COMMENTS

The Exclusionary Rule in Deportation Proceedings

The Board of Immigration Appeals recently held that the exclusionary rule does not apply in civil deportation proceedings. This comment examines the Board's rationale and concludes that the deterrent effect of the rule justifies its continued application in such proceedings.

INTRODUCTION

The fourth amendment exclusionary rule is a judicially created remedy designed to deter illegal searches and seizures.[1] Since 1923 courts generally have assumed that the rule applies in deportation proceedings.[2] Recently, however, in *In re Sando-*

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[1] The fourth amendment guarantees "[t]he right of the people to be secure . . . against unreasonable searches and seizures. . . . " U.S. CONST. amend. IV. In an effort to protect this right, courts have created the exclusionary rule, which mandates the exclusion of evidence obtained through an illegal search and seizure. Weeks v. United States, 232 U.S. 383 (1914). *See also* Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule applicable to the states).

[2] United States ex rel. Bilokumsky v. Tod, 263 U.S. 149 (1923). In Huerta-Cabrera v. INS, 466 F.2d 759 (7th Cir 1972), petitioner sought review of a deportation order. The court, which did not find sufficient evidence to show that petitioner's arrest violated constitutional standards, stated in a footnote that even if the arrest had been illegal, the fact that petitioner's body was illegally seized would not make the proceeding prosecuting or deporting him the "fruit of the poisonous tree." The court added that "[t]his would not be a case of the use of evidence seized during the course of an illegal arrest." *Id.* at 761 n.5; *accord* Hoonsilapa v. INS, 575 F.2d 735 (9th Cir. 1978); Wong Chung Che v. INS, 565 F.2d 166 (1st Cir. 1977); Vlissidis v. Anadell, 262 F.2d 398 (7th Cir. 1959); In re Gonzalez, 16 I. & N. Dec. 44 (BIA 1976); In re Davila, 15 I. & N. Dec. 781 (BIA 1976); In re Yau, 14 I. & N. Dec. 630 (BIA 1974); In re Scavo, 14 I. & N. Dec. 326 (BIA 1973); In re Tsang, 14 I. & N. Dec. 294 (BIA 1973); In re Methure, 13 I. & N. Dec. 522 (BIA 1970); In re Au, Yim, and Lam, 13 I. & N.

val[3] the Board of Immigration Appeals (BIA) concluded that the rule does not apply in such proceedings. Adherence to the BIA's holding in subsequent cases could lead to a serious dilution of the constitutional rights of aliens.[4]

This comment examines the appropriateness of applying the exclusionary rule in deportation proceedings. It briefly traces the history of the rule in such proceedings and discusses the civil/criminal characterization of deportation. It then evaluates alternatives to the exclusionary rule for deterring fourth amendment violations by Immigration and Naturalization Service (INS) agents. Finally, this comment concludes that society would best be served by the continued application of the rule in deportation proceedings.

I. History of the Exclusionary Rule in Deportation Proceedings

Until the BIA's ruling in *Sandoval*[5] the issue of whether the exclusionary rule should apply in deportation proceedings had never been fully analyzed.[6] The primary authority for the appli-

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Dec. 294 (BIA 1969); In re D_ M_, 6 I. & N. Dec. 726 (BIA 1955). *See also* C. Gordon & H. Rosenfield, Immigration Law and Procedure, § 5, at 31 (1977): "It is undisputed . . . that the Fourth Amendment's prohibition against unreasonable searches and seizures applies in deportation proceedings, and that evidence obtained as the result of an unlawful search cannot be used." *But see* notes 12-13 and accompanying text *infra*.

[3] No. 2725 (BIA Aug. 20, 1979).

[4] The Supreme Court has held that the constitutional guarantee of due process extends to all aliens, whether they are in the country lawfully or unlawfully. Wong Wing v. United States, 163 U.S. 228 (1896). The Court subsequently recognized the procedural rights of aliens in deportation proceedings. *See, e.g.,* Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953); Wong Yang Sung v. McGrath, 339 U.S. 33, 49-50 (1950). While it has never explicitly stated that aliens have fourth amendment rights, the Supreme Court has held that a Mexican citizen's fourth amendment rights were violated by a warrantless search of his automobile made without probable cause. Almeida-Sanchez v. United States, 413 U.S. 266 (1973). *Almeida-Sanchez* supports the proposition that aliens are "people" within the meaning of the fourth amendment and are entitled to its protection. *See also* Au Yi Lau v. INS, 445 F.2d 217 (D.C. Cir.), *cert. denied,* 404 U.S. 864 (1971), in which petitioners, illegal aliens, sought review of their deportation orders, claiming that their arrests were illegal. The court found their arrests to be legal but stated that "aliens in this country are sheltered by the Fourth Amendment in common with citizens." 445 F.2d at 223.

[5] In re Sandoval, No. 2725 (BIA Aug. 20, 1979).

[6] *See* cases cited in note 2 *supra*.

cation of the rule to deportation is the Supreme Court's opinion in *United States ex rel. Bilokumsky v. Tod.*[7] Although dictum, the Court stated: "It may be assumed that evidence obtained . . . through an illegal search and seizure cannot be made the basis of a finding in deportation proceedings."[8]

While federal courts and the BIA implicitly accepted the Supreme Court's assumption in *Bilokumsky,* they did not advance a principled basis for that position.[9] The clearest statement came from the First Circuit in *Wong Chung Che v. INS.*[10] Two alien crewmen sought review of a deportation order based on a landing permit allegedly secured by an illegal search. The First Circuit vacated the deportation order and remanded the case for a hearing on the petitioner's motion to suppress. Regarding the applicability of the exclusionary rule in deportation proceedings, the court said:

> If petitioner's Crewman's Landing Permit was obtained through an illegal search, there is no authority of which we are aware that would make it admissible. Such authority as we have found, however, assumes that it is inadmissible . . . . There is no doubt that, if the landing permit was obtained through an illegal search, its admission into evidence infected the deportation proceeding.[11]

Other federal courts have avoided squarely confronting the issue. For example, in *Cuevas-Ortega v. INS,*[12] the petitioner claimed that certain statements were the fruits of an illegal search and seizure. The Ninth Circuit affirmed the BIA's finding of deportability. Although the court initially stated that the exclusionary rule did not apply to deportation, it omitted this discussion from an amended opinion, explaining that the issue did not have to be reached.[13]

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[7] 263 U.S. 149 (1923). Prior to *Bilokumsky,* two district courts had ordered exclusion of illegally seized evidence from deportation hearings. Ex Parte Jackson, 263 F. 110 (D. Mont.), *appeal dismissed sub nom.* Andrews v. Jackson, 267 F. 1022 (9th Cir. 1920); United States v. Wong Quong Wong, 94 F. 832 (D. Vt. 1899).

