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## Policing the Immigrant Identity

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## POLICING THE IMMIGRANT IDENTITY

*Eda Katharine Tinto\**

### Abstract

Information concerning an immigrant's "identity" is critical evidence used by the government in a deportation proceeding. Today, the government collects immigrant identity evidence in a variety of ways: a local police officer conducts a traffic stop and obtains a driver's name and date of birth, fingerprints taken at booking link to previously acquired biographical information, and a search of a national database reveals a person's country of origin. Data suggests that in an increasing number of cases, police collect immigrant identity evidence following an unlawful search and seizure in violation of the Fourth Amendment to the U.S. Constitution. In immigration proceedings, courts may suppress evidence obtained in egregious violation of the Fourth Amendment through application of the exclusionary rule. Under current doctrine, when the suppression of identity evidence is at issue, courts make a factual inquiry as to whether the police collected the identity evidence for an investigative purpose, which would warrant suppression, or for an administrative purpose, which would not. Despite this purpose-based standard, the policing underlying immigrant identity evidence collection has received almost no judicial or scholarly scrutiny. Instead, courts frequently assume that police collect all immigrant identity evidence for an administrative purpose since the government ultimately introduces it in an administrative immigration proceeding.

This Article's examination of immigrant identity evidence reveals that, contrary to traditional assumptions, the collection of such evidence is no longer accurately assumed to be administrative in nature. Instead, in today's world of immigration policing, the collection of immigrant identity evidence is often investigative in its underlying purpose due to the expanding role of local law enforcement in federal immigration enforcement, the expansion of government databases, and the growth of immigration-related offenses. Consequently, in the immigration context, current exclusionary rule doctrine often wrongly shields evidence from suppression that the rule normatively intends to suppress and unwittingly undermines the animating function of the exclusionary rule—the deterrence of unconstitutional police misconduct. In light of this analysis, this Article concludes by offering specific reforms to exclusionary rule doctrine governing the suppression of immigrant identity evidence.

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INTRODUCTION

Information concerning an immigrant’s “identity” is critical evidence used by the government in a deportation proceeding. When seeking to deport a noncitizen from the United States, the federal government has the evidentiary burden of proving the individual’s identity and status as a noncitizen.<sup>1</sup> Thus, “identity evidence” is the primary evidence in the government’s removal case against a noncitizen. Although the term “identity evidence” is admittedly an amorphous one, this Article, along with most courts, uses this term to signify evidence *related to* an individual’s identity<sup>2</sup>—such as an individual’s name, date of birth, fingerprints, and country of origin.<sup>3</sup>

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1. See *In re Sandoval*, 17 I. & N. Dec. 70, 79 (B.I.A. 1970). Immigration proceedings, often colloquially referred to as “deportation” proceedings, are now referred to by statute as “removal” proceedings. 8 U.S.C. § 1229a (2006). Because the term “deportation” is more familiar to readers, and for this Article’s purposes essentially the same as “removal,” this Article uses both terms interchangeably. Judges within the Executive Office of Immigration Review, an administrative court system under the auspices of the U.S. Department of Justice, handle immigration proceedings. Removal proceedings comprise the overwhelming majority of matters before immigration courts. See *infra* note 14 and accompanying text. For a concise overview of the removal process, see Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TULANE L. REV. 1, 14–17 (2014).

2. See, e.g., *United States v. Oscar-Torres*, 507 F.3d 224, 229 (4th Cir. 2007) (relating identity evidence to information “sufficiently identity-related”); *United States v. Perez-Partida*, 773 F. Supp. 2d 1054, 1056–58 (D.N.M. 2011) (describing identity evidence as the name, date of birth, place of birth, and fingerprints of an individual).

3. See *Oscar-Torres*, 507 F.3d at 232 n.5 (fingerprints); *United States v. Stamper*, 91 Fed. Appx. 445, 457 (6th Cir. 2004) (name); *Perez-Partida*, 773 F. Supp. 2d at 1056–58 (name, date

Today, the government collects identity evidence in a variety of ways. A local police officer conducts a traffic stop and obtains a driver's name and date of birth,<sup>4</sup> fingerprints taken during the booking process link to previously collected biographical information,<sup>5</sup> and a search of a government database reveals a record containing a person's country of origin.<sup>6</sup> In some cases, identity evidence is collected by law enforcement following an unlawful search and seizure in violation of the Fourth Amendment to the U.S. Constitution.<sup>7</sup> In fact, quantitative and qualitative data suggest that, in recent years, allegations and instances of unlawful racial profiling and other unconstitutional police conduct targeting noncitizens, such as warrantless home and workplace raids, have significantly increased in number.<sup>8</sup>

In criminal proceedings, the exclusionary rule serves to suppress evidence obtained as a result of police conduct in violation of the Fourth Amendment.<sup>9</sup> In immigration proceedings, the exclusionary rule only applies if police obtained evidence as a result of an "egregious" violation of the Fourth Amendment.<sup>10</sup> Consequently, noncitizens in immigration court must first allege an egregious violation of the Fourth Amendment and then move to suppress the evidence collected by law enforcement following the egregious constitutional violation.

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of birth, place of birth, and fingerprints). "Identity evidence" is of course a broad term that also includes evidence such as DNA and physical descriptors of individuals.

4. *People v. Tejada*, 270 A.D. 2d 655, 655 (N.Y. App. Div. 2000) (noting that during a traffic stop, the officer requested the defendant's "name, date of birth, where he was coming from and his destination").

5. *See United States v. Olivares-Rangel*, 458 F.3d 1104, 1113 (10th Cir. 2006).

6. *See infra* notes 159–67 and accompanying text.

7. *See infra* notes 67–70 and accompanying text.

8. *See infra* notes 255–57 and accompanying text.

9. *See Elkins v. United States*, 364 U.S. 206, 217–18 (1960) (quoting *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting)); *see also* discussion *infra* Section I.A (discussing the exclusionary rule).

10. In *INS v. Lopez-Mendoza*, the Supreme Court stated that, although the exclusionary rule did not generally apply to civil immigration proceedings, evidence obtained via "egregious violations of [the] Fourth Amendment" may warrant the application of the exclusionary rule in immigration court. 468 U.S. 1032, 1050 (1984). Although only a plurality of Justices made this suggestion, four dissenting Justices argued that the exclusionary rule should apply generally in immigration proceedings. *Id.* at 1051–52 (Brennan, J., dissenting); *id.* at 1053 (White, J., dissenting); *id.* at 1060–61 (Marshall, J., dissenting); *id.* at 1061 (Stevens, J., dissenting). Even though there are important qualifications to the following statement, broadly speaking, the majority of federal circuits recognize that the exclusionary rule may apply in immigration proceedings when officers obtain evidence in egregious violation of the Fourth Amendment. *See* Elizabeth A. Rossi, *Revisiting INS v. Lopez-Mendoza: Why the Fourth Amendment Exclusionary Rule Should Apply in Deportation Proceedings*, 44 COLUM. HUM. RTS. L. REV. 477, 503–27 (2013); *see also infra* notes 102–07 and accompanying text (discussing the definition of "egregiousness").

Scholars and courts have grappled with the immediate questions raised by this limited availability of the exclusionary rule, such as how to define “egregiousness” and what type of police misconduct rises to this level.<sup>11</sup> In addition, scholars have argued that due to the widespread occurrence of Fourth Amendment violations against noncitizens, the exclusionary rule should now apply more broadly in immigration proceedings, that is, it should be available as a remedy even for “non-egregious” Fourth Amendment violations, as it is in criminal proceedings.<sup>12</sup> But there has been little consideration given to an important subsequent question: if there is indeed an egregious constitutional violation, or even if the exclusionary rule remedy was available more broadly, what evidence should then be suppressed under operation of the exclusionary rule in immigration court?

It is important to remember that courts do not automatically suppress evidence upon a finding of unconstitutional police conduct. Rather, once the requisite Fourth Amendment violation is found, courts in both criminal and immigration proceedings look to exclusionary rule doctrine to determine whether suppression is appropriate or whether the exceptions and limitations to the exclusionary rule render the evidence

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11. See, e.g., Rossi, *supra* note 10, at 526–30 (presenting courts’ disagreements over the definition of egregiousness); Nathan Treadwell, *Fugitive Operations and the Fourth Amendment: Representing Immigrants Arrested in Warrantless Home Raids*, 89 N.C. L. REV. 507, 525 (2011) (arguing that warrantless home raids conducted by Immigration and Customs Enforcement (ICE) meet the definition of an “egregious violation”); cf. *United States v. Sanders*, 743 F.3d 471, 474 (7th Cir. 2014) (stating in a criminal case that “it is hard to understand how an ‘egregious’ violation could be defined in a way that is both administrable and distinguishes severe from other violations”).

12. The Court in *Lopez-Mendoza* suggested that the exclusionary rule might generally apply to immigration proceedings if “Fourth Amendment violations by INS officers were widespread.” 468 U.S. at 1050. Several scholars have argued that the exclusionary rule should now be available as a remedy in immigration proceedings under this reasoning. See, e.g., Stella Burch Elias, “*Good Reason to Believe*”: *Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revising Lopez-Mendoza*, 2008 WIS. L. REV. 1109, 1115 (arguing that Fourth Amendment violations in the immigration context are geographically and institutionally widespread, and therefore the exclusionary rule should apply more broadly); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1114 (2004) (arguing that data of immigration-related arrests supports the notion that Fourth Amendment violations are widespread, and therefore the exclusionary rule should apply more generally in the immigration context). Notably, some scholars have pointed out broader systemic and doctrinal concerns with allowing a more limited exclusionary rule in the immigration context. See, e.g., David Gray, Meagan Cooper & David McAloon, *The Supreme Court’s Contemporary Silver Platter Doctrine*, 91 TEX. L. REV. 7, 15, 35 (2012) (arguing that allowing the collateral use of suppressed evidence in immigration proceedings has revived a misguided “silver platter doctrine”); Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1939 (2014) (suggesting that an exclusionary rule rooted in the Due Process Clause may apply to deportation proceedings though not to other civil proceedings).

not subject to suppression, despite the initial constitutional violation.<sup>13</sup>

Virtually all immigration court proceedings are cases in which the government is trying to remove a person from the United States.<sup>14</sup> In these proceedings, identity evidence is the critical evidence, and very often the only evidence, in the government's case against the noncitizen.<sup>15</sup> Therefore, in the immigration context, the general question as to what evidence may be suppressed under application of the exclusionary rule is, for all practical purposes, a more specific question of whether and when identity evidence may be suppressed.

Almost all of the discussion surrounding the suppression of identity evidence has taken place in the context of a *criminal* case.<sup>16</sup> There is virtually no scholarly or judicial analysis of the suppression of identity evidence in *immigration* proceedings. This is not, in and of itself, that surprising. Exclusionary rule doctrine has almost exclusively developed in the criminal context because criminal cases are the predominant setting for considering factual allegations of police misconduct and evaluating the scope of the exclusionary rule.<sup>17</sup> But this lack of immigration-specific analysis, though perhaps understandable, is problematic. As described in this Article, exclusionary rule doctrine governing the suppression of identity evidence contains a fact-based standard that requires a court to consider the specific manner of the identity evidence collection.<sup>18</sup> Thus, the fact that this analysis is not taking place in the immigration context suggests that an analysis of law enforcement's collection of *immigrant* identity evidence is being neglected or ignored. Furthermore, although immigration law scholars often call for the introduction of substantive criminal constitutional protections—traditionally absent in the civil sphere of immigration<sup>19</sup>—an examination of current exclusionary rule

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13. See discussion *infra* Section I.A (discussing traditional exclusionary rule analysis of taint, attenuation, and “fruit of the poisonous tree”).

14. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PENN. L. REV. 1, 11–12 (2015) (documenting that ninety-seven percent of all immigration proceedings are removal proceedings).

15. See *supra* note 1 and accompanying text.

16. See *People v. Tolentino*, 926 N.E.2d 1212, 1216 (N.Y. 2010). See generally Wayne A. Logan, *Policing Identity*, 92 B.U. L. REV. 1561 (2012) (discussing the limits of identity evidence). As discussed in more detail in Section I.B., the bulk of the judicial debate surrounding the suppression of identity evidence takes place in immigration-related *criminal* cases. See *infra* notes 77–81.

17. See *infra* note 40 and accompanying text. See generally Scott E. Sundby & Lucy B. Ricca, *The Majestic and the Mundane: The Two Creation Stories of the Exclusionary Rule*, 43 TEX. TECH L. REV. 391 (2010) (presenting an overview of Supreme Court exclusionary rule jurisprudence).

18. See discussion *infra* Section I.B.

19. See, e.g., Beth Caldwell, *Banished for Life: Deportation of Juvenile Offenders as Cruel and Unusual Punishment*, 34 CARDOZO L. REV. 2294–95 (2013) (arguing for the Eighth

doctrine as applied to immigrant identity evidence raises serious doubts as to whether this doctrine as developed in the criminal context should be imported into the immigration arena.<sup>20</sup>

Consider a scenario in which these issues would arise: A local police officer conducts a traffic stop, pulling over an individual driver for allegedly speeding. The driver will later contend that the officer stopped him solely on the basis of his race. After pulling the driver over, the officer questions the driver, asking his name and date of birth; where he was going to and coming from; and, eventually, his immigration status and where he was born. The driver admits that he was born in Mexico and does not currently have legal permission to live in the United States. The officer memorializes these admissions, issues a traffic ticket, and then calls Immigration and Customs Enforcement (ICE).<sup>21</sup> A federal immigration officer arrives and ultimately the driver is placed in removal proceedings. In immigration court, the government seeks to admit evidence regarding the driver's identity into evidence (e.g., the driver's statements to the police officer and his Mexican birth certificate). The noncitizen argues, and the immigration judge agrees, that the traffic stop was based solely on the driver's race and was therefore an egregious violation of the Fourth Amendment.<sup>22</sup> The noncitizen then moves to suppress the government's identity evidence. The judge must now decide whether exclusionary rule doctrine permits the suppression of the identity evidence in question.

At first glance, federal courts appear divided into two opposing positions on the question of whether the exclusionary rule generally

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Amendment prohibition against cruel and unusual punishment to apply to deportation proceedings); Ingrid V. Eagly, *Gideon's Migration*, 122 YALE L.J. 2282, 2301 (2013) (suggesting a constitutional right to counsel for some immigration cases); Aarti Kohli, *Does the Crime Fit the Punishment?: Recent Judicial Actions Expanding the Rights of Noncitizens*, 2 CAL. L. REV. CIR. 1, 22 (2011) (stating that courts should import criminal protections such as proportionality, suppression, and right to counsel into immigration proceedings); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. CIV. RTS. CIV. LIBERTIES L. REV. 289, 298 (2008) (arguing that courts should apply the protections of the Sixth Amendment, Ex Post Facto Clause, and evidentiary rules to deportation proceedings).

20. Cf. Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1286 (2010) (observing that underlying the scholarly calls for criminal protections is "the belief that these protections do, in fact, operate in the criminal sphere" and suggesting that their interaction with the civil immigration sphere has affected these same protections in the criminal context).

21. ICE is the principle investigative and enforcement arm of the Department of Homeland Security (DHS). *Who We Are*, ICE, <http://www.ice.gov/about/overview/> (last visited Oct. 12, 2016).

22. Courts are likely to find a traffic stop based solely on race to be an egregious violation of the Fourth Amendment. See *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1451–52 (9th Cir. 1994); *David Antonio Lara-Torres*, A094 218 294, 2014 WL 1120165, at \*2 (B.I.A. Jan. 28, 2014).

applies to identity evidence.<sup>23</sup> The U.S. Courts of Appeals for the First, Third, Fifth, Sixth, Seventh, and Eleventh Circuits broadly state that identity evidence may not be suppressed under the exclusionary rule.<sup>24</sup> In contrast, the U.S. Courts of Appeals for the Second, Fourth, Eighth, Ninth, and Tenth Circuits support the principle that identity evidence may be suppressed via the exclusionary rule.<sup>25</sup> The framing of this doctrinal question as one subject to a “circuit split,”<sup>26</sup> however, is insufficient for a full understanding of the suppression remedy as applied to identity evidence and is in fact misleading to one’s perception of how the exclusionary rule currently operates in practice. What seem like broad, categorical, and opposing rules governing the suppression of identity evidence are in actuality more complex, fact-based, and overlapping evidentiary standards.

When evaluating the suppression of identity evidence, courts on both sides of the debate often distinguish between identity evidence collected for an investigative purpose, which courts should suppress, and identity evidence collected for an administrative purpose, which courts should not suppress.<sup>27</sup> Thus, notwithstanding these seemingly categorical rules, when determining the applicability of the exclusionary rule to any particular piece of identity evidence, courts use, explicitly and implicitly, a fact-based “investigative versus administrative” standard. For example, to account for Supreme Court precedent suppressing fingerprint evidence, the “identity evidence cannot be suppressed” side of the debate acknowledges that fingerprints taken for an investigative purpose may sometimes be suppressed.<sup>28</sup> Similarly, the “identity evidence can be suppressed” camp recognizes that some forms of identity evidence, such as facts obtained through the administrative booking process, are often exempt from suppression.<sup>29</sup> In short, despite the proclaimed doctrinal divide, in practice there are often analytical commonalities and matching

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23. See discussion *infra* Section I.B.

24. See *infra* note 77 and accompanying text.

25. See *infra* note 80 and accompanying text.

26. Commentators and courts have labeled this question as being the subject of a “split.” See, e.g., *United States v. Hernandez-Mandujano*, 721 F.3d 345, 352 (5th Cir. 2013); LEGAL ACTION CTR., AMERICAN IMMIGRATION COUNCIL, MOTION TO SUPPRESS IN REMOVAL PROCEEDINGS: A GENERAL OVERVIEW 2 (2015).

27. See discussion *infra* Section I.B. Substantive Fourth Amendment doctrine also contains a similar distinction between investigative searches and searches justified by administrative or governmental “special needs.” See Eve Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 255–56 (discussing administrative searches in the context of the Fourth Amendment). That distinction is not relevant for this Article’s purposes here. The discussion of exclusionary rule doctrine regarding identity evidence necessarily only takes place after the finding of a violation of the Fourth Amendment.

28. See *infra* note 91 and accompanying text.

29. See *infra* note 89 and accompanying text.



results when answering the question of whether a particular piece of identity evidence may be suppressed in a particular case.

