (1959) (drawing on historical notions of banishment as support for the thesis that deportation is punishment).

75. Although the standard of proof required in deportation cases is midway between those required in criminal and other civil trials, other due process elements of the statutory scheme are patently more civil than criminal. Unlike the criminal defendant who is presumed innocent until proven guilty, the alien may be required to show that he is legally present, subject to a presumption of illegality if he fails to meet this burden. 8 U.S.C. § 1361 (1982). There is no right to a jury trial in a deportation proceeding, 8 U.S.C. § 1252(b) (1982), nor does the state bear the expense for counsel. 8 U.S.C. § 1362 (1982). INS agents are not required to give Miranda warnings in the apprehension stage of deportation. The court in Chavez-Raya v. INS, 519 F.2d 397 (7th Cir. 1975), reasoned that a Miranda warning is unnecessary and misleading because an alien who remains silent may suffer an adverse inference.

76. *See* Navasky, *supra* note 74, at 215 ("[V]irtually every major deportation case to reach the Supreme Court is a case-study in human suffering."); Comment, *supra* note 74, at 960 ("[T]he inquiry should focus on the effect that deportation has on the alien rather than on the source and extent of the government's power."). Viewed from the perspective of a long-term resident with family and occupational ties in this country, deportation may be equated with punishment; the resulting personal disaster may be of greater proportion than that stemming from criminal penalties.

Courts have not totally ignored the aliens' perspective on deportation. The Supreme Court has recognized that although "deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted." Bridges v. Wixon, 326 U.S. 135, 154 (1945) (rejecting prejudicial testimony as basis to deport an alien for membership in Communist Party). Because of this realization, the Court imposes a more stringent standard of proof in deportation proceedings than the preponderance standard of civil proceedings; the government must prove deportability by clear, unequivocal and convincing evidence. Woodby v. INS, 385 U.S. 276, 285 (1966) (acknowledging drastic deprivation that can result from deportation and requiring the same standard that applied in denaturalization and expatriation cases). One district court took the extreme step of holding that the deportation of an alien for a marijuana conviction constituted cruel and unusual punishment. Lieggi v. INS, 389 F. Supp. 12 (N.D. Ill. 1975), *rev'd,* 529 F.2d 530 (7th Cir. 1976).

77. Some old cases indicate that there is punishment if the victim suffers deprivation of any civil or political rights. *See, e.g.,* Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866) (overturning the conviction of a priest who refused to take an oath imposed by the state constitution). Today courts usually examine the intent of Congress in deciding whether a statute is punitive. In Trop v. Dulles, 356 U.S. 86 (1958), for example, the Court determined that congressional intent to punish made a regulatory statute criminal in nature.

The Supreme Court clearly spelled out its view that deportation is civil in nature in Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893):

> It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments has determined that his continuing to reside shall depend.

ceeding should be considered only if it is related to the purpose of applying the exclusionary rule, which is to deter fourth amendment violations.[78] From this perspective, the civil/criminal distinction seems insignificant in the deportation context.[79]

B. COST-BENEFIT ANALYSIS

After characterizing deportation hearings as civil proceedings, the Court applied the *Janis* cost-benefit analysis to determine whether the exclusionary rule should apply in deportation hearings. The Court first looked at the rule's value as a deterrent.

1. Deterrence Benefit

The Court conceded that the rule is a stronger deterrent in this case than in *Janis* because the violation in the deportation context is "intrasovereign" and because the arresting officer's primary objective is to use the evidence in the civil proceeding.[80] However, the Court found that four factors reduced the deterrence value of the rule in civil deportation proceedings and concluded that these factors prevented the rule from providing significant deterrence.[81] In his dissent, Justice White rebutted each of the majority's assertions about the rule's reduced deterrence value, arguing that there is no principled basis for distinguishing between the rule's value in criminal cases and civil deportation proceedings.[82]

First, the majority pointed out that even if an arrest is illegal, an alien could be deported if there is enough evidence derived independently from the arrest to support deportation.[83] Justice White denied that this reduces deterrence; in criminal trials convictions can be obtained despite the suppression of some evidence.[84] The possibility that deportation can result from evidence obtained legally from another source seems neither as important as the majority believes nor as irrelevant as the dissent believes. The dissent correctly pointed out

78. *See supra* notes 17-21 and accompanying text.