[8] United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 155 (1923).

[9] *See* cases cited in note 2 *supra.*

[10] 565 F.2d 166 (1st Cir. 1977).

[11] *Id.* at 169. The court cited Huerta-Cabrera v. INS, 466 F.2d 759 (7th Cir. 1972); United States v. Villella, 459 F.2d 1028 (9th Cir. 1972); Vlissidis v. Anadell, 262 F.2d 398 (7th Cir. 1959).

[12] 588 F.2d 1274 (9th Cir. 1979).

[13] *See* Note, 7 FORDHAM URB. L.J. 459, 461 (1979). *See also* Lee v. INS, 590 F.2d 497 (3rd Cir. 1979), where the petitioner sought review of a BIA decision

Reasoning that the issue had never been definitively decided, the BIA, in *Sandoval,*[14] treated the admissibility of illegally obtained evidence as an open question. INS agents had entered and searched the Sandoval apartment without consent or a warrant. Finding Mrs. Sandoval and her husband in the apartment, the agents arrested them and took them to the INS office where Mrs. Sandoval signed an affidavit and an INS Form I-213[15] admitting her illegal status. On the basis of those documents, the immigration judge ordered deportation. Mrs. Sandoval appealed, claiming that the illegally obtained evidence should have been excluded below.[16]

The BIA affirmed the immigration judge's ruling, holding that the exclusionary rule does not apply in deportation proceedings.[17] Characterizing deportation as a civil proceeding, the BIA maintained that the courts had never applied the exclusionary

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affirming a finding of deportability, claiming that the evidence seized should have been suppressed because of an illegal interrogation and arrest. The court concluded that the INS had acted on reasonable suspicion and, therefore, its actions were legal. While agreeing with the BIA's finding that the evidence introduced was not illegally obtained, the court refused to address the INS' contention that the exclusionary rule was inapplicable in deportation hearings. In fact, the court amended its slip opinion, deleting all references to the divergent views of the rule expressed by the First and Ninth Circuits. 7 FORDHAM URB. L.J., *supra* this note, at 471.

[14] No. 2725 (BIA Aug. 20, 1979). The BIA could treat the issue as one of first impression because the First Circuit holding in *Wong Chung Che* did not bind the BIA in cases originating outside that circuit. Castillo-Felix v. INS, 601 F.2d 459, 467 (9th Cir. 1979) (court upheld BIA's decision to observe a statutory interpretation given by Second Circuit Court of Appeals in that circuit, while continuing to follow its own interpretation outside Second Circuit). The *Sandoval* decision is significant since it provides a basis for the BIA to refuse to apply the exclusionary rule in all circuits except the First Circuit.

[15] INS Form I-213 (Record of Deportable Alien) is a form which an INS agent completes after apprehending a suspected alien. The agent records information provided by the alien concerning the alien's citizenship, status and entry into the U.S. The agent also records how and where the alien was located and apprehended. *See* J. WASSERMAN, IMMIGRATION LAW AND PRACTICE 159-161 (2d. ed. 1973).

[16] Mrs. Sandoval's statements would have qualified as the "fruits of a poisonous tree" under the "Silverthorne doctrine" had the BIA held the exclusionary rule applicable. In Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), the Supreme Court first held that the exclusionary rule prohibits introduction of evidence obtained as an indirect result of unlawful police conduct. *See also* Wong Sun v. United States, 371 U.S. 471, 484-486 (1963).

[17] In re Sandoval, No. 2725 (BIA Aug. 20, 1979).

rule to civil proceedings.[18] Further, it stated that applying the exclusionary rule would not deter INS agents from violating aliens' fourth amendment rights.[19] Concluding that the costs of applying the rule exceed its benefits and that there exist alternative means to deter overzealous agents, the BIA refused to exclude the illegally seized evidence.[20]

II. An Analysis of the *Sandoval* Rationale

The BIA's reasoning is flawed in several respects. Although courts have traditionally considered deportation a civil proceeding,[21] it is more accurately characterized as quasi-criminal. The exclusionary rule is probably the only effective deterrent to fourth amendment violations by INS agents. Moreover, the societal costs associated with the rule do not justify its abandonment in deportation proceedings.

A. The Quasi-Criminal Nature of Deportation

The characterization of deportation as civil or quasi-criminal is critical since the courts have never applied the exclusionary rule to purely civil proceedings.[22] For the most part, courts have held that deportation is a civil proceeding.[23] They have reasoned that deportation is not punishment for a crime since the government is merely exercising its sovereign power to expel those who

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[18] *Id.* at 10, 11. *But see* notes 41-44 and accompanying text *infra.*

[19] In re Sandoval, No. 2725 at 13 (BIA Aug. 20, 1979). For a summary of the alleged negative effects of the exclusionary rule, *see* Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. Chi. L. Rev. 665 (1970). A major criticism of the rule is that its application causes the suppression of reliable evidence. As a result, guilty criminals are frequently released for lack of admissible evidence of their guilt. This outcome destroys public respect for the law. Another criticism of the rule is that it fosters false testimony by the police. Additionally, the rule is said to promote administrative inefficiency by causing delay and diverting the focus of a criminal proceeding from the issue of the defendant's innocence or guilt. *Id.* at 736-754.

[20] In re Sandoval, No. 2725 at 17 (BIA Aug. 20, 1979). It should be noted that the BIA's decision was not appealed since Mrs. Sandoval's status was adjusted to that of a legal resident by virtue of her being a parent of a child born in the United States. Phone conversation with Mr. Leon Rosen, Jan. 16, 1981. (Mr. Rosen is Mrs. Sandoval's former counsel.)

