

# THE ICE STORM IN U.S. HOMES: AN URGENT CALL FOR POLICY CHANGE

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## ABSTRACT

Since its creation in 2003, the Bureau of Immigration and Customs Enforcement (ICE) has used increasingly aggressive tactics to enforce U.S. immigration law. One of ICE's most prominent enforcement initiatives is its practice of raiding the homes of immigrants. Accounts of home raids from victims all over the country reveal a pattern of practice that differs widely from ICE's official statements regarding raids. This paper establishes that although immigration officials are governed by the Fourth Amendment when conducting home raids, ICE's agents nonetheless regularly violate the Constitution when carrying out home raids. Additionally, this paper argues that the number and nature of these constitutional violations, combined with the social costs of the raids, present a compelling case for policy change. The paper concludes with a series of policy proposals that would rectify the profound invasions of privacy and degrading treatment many immigrants in this country are currently experiencing.

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## INTRODUCTION

At 4:30 a.m. on January 29, 2008, María Argueta awoke to loud banging on the windows and doors of her home in North Bergen, New Jersey.<sup>2</sup> She was scared that people were trying to break in and did not open the door.<sup>3</sup> The basement tenants in her building went out to investigate.<sup>4</sup> The individuals knocking on the house were visibly armed and said they were police officers looking for a male criminal.<sup>5</sup> The

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2. First Amended Complaint ¶ 57, *Argueta v. ICE*, 2009 WL 1307236 (D.N.J. May 7, 2009) (No. 08-1652) [hereinafter *Argueta* Complaint], available at [http://law.shu.edu/ProgramsCenters/PublicIntGovServ/CSJ/upload/amended\\_complaint.pdf](http://law.shu.edu/ProgramsCenters/PublicIntGovServ/CSJ/upload/amended_complaint.pdf).

3. *Id.*

4. *Id.* ¶ 58.

5. *Id.* ¶¶ 58, 60.

tenants phoned their landlord, Ms. Argueta's brother, and gave the phone to one of the purported police officers who repeated this story.<sup>6</sup> Ms. Argueta's brother called her and told her that police officers needed to enter her apartment as part of their search for a male criminal.<sup>7</sup> Based on this information, Ms. Argueta opened her door.<sup>8</sup>

After entering Ms. Argueta's apartment, the agents again identified themselves as police and asked her if she knew a particular man.<sup>9</sup> She told them no.<sup>10</sup> Even though Ms. Argueta had lived in her apartment for seven years, and no man had lived there during that time, the agents searched her entire apartment.<sup>11</sup> Ms. Argueta was not allowed to change or use the bathroom outside the presence of an agent.<sup>12</sup> Three agents remained stationed in front of the door to her apartment. One of the agents asked her about her immigration status.<sup>13</sup> Ms. Argueta told them that she had received Temporary Protection Status (TPS) and showed them documentation proving her status.<sup>14</sup> The agents told Ms. Argueta that she would not be receiving a new TPS card that year and arrested her without verifying her status, despite the fact that TPS status information is easily accessible in the U.S. Citizenship and Immigration Service database.<sup>15</sup> She was taken to an Immigration and Customs Enforcement (ICE)<sup>16</sup> facility in Elizabeth, New Jersey, and then transferred twice.<sup>17</sup> Ms. Argueta was not given food or water for over twenty-four hours and was detained for nearly thirty-six hours before being released.<sup>18</sup> ICE agents confiscated her passport and jewelry, which were never returned to her.<sup>19</sup>

Nelly Amaya awoke in her Suffolk County, New York, home between

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6. *Id.* ¶ 59.

7. *Id.*

8. *See id.* ¶ 60.

9. *Id.* ¶ 62.

10. *Id.*

11. *Id.* ¶¶ 62–63.

12. *Id.* ¶ 64.

13. *Id.*

14. *Id.* ¶¶ 65–66.

15. *Id.* ¶¶ 66–67.

16. ICE was formed in March 2003 when the Department of Homeland Security (DHS) was created and the Immigration and Naturalization Service (INS) was reorganized within DHS. Before March 2003, the INS was responsible for enforcing immigration laws as well as processing applications for immigration benefits. Those two functions have been separated into different departments within DHS: (1) ICE; and (2) the U.S. Citizenship and Immigration Service, which is responsible for adjudicating immigration applications. *See* Dep't of Homeland Sec., History: Who Became Part of the Department?, [http://www.dhs.gov/xabout/history/editorial\\_0133.shtm](http://www.dhs.gov/xabout/history/editorial_0133.shtm) (last visited July 8, 2009) (detailing agency name changes and functions in 2003).

17. *Argueta* Complaint, *supra* note 2, ¶¶ 72–73.

18. *Id.* ¶ 74.

19. *Id.* ¶¶ 68, 76.

4:00 and 5:00 a.m. on the morning of February 20, 2007, to find ICE agents in her bedroom.<sup>20</sup> The agents had gained entry by kicking open the door to her home.<sup>21</sup> When she awoke, Ms. Amaya observed several men blocking the door to her bedroom.<sup>22</sup> One of the agents shone a flashlight in her eyes and started asking about her brother-in-law.<sup>23</sup> The agents ordered her into the living room.<sup>24</sup> Ms. Amaya had been wearing only a t-shirt and underwear, and she was just able to put on pajama pants and a sweatshirt as one of the agents pulled her by the arm to the living room.<sup>25</sup> Ms. Amaya asked the men who they were, but her questions were to no avail.<sup>26</sup> Ms. Amaya also asked to see a warrant, but the officers did not show her one.<sup>27</sup> Ms. Amaya had been using a sling because of an arm injury, but ICE agents twisted her arm to frisk her and handcuffed her nonetheless, causing her injured arm to turn purple and swell.<sup>28</sup> After being arrested, she was eventually taken to the ICE processing station in downtown New York.<sup>29</sup> She was fingerprinted and questioned by another ICE officer.<sup>30</sup> This officer asked Ms. Amaya, “Why did they take you in? You have a clean record,” and later remarked, “You shouldn’t have asked for a warrant.”<sup>31</sup> After being detained for ten hours, Ms. Amaya was released in only her pajamas and sweatshirt, without treatment for her injury, money, or a way to travel the several hours back to her home.<sup>32</sup> She eventually succeeded in convincing a taxi driver to bring her to the house of her friend in Queens who could pay the fare and help her get home.<sup>33</sup>

What happened to Ms. Argueta and Ms. Amaya is emblematic of the experience of thousands of individuals throughout the United States subjected to ICE’s growing practice of home raids. Unless the Obama Administration adopts the policy changes proposed in this paper, more and more families in the United States are likely to wake in the middle of the night to ICE agents banging at their doors, forcing their way inside, searching their homes, and questioning them against their will and in

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20. Amended Class Action Complaint ¶¶ 17, 148–49, 156, *Aguilar v. ICE*, 255 F.R.D. 350 (S.D.N.Y. 2008) (No. 07 Civ. 8224) [hereinafter *Aguilar* Complaint] (on file with author).

21. *Id.* ¶ 149.

22. *Id.* ¶ 153.

23. *Id.* ¶¶ 147, 155, 158.

24. *Id.* ¶ 159.

25. *Id.* ¶¶ 157, 160.

26. *Id.* ¶ 158.

27. *Id.* ¶ 162.

28. *Id.* ¶¶ 170–75.

29. *Id.* ¶ 179.

30. *Id.* ¶ 180.

31. *Id.* ¶¶ 181–82.

32. *Id.* ¶¶ 185–86.

33. *Id.* ¶ 186.

violation of their rights.<sup>34</sup>

Since ICE's formation in 2003, the government has dramatically expanded its interior immigration enforcement efforts.<sup>35</sup> ICE created Fugitive Operations Teams<sup>36</sup> to arrest people the agency refers to as "fugitive aliens"—individuals who have not left the United States after receiving a final order of removal or who were issued a notice to appear at an ICE Detention and Removal Office but missed their scheduled hearing.<sup>37</sup> It is important to note that the existence of a removal order does not necessarily mean that the individual subject to that order is aware of the order and is a "fugitive" in the conventional sense of the word.<sup>38</sup> Removal orders can be issued in absentia, and there is a formal process for challenging these orders based on the government's failure to give proper notice of the proceeding.<sup>39</sup> Individuals subject to a removal order issued in

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34. As of the time of publication, the Obama Administration was continuing to conduct home raids and defend ICE agents' conduct in the course of the raids. See Nina Bernstein, *Report Says Immigration Agents Broke Laws and Agency Rules in Home Raids*, N.Y. TIMES, July 22, 2009, at A20; Julia Preston, *Firm Stance on Illegal Immigrants Remains Policy*, N.Y. TIMES, Aug. 3, 2009, at A14.

35. ICE, U.S. Dep't of Homeland Sec., Fact Sheet: ICE Fugitive Operations (2008), [http://www.ice.gov/doclib/pi/news/factsheets/NFOP\\_FS.pdf](http://www.ice.gov/doclib/pi/news/factsheets/NFOP_FS.pdf) [hereinafter ICE Fugitive Operations Fact Sheet]. See also ICE, U.S. DEP'T OF HOMELAND SEC., ENDGAME: OFFICE OF DETENTION AND REMOVAL STRATEGIC PLAN 2003–2012, at 4-4 (2003) ("DRO Goal One" is to achieve "a 100% rate of removal of all removable aliens."), available at [http://www.thenyc.org/images/uploads/ICE\\_Endgame\\_Strategic\\_Plan.pdf](http://www.thenyc.org/images/uploads/ICE_Endgame_Strategic_Plan.pdf). This strategy raises serious questions as to its feasibility and sensibility. There are an estimated twelve million people in the United States who have committed a removable offense or are without status and therefore removable, and former Assistant Secretary Myers estimated the cost of removing all of these individuals at nearly \$100 billion, not including the costs of locating all twelve million individuals. See Mike M. Ahlers, *ICE: Tab to Remove Illegal Residents Would Approach \$100 Billion*, CNN.COM, Sept. 12, 2007, <http://www.cnn.com/2007/US/09/12/deportation.cost/index.html>.

36. A typical Fugitive Operations Team is comprised of seven members: four Deportation Officers who are primarily responsible for identifying, locating, and apprehending fugitive aliens; an Immigration Enforcement Agent who assists in arresting individuals and transporting them to detention and processing centers; one supervisor; and one assistant. OFFICE OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., OIG-07-34, AN ASSESSMENT OF UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT'S FUGITIVE OPERATIONS TEAMS 6 (2007) [hereinafter OIG REPORT], available at [http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG\\_07-34\\_Mar07.pdf](http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_07-34_Mar07.pdf). Initially, only Deportation Officers who had achieved a relatively high level of experience (GS-12) were included on the teams, but due to the expansion of the teams and the lack of applicants at that level, teams now include less experienced officers. *Id.* at 7.

37. Letter from Michael Chertoff, Dir. of Homeland Sec., to Christopher J. Dodd, U.S. Senator (June 14, 2007) [hereinafter Chertoff Letter] (on file with author); ICE Fugitive Operations Fact Sheet, *supra* note 35.

38. See generally *In re G-Y-R-*, 23 I. & N. Dec. 181, 181 (2001) ("[E]ntry of an *in absentia* order of removal is inappropriate where the record reflects that the alien did not receive, or could not be charged with receiving the Notice to Appear that was served by certified mail at an address obtained from documents filed with the Immigration and Naturalization Service several years earlier.").

39. 8 U.S.C. §§ 1229a(b)(5)(A), (C)(ii) (2006).

absentia nonetheless fall under ICE's rubric of "fugitive aliens."<sup>40</sup> Approximately 100 Fugitive Operations Teams were operating nationally as of September 2008,<sup>41</sup> and ICE estimates that over 96,000 people had been arrested through this program by the end of September 2008.<sup>42</sup>

In 2006, ICE launched "Operation Return to Sender,"<sup>43</sup> a nationwide interior enforcement initiative that aims to "eliminate the backlog of ICE fugitive cases"<sup>44</sup>—an estimated 560,000 people as of September 2008.<sup>45</sup> With the launch of "Operation Return to Sender," ICE imposed arrest quotas of 1000 arrests per year on each Fugitive Operations Team.<sup>46</sup> Immigration arrests climbed sharply as a result of these policies. In 2008, ICE reported a nearly twenty-fold increase in the number of annual immigration arrests since 2003.<sup>47</sup> The Obama Administration has reportedly replaced this arrest quota with a requirement that each Fugitive Operations Team identifies and targets fifty "fugitive aliens" per month as well as another 500 "fugitive aliens" each year in operations with other Fugitive Operations Teams.<sup>48</sup> However, the Obama Administration has not abandoned home raids as an enforcement method,<sup>49</sup> and, as a result, thousands of people living in the United States will continue to experience severe invasions of privacy and abusive behavior by U.S. officials.

Reports of the way home raids are conducted have provoked criticism from immigrant communities, their advocates, the media, policymakers, and the legal community. While officials from the Department of Homeland Security (DHS) and ICE say their practices conform to the Fourth Amendment and respect other individual rights,<sup>50</sup> numerous

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40. See Chertoff Letter, *supra* note 37.

41. ICE Fugitive Operations Fact Sheet, *supra* note 35, at 2. This represents more than a twelvefold increase in the number of teams from when the initiative began in 2003. See *id.* (reporting that when the program was launched, there were only eight fugitive operations teams nationwide).

42. MARGOT MENDELSON, SHAYNA STROM & MICHAEL WISHNIE, MIGRATION POLICY INST., COLLATERAL DAMAGE: AN EXAMINATION OF ICE'S FUGITIVE OPERATIONS PROGRAM 1 (2009), available at [http://www.migrationpolicy.org/pubs/NFOP\\_Feb09.pdf](http://www.migrationpolicy.org/pubs/NFOP_Feb09.pdf).

43. Chertoff Letter, *supra* note 37.

44. *Id.*

45. ICE Fugitive Operations Fact Sheet, *supra* note 35.

46. OIG REPORT, *supra* note 36, at 8–9.

47. See ICE Fugitive Operations Fact Sheet, *supra* note 35, at 1 (reporting that there were approximately 1900 arrests in fiscal year 2003 and approximately 34,000 in fiscal year 2008).

48. N.C. Aizenman, *Conflicting Accounts of an ICE Raid in Md.*, WASH. POST, Feb. 18, 2009, at A1.

49. See *supra* note 34.

50. See, e.g., Transcript of Record at 113, *In re O-R-* (Immigr. Ct., Elizabeth, N.J. filed Apr. 23, 2008) (testimony of ICE field officer discussing the training ICE agents receive on the Fourth Amendment) (on file with author); Elizabeth Llorente, *Immigration Officials Say Raids on Illegals Are Within the Law*, HACKENSACK REC., Jan. 2, 2008 (including statement by Scott Weber, ICE field director for its Newark, New Jersey, office: "We all

challenges have been raised through civil lawsuits<sup>51</sup> and evidence suppression hearings in immigration courts.<sup>52</sup> Legal commentators are also paying increasing attention to the methods used to enforce immigration laws as these initiatives have expanded and become more aggressive.<sup>53</sup>

I argue that urgent policy change is needed under the Obama Administration to alter the current trajectory of immigration enforcement practices. Home raids may result in the deportation of individuals without immigration status, but these deportations come at a significant cost. Accounts of home raids from across the country demonstrate that individuals are often stripped of their dignity at the hands of state actors following policies that arguably violate the Constitution. Numerous elements of ICE's practices result in profound intrusions of privacy and give rise to several distinct claims under the Fourth Amendment. The

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operate under the same Constitution. . . . Our officers have extensive training in which they're taught constitutional law, statutory law, and immigration law."); Stephanie Francis Ward, *Illegal Aliens on I.C.E.: Tougher Immigration Enforcement Tactics Spur Challenges*, A.B.A. J., June 2008 (reporting that Michael Neifach, ICE's principal legal adviser, stated that agents are trained to obtain consent or produce a lawful search warrant during raids on private residences); Chertoff Letter, *supra* note 37 (emphasizing that questioning about identity and requests for identification do not constitute Fourth Amendment seizures); Letter from Julie Myers, Assistant Sec'y, ICE, to Christina DeConcini, Dir. of Policy, Nat'l Immigration Forum (July 6, 2007) [hereinafter Myers Letter] (arguing that home raids are completed in a manner that respects the rights of those involved), available at [http://law.shu.edu/ProgramsCenters/PublicIntGovServ/CSJ/upload/exhibit\\_d.pdf](http://law.shu.edu/ProgramsCenters/PublicIntGovServ/CSJ/upload/exhibit_d.pdf).

51. See, e.g., Amended Complaint for Declaratory and Injunctive Relief and Damages, *Arias v. ICE*, 2009 WL 2900315 (D. Minn. Sept. 2, 2009) (No. 07-1959) [hereinafter *Arias* Complaint]; *Argueta* Complaint, *supra* note 2; First Amended Complaint—Class Action, *Mancha ex rel/Martinez v. ICE*, 2009 WL 900800 (N.D. Ga. Mar. 31, 2009) (No. 1:06-CV-2650) [hereinafter *Mancha* Complaint]; *Agular* Complaint, *supra* note 20; Complaint, *Daniel T. v. Bd. of County Comm'rs of Otero*, No. 2:07-CV-01044 (D.N.M. filed Oct. 17, 2007) [hereinafter *Daniel T.* Complaint]; Amended Complaint, *Flores-Morales v. George*, No. 1:07-CV-0050 (M.D. Tenn. filed July 27, 2007) [hereinafter *Flores-Morales* Complaint].

