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THE FOURTH AMENDMENT AND IMMIGRATION ENFORCEMENT IN THE HOME: CAN ICE TARGET THE UTMOST SPHERE OF PRIVACY?

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INTRODUCTION

On February 20th, 2007, Adriana Leon was awakened at 5:00 a.m. when armed agents burst into her room and pulled the blankets off her and her four-year-old son.[1] The agents gathered Adriana's family in an office space, blocked the exits to the area, and threatened her with their weapons when she attempted to contact a lawyer.[2]

On September 27th, 2007, Peggy Delarosa-Delgado was asleep in her bed at 6:00 a.m. when more than a dozen agents pushed past her high-school aged son to enter her home.[3] Ms. Delarosa-Delgado awoke to find her family frightened and distraught after U.S. Immigration and Customs Enforcement ("ICE")[4] agents had gathered her three children into the living room and threatened a houseguest with a gun.[5]

1. Nina Bernstein, *U.S. Raid on an Immigrant Household Deepens Anger and Mistrust*, N. Y. TIMES, Apr. 10, 2007, at B1 [hereinafter Bernstein, *U.S. Raid*].

2. Amended Complaint ¶¶ 116-17, 120-22, 124-25, Aguilar v. Immigration & Customs Enforcement, No. 07-8224 (S.D.N.Y. filed Oct. 4, 2007) [hereinafter Aguilar Amended Complaint].

3. Nina Bernstein, *Citizens Caught up in Immigration Raid*, N.Y. TIMES, Oct. 4, 2007, at B5 [hereinafter Bernstein, *Citizens*].

4. U.S. Immigration and Customs Enforcement ("ICE"), part of the Department of Homeland Security ("DHS"), took over the interior enforcement responsibilities of the Immigration and Naturalization Service ("INS") in March 2003. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE FISCAL YEAR 2006 ANNUAL REPORT: PROTECTING NATIONAL SECURITY AND UPHOLDING PUBLIC SAFETY 1-2 (2006); April McKenzie, *A Nation of Immigrants or a Nation of Suspects? State and Local Enforcement of Federal Immigration Laws Since 9/11*, 55 ALA. L. REV. 1149, 1150 (2004).

5. Bernstein, *Citizens*, *supra* note 3.

These women were not criminals, nor were they living in a totalitarian state. Rather, they were U.S. citizens whose homes were mistakenly targeted in raids by ICE.

In recent years, the Department of Homeland Security ("DHS") has increasingly expanded its enforcement focus from patrol of the border to efforts to apprehend illegal immigrants already within the United States.[6] The Leons and the Delarosa-Delgados were targets of such interior enforcement efforts. DHS targeted the Leon home pursuant to "Operation Return to Sender." The purpose of this initiative, which began in May 2006, is to apprehend "immigration fugitives": people who remain in this country despite a final order of deportation.[7] The Delarosa-Delgado home was a target of "Operation Community Shield," a program that began in February, 2005 and seeks to remove illegal immigrants who are also gang members.[8] These enforcement programs have been the subject of criticism and multiple federal lawsuits[9] because ICE agents are instructed to carry out these initiatives by targeting private homes without judicial warrants.[10]

ICE claimed authority to target the Leon and Delarosa-Delgado homes based on administrative arrest warrants.[11] Such warrants need not be issued by a judge, but rather can be issued by forty-nine different officials within DHS.[12] In order to secure a standard administrative warrant, an ICE officer must present such an official

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6. *See* Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137, 1139 (2008).

7. Press Release, Immigration & Customs Enforcement, ICE Arrests 128 Immigration Violators in Statewide Enforcement Operation (Apr. 2, 2007), *available at* http://www.ice.gov/pi/news/newsreleases/articles/070402newark.htm.

8. Nina Bernstein, *Immigrant Workers Caught in a Net Cast for Gangs*, N.Y. TIMES, Nov. 25, 2007, at 41 [hereinafter Bernstein, *Immigrant Workers*]; *see* U.S. Immigration & Customs Enforcement, Operation Community Shield, *http://www.ice.gov/pi/investigations/comshield/index.htm* (last visited Oct. 1, 2008).

9. *See, e.g.*, Arias v. Immigration & Customs Enforcement, No. 07-1959, 2008 WL 1827604 (D. Minn. Apr. 23, 2008); Mancha v. Immigration & Customs Enforcement, No. 06-2650, 2007 WL 4287766 (N.D. Ga. Oct. 24, 2007); Aguilar v. Immigration & Customs Enforcement, No. 07-8224 (S.D.N.Y. filed Sept. 20, 2007); Editorial, *Stop the Raids*, N.Y. TIMES, Oct. 4, 2007, at A28; Tyche Hendricks, *The Human Face of Immigration Raids in Bay Area: Arrests of Parents Can Deeply Traumatize Children Caught in the Fray, Experts Argue*, S.F. CHRON., Apr. 27, 2007, at A1.