[21] *See, e.g.,* Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952); Fong Yue Ting v. United States, 149 U.S. 698, 729 (1893).

[22] United States v. Janis, 428 U.S. 433, 447 (1976).

[23] *See* cases cited note 21 *supra.*

fail to comply with the immigration laws.[24]

This analysis, however, is misdirected; the inquiry should focus on the effect that deportation has on the alien rather than on the source and extent of the government's power. In *Cummings v. Missouri*,[25] the Supreme Court recognized that a statute imposes punishment if it causes deprivation.[26] Applying this concept of punishment to deportation, commentators have argued that since the effect of deportation on the alien is often quite severe, it amounts to punishment.[27] For long-time residents with roots in this country the calamitous impact of deportation is evident.[28] Even aliens who have not been here long enough to establish strong ties suffer when they are deported since they may forfeit the chance of ever returning to this country as legal residents.[29] Thus, the punitive nature of deportation

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[24] Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893). In *Fong Yue Ting*, which involved the imprisonment and deportation of Chinese laborers for failure to register as required by an act of Congress, the Court stated:

> The order of deportation is not a punishment for crime. 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 here shall depend.

Id. at 730; *accord* Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952); Mahler v. Eby, 264 U.S. 32, 39 (1924); Bugajewitz v. Adams, 228 U.S. 585, 591 (1913).

[25] 71 U.S. (4 Wall.) 277 (1866) (the court in striking down a provision of the Missouri constitution as violative of the prohibition against bills of attainder defined punishment in terms of deprivation).

[26] *Id.* at 320; *accord* United States v. Brown, 381 U.S. 437, 448 (1965).

[27] *See, e.g.*, Fragomen, *Procedural Aspects of Illegal Search and Seizure in Deportation Cases*, 14 SAN DIEGO L. REV. 151, 156 (1976); Navasky, *Deportation as Punishment*, 27 U. KAN. CITY L. REV. 213, 231 (1959); Note, *Resident Aliens and Due Process: Anatomy of a Deportation*, 8 VILL. L. REV. 566, 580 (1963).

[28] *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (three alien petitioners were deported for Communist Party membership that had been terminated several years prior to deportation; all three had resided in the United States for over 31 years, two had married U.S. citizens, and all three had children born in the United States); Jordan v. DeGeorge, 341 U.S. 223 (1951) (alien who had lived in the U.S. for 29 years was deported for having been convicted and sentenced twice for liquor law violations during Prohibition on the basis that these were crimes involving moral turpitude).

[29] 8 U.S.C. § 1182(a)(17) (1976) provides that aliens who have been previ-

can cause personal distress comparable to, or greater than, that associated with the traditional criminal penalties of fines and imprisonment. As one commentator has stated, the notion that deportation is not punishment is a "mammoth fiction."[30]

Congress also tacitly recognizes the punitive effect of deportation[31] as reflected by the discretionary relief provisions of the Immigration and Nationality Act.[32] The Act denies relief such as voluntary departure[33] to aliens who possess a bad moral character or who have been convicted of criminal activities.[34] Had Congress intended merely to regulate, it could have made relief from deportation available to all aliens, with moral character but one of the determinative criteria. Instead, Congress enacted a statutory exception that automatically excludes all aliens with bad moral character from any discretionary relief.[35] Thus deportation is punitive; it is used as effectively as imprisonment to remove individuals from American society.

The courts likewise acknowledge that deportation is a harsh

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ously deported are barred from entry into the United States unless the Attorney General consents to their reapplying for admission.

The alien threatened with deportation may later be able to legally re-enter the United States if he opts to depart voluntarily. 8 U.S.C. § 1252(b) (1976) provides that voluntary departure is a privilege that may be granted to one who would otherwise be expelled. Voluntary departure is, however, discretionary and does not have to be granted even if the alien meets all the statutory prerequisites. United States v. Floulis, 457 F. Supp. 1350, 1357 (W.D. Pa. 1978); *accord* Prassinos v. INS, 193 F. Supp. 416, 420 (N. D. Ohio, 1960), *aff'd* 289 F.2d 490 (6th Cir.), *cert. denied*, 366 U.S. 966 (1961). Even when available, voluntary departure may be of limited value, since under some circumstances the alien who has departed voluntarily may nonetheless be denied re-entry. For example, the alien is considered deported once the order of deportation is entered, and subsequent voluntary departure does not improve the alien's ability to re-enter the United States. C. GORDON & H. ROSENFIELD, *supra* note 2, at § 7.2b(3). Moreover, voluntary departure is not a very meaningful alternative for indigent aliens; if the INS pays their departure expenses, they are barred from re-entry unless the Attorney General consents to their reapplying for admission. 8 U.S.C. § 1182(a)(17) (1976).

[30] *See* Navasky, *supra* note 27, at 213.

[31] *See, e.g.*, Fragomen, *supra* note 27, at 156.

[32] 8 U.S.C. § 1252(b) (1976) (voluntary departure before deportation proceeding); *id.* § 1254(a) (suspension of deportation); *id.* § 1254(e) (voluntary departure during deportation proceedings); *id.* § 1259 (1976) (legalization of status of aliens who entered the U.S. prior to June 30, 1948).

[33] *See* note 29 *supra*.

[34] 8 U.S.C. §§ 1252(b), 1254(e) (1976).

[35] *See* note 32 *supra*.

measure tantamount to banishment or exile.[36] As Justice Murphy stated in *Bridges v. Wixon*:[37]

> It is no answer that a deportation proceeding is technically noncriminal in nature and that a deportable alien is not adjudged guilty of a "crime." Those are over-subtle niceties that shed their significance when we are concerned with safeguarding the ideals of the Bill of Rights. The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends and his livelihood forever. Return to his native land may result in poverty, persecution and even death. There is thus no justifiable reason for discarding the democratic and humane tenets of our legal system and descending to the practices of despotism in dealing with deportation.[38]

Because of the harsh, punitive nature of deportation the Supreme Court has required that proof of deportability be established by clear, unequivocal and convincing evidence,[39] a more stringent standard than the preponderance of the evidence standard applied in civil proceedings.[40] Hence, deportation is more accurately characterized as quasi-criminal.