79. The Court suggested that the deterrence value of applying the rule in a civil proceeding may be less where, as in deportation, the civil proceeding is a complement to a possible criminal prosecution. The deterrence gained by excluding evidence from a civil proceeding is not as great when some deterrence is already provided by exclusion of the same evidence from a complementary criminal proceeding. 104 S. Ct. at 3486. However, the Court also acknowledged that few alien arrests lead to criminal prosecutions and that the arresting officer's primary objective is to use the evidence in a civil proceeding. *Id.*

80. *Id. See supra* note 36.

81. "[A]pplication of the rule in INS civil deportation proceedings, as in the circumstances discussed in *Janis,* is unlikely to provide significant, much less substantial deterrence." *Id.* at 3488 (citation omitted).

82. *Id.* at 3491-95 (White, J., dissenting).

83. *Id.* at 3487.

84. *Id.* at 3492 (White, J., dissenting).

that the same possibility exists in the criminal context. However, the government's lower burden of proof in a civil proceeding may be significant, as the majority asserted.[85] In a criminal proceeding, the prosecution must submit enough other evidence to enable the jury to find guilt beyond a reasonable doubt. In a deportation proceeding, where there is no presumption of innocence, the INS need only submit enough evidence to establish identity and alienage.[86]

Second, the majority asserted that because many arrested illegal aliens elect to return home without a formal hearing, and of those who elect to have a hearing few raise fourth amendment challenges, INS officers know it is unlikely that an arrestee will bring such a challenge. Therefore, the Court concluded that an officer is "most unlikely to shape his conduct in anticipation of the exclusion of evidence at a formal deportation hearing."[87] Justice White found that this factor, like the first, is no more significant in a deportation case than in a criminal case. He pointed to a parallel between an alien's ability to elect voluntary departure and a criminal defendant's option to plead guilty, arguing that neither possibility significantly dilutes the rule's deterrent effect.[88] The majority's argument is effective. Although criminal defendants have the option to plead guilty, the number of criminal defendants who do so is far lower than the number of illegal aliens who agree to voluntary departure without a hearing. INS statistics show that even when the exclusionary rule was in effect, the vast majority of aliens apprehended chose to depart voluntarily; fewer than 2.5% were deported following formal adjudication.[89] Officers might reasonably assume that an alien would forego a valid complaint rather than risk damaging his status for re-entry.

Third, the Court argued that application of the exclusionary rule would add little to the INS's own "comprehensive scheme"[90] for deterring fourth amendment violations, which includes instruction in fourth amendment law for new officers and guidelines of proper conduct. Justice White denigrated the effectiveness of the INS's scheme.[91] He pointed out that the INS developed its program when the rule was in force, suggesting that the rule created the incentive to develop the program.[92] The majority was apparently willing to assume that the

85. *Id.* at 3487.
86. *Id.*
87. *Id.*
88. *Id.* at 3492 (White, J., dissenting).
89. STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE (1979) (cited in the Ninth Circuit opinion, 705 F.2d at 1071 n.17).
90. 104 S. Ct. at 3487.
91. *Id.* at 3492-93 (White, J., dissenting). "[T]he INS . . . points to not a single instance in which that scheme has been involved." *Id.*
92. *Id.* at 3493 (White, J., dissenting).

INS's internal procedures are effective. The Ninth Circuit Court of Appeals instead considered the ineffectiveness of internal self-policing by other law enforcement agencies[93] and placed the burden on the INS to show that its procedures are different.[94] The INS failed to meet that burden.[95]

Fourth, the Court focused on the availability of alternative remedies such as declaratory relief for improper INS practices.[96] Justice White argued that dependence on alternative remedies is unrealistic. Illegal aliens against whom the INS illegally obtains evidence are promptly removed from the country, and many of the INS's victims who are in the country legally are poor and uneducated and cannot speak English.[97] Alternative remedies are rare and difficult to obtain. In order to qualify for injunctive relief, the victim of an illegal INS search or seizure must show a real and immediate threat of future harm; a demonstration of past violations only serves as evidence bearing on whether such a threat exists.[98] To establish the likelihood of future harm, applicants for injunctive relief must also show widespread violations resulting from an official INS policy.[99] Citizens and

93. The court was reluctant to place responsibility for protecting citizens and aliens from unwarranted government intrusion with the same officers responsible for enforcing the immigration laws. 705 F.2d at 1074.