Thus, exclusionary rule doctrine regarding the suppression of identity evidence does not contain simple categorical rules but a fact-based standard that requires an individual case-by-case analysis. To return to the hypothetical, the answer to the question of whether an immigration court would suppress the evidence of the driver's identity would depend not only on the circuit in which the case arose but also on the manner of the evidence collection and the purpose for which the police collected the evidence. Currently, however, instead of conducting this necessary analysis, most courts assume that when applying the investigative versus administrative standard, all identity evidence ultimately presented in an administrative immigration proceeding was collected for an administrative purpose and, as such, is categorically exempt from the exclusionary rule remedy.<sup>30</sup>

This assumption, while not inherently leading to an incorrect result, does raise two significant concerns. First, there is the potential for a categorical exception for identity evidence to swallow the rule, thereby essentially cancelling any remedy for the initial constitutional violation.<sup>31</sup> This is particularly troubling in the immigration context because the police conduct is, by definition, an egregious violation of Fourth Amendment rights.<sup>32</sup> Second, allowing a categorical exception to the exclusionary rule effectively enables courts to avoid answering the question of whether there was a constitutional violation in the first place, thus shielding law enforcement practices from judicial scrutiny.<sup>33</sup> While a wrong without a remedy or an exception to a rule may ultimately have its place in exclusionary rule doctrine, these outcomes should be analytically justified rather than assumed.

In light of these concerns, this Article undertakes the needed analysis of the suppression of identity evidence in immigration proceedings. An examination of immigrant identity evidence demonstrates that courts inaccurately assume the collection of such evidence to be administrative in nature. Instead, due to the expanding role of state and local police in federal immigration enforcement,<sup>34</sup> the expansion of the storage of

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30. See *infra* notes 98–101 and accompanying text.

31. See, e.g., *United States v. Farias-Gonzalez*, 556 F.3d 1181, 1185 (11th Cir. 2009) (assuming “*arguendo*” that the district court’s finding of a Fourth Amendment violation was correct but holding that identity evidence is not suppressible).

32. See *supra* note 10 and accompanying text.

33. See, e.g., *Pretzantzin v. Holder*, 736 F.3d 641, 646 (2d Cir. 2013) (stating that the Board of Immigration Appeals (BIA) did not determine whether there was an egregious violation of the Fourth Amendment because the court instead found that an exception to the exclusionary rule was applicable).

34. See discussion *infra* Subsection II.B.1.

personal information in electronic databases,<sup>35</sup> and the role of an individual's name and date of birth in the investigation of immigration-related offenses,<sup>36</sup> immigration policing today is often investigative in its underlying purpose. Consequently, exclusionary rule doctrine as currently applied to immigrant identity evidence often wrongly shields evidence from suppression that the rule normatively intends to suppress and unwittingly undermines the animating function of the exclusionary rule—the deterrence of unconstitutional police conduct.<sup>37</sup> This Article argues, therefore, that rather than simply transferring exclusionary rule doctrine from one forum to another, the combination of the investigative policing of a noncitizen's identity and the administrative proceedings in which the government uses this identity evidence justifies exclusionary rule doctrine unique to the immigration court context.

Part I begins by presenting an overview of the Fourth Amendment exclusionary rule and its rationale as a mechanism for the deterrence of unconstitutional police conduct. This Part then discusses the debate over the suppression of identity evidence currently taking place in the federal criminal court context. Part I explains that rather than a “can be suppressed” and “can never be suppressed” dichotomy, the exclusionary rule doctrine is more complex and primarily looks to the underlying purpose of the evidence collection, distinguishing between investigative and administrative police purposes.

Part II begins with the observation that the questions surrounding the suppression of identity evidence in immigration proceedings have received almost no close inspection. This Part supplies this missing analysis, using the current framework of the investigative versus administrative standard. Part II also discusses the evolution of immigration enforcement and examines police practices through the lens of three categories of identity evidence, each of which warrants a distinct evidentiary analysis under exclusionary rule doctrine. This examination demonstrates that exclusionary rule doctrine as applied to identity evidence in criminal court is, at minimum, unhelpful to the judicial inquiry in the immigration context and more fundamentally—and more problematically—produces a result in immigration court that is often contrary to the deterrent purpose of the Fourth Amendment exclusionary rule.

In light of these findings, Part III posits that current exclusionary rule doctrine with respect to immigrant identity evidence is neither functional in practice nor desirable as doctrine. Therefore, this Article concludes by

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35. See discussion *infra* Subsection II.B.2.

36. See discussion *infra* Subsection II.B.3.

37. See *infra* note 40 and accompanying text (discussing the exclusionary rule's function as a mechanism of deterrence).

proposing revisions to exclusionary rule doctrine in immigration proceedings, including the abandonment of the purpose-based standard.<sup>38</sup> This Article grounds these proposals in the recognition that the application of the exclusionary rule in immigration proceedings today addresses a unique blend of criminal and civil law, investigative and administrative police practices, and lawful and unlawful law enforcement conduct.

## I. THE SUPPRESSION OF EVIDENCE

To effectively analyze exclusionary rule doctrine as applied in immigration proceedings, it is helpful to first have a broader understanding of the suppression of evidence generally and the suppression of identity evidence in the criminal justice system specifically. Part I begins with a brief review of this doctrine and then presents the current approaches of the federal circuits to the suppression of identity evidence.

### A. *The Exclusionary Rule*

Despite much debate and doctrinal adjustments, the exclusionary rule remains a bedrock principle of Fourth Amendment law. Historically, courts and scholars have recognized the exclusionary rule as having several justifications, including preserving “judicial integrity” and ensuring public trust in the government.<sup>39</sup> In contemporary jurisprudence, however, the primary, if not the only, rationale for the application of the exclusionary rule is to deter unconstitutional police conduct.<sup>40</sup> From this

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38. See *infra* discussion Part III (suggesting that the traditional exclusionary rule analysis as applied to other types of evidence should also govern the suppression of immigrant identity evidence); see also *infra* notes 51–56 and accompanying text (describing the “traditional” exclusionary rule analysis of taint, attenuation, and the term “fruit of the poisonous tree”).

39. See WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE OF THE FOURTH AMENDMENT § 1.1(f) (5th ed. 2013) (quoting *Elkins v. United States*, 364 U.S. 206 (1960)) (discussing various purposes of the exclusionary rule); see also Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 262 (1998) (suggesting additional justification of restoring both the government and suspect to the *status quo ante*).

40. *Davis v. United States*, 131 S. Ct. 2419, 2426 (2011) (“The rule’s sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations.”); *Herring v. United States*, 555 U.S. 135, 141 (2009) (stating that “the exclusionary rule is not an individual right and applies only where it ‘result[s] in appreciable deterrence’” (quoting *United States v. Leon*, 468 U.S. 897, 909 (1984))); *United States v. Calandra*, 414 U.S. 338, 347 (1974) (stating that the exclusionary rule’s “prime purpose is to deter future unlawful police conduct”); see also LAFAVE, *supra* note 39, § 1.1(f) (noting the Court’s recent focus as “almost exclusively upon the deterrence function”). More fundamentally, the Supreme Court has moved away from viewing the exclusionary rule as a remedy embedded in the constitutional protections of the Fourth Amendment to the opinion that it is a judicially created remedy. Compare *Mapp v. Ohio*, 367 U.S. 643, 657 (1961) (holding that

perspective, the exclusionary rule remedy is not intended to be a punishment for past unconstitutional police conduct but is instead applied to deter future wrongdoing by law enforcement. The remedy “is calculated to prevent, not to repair.”<sup>41</sup>

In determining whether the exclusionary rule should apply in any particular case, the Supreme Court has constructed a balancing test of the costs and benefits of the rule’s application.<sup>42</sup> When considered in tandem with the deterrent function of the exclusionary rule, this balancing dictates that the exclusionary rule should only apply if the deterrence benefits from its application outweigh the social costs that suppression of the evidence would incur.<sup>43</sup> “Where suppression fails to yield ‘appreciable deterrence,’ exclusion is ‘clearly unwarranted.’”<sup>44</sup> This cost versus deterrent–benefit analysis also governs the exclusionary rule’s expansion outside the criminal trial context.<sup>45</sup>

In *INS v. Lopez-Mendoza*,<sup>46</sup> the Supreme Court held that the exclusionary rule did not generally apply to civil immigration proceedings.<sup>47</sup> After weighing the costs of suppression with the possible benefits of deterrence, the Court concluded that this balancing “comes out against applying the exclusionary rule.”<sup>48</sup> However, the Court stated that the exclusionary rule might apply in immigration court following “egregious violations” of the Fourth Amendment.<sup>49</sup> Today, the majority of the federal circuits and the Board of Immigration Appeals (BIA) recognize that the exclusionary rule is available in immigration proceedings as a remedy for egregious violations of the Fourth Amendment.<sup>50</sup>

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“the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments”), with *Calandra*, 414 U.S. at 348 (calling the exclusionary rule a “judicially created remedy”).

41. *Elkins*, 364 U.S. at 217.

42. See *United States v. Janis*, 428 U.S. 433, 448–54 (1976).

43. E.g., *Davis*, 131 S. Ct. at 2426–27.

44. *United States v. Weaver*, 808 F.3d 26, 33 (D.C. Cir. 2015) (quoting *Davis*, 131 S. Ct. at 2426–27).

45. See, e.g., *Janis*, 428 U.S. at 459–60 (holding that the exclusionary rule does not apply in federal civil tax proceedings); *Calandra*, 414 U.S. at 349–52 (declining to extend the exclusionary rule to grand jury proceedings); *Stone v. Powell*, 428 U.S. 465, 493–94 (1976) (concluding that the exclusionary rule does not apply to habeas proceedings).

46. 468 U.S. 1032 (1984).

47. *Id.* at 1050; *Almeida-Sanchez v. United States*, 413 U.S. 266, 273–74 (1973). The Supreme Court had previously held that noncitizens are entitled to the protections of the Fourth Amendment. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 882–84 (1975).

48. *Lopez-Mendoza*, 468 U.S. at 1050.

49. *Id.*

50. See Rossi, *supra* note 10, at 503–27 (reviewing federal and immigration case law on egregious violations). Several circuits, although potentially or theoretically recognizing the exception, have never found “egregiousness” on the facts before the court. See, e.g., *Martinez*

When the exclusionary rule does apply, it serves to suppress evidence obtained both as a direct and indirect result of the Fourth Amendment violation.<sup>51</sup> As famously held by the Supreme Court in *Wong Sun v. United States*,<sup>52</sup> in addition to evidence directly obtained as a result of a Fourth Amendment violation, evidence that is “fruit of the poisonous tree” is also suppressible.<sup>53</sup> Evidence is not automatically suppressed, however, simply because the constitutional violation serves as the “but for” cause of the evidence collection.<sup>54</sup> Rather, evidence is only considered fruit of the poisonous tree “if the link between the evidence and the conduct is not too attenuated.”<sup>55</sup> Thus, under what this Article calls the traditional exclusionary rule analysis, a court must ask whether the officers “exploited” the initial illegality to obtain the evidence or whether the officers obtained the evidence by means “purged of the primary taint.”<sup>56</sup>

A well-established exception to the exclusionary rule is evidence obtained from an independent source. “Independent” evidence is categorically exempt “from the suppression remedy because it is viewed as sufficiently attenuated from, or not tainted by, the initial unlawful search or seizure.”<sup>57</sup> This exception ensures that the police are put “in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred.”<sup>58</sup> Like the exclusionary rule generally, the underlying rationale is focused on balancing the benefit of deterrence and

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Carcamo v. Holder, 713 F.3d 916, 922 (8th Cir. 2013); *see infra* notes 102–07 (discussing the definition of egregiousness).

51. *E.g.*, *Mapp v. Ohio*, 367 U.S. 643, 655–56 (1961).

52. 371 U.S. 471 (1963).

53. *Id.* at 488.

54. *Id.* at 487–88.

55. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1040–41 (1984) (citing *Wong Sun*).

56. *Wong Sun*, 371 U.S. at 488 (quoting JOHN MACARTHUR MAGUIRE, EVIDENCE OF GUILT 221 (1959)). In making this determination of attenuation, a court considers several factors, including the “temporal proximity” between the unlawful police conduct and the obtaining of the evidence, the presence of any intervening circumstances, and, “particularly, the purpose and flagrancy of the official misconduct.” *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975). If the court finds the police exploited the initial constitutional violation to collect the contested evidence, the suppression remedy covers many types of evidence, including physical evidence, officers’ observations, and the defendant’s oral and written statements. *See United States v. Crews*, 445 U.S. 463, 470 (1980).

57. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920); *Segura v. United States*, 468 U.S. 796, 805 (1984). In theory, a truly independent source of evidence will not satisfy even a “but for” test of causation stemming from the initial unconstitutional police conduct. In practice, however, the question of independence is often one of degree and entails a fact-specific analysis. *United States v. Burton*, 288 F.3d 91, 99–100 (3d Cir. 2002).

58. *Murray v. United States*, 487 U.S. 533, 537 (1988) (quoting *Nix v. Williams*, 467 U.S. 431, 443 (1984)).

the cost of suppression.<sup>59</sup> According to this reasoning, there is no need to—and society does not want to—deter police officers from lawful investigations that independently lead them to probative evidence.<sup>60</sup> By limiting the scope of the suppression remedy to simply putting the police back to where they would have been, minus the unlawful conduct, sufficient deterrence of unlawful conduct will remain without the more severe cost of excluding evidence that was, at least in the opinion of the decision maker, independently obtained.<sup>61</sup>

Evidence collected during the routine booking process is also frequently deemed to be sufficiently attenuated from, or independent of, the initial Fourth Amendment violation and therefore outside the reach of the suppression remedy. Courts have long recognized that evidence obtained during the “standardized procedure” of the booking process is not subject to constitutional scrutiny under the Fourth Amendment.<sup>62</sup> Consequently, when courts confront questions regarding the suppression of evidence obtained during the booking process but following an unlawful arrest, many have found that the exclusionary rule is not applicable to the evidence collected.<sup>63</sup> These courts reason that there is little need to deter the police from asking routine booking questions because the booking process is collective and administrative and not aimed at gathering evidence of any particular crime.<sup>64</sup>

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59. *See id.* at 537–39 (discussing the history and rationale of the independent source exception); *see also id.* at 544–45 (Marshall, J., dissenting) (“The independent source exception . . . is primarily based on a practical view that under certain circumstances the beneficial deterrent effect that exclusion will have on future constitutional violations is too slight to justify the social cost of excluding probative evidence from a criminal trial.”).

60. *See id.* at 545 (Marshall, J., dissenting).

61. Another related exception to the exclusionary rule is the “inevitable discovery” exception. This exception allows the admission of evidence that would “inevitably have been discovered without reference to the police error or misconduct.” *Nix*, 467 U.S. at 448.

62. *Illinois v. Lafayette*, 462 U.S. 640, 644 (1983); *see also Maryland v. King*, 133 S. Ct. 1958, 1977 (2013) (noting that the Fourth Amendment allows for administrative evidence collection during booking such as fingerprints and photographs). Courts see the collection of evidence during routine booking as lawfully motivated by the administrative purpose of accurately identifying those in police custody and ensuring the safety of custodial officers. *See Lafayette*, 462 U.S. at 646 (holding inventory searches reasonable in part because “inspection of an arrestee’s personal property may assist the police in ascertaining or verifying his identity”); *United States v. Olivares-Rangel*, 458 F.3d 1104, 1113 (10th Cir. 2006) (“Certain routine administrative procedures, such as fingerprinting, photographing, and getting a proper name and address from the defendant, are incidental events accompanying an arrest that are necessary for orderly law enforcement and protection of individual rights.”).

63. *See, e.g., United States v. Beckwith*, 22 F. Supp. 2d 1270, 1293 (D. Utah 1998) (listing cases that hold that the exclusionary rule does not apply to photographs obtained during routine booking).

64. A court may permit the suppression of evidence obtained during booking, however, if the court finds that the police “exploited” the unlawful arrest to obtain the very evidence typically

## B. Identity Evidence

The doctrinal question of whether identity evidence is subject to suppression via the Fourth Amendment exclusionary rule can be answered quite differently depending on one's analytical viewpoint of the term "identity." On the one hand, identity as defined by a defendant's physical body is not suppressible.<sup>65</sup> The *Ker-Frisbie* doctrine holds that an unconstitutional search or seizure cannot divest a court of jurisdiction over the defendant.<sup>66</sup> Although this rule is at its roots a rule of personal jurisdiction, it functions as a limit on the exclusionary rule—a defendant's body cannot be suppressed.

On the other hand, under Supreme Court jurisprudence, it is clear that some evidence of identity is suppressible following a violation of the Fourth Amendment. In *Davis v. Mississippi*,<sup>67</sup> and again in *Hayes v. Florida*,<sup>68</sup> the Supreme Court held that fingerprint evidence could be suppressed following an unlawful detention in violation of the Fourth Amendment.<sup>69</sup> In both *Davis* and *Hayes*, the police collected fingerprints from the suspect after unlawfully arresting him for the purpose of connecting him to a specific crime.<sup>70</sup> In neither *Davis* nor *Hayes*, however, did the Court address the suppression of identity evidence more broadly or discuss (or differentiate) the *Ker-Frisbie* rule of personal jurisdiction.

Today, the debate over whether identity evidence is categorically subject to the exclusionary rule is rooted in a disagreement over a statement made by the Supreme Court in *INS v. Lopez-Mendoza*. The case consolidated the appeals of Adan Lopez-Mendoza and Elias Sandoval-Sanchez.<sup>71</sup> Both challenged aspects of their deportation proceedings on the basis of their allegedly unlawful arrests by immigration law enforcement officers.<sup>72</sup> Lopez-Mendoza challenged the entirety of the immigration proceedings against him.<sup>73</sup> The Court denied his appeal, holding that even if there was an unlawful arrest, an individual could not

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collected during the booking process. See *United States v. Oscar-Torres*, 507 F.3d 224, 232 (4th Cir. 2007).

65. Re, *supra* note 12, at 1959.

66. *Ker v. Illinois*, 119 U.S. 436, 440 (1886); *Frisbie v. Collins*, 342 U.S. 509, 522 (1952); see also *United States v. Alvarez-Machain*, 504 U.S. 655, 660–62 (1992) (discussing the *Ker-Frisbie* doctrine).

67. 394 U.S. 721 (1969).

68. 470 U.S. 811 (1984).

69. *Id.* at 816–18; *Davis*, 394 U.S. at 727–28.

70. *Hayes*, 470 U.S. at 812–14; *Davis*, 394 U.S. at 723.

71. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1034 (1984).

72. *Id.*

73. *Id.* at 1034–35.

object to the very proceeding in which he is a party.<sup>74</sup> In so holding, the Court stated, “[t]he ‘body’ or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred.”<sup>75</sup> This statement is now referred to as the *Lopez-Mendoza* “identity statement.”<sup>76</sup>

The federal circuit courts are divided into two positions on the meaning of the *Lopez-Mendoza* identity statement. The First, Third, Fifth, Sixth, Seventh, and Eleventh Circuits approach *Lopez-Mendoza* as a blanket prohibition on the suppression of identity evidence.<sup>77</sup> The Fifth Circuit, for example, broadly proclaims that an individual’s identity is not suppressible.<sup>78</sup> These courts ground their position in the plain language of the *Lopez-Mendoza* identity statement.<sup>79</sup> In contrast, the Second, Fourth, Eighth, Ninth, and Tenth Circuits do not view the *Lopez-Mendoza* identity statement as a categorical removal of identity evidence from the remedy of suppression.<sup>80</sup> Rather, in their view, *Lopez-Mendoza* merely “reaffirmed a long-standing rule of personal jurisdiction”—the *Ker-Frisbie* principle that one cannot contest one’s physical presence in

74. *Id.* at 1040.