10. *See* Memorandum of Law in Support of the Government's Motion to Dismiss at 12, *Aguilar*, No. 07-8224 [hereinafter Aguilar Memorandum of Law]; Bernstein, *Immigrant Workers*, *supra* note 8, at 41; Bernstein, *U.S. Raid*, *supra* note 1; Elliot Spagat, *Immigrants Are 'Collateral Arrests'*, S. FLA. SUN-SENTINEL, Apr. 6, 2007, at 3A.

11. *See* Nina Bernstein, *Raids Were a Shambles, Nassau Complains to U.S.*, N.Y. TIMES, Oct. 3, 2007, at B1; Bernstein, *U.S. Raid*, *supra* note 1.

12. *See* 8 C.F.R. § 287.5(e)(2) (2008).

with a Notice to Appear for the person sought, a document that sets forth the facts and law justifying an arrest for a violation of immigration law.[13] ICE came to the Leon household with a warrant to arrest Adriana's estranged ex-husband.[14] Despite the five years since their divorce, the order of protection she had against him, and her subsequent marriage, ICE agents sought to execute the warrant at the Leon home.[15] For her part, Ms. Delarosa-Delgado had never seen or heard of the person who ICE sought to arrest in her home.[16] However, during the summer of 2006, Ms. Delarosa-Delgado had been the victim of another pre-dawn raid searching for the same person.[17]

Unfortunately, the experiences of the Leons and the Delarosa-Delgados are not isolated incidents. In fact, the Delarosa-Delgado raid was part of a series of raids conducted in Nassau County during the last week of September 2007.[18] During the course of these raids, ICE agents' behavior prompted Nassau County Executive Thomas Suozzi to write a letter to Department of Homeland Security Secretary Michael Chertoff calling for an investigation of the enforcement operation.[19] One of the major complaints in the letter was that ICE agents targeted homes without "current intel[ligence]" as to whether the people they were seeking could actually be found in those homes.[20] Specifically, although the purpose of the raid was allegedly to apprehend illegal aliens who were also gang members,[21] on several occasions ICE agents neglected to verify the names and addresses of their targets with the local police department's Gang Intelligence Files.[22] ICE agents also used other unreliable information. For example, ICE agents used a childhood photograph in their attempts to locate one twenty-eight-year-old suspect.[23] As a result of this lack of current

13. United States v. Abdi, 463 F.3d 547, 551 (6th Cir. 2006).
14. Aguilar Amended Complaint, *supra* note 2, ¶¶ 127-28.
15. *Id.* ¶¶ 129-30; Bernstein, *U.S. Raid*, *supra* note 1.
16. Bernstein, *Citizens*, *supra* note 3.
17. *See id.*
18. See *id.*
19. Letter from Thomas Suozzi, Executive, Nassau County, to Michael Chertoff, Sec'y, Dept. of Homeland Sec. (Oct. 2, 2007), *available at* http://www.nassaucountyny.gov/agencies/CountyExecutive/NewsRelease/2007/10-2-2007.html.
20. *Id.*
21. Letter from Lawrence W. Mulvey, Police Comm'r, Nassau County, to Joseph A. Palmese, Resident Agent-in-Charge, ICE Office of Investigation, Bohemia N.Y. (Sept. 27, 2007) (attached as exhibit to Aguilar Amended Complaint, *supra* note 2) (on file with author).
22. Letter from Thomas Suozzi to Michael Chertoff, *supra* note 19.
23. *See id.*

information, ICE agents raided many homes that, like Ms. Delarosa-Delgado's, should not have been targets of the investigation. In fact, of the eighty-two people arrested, only nine were targets of the operation.[24] The ICE agents' aggressive attitude in the Delarosa-Delgado home was not unique. Suozzi's letter complains that ICE agents maintained a "cowboy" attitude and even drew guns on local police during the course of the raids.[25]

One question raised by these raids is whether targeting and entering homes without court-ordered warrants raises problems under the Fourth Amendment's prohibition of "unreasonable searches and seizures."[26] The Fourth Amendment applies to civil as well as criminal law enforcement, and courts recognize that both citizens and non-citizens are entitled to some degree of Fourth Amendment protection in the immigration enforcement context.[27] Furthermore, entry of the home is characterized as the "chief evil against which the wording of the Fourth Amendment is directed."[28] Therefore, interior enforcement efforts that target the home without judicial warrants raise serious concerns, especially in light of anecdotal evidence of indiscriminate targeting of homes and coerced consent.

This Note argues that additional protections are necessary to ensure that ICE does not violate the Fourth Amendment rights of those they target and those who get swept up in their enforcement efforts. This is particularly true with initiatives such as "Operation Return to Sender" and "Operation Community Shield" because they are carried out in private homes, the traditional sphere of greatest Fourth Amendment protection. The experiences of the Leons, the Delarosa-Delgados, and many others like them, as well as official reports of ICE misconduct, indicate that there are insufficient safeguards in place to ensure that ICE's enforcement efforts comply with the Fourth Amendment.