The courts have applied the exclusionary rule to various types of civil proceedings which are sufficiently punitive in nature to be classified as quasi-criminal.[41] In *One Plymouth Sedan v.*

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[36] *See, e.g.*, Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948); Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947). Other courts have recognized the harsh consequences of deportation. *See, e.g.*, Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (deportation may result in the "loss . . . of all that makes life worth living"); Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting) ("it needs no citation of authorities to support the proposition that deportation is punishment"); Johns v. Department of Justice of United States, 624 F.2d 522, 524 (5th Cir. 1980) (deportation is not a criminal action, but its consequences to the deportee may be more serious than a jail sentence).

[37] 326 U.S. 135 (1945) (deportation order based on alien's affiliation with the Communist party reversed because of misconstruction of the term "affiliation" and violation of the alien's due process rights below).

[38] *Id.* at 163 (Murphy, J., concurring).

[39] Woodby v. INS, 385 U.S. 276, 285 (1966).

[40] McCormick's Handbook of the Law of Evidence § 339 (2d ed. E. Cleary 1972).

[41] *See, e.g.*, One Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965) (exclusionary rule held applicable to civil proceeding for forfeiture of property seized for a violation of criminal laws); Knoll Assocs., Inc. v. FTC, 397 F.2d 530 (7th Cir. 1968) (use of stolen documents was barred in proceedings brought by the FTC seeking enforcement of a cease and desist order under the Clayton Act); Powell v. Zuckert, 366 F.2d 634 (D.C. Cir. 1966) (evidence illegally seized

Pennsylvania,[42] for example, the Supreme Court held that the exclusionary rule must be extended to forfeiture, a civil proceeding.[43] The driver/owner of an automobile was stopped and his car searched without probable cause. He was subsequently arrested and charged with a criminal violation of Pennsylvania's liquor laws. If convicted, the driver was subject to a maximum penalty of $500. The state laws also provided for a civil action of forfeiture of the seized vehicle which was worth approximately $1,000. The Court felt that it would be anomalous to exclude the illegally seized evidence in the criminal proceeding and permit its use in the civil action in which the penalty might be greater.[44] Accordingly, illegally seized evidence must be excluded in quasi-criminal proceedings where the penalties are comparable to possible criminal sanctions.

Deportation is analogous to quasi-criminal proceedings in which courts have applied the exclusionary rule. An alien may be subject to both criminal penalties and deportation for violation of the Immigration and Nationality Act.[45] Given that the criminal penalty can be no more than a brief prison term and/or a fine, deportation is undeniably the more severe penalty.[46] To admit illegally seized evidence in a deportation hearing would

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by Air Force authorities could not be used in civil discharge proceedings since these are analogous to proceedings which involve the imposition of criminal sanctions). Courts have also held that illegally seized evidence of gambling must be excluded from civil tax assessment proceedings since the penalty imposed would be commensurate with the criminal penalty for wagering, *e.g.*, United States v. Blank, 261 F. Supp. 180 (N.D. Ohio 1966); Lassoff v. Gray, 207 F. Supp. 843 (W.D. Ky. 1962). *See also* Pizzarello v. United States, 408 F.2d 579 (2d Cir.), *cert. denied*, 396 U.S. 986 (1969) (court held illegally seized evidence inadmissible to compute wagering taxes, reasoning that there would otherwise be no available remedy against the government for its illegal search).

[42] 380 U.S. 693 (1965).

[43] *Id.* at 702.

[44] *Id.* at 701.

[45] Aliens who enter the United States unlawfully are subject to a maximum prison term of six months and/or a fine of up to $500. Subsequent violations are punishable by a maximum prison term of two years and/or a maximum fine of $5,000. 8 U.S.C. § 1325 (1976). An alien who has obtained entry by fraud or misrepresentation is subject to further penalties. *See, e.g.*, 18 U.S.C. §§ 1001, 1543, 1544, 1546 (1976). 8 U.S.C. § 1251(a)(2) (1976) provides that aliens who enter the United States unlawfully are subject to deportation. *See generally* 8 U.S.C. § 1251 (1976) (aliens can be deported for criminal activities such as subversion, crimes involving moral turpitude, and narcotics violations).

[46] *See* notes 27 & 28 and accompanying text *supra*.

thus run counter to the rationale underlying the Supreme Court's decision in *Plymouth Sedan*.[47]

B. Justification for the Exclusionary Rule: Its Costs and Benefits

The exclusionary rule is designed to deter law enforcement officials from violating an individual's fourth amendment rights.[48] The Supreme Court has restricted application of the rule to those areas where its remedial objectives are clearly served.[49] To

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[47] There is one category of deportable aliens to whom the rationale of *Plymouth Sedan* does not apply. Aliens who enter the United States legally but remain beyond the expiration of the visa or entry permit are subject to deportation unaccompanied by a criminal penalty. However, the number of deportable aliens who fall into this category is very small, amounting to only 7% of all deportable aliens located in 1979. INS ANN. REP. 3 (1979). Thus, for the overwhelming majority of deportable aliens, the reasoning of *Plymouth Sedan* should apply.

[48] In United States v. Calandra, 414 U.S. 338 (1974), the Supreme Court stated:

> [T]he [exclusionary] rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures: 'The rule is calculated to prevent not to repair. Its purpose is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it.'

Id. at 347 (citation omitted).

Under traditional applications of the rule, if a law enforcement official violates a person's fourth amendment rights in securing evidence against that person, the evidence is rendered inadmissible in subsequent criminal proceedings. Loss of the illegally seized evidence may destroy the prosecution's case and result in an acquittal. Accordingly, the law enforcement official's main objective of criminal prosecution is ill-served by the use of illegally seized evidence. This deters further fourth amendment violations. *See also* Stone v. Powell, 428 U.S. 465 (1976); United States v. Janis, 428 U.S. 433 (1976).