75. *Id.* at 1039. Sandoval-Sanchez challenged the admission of statements he made upon his arrest, arguing that the Court should exclude this evidence as “fruit of an unlawful arrest.” *Id.* at 1037. In rejecting Sandoval-Sanchez’s claim, the Court held that the exclusionary rule did not generally apply to civil immigration proceedings but noted that this holding did not cover “egregious violations of Fourth Amendment or other liberties.” *Id.* at 1050.

76. *E.g.*, *Pretzantzin v. Holder*, 736 F.3d 641, 650 (2d Cir. 2013).

77. *See* *United States v. Garcia-Garcia*, 633 F.3d 608, 616 (7th Cir. 2011); *United States v. Bowley*, 435 F.3d 426, 430 (3d Cir. 2006); *United States v. Navarro-Diaz*, 420 F.3d 581, 588 (6th Cir. 2005); *Navarro-Chalan v. Ashcroft*, 359 F.3d 19, 22 (1st Cir. 2004); *United States v. Roque-Villanueva*, 175 F.3d 345, 346 (5th Cir. 1999); *cf.* *United States v. Farias-Gonzalez*, 556 F.3d 1181, 1186, 1189 (11th Cir. 2009) (stating that *Lopez-Mendoza* is not binding in this factual context but holding that identity evidence is not suppressible).

78. *United States v. Hernandez-Mandujano*, 721 F.3d 345, 351 (5th Cir. 2013).

79. *See, e.g.*, *Bowley*, 435 F.3d at 430 (stating that “we doubt that the Court lightly used such a sweeping word as ‘never’ in deciding when identity may be suppressed as the fruit of an illegal search of arrest”).

80. *See Pretzantzin*, 736 F.3d at 647–48 (stating that *Lopez-Mendoza* “did not announce a new rule insulating all identity-related evidence from suppression”); *United States v. Oscar-Torres*, 507 F.3d 224, 231–32 (4th Cir. 2007); *United States v. Olivares-Rangel*, 458 F.3d 1104, 1112 (10th Cir. 2006); *United States v. Guevara-Martinez*, 262 F.3d 751, 754 (8th Cir. 2001). The most recent Ninth Circuit statement on this issue supports this reading of *Lopez-Mendoza*. *See United States v. Garcia-Beltran*, 389 F.3d 864, 866–67 (9th Cir. 2004) (“*Lopez-Mendoza* does not preclude suppression of evidence unlawfully obtained from a suspect that may in a criminal investigation establish the identity of the suspect.”). There is, however, prior case law in that circuit that supports the “can never be suppressed” interpretation as well. *See United States v. Del Toro Gudino*, 376 F.3d 997, 1001 (9th Cir. 2004).



court.<sup>81</sup> Therefore, courts in these circuits have held that identity evidence may be subject to suppression under the exclusionary rule.<sup>82</sup>

The meaning of the *Lopez-Mendoza* identity statement is a question in need of an answer.<sup>83</sup> But of more significance to this Article's purposes is the fact that this debate over one sentence has led both scholars and courts to view the broader question of whether identity evidence can be suppressed in a similar binary manner: identity evidence can be suppressed versus identity evidence cannot be suppressed. Judicial analysis has largely accepted this categorical framework as the current state of exclusionary rule doctrine. Stopping the inquiry here, however, allows much more complex doctrinal and evidentiary questions to escape notice.

A closer examination of the application of the exclusionary rule to identity evidence in any particular case reveals a more complicated—and sometimes shared—analysis by courts on both sides of the debate. In courts on both sides, despite the broad, categorical proclamations, the question of whether identity evidence is subject to suppression remains a fact-based analysis—one that asks the court to review the nature of the underlying police conduct and to evaluate the purpose of the initial evidence collection. In light of the Supreme Court precedent of *Hayes* and *Davis*, which suppressed identity evidence collected during a police investigation, but also recognizing that identity evidence is often collected during the routine booking process, a purpose-based standard developed in exclusionary rule jurisprudence regarding the suppression of identity evidence. This analysis distinguishes between evidence collected for an “investigative” purpose and evidence collected for an “administrative” purpose. The general rule may be simplified as follows:

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81. *Pretzantzin*, 736 F.3d at 647–48 (discussing the *Ker-Frisbie* doctrine and its references in *Lopez-Mendoza*); *Olivares-Rangel*, 458 F.3d at 1110–11 (same). It is interesting to note that the Court decided *Hayes*—a case in which the Court suppressed identity evidence—eight months after *Lopez-Mendoza*, and yet the *Hayes* opinion does not mention *Lopez-Mendoza*, much less discuss it as a limitation on the suppression of identity-related evidence. See *Hayes v. Florida*, 470 U.S. 811 (1984).

82. The U.S. Court of Appeals for the D.C. Circuit has not yet taken a position on this issue. Compare *Delia Mercedes Sinche Barros*, A088 142 068, 2012 WL 371685, at \*2 (B.I.A. Jan. 12, 2012) (“The identity of the respondent is not suppressible . . .”), with *Juan Carlos Guevara-Mata*, A097-535-291, at \*9 (B.I.A. June 14, 2011), <http://www.scribd.com/doc/130698575/Juan-Carlos-Guevara-Mata-A097-535-291-BIA-June-14-2011> (affirming the immigration judge’s suppression of identity-related evidence). The BIA primarily follows the law of the circuit in which it sits. See *Abdulai v. Ashcroft*, 239 F.3d 542, 553 (3d Cir. 2001) (“The BIA is required to follow court of appeals precedent within the geographical confines of the relevant circuit.”).

83. See *Oscar-Torres*, 507 F.3d at 228 (“The meaning of the *Lopez-Mendoza* ‘identity statement’ has bedeviled and divided our sister circuits.”); *United States v. Ortiz-Hernandez*, 441 F.3d 1061, 1063 (9th Cir. 2006) (Paez, J., dissenting from denial of rehearing en banc) (“One seemingly innocuous sentence . . . has led to amaranthine confusion.”).

identity evidence taken for investigative purposes may be suppressed, while evidence collected for administrative purposes is not subject to the exclusionary rule.

Courts have not explicitly defined these diametrically used terms—investigative versus administrative—in exclusionary rule doctrine. Instead, courts often use a “know it when I see it”<sup>84</sup> approach. In general, an “investigative” purpose underlies evidence collected by police officers during the investigation of a crime.<sup>85</sup> Confrontation Clause jurisprudence suggests that an investigative purpose can be further defined as when “the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”<sup>86</sup> In contrast, more standardized police practices addressing “administrative concerns,”<sup>87</sup> such as procedures and questions that are part of the custodial booking process, are conducted with an administrative purpose. In Fourth Amendment law more generally, the term “administrative” suggests police procedures that are “established routine,” rather than actions that are “a ruse . . . to discover incriminating evidence.”<sup>88</sup>

Several jurisdictions recognize the investigative versus administrative standard explicitly.<sup>89</sup> For example, the Tenth Circuit differentiates between evidence collected as part of a routine booking procedure and

84. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

85. See Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. 261, 266–67 (1998) (discussing the Fourth Amendment jurisprudence’s general focus on criminal investigations).

86. *Davis v. Washington*, 547 U.S. 813, 822 (2006). This type of police conduct results in witness “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial” and therefore merit protection under the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36, 52 (2004) (quoting the *Amici Curiae* Brief for National Association of Criminal Defense Lawyers et al.); *United States v. Hinton*, 423 F.3d 355, 359 (3d Cir. 2005) (quoting *Crawford*).

87. *Pennsylvania v. Muniz*, 496 U.S. 582, 601–02 (1990) (holding that questions that address law enforcement’s “administrative concerns” fall outside the protections of *Miranda*).

88. *Florida v. Wells*, 495 U.S. 1, 4 (1990) (discussing the Fourth Amendment inventory search doctrine); *United States v. Roberts*, 86 F. Supp. 2d 678, 685 (S.D. Tex. 2000) (same).

89. See, e.g., *United States v. Oscar-Torres*, 507 F.3d 224, 232 (4th Cir. 2007); *United States v. Olivares-Rangel*, 458 F.3d 1104, 1112–13 (10th Cir. 2006); *United States v. Garcia-Beltran*, 389 F.3d 864, 867 (9th Cir. 2004); *United States v. Guevara-Martinez*, 262 F.3d 751, 756 (8th Cir. 2001); see also Jorge Hernandez-Calderon Elide Cruz-Azua, A200 672 287, 2014 WL 2919262, at \*1 (B.I.A. Apr. 29, 2014) (holding that the police took respondent’s fingerprints after his arrest for an “administrative purpose,” and therefore the fingerprints could not be suppressed); Christian Rodriguez, A088 190 226 (B.I.A. June 18, 2013), <http://www.scribd.com/doc/150133888/Christian-Rodriguez-A088-190-226-BIA-June-18-2013> (contrasting fingerprints obtained for identification purposes from those taken for criminal investigation purposes); Eric Rey Cruz, A098 430 020, 2012 WL 3911826, at \*2 (B.I.A. Aug. 22, 2012) (finding identity evidence admissible as it was “obtained for administrative purposes and not subject to suppression”).

evidence obtained during a police investigation.<sup>90</sup> Courts that openly state this purpose-based standard are in the circuits that broadly proclaim that identity evidence is subject to the exclusionary rule. Consequently, despite these circuits' posture as "can be suppressed" jurisdictions, there is a significant doctrinal dividing line that renders much identity evidence exempt from the exclusionary rule remedy.

On the surface, the "can never be suppressed" jurisdictions may appear, with their blanket prohibition, to have rejected any fact-based standard that would potentially allow for the suppression of identity evidence. But even in these jurisdictions, to account for the precedent of *Davis* and *Hayes*, courts acknowledge that identity evidence may be suppressed under certain circumstances.<sup>91</sup> For example, the Sixth Circuit distinguishes the suppression of fingerprint evidence, which might be permissible, from the suppression of a person's name and date of birth, which is not.<sup>92</sup> Although in neither case did the Supreme Court fully explain its reasoning justifying the suppression of fingerprint evidence, in the years following *Davis* and *Hayes*, lower courts have emphasized the investigatory nature of the fingerprint collection in those cases, thereby providing support for the distinction between an investigative and administrative purpose.<sup>93</sup> Thus, the supposed "can never be suppressed" jurisdictions, in recognizing the suppression of fingerprints under *Davis* and *Hayes*, also recognize—albeit implicitly—the notion that identity

90. *Olivares-Rangel*, 458 F.3d at 1112 (“[W]e distinguish between fingerprints that are obtained as a result of an unconstitutional governmental investigation and fingerprint evidence that is instead obtained merely as part of a routine booking procedure.”).

91. *See, e.g.*, *United States v. Farias-Gonzalez*, 556 F.3d 1181, 1185 n.4 (11th Cir. 2009) (distinguishing fingerprints collected for purposes of connecting defendants to serious, non-identity-related crimes and citing *Davis* and *Hayes*); *United States v. Navarro-Diaz*, 420 F.3d 581, 585–86 (6th Cir. 2005) (distinguishing fingerprints from one's name and date and birth, and citing *Davis* and *Hayes*); *see also* Christian Rodriguez, A088 190 226 (B.I.A. June 18, 2013), <http://www.scribd.com/doc/150133888/Christian-Rodriguez-A088-190-226-BIA-June-18-2013> (acknowledging that fingerprints taken for criminal investigation purposes can be suppressed).

92. *Navarro-Diaz*, 420 F.3d at 585–86.

93. *See, e.g.*, *Oscar-Torres*, 507 F.3d at 231 (“We recognize that *Hayes* and *Davis* themselves do not articulate this rule. But in both cases the Supreme Court based its holding—requiring suppression of the fingerprint evidence—on the undisputed fact that the police obtained the challenged fingerprints during investigation of a specific crime . . . .”); *United States v. Ortiz-Hernandez*, 427 F.3d 567, 576 (9th Cir. 2005) (“It is established law under *Hayes* and *Davis* that if fingerprints are taken for investigatory purposes, they must be suppressed in a criminal trial.”); *Guevara-Martinez*, 262 F.3d at 755 (noting that the police in both *Davis* and *Hayes* detained the suspect solely for the purpose of obtaining fingerprints); *United States v. Ortiz-Gonzalbo*, 946 F. Supp. 287, 289 (S.D.N.Y. 1996) (stating that in both *Davis* and *Hayes* “the Court focused its attention squarely on the motive of the arresting officers to obtain fingerprints, and made it plain . . . that that motive rationalized its decision”). The Supreme Court in *Hayes* did state that the police detained the suspect for “investigative purposes.” *Hayes v. Florida*, 470 U.S. 811, 816 (1985).

evidence collected for an investigatory purpose may be suppressed.

In sum, framing the current debate on the suppression of identity evidence as a simple split between “can be suppressed” and “can never be suppressed” conceals more intricate questions in Fourth Amendment exclusionary rule doctrine. Moreover, the notion that questions surrounding the suppression of identity evidence are answered by clear-cut rules obscures the observation that this area of the law contains a fact-based standard that is subject to much interpretation, as will be evident when applying these terms to the context of immigration-related policing.

## II. THE POLICING OF IMMIGRANT IDENTITY EVIDENCE

Although the Supreme Court made its now-controversial “identity statement” in the context of addressing Lopez-Mendoza’s protest against his immigration proceedings, the contemporary judicial debate surrounding this statement has almost entirely taken place within the context of immigration-related *criminal* proceedings.<sup>94</sup> Questions regarding the suppression of identity evidence have primarily arisen during federal prosecutions for the crime of illegal reentry into the United States following a prior deportation order.<sup>95</sup> Consequently, the existing conversation about the suppression of identity evidence is actually a more narrow discussion regarding the collection of immigration-related identity evidence introduced in a criminal court. Even though one might think that immigration courts would be the appropriate setting for an analysis of immigration-specific questions, immigration judges at the trial and appellate level generally follow the approach of the circuit in which the individual court sits.<sup>96</sup> As a result, immigration courts principally look to exclusionary rule doctrine as applied in the federal criminal context. A full analysis of these same questions is noticeably lacking in the specific context of the policing that underlies evidence introduced in civil immigration proceedings.<sup>97</sup>

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94. Only a handful of federal cases arose from an appeal of a civil removal proceeding. *See, e.g.,* Pretzantzin v. Holder, 736 F.3d 641, 644 (2d Cir. 2013); Navarro-Chalan v. Ashcroft, 359 F.3d 19, 21–22 (1st Cir. 2004).

95. *See, e.g.,* Olivares-Rangel, 458 F.3d at 1105; Navarro-Diaz, 420 F.3d at 582; *see also* 8 U.S.C. § 1326 (2012) (statute prohibiting being present in the United States after prior removal order).

96. *See, e.g.,* Jorge Hernandez-Calderon Elide Cruz-Azua, A200 672 287, 2014 WL 2919262, at \*1 (B.I.A. Apr. 29, 2014) (sitting in Charlotte, North Carolina, within the Fourth Circuit, and citing the Fourth Circuit’s *Oscar-Torres*, 507 F.3d at 227–32, decision for proposition that “identity-related evidence obtained for an administrative purpose, such as a removal hearing, may not be suppressed”); *see supra* note 82 and accompanying text.

97. To be clear, there has been a robust judicial debate regarding the meaning of the *Lopez-Mendoza* identity statement and whether the Court intended to exclude from the suppression remedy all evidence related to identity or whether it was merely restating a jurisdictional principle.

### A. *Immigrant Identity Evidence*

In applying the investigative versus administrative standard in the criminal context, courts often mention that if one were to apply this standard to evidence used in *immigration* proceedings, all identity evidence would be exempt from the suppression remedy.<sup>98</sup> These courts assume that because the immigration proceeding is an administrative hearing, all evidence collected for use in this proceeding is necessarily collected with an administrative purpose.<sup>99</sup> The Fourth Circuit, for example, rationalizes its holding that identity evidence can be suppressed in criminal court by stating that “[t]his emphasis on the criminal context in which the fingerprints were obtained, and the intended investigative purpose for which they were procured, at least suggests that fingerprints obtained for *administrative* purposes, and intended for use in an *administrative* process—like deportation—may escape suppression.”<sup>100</sup> In addition, courts sometimes equate the policing purpose of “identification” with an administrative purpose. For instance, the Ninth Circuit, although holding that identity evidence can be suppressed if collected for investigative purposes, contrasts this with evidence collected “solely to establish [the defendant’s] true identity.”<sup>101</sup> This rationale renders much, if not all, identity evidence admissible in immigration proceedings because immigrant identity evidence is typically collected for purposes of establishing an individual’s identity.

An examination of immigration policing today, however, illuminates the inaccuracies of judicial assumptions regarding identity evidence introduced in immigration proceedings. Labeling the collection of immigrant identity evidence as administrative in purpose is, in many

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What this judicial conversation has not included, however, is the subsequent analysis of the application of the exclusionary rule when applied to identity evidence introduced in an immigration proceeding. The notable exception is the Second Circuit. *See Pretzantzin*, 736 F.3d at 647–50.

98. *See, e.g., Oscar-Torres*, 507 F.3d at 231 (suggesting that identity evidence that would be suppressed in a criminal case would not be suppressed in a deportation proceeding); *United States v. Mendoza-Carrillo*, 107 F. Supp. 2d 1098, 1107 (D.S.D. 2000) (reasoning that suppressing the challenged identity evidence in the criminal case “will not hamper the INS in civil deportation proceedings”).

99. *See, e.g., United States v. Plaza-Leon*, No. CR-11-0098-TUC-DCB-DTF, 2011 WL 3510944, at \*3 (D. Ariz. June 15, 2011) (holding that the fingerprint evidence was admissible because it was “taken for the purpose of identifying [the defendant], in relation to an administrative immigration matter”).

100. *Oscar-Torres*, 507 F.3d at 231. The court went on to state that “[f]ingerprinting conducted as part of an arrest intended to lead only to an administrative deportation simply does not present the same concerns as the fingerprinting at issue in *Hayes* and *Davis*, which was meant to (and did in fact) lead to criminal prosecutions.” *Id.*

101. *United States v. Garcia-Beltran*, 389 F.3d 864, 866–67 (9th Cir. 2004).

cases, a mischaracterization of the nature and function of immigration-related policing. Rather, as the analysis in Section II.B demonstrates, immigrant identity evidence is often collected with an investigative purpose, and as such, should be suppressed under operation of the exclusionary rule in immigration court.