52. See, e.g., *In re P-*, P-, P-, P-, P-, at 7 (Immigr. Ct., New York, N.Y. June 25, 2008) (on file with author); *In re N-* (Immigr. Ct., San Francisco, Ca. Aug. 23, 2007) (on file with author); *In re M-* (Immigr. Ct., San Francisco, Ca. Aug. 16, 2007) (on file with author); Transcript of Record, *In re O-R-*, *supra* note 50; Respondent's Memorandum in Support of Its Motion to Suppress and Terminate, *In re M-* (Immigr. Ct., New York, N.Y. filed Oct. 2, 2008) [hereinafter Respondent's Support Memo, *In re M-*] (on file with author).

53. See, e.g., BESS CHIU, LYNLY EGYES, PETER L. MARKOWITZ & JAYA VASANDANI, IMMIGRATION JUSTICE CLINIC, BENJAMIN N. CARDOZO SCHOOL OF LAW, CONSTITUTION ON ICE: A REPORT ON IMMIGRATION HOME RAID OPERATIONS (2009), available at [http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/IJC\\_ICE-Home-Raid-Report%20Updated.pdf](http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/IJC_ICE-Home-Raid-Report%20Updated.pdf); Raquel Aldana, *Of Katz and "Aliens": Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081 (2008); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006); Shoba Sivaprasad Wadhia, *Under Arrest: Immigrants' Rights and the Rule of Law*, 38 U. MEM. L. REV. 853 (2008); Raquel Aldana, *Immigration Raids Lead U.S. to a Moral, Legal Crisis*, LA PRENSA SAN DIEGO, June 13, 2008.

likely unconstitutionality of the agency's actions and resulting liability should be sufficient to prompt changes in policy. However, in addition to the degradation felt by individuals, including U.S. residents and citizens, home raids exact a significant social cost that should provoke policy change. The clamor for enforcement of immigration laws does not justify aggressive and divisive home raids. Instead, I outline different options for policymakers in the Obama Administration that would respect the letter and spirit of the Fourth Amendment.

The first section compares ICE's official policy on home raids as described by former high-level administrators and in written guidelines with their actual practice. Evidence from home raids nationwide reveals widespread patterns of ICE agents detaining people through deception, intimidation, and physical force rather than through voluntary cooperation as described by ICE officials. This section also shows that the majority of those arrested by ICE do not fall under any of the categories that the Fugitive Operations Teams are supposed to target, suggesting that the public receives a false picture of these operations' outcomes. As a result, the impact of the current policy is felt primarily by individuals who may not be removable and have no criminal history or prior contact with immigration officials. This group, along with the family members swept up in the raids, includes U.S. citizens and lawful permanent residents.

The second section argues that the Fourth Amendment applies to ICE as it conducts home raids regardless of the legal status of the home's occupants. Because of the substantial privacy interests at stake, the administrative nature of immigration law should not lessen the protections of the Fourth Amendment in the context of home raids. This section also demonstrates that ICE routinely violates the Fourth Amendment at three distinct points in the course of conducting home raids: entering the home, searching the premises, and interrogating the residents. Finally, Section II examines weaknesses in the Fourth Amendment doctrine that could prevent victims of home raids from prevailing in their constitutional claims. It concludes that these doctrinal idiosyncrasies, which might allow ICE's practices to survive constitutional scrutiny, are not a sound basis for public policy. Instead, ICE's enforcement practices should be legally subject and should conform in practice to the core principles of the Fourth Amendment.

Section III outlines the social costs of the current policy and proposes changes for the new administration. The broad effects of home raids provide additional weight to the constitutional arguments for policy change. Home raids undermine relationships between local police departments and immigrant communities, making it more difficult to investigate crimes and provide protection. U.S. citizens, especially those of Hispanic descent, are regularly swept up in immigration raids. Not only do some U.S. citizens have to bear the burden of a constitutionally-



problematic enforcement policy, but that burden is also allocated by race. Further, ICE officials may be willing to accept constitutional violations in their current practices because there are often no legal consequences for violations due to the limitations of the exclusionary rule in immigration proceedings. This “what can we get away with” approach to public policy undermines the rule of law and erodes the government’s credibility.

Section III concludes with several policy recommendations. In light of the likely constitutional violations and the social costs of these raids, ultimately, the Obama Administration should stop the raids. The privacy intrusion is too great, the reliance on bad information is too pervasive, and the state interest in enforcing administrative immigration law is too low. If the Obama Administration stops short of prohibiting home raids altogether, it should put in place safeguards, such as informing residents of their right to refuse entry or only entering homes after obtaining a modified judicial arrest warrant, to ensure that individuals’ constitutional rights are protected. It should closely monitor the impact of its new “target and identify” quotas to make certain they do not lead to the same dragnet sweeps as were caused by previous arrest quotas. Finally, it should ensure that ICE follows its own regulations, which recognize the Fourth Amendment as a constraint on agency action but are often disregarded in practice.

## I.

### ICE’S POLICY VERSUS ITS PRACTICE

#### A. *ICE Policy: Statements by Officials Regarding Home Raids*

Even the nomenclature of home-based immigration enforcement has sparked controversy. Former DHS Secretary Michael Chertoff rejected the term “raid,” stating that it implies an ad hoc approach to immigration enforcement.<sup>54</sup> He asserted instead that Fugitive Operations Teams design their enforcement efforts based on the following arrest targets, in descending order of priority: (1) fugitives who are a threat to national security, (2) fugitives who pose a threat to the community, (3) fugitives who were convicted of violent crimes, (4) fugitives who have criminal records, and (5) non-criminal fugitives.<sup>55</sup>

Mr. Chertoff and the former DHS Assistant Secretary in charge of ICE, Julie Myers, described the general practices employed by agents conducting home raids in letters responding to public and Congressional

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54. Chertoff Letter, *supra* note 37.

55. *Id.* See also *supra* text accompanying notes 38–39 regarding removal orders issued in absentia.

criticism of such raids in New Haven, Connecticut.<sup>56</sup> First, the Fugitive Operations Teams identify their targets. Mr. Chertoff stated that the Fugitive Operations Teams act on “specific intelligence-based data gathered through law enforcement channels. Once intelligence is gathered on several fugitives located within the same general vicinity, a Fugitive Operation Team will develop an operational plan for the swift and safe arrest of the fugitive aliens in the most fiscally efficient way.”<sup>57</sup>

Second, the ICE officers must gain access to the residence. Deportation officers often carry a “Warrant of Deportation/Removal” (Form I-205) for the fugitive alien who is purportedly connected to the address of the house targeted.<sup>58</sup> A Warrant of Deportation/Removal is an administrative warrant, not a judicially-issued arrest or search warrant based on probable cause.<sup>59</sup> Once an administrative immigration judge has determined that an individual is removable from the United States, federal rules require a Warrant of Deportation/Removal to be issued within fourteen days.<sup>60</sup> This warrant can be issued by any person with one of twenty-five different titles in ICE or by their designees.<sup>61</sup> In short, a Warrant of Deportation/Removal is generated pro forma by any one of a large number of agency officials. It does not authorize entry into residences or other private areas,<sup>62</sup> nor is it usually generated close in time to a raid on any particular home.<sup>63</sup> Because Warrants of Deportation/Removal do not authorize ICE agents to enter the home of the person named, ICE officials are adamant that consent is always obtained before agents enter a residence.<sup>64</sup> Addressing home raids that

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56. Chertoff Letter, *supra* note 37; Myers Letter, *supra* note 50.

57. Chertoff Letter, *supra* note 37; Myers Letter, *supra* note 50.

58. Transcript of Record, *In re O-R-*, *supra* note 50, at 113; Llorente, *supra* note 50 (including statement by Scott Weber, ICE field director for Newark, New Jersey, office: “My officers are not involved in sweeps or random searches. We’re looking for specific individuals that we have specific information for and active and valid warrants for their removal.”).

59. Chertoff Letter, *supra* note 37.

60. 8 C.F.R. § 238.1(f)(1) (2009).

61. 8 C.F.R. § 241.2(a)(1) (2009). The Office of Detention and Removal Operations issues a Warrant of Deportation/Removal once a final order of removal has been issued by an immigration judge. *Id.*; Chertoff Letter, *supra* note 37.

62. *See, e.g.*, Transcript of Record, *In re O-R-*, *supra* note 50, at 113–14 (describing the administrative warrants as “knock and talk” warrants because officers must be granted access into the residence); Chertoff Letter, *supra* note 37; Myers Letter, *supra* note 50.

63. 8 C.F.R. § 238.1(f)(1) (2009). Because the federal rule requires a Warrant of Deportation/Removal to be generated within fourteen days of an order of removal, its issuance can precede the date of a home raid by months or even years.

64. Declaration of Lawrence Mulvey in Support of Motion to Suppress Evidence, *In re M-* (Immigr. Ct., New York, N.Y. filed Oct. 2, 2008) [hereinafter Mulvey Declaration] (“In conversations with representatives of ICE, it was reported to me [Commissioner of Police for Nassau County] that in all 131 homes they asked for and received consent to enter.”) (on file with the author); Chertoff Letter, *supra* note 37; Myers Letter, *supra* note 50.

occurred in New Haven on June 6, 2007, Mr. Chertoff stated that ICE agents never entered a house without consent and added that each team included a Spanish-speaking officer to ensure that consent was obtained “knowingly and voluntarily.”<sup>65</sup>

Next, the ICE officers search all rooms of the home and gather all individuals present in a common area, regardless of whether they reside in the home or are just visiting.<sup>66</sup> ICE officials explained that this action is required for the safety of the officers<sup>67</sup> and is “a common practice throughout law enforcement.”<sup>68</sup>

ICE officers then request proof of identification from all individuals present.<sup>69</sup> Mr. Chertoff stated that “[q]uestioning as to identity or request for identification does not constitute a Fourth Amendment seizure.”<sup>70</sup> Additionally, Mr. Chertoff and Ms. Myers asserted that ICE officers have “the authority to question any person as to their right to enter, reenter, pass through, or reside in the United States.”<sup>71</sup> It should be noted that the statute they cited as the basis for this authority has been interpreted to require reasonable suspicion on the part of the agents that the person questioned is not a U.S. citizen.<sup>72</sup> Both Mr. Chertoff and Ms. Myers acknowledged that “[t]he individual being interviewed must voluntarily agree to remain during questioning,”<sup>73</sup> because detaining an individual against her will for further questioning requires the officers to have a reasonable suspicion that the individual “has committed a crime, is an

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65. Chertoff Letter, *supra* note 37.

66. Transcript of Record, *In re O-R-*, *supra* note 50, at 109–10; Chertoff Letter, *supra* note 37.

67. *Id.* See also Nina Bernstein, *U.S. Raid on an Immigrant Household Deepens Anger and Mistrust*, N.Y. TIMES, Apr. 10, 2007, at B1 (The article describes a home raid of Latino U.S. citizens in East Hampton, New York, in which officers were looking for the ex-husband of the homeowner. The homeowner had an order of protection against her former husband, and they had been divorced for five years at the time of the raid. Christopher Shanahan, the Director of Deportation and Removal for ICE in New York, stated: “Due to officer safety needs, they can look into other areas, to clear rooms.”).

68. Myers Letter, *supra* note 50.

69. Transcript of Record, *In re O-R-*, *supra* note 50, at 107.

70. Chertoff Letter, *supra* note 37.

71. *Id.*; Myers Letter, *supra* note 50.

72. Both letters cite 8 U.S.C. § 1357(a)(1) for this proposition. The relevant language of this statute states: “Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant . . . to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States.” 8 U.S.C. § 1357(a)(1) (2006). Courts have interpreted the word “believed” in the context of the Fourth Amendment and generally require reasonable suspicion that the individual was a noncitizen before interrogation can occur. See, e.g., *Babula v. INS*, 665 F.2d 293, 295 (3d Cir. 1981); *Ojeda-Vinales v. INS*, 523 F.2d 286, 287 (2d Cir. 1975); *Au Yi Lau v. INS*, 445 F.2d 217, 223 (D.C. Cir. 1971).

73. Chertoff Letter, *supra* note 37. See also Myers Letter, *supra* note 50 (changing the language to “[a]n individual being interviewed voluntarily agrees to remain during questioning”).

alien who is unlawfully present, is an alien with status who is either inadmissible or removable from the United States, or is a nonimmigrant who is required to provide truthful information to DHS upon demand.”<sup>74</sup>

Finally, ICE officers may arrest, without a warrant, any individuals they encounter at the targeted location who they believe are in the United States illegally and are removable.<sup>75</sup> Mr. Chertoff and Ms. Myers stated that “[a] warrant is not necessary when arresting someone in the country illegally.”<sup>76</sup> Ms. Myers added, “ICE cannot turn a blind eye to illegal aliens once encountered.”<sup>77</sup>

### *B. ICE Practice: A Divergent Pattern Emerges from Accounts of Raids Across the Country*

Descriptions of home raids from all over the country illustrate a pattern of practice in which ICE officials rely on deception and intimidation rather than on the voluntary cooperation of occupants in conducting home raids. In a typical home raid, between five and twenty-five ICE agents arrive at a home early in the morning when residents are usually asleep.<sup>78</sup> Agents bang on the door, sometimes claiming to be the police,<sup>79</sup> sometimes identifying themselves as immigration officials,<sup>80</sup> and

74. Chertoff Letter, *supra* note 37; Myers Letter, *supra* note 50. With respect to nonimmigrants, both letters cite 8 C.F.R. § 214.1(f), which requires nonimmigrants to provide “full and truthful disclosure of all information requested by the Service” in order to maintain their lawful status in the United States. 8 C.F.R. § 214.1(f) (2009). The “Service” refers to the INS, the legacy agency of ICE and the U.S. Citizenship and Immigration Service (USCIS). The immigration section of the Code of Federal Regulations has not been fully revised since the INS was eliminated and replaced by USCIS and ICE.

75. Chertoff Letter, *supra* note 37; Myers Letter, *supra* note 50.

76. Chertoff Letter, *supra* note 37; Myers Letter, *supra* note 50. Although neither letter cites statutory authority for this proposition, presumably they are basing these statements on 8 U.S.C. § 1357(a)(2) (2006) (“Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant . . . to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest . . .”). ICE officers must have probable cause to believe that a person is likely to escape for a warrantless arrest. See *Babula v. INS*, 665 F.2d 293, 298 (3d Cir. 1981); *United States v. Sanchez*, 635 F.2d 47, 62 (2d Cir. 1980); *United States v. Khan*, 324 F. Supp. 2d 1177, 1186–87 (D. Colo. 2004). However, admission of unlawful status alone has been found to be sufficient to justify a warrantless arrest. *Contreras v. United States*, 672 F.2d 307, 309 (2d Cir. 1982).

77. Myers Letter, *supra* note 50.

78. See, e.g., Transcript of Record, *In re O-R-*, *supra* note 50, at 3; *Argueta* Complaint, *supra* note 2, ¶¶ 2, 57, 96–97, 112, 134, 148, 163, 176; *Mancha* Complaint, *supra* note 51, ¶¶ 24–26; *Aguilar* Complaint, *supra* note 20, ¶¶ 15–31; *Flores-Morales* Complaint, *supra* note 51, ¶ 22(a).

79. See, e.g., *Argueta* Complaint, *supra* note 2, ¶¶ 58, 98, 126; *Mancha* Complaint, *supra* note 51, ¶ 26.

80. See, e.g., *Mancha* Complaint, *supra* note 51, ¶ 42; *Aguilar* Complaint, *supra* note 20, ¶ 227.

sometimes saying nothing at all.<sup>81</sup> Though ICE agents often have a Warrant of Deportation/Removal for someone who may have been connected to the address at one time, this information is frequently outdated.<sup>82</sup> If someone opens the door, the agents generally push their way into the house.<sup>83</sup> Agents are also reported to have kicked in doors or entered through windows.<sup>84</sup> Upon entry, agents typically search the entirety of the home and gather all individuals in a common area,<sup>85</sup> sometimes handcuffing people or drawing their guns.<sup>86</sup> Agents then demand identification and proof of immigration status,<sup>87</sup> and arrest anyone who cannot prove her lawful status.<sup>88</sup> Individuals are transported to a detention center to be processed. Many report being held at detention centers for extended periods without food or water.<sup>89</sup>

### C. *The Target: Fugitive Aliens or Collateral Arrests*

To understand the impact of ICE's home raids, it is important to examine who is arrested. ICE's rhetoric includes references to "criminal aliens," "fugitive aliens," and "gang associates."<sup>90</sup> ICE has historically

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81. See, e.g., *Argueta* Complaint, *supra* note 2, ¶ 78; *Mancha* Complaint, *supra* note 51, ¶ 61; *Aguilar* Complaint, *supra* note 20, ¶¶ 123, 211.