94. " 'It would . . . be myopic to presume from the existence of a remedy its effectiveness and consistent implementation.' " *Id.* (quoting Note, *The Exclusionary Rule in Deportation Proceedings: Time for Alternatives*, 14 J. INT'L L. & ECON. 349, 371 (1980).

95. The Respondent's brief in INS v. Lopez-Mendoza explained that the INS does not compile identifiable statistics on fourth amendment violations. It instead includes those complaints among civil rights complaints and destroys its records after a specified time period. The INS was unable to show that any officer had been disciplined for a fourth amendment violation since the BIA held the exclusionary rule inapplicable in 1979. Its only disciplinary cases involved more egregious misconduct such as physical abuse and rape of aliens. Brief for Respondent at 55, INS v. Lopez-Mendoza, 104 S. Ct. 3479. The failure of the internal disciplinary system to stop even such flagrant brutality has drawn publicity. *See* J. CREWDSON, THE TARNISHED DOOR (1983) at 143-171, 208-212; U.S. COMMISSION ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR (1980) at 117-129 (Department of Justice audits of past and present INS procedures reveal improvements and remaining complaint resolution deficiencies); *U.S. Immigration Service Hampered by Corruption*, N. Y. Times, Jan. 13, 1980, at A1, col. 2; *"Violence, Often Unchecked, Pervades Border Patrol,"* N.Y. Times, Jan. 14, 1980, at A1, col. 2, *cited in* Brief for Respondent at 55, n.34, INS v. Lopez-Mendoza, 104 S. Ct. 3479.

96. 104 S. Ct. at 3488.

97. *Id.* at 3493 (White, J., dissenting).

98. City of Los Angeles v. Lyons, 103 S. Ct. 1660, 1667 (1983) (refusing injunctive relief to plaintiff injured by police officer's unjustified use of chokehold for failure to show likelihood that plaintiff would again be victimized by police chokeholds). *See* Brief for Respondents at 48-50, INS v. Lopez-Mendoza, 104 S. Ct. 3479.

99. *See* Illinois Migrant Council v. Pilliod, 540 F.2d 1062 (7th Cir. 1976) (granting injunctive relief to Mexican plaintiffs who demonstrated "a specific pattern of conduct, akin to an explicit policy" by INS officers), *modified on rehearing en banc*, 548 F.2d 715 (1977); see also Rizzo v. Goode, 423 U.S. 362, 373-76 (1976).

resident aliens can bring civil actions for damages,[100] but they are expensive, time-consuming, and rarely successful.[101] It is highly unlikely that an INS agent would be deterred from illegally obtaining evidence by the remote possibility that an arrestee might seek a remedy.

The four factors cited by the majority probably have some effect on the exclusionary rule's deterrent value in civil deportation. But the factors are not as significant as the majority suggests; most of Justice White's arguments in rebuttal are persuasive. The " 'primary objective' of the INS agent is 'to use evidence in the civil deportation proceeding'."[102] If INS officers know that evidence obtained in an illegal arrest will be excluded from civil deportation proceedings, they will be less likely to violate the fourth amendment.

2. *Equal Protection Concerns—The Need for Deterrence*

The respondents in *Lopez-Mendoza* argued that the role of race and ethnicity in INS enforcement decisions added "equal protection overtones" to the fourth amendment problem in the case.[103] The Court recognized "that respondents raise here legitimate and important concerns,"[104] but did not examine the issue in depth because of its conclusion that the exclusionary rule did not provide enough deterrence to add significant protection to fourth amendment rights.[105] This Note argues that the exclusionary rule does provide significant deterrence to violative INS conduct. Therefore, it is appropriate to consider equal protection concerns when applying the exclusionary rule balancing test.

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100. In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Court held that money damages were a proper remedy for injuries caused by a fourth amendment violation by federal officials. The petitioner in that case sought damages for "great humiliation, embarrassment and mental suffering." *Id.* at 388-90.

101. *See* Brief for Respondent at 51, INS v. Lopez-Mendoza, 104 S. Ct. 3479.

102. 104 S. Ct. at 3492 (White, J., dissenting).

103. Brief for Respondents at 95, INS v. Lopez-Mendoza, 104 S. Ct. 3479. Respondents raised this point in their argument that the social costs of not applying the rule here would be excessive. They argued that the loss of the exclusionary rule in deportation proceedings would result in "open season" on Hispanic Americans. *Id.* at 99.