Part I of this Note details the particular ICE practices that individuals, community groups, and scholars have questioned on Fourth Amendment grounds. Part II then examines the legal framework through which this behavior can be analyzed to evaluate its compliance with the Fourth Amendment. Part II first de-

24. *See id.*

25. *See id.*

26. U.S. CONST. amend. IV.

27. *See infra* notes 116-21 and accompanying text.

28. Welsh v. Wisconsin, 466 U.S. 740, 748 (1984) (quoting United States v. U.S. Dist. Court (*Plamondon*), 407 U.S. 297, 313 (1972)).

scribes the special protections for the home afforded in the criminal context, then outlines the distinctions courts draw between the criminal and immigration contexts for Fourth Amendment purposes. Because of these distinctions, Fourth Amendment standards for ICE conduct must be independently evaluated based on the particular privacy interests at stake in the immigration enforcement context. Part II then reviews the case law that establishes Fourth Amendment standards in the immigration enforcement context. Because there have been few cases challenging immigration enforcement behavior in the home, the discussion centers around standards for workplace raids and vehicle stops and searches. Part III applies the standards set forth in the vehicle and workplace contexts to the home, arguing that because the Fourth Amendment interests at stake in the home are greater than in workplaces or vehicles, the standards set forth in those contexts are the minimal standards that should be applied to the home. This argument finds further support in ICE's own internal guidelines, which contain similar requirements. Application of vehicle and workplace standards and ICE's own guidelines to ICE's current home enforcement scheme reveals that these minimal standards are not respected. Finally, Part III concludes that by enforcing standards already in place in the immigration enforcement scheme, ICE could significantly curb Fourth Amendment violations in the home.

I. ICE's Current Practices

The stories told in the Introduction above show the general modus operandi of home raids pursuant to "Operation Return to Sender" or "Operation Community Shield." Commentators, advocacy groups, and scholars have taken issue with a number of ICE's home enforcement practices on Fourth Amendment grounds.[29] The first practice that raises concern is targeting homes with little or no evidence that a subject of the search resides at the home in question. This indiscriminate targeting is not limited to the communities described in the opening stories. Across the country,

29. *See, e.g.*, Arias v. Immigration & Customs Enforcement, No. 07-1959, 2008 WL 1827604 (D. Minn. Apr. 23, 2008); Mancha v. Immigration & Customs Enforcement, No. 06-2650, 2007 WL 4287766 (N.D. Ga. Oct. 24, 2007); Aguilar v. Immigration & Customs Enforcement, No. 07-8224 (S.D.N.Y. filed Sept. 20, 2007); Raquel Aldana, *Of Katz and "Aliens": Privacy Expectations and the Immigration Raids*, 41 U.C. Davis L. Rev. 1081 (2008); Editorial, *Stop the Raids, supra* note 9; Hendricks, *supra* note 9.

news reports and legal complaints tell stories of people whose homes were raided pursuant to warrants containing inaccurate or outdated information.[30] In other cases, it is not clear that ICE possesses a warrant at all because ICE agents refuse to produce one,[31] or do not disclose the name of the person they are trying to apprehend.[32]

The effects of targeting homes based on little or no evidence are evidenced by the large numbers of "collateral arrests" by ICE nationwide.[33] For instance, in April 2007, ICE reported the arrests of 359 people in a series of raids in the San Diego region, only sixty-two of whom were targets of the operation.[34] In December 2006, ICE reported the arrests of forty-five people in Austin and Albert Lea, Minnesota, only nine of whom were targets of the operation.[35] Of the 18,149 people arrested in "Operation Return to Sender" between May 2006, when the program began, and February of 2007, 37% were not initial targets of the operation.[36] This percentage of "collateral arrests" is even larger in certain areas of the country.[37] For instance, "collateral arrests" made up 59% of all arrests in Dallas and El Paso, Texas, 54% in New York City, and 57% in San Diego.[38]

Another aspect of ICE's home enforcement initiatives that raises Fourth Amendment concerns is entry of homes without consent. Some news articles and legal complaints report that ICE agents have physically broken into homes in order to locate illegal immi-

30. *See, e.g.*, Bernstein, *Citizens*, *supra* note 3; Sandra Forester, *Immigration Raids Spark Anger in Sun Valley Area*, IDAHO STATESMAN, Sept. 21, 2007, at 1; Hendricks, *supra* note 9.

31. *See, e.g.*, Aguilar Amended Complaint, *supra* note 2, ¶¶ 136-39, 143-45, 162-65 ("After she requested to see a warrant, one of the ICE agents asked Nelly her name. Nelly Responded, 'Nelly Amaya.' The ICE agent started laughing and said, "Nelly Amaya, this is your arrest order. You are under arrest.").