82. See OIG REPORT, *supra* note 36, at 15 (characterizing the majority of the information in the database used by the Fugitive Operations Teams to conduct home raids as "inaccurate" or "incomplete"); Nina Bernstein, *Raids Were a Shambles, Nassau Complains to U.S.*, N.Y. TIMES, Oct. 3, 2007, at B1 (reporting Nassau County Police Commissioner Lawrence Mulvey's observation that, after ICE agents repeatedly declined offers to check the addresses of their list of targets against a local database that is updated daily, they found only six of their ninety-six targets).

83. See, e.g., *Argueta* Complaint, *supra* note 2, ¶¶ 80, 99, 115, 127; *Aguilar* Complaint, *supra* note 20, ¶ 255.

84. See, e.g., *Arias* Complaint, *supra* note 51, ¶ 68; *Mancha* Complaint, *supra* note 51, ¶¶ 59, 68; *Aguilar* Complaint, *supra* note 20, ¶¶ 193, 205, 287.

85. See, e.g., *Argueta* Complaint, *supra* note 2, ¶¶ 63, 129, 143; *Aguilar* Complaint, *supra* note 20, ¶¶ 118, 249, 256, 286; *Illegal Immigrants Arrested Two Days After ID Proposal Passes* (NBC Connecticut television broadcast, June 6, 2007) (covering raids in New Haven, Connecticut).

86. See, e.g., *Arias* Complaint, *supra* note 51, ¶ 72; *Argueta* Complaint, *supra* note 2, ¶¶ 84, 151; *Mancha* Complaint, *supra* note 51, ¶ 37; *Aguilar* Complaint, *supra* note 20, ¶ 248; Llorente, *supra* note 50; Aaron Nicodemus, *Illegal Aliens Arrested in Raid: Feds Nab 15 in Milford*, WORCHESTER TELEGRAM & GAZETTE, Dec. 9, 2007, available at <http://www.telegram.com/article/20071209/NEWS/712090446/NEWS02>.

87. See, e.g., Transcript of Record, *In re O-R-*, *supra* note 50, at 109; *Argueta* Complaint, *supra* note 2, ¶ 50; *Mancha* Complaint, *supra* note 51, ¶ 50; *Aguilar* Complaint, *supra* note 20, ¶ 266; Respondent's Support Memo, *In re M-*, *supra* note 52, at 5.

88. See, e.g., *Arias* Complaint, *supra* note 51, ¶ 93; *Argueta* Complaint, *supra* note 2, ¶¶ 3, 75 (Plaintiff *Argueta* provided ICE agents with proof of identification and proof of lawful status but was nonetheless arrested and held in a processing center for thirty-six hours); *Aguilar* Complaint, *supra* note 20, ¶ 165.

89. See, e.g., Transcript of Record, *In re O-R-*, *supra* note 50, at 57-58; *Argueta* Complaint, *supra* note 2, ¶ 74.

90. See Bernstein, *supra* note 82 (discussing gang associates); Chertoff Letter, *supra*

refused to disclose information about the ratio of arrests of individuals targeted in the raids to total arrests.<sup>91</sup> Documents released in February 2009 as a result of a lawsuit show that forty-six percent of the noncitizens arrested by ICE from fiscal year 2005 to fiscal year 2008 were “collateral” arrests, not arrests of individuals who fit the five arrest priorities described by Mr. Chertoff.<sup>92</sup> These “collateral” individuals have had no contact with the criminal justice system and no previous contact with immigration enforcement. All personal accounts of home raids included in this article come from people considered “collateral arrests.” There were nearly 30,000 collateral arrests made between 2005 and 2008.<sup>93</sup>

Reports from individual raids often reflect an even greater proportion of collateral arrests. In raids in Contra Costa County, California, over the course of ten days, ICE reported a ratio of five collateral arrests for every target arrested.<sup>94</sup> A report from Columbus, Ohio, indicated that over fifty-five percent of those arrested were collateral arrests.<sup>95</sup> Approximately seventy percent of the arrests in raids in Suffolk and Nassau counties in New York were collateral arrests.<sup>96</sup> Raids in New Haven resulted in a ratio of approximately six collateral arrests for every arrest of a fugitive alien.<sup>97</sup> ICE press releases in New Jersey indicate that as few as one in three individuals arrested in raids in April 2007 was considered a fugitive by

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note 37 (discussing fugitive aliens); Press Release, Dep’t of Homeland Sec., ICE Apprehends More Than 2,100 Criminal Aliens, Gang Members, Fugitives and Other Immigration Violators in Nationwide Interior Enforcement Operation (June 14, 2006), available at [http://www.dhs.gov/xnews/releases/press\\_release\\_0926.shtm](http://www.dhs.gov/xnews/releases/press_release_0926.shtm).

91. The Immigration Justice Clinic at Cardozo School of Law litigated ICE’s refusal to disclose policy memoranda and arrest statistics in response to the Clinic’s Freedom of Information Act (FOIA) request. Immigration Justice Clinic, Cardozo Sch. of Law, Immigration Justice Clinic News, <http://www.cardozo.yu.edu/immigrationnews> (last visited May 8, 2009).

92. See Immigration Justice Clinic, Cardozo Sch. of Law, ICE FOIA Documents, <http://cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/memos%20and%20data.pdf> (last visited May 8, 2009) [hereinafter ICE FOIA Documents]. Note that of the arrests that do fall within one of the five priority categories, the vast majority falls within the lowest category—those individuals who have received an order of deportation but have no criminal history. This category, in addition to the collateral arrests, accounts for seventy-three percent of the nearly 97,000 arrests by Fugitive Operations Teams from fiscal year 2003 to fiscal year 2008. MENDELSON, STROM & WISHNIE, *supra* note 42, at 1.

93. See ICE FOIA Documents, *supra* note 92. The total number of collateral arrests between fiscal years 2005 and 2008 was 27,834.

94. See Tom Lochner, *ACLU Asks for Details on Migrant Deportations*, THE OAKLAND TR., Mar. 10, 2007, available at [http://www.insidebayarea.com/search/ci\\_5406654](http://www.insidebayarea.com/search/ci_5406654).

95. See Kevin Mayhood, *Ohio Sweep Nets 154: Federal Authorities Track Down Immigrants from 30 Countries Living Illegally in the State*, COLUMBUS DISPATCH, July 15, 2006, at 1E.

96. See Bernstein, *supra* note 82. Officials gave differing estimates; this figure is based on the only account of the total arrests for both counties.

97. Nina Bernstein, *Hunts for ‘Fugitive Aliens’ Lead to Collateral Arrests*, N.Y. TIMES, July 23, 2007, at B5.

ICE.<sup>98</sup> In a raid in Passaic, New Jersey, ICE officers reported raiding thirteen homes looking for six targets.<sup>99</sup>

There are several possible explanations for the imbalance between the number of collateral and targeted arrests. Mr. Chertoff spoke of the need for “swift and safe arrest[s]” and fiscal efficiency,<sup>100</sup> and the high number of collateral arrests may be the result of these emphases. With the increased arrest quota of 1000 arrests per year in 2006, the agency subsequently dropped previous requirements that a vast majority of the arrests be “criminal” or “fugitive aliens.”<sup>101</sup> Additionally, a report by the DHS Inspector General concluded that an estimated fifty percent of the data in the database relied on by the Fugitive Operations Teams is inaccurate and an even greater percentage is incomplete.<sup>102</sup> Also, while Fugitive Operations Teams are instructed to coordinate with local law enforcement before conducting a raid,<sup>103</sup> they do not always do so, and, therefore, do not receive updated information on their targets.<sup>104</sup>

Local law enforcement officials in Nassau County, New York, participated in some of the raids that formed the basis for a class action lawsuit against ICE. The day after the raids, the Police Commissioner and the County Executive denounced the way the raids were conducted. They said there were “clear dangers of friendly fire” and that the raids were based on wrong or outdated addresses.<sup>105</sup> The Nassau County Executive wrote to then-Secretary Chertoff calling for an investigation into alleged “misconduct and malfeasance” on the part of ICE.<sup>106</sup> The Police Commissioner stated: “You have to have some reason to believe the target will be there when you enter a home. . . . When you have 96 warrants and

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98. See Press Release, ICE, Dep’t of Homeland Sec., ICE Fugitive Operations Teams Arrest 217 Immigration Violators (May 1, 2007), available at [www.ice.gov/pi/news/newsreleases/articles/070501newark.htm](http://www.ice.gov/pi/news/newsreleases/articles/070501newark.htm).

99. Meredith Mandell, *Immigration Raid Raises Questions About Passaic’s ‘Safe Haven’ Status*, N.J. HERALD NEWS, Mar. 9, 2008 (on file with the author). The report did not include the number of arrests that resulted from the raids nor the number of original targets actually found, but the ratio of targets to houses raided indicates a potentially high proportion of collateral arrests.

100. Chertoff Letter, *supra* note 37.

101. See ICE FOIA Documents, *supra* note 92. Fugitive Operations Teams were originally required to make 125 “fugitive alien” arrests in 2003. In 2004, agency officials required that seventy-five percent of the individuals arrested be “criminal aliens.” OIG REPORT, *supra* note 36, at 8. The change in the proportion of collateral arrests due to the Obama Administration’s policy change from requiring 1000 *arrests* per year to requiring the *identification and targeting* of 600 “fugitive aliens” per year per team plus an additional 500 “fugitive aliens” through operations with other teams is too recent to be measurable. See Aizenman, *supra* note 48.

102. OIG REPORT, *supra* note 36, at 15.

103. See Chertoff Letter, *supra* note 37.

104. Bernstein, *supra* note 82.

105. *Id.*

106. *Id.*

you only find six of them, it's hard to make the argument that you had a good faith basis to enter those houses."<sup>107</sup> The Police Commissioner also reported that ICE agents repeatedly declined offers to check their list of targets against the local database that is updated daily.<sup>108</sup> The ICE agent in charge of the raids responded: "These people are very transient. They don't stay at that location. . . . We keep going to these different places until we find them."<sup>109</sup>

The next section describes the actual experiences of numerous raid victims, all of whom were "collateral arrests," and analyzes the constitutional violations that occurred in the course of raids on their homes. It also examines the doctrinal obstacles that could prevent raid victims from prevailing on these constitutional claims.

## II.

### HOME RAIDS AND THE FOURTH AMENDMENT: ICE'S CURRENT PRACTICE GIVES RISE TO MULTIPLE CONSTITUTIONAL CLAIMS

This section of the paper explores the constitutionality of ICE's practice by examining Supreme Court precedent in the context of descriptions of home raids throughout the country. This section also discusses the implication of that analysis for public policy. Supreme Court precedent on the scope of the Fourth Amendment and the balance between the state interest in administrative searches and privacy interests in the home establishes that the Fourth Amendment governs immigration home raids. However, ICE's practices typically fall short of meeting Fourth Amendment standards at three distinct points: entering the home, searching all rooms in the home, and gathering residents in one room and questioning them regarding identification and immigration status. Consent to enter is generally coerced. The rubric of "protective sweeps" is inapposite to agency practice, and the searches are without legal basis. In addition, residents are illegally seized in the course of being corralled and cannot provide valid consent to agents' questioning. This section also discusses the possibility that weaknesses in the Fourth Amendment doctrine, such as the limited precedential value of "totality of the circumstances" tests and concessions intended to protect officer safety, could undermine the constitutional claims of people subjected to raids. While doctrinal idiosyncrasies might defeat a motion to suppress or a damages action, they do not justify a public policy that violates the over-arching principles of the Fourth Amendment.

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107. *Id.*

108. *Id.*

109. *Id.*



A. *The Fourth Amendment Applies to Home Raids by Immigration Officials*

The Fourth Amendment protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”<sup>110</sup> Its well-accepted purpose is “to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.”<sup>111</sup> The Supreme Court has questioned who qualifies as one of “the people,” however, and has not provided a definitive answer.<sup>112</sup> Also, the Fourth Amendment’s requirements with respect to probable cause and the issuance of a warrant are not as strict when enforcing administrative law as they are in the enforcement of criminal law.<sup>113</sup> Together, this means that the scope of the Fourth Amendment depends on what law is being enforced, how, and against whom.

This section argues that the Fourth Amendment protects all individuals lawfully present in the United States as well as many who are present unlawfully, and that the administrative nature of immigration law does not mitigate its protections in the context of home raids. Additionally, this section argues that agency regulations, internal manuals, and official statements recognize the requirements of the Fourth Amendment in immigration enforcement and, therefore, that ICE agents’ actions should conform to the Constitution. Finally, this section discusses the limited application of the exclusionary rule in removal proceedings and the calls for the Supreme Court to revisit its decision on this issue.

The first question is to whom does the Fourth Amendment apply in the criminal context. If the Fourth Amendment does not apply in the criminal context, it is unlikely to apply in the less demanding context of administrative law. With respect to the application of the Fourth Amendment to noncitizens, the Supreme Court has held that the Fourth Amendment protects a Mexican citizen, lawfully present in the United

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110. U.S. CONST. amend. IV.

111. *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 528 (1967).

112. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 265–71 (1990).

113. *See, e.g., Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 619 (1989) (“Except in certain well-defined circumstances, a search or seizure in such a case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause. We have recognized exceptions to this rule, however, when ‘special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.’”) (internal citations omitted); *Donovan v. Dewey*, 452 U.S. 594, 600 (1981) (“[A] warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.”); *Camara*, 387 U.S. at 535–39 (holding that area searches can be reasonable under the Fourth Amendment absent individualized probable cause of a regulatory violation).

States, in a criminal proceeding.<sup>114</sup> It was left uncertain, however, whether the exclusionary rule would be available in removal proceedings to remedy Fourth Amendment violations.<sup>115</sup> In deciding the reach of the exclusionary rule in *INS v. Lopez-Mendoza*, the Court assumed that the Fourth Amendment protected illegal aliens.<sup>116</sup> In *United States v. Verdugo-Urquidez*, the Court explained that the assumption made by the *Lopez-Mendoza* Court was not binding and specifically declined to answer the question of whether the Fourth Amendment protects illegal aliens in criminal investigations.<sup>117</sup> In *Verdugo-Urquidez*, U.S. officials searched a Mexican national's home in Mexico, confiscated drugs, and brought the Mexican national to the United States to be arraigned on criminal charges. The Court suggested that an individual would be one of "the people" protected by the Fourth Amendment if she were present in the United States voluntarily and had "accepted some societal obligations" or "developed substantial connections with this country."<sup>118</sup> The precedential value of this portion of the Court's opinion is complicated by the fact that Justice Kennedy concurred in the opinion but rejected the idea that the text "the people" provides any authority for restricting the category of persons protected by the Fourth Amendment.<sup>119</sup> Justice Kennedy went on to say that if the search had been conducted in the United States, he had "little doubt that the full protections of the Fourth Amendment would apply."<sup>120</sup> Therefore, despite the Court's holding, it does not appear that there were actually five votes for the proposition that some individuals living in the United States might not be protected by the Fourth Amendment.<sup>121</sup> Additionally, the Court stated that the "illegal aliens in *Lopez-Mendoza* were in the United States voluntarily and presumably had accepted some societal obligations," thereby suggesting that the

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114. *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973). Border Patrol searched the car of a Mexican citizen without probable cause or reasonable suspicion and not as part of a border search. The agents found marijuana, and the Mexican citizen was convicted of criminal charges. *Id.* at 267-68.

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

116. *See id.* at 1050.

117. *Verdugo-Urquidez*, 494 U.S. at 272 (holding that the Fourth Amendment does not apply to the search by American authorities of the Mexican residence of a Mexican citizen).

118. *Id.* at 271, 273.

119. *Id.* at 276 (Kennedy, J., concurring) ("[E]xplicit recognition of 'the right of the people' to Fourth Amendment protection may be interpreted to underscore the importance of the right, rather than to restrict the category of persons who may assert it.").

120. *Id.* at 278.

121. Justice Stevens concurred in the judgment but not the opinion, stating that the respondent was lawfully in the United States because he was brought to the United States in criminal custody and, therefore, was covered by the Fourth Amendment. He concurred in the judgment because the search was reasonable in his opinion. *See id.* at 279 (Stevens, J., concurring).

protections of the Fourth Amendment are not limited to noncitizens who are lawfully present in the United States.<sup>122</sup> But the Court did not describe what constitutes sufficient societal obligations.

Many of the families described in this article whose homes have been raided are of mixed immigration status, often including U.S. citizen children and some lawful permanent resident members. As such, many occupants of these homes would enjoy the full protection of the Fourth Amendment under *Verdugo-Urquidez* in the criminal context. Those occupants who are not lawfully in the United States are still here voluntarily and may have accepted sufficient “societal obligations” to be protected by the Fourth Amendment. As a result, the immigration status of a home’s occupants is unlikely to limit the application of the Fourth Amendment in home raids.