104. 104 S. Ct. at 3488. "Respondents contend that retention of the exclusionary rule is necessary to safeguard the Fourth Amendment rights of ethnic Americans, particularly the Hispanic-Americans lawfully in this country. We recognize that respondents raise here legitimate and important concerns." *Id.*

105. [A]pplication of the exclusionary rule to civil deportation proceedings can be justified only if the rule is to add significant protection to these Fourth Amendment rights. . . . Important as it is to protect the Fourth Amendment rights of all persons, there is no convincing indication that application of the exclusionary rule in civil deportation proceedings will contribute materially to that end.

104 S. Ct. at 3488.

a. Nature of threats to equal protection values

Some illegal alien defendants have contended that the disproportionate questioning and detention of Hispanic aliens and citizens by the INS rises to the level of an equal protection violation.[106] The Supreme Court has not responded directly to that contention, but has held that some reliance on Mexican appearance as a factor in a decision to detain is permissible.[107] Courts apply strict scrutiny to government classifications only if they are discriminatory in both impact and purpose.[108] It would be very difficult to establish an INS purpose to discriminate against Mexican or Hispanic individuals. In the absence of a showing of such a purpose, reliance on Mexican appearance does not constitute an equal protection violation[109] even if there is a dispro-

106. Respondents in both United States v. Brignoni-Ponce, 422 U.S. 873 (1975), and United States v. Martinez-Fuerte, 428 U.S. 543 (1976) argued that INS officers' excessive reliance on ethnicity violated the equal protection component of the fifth amendment. (*See infra* note 109). Brief for Respondent at 46-55, United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Brief for Respondent at 43, United States v. Martinez-Fuerte, 428 U.S. 543 (1976). Respondents argued that the government's stopping and interrogating persons who appeared to be of Mexican descent constituted an invidiously discriminatory exercise of a neutral statute, resulting in interference with that group's right to travel. The argument relied on traditional equal protection cases such as Yick Wo v. Hopkins, 118 U.S. 356 at 373-74, (1886) (ordinance allowing discrimination against Chinese owners of laundries was unconstitutional), Korematsu v. United States, 323 U.S. 214 (1944) (all racial classifications are suspect and call for rigid scrutiny), and Loving v. Virginia, 388 U.S. 1 (1967) (statute preventing marriages on basis of racial classification violates the equal protection and due process clauses of the fourteenth amendment). The Court was not persuaded by the equal protection argument in either case. *See infra* note 107.

107. In *Brignoni-Ponce* the Court indicated in dicta that apparent Mexican ancestry is a relevant factor in a detention decision: "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor. . . ." 422 U.S. at 886-87. The Court held that apparent Mexican descent alone did not supply the reasonable suspicion needed to justify an arrest in a Mexican border area. *Id.* at 886.

In *Martinez-Fuerte,* the Court held that minimally intrusive referrals for secondary investigation at checkpoint stops were permissible even if based on apparent Mexican ancestry. "[E]ven if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation." 428 U.S. at 563. The Court approved referrals for secondary interrogation based largely upon apparent Mexican ancestry at checkpoint stops in a border area but cautioned that Mexican appearance should not be weighed as heavily at checkpoints near the Canadian border. 428 U.S. at 564 n.17. While the need to control the illegal alien population may be compelling enough to justify using national origin as *a factor,* it does not justify using national origin as the only or as a highly significant factor. *Cf.* Johnson, *Race and the Decision to Detain a Suspect,* 93 YALE L.J. 214, 230-33 (1983).

108. Washington v. Davis, 426 U.S. 229 (1976) (invidious quality of a law claimed to be discriminatory must be traced to a discriminatory purpose; although blacks failed employment test four times as often as whites, failure to allege discriminatory purpose freed the Court from duty to scrutinize strictly the test's use, which was rationally related to the permissible government interest of upgrading employee abilities).

109. The equal protection clause of the fourteenth amendment protects people only from state action. The due process clause of the fifth amendment has been interpreted to guarantee equal protection by the federal government. *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954); Karst, *The Fifth Amendment's Guarantee of Equal Protection,* 55 N.C.L. Rev. 541 (1977). *Bolling* is cited for the proposition that the fifth and fourteenth amendments

portionate impact on Mexicans and Hispanics.

Some reliance on appearance of foreign origin as a justification for detention may not rise to the level of an equal protection violation, but undue reliance on appearance does threaten the values behind the equal protection clause. Equal protection doctrine forbids classifications by the government that unreasonably disadvantage "discrete and insular minorities."[110] Unreasonable INS use of appearance of foreign origin as a criterion in detention decisions is, in effect if not by design, an unreasonable government classification of a "discrete and insular" minority.