[49] Stone v. Powell, 428 U.S. 465, 486 (1976); United States v. Janis, 428 U.S. 433, 447 (1976); United States v. Calandra, 414 U.S. 338, 348 (1974). *Janis* presents a clear example of a situation in which the remedial objectives of the exclusionary rule are not served. It involved the violation of an individual's fourth amendment rights by one agency and subsequent use of the seized evidence by another agency. Because of the agencies' intersovereign relationship, application of the rule against the user of the evidence would not have had any deterrent effect on the fourth amendment violator. Consequently, the court in *Janis* refused to apply the exclusionary rule.

In *Sandoval* the BIA stated that the *Janis* Court would probably have questioned the "efficacy of the exclusionary rule as a meaningful tool of deterrence

determine the areas in which the rule applies, the Court has weighed the likelihood of deterrence against the societal costs which result from rendering the evidence unavailable in subsequent proceedings.[50]

1. The Deterrent Effect

In *Sandoval* the BIA concluded that application of the exclusionary rule to deportation would not provide any additional deterrence.[51] An INS agent is unaware at the time of an arrest whether, in addition to deportation, the alien will be subject to prosecution for violation of a criminal provision of the immigration laws.[52] If illegally seized evidence were offered in a subsequent criminal proceeding, it would have to be excluded.[53] The BIA concluded that this factor, standing alone, would deter INS agents from violating aliens' fourth amendment rights.[54]

The possibility of subsequent criminal prosecution will not deter agent misconduct. The INS is responsible for enforcing the regulatory and criminal provisions of the Immigration and Nationality Act.[55] INS officers assemble the evidence and present it to the Attorney General,[56] who is responsible for criminal prosecution of the aliens apprehended by the INS.[57] Since the INS'

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if applied in deportation proceedings." In re Sandoval, No. 2725 at 12 (BIA Aug. 20, 1979). The situation in *Janis*, however, is different from deportation since the INS is responsible both for the arrest and the subsequent proceedings. In deportation there is an intrasovereign relationship between the arresting agent and the prosecuting officer in contrast to the intersovereign relationship in *Janis*. Hence, *Janis* does not support the BIA's position.

[50] Stone v. Powell, 428 U.S. 465, 488 (1976); United States v. Janis, 428 U.S. 433, 453 (1976).

[51] In re Sandoval, No. 2725 at 11, 12 (BIA Aug. 20, 1979).

[52] *See* note 45 and accompanying text *supra*.

[53] United States v. Barbera, 514 F.2d 294, (2d Cir. 1975) (unlawfully seized evidence excluded in criminal prosecution for entry into the United States without inspection).

[54] In re Sandoval, No. 2725 at 11, 12 (BIA Aug. 20, 1979).

[55] 8 C.F.R. § 2.1 (1980) authorizes the Commissioner of INS to enforce the Immigration and Nationality Act and all other laws relating to the immigration and naturalization of aliens.

[56] *See* C. GORDON & H. ROSENFIELD, *supra* note 2, at § 9.41.

[57] 28 C.F.R. § 0.55(f) (1980) provides that all litigation arising under the immigration and nationality laws shall be conducted by the Assistant Attorney General in charge of the Criminal Division. 28 C.F.R. § 0.105 (1980) requires the Commissioner of INS to investigate violations of the immigration and nationality laws and recommend prosecutions when advisable. In Dear Wing

primary objective is deportation and not criminal prosecution, the agency's purpose is served if the alien is deported through civil proceedings.[58] Therefore, the possibility that evidence may be excluded in a parallel criminal proceeding will not deter INS agents from violating the alien's rights.

The BIA also stated that since the "body" of the alien cannot be excluded,[59] knowledge of the alien's identity will often be sufficient to establish deportability, and the exclusionary rule's impact on INS agents would, therefore, be insignificant.[60] In deportation proceedings the government has the burden of establishing alienage. The burden then shifts to the alien to prove the time, place and manner of entry into the United States.[61] For a repeat offender, once the alien's identity is known, INS records pertaining to the alien's prior immigration law violation will enable the government to meet its burden. Consequently, the alien can be deported even if other illegally seized evidence is excluded.

The BIA failed to note, however, that most of the deportable aliens in this country have no records with the INS.[62] In addition, the INS agent is unaware when making an arrest whether

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Jung v. United States, 312 F.2d 73, 75 (9th Cir. 1962), the court stated that the decision to prosecute rests with the United States Attorney General rather than the INS.

[58] The INS acknowledges that it directs its efforts to apprehend and "remove" foreign nationals who are in violation of the law. INS ANN. REP. 3 (1979). In 1979, out of 992,033 aliens expelled, 966,137, or almost 98%, were allowed to leave without any formal order of deportation. *Id.* at 5. Only 25,896 were formally deported even though investigation officers located 259,147 aliens who were repeat violators and could, therefore, have been criminally prosecuted in addition to being deported. *Id.* at 5.

[59] *See* Huerta-Cabrera v. INS, 466 F.2d 759 (7th Cir. 1972), discussed in note 2 *supra.*

[60] In re Sandoval, No. 2725 at 13 (BIA Aug. 20, 1979).

[61] *Id.* at 12; *accord* Cabral-Avila v. INS, 589 F.2d 957, 959 (9th Cir. 1978), *cert. denied,* 440 U.S. 920 (1979); Ah Chiu Pang v. INS, 368 F.2d 637, 639 (3d Cir. 1966), *cert. denied,* 386 U.S. 1037 (1967); Vlisidis v. Holland, 245 F.2d 812, 814 (3rd Cir. 1957); Fragomen, *supra* note 27, at 175. *See generally* C. GORDON & H. ROSENFIELD, *supra* note 2, § 5.10b, c.

[62] In 1979 fewer than a third (259,147 out of 896,929) of deportable aliens located by the Immigration Border Patrol had been prviously expelled from the United States. Figures for previous years are comparable. INS ANN. REP. 15 (1979). Without prior records for the majority of aliens, the government often will be unable to meet its burden of establishing their alienage in proceedings where the excluded evidence is the sole evidence of deportability.

the agency has information in its files about a particular alien. Consequently, the agent is uncertain whether the seized evidence is the sole evidence of deportability. Should the exclusionary rule be applied to deportation, the agent, faced with possible suppression of the evidence, would avoid illegal searches and seizures. Thus, contrary to the BIA's contention, application of the exclusionary rule in deportation proceedings will serve a useful purpose.