Also, the immigration status of a home’s occupants or the extent of their “societal obligations” is not immediately apparent to ICE agents. This information is only learned later in the encounter. Agents should assume that the Fourth Amendment applies from the outset. Otherwise, agents would be justifying state action that does not conform to the Fourth Amendment with information gathered only after the action was taken. Such ex-post findings cannot be the basis for unconstitutional behavior. In an analogous situation, the Court in *Hamdi v. Rumsfeld* reasoned that the Due Process Clause applies to a U.S. citizen challenging her status as an enemy combatant and, therefore, only after that status was confirmed could fewer constitutional protections attach.<sup>123</sup>

The nature of the law being enforced also affects the level of protection afforded by the Fourth Amendment. Probable cause and a warrant, or circumstances that constitute an exception to the warrant requirement, are requirements of criminal law enforcement. However, in civil law enforcement, courts determine whether an administrative search was reasonable by balancing the state interest in the search against the

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122. *Id.* at 273 (majority opinion). Lower courts have split on whether and when illegal aliens have Fourth Amendment rights. *See, e.g.,* *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 624 (5th Cir. 2006) (questioning whether there was a majority for the requirement of a substantial connection to the United States in addition to voluntary presence); *United States v. Ullah*, No. 04-CR-30A(F), 2005 WL 629487, at \*29–30 (W.D.N.Y. Mar. 17, 2005) (holding that illegal aliens can never establish substantial connections to trigger the protections of the Fourth Amendment); *United States v. Esparza-Mendoza*, 265 F. Supp. 2d 1254, 1261 (D. Utah 2003) (“This court is not at liberty to second-guess Justice Kennedy’s direct statement that he was joining the Court’s opinion.”); *United States v. Guittierrez*, 983 F. Supp. 905, 912–15 (N.D. Cal. 1998) (interpreting *Verdugo-Urquidez* as a plurality and finding an illegal alien need not demonstrate a “connection” with this country as a prerequisite to asserting the shelter of the Fourth Amendment), *rev’d on other grounds*, 203 F.3d 833 (9th Cir. 1999).

123. *Hamdi v. Rumsfeld*, 542 U.S. 507, 524 (2004) (“Even in cases in which the detention of enemy combatants is legally authorized, there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status.”).

degree of invasion the search entails.<sup>124</sup> In evaluating the level of intrusion, courts have considered the following factors: prior notice of the search,<sup>125</sup> the amount of discretion exercised by the officer in choosing whom to search,<sup>126</sup> a diminished expectation of privacy,<sup>127</sup> the location of the search,<sup>128</sup> the duration of a seizure required to effectuate a search,<sup>129</sup> and the invasiveness of the search.<sup>130</sup>

The government's interest in enforcing immigration laws is certainly legitimate and substantial. On the other hand, all of the factors indicating level of intrusion point toward a severe intrusion of privacy in home raids. In particular, the invasion of privacy in one's own home implicates the core of the Fourth Amendment. The Supreme Court described arbitrary searches of one's home as the "chief evil" against which the Fourth Amendment aims to protect<sup>131</sup> and has referred to "the Fourth Amendment sanctity of the home."<sup>132</sup>

The Court in *Camara v. Municipal Court of San Francisco* addressed whether probable cause and a warrant were required for entry into a home to conduct an administrative safety inspection in the absence of consent.<sup>133</sup> In balancing the competing interests, it determined that probable cause of a safety violation in a specific building was not required, but a warrant

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124. See, e.g., *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 536–37 (1967).

125. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 667 (1989).

126. Less discretion by officers makes a search less intrusive. See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 452–53 (1990); *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976); *Delaware v. Prouse*, 440 U.S. 648, 661 (1976).

127. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 657 (1995); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 627 (1989) (finding drug testing of railroad employees acceptable in part because they are in a pervasively regulated industry); *Von Raab*, 489 U.S. at 666–67 (permitting drug testing of U.S. Customs employees upon promotion or application for sensitive positions).

128. *Vernonia*, 515 U.S. at 656–57 (students in a public school environment); *Skinner*, 489 U.S. at 625 (in a medical environment).

129. See, e.g., *Sitz*, 496 U.S. at 451–52; *United States v. Montoya de Hernandez*, 473 U.S. 531, 542–43 (1985); *Martinez-Fuerte*, 428 U.S. at 558.

130. *Von Raab*, 489 U.S. at 663 (aural rather than visual monitoring of urine collection for drug testing); *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985) (holding that a search in a school for administrative purposes "will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction"); *United States v. Charleus*, 871 F.2d 265 (2d Cir. 1989) (removal of shoes, pulling down girdle or lifting skirt in private room is less intrusive than body cavity or full strip search and not unreasonable in a border search); *Konop v. Nw. Sch. Dist.*, 26 F. Supp. 2d 1189 (D.S.D. 1998) (strip search of eighth grade students to look for stolen money unreasonable).

131. *Payton v. New York*, 445 U.S. 573, 585 (1980).

132. *Kyllo v. United States*, 533 U.S. 27, 37 (2001) (holding that use of thermal imaging devices to determine that part of home was substantially warmer than the rest of home and neighbors' homes in a marijuana investigation was a search).

133. *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 525 (1967).

was.<sup>134</sup> A modified warrant procedure was required because “administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment.”<sup>135</sup> Given the significant privacy interests at stake and the Court’s previous holding on administrative searches of homes, the administrative nature of immigration law should not reduce the protections afforded by the Fourth Amendment in the context of home raids.

ICE’s own position has conformed to the doctrinal arguments suggesting that the Fourth Amendment applies in immigration home raid. ICE’s regulations,<sup>136</sup> internal guidelines,<sup>137</sup> and policy statements<sup>138</sup> all draw on the standards and requirements of the Fourth Amendment. As a result, the actions of ICE agents when conducting home raids should be judged against the requirements of the Fourth Amendment.

While the Fourth Amendment may govern ICE’s conduct in home raids, the availability of a remedy for a violation is a separate issue. The Supreme Court created the remedy of the exclusionary rule, which bars the use of evidence obtained in violation of the Fourth Amendment against that person in a criminal proceeding.<sup>139</sup> The primary rationale offered for the exclusionary rule is to deter law enforcement officers from violating constitutional rights.<sup>140</sup>

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134. *Id.* at 538–39 (warrant could be issued based on generalized facts such as passage of time or an established area-wide inspection program).

135. *Id.* at 534.

136. *See, e.g.*, 8 C.F.R. § 287.8(b)(1) (2009) (“Interrogation is questioning designed to elicit specific information. An immigration officer, like any other person, has the right to ask questions of anyone as long as the immigration officer does not restrain the freedom of an individual, not under arrest, to walk away.”); 8 C.F.R. § 287.8(b)(2) (2009) (“If the immigration officer has a reasonable suspicion, based on specific articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is an alien illegally in the United States, the immigration officer may briefly detain the person for questioning.”); 8 C.F.R. § 287.8(f)(2) (2009) (“An immigration officer may not enter into the non-public areas of a . . . residence including the curtilage of such residence . . . for the purpose of questioning the occupants . . . concerning their right to be or remain in the United States unless the officer has either a warrant or the consent of the owner or other person in control of the site to be inspected.”).

137. Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, Immigration & Naturalization Serv., *The Law of Arrest, Search, and Seizure for Immigration Officers*, in 1 IMMIGRATION LAW AND PROCEDURE (2009).

138. *See generally* Chertoff Letter, *supra* note 37; Authority of INS Officers to Assist State Enforcement Operations, 8 Op. INS Gen. Counsel 91-36 (1991).

139. *Weeks v. United States*, 232 U.S. 383, 398 (1914). The exclusionary rule was applied to Fourth Amendment violations by state police in *Mapp v. Ohio*, 367 U.S. 643, 657 (1961).

140. *Mapp*, 367 U.S. at 648. *Weeks* also discussed the rationale of judicial integrity, which requires that courts not sanction illegal searches by admitting the fruits of illegality into evidence. 232 U.S. at 394. *Mapp* shifted the focus to deterrence as the sole rationale. Judicial integrity has been abandoned in the Court’s more recent decisions related to the application of the exclusionary rule. *See, e.g.*, *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1041–45 (1984); *United States v. Janis*, 428 U.S. 433, 447–54 (1976).

Generally, home raids result in civil removal proceedings against individuals who cannot prove their lawful status rather than criminal charges. Questioning the deterrent value of the exclusionary rule in removal proceedings and noting its high cost, the Supreme Court limited its application in civil removal proceedings to “egregious violations of the Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.”<sup>141</sup> The Court also said that it might reconsider the need for the exclusionary rule in immigration proceedings “if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread.”<sup>142</sup> In light of more aggressive enforcement and increasing reports of constitutional violations by ICE, legal commentators have called for the Court to reexamine its position on the application of the exclusionary rule in removal proceedings.<sup>143</sup> Individuals subjected to home raids can advocate for immigration courts to apply the exclusionary rule under *Lopez-Mendoza*, but they must convince the immigration judge that the violation was egregious or that such violations are widespread in order to succeed.<sup>144</sup>

It is important to note that the exclusionary rule is only a remedy, and the absence of the exclusionary rule does not mean that actions by ICE agents are constitutional. The next section outlines the numerous violations of the Fourth Amendment that occur in the course of a typical home raid. The following section argues that ICE policy should not promote unconstitutional behavior simply because there is often no consequence for such conduct.

### *B. Fourth Amendment Violations Occur Regularly in the Course of Home Raids*

The application of the Fourth Amendment in immigration home raids,

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141. *Lopez-Mendoza*, 468 U.S. at 1050–51.

142. *Id.* at 1050.

143. See e.g., Stella Burch Elias, “Good Reason to Believe”: Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting *Lopez-Mendoza*, 5 WISC. L. REV. 1109, 1156 (2008) (arguing that Fourth Amendment violations have become widespread and the exclusionary rule is needed to constrain ICE); Matthew S. Mulqueen, *Rethinking the Role of the Exclusionary Rule in Removal Proceedings*, 82 ST. JOHN’S L. REV. 1157, 1161, 1188–91 (2008) (arguing that ICE’s internal guidelines have failed to control Fourth Amendment violations and the deterrent effect of the exclusionary rule is needed).

144. See, e.g., *In re P-*, P-, P-, P-, P-, P-, at 7 (Immigr. Ct., New York, N.Y. June 25, 2008) (on file with author); *In re O-R-*, at 9 (Immigr. Ct., Elizabeth, N.J. May 1, 2008) (on file with author); *In re N-*, at 10–11 (Immigr. Ct., San Francisco, Ca. Aug. 23, 2007) (on file with author); *In re M-*, at 6 (Immigr. Ct., San Francisco, Ca. Aug. 16, 2007) (on file with author); Respondent’s Support Memo, *In re M-*, *supra* note 52, at 5–8, 29 (claiming that “administrative warrants were being used as a pretext to round up as many undocumented immigrants as ICE could lay their hands on”).

discussed in the preceding section, is a threshold question. If the Supreme Court were to decide that the Fourth Amendment does not apply to any individual present in the United States unlawfully or that the interest in enforcement of immigration law justified the substantial privacy intrusion, the following analysis would have much less import for individual cases. U.S. citizens and lawful residents whose homes were raided might be able to bring damages actions,<sup>145</sup> but individuals in the same home not protected by the Fourth Amendment would have little recourse.<sup>146</sup>

However, an account of the unconstitutional aspects of ICE's practice is nevertheless important to evaluating the current policy. The limitations of the exclusionary rule in immigration proceedings already mean that there may not be a legal consequence for constitutional violations in every case. However, the number and nature of the violations—with or without the exclusionary remedy—provide the strongest support for abandoning current policy.

This section presents accounts of victims of home raids as described in lawsuit complaints, media reports, and immigration court decisions on motions to suppress evidence acquired in the course of a home raid.<sup>147</sup> Based on these accounts, this section argues that consent to enter is usually coerced, the search of all rooms in the home is without legal basis, and ICE agents typically seize residents before questioning them rendering any consent to answering their questions invalid.

### *1. Entry: ICE's Practice of Gaining Entry to Homes and Its Constitutional Failings*

There are no accounts of ICE officers possessing judicial warrants authorizing them to enter the homes of immigrants, and ICE officials do not claim to possess such warrants. Instead, ICE officials assert that they obtain consent to enter the homes,<sup>148</sup> obviating the need for a warrant.<sup>149</sup> One local law enforcement official who participated in ICE raids has

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145. See *Bivens v. Six Unknown Named Agents of the FBI*, 403 U.S. 388, 397 (1971).

146. See *Rakas v. Illinois*, 439 U.S. 128, 148–50 (1978) (holding that standing to invoke the exclusionary rule depends on whether the person has a legitimate expectation of privacy in the area searched). In the absence of protection by the Fourth Amendment, individuals might be able to challenge ICE's action under the Fifth Amendment right to due process, but a discussion of alternative checks on state action is beyond the scope of this paper.

147. Because most of these suits are ongoing or have been settled, no facts have formally been found by federal courts. The decisions on the motions to suppress represent the formal findings of immigration judges.

148. Transcript of Record, *In re O-R-*, *supra* note 50, at 113–14 (testimony of ICE Officer Belluardo); Chertoff Letter, *supra* note 37; Myers Letter, *supra* note 50.

149. *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (“It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.” (citations omitted)).

questioned the veracity of this assertion. Lawrence Mulvey, Commissioner of Police for Nassau County, stated,

In conversations with representatives of ICE, it was reported to me that in all 131 homes they asked for and received consent to enter . . . . In my 29 years of police work, I have executed countless warrants and have sought consent to enter countless homes. ICE's claim that they received 100% compliance with their requests to enter is not credible under even the best of circumstances.<sup>150</sup>

Numerous accounts of home raids describe ICE agents entering residences by force. In a class action brought in Georgia regarding raids conducted in southeastern Georgia in September 2006, Gladis Espitia stated that eighteen vehicles surrounded her home on September 2, 2006.<sup>151</sup> Several ICE agents handcuffed members of Ms. Espitia's family who were outside while other agents knocked on the door.<sup>152</sup> Ms. Espitia reported that at least one of the agents threatened to break down the door and throw gas inside the home.<sup>153</sup> None of the family members opened the door.<sup>154</sup> Ms. Espitia reported that the ICE agents broke through her front door, damaging the frame and lock, and searched her home.<sup>155</sup> She stated that some of the agents again threatened to use gas to get the family members out of the bedroom.<sup>156</sup> Several individuals who rented rooms in a boarding house in Riverhead, New York, reported waking at 4:30 a.m. on April 18, 2007, to banging on the outside doors.<sup>157</sup> The agents reportedly forced open the back door after denting the front door and pounding a hole in the wall around the front lock.<sup>158</sup> These individuals were taken to a

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150. Mulvey Declaration, *supra* note 64, ¶ 10.

151. *Mancha* Complaint, *supra* note 51, ¶ 57.

152. *Id.* ¶ 58.

153. *Id.*

154. *Id.* ¶ 59.

155. *Id.* ¶¶ 59–60.

156. *Id.* ¶ 60. David Robinson owns two trailer parks in Georgia that were raided. He reported that one of the trailer parks was raided on September 7, 2006, and the other on September 3, 2006, and September 5, 2006. *Id.* ¶ 67. In the course of the three raids, Mr. Robinson stated that ICE officers forcibly entered many of the trailers, caused damage to a door and several windows in several homes, and pulled the skirting off another trailer and intentionally damaged its floor. *Id.* ¶¶ 67–68.

In *In re M*, the respondent describes a raid outside New York City on April 18, 2007, in which ICE officers gained entry to the home by (1) pushing in a window air conditioner and then entering via the window, and (2) opening an unlocked window in the kitchen and entering the home. Respondent's Support Memo, *In re M*, *supra* note 52, at 15. Numerous plaintiffs in *Aguilar*, *Arias*, and *Mancha* describe ICE agents forcibly entering their homes. *Arias* Complaint, *supra* note 51, ¶¶ 68, 71; *Mancha* Complaint, *supra* note 51, ¶¶ 59, 68; *Aguilar* Complaint, *supra* note 20, ¶¶ 17, 19, 21.

157. *Aguilar* Complaint, *supra* note 20, ¶ 19.

158. *Id.* ¶ 204.



processing center in New York City and released after several hours without money to get home.<sup>159</sup> In such cases, lack of consent is evident in the broken doors and windows.

However, these cases may be outliers. There are also accounts of ICE leaving a home if no resident opens the door, indicating that ICE does not always enter the homes they intend to raid by one method or another.<sup>160</sup> ICE's conduct as described by its officials may be a better indicator of the prevailing practice or may at least serve as a baseline from which to evaluate the constitutionality of ICE's official policy. This section examines the legal standard for consent and argues that under the totality of the circumstances, ICE gains entry via coercion, not voluntary cooperation.

*a) Examples of ICE's Current Practice*

An immigration judge suppressed evidence obtained by the government and terminated the removal proceeding against Mr. P-, finding that consent to enter his home was involuntary and "granted in submission to authority."<sup>161</sup> Mr. P- testified that he was awoken at 4:45 a.m. by banging on his front door.<sup>162</sup> When he opened the window and looked out, he saw six individuals who identified themselves as police and told him to open the door; he saw they were wearing guns and uniforms, and he did what they told him to do.<sup>163</sup>

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159. *Id.* ¶¶ 202–03. Several other individuals who rented rooms in a boarding house in Mount Kisco, New York, reported almost an identical experience on March 19, 2007, beginning at around 4:00 a.m. *Id.* ¶¶ 209–18.