INS arrests of suspected illegal aliens almost always involve individuals who appear to be of Mexican or Hispanic origin.[111] When INS officers violate the fourth amendment by making an arrest or detention without probable cause or reasonable suspicion,[112] they often allow national origin to play too great a role in the decision to arrest or detain. Law enforcement officers have made investigatory stops and detentions when Hispanics sat erectly in a car and did not turn to look at a passing car[113] and when they sat low in the back seat of a type of car often used by smugglers.[114] In one case a district court found that surveillance, interrogations, and raids by INS agents, solely on the

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provide coextensive protection against discrimination. Karst, *supra,* at 554. But the *Bolling* Court noted, "we do not imply that [equal protection and due process] are always interchangeable." 347 U.S. at 499.

The Court has stated that "overriding national interests" may "justify selective federal legislation that would be unacceptable for an individual State." Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976). In *Hampton,* aliens challenged a civil service regulation barring noncitizens from employment in the competitive federal civil service. *Id.* at 90. The Court held that the regulation violated the fifth amendment, *id.* at 116-17, but based the holding on the ground that no national interest supporting the rule had been identified. *See* Karst, *supra,* at 552 n.61. The Court noted that a citizenship requirement for federal service may be permissible even if such a requirement would be impermissible if imposed by a state. 426 U.S. at 101.

110. United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938). Classifications burdening illegal aliens may be struck down on equal protection grounds. *See* Plyler v. Doe, 457 U.S. 202 (1982) (applying a middle level standard of equal protection review to strike down a Texas statute withholding state funds for education of the children of illegal aliens and authorizing local school districts to deny enrollment to such children). As noted above, the standard of review is somewhat different under the fifth amendment. *See supra* note 109.

111. 866,761 of 888,729 deportable aliens located by the INS in 1979 were Mexican. Immigration and Naturalization Service, U.S. Dept. of Justice, Annual Report, Table 1, at 15 (1979). About 85% of illegal aliens in this country come from Mexico. *See* Department of Justice, SPECIAL STUDY GROUP ON ILLEGAL IMMIGRANTS FROM MEXICO: A PROGRAM FOR EFFECTIVE AND HUMANE ACTION ON ILLEGAL MEXICAN IMMIGRATION 6 (1973), (cited in Lopez-Mendoza v. INS, 705 F.2d at 1071.)

112. *See supra* note 55.

113. United States v. Mallides, 473 F.2d 859, 861 (9th Cir. 1973).

114. United States v. Pena-Cantu, 639 F.2d 1228, 1229 (5th Cir. 1981).

basis of appearance of Mexican ancestry, amounted to a policy.[115] The courts in these cases rejected the officers' almost total reliance on ethnicity, holding that no detention or investigatory stop was justified.[116] Although these cases were decided on fourth amendment grounds, they demonstrate the threat to equal protection values posed by INS overreliance on ethnicity.

b. Incorporation of values underlying the equal protection clause in fourth amendment balancing.

The exclusionary rule balancing test weighs social costs against social benefits in estimating the utility of applying the rule in a given situation.[117] In *Lopez-Mendoza,* the Court appropriately evaluated a wide range of the social costs of extending the rule to civil deportation hearings. The Court considered whether significant evidence would be excluded, and looked at the burden that an extension of the rule would add to INS agents' practices in the field and to immigration judges' processing of deportation hearings.[118]

If a broad inquiry into the social costs of applying the exclusionary rule is appropriate, it is equally appropriate to make a broad inquiry into the social benefits of deterring fourth amendment violations. The Court did not consider the benefit to values underlying the equal protection clause. If the Court had considered this added benefit of deterrence in the deportation context, it might have concluded that the benefits of applying the exclusionary rule in deportation hearings outweighs the costs.

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115. Illinois Migrant Council v. Pilliod, 398 F. Supp. 882, 901-04 (N.D. Ill. 1975), *aff'd,* 540 F.2d 1062 (7th Cir. 1976), *modified on other grounds,* 548 F.2d 715 (1977) (*en banc*).

116. Some commentators argue that a probable cause standard is essential to the elimination of questioning and detention of innocent citizens. *See* Case Comment, *Minority Groups and the Fourth Amendment Standard of Certitude: United States v. Ortiz and United States v. Brignoni-Ponce,* 11 HARV. C.R.-C.L. L. REV. 733 (1976).