Finally, the BIA declared that the purpose of deterrence is more directly served by the existing alternatives to the exclusionary rule.[63] The BIA maintained that such alternative remedies as complaints to the INS, actions for injunctive relief, and civil or criminal actions against the individual officer[64] would adequately protect fourth amendment interests. Careful analysis, however, reveals the inadequacy of these alternatives.

Complaints to the INS will do little to protect the alien against an illegal search and seizure. Although the INS has set up an elaborate scheme for the handling of complaints,[65] the experience of other law enforcement agencies with self-policing has shown that such internal review is ineffective.[66] As courts have recognized, self-policing, while a laudable goal, is difficult to achieve.[67] The acknowledged necessity for continued application

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[63] In re Sandoval, No. 2725 at 15 (BIA Aug. 20, 1979).

[64] *Id.* The civil action that the BIA referred to was based on Bivens v. Six Unknown Agents, 403 U.S. 388 (1971). In *Bivens* the Supreme Court held that a complaint alleging violation of fourth amendment rights by federal agents acting under color of authority states a federal cause of action for damages.

[65] IMMIGRATION AND NATURALIZATION SERVICE, OPERATIONS INSTRUCTIONS, REGULATIONS, AND INTERPRETATIONS, § 287.10 (1979). The complaint procedure is directed and managed by the INS' Office of Professional Integrity (OPI). The OPI investigates serious allegations and those involving senior officials, while the Regional Commissioner is responsible for minor administrative infractions. Once a prima facie case of misconduct has been established, a designated employee conducts a preliminary inquiry. When an allegation of criminal misconduct is sustained, the OPI refers the matter to the United States Attorney. Corrective action for administrative misconduct is taken at the regional level.

[66] *See, e.g.*, Batey, *Deterring Fourth Amendment Violations through Police Disciplinary Reform*, 14 AM. CRIM. L. REV. 245, 248 (1976); Berger, *Law Enforcement Control: Checks and Balances for the Police System*, 4 CONN. L. REV. 467, 483 (1971-72).

[67] *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 670 (1961) (Court extended the exclusionary rule to the states, recognizing *inter alia* the limitations of self-policing); People v. Cahan, 44 Cal.2d 434, 447, 282 P.2d 905, 913 (1955) (court

of the exclusionary rule to criminal prosecutions,[68] including those for the violation of immigration laws,[69] demonstrates that self-policing does not work.[70]

Nor will a civil[71] or criminal[72] suit against the INS agent or an injunctive suit against the agency provide an adequate remedy. Upon the issuance of a deportation order, the alien may request a temporary stay of the order to prosecute such a suit.[73] The

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adopted the exclusionary rule in California, stating that administrative and other alternatives to the exclusionary rule were ineffective).

[68] *See* Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).

[69] United States v. Barbera, 514 F.2d 294 (2d Cir. 1975).

[70] Moreover, it is unrealistic to expect aliens whose rights have been violated to file a complaint with the very agency that is seeking to deport them. *Cf.* Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives,* 1975 WASH. U.L.Q. 621, 692 (fear of reprisals may inhibit civil suits against the police). This problem is exacerbated by the aliens' unfamiliarity with the American legal system and general fear of authority.

[71] In view of the prevailing hostile attitude towards aliens, it is unlikely that juries will be sympathetic to the illegal alien who seeks damages for a violation of fourth amendment rights. *See* Gilligan & Lederer, *Replacing the Exclusionary Rule with Administrative Rule Making,* 28 ALA. L. REV. 533, 547 (1977); Goldstein, *Administrative Problems in Controlling the Exercise of Police Authority,* 58 J. CRIM. L.C. & P.S. 160, 168 (1967); Paulsen, *The Exclusionary Rule and Misconduct by the Police,* 52 J. CRIM. L.C. & P.S. 255, 260 (1961); Spiotto, *Search & Seizure: An Empirical Study of the Exclusionary Rule & its Alternatives,* 2 J. LEGAL STUD. 243, 272 (1973).

Punitive damages were not specifically mentioned by the *Bivens* Court. Bivens v. Six Unknown Agents, 403 U.S. 388 (1971). Therefore, even a successful suit would probably only result in an award of nominal damages. Spiotto, *supra* this note, at 272.

[72] Criminal prosecutions against INS agents may be brought under Title 18 of the United States Code. 18 U.S.C. § 2234 (1976) provides that whoever exceeds authority in executing a search warrant is subject to a fine or imprisonment. *Id.* § 2235 provides that whoever maliciously and without probable cause procures a search warrant may be fined or imprisoned. *Id.* § 2236 states that any officer or agent of the United States will be fined and/or imprisoned for searches without warrant or probable cause. These statutes have been on the books in their present form since 1948. Their lack of effectiveness in deterring fourth amendment violations is demonstrated by the fact that the Court in *Mapp* found it necessary to extend the exclusionary rule to the states. Mapp v. Ohio, 367 U.S. 643 (1961). *See also* Paulsen, *supra* note 71, at 260 (despite the large number of reported illegal searches and seizures, there are very few reported cases of criminal prosecutions).

[73] 8 C.F.R. § 243.4 (1980) provides that the district director has the discretion to grant a temporary stay of the deportation order. The denial of a stay is not appealable.

grant of a stay, however, is discretionary.[74] If the stay is denied, the deported alien is not assured a forum since nonresident aliens may not have a right to sue in federal courts.[75] If the alien obtains a federal forum, practical difficulties, such as lack of knowledge and resources, may nonetheless inhibit the suit.[76]

The prospective nature of injunctive relief further detracts from its effectiveness as a deterrent. As the BIA acknowledged, the scope of injunctive relief is limited to violations stemming from unlawful INS policies.[77] The injunctive remedy, therefore,

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[74] *Id.*

[75] In Silva v. Bell, 605 F.2d 978 (7th Cir. 1978), the court noted without comment that "[t]he parties agree that the authorities do not answer the question whether nonresident aliens have standing to file suits concerning their rights under the Immigration and Nationality Act in the federal courts." *Id.* at 984. *See also* Johnson v. Eisentrager, 339 U.S. 763, 771 (1950) (alien's presence within the territorial jurisdiction gave the judiciary power to act). *Contra* Estrada v. Ahrens, 296 F.2d 690, 694 (5th Cir. 1961) (requirement of jurisdiction is satisfied by nonresident alien's consent to court's exercise of jurisdiction). *See generally* C. GORDON & H. ROSENFIELD, *supra* note 2 at § 1.37; Comment, *The Right of an Illegal Alien to Maintain a Civil Action*, 63 CALIF. L. REV. 762 (1975).