160. One New York family reported waking up at 5:30 a.m. to shouts of "Immigration. Open the door." The agents reportedly tried to break open the door but could not. The family refused to open the door and reported telling the agents that they wanted to see a warrant and to slide it under the door. An agent reportedly said that they would go get the necessary papers if the family would not let them in. The agents then told the family that they were police and the family should not be afraid and should open the door. The family continued to refuse, and the ICE agents eventually left. *Id.* ¶¶ 223–34.

A complaint filed by thirteen plaintiffs against ICE and New Jersey field officers includes a report from the Monmouth County Police Department describing a call from an ICE agent who said ICE had an administrative deportation warrant that it was trying to serve. The ICE agent knew that the family was home, but nobody would open the door when the officers knocked at 6:00 a.m. The ICE agent asked a uniformed police officer to take a marked Freehold Borough Police car to the house and knock on the door and "have the accused family come to the door. Once someone was to come to the door ICE would take over the investigation." A police officer complied with the request, but the family did not answer the door, and both the police and ICE left the scene. *Argueta* Complaint, *supra* note 2, Ex. B.

161. *In re P-, P-, P-, P-, P-, P-*, at 5 (Immigr. Ct., New York, N.Y. June 25, 2008) (on file with author).

162. *Id.* at 3.

163. *Id.*

representing thirteen plaintiffs in their lawsuit arising from raids conducted from August 2006 to April 2008.<sup>164</sup> Their complaint describes the experience of Mr. Flores, who reports being awoken at 3:00 a.m. to banging on his front door and shouts of “Police.”<sup>165</sup> When he opened the door slightly, the agents forced the door open and went inside.<sup>166</sup> Plaintiff Covias, in the same lawsuit, states that she woke at 4:00 a.m. to banging on her front door and shouts of “Paterson Police.”<sup>167</sup> When she opened the door to see what was going on, an agent put his foot in the door and then forced it open the rest of the way.<sup>168</sup> When Ms. Covias asked if the agents had a warrant, an agent said that they just wanted to talk to her.<sup>169</sup> Agents searched each room of her house and arrested her son.<sup>170</sup>

Raids in Willmar and Atwater, Minnesota, from April 10–14, 2007, led to a lawsuit with fifty-seven plaintiffs.<sup>171</sup> All of the plaintiffs reported ICE agents banging on their doors and, when asked to identify themselves, ICE agents saying that they were police.<sup>172</sup> Those individuals who opened their doors a few inches to confirm the identity of the officers stated that the ICE agents then forced their way into the homes.<sup>173</sup> One individual tried to hold her door closed, but the ICE officers forced open the door and told her to step back while motioning for their guns.<sup>174</sup> Three individuals reported watching ICE agents break into their homes by either forcing open the door or breaking a window and opening the door.<sup>175</sup> The agents reportedly told several of the individuals that they were looking for fugitives, but then they would either not state a name or instead stated names of people who no longer lived at the location.<sup>176</sup> One individual stated that when he asked if the agents had a warrant, the agent said, “We don’t need one; we are the authorities and can come into the house.”<sup>177</sup>

In *In re O-R-*, respondent’s sister, Ms. O-, described being awoken at 4:30 a.m. on March 26, 2007, at their home in Englewood, New Jersey, by the incessant buzzing of their doorbell.<sup>178</sup> When she stepped outside of her

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164. *Argueta* Complaint, *supra* note 2.

165. *Id.* ¶¶ 97–98.

166. *Id.* ¶ 99.

167. *Id.* ¶ 126.

168. *Id.* ¶ 127.

169. *Id.*

170. *Id.* ¶¶ 129–31.

171. *Arias* Complaint, *supra* note 51, ¶ 1.

172. *Id.* ¶ 70.

173. *Id.* ¶ 71.

174. *Id.* ¶ 72.

175. *Id.* ¶¶ 73, 75, 76.

176. *Id.* ¶ 81.

177. *Id.*

178. Affidavit of Ms. C-O- ¶¶ 3–4, *In re O-R-* (Immigr. Ct., Elizabeth, N.J. May 1, 2008) (on file with author).

apartment to see what was going on, she found approximately five armed men running up the stairs.<sup>179</sup> Still in her pajamas, she was soon surrounded by the men.<sup>180</sup> One waived a piece of paper in front of her and said they had an order for the arrest of M-T-.<sup>181</sup> The men asked her if they could enter, and Ms. O- stated that she believed the arrest order gave them the right to enter the apartment and that she could not refuse their request.<sup>182</sup>

*b) Constitutional Challenges to the Current Practice*

The legal validity of “consent” for ICE agents to enter a home, if obtained at all, can be challenged on the basis that it is routinely coerced. In a typical home raid, ICE agents violate the Constitution from the minute they enter the premises.

The Supreme Court articulated the test for consent in *Schneckloth v. Bustamonte*, stating that “the question whether a consent to search was in fact ‘voluntary’ or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.”<sup>183</sup> Although the Court did not articulate all of the factors relevant to assessing the totality of the circumstances in *Schneckloth*, it acknowledged that knowledge of one’s right to refuse is one factor to be taken into account.<sup>184</sup> In addition, the Court highlighted “subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents” as additional factors to consider.<sup>185</sup> Consent cannot be “coerced, by explicit or implicit means, by implied threat or covert force.”<sup>186</sup> The Court has also stated that consent cannot be shown by “no

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179. *Id.* ¶¶ 6–7.

180. *Id.* ¶ 9.

181. *Id.* ¶ 10.

182. *Id.* ¶¶ 11–16. In an account that may indicate the results of education efforts by community groups, Luis Gonzalez of Marin County, California, reported that his wife called to inform him that ICE officers were pounding on their door on the morning of May 22, 2008. Mr. Gonzalez knew that the administrative warrants carried by ICE agents did not authorize them to enter a home and told his wife that she did not have to let the agents in. The agents left without gaining access to their home. Joy Lanzendorfer, *ICE Storm: Recent Immigration Raids in San Rafael’s Canal District Have Residents Hiding Behind Locked Doors*, N. BAY BOHEMIAN, June 18, 2008, available at <http://www.metroactive.com/bohemian/06.18.08/news-0825.html>.

183. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). The facts in *Schneckloth* are illustrative. Following a police officer’s routine traffic stop due to an apparent traffic infraction, the officer asked one of the car’s occupants if he could search the car. The man agreed and opened the trunk. Subsequently, he challenged the use of incriminating evidence found in the trunk, arguing that he did not know he could refuse the officer’s request and, therefore, that his consent had been involuntary. The Court rejected this argument.

184. *Id.* at 229.

185. *Id.*

186. *Id.* at 228.

more than acquiescence to a claim of lawful authority.”<sup>187</sup>

In developing the totality of the circumstances test, the *Schneckloth* Court relied heavily on the Court’s cases analyzing the admissibility of a confession, because these cases balanced similar competing interests: the need for effective law enforcement and protection of individuals against overwhelming police power.<sup>188</sup> In order for a confession to be admissible, it must be voluntary. Otherwise “if [the defendant’s] will was overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.”<sup>189</sup> In cases that assess whether the individual’s will was overborne, the Court has looked to (1) the circumstances of the confession, such as the number of interrogators and the length and time of day of the interrogation; (2) the conduct of the officers, such as the use of physical abuse or deceptive tactics; and (3) the characteristics of the individual interrogated, including her level of education and her nationality or experience with U.S. law.<sup>190</sup> These factors are instructive in analyzing whether consent is voluntary in a typical home raid.<sup>191</sup>

All of the factors looked to by the court in assessing voluntariness indicate that consent is coerced in a typical home raid. First, ICE engages in deceptive tactics. Agents often identify themselves as police, which is misleading at best and false at worst.<sup>192</sup> Agents sometimes state that they

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187. *Bumper v. North Carolina*, 391 U.S. 543, 548–49 (1968).

188. *Schneckloth*, 412 U.S. at 227–28. In the case of consent searches, the Court was trying to accommodate the need for investigation before probable cause supporting a warrant exists, and the equally important need to ensure the absence of coercion in carrying out that investigation. *Id.*

189. *Id.* at 225–26 (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)).

190. *See, e.g., Arizona v. Fulminante*, 499 U.S. 279, 287–88 (1991) (protection against threat of violence from other inmates contingent on confession); *Spano v. New York*, 360 U.S. 315, 323 (1959) (overnight interrogation by many officers including deceptive use of childhood friend to extract confession; defendant was foreign-born with limited education); *Crooker v. California*, 357 U.S. 433, 437, 440 (1958) (confession not involuntary because defendant was well-educated, given food and allowed to smoke); *Payne v. Arkansas*, 356 U.S. 560, 562, 567 (1958) (protection from angry mob contingent on confession; defendant had fifth grade education); *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944) (thirty-six hours of continuous questioning); *Brown v. Mississippi*, 297 U.S. 278, 279, 287 (1936) (physical abuse by officers).

191. In *United States v. Gonzalez-Basulto*, the Fifth Circuit listed some of the factors to consider in evaluating whether consent to search was voluntary: “(1) the voluntariness of the defendant’s custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant’s cooperation with the police; (4) the defendant’s awareness of his right to refuse consent; (5) the defendant’s education and intelligence; and (6) the defendant’s belief that no incriminating evidence will be found.” 898 F.2d 1011, 1013 (5th Cir. 1990) (quoting *United States v. Galbraith*, 846 F.2d 983, 987 (5th Cir. 1988)).

192. ICE spokesperson Lori Haley defended ICE agents’ practice of identifying themselves as police, stating: “They are indeed federal police. . . . People who don’t understand much English generally understand the word ‘police.’” Tom Lochner, *Federal Agents Pose as Police to Make Busts: Immigration Authorities Misidentify Themselves to*

have a “warrant,” which, in fact, carries no authority to search the home and no authority to enter the premises to effectuate an administrative arrest. This confusing nomenclature affects policymakers as well. In response to criticism of local raids, the mayor of Passaic, New Jersey, stated: “Immigration warrants are warrants. If they came and took them away, they must have had the right to take them.”<sup>193</sup>

Alternatively, agents frequently say that they are looking for a “criminal,” either as a pretext or in a misleading manner wherein it refers to a “fugitive alien” who has already been apprehended and convicted of a crime as opposed to someone who is suspected of committing a crime and has not yet been captured. The person allowing ICE agents to enter her home generally believes that she has no choice because these are police officers with a warrant, or that she is allowing local police to come inside in order to further an ongoing criminal investigation in some way.

ICE’s deceptive tactics are combined with coercive circumstances. Home raids are generally conducted early in the morning when most residents are sleeping, capitalizing on the confusion and disorientation of the home’s occupants when they are awoken.<sup>194</sup> They involve at least five and as many as twenty-five ICE agents.<sup>195</sup> Finally, the residents of the home are often foreign-born with varying levels of education, and many have no knowledge of their right to refuse entry.<sup>196</sup> Together, these factors indicate that consent is typically coerced in home raids.

The use of Warrants of Deportation/Removal to gain entry is also problematic in its own right. In *Bumper v. North Carolina*, the Supreme Court found that consent is rendered involuntary if it is given in response to a false statement of possession of a valid warrant.<sup>197</sup> The “warrant” possessed by ICE agents is not akin to a judicial arrest warrant because it

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*Gain Entry for Arrests*, ALAMEDA TIMES STAR, Jan. 26, 2007, available at [http://www.insidebayarea.com/timesstar/ci\\_5092344](http://www.insidebayarea.com/timesstar/ci_5092344).

193. Mandell, *supra* note 99.

194. Night searches are prohibited absent special circumstances in slightly less than half of all states. STEPHEN A. SALTZBURG, DANIEL J. CAPRA & ANGELA J. DAVIS, *BASIC CRIMINAL PROCEDURE* 160 (4th ed. 2005). The Federal Rules of Criminal Procedure restrict searches to daytime unless reasonable cause is shown. See FED. R. CRIM. P. 41(c)(2)(ii). Some courts require a showing of exigent circumstances to allow a nighttime search, tying the time of the search to the reasonableness requirement of the Fourth Amendment. See, e.g., *United States v. Morehead*, 959 F.2d 1489, 1497–98 (10th Cir. 1992).

195. In *Spano v. New York*, the Supreme Court held that the number of officers conducting an interrogation militated against a finding that defendant’s confession was voluntary. 360 U.S. 315, 322 (1959). See *supra* notes 188–90 and accompanying text regarding the connection between the legal standard used to assess the voluntariness of a confession and voluntariness of consent.

196. See, e.g., *In re P-, P-, P-, P-, P-*, at 2, 6 (Immigr. Ct., New York, N.Y. June 25, 2008) (on file with author); Affidavit of Ms. C-O-, *In re O-R-*, *supra* note 178, at ¶¶ 1, 15–19. See also *Spano*, 360 U.S. at 321–22 (taking into account defendant’s vulnerability due to his limited education and foreign-born status when finding his confession was involuntary).

197. *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968).

does not confer authority to enter the home in order to effectuate an arrest or conduct a search.<sup>198</sup> While it may be true that the piece of paper ICE agents carry is nominally a warrant, this piece of paper is a far cry from a judicial warrant. ICE agents know this.<sup>199</sup> While their statements regarding possession of a “warrant” may not be literally false, they are false in substance, and consent given on this basis should be deemed involuntary under *Bumper*.

The most common practice described in accounts of home raids is ICE agents pushing their way into a home after a resident opens the door to speak with the agents. In discussing a raid on a Nassau County home, Christopher Shanahan, the Director of Deportation and Removal for ICE in the New York region, stated: “Once Erica’s grandmother let agents over the threshold, there was no turning back.”<sup>200</sup> Importantly, Mr. Shanahan specified that the agents must be permitted to cross the threshold. Simply opening the door is not the equivalent of consenting to ICE agents’ entry.

## 2. *Search: ICE’s Practice of Searching the Entire Home upon Entry Goes Far Beyond a Protective Sweep*

ICE officials have repeatedly justified their practice of searching all of the rooms of a home they have entered as required for officer safety,<sup>201</sup> and former Assistant Secretary Myers stated that “[t]his is a common practice throughout law enforcement.”<sup>202</sup> Presumably, these statements are based on the Supreme Court’s decision in *Maryland v. Buie*, which established the legality of protective sweeps by police officers.<sup>203</sup> However, ICE’s practice does not fit under the rubric of protective sweeps. Protective sweeps are limited to looking in areas where a person could be, after a legitimate arrest is made, and only if the agent has reasonable suspicion that other people are present and represent a danger.<sup>204</sup> As explained below, the searches in home raids do not fit within these limits and are unconstitutional.

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198. Chertoff Letter, *supra* note 37.

199. *See, e.g.*, Transcript of Record, *In re O-R-*, *supra* note 50, at 113–14 (testimony of ICE Officer Belluardo); Bernstein, *supra* note 67 (describing acknowledgment by ICE official Christopher Shanahan of limited power of administrative warrants).

200. Bernstein, *supra* note 67.

201. *Id.* (quoting ICE official Christopher Shanahan: “Due to officer safety needs, [agents] can look into other areas, to clear rooms.”); Myers Letter, *supra* note 50 (describing how officers “searched the immediate area for potential weapons for officer safety”).

202. Myers Letter, *supra* note 50.

203. *Maryland v. Buie*, 494 U.S. 325, 334–36 (1990). After an armed robbery, police obtained arrest warrants for Buie and an accomplice. Police went to Buie’s house and arrested him when he came out of the basement. Police looked around the basement to see if anyone else was there and found incriminating evidence in plain view. *Id.* at 328.

204. *Id.* at 334–35.

a) *Examples of ICE's Current Practice*

In *In re M-*, the respondent describes a raid on his home outside New York City on April 18, 2007, in which ICE agents possessed a Warrant of Deportation/Removal for Mr. B-, respondent's roommate.<sup>205</sup> Mr. B- identified himself immediately to the ICE agents and was arrested.<sup>206</sup> However, rather than leaving the residence with their target, agents proceeded to enter all of the bedrooms in the home without knocking, to handcuff everyone they found, and to bring them to the kitchen where they were interrogated.<sup>207</sup> Without asking permission, agents searched wallets, dressers, closets, and under beds looking for people and immigration paperwork.<sup>208</sup>

In *In re N-*, the immigration judge decided that the respondents had established a prima facie case that the government's evidence against them was obtained unlawfully via a home raid.<sup>209</sup> The respondents stated that ICE agents entered the apartment when one resident opened the back door.<sup>210</sup> After handcuffing that resident upon entry, three officers entered the bedrooms and living room of the apartment where they awoke and questioned the other occupants of the home.<sup>211</sup> The immigration judge specifically found that the search was not likely justifiable as a protective sweep and granted respondents' request for a suppression hearing.<sup>212</sup>

The class action filed against ICE as a result of raids conducted in and around New York City throughout 2007 includes an account of the raid on the Leon-Aguilar family, all of whom are U.S. citizens or lawful permanent residents.<sup>213</sup> On February 20, 2007, the Leon-Aguilar family reported waking at around 4:30 a.m. to the doorbell ringing and banging on the front door.<sup>214</sup> Elena Leon reported opening the door and several ICE agents immediately entering her home.<sup>215</sup> The agents reportedly proceeded through the home banging on and opening doors to the rooms and searching the basement.<sup>216</sup> Adriana Aguilar was asleep with her four-year-old son when she was awoken by ICE agents pulling off their covers

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205. Respondent's Support Memo, *In re M-*, *supra* note 52, at 1-2.