> In order to minimize the discriminatory burden on fourth amenmdent rights that occurs when minority groups, characterized by such immutable traits as race or national origin, are the target of "reasonable suspicion" searches and seizures, reduction of the probable cause standard in such circumstances should be authorized only in the absence of less restrictive alternatives. There are sufficient nondiscriminatory alternative methods of policing the border to justify prohibiting the Border Patrol from conducting searches and interrogation stops initiated on less than probable cause. Consideration of less restrictive alternatives, as a matter of fourth amendment doctrine, before approving a diminishing standard of certitude, would ensure greater judicial solicitude for the rights of discrete and insular minorities unable to protect their interests through the political process.

Id. at 763.

117. Case Comment, *United States v. Janis — The Return of the "Silver Platter Doctrine,"* 12 NEW ENG. L. REV. 789, 808 (1977) (describing test as balance "between the societal need for the evidence which is to be removed from the public domain and the benefit to society of the exclusionary rule in the form of its deterrent effect").

118. 104 S. Ct. at 3488-90.

3. Costs

The Court stated that the social costs of applying the exclusionary rule to deportation proceedings are "unusual and significant."[119] The majority argued first that deportation proceedings are intended not to punish past transgressions but to prevent their continuance or renewal.[120] Applying the exclusionary rule would thus "require the courts to close their eyes to ongoing violations of the law."[121] This argument assumes that an illegal alien's mere presence in this country is a crime.[122] In his dissent, Justice White attacked the majority's construction of § 275 of the Immigration and Nationality Act, asserting that it lists only illegal entry as an offense, not the alien's continued presence in the country.[123]

Even if a released deportation defendant is allowed to stay in the country until he is apprehended independently of tainted evidence, the problem is largely theoretical. Illegal aliens generally are not dangerous,[124] unlike some criminal defendants who are released when the rule is applied in criminal proceedings.[125] Although economic costs may result from the presence of millions of illegal aliens in this country,[126] the economic costs of extending the exclusionary rule to deportation hearings are insignificant.[127]

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119. *Id.* at 3488.

120. *Id.*

121. *Id.*

122. *See id.* at 3488-89.

123. 104 S. Ct. at 3493-94 (White, J., dissenting). Section 275 provides that any alien who enters the United States illegally "shall be guilty of a misdemeanor." 8 U.S.C. § 1325 (1982). The Court stated that unregistered presence is a crime, *id.* at 3488-89, but avoided confronting Justice White's interpretation of section 275:

> We need not decide whether or not remaining in this country following an illegal entry is a continuing or a completed crime under § 1325. The question is academic, of course, since in either event the unlawful entry remains both punishable and continuing grounds for deportation. See 8 U.S.C. § 1251(a)(2).

Id. at 3489 n.3. Section 1251(a)(2) merely provides for the deportation of an alien who has entered illegally.

124. Aliens, fearing detection by authorities, have a particular incentive to abide by this country's laws. "Mexican immigrants show no evidence of rejecting fundamental American values and institutions." CORNELIUS, CHAVEZ & CASTRO, MEXICAN IMMIGRANTS AND SOUTHERN CALIFORNIA: A SUMMARY OF CURRENT KNOWLEDGE 9 (1982), *quoted in* Lopez-Mendoza v. INS, 705 F.2d at 1072-73.

125. *See supra* note 27 and accompanying text. According to one survey, 26% of those committed to prison have served one or more prison terms. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, UNIFORM PAROLE REP. CHARACTERISTICS OF THE PAROLE POPULATION, 1978 at 3 (1980), *quoted in* Lopez-Mendoza v. INS, 705 F.2d at 1073.

126. Estimates on the number of illegal aliens in the United States range from two million to twelve million. *See* sources cited in 705 F.2d at 1072.

127. "If application of the rule results in aborted deportation proceedings in as many as one hundred cases a year — a number twice as great as the number of evidentiary challenges raised before the BIA since 1952 — the result would be an increase of less than one thousandth of one percent in the illegal alien population." Lopez-Mendoza v. INS, 705 F.2d at 1072.