[76] The deportable alien's poverty, lack of education, unfamiliarity with the legal system, and inability to speak English may be obstacles to the prosecution of the suit. These obstacles remain undiminished despite the availability of free legal services. A recent report affirmed that persons with limited English-speaking abilities have special problems of access to legal services. In addition, very few legal assistance programs handle cases involving rights of noncitizens or immigration. 2 LEGAL SERVICES CORP., SPECIAL LEGAL PROBLEMS AND PROBLEMS OF ACCESS TO LEGAL SERVICES OF VETERANS, NATIVE AMERICANS, PEOPLE WITH LIMITED ENGLIGH-SPEAKING ABILITIES, MIGRANT AND SEASONAL FARM WORKERS, INDIVIDUALS IN SPARSELY POPULATED AREAS 120, 136 (1979). Another report found that legal services offices turned away tens of thousands of needy persons because of too many requests for assistance. Others were denied help because the local office did not provide representation in the immigration area. STATE BAR OF CALIFORNIÁ, LEGAL SERVICES SECTION, FINAL REPORT OF BOARD COMMITTEE ON LEGAL SERVICES AND SPECIAL COMMITTEE ON PRO BONO LEGAL SERVICES RE CREATION OF A STATE BAR VOLUNTARY LEGAL SERVICES PROGRAM 4 (1978). For the alien who is deported the obstacles to an effective remedy are compounded by the problems of prosecuting the suit from another country, such as providing depositions, communicating with counsel, and increased costs.

[77] In re Sandoval, No. 2725 at 16 (BIA Aug. 20, 1979). *See also* Loya v. INS, 583 F.2d 1110 (9th Cir. 1978) (court stated that injunctive relief requires that the threat of future harm be adequately proved). The probability of future harm is difficult to prove in the absence of explicit or unspoken unlawful policies or widespread violations on a regular basis by INS agents. *See* Illinois Mi-

does not deter individual misconduct. Even if a fourth amendment violation is traceable to unlawful INS policies, a wronged alien has little incentive to file such an injunctive action since obtaining an injunction will not prevent the INS from using the prior illegally seized evidence as a basis for deportation. Nor can other aliens file this action, individually or as a class, since they lack standing unless they can demonstrate that they personally have been wronged.[78] Thus, like the other remedies discussed by the BIA, injunctive relief is not a meaningful alternative to the exclusionary rule.

The deterrent effect of the exclusionary rule in deportation proceedings benefits citizens and aliens alike. Deportable aliens are not the only victims of fourth amendment violations by INS agents; citizens and lawful resident aliens whose appearance earmarks them as members of an ethnic group are frequently the victims of such abuses.[79] Abandoning the exclusionary rule could increase the incidence of racially discriminatory fourth amendment violations by giving INS agents license to question individuals illegally merely on the basis of racial characteristics.

2. The Societal Costs

A natural consequence of adopting the exclusionary rule in the deportation context is that some aliens may remain in the country in continuing violation of immigration laws.[80] The BIA contrasted this with the application of the rule in the criminal con-

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grant Council v. Pilliod, 540 F.2d 1062, 1066-1072 (7th Cir. 1976), *rehearing en banc* 548 F.2d 715 (7th Cir. 1977), where the Seventh Circuit affirmed the district court's ruling enjoining the INS from its practice of conducting pre-dawn illegal raids on factory dormitories.

[78] *See* O'Shea v. Littleton, 414 U.S. 488 (1974) (in class action suit to enjoin racially discriminatory practices, Court held that plaintiffs lacked standing since none of the named plaintiffs either had been personally harmed or were threatened with future harm as a result of the challenged practices).

[79] *See* Illinois Migrant Council v. Pilliod, 540 F.2d 1062 (7th Cir. 1976), *rehearing en banc*, 548 F.2d 715 (7th Cir. 1977) (citizens and lawful residents of Mexican ancestry were routinely detained and questioned without probable cause merely on the basis of their appearance). *See also* Fragomen, *supra* note 27 at 191.

[80] In re Sandoval, No. 2725 at 15 (BIA Aug. 20, 1979). The INS will be unable to deport undocumented aliens only in cases where the excluded evidence is the sole basis of deportation. Thus, if the INS has prior records on the alien, it may be able to obtain deportation notwithstanding the exclusion of the evidence. *See, e.g.*, Hoonsilapa v. INS, 575 F.2d 735 (9th Cir. 1978).

text where, even if the criminal goes free, the crime is a past event.[81] This technical distinction, however, does not require admission of illegally obtained evidence in deportation hearings.

The BIA's suggestion that the alien's continued unlawful presence is akin to granting a license "to commit future crimes"[82] is absurd. Such presence, while a violation of immigration laws, does not pose a serious threat to society.[83] In contrast, allowing a criminal to remain at large endangers society since habitual offenders may commit additional crimes.[84] Such crimes exact heavy economic costs[85] and cause great suffering to the victims. The undocumented alien imposes no such costs.

The presence of undocumented aliens also allegedly imposes a substantial economic burden on society.[86] Undocumented aliens are believed by some to increase unemployment by displacing local labor and thereby reducing the wage-level, to depress the economy by sending money back to their countries of origin, and to burden the welfare system.[87]

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[81] In re Sandoval, No. 2725 at 15 (BIA Aug. 20, 1979).

[82] *Id.*

[83] Unlike a criminal who commits a *malum-in-se* offense that endangers persons and property, the alien who remains in the country unlawfully is merely committing a *malum prohibitum* offense. *See generally* W. LaFave & A. Scott, Jr., Handbook on Criminal Law 29 (1972).