It is important to remember that this argument does not necessarily span the entirety of evidence introduced in immigration proceedings or address all forms of immigration policing. Just as one can imagine criminal evidence collected devoid of an investigative motive (e.g., drugs found in a pocket while being booked on drunk-driving charges), so too can one posit that there is some immigrant identity evidence collected for an administrative purpose (e.g., answers to routine questions posed at a typical port of entry). This Article necessarily limits its argument to evidentiary questions that are raised when applying exclusionary rule doctrine, that is, questions that follow a judicial finding of an egregious violation of the Fourth Amendment. It is therefore helpful to keep in mind what police conduct might qualify as “egregious.”

Although the circuits define “egregiousness” differently,<sup>102</sup> broadly speaking, the offending police conduct typically reflects either the importance of the underlying constitutional value or the severity of the police conduct itself.<sup>103</sup> Detaining an individual solely on the basis of her race or ethnicity is an egregious constitutional violation.<sup>104</sup> The Ninth Circuit, for example, affirmed an immigration judge’s determination that a traffic stop was based solely on race when the law enforcement officer testified in part that he pulled over the driver because he “appeared to be Hispanic,” seemed to have a “dry” mouth, “was blinking,” and looked nervous.<sup>105</sup> Additionally, courts will likely find that warrantless home raids constitute egregious violations.<sup>106</sup> In one such case, armed ICE

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102. See Rossi, *supra* note 10, at 526–30 (reviewing circuits’ standards of egregiousness); *Developments in the Law—Immigrant Rights & Immigration Enforcement*, 126 HARV. L. REV. 1565, 1638–43 (2013) (discussing and comparing how different circuits approach and define egregiousness).

103. Many circuits consider “threats, coercion or physical abuse” to fall within the definition of egregiousness. See *Kandamar v. Gonzales*, 464 F.3d 65, 71 (1st Cir. 2006) (discussing egregiousness in terms of involuntariness and coercion under the Fifth Amendment); see also *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006) (stating that a court finds egregiousness in part by evaluating the “characteristics and severity of the offending conduct”).

104. See, e.g., *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1451–52 (9th Cir. 1994) (holding that Border Patrol officers stopping Mario Gonzalez solely on the basis of his Hispanic appearance was an egregious constitutional violation); *David Antonio Lara-Torres*, A094 218 294, 2014 WL 1120165, at \*2 (B.I.A. Jan. 28, 2014) (ruling that the Fourth Amendment violation was egregious because it was based solely on race).

105. *Gonzalez-Rivera*, 22 F.3d at 1446.

106. See *Cotzajay v. Holder*, 725 F.3d 172, 182–83 (2d Cir. 2013) (finding that a nighttime, warrantless home raid might constitute an egregious Fourth Amendment violation); *Lopez-*

officers loudly pounded on a home's windows and doors at four in the morning and then, without a warrant or consent, forcibly entered the home, placed the residents in handcuffs, and ordered them onto the floor.<sup>107</sup> This type of police conduct exemplifies the factual context of exclusionary rule doctrine in immigration court, and provides the necessary facts for evaluating the underlying police purpose of the collection of identity evidence.

### B. *The Collection of Immigrant Identity Evidence*

This Article presents its analysis of immigration policing and the collection of immigrant identity evidence through the lens of exclusionary rule doctrine. When a court is confronted with suppressing any particular piece of identity evidence (whether the facts are contained within a police report, a database record, or a suspect's own statements), the court applies exclusionary rule doctrine—an analysis that focuses on the type of evidence, the underlying purpose of collecting the evidence, and the manner in which officers collected the evidence.<sup>108</sup> Depending on the nature of the evidence and when it came into the possession of law enforcement, different pieces of evidence raise different questions in exclusionary rule doctrine. Consequently, this Article structures its examination of immigrant policing into three categories that reflect distinct analytical strands and justifications for the admission of immigrant identity evidence. The three categories are: evidence collected *post*-unconstitutional police conduct (e.g., a statement made by the suspect); evidence collected *prior* to unconstitutional police conduct (e.g., a preexisting record in a government database); and evidence that exists *concurrently* with unconstitutional police conduct (e.g., a person's name and date of birth).

#### 1. Acquired Evidence of Identity

Identity evidence collected by law enforcement after an egregious Fourth Amendment violation should not be deemed as administrative in purpose simply because of its eventual use in an administrative immigration proceeding. As explained below, due to the evolution of immigration enforcement, identity evidence today is often collected for an investigative purpose, and as such, that evidence should be subject to suppression under the exclusionary rule in immigration court.

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Rodriguez v. Mukasey, 536 F.3d 1012, 1018–19 (9th Cir. 2008) (finding warrantless, forcible entry into home to be an egregious Fourth Amendment violation).

107. *Cotzoyay*, 725 F.3d at 174.

108. *See generally* Davis v. United States, 131 S. Ct. 2419, 2426–28 (2011) (discussing and applying the exclusionary rule).

Immigration policing historically lay in the hands of federal law enforcement and was conducted in a manner that intuitively seems more administrative in nature. An individual crossing a border, whether on land or via an airport, expects routine questions regarding where he came from, his legal permission to enter, and the purpose of his visit. The questioning of all who enter, the physical location of such questioning, and the use of trained immigration officers to ask these questions contributed to the sense of past immigration policing as a routine form of civil border protection.

Over the past twenty years, however, state and local law enforcement have moved to the front lines of immigration policing, thereby drastically changing the means of enforcing federal immigration law.<sup>109</sup> Local involvement has increased as a result of both formal and informal mechanisms. First, in 1996, Congress authorized state and local police officers to arrest for the federal crime of illegal reentry.<sup>110</sup> Then, following September 11, 2001, formalized agreements for federal–state cooperation in immigration enforcement greatly increased in number.<sup>111</sup> Under agreements known as “287g memorandums,” the federal government delegated local police officers the formal authority to enforce federal immigration law.<sup>112</sup> The federal government also created Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS), an umbrella of programs run by ICE to train and assist local police in conducting immigration enforcement.<sup>113</sup> These programs were born in part from the recognition that “partnerships with state and local law enforcement agencies can leverage ICE’s enforcement capacity.”<sup>114</sup> Additionally, over the last few years, several states have

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109. See Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1130 (2013); Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1579 (2010).

110. See 8 U.S.C. § 1252c(b) (2012); Wishnie, *supra* note 12, at 1098.

111. See Jennifer M. Chacón, *Whose Community Shield?: Examining the Removal of the “Criminal Street Gang Member,”* 2007 U. CHI. LEGAL F. 317, 326 (2007).

112. *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION & CUSTOMS ENF’T, <https://www.ice.gov/factsheets/287g> (last visited Oct. 12, 2016). As of this printing, ICE has thirty-two such agreements with local law enforcement agencies from sixteen states. *Id.*

113. *Id.* The 287g memorandums are one program under ICE ACCESS (Agreements of Cooperation in Communities to Enhance Safety and Security). *Id.*

114. MARC R. ROSENBLUM & WILLIAM A. KANDEL, CONG. RESEARCH SERV., R42057, INTERIOR IMMIGRATION ENFORCEMENT: PROGRAMS TARGETING CRIMINAL ALIENS 28 (2012), <http://www.fas.org/sgp/crs/homesecc/R42057.pdf> (“Partnerships with state and local law enforcement agencies leverage ICE’s enforcement capacity because there are about 150 times more state and local law enforcement officers in the United States than there are ICE agents . . .”).



passed laws requiring local law enforcement to assist in immigration enforcement.<sup>115</sup>

In addition to formal cooperation at the front end of policing, the federal government has also mandated assistance with immigration enforcement at the “back end.” Launched in 2008, Secure Communities (S-Comm) required all local jails to share the fingerprints of those detained with federal immigration officers.<sup>116</sup> Although ICE has discontinued S-Comm,<sup>117</sup> under its replacement program, the Priority Enforcement Program (PEP), local law enforcement and federal immigration authorities will continue to share fingerprints and biometric data.<sup>118</sup> Similarly, the Criminal Alien Program (CAP) works with local and state correctional facilities to identify incarcerated individuals who may be subject to deportation.<sup>119</sup> These information-sharing programs directly connect local police—and those individuals they decide to detain and arrest—to the federal enforcement of civil immigration law.

Even without a formal arrangement, a vast number of local police officers today participate in immigration enforcement to some extent. Under federal law, local police departments may “cooperate . . . in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.”<sup>120</sup> In many localities across the country,

115. Arizona’s S.B. 1070 is perhaps the most well-known of these efforts, and despite the Supreme Court partially striking this statute down, the provision that allows local officers to question the immigration status of those they suspect are in the country illegally remains valid law. *See Arizona v. United States*, 132 S. Ct. 2492, 2507–10 (2012); *see also* UTAH CODE ANN. § 76-9-1003 (West 2015); S.C. CODE ANN. § 17-13-170 (2015).

116. *See Secure Communities: Get the Facts*, U.S. IMMIGRATION & CUSTOMS ENF’T, [http://www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/) (last visited Oct. 12, 2016); *see also* Margaret Hu, *Big Data Blacklisting*, 67 FLA. L. REV. 1735, 1743–44 (2015). S-Comm also included the use of “detainers”—a request by the federal government for the locality to hold the individual in custody until federal officers could pick up the individual. *See* Amelia Fischer, *Secure Communities, Racial Profiling, & Suppression Law in Removal Proceedings*, 19 TEX. HISP. J. L. & POL’Y 63, 66 (2013).

117. Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t. of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf’t. 2 (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_secure\\_communities.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf) (directing the discontinuation of S-Comm).

118. *Id.* at 2–3.

119. *See Criminal Alien Program*, U.S. IMMIGRATION & CUSTOMS ENF’T, <http://www.ice.gov/criminal-alien-program> (last visited Oct. 12, 2016); NAT’L IMMIGRATION PROJECT, PUSHING BACK ON ICE ENFORCEMENT INSIDE LOCAL JAILS 1 (2013), [http://www.ilrc.org/files/documents/cap\\_advocacy\\_guide.pdf](http://www.ilrc.org/files/documents/cap_advocacy_guide.pdf).

120. 8 U.S.C. § 1357(g)(10)(B) (2012); *see also* *United States v. Ovando-Garza*, 752 F.3d 1161, 1164 (8th Cir. 2014) (holding that the officer did not unreasonably prolong the traffic stop because the officer had the authority under § 1357(g)(10) to investigate whether the driver was unlawfully present in the U.S., to communicate with Border Patrol, and to detain the driver until Border Patrol arrived).

local police departments have informal working relationships with the regional ICE or Border Patrol office and often voluntarily, and without express directive, notify immigration authorities after detaining someone who they believe is a noncitizen without legal status.<sup>121</sup> In addition, the federal government provides localities with some financial “reimbursement” for the costs of incarcerating noncitizens.<sup>122</sup> Although the federal government does not require any particular level of cooperation, the fact that it reimburses states for costs they already may incur (such as for correctional officer salary and the costs of detaining a noncitizen with a pending state criminal matter) provides a financial incentive for local officers to inquire about the immigration status of those stopped and detained.<sup>123</sup>

Certainly, the evolution of immigration enforcement is not simply limited to the addition of local actors. Federal immigration officers have also moved from routine patrols at the borders to individualized policing tactics in the interior, including traffic stops and home and workplace raids.<sup>124</sup> But in large part because of the growth of local law enforcement’s participation, the overall nature of immigration policing has changed, and consequently, so too has the factual context in which law enforcement initially learns of an individual’s identity and obtains identity-related evidence. As a result of local law enforcement’s involvement in immigration enforcement, it is now more often state or local police officers, during the course of their day-to-day policing, who

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121. See Anjana Malhotra, *The Immigrant and Miranda*, 66 SMU L. REV. 277, 332 (2013) (presenting data that state and local police referrals increased from 5.4% of all ICE criminal cases in 2004 to 10% by 2009 and that last year, more than 46,000 federal criminal immigration cases were a result of state and local referrals); *id.* at 327 n.387 (listing instances of local law enforcement participating in immigration enforcement); Monica Varsanyi et al., *Immigration Federalism: Which Policy Prevails?*, MIGRATION POL’Y INST. (Oct. 9, 2012), <http://www.migrationpolicy.org/article/immigration-federalism-which-policy-prevails> (giving the results of a nationwide study of local law enforcement agencies and noting that over twenty-seven percent of county sheriffs would check immigration status, call ICE if they encountered a noncitizen during a traffic violation stop, or both).

122. In fiscal year 2013, the State Criminal Alien Assistance Program (SCAAP), a federal program that reimburses localities for the costs of incarcerating noncitizens, distributed over \$213 million to 897 jurisdictions. See Fiscal Year of 2013 SCAAP Award List, BUREAU OF JUST. ASSISTANCE, [https://www.bja.gov/ProgramDetails.aspx?Program\\_ID=86](https://www.bja.gov/ProgramDetails.aspx?Program_ID=86) (select the “Archives” tab, follow the “FY 2013 SCAAP Award List” hyperlink, and download the spreadsheet).

123. See Malhotra, *supra* note 121, at 332–33. The majority of jurisdictions that participate in SCAAP report that they ask all arrestees about their immigration status. *Id.* at 330.

124. See, e.g., *Cotzjoay v. Holder*, 725 F.3d 172, 174 (2d Cir. 2013) (home raid by ICE officers); *Eric Rey Cruz Cruz*, A098 430 020, 2012 WL 3911826, at \*1 (B.I.A. Aug. 22, 2012) (ICE operation targeting gang members at a nightclub).

encounter noncitizens and investigate immigration status and identity.<sup>125</sup>

Envision again the following scenario: A local police officer, driving along a highway, pulls over an individual driving a car. Assume that the traffic stop was an egregious violation of the Fourth Amendment—the officer stopped the driver solely on the basis of his race. After stopping the driver, the officer questions the driver, asking him his name, date of birth, and immigration status. The driver states that he is from El Salvador and is not an U.S. citizen. The officer memorializes these admissions in a police report, which ICE later copies onto a similar report.<sup>126</sup> Ultimately, the driver is placed in removal proceedings, and the government seeks to admit these admissions into evidence.<sup>127</sup>

With respect to the exclusionary rule analysis, courts consider these identity-related admissions evidence acquired *after* the egregious Fourth Amendment violation. Other identity evidence in this category includes a suspect's fingerprints, evidence later obtained from foreign governments (e.g., a birth certificate), and evidence obtained from a search of the suspect's person (e.g., a foreign identification card). In general, the suppression of evidence acquired by the government following unconstitutional police conduct is analyzed according to traditional exclusionary rule principles—the well-established “fruit of the poisonous tree” analysis. But, as stated previously, when identity evidence is at issue, the court then applies the investigative versus administrative standard<sup>128</sup> and must focus on the motive of the officer at the time of the evidence collection.

The collection of identity evidence for an immigration-related investigation does not automatically render the evidence collection administrative in its purpose. Criminal courts have occasionally

125. State and local officers now arrest four times more immigrants referred for removal hearings than federal officers. Jason A. Cade, *Policing the Immigration Police: ICE Prosecutorial Discretion and the Fourth Amendment*, 113 COLUM. L. REV. SIDEBAR 180, 183 (2013), [http://columbialawreview.org/policing-the-immigration-police\\_cade](http://columbialawreview.org/policing-the-immigration-police_cade). See, e.g., Roger Nigel Ramjattan, A087 546 017, 2014 WL 3795454, at \*1 (B.I.A. June 13, 2014) (stating that a New York State trooper pulled over respondent and then called Border Patrol); Efrain Moralez-Palillero, A087 779 440, 2014 WL 3697662, at \*1 (B.I.A. Apr. 30, 2014) (noting that the Camden Police Department arrested the respondent for a traffic violation and then took respondent into custody where DHS interviewed him).

126. A noncitizen's immigration-related statements are often memorialized in a Form I-213 (Record of Deportable/Inadmissible Alien). See Patricia J. Schofield, Note, *Evidence in Deportation Proceedings*, 63 TEX. L. REV. 1537, 1565 (1985). A Form I-213 is the document the immigration enforcement officer fills in with a noncitizen's personal information, immigration record, any statements made, and any further investigation undertaken. *Id.* It is, in general terms, the immigration court version of a police report.

127. For a similar fact pattern, see Jose Alfredo Fonseca-Velasquez, A200 586 281, 2014 WL 1278449, at \*1 (B.I.A. Mar. 10, 2014).

128. See *supra* text accompanying note 89.

recognized that an officer collecting immigrant identity evidence may act with an investigative purpose.<sup>129</sup> For instance, in *United States v. Guevara-Martinez*,<sup>130</sup> two city police officers stopped the defendant, arrested him, and, suspecting he was not in the country legally, informed the federal immigration authorities (at the time called the Immigration and Naturalization Service (INS)).<sup>131</sup> The federal immigration officer arrived the next day at the local jail and fingerprinted Martin Guevara-Martinez.<sup>132</sup> Eventually Guevara-Martinez was indicted for a criminal immigration offense.<sup>133</sup> Following the district court's determination that the initial arrest by the city police officers was unlawful, the Eighth Circuit affirmed the suppression of the fingerprint evidence, in part due to "[t]he absence of evidence that the fingerprinting resulted from routine booking" and the logical inference that the officer took the fingerprints "for the purpose of assisting the INS investigation."<sup>134</sup>

Under current judicial thinking, however, the above analysis of individual officer motive would change if the exclusionary rule question was presented in the context of an administrative removal proceeding. Courts most often define an "investigative" purpose as one in which the police are investigating a criminal offense.<sup>135</sup> But many courts take a leap of logic and conclude that if no criminal charges result from the initial police stop, and only deportation occurs, the underlying police motive could not have been an investigative one.<sup>136</sup>

There is no support, in doctrine or practice, for the notion that the proceeding in which the evidence ultimately appears determines the initial purpose of the evidence collection. First, from a purely common

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129. *See, e.g.*, *United States v. Olivares-Rangel*, 458 F.3d 1104, 1116 (10th Cir. 2006) (remanding to the district court for an evidentiary hearing to determine whether the Border Patrol officer had an investigative motive after an unlawful arrest and subsequent fingerprinting of the defendant); *United States v. Flores-Sandoval*, 422 F.3d 711, 715 (8th Cir. 2005) (affirming the suppression of fingerprints taken in part because police collected them "for the purpose of assisting the [ICE] investigation" (quoting *United States v. Guevara-Martinez*, 262 F.3d 751, 756 (8th Cir. 2001))).

130. 262 F.3d 751 (8th Cir. 2001).

131. *Id.* at 752.

132. *Id.*

133. *Id.* (8 U.S.C. § 1326 violation).

134. *Id.* at 755–57 (stating that the officers "obtained Guevara-Martinez's fingerprints by exploiting his unlawful detention, instead of by means sufficient to have purged the taint of the initial illegality"). At the time of this case, INS was the federal agency responsible for the enforcement of federal immigration law.