The majority also considered the likelihood of added burdens on the administration of the deportation system. It asserted that even an occasional fourth amendment challenge would endanger the present simplicity of the deportation hearing system by requiring immigration judges and attorneys to become conversant with fourth amendment law.[128] Justice White did not share the majority's reluctance to allow interference with the "streamlined"[129] nature of the deportation proceeding. He pointed out the contradiction between the Court's apparent willingness to tolerate ignorance of fourth amendment law among immigration judges and lawyers and the Court's argument that INS agents' knowledge of the law limits the effect that the exclusionary rule would have on their practice. He also cited experience with the rule when it was available: "there is no indication that [the rule] significantly interfered with the ability of the INS to function."[130] Justice White pointed out that there were fewer than fifty fourth amendment challenges in BIA proceedings between 1952 and 1979, "despite the fact that 'immigration law practitioners have been informed by the major treatise in their field that the exclusionary rule was available to clients facing deportation.' "[131]

The majority suggested that application of the rule would require officers to compile "elaborate, contemporaneous, written reports detailing the circumstances of every arrest,"[132] an overwhelming burden because over a million aliens are apprehended yearly. The Court also gave weight to the INS's argument that the application of the rule would result in the suppression of lawfully obtained information because of agents' inability to testify precisely about what happened in crowded, confused mass arrests.[133] Justice White argued that the majority's position amounted to a rejection not only of the exclusionary rule but of the fourth amendment itself as it applies to INS agents.[134] He pointed out that if fourth amendment violations cannot be ascertained for exclusionary rule purposes, "there is no reason to think that such violations can be ascertained for purposes of civil suits or internal disciplinary proceedings, both of which the majority suggests provide adequate deterrence against Fourth Amendment violations."[135] Prevention of fourth amendment violations requires that

128. INS v. Lopez-Mendoza, 104 S. Ct. at 3489.
129. *Id.*
130. *Id.* at 3495 (White, J., dissenting).
131. *Id.* (White, J., dissenting) (quoting Lopez-Mendoza v. INS, 705 F.2d at 1071). The lower court's reference was to 1A C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE 5.2c, at 5-31 (rev. ed. 1980).
132. 104 S. Ct. at 3490.
133. *Id.*
134. *Id.* at 3495 (White, J., dissenting).
135. *Id.* (White, J., dissenting).

officers meet certain standards of order during arrests.

The Court's recent clarification of the legality of factory surveys[136] makes it likely that mass arrests will account for a higher proportion of total INS arrests in the future. The Court may be correct in its assertion that proper implementation of the exclusionary rule requires more detailed records than are feasible in such situations. However, arrests that are so crowded and confused that no one remembers what happened later are a likely setting for fourth amendment violations. Justice White's observation that countenacing such arrests rejects the fourth amendment as well as the exclusionary rule is valid.[137]

The majority concluded that the high costs associated with the rule outweigh the slight deterrence benefit to be gained from its application.[138] Justice White concluded that "the costs and benefits of applying the exclusionary rule in civil deportation proceedings do not differ in any significant way from the costs and benefits of applying the rule in ordinary criminal proceedings"[139] and that the rule should apply in deportation proceedings. The majority opinion's estimation of the social costs of applying the rule seems exaggerated, especially in light of their absence when the rule was available in deportation proceedings.

CONCLUSION

The fourth amendment exclusionary rule should apply to civil deportation proceedings. Application of the rule would deter violations of fourth amendment rights and protect equal protection values in the deportation context. The traditional categorization of deportation as a civil proceeding has no bearing on the need to deter fourth amendment violations and to protect the values underlying the equal protection clause. The deterrence to be gained from the rule's applica-

136. *See* INS v. Delgado, 104 S. Ct. 1758 (1984). *See supra* note 50.

137. Much of the criticism leveled at the exclusionary rule is misdirected; it is more properly directed at the fourth amendment itself. It is true that, as many observers have charged, the effect of the rule is to deprive the courts of extremely relevant, often direct evidence of the guilt of the defendant. But these same critics sometimes fail to acknowledge that, in many instances, the same extremely relevant evidence would not have been obtained had the police officer complied with the commands of the fourth amendment in the first place.

Stewart, *supra* note 8, at 1392. The exclusionary rule's relation to the constitution has been likened to a messenger's relation to bad news. "Although the immediate and irrational reaction is to destroy the messenger, the news will remain the same." Goodpaster, *supra* note 27, at 1082.

138. 104 S. Ct. at 3490.

139. *Id.* at 3495 (White, J., dissenting).

tion in the immigration context is significant enough to justify the costs of its implementation.

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