[84] According to a national survey, 26% of the persons committed to prison had served one or more prior prison terms. Nat'l Council on Crime and Delinquency, Uniform Parole Rep., Characteristics of the Parole Population, 1978 at 3 (1980). Another survey based on arrest records revealed that 49% of persons who had committed rape had a previous arrest record. M. Amir, Patterns in Forcible Rape 112 (1971).

[85] Crimes against persons or property result in a substantial loss to society because of the value of the property lost, injuries to persons, the increased need for law enforcement, and the burden placed on already strained judicial resources.

[86] *See generally* Chapman, *A Look at Illegal Immigration: Causes and Impact on the United States,* 13 San Diego L. Rev. 34 (1975); Fogel, *Illegal Aliens: Economic Aspects and Public Policy Alternatives,* 15 San Diego L. Rev. 63 (1977); Manulkin & Maghame, *A Proposed Solution to the Problem of the Undocumented Mexican Alien Worker,* 13 San Diego L. Rev. 42 (1975); Nafziger, *A Policy Framework for Regulating the Flow of Undocumented Mexican Aliens,* 56 Ore. L. Rev. 63 (1977); Sheffield, *Illegal Alien or the Great Undocumented,* 1 Immigration & Nationality L. Rev. 657 (1977); Comment, 9 N.M.L. Rev. 99 (1977).

[87] *See* Chapman, *supra* note 86, at 37-39; Fogel, *supra* note 86, at 66-72; Manulkin & Maghame, *supra* note 86, at 48-52; Nafziger, *supra* note 86, at 64; Sheffield, *supra* note 86, at 660-664.

This economic threat may well be exaggerated.[88] Undocumented workers are, to a large extent, employed in low-paying agricultural and other menial jobs — jobs which might go unfilled by United States citizens.[89] Contrary to popular belief, most of the undocumented workers' income is spent within the United States.[90] Undocumented workers also pay a substantial sum of money in job-related and sales taxes.[91] Furthermore, recent studies indicate that undocumented aliens do not place a great burden on the welfare system.[92] Thus, the adverse economic impact of undocumented aliens is not as great as is commonly believed and may even be counterbalanced by their positive contribution.[93]

In assessing the societal costs resulting from the exclusionary rule, the BIA gave undue weight to the possibility of increased frivolous appeals. The mere fact that the exclusionary rule may generate such appeals is certainly not a sufficient reason for eroding fourth amendment rights. The problem of frivolous appeals is not unique to deportation. Constitutional rights plainly deserve greater weight than considerations of administrative efficiency.[94]

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[88] *See, e.g.,* Nafziger, *supra* note 86, at 97; Sheffield, *supra* note 86, at 662.

[89] *See* COMMUNITY RESEARCH ASSOCIATES, UNDOCUMENTED IMMIGRANTS: THEIR IMPACT ON THE COUNTY OF SAN DIEGO IX, X (1980) [hereinafter cited as UNDOCUMENTED IMMIGRANTS]; Nafziger, *supra* note 86, at 70; Sheffield, *supra* note 86, at 660.

[90] UNDOCUMENTED IMMIGRANTS, *supra* note 89, at X; Nafziger, *supra* note 86, at 72; Sheffield, *supra* note 86, at 662.

[91] 9 N.M.L. REV., *supra* note 86, at 100 (in 1975 73% of undocumented workers had federal income taxes and 77% had Social Security taxes withheld from their paychecks; since undocumented workers generally do not apply for tax refunds or for Social Security benefits due to fear of being deported, these taxes are retained by the federal government). *See also* UNDOCUMENTED IMMIGRANTS, *supra* note 89, at XI; Nafziger, *supra* note 86, at 75; Sheffield, *supra* note 86, at 663.

[92] *See* Fogel, *supra* note 86, at 67; UNDOCUMENTED IMMIGRANTS, *supra* note 89, at XII.

[93] Sheffield, *supra* note 86, at 662. The alien's employment, and the consequent increased production, contributes to the economic wealth of this country. In addition, the salary the alien receives is spent on purchasing consumer goods here, which creates an increased demand for these goods and forms a basis for more jobs.

[94] *See* United States v. Robinson, 414 U.S. 218 (1973): "Mere administrative inconvenience . . . cannot justify invasion of Fourth Amendment rights." *Id.* at 259 n.7 (Marshall, J., dissenting).

CONCLUSION

Contrary to the BIA's conclusion in *Sandoval,* the exclusionary rule should apply in deportation proceedings. Despite its traditional characterization as civil, deportation has harsh consequences that make it more akin to a criminal proceeding. The Immigration and Nationality Act tacitly recognizes the punitive nature of deportation, as do courts and commentators. Therefore, deportation should be characterized as quasi-criminal, and courts and the BIA should apply the exclusionary rule to deportation.

The alternatives suggested by the BIA for deterring INS agents' misconduct are not satisfactory. The INS is not likely to police itself. Nor will an INS agent be deterred if, through violation of aliens' fourth amendment rights, the INS can satisfy its primary objective of deportation. Moreover, the existing potential for exclusion of illegally seized evidence in criminal suits under the Immigration and Nationality Act cannot reasonably be expected to deter INS agents.

Even the most ardent proponents of the exclusionary rule would not deny that it imposes certain societal costs. However, the costs are no greater in the context of deportation than in the criminal context. The alien may well be a law-abiding person, in contrast to a criminal who could present a serious threat to society if freed on account of the suppression of illegally obtained but nevertheless incriminating evidence. The adverse economic impact ascribed to undocumented aliens is exaggerated. On balance, the deterrent effect of applying the exclusionary rule in deportation proceedings outweighs the concomitant societal costs.

The exclusionary rule has been applied in deportation proceedings for over fifty years, and there is no justification for now rejecting the accepted rule. Its abandonment could result in increased illegal searches and seizures of citizens and lawful residents of foreign appearance. Continued application of the exclusionary rule to deportation is essential to assure enjoyment of constitutional rights by aliens and citizens alike.

Nirja N. Savill
Jeevan S. Ahuja