32. *See, e.g.*, Plaintiff's Amended Complaint for Declaratory and Injunctive Relief and Damages ¶ 46, *Arias*, 2008 WL 1827604 (No. 07-1959) [hereinafter Arias Complaint]; First Amended Complaint ¶ 30, *Mancha*, 2007 WL 4287766 (No. 06-2650) [hereinafter Mancha Complaint].

33. *See* Spagat, *supra* note 10.

34. *See* Leslie Berestein, *'I Want My Parents . . . Back': When Relatives Are Deported, Families Can't Do Much but Cope*, SAN DIEGO UNION-TRIBUNE, Apr. 28, 2007, at B-1.

35. *See* Press Release, U.S. Immigration & Customs Enforcement, ICE Arrests 45 Fugitives and Immigration Violators in Albert Lea and Austin (Dec. 12, 2006), *available at* http://www.ice.gov/pi/news/newsreleases/articles/061212bloomington.htm.

36. *See* Spagat, *supra* note 10.

37. *See id.*

38. *Id.*

grants.[39] However, even in cases where a resident opens the door for ICE agents, the validity of this consent is debatable. ICE agents frequently engage in coercive behavior,[40] are routinely armed and wearing bulletproof vests,[41] sometimes announce themselves as "police,"[42] often arrive in groups of at least six,[43] and do not inform residents of the home that they can refuse consent.[44] These factors are especially significant because ICE frequently targets residents who have poor English skills, are particularly intimidated by law enforcement, and are not aware of their legal right to refuse consent.[45]

A final concern is that, although ICE does not obtain search warrants in initiatives such as "Operation Return to Sender" and "Operation Community Shield,"[46] ICE agents will frequently search throughout the home in an effort to locate illegal immigrants.[47] Indeed, after gaining entry, ICE claims the right to question every person in the home about their immigration status[48] and has been known to search bedrooms, basements, and even dresser

39. *See* Aguilar Amended Complaint, *supra* note 2, ¶¶ 149, 223, 268; Mancha Complaint, *supra* note 32, ¶ 68; Samuel G. Freedman, *Immigration Raid Leaves Sense of Dread in Hispanic Students*, N.Y. TIMES, May 23, 2007, at B7.

40. Aguilar Amended Complaint, *supra* note 2, ¶¶ 107, 205, 209, 255 (describing various coercive behaviors such as pounding on door so hard that the doorframe came loose, shining bright lights into the home, and pointing a gun at resident's chest after the door was opened); Mancha Complaint, *supra* note 32, ¶ 58 (indicating that one agent yelled that ICE would "break down the door" or throw gas in the home if resident did not open the door); Cathy Dyson, *ICE Raid in Stafford Stunning to Family*, FREE LANCE STAR (Fredericksburg, Va.), Apr. 29, 2007, http://www.fredericksburg.com/News/FLS/2007/042007/04292007/279583 (after repeated banging and doorknob jiggling by an agent in a bulletproof vest, resident of home told her husband, "he'd better open the door before the police knocked it down").

41. *See* Aguilar Amended Complaint, *supra* note 2, ¶¶ 104, 154; Mancha Complaint, *supra* note 32, ¶ 27; Dyson *supra* note 40.

42. *See* Aguilar Amended Complaint, *supra* note 2, ¶¶ 232, 240; Arias Complaint, *supra* note 32, ¶ 44; Mancha Complaint, *supra* note 32, ¶ 26.

43. *See* Aguilar Amended Complaint, *supra* note 2, ¶ 276; Arias Complaint, *supra* note 32, ¶ 45; Mancha Complaint, *supra* note 32, ¶¶ 28, 57; Dyson *supra* note 40; Forester *supra* note 30.

44. *See* Aguilar Amended Complaint, *supra* note 2, ¶¶ 110, 151.

45. *See* Steve Helfand, *Desensitization to Border Violence & the Bivens Remedy to Effectuate Systemic Change*, 12 LA RAZA L. J. 87, 107 (2001); Jenny Schulz, *Grappling with a Meaty Issue: IIRARA's Effect on Immigrants in the Meatpacking Industry*, 2 J. GENDER RACE & JUST. 137, 153-54 (1998) (explaining that even legal immigrants fear government retaliation against themselves or their families).

46. *See supra* notes 7-10 and accompanying text.

47. *See* Aguilar Amended Complaint, *supra* note 2, ¶¶ 115-16, 243, 249; Arias Complaint, *supra* note 32, ¶¶ 47, 48; Mancha Complaint, *supra* note 32, ¶ 60.

48. *See* Leah Rae, *Mount Kisco Immigration Raids Are Among Many Across U.S.*, JOURNAL NEWS (White Plains, N.Y.), Apr. 8, 2007 (on file with author).

drawers while looking for additional residents.[49] The collateral arrest statistics described above[50] provide further evidence that these operations contemplate apprehension of as many illegal immigrants as possible, not just the persons listed on particular arrest warrants.