135. *See, e.g.*, *United States v. Garcia-Beltran*, 389 F.3d 864, 865 (9th Cir. 2004) (defining investigative purpose as one aimed at connecting the defendant to "alleged criminal activity"); *see also supra* notes 85–86 and accompanying text (elaborating on the definition of an "investigative" purpose).

136. *See supra* note 135 and accompanying text.

sense standpoint, if the legal forum controlled the determination of police motive, then courts would deem all pieces of evidence introduced in a criminal court to have an investigative purpose. Such an analysis, however, would negate the administrative label given to evidence collected during routine booking procedures—a result with no support in current exclusionary rule doctrine. Therefore, it cannot be that all evidence collected after unconstitutional police conduct is collected for an administrative purpose simply because the evidence ultimately appears in an administrative immigration proceeding.

Second, the investigative versus administrative standard is specific in its time frame—the analysis considers the officer’s purpose at the moment of the evidence collection.<sup>137</sup> As a practical matter, it is difficult to argue that the ultimate forum directly corresponds with the officer’s purpose because, in the context of a traffic stop today, the officer likely does not know whether a criminal or civil prosecution will result.<sup>138</sup> At the time of the collection of most identity evidence, it is virtually impossible to know whether the investigation will result in a criminal charge—perhaps for unlawful entry or unlawful reentry after deportation—or merely a civil violation for being unlawfully present in the United States.<sup>139</sup> It is inaccurate, therefore, to assume that a later administrative proceeding necessarily signifies an earlier administrative purpose in evidence collection.

Furthermore, state and local officers often have an investigative purpose at the time of the collection of immigrant identity evidence due to current law governing immigration policing. Generally under federal law, state and local police may not stop or arrest an individual based solely on suspicion of a violation of federal civil immigration law.<sup>140</sup> It is, however, generally acceptable for local authorities to investigate

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137. *Garcia-Beltran*, 389 F.3d at 867 (distinguishing between the admissibility of fingerprint exemplars based on their purpose at the time the prints were taken).

138. *Compare In re Jose Alfredo Fonseca-Velasquez*, A200 586 281, 2014 WL 1278449 (B.I.A. Mar. 10, 2014) (recognizing that the traffic stop led to civil removal proceedings), *with United States v. Rodriguez-Arreola*, 270 F.3d 611, 613 (8th Cir. 2001) (recognizing that the traffic stop led to an immigration-related criminal prosecution).

139. *See Re*, *supra* note 12, at 1939 (noting that civil immigration proceedings often arise from investigations undertaken with an eye toward possible criminal charges).

140. *See Arizona v. United States*, 132 S. Ct. 2492, 2509 (2012); *Assistance by State and Local Police in Apprehending Illegal Aliens*, 20 Op. O.L.C. 26, 26 (1996) (“State and local police lack recognized legal authority to stop and detain an alien solely on suspicion of civil deportability, as opposed to a criminal violation of the immigration laws or other laws.”). The Supreme Court recently reaffirmed that being present in the United States is a civil violation, not a criminal one. *Arizona*, 132 S. Ct. at 2505 (“[I]t is not a crime for a removable alien to remain present in the United States.”). The caveat to this statement is if the locality has a formal agreement with the federal government to assist in civil immigration enforcement. *See supra* note 112 and accompanying text (describing 287(g) agreements).

federal *criminal* immigration offenses in addition to investigating other state and federal crimes.<sup>141</sup> Furthermore, although federal law permits the police to ask questions related to immigration status, these questions must be within the confines of a constitutional detention based on a traffic violation or an investigation of a criminal offense.<sup>142</sup> In short, because there are only limited circumstances in which local police have the legal authority to conduct *civil* immigration enforcement, the police ask many of the questions that elicit immigrant identity evidence as part of an initial investigation into a criminal offense.<sup>143</sup>

A consideration of current immigration policing in practice also supports the conclusion that police no longer only collect immigrant identity evidence during “routine” and administrative procedures.<sup>144</sup> As mentioned earlier, the involvement of state and local law enforcement officers means the very nature of immigration enforcement has changed.<sup>145</sup> The means of policing are often more focused on a specific individual compared to the more standardized practices of border checkpoints and airport screenings. The police now ask immigration-related identity questions during an individually targeted investigative tactic, such as a home raid or traffic stop—tactics more akin to a criminal investigation of a particular person or specific crime.<sup>146</sup> Furthermore, in the context of the immigrant identity evidence at issue here, the individual being questioned will, by the very nature of the prerequisite finding of egregious police conduct, be subject to police conduct that is by definition less standard, routine, and administrative.

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141. See Assistance by State and Local Police in Apprehending Illegal Aliens, *supra* note 140 (“Subject to the provisions of state law, state and local police may constitutionally detain or arrest aliens for violating the criminal provisions of the Immigration and Naturalization Act.”); Lucas Guttentag, *Immigration Preemption and the Limits of State Power: Reflections on Arizona v. United States*, 9 STAN. J. CIV. RTS. & CIV. LIBERTIES 1, 21 (2013) (noting that most courts and scholars accept that local police have the authority to arrest for federal criminal violations); Santos v. Frederick Cty. Bd. of Comm’rs, 725 F.3d 451, 464 (4th Cir. 2013) (same).

142. *Arizona*, 132 S. Ct. at 2509 (noting that an immigration status check within a lawful detention would likely survive preemption); *Muehler v. Mena*, 544 U.S. 93, 101 (2005) (holding that since questions regarding immigration status did not unconstitutionally prolong the detention, there was no additional Fourth Amendment justification required for such questioning).

143. Admittedly, it is difficult to determine whether an investigative or administrative purpose motivates in and of itself any specific identity-related question. But it is this very difficulty that ultimately supports the rejection of the administrative label for all immigrant identity evidence. See *infra* Part III.

144. See *supra* notes 87–88 and accompanying text (defining “administrative” in Fourth Amendment doctrine).

145. See *supra* notes 124–25 and accompanying text.

146. See Kate Linthicum, *Spurned by Local Law Enforcement, ICE Stages Elaborate Immigration Raids*, L.A. TIMES (Aug. 15, 2015, 4:00 AM), <http://www.latimes.com/local/politics/la-me-immigrant-arrests-20150815-story.html>.

One potential complication in exclusionary rule doctrine in this context is the fact that the evidence initially collected by local or state police is handed over (or in the case of identifying information, is repeated) to federal immigration officials. Some courts—but not all—have refused to consider the unlawful conduct of *state* police officers when determining whether the law prevents the *federal* government from using such evidence in an immigration proceeding.<sup>147</sup> These courts reason that any deterrent effect on local police officers from the suppression of evidence in immigration court would be “highly attenuated.”<sup>148</sup> Although outside of the scope of this Article to consider fully, criminal law scholar David Gray and others have critiqued this view as resurrecting the “silver platter” doctrine, a doctrine that has been resoundingly rejected in the criminal context between federal and state actors.<sup>149</sup> In the years following the incorporation of the Fourth Amendment to the states in 1949,<sup>150</sup> it was still permissible for federal officials to introduce evidence in federal court that state police officers illegally seized in violation of the Fourth Amendment.<sup>151</sup> At the time, the Supreme Court reasoned that “it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter.”<sup>152</sup> The Court later repudiated this doctrine in *Elkins v. United States*<sup>153</sup> and acknowledged that the silver platter doctrine incentivized unconstitutional state police conduct.<sup>154</sup> As Professor Gray points out, this exact same reasoning should apply in the context of immigration enforcement today.<sup>155</sup> In light of the close relationship between federal and state officers in immigration policing, an exclusionary rule doctrine

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147. See Alejandro Hernandez-Morales, A200 618 026, 2013 WL 6269374, at \*2 (B.I.A. Nov. 6, 2013) (stating that DHS had no role in the initial unlawful arrest, and therefore the judge must consider whether to hold any evidence obtained by DHS as fruit of the poisonous tree). *But see* Jairo Ferino Sanchez, A094 216 521, 2014 WL 3889481, at \*1 (B.I.A. July 11, 2014) (holding that in determining whether to suppress evidence ultimately collected by DHS officers, the immigration judge must first assess the constitutionality of the initial seizure by local police as “the subsequent immigration questioning flows directly from the respondent’s initial stop and arrest”).

148. *Lopez-Gabriel v. Holder*, 653 F.3d 683, 686 (8th Cir. 2011).

149. See Gray, *supra* note 12, at 15, 35; see also *Elkins v. United States*, 364 U.S. 206, 208–14 (1960) (discussing the history of the exclusionary rule and the silver platter doctrine).

150. *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949).

151. See Gray, *supra* note 12, at 11–13. Federal officials could use this illegally seized evidence so long as they did not direct, or have knowledge of, the state officers’ actions. See *id.* at 11.

152. *Lustig v. United States*, 338 U.S. 74, 78–79 (1949).

153. 364 U.S. 206 (1960).

154. *Id.* at 217, 221–24; see also *Mapp v. Ohio*, 367 U.S. 643, 657 (1961) (“[N]o man is to be convicted on unconstitutional evidence.”).

155. See Gray, *supra* note 12, at 36.

in immigration court that would automatically permit federal officials to introduce evidence illegally seized by state and local officers undermines the primary deterrent function of the exclusionary rule and encourages the disregard of the Fourth Amendment by both federal and local law enforcement.<sup>156</sup>

In sum, the collection of identity evidence by local police officers after an egregious Fourth Amendment violation should not automatically be deemed administrative in purpose simply because of its eventual use in a deportation proceeding. Rather, police officers may collect immigrant identity evidence with an investigative purpose, and, if so motivated, the evidence should be subject to suppression under application of the exclusionary rule, even when introduced in immigration court.

## 2. Preexisting Evidence of Identity

Identity evidence introduced into immigration proceedings also falls into a second evidentiary category of analysis: evidence that is lawfully in the hands of the government prior to the unconstitutional police conduct. This is often referred to in exclusionary rule jurisprudence as *preexisting* evidence.<sup>157</sup> In today's world of law enforcement, and particularly in the world of immigration enforcement, this evidence is most often in the form of a database record. For example, a database record containing a person's name, date of birth, country of origin, and immigration status may already be in the government's possession because she has been previously arrested, sought a travel visa at a foreign consular office, or applied for a state identification card. Once the individual faces deportation, the government seeks to introduce this preexisting database record in the immigration proceeding.<sup>158</sup>

Over the past twenty years, the federal government has established and expanded databases that gather domestic and international data on millions of individuals.<sup>159</sup> The main identity-related database of the

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156. Professor Gray advances his critique of the creation of a "contemporary silver platter doctrine" based on the lack of a generally applicable exclusionary rule in immigration proceedings. *See id.* at 31–33.

157. Sophia Lin Lakin, *Argumentative Preview Exclusionary Rule and Identity-Related Documents*, SCOTUS BLOG (Mar. 15, 2011), <http://www.scotusblog.com/2011/03/argument-previous-does-the-exclusionary-rule-apply-to-pre-existing-identity-related-governmental-documents/>.

158. *See, e.g., In re David Antonio Lara-Torres*, A094 218 294, 2014 WL 1120165, at \*2 (B.I.A. Jan. 28, 2014) (describing the government's evidence including records from the Maryland Motor Vehicle Administration).

159. The databases discussed above are not a complete list. In addition to the ones discussed above, other national databases include CODIS (the Combined DNA Index System) and E-Verify (a federal employment eligibility verification system). There are over 2000 databases maintained by federal agencies and departments. *See Erin Murphy, Databases, Doctrine & Constitutional*



Federal Bureau of Investigation (FBI), the National Crime Information Center (NCIC), contains millions of criminal history records from state criminal justice systems, including “rap sheets,” missing person reports, and protection orders.<sup>160</sup> In 2001, Congress authorized the expansion of NCIC to include civil immigration records.<sup>161</sup> The Department of Homeland Security also maintains its own database, the Automated Biometric Identification System (IDENT), which contains biographic and biometric records on over 148 million individuals, including individuals who have had contact with their agency or another immigration-related office such as a consulate or embassy.<sup>162</sup>

The expansion of data collection has not been limited to immigration and criminal records alone. The FBI maintains the Next Generation Identification system (NGI), a database of fingerprints that includes not only prints of individuals who have passed through the criminal justice system but also “civil fingerprints”—fingerprints of individuals who have served in the military or have worked for the federal government.<sup>163</sup> The FBI is currently expanding its database system to include data gathered from commercial databases, social networking platforms, and private employers.<sup>164</sup> Federal, state, and local law enforcement agencies now work together to gather records from a variety of private and public sources including agriculture, banking, retail, real estate, health services, and motor vehicle records.<sup>165</sup>

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*Criminal Procedure*, 37 FORDHAM URB. L.J. 803, 809 (2010). For a history of the rise of the use of databases in the criminal justice system, see *id.* at 805–10.

160. See Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105, 1124 (2013); Brief of Amici Curiae Electronic Privacy Information Center and Legal Scholars and Technical Experts in Support of the Petitioner at 8, *Tolentino v. New York*, 131 S. Ct. 1387 (2011) (No. 09-11556) [hereinafter EPIC *Tolentino* Brief].

161. Kalhan, *supra* note 160, at 1124–25.

162. *Id.* at 1127. IDENT contains digital fingerprints, iris scans, facial images, photographs, and biographic information. See U.S. DEP’T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE AUTOMATED BIOMETRIC IDENTIFICATION SYSTEM (IDENT) 2 (2012), [www.dhs.gov/sites/default/files/publications/privacy/PIAs/privacy\\_pia\\_usvisit\\_ident\\_appendixj\\_jan2013.pdf](http://www.dhs.gov/sites/default/files/publications/privacy/PIAs/privacy_pia_usvisit_ident_appendixj_jan2013.pdf).

163. FED. BUREAU INVESTIGATION, NEXT GENERATION IDENTIFICATION (NGI) MONTHLY FACT SHEET (2016), <https://www.fbi.gov/file-repository/ngi-monthly-fact-sheet/view>. The “civil file” contains over 50 million individuals. *Id.*

164. Kalhan, *supra* note 160, at 1133.

165. See EPIC *Tolentino* Brief, *supra* note 160, at 13–17 (describing the development of national and local “fusion centers” that will collect data from a wide variety of organizations and government offices as well as provide such data to state and local law enforcement); see also *State and Major Urban Area Fusion Centers*, U.S. DEP’T HOMELAND SECURITY, <http://www.dhs.gov/state-and-major-urban-area-fusion-centers> (last visited Oct. 12, 2016) (providing general information on state and major urban area fusion centers).

The collection of personal data has grown in tandem with increased accessibility of these federal databases to state and local law enforcement. For instance, the Law Enforcement Support Center (LESC), formed in 1994, is a federal clearinghouse that local police officers can call twenty-four hours a day to run a suspect through international and national databases, including IDENT and NCIC.<sup>166</sup> A database inquiry is a routine part of the booking process and, due to advances in technology, may also occur even earlier at the initial traffic stop or moment of detention. Products for officers to carry in their hands and in their patrol cars, such as mobile fingerprint devices, iris scanners, and facial recognition cameras, are now readily available and linked to state and federal databases.<sup>167</sup> In short, twenty-four hours a day, from essentially any location and before any arrest, the police have access to a vast amount of personal and identifying information.

The growth of database policing has changed the very nature of immigration policing. Today's immigration enforcement regime is, in the words of immigration scholar Anil Kalhan, one of "automated immigration policing."<sup>168</sup> Local police access LESL over a million times per year, and in fiscal year 2013, local law enforcement contacted deportation specialists at the clearinghouse over 150,000 times.<sup>169</sup> NCIC, which contains civil immigration records and more than 300,000 records from ICE, conducts an average of 12 million transactions per day with law enforcement.<sup>170</sup>

Moreover, the increased involvement of state and local police in federal immigration enforcement, combined with the rise of more-accessible and expansive database systems, puts the search for immigration-related identity evidence at the front lines of local policing.<sup>171</sup> Determining an individual's immigration status or country of origin is no longer an investigation only conducted later in time, at an administrative hearing or by a federal immigration officer. Rather, in immigration policing today, a local police officer often collects such identifying information through a quick phone call or computer search

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166. Kalhan, *supra* note 160, at 1117; *see also* Murphy, *supra* note 159, at 808 (discussing the rise of searching and sharing database functions post-1999).

167. *See* Kalhan, *supra* note 160, at 1133; EPIC *Tolentino* Brief, *supra* note 160, at 6–7.

168. Kalhan, *supra* note 160, at 1109 (stating that "automated immigration policing . . . renders immigration status visible, accessible, . . . and subject to routine monitoring and screening by a wide range of public and private actors").

169. *Law Enforcement Support Center*, U.S. DEP'T HOMELAND SECURITY, <http://www.ice.gov/lesc/> (last visited Oct. 12, 2016).

170. *Id.*; *National Crime Enforcement Center*, FED. BUREAU INVESTIGATION, <http://www.fbi.gov/services/cjis/ncic> (last visited Feb. 14, 2016).

171. Databases also play a significant role in contemporary policing more generally. *See* Murphy, *supra* note 159, at 836.

during a traffic stop. According to the LESC website, “The primary users of the center are state and local law enforcement officers seeking information regarding aliens encountered in the course of their daily enforcement activities.”<sup>172</sup>

Determining the exclusionary rule’s application to evidence acquired *after* unconstitutional police conduct typically focuses on questions of taint and attenuation. But in the case of preexisting government records, because the government has the information stored in a database prior to the unreasonable search or seizure, courts often find that the “independent source exception” applies to the records’ suppression.<sup>173</sup> In general, the exclusionary rule “does not reach backward to taint information that was in official hands prior to any illegality.”<sup>174</sup>

Taken at face value, the idea that the exclusionary rule can never reach backward would appear to categorically protect any preexisting evidence from the application of the exclusionary rule. Courts would therefore always deem a government database record “independent” and not subject to suppression. But the rationale underlying why a particular piece of evidence is deemed sufficiently independent or already in the government’s possession under exclusionary rule doctrine, as developed in the criminal context, does not justify this same conclusion when analyzing the role of the government database record in immigration policing today.

Although the database record is technically already in the government’s hands writ large, the record is not, in any meaningful sense, knowledge that is already part of the police investigation. Exclusionary rule doctrine has always placed more weight on the officer’s actual knowledge, as opposed to his potential knowledge, at the time of the Fourth Amendment violation.<sup>175</sup> This jurisprudence also focuses on the

172. *Law Enforcement Support Center*, *supra* note 169.