206. *Id.* at 3.

207. *Id.*

208. *Id.* at 4.

209. See *In re N-*, at 10 (Immigr. Ct., San Francisco, Ca. Aug. 23, 2007) (on file with author).

210. *Id.* at 5.

211. *Id.* at 4-5.

212. *Id.* at 9, 16.

213. *Aguilar* Complaint, *supra* note 20, ¶¶ 14-32.

214. *Id.* ¶¶ 99-101.

215. *Id.* ¶¶ 103-08.

216. *Id.* ¶ 113.

and shining a flashlight into her face.<sup>217</sup>

In Otero County, New Mexico, ICE raids in early September 2007 also resulted in a lawsuit.<sup>218</sup> The complaint describes one family who reported waking up to banging on the walls of their home sometime before 6:00 a.m. on September 10, 2007.<sup>219</sup> The family, including an elderly grandmother suffering from terminal cancer and a woman who was eight months pregnant, were told to get outside and were not allowed to bring their coats or shoes.<sup>220</sup> They watched as the deputies proceeded to empty out drawers, cabinets, and the contents of one individual's purse, presumably looking for evidence of immigration status.<sup>221</sup>

b) *Constitutional Challenges to the Current Practice*

Protective sweeps are exceptions to the Fourth Amendment's requirement of a warrant and probable cause in order for a search to be reasonable. The *Buie* Court held that, as a precautionary measure, officers may look in areas immediately adjacent to an arrest "from which an attack could be immediately launched" without reasonable suspicion or probable cause.<sup>222</sup> To conduct a protective sweep beyond this area, the Court held that officers must have reasonable suspicion, based on specific and articulable facts, that other people are present and represent a risk of harm to the officers or other individuals in the home.<sup>223</sup> The Court was clear in limiting officers' incident search powers to spaces large enough to contain a person, of which they could perform only a cursory inspection lasting "no longer than is necessary to dispel the reasonable suspicion of danger."<sup>224</sup>

In the context of home raids, as illustrated above, a search often occurs before any arrest, if an arrest takes place at all. This practice conflicts with the facts and rationale in *Buie*, which was based on the Court's decisions in

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217. Bernstein, *supra* note 67 (reporting the raid of the Leon-Aguilar home). Several family members were taken to the home's office space where ICE agents blocked the doors to the exits. *Aguilar* Complaint, *supra* note 20, ¶¶ 116–17. One of the officers stated that they were looking for a man with the same name as Adriana's ex-husband. *Id.* at ¶¶ 127–28. She had been divorced from this man for five years and purchased her home with her new husband. *Id.* ¶¶ 129–30. Ms. Aguilar asked to see a warrant and reported that one of the officers opened and closed a manila folder that they said contained a warrant but would not allow her to see it. *Id.* ¶¶ 133–39.

218. *Daniel T.* Complaint, *supra* note 51, at 1. The local sheriff's department, which receives money from DHS to curb crime, conducted the raids and then detained individuals for questioning by federal immigration officers. *Id.* ¶¶ 21–22. *See also* Alicia A. Caldwell, *Groups Sue N.M. County After Immigration Raids*, ASSOCIATED PRESS, Oct. 18, 2007.

219. *Daniel T.* Complaint, *supra* note 51, ¶¶ 28–29.

220. *Id.* ¶¶ 42–43.

221. *Id.* ¶ 47.

222. *Maryland v. Buie*, 494 U.S. 325, 334 (1990).

223. *Id.*

224. *Id.* at 334–36.



*Terry v. Ohio*<sup>225</sup> and *Michigan v. Long*.<sup>226</sup> These cases did not involve indiscriminate and dragnet-type searches. Instead, officers possessed probable cause and an arrest warrant for Buie,<sup>227</sup> reasonable suspicion that Terry was armed and dangerous,<sup>228</sup> and reasonable suspicion that Long was dangerous and might have a weapon in his adjacent car.<sup>229</sup> The Court in these cases emphasized that the encounter itself might have been dangerous either because the officers had reasonable suspicion that the person could access a weapon or because of the general risk of ambush when arresting someone in her own home for a criminal offense.<sup>230</sup> This danger justified an incident search to protect officer safety.<sup>231</sup> In contrast, in home raids, ICE agents do not have probable cause to support a criminal arrest and may not even have probable cause that any particular person in the home committed an immigration violation, if they are relying on outdated or incomplete information. Nor do agents generally have a particularized ground to believe that other residents represent a danger when they search all rooms of a home. The Court has been careful to cabin searches justified by officer safety, rather than probable cause and a warrant, in order to prevent fishing expeditions.<sup>232</sup> Where agents search first, no formal law enforcement encounter recognized by the Fourth Amendment (e.g., a stop or arrest) has yet occurred. Therefore, at the time of the search in a typical home raid, there is no dangerous event that would justify a search to protect officer safety.

ICE is mischaracterizing its searches. Searches conducted by ICE agents are not protective sweeps; they are not part of the process of arresting a person for whom the agents possess probable cause and a warrant. Searches by ICE agents are typically roundups that generate the arrests in home raids. As such, the purpose of these searches is investigative, not protective—exactly what the *Buie* Court rejected in scope and rationale.<sup>233</sup>

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225. *Terry v. Ohio*, 392 U.S. 1 (1968).

226. *Michigan v. Long*, 463 U.S. 1032 (1983). In *Buie*, the Court stated: “The ingredients to apply the balance struck in *Terry* and *Long* are present in this case.” 494 U.S. at 332.

227. *Buie*, 494 U.S. at 330. In fact, the arresting officers in *Buie* had a warrant.

228. *Terry*, 392 U.S. at 30.

229. *Long*, 463 U.S. at 1050.

230. *Buie*, 494 U.S. at 333 (citing *Terry* and *Long*).

231. *Id.* at 336 (“The type of search we authorize today . . . is decidedly not ‘automat[i]c,’ but may be conducted only when justified by a reasonable, articulable suspicion that the house is harboring a person posing a danger to those on the arrest scene.”).

232. See e.g., *Arizona v. Gant*, 129 S. Ct. 1710, 1718–19 (2009); *Buie*, 494 U.S. at 335–36; *Long*, 463 U.S. at 1049–50; *Terry*, 392 U.S. at 24–26.

233. *Buie*, 494 U.S. at 335–36 (“We should emphasize that such a protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is nevertheless not a full search of the premises.”).

### 3. *Seizure: ICE's Practice of Corraling All Residents Results in Unlawful Seizures and Involuntary Questioning*

Mr. Chertoff and Ms. Myers noted that ICE officers can question any person as to their right to be in the United States,<sup>234</sup> and, if residents comply with these requests, they do so voluntarily.<sup>235</sup> Typically, residents do give ICE officers identification, which often reveals their immigration status, or they concede that they do not have legal authority to be in the United States in response to agents' questions.<sup>236</sup> Once agents learn that an individual does not have legal authority to be in the United States, they can arrest the individual without a warrant and detain her for further questioning so long as they have reason to believe the person is likely to escape before a warrant can be obtained.<sup>237</sup>

This section argues that the initial exchange with ICE agents is not voluntary. Instead, individuals typically answer ICE's questions after they have been illegally seized, rendering their consent to answering agents' questions invalid.<sup>238</sup> The Fourth Amendment encompasses encounters that fall short of a full arrest; to seize someone, the officer must have

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234. Chertoff Letter, *supra* note 37; Myers Letter, *supra* note 50. For the statutory language supporting this proposition and an explanation of the need for reasonable suspicion that the individual in question is a noncitizen, see *supra* note 72.

The Supreme Court's decision in *Muehler v. Mena*, 544 U.S. 93 (2005), provides some support for the government's assertion that ICE agents can question anyone about her immigration status. In *Mena*, the defendant was handcuffed and detained in a garage at a friend's home for several hours while police executed a criminal search warrant to look for weapons and evidence of gang membership. While handcuffed, she was questioned about her immigration status. *Id.* at 95–96. The Court held that police questioning regarding immigration status did not constitute an additional seizure under the Fourth Amendment, which would have required independent reasonable suspicion that she was present in the United States in violation of the immigration laws. *Id.* at 102. Relying on *Florida v. Bostick*, 501 U.S. 429, 434 (1991), the Court affirmed that police questioning alone does not constitute a stop or seizure recognized by the Fourth Amendment. *Id.* at 101. While this case supports ICE's assertion that agents can request immigration status information without reasonable suspicion, it does not follow that there is no seizure in a typical home raid. *Mena* did not change the standard for what constitutes a seizure. In *Mena*, the Court held that the seizure connected to the search warrant was lawful and the questioning on immigration status did not prolong the seizure so there was no separate, immigration-related seizure of *Mena*. In home raids there are numerous indications that a seizure has occurred; however, there are no criminal search warrants that could provide a lawful basis for the seizure of a home's occupants, during which residents could also be questioned regarding their status. Instead, residents are seized for the sole purpose of being questioned about their status, and the duration of the seizure is defined by the duration of the immigration-related questioning, not by the execution of an independent search warrant.

235. Chertoff Letter, *supra* note 37; Myers Letter, *supra* note 50.

236. See *infra* text accompanying notes 14, 246.

237. See *supra* text accompanying note 74.

238. *Florida v. Royer*, 460 U.S. 491, 500–01 (1983) (plurality opinion).

reasonable suspicion of illegal activity.<sup>239</sup> In home raids, it is difficult to imagine how ICE agents would have reasonable suspicion to seize every occupant of a home simply because they have a Warrant of Deportation/Removal for one person or, in the absence of a Warrant, a belief that a particular “fugitive alien” resides in the home. In many cases, the target is not present at the home, or the agents do not inform the residents of the identity of their target. Nonetheless, agents systematically corral all of the occupants without any basis to suspect that each and every individual is in violation of the immigration laws. As a result, any consent to answer questions by illegally seized individuals is involuntary and the unconstitutionally-gathered information these individuals provide cannot be used as a basis for arrests.

*a) Examples of ICE’s Current Practice*

In *In re O-R-*, the respondent testified that he was awakened at 4:30 a.m. on March 26, 2007, when ICE agents entered his bedroom.<sup>240</sup> He was told to go to the living room but was given permission to change out of his pajamas first.<sup>241</sup> Mr. O-R- testified that the rest of his family was in the living room when he got there, and ICE agents blocked the doors to the exits of the living room.<sup>242</sup> He stated that he was not permitted to use the bathroom in private.<sup>243</sup> When his sister stood up in the living room, ICE agents told her to sit down and that, if she did not sit down, she could be arrested.<sup>244</sup> The officers told Mr. O-R- to go with one of them to get his identification, which he did.<sup>245</sup> ICE Officer Belluardo, who testified in *In re O-R-*, stated that ICE’s general procedure is to gather every person in the house in one central location and then “we ID each person to find out who they are and their status in the United States.”<sup>246</sup> She testified that corralling occupants and demanding identification is not based on specific facts regarding those individuals.<sup>247</sup>

A recent Georgia class action is based, in part, on the experience of Ranulfo Perez.<sup>248</sup> Mr. Perez reported being confronted by approximately fifteen ICE agents in front of his home on September 5, 2006.<sup>249</sup> As he told them that he had “papers,” one of the agents reportedly grabbed Mr.

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239. *Terry*, 392 U.S. at 16–19.

240. Transcript of Record, *In re O-R-*, *supra* note 50, at 3.

241. *Id.*

242. *Id.* at 4.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at 107 (testimony of ICE Officer Belluardo).

247. *Id.* at 109.

248. *Mancha* Complaint, *supra* note 51.

249. *Id.* ¶ 36.

Perez by his shirt, put his gun to Mr. Perez's side, and held him against his truck.<sup>250</sup> The officer told him not to move and held him there for ten minutes while he ordered other officers to go inside Mr. Perez's home.<sup>251</sup> The officer then searched Mr. Perez for weapons and told him to show proof of his immigration status.<sup>252</sup> The officer verified Mr. Perez's information and reportedly told him that these were immigration agents, that they would be in the area for another two weeks, and that Mr. Perez and his family should leave the area during this time to avoid future incidents at his home.<sup>253</sup>

In Tennessee, twelve people subjected to home raids brought a civil action against the Sheriff of Maury County, where the raids took place, as well as ICE administrators and officers.<sup>254</sup> The plaintiffs in this lawsuit describe a raid of mobile homes at 6:00 a.m. on July 3, 2007.<sup>255</sup> One of the plaintiffs saw ICE officers at his front door and sheriff's deputies at his back door.<sup>256</sup> He reported that when he didn't open the door, ICE officers forcibly opened the front door and then instructed him to open the back door.<sup>257</sup> While being questioned, he stood up to use the bathroom and an ICE agent pointed his gun at him and told him to stay where he was.<sup>258</sup>

In a lawsuit resulting from raids in Minnesota, the plaintiffs reported that all Latino members in the raided households were brought to a common area in each home, placed in handcuffs, and interrogated.<sup>259</sup> Several individuals reported that they were not allowed to change out of their sleeping clothes.<sup>260</sup> One individual reported that she had suffered an ectopic pregnancy and was denied use of the bathroom despite heavy bleeding.<sup>261</sup> She also reported being forced to change in front of the officers.<sup>262</sup> Two white plaintiffs reported that they were not asked for identification or proof of immigration status when ICE agents entered their homes.<sup>263</sup>

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250. *Id.* ¶ 37.

251. *Id.* ¶¶ 38–39.

252. *Id.* ¶ 41.

253. *Id.*

254. *Flores-Morales* Complaint, *supra* note 51, ¶ 1; *Immigrants Say They Were Illegally Arrested*, NEWSCHANNEL5.COM, July 10, 2007, <http://www.newschannel5.com/Global/story.asp?S=6771363>.

255. *Flores-Morales* Complaint, *supra* note 51, ¶ 22(c).

256. *Id.* ¶ 40.

257. *Id.*

258. *Id.*

259. *Arias* Complaint, *supra* note 51, ¶ 82.

260. *Id.* ¶ 84.

261. *Id.* ¶ 87.

262. *Id.* ¶ 84.

263. *Id.* ¶¶ 91–92.

b) *Constitutional Challenges to the Current Practice*

In *Florida v. Bostick*, the Supreme Court recognized that the Fourth Amendment encompasses seizures that fall short of a full arrest and articulated the test for a seizure, stating that “a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers’ requests or otherwise terminate the encounter.”<sup>264</sup> In an earlier decision, the Court noted circumstances that might indicate seizure, including “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.”<sup>265</sup> In *California v. Hodari D.*, the Court required that in cases in which an officer has not physically touched an individual, the individual must actually submit to a show of authority for a seizure to occur.<sup>266</sup> And in *INS v. Delgado*, the Court made clear that a police officer’s request for identification or questioning as to an individual’s identity is unlikely, by itself, to constitute a seizure under the Fourth Amendment.<sup>267</sup>

In a typical home raid, ICE agents seize residents before requesting identification or questioning an individual about her immigration status. Numerous accounts of raids include descriptions of individuals being physically touched by ICE agents and often handcuffed at the start of the encounter, which automatically constitutes a seizure under *Hodari D.*<sup>268</sup>

In addition, residents typically report submitting to a show of force. Individuals subjected to raids report being woken by flashlights or shouting and banging, finding numerous ICE agents in their home, and being told either to produce identification at that point or to go to a common area where they are then told to produce identification.<sup>269</sup> Individuals invariably report being yelled at by agents and seeing agents block the doors to the home.<sup>270</sup> Numerous individuals report being told they could not put on additional clothes or use the bathroom in private.<sup>271</sup>

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264. *Florida v. Bostick*, 501 U.S. 429, 436–37 (1991).

265. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (plurality opinion).

266. *California v. Hodari D.*, 499 U.S. 621, 625–26 (1991).

267. *INS v. Delgado*, 466 U.S. 210, 216 (1984).

268. *Hodari*, 499 U.S. at 625.

269. *See, e.g., In re M-*, at 1, 3 (Immigr. Ct., San Francisco, Ca. Aug. 16, 2007) (on file with author); Transcript of Record, *In re O-R-*, *supra* note 50, at 3–4; *Arias* Complaint, *supra* note 51, ¶¶ 70, 82; *Argueta* Complaint, *supra* note 2, ¶¶ 57, 97, 112, 163, 170, 173.

270. *See, e.g., In re O-R-*, at 4 (Immigr. Ct., Elizabeth, N.J. May 1, 2008) (on file with author); *Argueta* Complaint, *supra* note 2, ¶¶ 82, 87, 105; *Aguilar* Complaint, *supra* note 20, ¶ 152; Respondent’s Support Memo, *In re M-*, *supra* note 52, at 2.