II. SEARCHING FOR A STANDARD FOR HOME ENFORCEMENT: FOURTH AMENDMENT REQUIREMENTS IN OTHER CONTEXTS

In order to evaluate ICE's compliance with the Fourth Amendment in carrying out initiatives such as "Operation Return to Sender" and "Operation Community Shield," immigration enforcement in the home must be located in the spectrum of Fourth Amendment standards that govern different law enforcement schemes. The Fourth Amendment provides that "the people" shall have the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[51] This protection is understood to extend to federal, state, and local government activity.[52]

The Fourth Amendment has generally been interpreted to mean that a warrant or probable cause is required for searches and seizures, and that valid warrants may only issue upon a showing of probable cause.[53] Probable cause "exists when known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that an offense has been or is being committed."[54] In certain situations, when government interests outweigh the individual privacy interest at stake, searches and seizures can be based on "reasonable suspicion," rather than probable cause.[55] Reasonable suspicion is defined as "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion."[56]

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49. *See* Aguilar Amended Complaint, *supra* note 2, ¶¶ 115-16, 243, 249; Arias Complaint, *supra* note 32, ¶¶ 47, 48; Mancha Complaint, *supra* note 32, ¶ 60.

50. *See supra* notes 34-39 and accompanying text.

51. U.S. CONST. amend. IV.

52. *See Investigation and Police Practices*, 35 GEO. L.J. ANN. REV. CRIM. PROC. 3, 3 (2006).

53. *See* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.1 (4th ed. 2004).

54. United States v. Davis, 458 F.2d 819, 821 (D.C. Cir. 1972).

55. *See Investigation and Police Practices*, *supra* note 52, at 18-19 (citing Illinois v. Wardlow, 528 U.S. 119, 124-25 (2000)).

56. Terry v. Ohio, 392 U.S. 1, 21 (1968).

A. Standards for Home Entry in the Criminal Context

In evaluating the constitutionality of immigration enforcement in the home, it is instructive to examine criminal law, where the home has been a target for quite some time. In the criminal context, courts recognize that the Fourth Amendment was created to protect the home, and have therefore afforded private residences special protection.[57] Indeed, although the Fourth Amendment affords protection against unreasonable searches and seizures in public places and in businesses, courts have recognized that "[f]reedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment."[58] The idea that "every man's house is his castle" is found in English common law,[59] and was manifested in early American jurisprudence by outrage over the writs of assistance.[60] Special protection for the home, however, can be traced back through Roman and even Biblical law.[61] Because of this special protection for the home, criminal law has strict guidelines for when a home can be entered in the absence of a judicial search warrant.[62]

1. *Searches Based on Consent.*

A search executed without a warrant is normally presumed to be unreasonable and therefore in violation of the Fourth Amend-

57. *See, e.g.*, Welsh v. Wisconsin, 466 U.S. 740, 748 (1984) ("It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" (quoting United States v. U.S. Dist. Court (*Plamondon*), 407 U.S. 297 , 313 (1972))) .

58. Dorman v. United States 435 F.2d 385, 389 (1970) (citing Agnello v. United States, 269 U.S. 20 (1925)).

59. *See* NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 47-50 (1937).

60. It is recognized that the Fourth Amendment was written largely in response to non-judicial warrants called writs of assistance that did not specifically state what was to be searched or seized, and were issued without oath or probable cause. Geoffrey G. Hemphill, *The Administrative Search Doctrine: Isn't this Exactly What the Framers Were Trying to Avoid?*, 5 REGENT U. L. REV. 215, 223-25 (1995). Although the warrants enabled British customs officers to search places of business, as well as homes, criticism of the writs was focused on their intrusion in the home. *See id.*; David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 FLA. L. REV. 1051, 1068-69 (2004) ("In 1772, Samuel Adams complained that customs officers may violate 'the sacred rights of the Domicil' and ransack houses. In 1774, the Continental Congress denounced customs officers, who could 'break open and enter houses without the authority of any civil magistrate founded on legal information.'").

61. *See* LASSON, *supra* note 59, at 13-18.

62. *See generally Investigation and Police Practices*, *supra* note 52.

ment.[63] Law enforcement personnel can lawfully search a home without a warrant, however, if a resident of the home or a person with "common authority over or other sufficient relationship to" the home gives voluntary consent.[64] The burden is on the government to prove that consent was voluntary.[65] A court determines the voluntariness of consent through an evaluation of the totality of the circumstances.[66] Among the factors weighed in making this determination are: knowledge of the right to refuse consent,[67] age, level of intelligence or education, length and character of the search or detention, coercive behavior by law enforcement,[68] and proficiency in English.[69] Consent is not voluntary when an officer claims to have authority to enter the home but in fact has none.[70] Consent may be implied through actions such as giving officers a key[71] or stepping back from the door.[72] Consent is not implied, however, when a person opens a door to determine who is seeking entry[73] or when a person steps aside to avoid being knocked down by the officer seeking entry into his home.[74]

2. *Searches Pursuant to Exigent Circumstances.*

In the absence of consent, law enforcement officers can enter a home under exigent circumstances.[75] Exigent circumstances exist when "there is compelling need for official action and no time to secure a warrant."[76] Courts sanction entry pursuant to exigent circumstances when law enforcement officers fear destruction of evidence,[77] are in hot pursuit of a suspect,[78] believe the suspect will

63. *See* Katz v. United States, 389 U.S. 347, 357 (1967).