173. *See, e.g., In re Sanchez*, A076 359 028, 2014 WL 3697757, at \*2 (B.I.A. May 27, 2014) (stating that the respondent’s application for Family Unity Benefits and Employment Authorization was independent evidence of alienage); *In re Cruz*, A098 430 020, 2012 WL 3911826, at \*4 n.2 (B.I.A. Aug. 22, 2012) (agreeing that the respondent’s DMV record was independent evidence); *see also Fischer*, *supra* note 116, at 79 (documenting cases in which the government argued for the admission of the proof of alienage already in the government’s possession based on the independent source exception). Of course, this reasoning does not appear only in immigration cases. *See, e.g., People v. Tolentino*, 926 N.E.2d 1212, 1215 (N.Y. 2010) (affirming the lower court holding that DMV records were admissible in part because they were “public records already in the possession of authorities”).

174. *United States v. Crews*, 445 U.S. 463, 475 (1980).

175. In *Crews*, the Supreme Court held that the defendant’s photograph taken by the police following his unlawful arrest was not subject to suppression because the police knew the defendant’s identity prior to the unlawful arrest. 445 U.S. at 475. The Court emphasized that, prior to the unlawful detention, the police were already actively investigating the defendant as a suspect in the very crimes for which he was later unlawfully detained. *Id.* The Court explicitly did not

knowledge of the individual officers themselves, rather than allowing a conception of “law enforcement” that encompasses any and all government officials.<sup>176</sup> In many immigration-related investigations today, the local police officer has no actual knowledge of the suspect’s identity or the database record at the time of his unlawful conduct.<sup>177</sup> Moreover, the officer would never have searched for the database record without first gaining the unlawful knowledge of, at the very least, a person’s name and date of birth.

In addition, viewing all database evidence as sufficiently in “official hands” so as to establish independence would provide perverse incentives for local officers to violate the Fourth Amendment. It is not hard to envision a modified “silver platter doctrine”<sup>178</sup> developing—a local officer purposefully commits an egregious violation of the Fourth Amendment, stopping a person solely on the basis of his race, knowing that although a court may suppress any evidence collected after the stop, the vast world of government database records would remain admissible. Considering the continued expansion of such databases,<sup>179</sup> the enticement to violate the Fourth Amendment (given the ever-increasing likelihood of discovering an individual in at least one database) will only grow over time. Thus, a doctrine that considered any government database record part of law enforcement’s knowledge at the time of the unconstitutional conduct loses the important focus on whether the officer exploits the initial illegal conduct to uncover evidence and, more fundamentally, weakens the deterrent function of the exclusionary rule itself.

Assuming for the sake of argument that a court deems the database record not in law enforcement’s possession, a court might still view the search for the database record as sufficiently independent of, or attenuated from, the unconstitutional police conduct. But this contention falls short as well when analyzing the underlying logic of the independent source exception. As established in *Segura v. United States*<sup>180</sup> and

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address a case in which “routine investigatory procedures would eventually have led the police to discover respondent’s culpability.” *Id.* at 475 n.22. In *Hudson v. Michigan*, the Court, in holding that a violation of the knock and announce requirement did not merit applying the exclusionary rule, noted that the police had a lawful search warrant at the time of the unlawful entry. 547 U.S. 586, 592 (2006). Similarly, in *New York v. Harris*, the Court held that the exclusionary rule did not apply to a suspect’s statement made at the police station following an unlawful arrest in his home in part because the officers had probable cause to arrest the suspect at the time of his unlawful arrest. 495 U.S. 14, 18 (1990).

176. *See supra* note 175.

177. *See Gray, supra* note 12, at 23–24.

178. *See supra* notes 149–55 (discussing the silver platter doctrine).

179. *See supra* text accompanying notes 155–65.

180. 468 U.S. 796 (1984).

*Murray v. United States*,<sup>181</sup> there are two general fact patterns considered to be within the scope of the independent source doctrine.<sup>182</sup> In *Segura*, the police unlawfully searched the defendant's apartment but waited in the apartment until they obtained a valid search warrant the next day.<sup>183</sup> The Supreme Court held that the evidence newly found during the execution of the warrant was admissible because the police discovered it based on an "independent source."<sup>184</sup> The *Segura* fact pattern can be described generally as follows: knowledge learned from the unlawful search (facts *X* and *Y*) is inadmissible, but knowledge gained from the lawful search (fact *Z*) is independently obtained and therefore admissible.<sup>185</sup> In *Murray*, the police unlawfully entered a warehouse and observed wrapped bundles, which they suspected contained marijuana.<sup>186</sup> The police then applied for a search warrant, without mentioning their prior unlawful entry or the observation of these suspicious bundles.<sup>187</sup> The police returned to the warehouse with the valid warrant and seized what turned out to be large amounts of marijuana.<sup>188</sup> In this fact pattern, although the police initially saw the wrapped bundles (fact *Z*) unlawfully, because they were able to obtain the same knowledge by independent means—the lawful search warrant—fact *Z* then became admissible.<sup>189</sup>

Despite the different fact patterns, in both cases there was independent lawful knowledge that led to the learning of fact *Z*, thus rendering fact *Z* admissible. In *Segura*, the warrant was based on information completely separate from the facts learned from the unlawful search.<sup>190</sup> In *Murray*, although the police first saw the bundles of marijuana unlawfully, they apparently had sufficient independent and previously held information that justified the obtaining of a warrant.<sup>191</sup> Indeed, the *Murray* Court noted that the analysis would have changed "if the agents' decision to

181. 487 U.S. 533 (1988).

182. These cases are the preeminent cases on the independent source doctrine. See RONALD JAY ALLEN ET AL., *COMPREHENSIVE CRIMINAL PROCEDURE* 694 (3d ed. 2011); STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE* 572 (9th ed. 2010).

183. *Segura*, 468 U.S. at 798, 801.

184. *Id.* at 814. The government conceded, and the Court agreed, that evidence initially observed during the unlawful search was inadmissible. *Id.* at 798.

185. *Murray*, 487 U.S. at 538.

186. *Id.* at 535.

187. *Id.* at 535–36.

188. *Id.* at 536.

189. *Id.* at 538.

190. 468 U.S. at 814 ("None of the information on which the warrant was secured was derived from or related in any way to the initial entry into petitioners' apartment; the information came from sources wholly unconnected with the entry and was known to the agents well before the initial entry.")

191. 487 U.S. at 542–44 (remanding to the lower courts to determine whether the warrant-authorized search was an independent source).

seek the warrant was prompted by what they had seen during the initial entry.”<sup>192</sup> Thus, under current exclusionary rule doctrine, the unlawful knowledge gained must play no part in the justification for the ultimate collection of the evidence.

In immigration policing today, there is often no independent knowledge that justifies the obtaining of the government database record. An analysis of the fact pattern of today’s prototypical egregious police conduct (i.e., a race-based traffic stop) and the subsequent database search does not fit under either conception of the independent source exception. In fact, it is exactly the situation the *Murray* Court proscribed: the officer’s *unlawful* knowledge—illegally stopping the car and learning the driver’s identity—prompts him to search and collect the database record.<sup>193</sup> Stated another way, in the case of this type of traffic stop, no independent facts provide a basis for the officer to search the database and acquire knowledge of the database record (fact Z). The only point of knowledge of the suspect’s identity is the unlawful conduct (fact X). There is no independent or untainted source of evidence that justifies the database search for evidence. This conclusion does not put the police in a “worse” place than they were prior to the unlawful stop—the database records exist for future use following lawful police conduct.<sup>194</sup>

Having suggested that the independent source exception should not automatically apply to preexisting government database records collected after egregious Fourth Amendment violations, the question remains whether the database record constitutes identity evidence that should be subject to the exclusionary rule. In this respect, the analysis is the same as that to which all identity evidence is now subject: did the police collect the evidence, that is, did they search the database for an investigative or administrative purpose?

Today, a database search is a ubiquitous tool of policing. There may be cases in which the search for preexisting database records occurs after the unconstitutional conduct but was undertaken for an administrative purpose (e.g., a routine database search for outstanding warrants conducted during booking). However, there are also clear instances in which the police search a database to investigate a particular crime. In the context of an egregious Fourth Amendment violation leading to a civil immigration proceeding, the database record containing identity evidence is often collected with an investigative purpose.<sup>195</sup> Return again to this

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192. *Id.* at 542–43 (“[W]e can be absolutely certain that the warrantless entry in no way contributed in the slightest either to the issuance of a warrant or to the discovery of the evidence during the lawful search that occurred pursuant to the warrant.” (quoting *United States v. Moscatiello*, 771 F.2d 589, 603 (1st Cir. 1985))).

193. *Id.* at 536–37.

194. *Id.* at 537.

195. *See supra* notes 129–34 and accompanying text.

factual scenario: a local law enforcement officer, without legal authority to do so, stops an individual and eventually turns that individual over to ICE for removal. Prior to the unlawful arrest, the individual was not known to the police, or at the very least, was not the focus of the police's lawful and knowing attention. In this instance, when the police conduct the database search, their motive is an investigative one—it is specifically to collect identity evidence to potentially connect this individual to an immigration-related criminal offense. As such, it remains tainted by the egregious constitutional violation and should be suppressed under operation of the exclusionary rule.

In the immigration context, the administrative need to accurately identify an individual and the investigative purpose in connecting an individual to an immigration-related offense collide. Although evidence collected for both purposes may be suppressed under current exclusionary rule doctrine,<sup>196</sup> the conceptual difficulty in determining, or disaggregating, the purpose of the immigration-related database search underscores the fact that the terms “investigative” and “administrative” are no longer helpful and may be misleading in guiding the suppression outcome in immigration court.<sup>197</sup>

### 3. Evidence of Identity

A third form of identity evidence introduced in removal proceedings is the noncitizen's name and date of birth. Although a person's name and date of birth can sometimes be considered evidence acquired after the unconstitutional police conduct, and sometimes thought of as evidence already lawfully in the government's possession, questions surrounding the suppression of a person's name and date of birth occupy a somewhat unique position in exclusionary rule jurisprudence.

Consider again the hypothetical: after pulling over a driver on the basis of his race, the police officer asks the driver his name and date of birth. After the driver also admits he was born in Mexico and does not have legal permission to be in the United States, the officer calls ICE, and the individual is eventually placed in removal proceedings. Imagine now that the immigration judge has suppressed the driver's statements regarding his country of origin and immigration status. The judge has also ruled that any database records that the government gained using knowledge of the driver's country of origin are inadmissible. But the judge holds that the driver's name and date of birth are not subject to the exclusionary rule. As a result, if the government can demonstrate that its evidence was collected only on the basis of knowing the driver's name

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196. See *infra* note 251.

197. See *infra* Part III (suggesting that courts discard these labels in the immigration context).

and date of birth, then such evidence would be admissible.

This scenario is a realistic one. Both “can be suppressed” jurisdictions and “can never be suppressed” jurisdictions have held that an individual’s name and date of birth are not suppressible under the exclusionary rule.<sup>198</sup> This exemption is grounded, at least in part, in the jurisdictional principle that a Fourth Amendment violation does not divest a court of jurisdiction over a defendant.<sup>199</sup> As explained recently by the Oregon Supreme Court,

That principle has unavoidable evidentiary consequences for the application of the exclusionary rule: An individual cannot escape a tribunal’s power over his or her “body” . . . despite being subject to an illegal seizure; in that respect, the person’s “identity” is not subject to suppression on a purely practical level.<sup>200</sup>

Using this line of reasoning, courts have held that, like one’s body, an individual’s name and date of birth are part of one’s “identity” necessary for establishing jurisdiction and therefore are categorically exempt from the exclusionary rule remedy.<sup>201</sup>

The categorical removal of a person’s name and date of birth from the suppression remedy has important evidentiary outcomes. According to this line of thinking, evidence collected as a result of knowing an individual’s name and date of birth is gathered “independently” since it was found only by using evidence that is not subject to suppression.<sup>202</sup> Thus, the categorical exemption of a person’s name and date of birth

198. *Compare* Pretzantzin v. Holder, 736 F.3d 641, 650 (2d Cir. 2013) (holding that although identity evidence is suppressible, name and date of birth are jurisdictional identity evidence which may not be), *with* United States v. Navarro-Diaz, 420 F.3d 581, 585, 588 (6th Cir. 2005) (holding that identity evidence is not suppressible in a case in which the defendant sought to suppress his name and date of birth).

199. *See supra* text accompanying note 66 (discussing the *Ker-Frisbie* doctrine). This is a narrow doctrinal justification for holding that a court cannot suppress a name and date of birth. A broader justification would simply be that no identity evidence, including a name and date of birth, is suppressible under the exclusionary rule.

200. *State v. Bailey*, 338 P.3d 702, 712 (Or. 2014) (en banc); *see also* Pretzantzin, 736 F.3d at 650 (“*Lopez-Mendoza’s* jurisdictional rule has unavoidable, practical evidentiary consequences.”).

201. *See supra* note 198.

202. *See, e.g.,* Pretzantzin, 736 F.3d at 646 (“In the instant case, the BIA did not reach the question of whether there was an egregious violation of the Fourth Amendment, but instead predicated its reversal of the IJ’s grant of suppression on a finding that Petitioners’ birth certificates and [the] arrest records were independently obtained through the use of only their names.”); *see also* Fischer, *supra* note 116, at 81 (noting that ICE attorneys often successfully argue that the government independently obtained the evidence by using the respondent’s biographical data).



renders most database evidence not subject to the exclusionary rule.<sup>203</sup> In addition, a name and date of birth may enable the government to collect other forms of evidence, such as a foreign birth certificate or consular identification card.<sup>204</sup>

The legal conclusion that a name and date of birth are pieces of identity evidence that categorically cannot be suppressed conflates information that has a *jurisdictional* function with information that has an *evidentiary* function. A name and date of birth, along with one's body, certainly have a jurisdictional function. A name and date of birth ensure that a legal proceeding subjects the correct individual to possible legal sanction.<sup>205</sup> Under the *Ker-Frisbie* doctrine, the exclusionary rule may not serve to strip a court of jurisdiction over the defendant.<sup>206</sup> In this respect, a name and date of birth cannot be suppressed if the purpose of suppression is to render the proceeding unlawful in and of itself.

But ending the analysis at this point ignores the possibility that a name and date of birth serve a separate evidentiary function. In a criminal case, the identification of the defendant as the perpetrator of the charged crime is always an element that the prosecution must prove beyond a reasonable doubt.<sup>207</sup> "Identity" as used in the context of evidence in a criminal case refers to proof that the individual standing before the judge or jury is the individual who committed the alleged crime.<sup>208</sup> Given the nature of most crimes, a suspect's name and date of birth are not typically necessary components of proving identity in a criminal case. This proof is more often garnered through an eyewitness, a suspect's confession, or fingerprint evidence.<sup>209</sup> If contested in a motion to suppress, this evidence

203. See, e.g., *Reyes-Basurto v. Holder*, 477 F. App'x 788, 789 (2d Cir. 2012) (finding suppression of database records not warranted in part due to their discovery on the basis of the respondent's name, which is not suppressible).

204. See *Pretzantzin*, 736 F.3d at 645 ("Petitioners' birth certificates were obtained . . . using Petitioners' incompressible identities . . .").

205. In actuality, a court does not legally require a name for it to have personal jurisdiction over a defendant. Under the Federal Rules of Criminal Procedure, a court does not require a name for an arrest warrant so long as there is a sufficient description to identify the defendant. See FED. R. CRIM. P. 4(b)(1)(A).

206. See *supra* note 66.

207. See, e.g., MODEL CRIMINAL JURY INSTRUCTIONS FOR THE THIRD CIRCUIT § 4.15 (2015), <http://www.ca3.uscourts.gov/sites/ca3/files/2014%20Chapter%204%20final.pdf>; STATE OF CONN.: JUDICIAL BRANCH, CRIMINAL JURY INSTRUCTIONS § 2.6-4 (2015), <http://www.jud.ct.gov/ji/criminal/part2/2.6-4.htm>.

208. See *id.*

209. See, e.g., *United States v. Carey*, 470 F.2d 469, 472 (D.C. Cir. 1972) (discussing the sufficiency of fingerprint evidence to prove that the defendant was the individual who committed the charged rape offense). There are cases, of course, in which the name of the criminal defendant does matter for proof of the alleged crime. See, e.g., *People v. Tolentino*, 926 N.E.2d 1212, 1213–

of identity is subject to the traditional exclusionary rule analysis, that is, “fruit of the poisonous” tree principles and, if applicable, the investigative versus administrative purpose standard.<sup>210</sup> Changing the *type* of evidentiary proof of identity—evidence that is in the form of a name and date of birth—does not change the underlying analysis. Evidence of identity serves an evidentiary function, in addition to having a jurisdictional function, and is therefore also subject to an “evidentiary” analysis under the exclusionary rule.

Further support for the argument that a piece of evidence can have both a jurisdictional and evidentiary function (and therefore be subject to two different analyses) exists in the role of proof of injury in civil proceedings. A plaintiff must produce evidence of an injury caused by the defendant’s conduct to have standing to bring a case in civil court.<sup>211</sup> This information has a *jurisdictional* function because the standing doctrine functions as a limit on the court’s exercise of jurisdiction.<sup>212</sup> Proof of injury also has a separate *evidentiary* function in a plaintiff’s case-in-chief and request for damages.<sup>213</sup> The fact that the evidence of injury may be the same or overlapping does not negate the fact that there are distinct doctrinal inquiries guiding the court’s consideration of the evidence in each aspect of the case.<sup>214</sup>

In immigration proceedings, a name and date of birth serve both a jurisdictional function and an evidentiary one. Like in a criminal case, the name and date of birth enable the court to accurately impose personal jurisdiction over the noncitizen. But in immigration cases, proof of the noncitizen’s name and date of birth are also important evidence in the government’s case. To deport a person from the United States, the government must prove who the person is and that she is not a U.S. citizen.<sup>215</sup> Significantly, these two functions of a name and date of birth

14 (N.Y. 2010) (noting that the defendant’s name was necessary to connect him to DMV database records demonstrating his legal guilt of the offense of unlicensed operation of a vehicle).

210. *See, e.g.*, *United States v. Gifford*, 549 F. Supp. 206, 208 (N.D. Ill. 1982) (analyzing whether evidence identifying the defendant as the perpetrator of the mail fraud scheme was “so tainted by the unlawful arrest as to be fruit of the poisonous tree . . .”).

211. *See Allen v. Wright*, 468 U.S. 737, 751 (1984), *abrogated on other grounds by* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014).

212. *See id.* at 750–51.

213. *See* RESTATEMENT (SECOND) OF TORTS § 902 (AM. LAW INST. 1979).