271. *See, e.g., In re O-R-*, at 4 (Immigr. Ct., Elizabeth, N.J. May 1, 2008) (on file with author); *Arias* Complaint, *supra* note 51, ¶ 84; *Argueta* Complaint, *supra* note 2, ¶ 64;

This last element is particularly indicative of a seizure, because if an agent does not allow an individual to decline the encounter in order to engage in an exceedingly private activity, an individual is reasonable in believing the agents would not permit her to decline a request for identification. If agents gather occupants in a common area before interrogating them, it is common practice for agents to block the exits from that room as well.<sup>272</sup> As discussed, many accounts include reports of agents pulling out their guns or motioning at their guns and, because of such conduct, most residents follow the agents' orders. As a result, questioning by ICE officers generally takes place after residents have been seized.

For a seizure to be reasonable under the Fourth Amendment, officers must have reasonable suspicion that illegal activity is occurring.<sup>273</sup> While reasonable suspicion is a somewhat amorphous concept, the Court in *United States v. Cortez* articulated the baseline requirement that "[b]ased upon the whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity."<sup>274</sup> Additionally, the Court held in *United States v. Brignoni-Ponce* that race or ethnicity can be a factor that supports reasonable suspicion, but it cannot be the only factor.<sup>275</sup> In other words, the fact a home's resident appears Latino is not enough on its own to support her seizure by ICE agents. ICE agents may have reasonable suspicion that an individual named in a Warrant of Deportation/Removal is violating immigration laws. However, it is difficult to imagine how agents would have the necessary reasonable suspicion for each and every person in a home sufficient to justify seizing them. ICE Officer Belluardo's testimony regarding the agency's policy of corraling all residents and holding them for questioning<sup>276</sup> lends further support to the conclusion that the seizure of most home raid victims is unconstitutional.

The Court in *Florida v. Royer* held that any consent to being searched which is the product of an illegal seizure is not valid consent.<sup>277</sup> While it is possible to give consent voluntarily while being seized,<sup>278</sup> that seizure must be lawful. In the context of home raids, residents' responses to ICE agents' demands for identification and immigration status are not

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Respondent's Support Memo, *In re M-*, *supra* note 52, at 4.

272. See, e.g., *In re O-R-*, at 4 (Immigr. Ct., Elizabeth, N.J. May 1, 2008) (on file with author); *Aguilar* Complaint, *supra* note 20, ¶¶ 120–21.

273. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 881–82 (1975); *Terry v. Ohio*, 392 U.S. 1, 22–24 (1968).

274. *United States v. Cortez*, 449 U.S. 411, 417–18 (1981).

275. *United States v. Brignoni-Ponce*, 422 U.S. at 886–87.

276. Transcript of Record, *In re O-R-*, *supra* note 50, at 107 (testimony of ICE Officer Belluardo).

277. *Florida v. Royer*, 460 U.S. 491, 507–08 (1983).

278. See *United States v. Watson*, 423 U.S. 411, 424–25 (1976).

voluntary if their seizure is unlawful, which it typically is. As a result, ICE agents are using unconstitutionally-obtained statements as the basis for their arrests.

*C. Weaknesses in the Fourth Amendment Doctrine Should Not Be the Basis for Public Policy*

Home raids appear to involve rampant constitutional violations, but the Court's application of its own tests and standards reveals several possible hurdles for plaintiffs seeking to prevail in these constitutional claims. This section examines these doctrinal idiosyncrasies. While adjudicating each Fourth Amendment issue separately might allow ICE's practices to stand, most people would agree that the total experience is extremely intrusive. This section concludes that ICE's practices in home raids flout the principles of the Fourth Amendment and that the potential obstacles that could defeat constitutional claims provide a poor foundation for public policy.

*1. Weaknesses in the Fourth Amendment Doctrine Could Allow ICE's Practices to Survive Constitutional Challenges*

With respect to consent searches, a totality of the circumstances test means that there is little guidance or precedential effect from past decisions. Even if a court were to find that ICE had not obtained voluntary consent to enter a home in one case, the ruling could have little consequence for other raids. Additionally, the bar for finding coercion is high,<sup>279</sup> and the use of deceptive tactics, or lies, is only one factor to consider in assessing voluntariness.<sup>280</sup>

Challenges to ICE's practice of conducting "protective sweeps" face the problem that the Supreme Court and lower courts tend to allow privacy intrusions in order to protect officer safety. In *Terry v. Ohio*, the Court began balancing competing interests rather than applying categorical requirements, determining the reasonableness of the search

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279. Supreme Court cases holding that a confession was involuntary have involved a variety of factors, including refusal of requests to speak with a lawyer and deceptive use of the suspect's friend to elicit a confession, *Spano v. New York*, 360 U.S. 315, 323 (1959); threats to allow an angry mob into the jail, *Payne v. Arkansas*, 536 U.S. 560, 567 (1958); forcing the suspect to remain naked in jail, *Malinski v. New York*, 324 U.S. 401, 405-07 (1945); over thirty-six hours of questioning, *Ashcraft v. Tennessee*, 322 U.S. 143, 153-54 (1944); and physical abuse, *Brown v. Mississippi*, 297 U.S. 278 (1936). The Court found consent to accompany drug enforcement officers was voluntary despite the defendant's limited education, lack of knowledge of the right to refuse, and the likelihood of a young African-American woman feeling threatened by the white male officers. *United States v. Mendenhall*, 446 U.S. 544, 557-58 (1980). The doctrine on voluntariness of consent is based largely on the Court's cases assessing the voluntariness of a confession. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 223-24 (1973).

280. See generally *Spano*, 360 U.S. at 323.

based on the level of intrusion and the interests of the state, such as officer safety.<sup>281</sup> The Court allowed intrusions in various forms in subsequent cases also based on the need to protect officer safety.<sup>282</sup> While these cases cabin the scope of a warrantless search far beyond what occurs in a typical home raid, courts may nonetheless be reluctant to strike down a practice where the same state interest is at stake.

There are two main features of the doctrine on seizures that could complicate claims that the immigration-related information residents provide is coerced.<sup>283</sup> First, residents' claims that a reasonable person would not have felt free to decline the officers' requests in a home raid face a doctrine that finds consent in situations in which it is difficult to

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281. *Terry v. Ohio*, 392 U.S. 1, 20–21 (1968). This case marked a significant departure from the Court's previous holdings that the Fourth Amendment categorically required probable cause and a warrant (or a specified exception) for searches.

282. *See, e.g.*, *Maryland v. Buie*, 494 U.S. 325 (1990) (allowing a protective sweep of areas where a person could hide that are immediately adjacent to the individual arrested without reasonable suspicion and of the remaining areas of the home with reasonable suspicion that others are present and represent a danger); *Michigan v. Long*, 463 U.S. 1032 (1983) (allowing a protective sweep of the passenger compartment of the car of a person legally stopped if the officer reasonably believes the person stopped is dangerous); *New York v. Belton*, 453 U.S. 454 (1981) (allowing a full search of the passenger compartment of the car upon an arrest without any suspicion of danger), *abrogated in part by Arizona v. Gant*, 129 S. Ct. 1710, 1723 (2009) (limiting a search of the passenger compartment of a car upon an arrest to situations in which "the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest"); *Chimel v. California*, 395 U.S. 751 (1969) (allowing a search of the area within grabbing reach of the person arrested).

283. There are several statutory barriers to prevailing in unlawful seizure claims. First, at least twenty states have statutes that require individuals to identify themselves when asked by police officers in the course of a *Terry* stop, overriding an individual's right to decline this request. *See Hiibel v. Sixth Judicial Dist. Ct. of Nev., Humboldt County*, 542 U.S. 177, 182 (2004). These statutes have been upheld as a reasonable intrusion of privacy in light of the government's interest in law enforcement. *Id.* at 187–88. However, these statutes do not require the individual to provide proof of identity and may not bind individuals confronted by immigration officials. In *Hiibel*, the Court followed the balancing approach established in *Terry* and decided that requiring a person to state her identity was justified by the law enforcement interests at stake. *Id.* at 188. The state interest in enforcing administrative law may not be as great as in enforcing criminal law. Also, enforcement of "stop and identify" statutes in immigration enforcement may conflict with the Fifth Amendment's privilege against self-incrimination, since one's identification often provides proof of immigration status and many immigration violations are also crimes. *See, e.g.*, 8 U.S.C. § 1304(e) (2006) (failure to carry registration); 8 U.S.C. § 1306(a) (2006) (willful failure to register); 8 U.S.C. § 1325(a) (2006) (improper entry); 8 U.S.C. § 1326 (2006) (reentry by a previously deported noncitizen).

Former Secretary Chertoff and Assistant Secretary Myers cited another statutory barrier: federal law makes it a misdemeanor for noncitizens over the age of eighteen not to carry proof of alien registration at all times. § 1304(e). *See Chertoff Letter, supra* note 37; *Myers Letter, supra* note 50. This statute provides additional support for ICE agents' right to request identification, but the Fourth Amendment requires agents to have reasonable suspicion that the person is an alien and is not carrying proof of registration to compel compliance. *See Terry*, 395 U.S. at 20.



imagine a person feeling free to decline the request in reality. Few people feel free to terminate an encounter with police, especially if they do not know they have the right to do so. The Court has acknowledged this, but has also indicated that responses will be presumed consensual unless there are other coercive factors present.<sup>284</sup> *INS v. Delgado* presents a particular challenge because it involved an immigration raid on a factory. INS agents stationed themselves at the exits of the factory while other agents asked everyone inside for proof of authorization to work.<sup>285</sup> The Court found that workers were free to move about the factory and that the presence of officers at the exits was insufficient to support a reasonable belief that the workers were not free to refuse to answer questions and leave.<sup>286</sup> Instead, the Court found that workers who did not feel free to leave felt this way because they did not want to lose their employment, not because of the agents' conduct.<sup>287</sup>

Second, in assessing whether an officer has reasonable suspicion to stop and question an individual, courts defer to the expertise of the officers,<sup>288</sup> allow for reasonable mistakes of fact on the part of officers,<sup>289</sup> and look at the totality of the circumstances such that individual facts, innocent on their own, can be sufficient in combination to justify reasonable suspicion.<sup>290</sup> Courts have found reasonable suspicion existed when an individual ran after seeing police cars in a high crime area,<sup>291</sup> and when a car and its occupants fit a general description and were found in the immediate vicinity of the site of the crime.<sup>292</sup> Additionally, although

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284. See *INS v. Delgado*, 466 U.S. 210, 216 (1984). The fact that seizure cases often involve individuals with illegal material in their bags agreeing to officers' requests to search their same bags indicates that these individuals did not feel free to decline; nonetheless, the Court requires more. See, e.g., *United States v. Drayton*, 536 U.S. 194 (2002) (holding that a reasonable person would still feel free to decline officers' request to search his bags and person in a bus sweep in which one officer was stationed at the front of the bus, another at the back, and a third was questioning all of the passengers); *Florida v. Bostick*, 501 U.S. 429 (1991) (remanding for additional fact finding and holding that a reasonable person could feel free to decline the officer's request to search his bag in a bus sweep by two armed officers).

285. *Delgado*, 466 U.S. at 209–10.

286. *Id.* at 218.

287. *Id.*

288. See *United States v. Cortez*, 449 U.S. 411, 418 (1981) (“A trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person.”).

289. See *Hill v. California*, 401 U.S. 797, 804 (1971) (“Sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time.”).

290. See *United States v. Sokolow*, 490 U.S. 1, 9 (1989) (“Any one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion.”).

291. *Illinois v. Wardlow*, 528 U.S. 119 (2000).

292. *United States v. Danielson*, 728 F.2d 1143, 1147 (8th Cir. 1984).

race or ethnicity alone cannot be the basis for reasonable suspicion, they can be taken into account to support reasonable suspicion.<sup>293</sup> In home raids, therefore, if ICE's target is present and cannot prove lawful status, and the other residents are of the same race and appear to be family members, agents may have reasonable suspicion to detain the potential family members, since immigration status is often tied to family relationships. Similarly, ICE agents might have reasonable suspicion to seize and question all the residents of a single home who are of the same race, gender, and approximate age as their intended target, assuming the agents can point to specific facts that support their belief that the target resides in the home.

## *2. Doctrinal Idiosyncrasies Do Not Justify the Highly Violative Practice of Home Raids*

There are strong arguments that ICE's practices in home raids regularly violate the Constitution in numerous ways, and many would agree that home raids involve extremely intrusive actions by the state. Yet, by parsing out each stage of a typical home raid—entry into the home, searching all rooms for individuals, collecting and questioning all individuals—it is also possible to see that what appear to be violations might be deemed constitutional. Nonetheless, the existence of possible obstacles to constitutional claims does not justify ICE's current practice. Official policy should conform to the foundational principle of the Fourth Amendment: protecting individuals' privacy.

Consent based on deception is not typically considered voluntary. The only reason for ICE agents to call themselves police or say they have a warrant is to encourage residents to draw the wrong conclusions regarding the agents' authority, since few people would consent to immigration agents entering their homes. Similarly, justifying searches based on safety and then arresting most of the individuals found in the home uses an exception to the Fourth Amendment to swallow the rule itself. Finally, characterizing responses to agents' questions as "voluntary," after residents have been pulled out of bed and held in a room while agents block the exits, defies belief.

When taken as a whole, ICE's current practice seems intuitively wrong. The fact that the practice might be upheld as constitutional reflects limitations in the doctrine, not a justification for public policy. The final section of this article builds on the constitutional arguments to abandon the current policy and examines the broader social costs of home raids in their current form. It concludes with proposals for policymakers in the Obama Administration.

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293. *United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975).

### III. THE NEED FOR POLICY REFORM UNDER THE OBAMA ADMINISTRATION

Civil lawsuits and suppression motions challenging ICE's current practice may be of limited value in effecting immediate policy change. It could take years for precedential decisions to emerge at the circuit level and even longer to resolve any splits. In addition, assessments of consent, seizure, and reasonable suspicion are heavily fact dependent, as discussed above. A factual scenario resulting in damages or suppression in one case may not provoke policy change, since ICE could prevail in the next case with a different set of facts. As a result, policy change must be made by the political branches. This can be accomplished most easily and effectively by the Executive, but Congress could also drive change by eliminating funds for enforcement via home raids or passing statutes that prohibit problematic practices.

The mounting social costs of home raids, along with their unconstitutional tactics, militate for a change in public policy. The new administration should abandon the practice of enforcement in private homes and focus on other established avenues to enforce immigration law. If the administration decides to continue an enforcement policy that includes residential initiatives, it should take steps to ensure that the constitutional rights of occupants are protected; that their lack of familiarity with their rights in the United States is not exploited; and that ICE agents are focused on priority targets, not dragnet sweeps.

#### *A. The Social Cost of Home Raids Provides Additional Support for Policy Change*

The broader costs of home raids have been documented in many areas. Perhaps their most direct impact is on the relationship between local law enforcement offices and immigrant communities.<sup>294</sup> This relationship is affected by ICE's current practice in home raids of calling themselves police or using police officers to try to obtain "consent" for immigration officials to enter the home. The Nassau County Police Commissioner summed up this concern in his statement that "Nassau has the lowest crime rate in the nation for a county of its size, in part because

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294. This concern is frequently discussed in the context of agreements known as "287g's" between local law enforcement and ICE, which allow local police forces to enforce federal immigration law, but there need not be a formal agreement for the relationship between immigrant communities and local police forces to be affected by federal enforcement practices. See, e.g., Major Cities Chiefs Association, Letter Announcing Recommendations for U.S. Congress and President Regarding the Immigration Crisis (June 7, 2006), [http://www.majorcitieschiefs.org/pdfpublic/mcc\\_press\\_release\\_june\\_2006.pdf](http://www.majorcitieschiefs.org/pdfpublic/mcc_press_release_june_2006.pdf) (stating that local police should not enforce federal immigration laws).

the police have good cooperation from the community. The conduct of the raids could undermine that relationship.”<sup>295</sup> Many cities have developed policies prohibiting local police officers from asking about immigration status in order to encourage immigrant communities to report crimes and cooperate in investigations.<sup>296</sup> When these police officers are asked by immigration agents to assist in carrying out home raids, they are placed in the difficult position of being asked to support enforcement of federal laws that they are prohibited from enforcing through their own policing activities.<sup>297</sup> Ultimately, raids are likely to undermine local efforts to fight crime through community policing.

Concerns have also been raised about extended detentions and even wrongful deportation of U.S. citizens as a result of raids.<sup>298</sup> Some U.S. citizens and lawful permanent residents are being asked to bear the burden of an overbroad immigration enforcement practice that includes constitutionally-questionable tactics.<sup>299</sup> The New Jersey lawsuit describes the experience of the Chavez family, lawful permanent resident parents with a U.S. citizen child.<sup>300</sup> They reported that ICE officers arrived at their home in six unmarked cars at approximately 7:15 a.m. one morning.<sup>301</sup> Mr. Chavez was outside when the agents pushed him up to his door and told him that if he didn’t open the door, they were going to make things worse.<sup>302</sup> When Mr. Chavez opened the door, seven agents ran inside.<sup>303</sup> At one point, an agent pointed his gun at Mrs. Chavez and her nine-year-old son and said, “Where are the illegal people?”<sup>304</sup> After showing the agents proof of everyone’s lawful status, the family reported that one agent

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295. Bernstein, *supra* note 82. Similarly, a police lieutenant in Richmond, California, stated: “We at the Richmond Police Department have heard that the ICE operations that targeted illegal residents have caused a lot of mistrust of all law enforcement.” Lochner, *supra* note 192.