64. United States v. Matlock, 415 U.S. 164, 171 (1974).

65. *See* United States v. Mendenhall, 466 U.S. 544, 557 (1980).

66. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).

67. *See id.* Although this factor is taken into account, it is not a necessary element for voluntary consent. *Id.* at 232-33.

68. *See id.* at 226.

69. *See* United States v. Contreras, 372 F.3d 974, 977-78 (8th Cir. 2004); United States v. Solis, 299 F.3d 420, 436-37 (5th Cir. 2002); United States v. Velasquez, 885 F.2d 1076, 1082 (3d Cir. 1989).

70. Bumper v. North Carolina, 391 U.S. 543, 549-50 (1968).

71. *See* United States v. Rosi, 27 F.3d 409, 412 (9th Cir. 1994).

72. *See* United States v. Carter, 378 F.3d 584, 588 (6th Cir. 2004).

73. *See* United States v. McCraw, 920 F.2d 224, 228 (4th Cir. 1990).

74. United States v. Albrektsen, 151 F.3d 951, 955 (9th Cir. 1998).

75. Michigan v. Tyler, 436 U.S. 499, 509 (1978) (citing Warden v. Hayden, 387 U.S. 294, 298-99 (1967)).

76. *Id.*

77. *See* Ker v. California, 374 U.S. 23, 41-42 (1963).

78. *See* Minnesota v. Olson, 495 U.S. 91, 100 (1990). Entry pursuant to "hot pursuit" will not usually be justified unless there is some sort of chase involved. *See*

escape before a warrant can be obtained,[79] or when delay would "gravely endanger their lives or the lives of others."[80] A search pursuant to exigent circumstances is only permitted insofar as is necessary to accommodate the particular exigency.[81] For instance, once law enforcement has secured the evidence in danger of destruction, prevented a suspect's imminent flight, or there is no longer a danger, they cannot enter a home without a warrant or consent.[82] Application of the exigent circumstances exception to entry of the home is especially circumscribed and has explicitly been reserved for serious crimes.[83]

3. *Entry of a Home to Effectuate an Arrest.*

Even armed with a valid arrest warrant, law enforcement officers may not enter a home to effectuate an arrest unless there is (1) a reasonable belief that the place to be entered is the suspect's residence and (2) a reason to believe that the suspect is present.[84] In determining whether an officer has a reasonable belief of residence, courts consider whether the information relied upon in targeting the home is current.[85] Courts also look to see whether officers consulted utility, property, or other records to ensure that the suspect resides at the home in question.[86] In determining whether officers have a reasonable belief of presence, courts do not require officers to see a suspect enter the residence in question.[87]

United States v. Santana, 427 U.S. 38, 43 n.3 (1976) (citing Johnson v. United States, 33 U.S. 10, 16 n.7 (1948)).

79. *See Olson*, 495 U.S. at 100.

80. *Hayden*, 387 U.S. at 298-99.

81. *Investigation and Police Practices*, *supra* note 52, at 76.

82. *See id.*

83. *See* Welsh v. Wisconsin, 466 U.S. 740, 753 (1984) ("[A]pplication of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense . . . has been committed.").

84. *See* Payton v. New York, 445 U.S. 573, 603 (1980). "Reason to believe" is not specifically defined in *Payton*, but the majority of courts require less proof to establish a "reason to believe" than to establish probable cause. Matthew A. Edwards, *Posner's Pragmatism and Payton Home Arrests*, 77 WASH. L. REV. 299, 362-63 (2002).

85. *See, e.g.*, United States v. Bervaldi, 226 F.3d 1256, 1264 (11th Cir. 2000); United States v. Lovelock, 170 F.3d 339, 343-44 (2d Cir. 1999).

86. *See, e.g.*, United States v. Terry, 702 F.2d 299, 319 (2d Cir. 1983) (finding entry to be reasonable where telephone service at the address was in the name of a woman with defendant's last name); Wanger v. Bonner, 621 F.2d 675, 682-83 (5th Cir. 1980) (finding home entry to be unreasonable where officers did not attempt to verify the address listed on the warrant despite their knowledge that out-of-county warrants were inaccurate in twenty to twenty-five percent of cases).

87. *See* Valdez v. McPheters, 172 F.3d 1220, 1226 (10th Cir. 1999).