214. A similar construct also exists in DNA evidence jurisprudence. In *Policing Identity*, Professor Wayne Logan discusses the Third Circuit’s recognition that there are two components to a person’s identity: who a person is (his name and date of birth) and what the person has done. *See Logan, supra* note 16, at 1583 (discussing *United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011) (en banc)). Correspondingly, it is possible to view DNA evidence as having two functions—to verify identity and to aid in the investigation of past and future crime—which may require separate and distinct doctrinal analyses. *Id.*

215. *See case cited supra* note 1 and accompanying text.

are *always* present in immigration proceedings. In every single removal case, the government must establish jurisdiction, and the government's case will require the introduction of identity evidence.<sup>216</sup> The Second Circuit's contrasting terms of "identity" and "alienage" are helpful constructs to distinguish these two functions of a name and date of birth in immigration proceedings.<sup>217</sup> The label "identity" can signify facts needed for jurisdictional purposes, and the term "alienage" can refer to facts introduced to meet the government's burden of proof for evidentiary purposes.<sup>218</sup> Using these terms renders more apparent how particular facts (i.e., a name and date of birth) might be in both categories, yet treated differently for exclusionary rule purposes. An individual in a removal proceeding may not suppress his person or "identity" but may seek to suppress evidence of "alienage"—evidence related to identity, including one's name and date of birth—gathered as a result of the unlawful arrest.<sup>219</sup>

Recognizing the evidentiary function of a name and date of birth, in addition to their jurisdictional function, has significant consequences. Although the name and date of birth would still be admissible to properly establish jurisdiction over the defendant, acknowledging the separate and distinct evidentiary function of a name and date of birth would, correspondingly, require a separate and distinct evidentiary analysis of that evidence *and* the evidence collected on the basis of that knowledge. Thus, evidence collected based on police knowledge of the name and date of birth, such as a birth certificate or database record, would be subject to the traditional exclusionary rule analysis of taint and attenuation,<sup>220</sup> and would not fall outside the reach of the exclusionary rule remedy.<sup>221</sup>

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216. Removal proceedings comprise over ninety-seven percent of immigration court proceedings. See Eagly & Shafer, *supra* note 14, at 12.

217. In *Pretzantzin v. Holder*, the Second Circuit used the term "identity" to refer to identity evidence that is not suppressible under the exclusionary rule. 736 F.3d 641, 650 (2d Cir. 2013). The court used the contrasting term "alienage" to connote identity-related evidence that would be suppressible in a removal proceeding but states that "where identity ends and alienage begins" is a difficult question. *Id.* at 650–51. The BIA has also made reference to this framework, noting that the "identity of an alien (as distinguished from alienage) is not suppressible . . . ." *In re Sandoval*, 17 I. & N. Dec. 70, 79 (B.I.A. 1970).

218. See *Pretzantzin*, 736 F.3d at 644.

219. See *id.* (describing that the petitioners' did not deny "they were the individuals named in the Notices to Appear" but sought to suppress evidence of alienage the government "obtained as a consequence of the nighttime, warrantless raid of their home . . .").

220. See *supra* note 56 and accompanying text.

221. Exempting the name, date of birth, and all evidence collected using that information implicitly encourages officers to make assumptions based on ethnicity and to guess an individual's country of origin based on a name, appearance, and language. This has the potential to introduce nonsensical and troublesome results into the exclusionary rule jurisprudence. Would people from particular places fare worse under such a regime? Would a common name in a country be more

The current approach to physical evidence in the criminal context bolsters this conclusion. A person's body is not suppressible as it relates to its jurisdictional function.<sup>222</sup> But that does not render all evidence stemming from the body as automatically "independent" in an evidentiary analysis. If that were true, fingerprints, hair fibers, and even a defendant's DNA would be categorically exempt from the exclusionary rule—a result contrary to current doctrine. Rather, such evidence is subject to the traditional exclusionary rule analysis: was the evidence obtained "'by exploitation' of the primary illegality instead of 'by means sufficiently distinguishable to be purged of the primary taint'?"<sup>223</sup> The fact that the link between the obtained evidence and the unlawful arrest is the suspect's body—a piece of evidence that for jurisdictional purposes is exempt from the exclusionary rule—does not change the chain of evidentiary analysis of which the suspect's body is a part.

In sum, in an immigration proceeding, a name and date of birth serve two separate and distinct functions. With respect to its evidentiary function, the court should apply "the normal and generally applicable Fourth Amendment exclusionary rule to determine whether challenged identity-related evidence should be excluded under the circumstances present in the particular case."<sup>224</sup> In other words, under current exclusionary rule doctrine, the court must determine whether officers collected the noncitizen's name and date of birth for an investigative or administrative purpose.<sup>225</sup>

In applying the investigative versus administrative standard to the collection of a name and date of birth in the context of immigration enforcement today, it is necessary to first discuss the policing act of "identification." Some courts equate the law enforcement need to identify the individual before them with a routine act with an administrative

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difficult for the police than a unique one? Would this lead to the policing of particular neighborhoods and locations? The potential for racial profiling should not be ignored when considering the exemption of a name and date of birth from the suppression remedy. *Cf.* *Orhorhaghe v. INS*, 38 F.3d 488, 497 (9th Cir. 1994) (holding that "Orhorhaghe's 'Nigerian-sounding name' is clearly insufficient to justify a seizure" and that "one cannot rationally or reliably predict whether an individual is an illegal alien based on the sound of his name").

222. *Lopez-Mendoza*, 468 U.S. at 1039 ("The 'body' . . . is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred."); *Pretzantzin*, 736 F.3d at 650 (stating that "an individual cannot escape a tribunal's power over his 'body' despite being subject to an illegal seizure").

223. *United States v. Guevara-Martinez*, 262 F.3d 751, 755 (8th Cir. 2001) (quoting *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)).

224. *United States v. Olivares-Rangel*, 458 F.3d 1104, 1112 (10th Cir. 2006).

225. *But see infra* Part III (arguing for stronger suppression protections for identity evidence in immigration court).

purpose.<sup>226</sup> For instance, the Ninth Circuit contrasts evidence taken for an “investigatory purpose” from evidence collected “solely for identification purposes.”<sup>227</sup> Similarly, the Tenth Circuit has held that “fingerprints administratively taken in conjunction with an arrest for the purpose of simply ascertaining or confirming the identity of the person arrested . . . are sufficiently unrelated to the unlawful arrest that they are not suppressible.”<sup>228</sup> But assuming that the purpose of identification is always administrative in nature confuses the important differences between “identity verification and investigation.”<sup>229</sup> The identification of individuals through routine booking procedures is identity verification; it is to ensure the police have accurately identified the individual in custody.<sup>230</sup> This function of identification contrasts with the function at work in identity investigation. Return to the seminal case of *Davis v. Mississippi*. In *Davis*, the police, following an unlawful arrest, collected the defendant’s fingerprints to determine whether he was the individual who committed the alleged rape.<sup>231</sup> This act of identification was investigative in nature because the police made the arrest to verify John Davis’s identity. Thus, the policing act of identification does not in and of itself dictate the legal conclusion regarding the investigative or administrative purpose of the identity evidence collection.<sup>232</sup>

Like fingerprints, a name and date of birth are pieces of evidence that the police can collect for different purposes—or dual purposes—depending on the factual context.<sup>233</sup> Consider the question asked by the

226. See, e.g., *United States v. Garcia-Beltran*, 389 F.3d 864, 867 (9th Cir. 2004); *In re Christian Rodriguez*, A088 190 226 (B.I.A. June 18, 2013), <http://www.scribd.com/doc/150133888/Christian-Rodriguez-A088-190-226-BIA-June-18-2013> (“Fingerprints can be considered identity evidence if they are obtained for identification purposes, rather than for criminal investigatory purposes.”). Under this view, courts could also view many database searches as administrative in purpose because these searches are ostensibly conducted with the goal of accurately identifying the suspect.

227. *Garcia-Beltran*, 389 F.3d at 867.

228. *Olivares-Rangel*, 458 F.3d at 1112–13.

229. Logan, *supra* note 16, at 1563.

230. See *supra* note 62.

231. 394 U.S. 721, 723 (1969).

232. These two aspects of identification clearly appear in the debate between the majority and dissenting opinions in *Maryland v. King*, 133 S. Ct. 1958 (2013). The Court held that obtaining a DNA sample from a felony arrestee without a warrant is reasonable under the Fourth Amendment in large part because of the government’s legitimate interest in accurately identifying suspects in its custody (identity verification). See *id.* at 1970, 1980. The dissent, in contrast, argues that the DNA samples police take during booking are not for verification of identity purposes but rather are part of the investigation of crime (identity investigation). See *id.* at 1980 (Scalia, J., dissenting).

233. Cf. *Olivares-Rangel*, 458 F.3d at 1121 (stating that the court must determine whether the fingerprints “were obtained for an investigatory purpose exploiting the unconstitutional arrest or whether they were obtained as part of a routine booking procedure not linked to the purpose of

Ninth Circuit in *United States v. Garcia-Beltran*<sup>234</sup>: was the purpose of the evidence collection “solely to establish [the suspect’s] true identity, or was it an attempt to connect [the suspect] to alleged illegal activity?”<sup>235</sup> While intended by the court to be a mutually exclusive question for which the answer would either allow or prohibit suppression, in the context of immigration policing and the acquisition of an individual’s name and date of birth, the answer to both questions is “yes.” The policing act of identification is part and parcel of the police investigation into immigration-related offenses.<sup>236</sup> This functional overlap is not necessarily true in the context of non-immigration-related criminal investigations. When it is true—as it was in *Davis* and *Hayes*—then the identity evidence is suppressed due to the investigative purpose underlying its collection.<sup>237</sup>

In the context of police actions that follow an egregious violation of the Fourth Amendment, a court should not automatically categorize the collection of a name and date of birth as solely an administrative act; the need to identify the detained individual often has an investigatory purpose in this context. Return to this Article’s hypothetical: after the police officer pulls over the driver solely on the basis of his race, he asks the driver his name and date of birth, which leads to questions regarding his immigration status. In this scenario, the learning of the name and date of birth is the nexus between the unlawful conduct and the investigation of immigration-related crimes. As the Fourth Circuit explained:

*Hayes* and *Davis* illustrate situations in which law enforcement authorities obtained fingerprint evidence by “exploitation” of the initial police illegal activity. In both

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the illegal arrest”). The fact that the police may subsequently re-collect an individual’s name and birth during the booking process or in subsequent interviews with immigration officials is not necessarily dispositive. It is part of the traditional exclusionary rule analysis to determine whether the initial unlawful conduct tainted the evidence collected—even evidence collected during a subsequent booking process. *See id.* at 1114 (“This is not to say that fingerprint evidence taken after an illegal arrest, even as part of a routine booking procedure, is never suppressible. By focusing upon the purpose for an illegal arrest and subsequent fingerprinting in determining whether fingerprint evidence is tainted fruit, courts properly focus on effectuating the underlying policy of the exclusionary rule.”); *see also* *United States v. Pena-Montes*, 589 F.3d 1048, 1050 (10th Cir. 2009) (stating that “when evidence of an individual’s identity is discovered through routine booking procedures incident to an unlawful arrest, that evidence is not suppressed unless the arrest was purposefully exploited to learn the identity”).

234. 389 F.3d 864 (9th Cir. 2004).

235. *Id.* at 866.

236. This aspect of immigration policing points to the need to reevaluate the use of these terms in exclusionary rule doctrine. *See infra* Part III.

237. *See supra* notes 91–93 and accompanying text; *see also infra* note 251 and accompanying text (explaining that under exclusionary rule doctrine, evidence collected with both purposes remains subject to suppression).

cases, the police, without probable cause, detained and then fingerprinted a person they suspected had committed a certain crime, and in both cases the police acted with a clear investigative purpose—to tie the fingerprinted suspect to that crime.<sup>238</sup>

This same reasoning applies to the collection of the name and date of birth in the context of egregious Fourth Amendment violations in immigration policing. The police often exploit the unlawful detention to learn the suspect's identity and investigate a suspected immigration-related offense.<sup>239</sup> Consequently, in these scenarios, the police collect the name and date of birth for an investigative purpose.<sup>240</sup>

If a court determines that the police collected the noncitizen's name and date of birth for an investigative purpose, the name and date of birth remain "tainted" evidence and part of the causal chain for purposes of the exclusionary rule analysis.<sup>241</sup> Consequently, the evidence collected based on this tainted evidence (e.g., database records and birth certificate) should also then be subject to the exclusionary rule under the traditional fruit of the poisonous tree principles.

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An analysis of the nature of identity evidence collection in today's immigration enforcement regime is largely absent from judicial and scholarly examinations of exclusionary rule doctrine. Conducting this analysis demonstrates that, following egregious violations of the Fourth

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238. *United States v. Oscar-Torres*, 507 F.3d 224, 230 (4th Cir. 2007). The hypothetical scenario is more akin to that of *Davis v. Mississippi*, where "the defendant's identity and connection to the illicit activity were only first discovered through an illegal arrest" (and therefore the identity evidence was subject to suppression), as opposed to the situation in *United States v. Crews*, in which the police knew the defendant's identity prior to the unlawful arrest (and therefore the identity evidence was not subject to suppression). 445 U.S. 463, 475 (1980) (analyzing *Davis*).

239. *United States v. Olivares-Rangel*, 458 F.3d 1104, 1113 (10th Cir. 2006).

240. Viewing the act of identification as one that may have an investigative purpose is consistent with Supreme Court jurisprudence recognizing that the demand for identification without reasonable suspicion is a violation of the Fourth Amendment. *See Brown v. Texas*, 443 U.S. 47, 50 (1979) ("When the officers detained appellant for the purpose of requiring him to identify himself, they performed a seizure of his person subject to the requirements of the Fourth Amendment."); *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (holding that without reasonable suspicion or probable cause, "stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment"); *see also Hiibel v. Sixth Jud. Dist. Court of Nev.*, 542 U.S. 177, 185 (2004) (holding that so long as reasonable suspicion exists, "a police officer is free to ask a person for identification without implicating the Fourth Amendment"); *INS v. Delgado*, 466 U.S. 210, 216 (1984) (holding that while acting pursuant to a lawful search warrant, the mere questioning of the defendants about their citizenship did not violate the Fourth Amendment).

241. *See supra* note 210 and accompanying text.

Amendment, the police may collect immigrant identity evidence with what courts traditionally consider to be an investigative purpose. Thus, current assumptions about the exemption of all or most identity evidence from the exclusionary rule remedy in immigration court lack support in exclusionary rule doctrine and ignore the practical effects of increased cooperation of state and local law enforcement, the growth of database policing, and the role of a name and date of birth in the investigation of immigration-related offenses.

### III. THE SUPPRESSION OF IMMIGRANT IDENTITY EVIDENCE

The call to import criminal law protections into the immigration arena is an important one. Noncitizens facing the immense consequence of deportation have very few of the substantive and procedural rights that all individuals are guaranteed when charged with a crime, no matter how minor.<sup>242</sup> The application of the exclusionary rule to *all* Fourth Amendment violations is a significant part of this call for additional safeguards.<sup>243</sup> For the majority of individuals appearing in immigration court who suffered a violation of their Fourth Amendment rights, there is no available remedy.<sup>244</sup> Exclusionary rule doctrine as developed in the criminal context, however, should not be introduced into immigration proceedings without reflection. As seen in its current application to identity evidence, even if a noncitizen successfully overcomes the hurdle of proving an egregious constitutional violation, and even if the exclusionary rule were to apply more broadly, exclusionary rule doctrine as currently applied to immigrant identity evidence renders that remedy effectively unavailable in immigration court.

This result is not necessarily contrary to Fourth Amendment doctrine. Evidence that the police collect with an administrative purpose or that is independent of the initial unlawful police conduct is evidence that the exclusionary rule does not intend to suppress. But to the extent that courts are confronting exclusionary rule questions as applied to immigrant identity evidence, there is no analysis of the underlying purpose of the evidence collection. Rather, courts fill judicial opinions with broad unequivocal statements, the quick finding of an “independent source,” and the assumption that immigrant identity evidence is categorically exempt from the exclusionary rule remedy.<sup>245</sup>

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242. See Markowitz, *supra* note 19, at 293–94.

243. See *supra* note 12.

244. See *supra* notes 46–50 and accompanying text.

245. See, e.g., *Torres-Hernandez v. Holder*, 482 F. App’x 931, 931 (5th Cir. 2012) (*per curiam*) (“The BIA and IJ did not err in denying Torres-Hernandez’s motion to suppress. Even if she had shown a constitutional violation, the airport immigration agent obtained only her identity from her Texas identification card, and her identity is not suppressible. Further, Torres–



The analysis of immigration policing conducted in Part II demonstrates that these conclusions are often unfounded and unjustified. Therefore, the fact that immigration courts would not suppress most immigrant identity evidence under current judicial thinking is a result contrary to the function of the investigative versus administrative standard specifically and the animating theory of the exclusionary rule generally. In addition, exclusionary rule doctrine as currently applied has the unintended effect of disincentivizing behavior by noncitizens that some localities have attempted to encourage, such as registering for a driver's license or state identification card or applying for legal status.<sup>246</sup>

A possible response to this problem is to suggest that the investigative versus administrative standard be retained in the doctrine but applied differently. For instance, courts should not conclude that the police collect all immigrant identity evidence for an administrative purpose simply because the government introduces the evidence in an administrative process. As a normative matter, however, such a remedy is ultimately unsatisfying because it leaves in place the problematic terms of "investigative" and "administrative"—terms that no longer function as a meaningful way to help courts distinguish evidence that they should or should not suppress. Immigration policing today is a blend of what courts have typically considered "administrative" aspects of law enforcement—verifying the identity of a suspect—with traditional "investigative" police conduct—the participation of local law enforcement and the investigation of crimes.

The difficulties of applying the purpose-based standard in practice are self-evident: a local police officer purposefully stops a person based on her race, investigates her immigration status, conducts computer searches, and then turns her over for routine booking and eventually the administrative process of removal. In this scenario, it may be impossible for a court to discern whether the officer had an administrative or investigative purpose, or a court may believe that the officer had both purposes in mind at the time of the evidence collection. Although perhaps at one point these labels seemed clear in application (the customs agent at the airport versus the local officer at the murder scene), today's immigration enforcement realm combines these forms of policing and, consequently, renders the terms unhelpful to a coherent doctrinal inquiry

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Hernandez's alienage and immigration status were not suppressible as this information was obtained through an independent search of the Traveler Enforcement Compliance System (TECS) after immigration agents learned her identity." (citations omitted)).