296. See, e.g., City of New York, N.Y., Exec. Order No. 41 (Sept. 17, 2003); S.F., CAL., ADMIN. CODE ch. 12H, § 12.H.2 (2000); DETROIT, MICH., CODE § 27-9-1 (Supp. 2009); Mandell, *supra* note 99.

297. See, e.g., Mandell, *supra* note 99. See also Jesse McKinley, *San Francisco Bay Area Reacts Angrily to Series of Immigration Raids*, N.Y. TIMES, Apr. 28, 2007, at A14.

298. See, e.g., Darryl Fears, *Immigration Is Snaring U.S. Citizens in Its Raids*, WASH. POST, Aug. 16, 2008, at A3; Eunice Moscoso, *Immigration Raids May Nab U.S. Citizens: Ga. Teen Says Was Targeted Based on Looks*, ATLANTA J.-CONST., Feb. 14, 2008, at 6A; Marisa Taylor, *Feds Admit Jailing Citizens as Illegal Immigrants*, HOUSTON CHRON., Feb. 14, 2008, at A8.

299. See e.g., Bernstein, *supra* note 82 (“‘That is not uncommon,’ [Peter Smith, ICE’s special agent in charge of the raids] said of the citizen’s mistaken arrest as a deportable immigrant.”).

300. *Argueta Complaint*, *supra* note 2, ¶¶ 77–94.

301. *Id.* ¶ 78.

302. *Id.* ¶ 80.

303. *Id.*

304. *Id.* ¶¶ 82, 85.

said that they would be back and “next time it would be worse.”<sup>305</sup>

A congressional subcommittee on immigration held hearings that addressed the impact of raids on U.S. citizens in April 2008. The lead plaintiff in the Georgia class action, Marie Mancha, is a U.S. citizen and was in tenth grade at the time of the raid. She testified before Congress regarding her experience during the raid on her home.<sup>306</sup> In her legal complaint, Ms. Mancha said she was getting ready for school alone in the house while her mother was running an errand.<sup>307</sup> Ms. Mancha reported hearing car doors slam in front of her home and unlocking her front door but leaving it closed, thinking her mother had just returned from the errand.<sup>308</sup> She stated that she then heard voices from inside her home shouting, “Police! Illegals!” and that when she went downstairs, she reportedly found five ICE agents blocking the door and saw a total of twenty to twenty-five agents in or around her home.<sup>309</sup> Several agents asked Ms. Mancha if her mother had worked at a nearby poultry plant and about her mother’s immigration status. Ms. Mancha told the agents that her mother was born in Florida and was a citizen.<sup>310</sup> She asked the agents why they were in her home, and one responded that they were looking for “illegals.”<sup>311</sup> Ms. Mancha reported hearing one agent say to another that they would go to a nearby gas station where they would find a lot of Mexicans.<sup>312</sup> Representative Zoe Lofgren criticized ICE’s procedures in raids, stating that she feared we have arrived in an era “where an overzealous government is interrogating, detaining, and deporting its own citizens while treating non-citizens even worse.”<sup>313</sup>

Citizens and lawful residents who “appear foreign”—often of Hispanic descent—are those most likely to be swept up in raids; the result is that the burden of the current policy is disproportionately allocated on the basis of race. Santa Fe, New Mexico, Mayor David Cross denounced raids in the area as “hurtful, hateful and divisive” and directed the city attorney’s office to investigate reports of civil rights violations and file complaints with DHS.<sup>314</sup> Two white plaintiffs in the case arising out of the raids in Willmar, Minnesota, stated that they were not corralled in a central

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305. *Id.* ¶¶ 88, 91.

306. Fears, *supra* note 298.

307. *Mancha* Complaint, *supra* note 51, at ¶ 24.

308. *Id.* ¶ 25.

309. *Id.* ¶¶ 26–28.

310. *Id.* ¶ 10.

311. *Id.*

312. *Id.*

313. Moscoso, *supra* note 298.

314. *Week in Review February 25–March 3*, SANTA FE NEW MEXICAN, Mar. 4, 2007, at C4.

location or questioned like all of the Latino residents of the home.<sup>315</sup> The large numbers of individuals arrested who do not fit any of the official priority categories for Fugitive Operations Teams and the existence of policies and practices that seem intended to generate a large numbers of collateral arrests have led to claims that home raids reflect a policy of racial profiling in the selection of houses and questioning of residents, and, therefore, that they violate the Equal Protection Clause and civil rights laws.<sup>316</sup>

There is also a more subtle racial aspect present in raids. In a lawful search, law enforcement officers can seize evidence of criminal activity if it is in plain view, even if the object is not covered by a warrant, so long as there is probable cause that the object is evidence of a crime. Discussing the practice of making collateral arrests, former Assistant Secretary Myers stated that “ICE cannot turn a blind eye to illegal aliens once encountered.”<sup>317</sup> This statement implies that when officers search a home, they are treating residents the way contraband is treated under the plain view doctrine. Instead of being individuals in their homes with privacy rights protected by the Fourth Amendment, home raid victims are evidentiary objects demonstrating unlawful activity. This attitude degrades immigrants and treats them as less worthy of the constitutional provisions intended to protect individuals’ dignity. It is also important to note that race is not an accurate indicator of illegality. ICE officers only know someone is without legal status after a series of Fourth Amendment violations reveal that fact.

More fundamentally, the raids erode the sense that the U.S. government abides by the rule of law and protects everyone equally. In an interview with the *ABA Journal*, Michael Neifach, ICE’s principal legal adviser, discussed the numerous legal challenges brought against ICE related to raids.<sup>318</sup> Pointing to the limitations on the exclusionary rule in immigration proceedings established in *INS v. Lopez-Mendoza*, he stated that “even if agents didn’t have the residents’ approval [to enter their homes], such searches and any subsequent arrests may not be disqualified in immigration courts.” He added: “Aliens and citizens are protected by the Constitution, but the protections are different.”<sup>319</sup> Mr. Neifach’s statement implies that ICE may be taking advantage of the fact that noncitizens have few remedies available for constitutional violations. This

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315. *Arias* Complaint, *supra* note 51, ¶¶ 91–92.

316. *Arias* Complaint, *supra* note 51, ¶¶ 125–30; *Argueta* Complaint, *supra* note 2, ¶¶ 253–60; *Mancha* Complaint, *supra* note 51, ¶¶ 96–98; *Flores-Morales* Complaint, *supra* note 51, ¶ 55(g).

317. Myers Letter, *supra* note 50.

318. Stephanie Francis Ward, *Illegal Aliens on I.C.E.: Tougher Immigration Enforcement Tactics Spur Challenges*, 94 A.B.A. J. 44 (2008).

319. *Id.*

implication was made explicit by Professor Jan Ting from Temple University's Beasley School of Law: "It is well-established in immigration law that you can do a lot of stuff you couldn't if it were concerning American citizens. If the exclusionary rule does not apply, is there anything wrong about law enforcement going in and getting the people they're looking for?"<sup>320</sup> In other words, it is fine for the government to enter homes and arrest individuals in a way that is unconstitutional because there is no penalty for this behavior.

This attitude is troubling to say the least. The government should not be testing the line of what is permissible by intruding into a private home and seizing of all of its occupants. An individual has an interest in pushing the bounds of the law in order to have more space to act free from government interference.<sup>321</sup> The state's interest is only the aggressive enforcement of administrative law, which is insufficient to justify the government's practice of pushing, if not crossing, the limits of the Constitution.<sup>322</sup> Instead, the government should ensure that its actions conform to the law.<sup>323</sup> The absence of effective constraints on ICE's practices in the form of the exclusionary rule does not change the analysis. ICE's current policy in home raids erodes the government's credibility because it disrespects constitutional rights the Executive is charged to protect.

The editorial board of the *New York Times* discussed the question of why ICE's current practice is wrong, regardless of the legal consequences, in an editorial on the "war on illegal immigration." It wrote: "The true cost is to the national identity: the sense of who we are and what we value. It will hit us once the enforcement fever breaks, when we look at what has been done and no longer recognize the country that did it."<sup>324</sup> A government policy requiring federal agents, without warrants, to force or manipulate their way into private homes, to search the premises, and to interrogate residents does not respect the country's founding principles of individual liberty and protection from the coercive power of the state.

### *B. Proposals for Policy Change Under the Obama Administration*

The above discussion illustrates the immense costs of home raids to the integrity of the Constitution and the values of our society. The most

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320. *Id.*

321. See generally Jeremy Waldron, *The Rule of International Law*, 30 HARV. J.L. & PUB. POL'Y 15, 18-19 (2006) (arguing that "the government does not have an interest in being unconstrained by law, in the way that the individual does," but instead, "the government should in all things act in accordance with law").

322. *Id.*

323. *Id.*

324. Editorial, *The Great Immigration Panic*, N.Y. TIMES, June 3, 2008, at A22.

appropriate policy response is to stop conducting home raids altogether. The INS once had a policy against investigations at homes because the Department of Justice had concluded that "private dwellings must be afforded the most stringent Fourth Amendment protection."<sup>325</sup> ICE should return to this policy. While these raids result in arrests of individuals without lawful status, their lack of status is only discovered after a series of privacy invasions and mistreatment by federal officials. The aggressive state action and ensuing degradation of victims is not justified by the routine enforcement of administrative law, especially when one takes into account that nearly half of all arrests are of individuals with no criminal history who do not represent a danger to society.

Immigration law can be enforced at the borders, through applications for immigration benefits, and through employers where the privacy interests at stake are not as great and where there are better structures in place to assure that a person's constitutional rights are protected. It is doubtful that home raids would produce any results if ICE abandoned its manipulative tactics for gaining entry and its practice of searching homes and seizing their occupants. Residents would likely deny entry or refuse to produce identification. The new administration should put an end to a policy that depends on constitutionally-suspect tactics in order to be effective.

If the Obama Administration does continue immigration enforcement at private residences, it should put in place safeguards to prevent ICE agents from exploiting residents' lack of knowledge about their constitutional rights. First, ICE agents should be required to identify themselves and inform a home's occupants of their right to refuse entry.<sup>326</sup> The individuals who receive requests to enter often have no familiarity with the U.S. legal system and their rights; they may come from countries where there is no right to refuse a request by law enforcement; they may or may not understand the language spoken by ICE agents; and they often believe the agents are police officers. These individuals are vulnerable to deceptive tactics. Instead of taking advantage of this, ICE officers should take extra precautions to ensure that consent to enter is truly voluntary.

In the absence of consent, ICE agents should be required to have a judicially-authorized arrest warrant. A modified warrant requirement would follow the *Camara* Court's holding with respect to administrative home searches.<sup>327</sup> ICE agents could use a prior order of deportation or an

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325. Authority of I.N.S. Officers to Assist State Enforcement Operations, 8 Op. INS Gen. Counsel 91-36 (1991).

326. Such a requirement is not without precedent. For example, the New Jersey Supreme Court held that the government must show knowledge of the right of refusal for consent to be valid under the State Constitution's guarantee against unreasonable searches and seizures. *State v. Johnson*, 346 A.2d 66, 68 (N.J. 1975).

327. *Camara v. Mun. Court of S.F.*, 387 U.S. 523 (1967).



order to appear at a Detention and Removal Office to show grounds to arrest an individual, but agents should also have to show facts that support probable cause that the individual resides in the home they want to enter. This is similar to the requirement for a search warrant to arrest an individual on criminal charges in the home of a third party.<sup>328</sup> An arrest warrant would authorize agents to search the home only to the extent necessary to find the individual named in the warrant and conduct a protective sweep as confined by *Buie*.<sup>329</sup>

The warrant should not give ICE agents authority to search the home generally or seize its occupants.<sup>330</sup> Agents typically have no legitimate basis to believe that the home's other occupants are in violation of immigration laws before they enter a home and question the residents. An ex-ante showing is a key part of the protection afforded by the warrant requirement.<sup>331</sup> The combination of requiring ICE officers to inform individuals of their right to refuse entry and to possess a judicial arrest warrant for entry in the absence of consent would reflect a better balance between the privacy rights of individuals in their own homes and the need to enforce immigration laws. These requirements would also mitigate the problem of ICE targeting homes based on outdated and inaccurate information.

Additionally, the new administration should closely monitor the effect of its shift from arrest quotas to quotas for targeting and identifying "fugitive aliens" to ensure that these quotas do not continue to incentivize dragnet sweeps. The new administration should make certain that enforcement activities and metrics focus on those individuals with recent, legitimate removal orders who represent a real risk of danger, not individuals with no criminal record who happen to be associated with the address of a noncitizen who may or may not know that she received a removal order at some point in the past.

At a minimum, ICE should enforce its own regulations<sup>332</sup> and guidelines<sup>333</sup> when conducting home raids. This would put an end to ICE

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328. See *Steagald v. United States*, 451 U.S. 204 (1981).

329. *Maryland v. Buie*, 494 U.S. 325 (1990).

330. See Marisa Anton-Fallon, *The Fourth Amendment and Immigration Enforcement in the Home: Can ICE Target the Utmost Sphere of Privacy?*, 35 FORDHAM URB. L.J. 999, 1029 (2008) (arguing that a judicially-authorized search warrant should be required to provide legal authorization for ICE's current practice). Note that this proposal would provide a legal basis for the current practice rather than change it. Also, because search warrants must specify the evidence to be sought, the use of a search warrant would mean that "illegal immigrants" constituted the evidence to be found.

331. See *Johnson v. United States*, 333 U.S. 10, 13-14 (1948) (holding that a neutral and detached magistrate must determine that probable cause exists before issuing a warrant).

332. 8 C.F.R. §§ 287.8(b)(1)-(2), (f)(2) (2009).

333. GORDON, MAILMAN & YALE-LOEHR, *supra* note 137.

agents forcibly entering homes or entering without permission when a resident merely opens the door. ICE agents would also have to refrain from using force or intimidation to corral residents or to compel compliance with requests for identification and immigration status information. Without knowledge of their right to refuse requests, residents might still believe that they must allow ICE agents to enter their home and answer their questions, but this is a problem with the Fourth Amendment doctrine that pervades criminal investigations as well. While only a partial solution, at least residents would be protected from the most violative behavior currently typical in home raids.

Congress can also change the current policy through attaching conditions to the monies it appropriates to ICE's Fugitive Operations Teams. The budget for this program has grown from \$9 million in 2003, its first year of operation, to more than \$218 million in fiscal year 2008.<sup>334</sup> ICE has sold this program and its budget increases to Congress by emphasizing the program's focus on arresting noncitizens with criminal convictions.<sup>335</sup> However, the number of collateral arrests generated by the program was not revealed until February 2009.<sup>336</sup> Congress can make the agency's receipt of additional funds contingent upon a change in its enforcement methods and priorities.

#### CONCLUSION

Accounts of how home raids are typically carried out and how individuals are treated by U.S. officials are surprising and disturbing. The current practice has understandably generated innumerable legal challenges and raises significant Fourth Amendment questions.

ICE may claim that the Fourth Amendment does not apply to people present in the United States unlawfully, but precedent and the agency's own policy in the past indicate the opposite. ICE's practice in home raids defies the principles of the Fourth Amendment. To gain entry to homes, ICE agents force their way inside or deceive residents regarding their identity and purpose. This practice stretches any definition of "consent." Once inside, agents search the home for other occupants without a basis to believe those other occupants are dangerous and often before making any arrests. ICE mischaracterizes these searches as "protective sweeps" when, in reality, the searches bear little resemblance to that sanctioned practice. After locating all of the home's residents, agents order them to a central location and request identification, at times with their guns out or using the

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334. See MENDELSON, STROM & WISHNIE, *supra* note 42, at 1.

335. Nina Bernstein, *Despite Vow, Target of Immigrant Raids Shifted*, N.Y. TIMES, Feb. 4, 2009, at A1.

336. *Id.*

threat of arrest. Residents are not consenting to questioning, they are simply doing what they are told to do after being seized. Yet agents admit that corralling residents is standard practice and not based on individualized suspicion that each and every resident is violating immigration law.

While it is possible that certain features of the Fourth Amendment doctrine could allow ICE to survive a constitutional challenge, and also that the remedy for Fourth Amendment violations is limited in immigration proceedings, the number and nature of the claims provide strong support for policy change. ICE pushes the floor on what is constitutional and takes advantage of the lack of legal consequences when it goes too far. When the strength of the constitutional claims are combined with the social costs of the raids, the case for policy change is overwhelming.

There are several ways the current policy could be rectified. The most complete and effective method would be to stop home raids altogether. At a minimum, ICE should be forced to follow its own regulations. Whatever choice the new administration makes, one thing is clear: the Obama Administration must put an end to a policy that denigrates individuals, immigrant communities, and the Constitution. The costs are simply too high.