Rather, officers can rely on "common sense factors" such as parked cars, the time of day, and a suspect's employment schedule,[88] as well as accounts of witnesses informing officers that the suspect is present.[89]

4. *Consequences of Fourth Amendment Violations*

The consequences of Fourth Amendment violations by law enforcement officers can be severe. Evidence that is obtained through a Fourth Amendment violation can be excluded from use in a criminal trial.[90] A victim of a Fourth Amendment violation may also have a damages claim under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.[91] *Bivens* held that an individual who has been a victim of a Fourth Amendment violation at the hands of a federal officer can sue that officer for monetary damages in federal court.[92] If the violation was committed by a State law enforcement officer, a victim can sue for damages or injunctive relief under title 42, section 1983 of the U.S Code. Section 1983 provides that any person who commits a constitutional violation "under color of" a state "statute, ordinance, regulation, custom, or usage," is subject to an action at law or suit in equity.[93]

B. Barriers to Application of the Traditional Fourth Amendment Scheme to Immigration Enforcement in the Home

1. *Differences Between Criminal and Immigration Enforcement for Fourth Amendment Purposes*

Viewed through the lens of criminal law's intricate system of protection for the home, ICE's behavior in carrying out "Operation Return to Sender" and "Operation Community Shield" raises serious Fourth Amendment concerns. ICE enters homes without search warrants and many of the factors that weigh against a determination of valid consent are present during pre-entry exchanges

88. *See id.*

89. *See* United States v. Spencer, 684 F.2d 220, 222 (2d Cir. 1982).

90. *See* Mapp v. Ohio, 367 U.S. 643, 654-55 (1961) (finding evidence obtained in violation of the Fourth Amendment should be excluded in state court); Elkins v. United States, 364 U.S. 206, 208 (1960) (finding evidence obtained in violation of the Fourth Amendment should be excluded in federal court); Weeks v. United States, 232 U.S. 383, 398 (1914).

91. 403 U.S. 388 (1971).

92. *See id.* at 396-97.

93. 42 U.S.C. § 1983 (2008).

between ICE agents and residents.[94] Furthermore, even when ICE seeks entry pursuant to a valid arrest warrant, evidence of targeting homes based on incorrect or outdated information raises doubts about whether ICE agents possess a "reasonable belief" that the subject of a warrant resides at the home in question or is present at the time of entry.[95] However, a number of factors differentiate the criminal and immigration enforcement schemes for Fourth Amendment purposes. Although these distinctions do not remove the Fourth Amendment's protection in the immigration context, they preclude direct application of criminal standards.

One consideration unique to the immigration context is the Plenary Power Doctrine. According to the Plenary Power Doctrine, immigration policy is an aspect of external sovereignty that, like the power to declare war or make treaties, is entrusted solely to the political branches of government.[96] Accordingly, courts should give these branches wide latitude in regulating the admission and removal of immigrants.[97] This means that immigration policy is not held to the same constitutional standards as domestic law and indeed at times escapes constitutional review entirely.[98] For instance, courts have cited the Plenary Power doctrine to support findings that immigration legislation favoring particular nationalities does not violate the equal protection clause,[99] and that an immigrant denied a visa based on his political viewpoint cannot invoke the First Amendment.[100] This constitutional leniency, how-

94. *See supra* notes 10-13, 40-47 and accompanying text.

95. *See supra* notes 14-24, 30-38 and accompanying text.

96. Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952). The most widely accepted rationale for the Plenary Power Doctrine is that because immigration policy concerns citizens of other nations, it necessarily implicates foreign affairs. *See* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 261 (1984). For example, nations may intervene on behalf of their citizens in other countries and immigration policy considerations have the power to affect international negotiations. *See id.* at 262.

97. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."); Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889); Barbara Hines, *An Overview of U.S. Immigration Law and Policy Since 9/11*, 12 TEX. HISP J.L. & POL'Y 9, 14 (2006).

98. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 792 (1977); Kleindienst v. Mandel, 408 U.S. 753, 766 (1972); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950).

99. *See, e.g.*, Romero v. INS, 399 F.3d 109, 111-12 (2d Cir. 2005) (finding that because of the plenary power of Congress over immigration law, such legislation will be upheld if there is a "facially legitimate and bona fide reason for the law").

100. *See Kleindienst*, 408 U.S. at 768-69.

ever, applies only to admission and removal policies and does not apply to efforts to regulate the rights and obligations of immigrants generally.[101] For example, the Plenary Power does not apply to legislation regarding tax or social welfare policy for immigrants.[102] Additionally, although the Plenary Power doctrine may limit constitutional scrutiny of immigration policy, ICE agents acting outside of that policy are not insulated from responsibility for constitutional violations.[103] Thus, to the extent that ICE policy authorizes Fourth Amendment violations that are unrelated to admission or exclusion, or that ICE agents commit Fourth Amendment violations that are not authorized by ICE policies, the Plenary Power doctrine does not shield this behavior from Fourth Amendment scrutiny.