246. See Jennifer Medina, *California Effort to Issue Driver's Licenses to Immigrants Receives Surge of Applicants*, N.Y. TIMES (Aug. 9, 2015), <http://www.nytimes.com/2015/08/09/us/california-effort-to-issue-drivers-licenses-to-immigrants-receives-surge-of-applicants.html>.

and often misleading in determining the ultimate result.<sup>247</sup>

The investigative versus administrative standard also provides insufficient guidance to the individual officer at the “front end” of policing. This purpose-based standard is given almost all of its content *ex post*. The evolution of immigration enforcement has made it particularly difficult for an officer conducting immigration-related policing to determine whether a court may deem his actions investigative or administrative in purpose.<sup>248</sup> Will the government ultimately prosecute the suspect in a criminal or civil court? Will a court consider the database search to be administrative, investigative, or independent? Will the name and date of birth lead to the discovery of additional identity-related evidence? The result of applying current exclusionary rule doctrine when evaluating immigrant identity evidence is largely unpredictable to the individual police officer. The predictability of the exclusionary rule and its proffered guidance for officer conduct matters because of the rule’s animating function—the deterrence of unlawful police conduct. Given current jurisprudence, the application of the exclusionary rule is at best unpredictable and at worst predictable in the negative—courts will not suppress identity evidence despite initial unlawful police conduct. If the local police officer cannot determine whether identity evidence will be suppressed but knows it likely will not be in most cases, then even in the rare case where such evidence *is* suppressed, that suppression will have little, if any, deterrent impact on future unconstitutional police conduct.<sup>249</sup>

The inability of current exclusionary rule doctrine to accurately and reliably address the suppression of immigrant identity evidence therefore suggests a different solution. The investigative versus administrative standard as applied to identity evidence in immigration court should be abandoned, and instead, all identity evidence collected as a result of an egregious violation of the Fourth Amendment should be subject to

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247. The argument that an evaluation of the officer’s purpose is unhelpful to the doctrinal inquiry is consistent with other areas of Fourth Amendment doctrine that do not consider the subjective motives of police officers. See *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (stating that in general the subjective motivations of government officials are irrelevant as “the Fourth Amendment regulates conduct rather than thoughts”); *Whren v. United States*, 517 U.S. 806, 812–13 (1996) (discussing precedent that holds that the actual motivations of police officers are not part of Fourth Amendment reasonableness analysis).

248. This unpredictability will of course also affect the application of the exclusionary rule in an immigration-related criminal case, as the criminal court applies this same investigative versus administrative standard.

249. As Professor Hiroshi Motomura points out, “State and local jurisdictions and officers that see immigration enforcement as part of their law enforcement duties will be especially inclined to view civil removal as a tangible result that makes the arrest worthwhile.” Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1847 (2011). The question in the Fourth Amendment context therefore becomes whether the police officer is motivated to refrain from unconstitutional police conduct when effectuating an immigration-related arrest.

suppression under traditional exclusionary rule principles. Stated differently, instead of a purpose-based standard for the evaluation of identity evidence introduced in immigration proceedings, there would simply be the well-established exclusionary rule analysis of exploitation, taint, and attenuation like that conducted for more “typical” pieces of evidence. In addition to this reform, other aspects of exclusionary rule doctrine need to be clarified in the immigration context. As explained in Part II, both the independent source exception and the intersection of jurisdictional rules with exclusionary rule doctrine need to be reexamined to structure an exclusionary rule doctrine that provides for the suppression of immigrant identity evidence that law enforcement initially collected with an investigative purpose.

One outcome of this proposal would likely be the suppression of more evidence in immigration proceedings than occurs under current doctrine. But this result is not objectionable for several reasons. First, as previously explained, the investigative and administrative labels protect evidence from suppression in immigration court that the doctrine intends to suppress to optimally deter unlawful police conduct. Therefore, an increase in suppression orders is normatively desirable in the immigration context.<sup>250</sup> Second, in cases in which an officer might have both an administrative and investigative purpose, it is appropriate under existing Fourth Amendment jurisprudence to hold that, due to the presence of an investigative purpose and the deterrent function of the exclusionary rule remedy, evidence collected for both purposes should be suppressed.<sup>251</sup> Third, any increase in suppression may only be temporary. In theory, the suppression of immigrant identity evidence today would deter unlawful police conduct tomorrow. Consequently, the frequency of the suppression of evidence would eventually diminish because the police conduct justifying such suppression would similarly decrease over time.

This Article recognizes that underlying much of this argument is the conclusion that the exclusionary rule works as a means of deterrence and that it guides and shapes police behavior.<sup>252</sup> But acknowledging that the

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250. In the criminal context, the investigative versus administrative standard does not improperly shield evidence collected with an investigative purpose to the same extent because such evidence, as it is not used in an administrative proceeding, is not automatically deemed administrative in nature.

251. *See* *United States v. Oscar-Torres*, 507 F.3d 224, 232 (4th Cir. 2007); *see also* *United States v. Guevara-Martinez*, 262 F.3d 751, 755 (8th Cir. 2001) (“Evidence can be obtained ‘by exploitation’ of an unlawful detention even when the detention is not for the sole purpose of gathering that evidence.”).

252. It is outside the scope of this Article to address the debate over whether the exclusionary rule actually works as a means of deterrence. *See* *Re*, *supra* note 12, at 1889 (discussing scholars on both sides of the debate). This Article sides with the position that it does. *See* Albert W. Alschuler, *Regarding Re’s Revision: Notes on the Due Process Exclusionary Rule*, 127 HARV. L.

exclusionary rule may not influence police conduct as much as one might hope does not also dictate ignoring the problems contained in current exclusionary rule doctrine and its application. There are several justifications for maintaining a focus on the exclusionary rule and for specifically adopting a more robust exclusionary rule in immigration proceedings. First, in determining whether the exclusionary rule should apply in any particular setting, the costs of excluding probative evidence are weighed against the need for a deterrent effect.<sup>253</sup> In immigration enforcement today, there is a strong need for a mechanism to deter unlawful police conduct. Although initially thought to be a small number of legal claims,<sup>254</sup> allegations of egregious unconstitutional police conduct have grown exponentially in number.<sup>255</sup> With the entanglement of state and local law enforcement in federal immigration enforcement, quantitative and qualitative data suggests that there has been a numerical increase in alleged Fourth Amendment violations.<sup>256</sup> More specifically, data suggests that racial profiling by local police is of grave concern in immigration enforcement today.<sup>257</sup> The potential for racial profiling is

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REV. F. 302, 324 n.87 (2014) (stating that “the exclusionary rule has demonstrably changed police conduct for the better”).

253. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1041 (1984) (explaining the *Janis* balancing test).

254. See *id.* at 1044 (noting that, according to BIA statistics, very few noncitizens challenged their arrests or the introduction of evidence).

255. See Elias, *supra* note 12, at 1127–35 (documenting the rise of alleged Fourth Amendment violations by law enforcement in both number and geographic scope); N.Y. CIV. LIBERTIES UNION ET AL., JUSTICE DERAILED: WHAT RAIDS ON NEW YORK’S TRAINS AND BUSES REVEAL ABOUT BORDER PATROL’S INTERIOR ENFORCEMENT PRACTICES 16 (2011), [http://www.nyclu.org/files/publications/NYCLU\\_justicederailedweb\\_0.pdf](http://www.nyclu.org/files/publications/NYCLU_justicederailedweb_0.pdf) (detailing the disproportionate impact of transportation raids in the Rochester, New York area on people of color); BESS CHIU ET AL., CONSTITUTION ON ICE: A REPORT ON IMMIGRATION HOME RAID OPERATIONS, CARDOZO IMMIGR. JUST. CLINIC 22 (2009), [http://www.cardozo.yu.edu/sites/default/files/Constitution%20On%20ICE--A%20Report%20on%20Immigration%20Home%20Raid%20Operations%20-%20Cardozo%20Law%20School\\_0.pdf](http://www.cardozo.yu.edu/sites/default/files/Constitution%20On%20ICE--A%20Report%20on%20Immigration%20Home%20Raid%20Operations%20-%20Cardozo%20Law%20School_0.pdf) (documenting the rise of suppression motions and potential constitutional violations by ICE during home raid operations since 2006).

256. See N.Y. CIV. LIBERTIES UNION ET AL., *supra* note 255.

257. See Cynthia Benin, Note, *Randomizing Immigration Enforcement: Exploring A New Fourth Amendment Regime*, 88 N.Y.U. L. REV. 1735, 1748–49 (2013) (documenting evidence of racial profiling in immigration enforcement); Chacón, *supra* note 111, at 340–41 (cataloguing evidence of the rise in racial profiling claims in immigration enforcement by local police); Wishnie, *supra* note 12, at 1102–13 (documenting the rise in racial profiling and selective immigration enforcement based on ethnicity following the involvement of local police in immigration enforcement post-September 2001); Trevor Gardner II & Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program*, WARREN INST.: POL’Y BRIEF 1 (2009), [https://www.law.berkeley.edu/files/policybrief\\_irving\\_0909\\_v9.pdf](https://www.law.berkeley.edu/files/policybrief_irving_0909_v9.pdf) (finding evidence of racial profiling by local police officers in a study of arrest data in Irving, Texas following the police department’s participation in federal immigration enforcement); see also Kevin R. Johnson,

particularly acute when there are financial, legislative, and other incentives for local law enforcement to assist with the enforcement of federal immigration law,<sup>258</sup> and when, as Professors Devon Carbado and Cheryl Harris have argued, current Fourth Amendment doctrine “enables and sanctions racial profiling.”<sup>259</sup>

Second, recent clarifications in immigration law positively impact the deterrent benefit of the suppression of evidence in immigration court. In the past, several courts, including the Supreme Court in *INS v. Lopez-Mendoza*, suggested that the deterrent benefit of suppressing evidence in removal proceedings is slight because the government could simply detain the noncitizen the very next minute because “a person whose unregistered presence in this country, without more, constitutes a crime. His release within our borders would immediately subject him to criminal penalties.”<sup>260</sup> This oft-repeated comment, however, is no longer good law. In *Arizona v. United States*,<sup>261</sup> the Supreme Court made clear that unlawful status alone is not a crime.<sup>262</sup> The police therefore could not simply re-arrest a noncitizen the moment he left the immigration courtroom. Law enforcement would need probable cause or reasonable suspicion of a criminal offense to detain the individual.<sup>263</sup> Even if the police could easily re-arrest or detain the individual, from the perspective of Fourth Amendment doctrine, “courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty.”<sup>264</sup>

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*The Case Against Race Profiling in Immigration Enforcement*, 78 WASH U. L.Q. 675, 701 (2000) (describing race-based immigration enforcement conducted by state and local governments).

258. See *supra* notes 121–23.

259. Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1583 (2011).

260. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1047 (1984) (footnote omitted); see also *United States v. Navarro-Diaz*, 420 F.3d 581, 587 (6th Cir. 2005) (quoting *Lopez-Mendoza*).

261. 132 S. Ct. 2492 (2012).

262. *Id.* at 2505 (“As a general rule, it is not a crime for a removable alien to remain present in the United States.”).

263. Although unlawful status itself is no longer considered a “continuing violation,” a criminal violation of 8 U.S.C. § 1326 (Reentry of Removed Aliens) may be different, and therefore the weighing of the costs and benefits of applying this reform in the criminal context may be different. See, e.g., *United States v. Sandoval-Vasquez*, 519 F. Supp. 2d 198, 201 (D. Mass. 2007) (“[B]ecause section 1326 defines a ‘continuing’ violation, if the court were to suppress all evidence of Sandoval–Vasquez’s identity and dismiss the indictment, upon his setting foot outside the courtroom, he would again be in violation of the statute, as he would still be a person ‘found’ in the United States without authorization after a prior deportation.”). However, just like other criminal offenses that may in some sense be “continuing” (e.g., driving on a suspended license and failure to register as a sex offender), the police must wait for lawful grounds to approach and detain the individual. See Logan, *supra* note 16, at 1608–09.

264. *Elkins v. United States*, 364 U.S. 206, 218 (1960) (quoting *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting)).

Some courts have suggested there would be little deterrent benefit in excluding identity evidence in *criminal* court because “[other] evidence recovered in the course of an illegal stop remains subject to the exclusionary rule.”<sup>265</sup> In other words, the exclusionary rule still has a deterrent effect on criminal investigations generally because the police are reluctant to risk having other evidence suppressed, such as firearms or narcotics. This reasoning does not apply in the immigration context. Identity evidence is the entirety of the government’s case in removal proceedings. Consequently, the collection of immigrant identity evidence may be the driving force of the unlawful police conduct. If there is only an unpredictable exclusionary rule remedy in immigration court, or one that courts apply with little chance of suppression, then there is effectively no mechanism of deterrence present in the context of immigration policing. A more protective exclusionary rule vis-à-vis immigrant identity evidence is needed precisely because there is no other aspect of the exclusionary rule providing the necessary deterrence function. Furthermore, allowing the exclusionary rule to more broadly suppress identity evidence in immigration court places no additional burden on law enforcement officers with respect to guiding and shaping their own conduct. The strictures of the Fourth Amendment already bind local police officers.<sup>266</sup>

It is important to remember that, in immigration proceedings, suppression would only be triggered once a judge found the initial police conduct to be an egregious violation of the Fourth Amendment. Consequently, in weighing the costs and benefits of the application of the exclusionary rule, the benefit at issue is that of deterring egregiously unlawful police conduct. This particular benefit is different in the criminal context, where a parallel rule would also impose the cost of suppression on “mere garden-variety” Fourth Amendment violations.<sup>267</sup> In addition, the suppression of evidence in the immigration context, although not available as a remedy to all Fourth Amendment violations, may ultimately serve a deterrent function for unconstitutional police

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265. *People v. Tolentino*, 926 N.E.2d 1212, 1216 (N.Y. 2010).

266. The Fourth Amendment also binds federal immigration officers when effectuating civil immigration arrests. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 881–82 (1975); *Oliva-Ramos v. Attorney Gen.*, 694 F.3d 259, 284–85 (3d Cir. 2012); *Au Yi Lau v. INS*, 445 F.2d 217, 222 (D.C. Cir. 1971).

267. *Lopez-Fernandez v. Holder*, 735 F.3d 1043, 1047 (8th Cir. 2013). A few courts in the *criminal* context have suggested that an egregious Fourth Amendment violation might affect their exclusionary rule analysis. *See, e.g., United States v. Bowley*, 435 F.3d 426, 431 (3d Cir. 2006) (stating that “absent the kind of egregious circumstances referred to in *Lopez-Mendoza*,” the defendant could not suppress his immigration file); *United States v. Aragon-Robles*, 45 F. App’x 590, 591 (9th Cir. 2002) (holding that identity evidence may be subject to suppression if the defendant’s race motivated the unlawful detention).

conduct more broadly, without the associated cost of suppressing evidence in all instances.

Finally, and most significantly, although the Constitution and substantive criminal law impose additional restraints on police investigation,<sup>268</sup> these limits on police power largely do not apply to suspects facing investigation for civil immigration offenses.<sup>269</sup> In addition, civil remedies—proffered alternatives to the exclusionary rule—are not readily available to noncitizens making race discrimination claims against law enforcement.<sup>270</sup> The absence of other mechanisms for the deterrence of unlawful police conduct is significant because today many local police encounters with noncitizens result in civil removal hearings, not charges in criminal court.<sup>271</sup> Imposing a more robust exclusionary rule in the immigration context therefore prohibits officers from purposefully shaping their conduct “to avoid criminal rules meant to restrain police behavior.”<sup>272</sup>

Specific aspects of the immigration context justify this Article’s argument for judicial reform of exclusionary rule doctrine. But the Article’s analysis of the policing of immigrant identity evidence has implications for exclusionary doctrine in other areas. For one, the investigative versus administrative standard has also lost its doctrinal function when evaluating the suppression of immigrant identity evidence in the criminal context. While the overall balancing of the interests underlying the application of the exclusionary rule may be different in the two court systems, the problems in applying this purpose-based standard to immigrant identity evidence, and sometimes even to identity

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268. For instance, the limits on police interrogation from *Miranda* and its progeny and the Fifth Amendment right to counsel. See Eda Katharine Tinto, *Wavering on Waiver: Montejo v. Louisiana and the Sixth Amendment Right to Counsel*, 48 AM. CRIM. L. REV. 1335, 1338–42 (2011).

269. See *supra* note 242 and accompanying text.

270. See Chacón, *supra* note 111, at 341–42 (discussing the Supreme Court precedent of *Whren v. United States* and *Reno v. American-Arab Anti-Discrimination Committee*); see also Messerschmidt v. Millender, 132 S. Ct. 1235, 1244 (2012) (reaffirming the qualified immunity of law enforcement officers); *De La Paz v. Coy*, 786 F.3d 367, 380 (5th Cir. 2015) (holding that noncitizens are barred from bringing *Bivens* actions against federal officers for unlawful acts leading up to civil removal proceedings). Additionally, once an individual is deported following a removal proceeding, the practical difficulties of continuing litigation often trump an individual’s desire to challenge the constitutional violation.

271. See Cade, *supra* note 125, at 183.

272. See Eagly, *supra* note 20, at 1289. Professor Eagly goes on to note that immigration law has inverted the traditional police power relationship between civil and criminal enforcement. Although typically the police have more power in the criminal system, “[c]ivil immigration law invites opportunities to arrest, interrogate, and detain without the need to comply with criminal law’s requirements.” *Id.* at 1339; see also Carbado & Harris, *supra* note 259, at 1550 (arguing that police are using immigration violations “as a pretext for investigating state criminal law”).

evidence more broadly, remain the same. In addition, developments in the policing of identity evidence may affect the evaluation of the need for the deterrence of unlawful police conduct, and consequently the exclusionary rule, in other civil settings—such as civil penalties and tax proceedings.

In sum, with regard to police conduct underlying egregious Fourth Amendment violations, an individual's immigrant identity is often "the objective of official illegality."<sup>273</sup> When this is so, "the deterrence purpose of the exclusionary rule would effectively be served only by excluding the very evidence sought to be obtained by the primary illegal behavior."<sup>274</sup> Exclusionary rule doctrine as currently applied to identity evidence in immigration proceedings wrongly safeguards this very evidence from suppression. The proposed revisions to exclusionary rule doctrine strengthen the needed mechanism to fulfill the rule's deterrence function and work to suppress immigrant identity evidence unlawfully and egregiously obtained.

#### CONCLUSION

Without an effective exclusionary rule doctrine as applied to immigrant identity evidence, there is no meaningful judicial review of much of the police conduct in immigration enforcement today. Given that this conduct necessarily contains allegations of "egregiousness," the lack of judicial scrutiny is especially troubling. As the Supreme Court recently stated, "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."<sup>275</sup> These conditions are met in the context of egregious violations of the Fourth Amendment, and justify a reformulated exclusionary rule doctrine with respect to the suppression of identity evidence in civil immigration proceedings.

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273. *United States v. Olivares-Rangel*, 458 F.3d 1104, 1120 (10th Cir. 2006).

274. *Id.*; see also *Elkins v. United States*, 364 U.S. 206, 217 (1960) ("[The] purpose [of the exclusionary rule] is . . . to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."); *Excluding from Evidence Fingerprints Taken After an Unlawful Arrest*, Notes & Comments, 69 *YALE L.J.* 432, 436 n.24 (1960) (noting that the effectiveness of the exclusionary rule depends on excluding the piece of evidence that is the target of the police activity).

275. *Herring v. United States*, 555 U.S. 134, 144 (2009).