Another factor that distinguishes immigration law from criminal law is that an immigration proceeding is civil, rather than criminal, in nature. Therefore, an immigrant facing removal does not enjoy the same constitutional protections as a criminal defendant.[104] The justification for this different level of protection is that civil violations carry less severe penalties than criminal violations, and therefore the additional safeguards afforded in criminal law are unnecessary.[105] For instance, an immigration hearing can proceed even if the subject of the hearing is absent,[106] and ICE need not prove that an immigrant is deportable beyond a reasonable doubt, but rather by clear and convincing evidence.[107] With regard to the

101. *See* Legomsky, *supra* note 96, at 256 (making this distinction and noting that immigrants have property rights and equal protection rights).

102. *See id.*

103. *See* Helfand, *supra* note 45, at 117.

104. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038-39 (1984).

105. *See* Judy C. Wong, *Egregious Fourth Amendment Violations and the Use of the Exclusionary Rule in Deportation Hearings: The Need for Substantive Equal Protection Rights for Undocumented Immigrants*, 28 COLUM. HUM. RTS. L. REV. 431, 442-43 (1997). This argument has been strongly criticized by many commentators, who argue that the catastrophic consequences of deportation for immigrants, as well as the increasing use of deportation as punishment for criminal violations, requires that criminal protections be applied in the immigration context. *See, e.g.*, Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1935 (2000); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 339-40 (2000).

106. *See* 8 U.S.C. § 1229a(b)(5)(A) (2007); *Lopez-Mendoza*, 468 U.S. at 1038-39.

107. *See* 8 U.S.C. § 1229a(c)(3)(A) (2007); *Lopez-Mendoza*, 468 U.S. at 1038-39. However, if a person is seeking admission into the country, they must prove that they are "clearly and beyond doubt entitled to be admitted and [are] not inadmissible under section 212 [of the Immigration and Nationality Act (INA)]." 8 U.S.C. § 1229a(c)(2)(A).

Fourth Amendment in particular, the Supreme Court held that with the possible exception of "egregious violations,"[108] the exclusionary rule does not apply in immigration proceedings.[109] However, the civil nature of immigration law does not preclude application of the Fourth Amendment. The language of the Fourth Amendment does not limit itself to application in criminal law,[110] and courts recognize that even in civil contexts, such as housing or health inspections, people have the right to be free from unreasonable searches and seizures.[111]

Although Fourth Amendment rights apply in the civil context, courts do not automatically import criminal standards. Rather, in civil cases a court evaluates the "reasonableness" of law enforcement action by balancing the legitimate law enforcement interest with the level of intrusion on the individual's Fourth Amendment privacy interest.[112] This balancing test is also used to determine the appropriate level of cause necessary to justify the issuance of a warrant in civil settings. Depending on the weight of the competing interests, a court will require different evidentiary standards for intrusion.[113]

In order to apply this balancing test to the immigration enforcement context, the individuals affected by immigration enforcement operations must possess a Fourth Amendment privacy interest. The Fourth Amendment's protection of immigrants in the immigration enforcement context is not well established. At least one federal judge has argued that the Fourth Amendment does not ex-

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108. Such "egregious violations" have been pled with varying degrees of success. *Compare* Almeida-Amaral v. Gonzales, 461 F.3d 231, 236 (2d Cir. 2006) (indicating that "lack of any valid basis whatsoever for a seizure" does not constitute an "egregious" Fourth Amendment violation), *with* Gonzalez-Rivera v. INS, 22 F.3d 1441, 1452 (9th Cir. 1994) (seizure based solely on race is an "egregious" Fourth Amendment violation).

109. *See Lopez-Mendoza*, 468 U.S. at 1050-51 (1984). The Supreme Court also indicated that it might decide the issue differently in the face of evidence of widespread Fourth Amendment violations by immigration agents. *Id*.

110. *See* U.S. CONST. amend. IV.

111. *See* Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978); Camara v. Mun. Court, 387 U.S. 523, 530-31 (1967).

112. *See* Delaware v. Prouse, 440 U.S. 648, 653-54 (1979) (citing *Marshall*, 436 U.S. at 312). Courts also engage in this balancing test in the criminal setting—usually when confronting an atypical situation that is less intrusive than a typical search or seizure. LAFAVE, *supra* note 53, § 3.2. Numerous judges and commentators have argued that to balance such different and intangible interests is not only futile, but also means that judges will merely make the decision based on their own preferences. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 369 (1985) (Brennan, J., dissenting); Hemphill, *supra* note 60, at 243-44.

113. *See Prouse*, 440 U.S. at 654-55.

tend to illegal immigrants who have criminal histories,[114] and the Supreme Court has suggested that admission of immigrants is conditioned upon the government's right to subject them to "reasonable questioning about their right to be and remain in the country."[115]

Despite this uncertainty, Fourth Amendment interests can be clearly defined in the immigration context. First, the language of the Fourth Amendment extends to non-citizens,[116] and courts have repeatedly recognized this, weighing the Fourth Amendment interests of non-citizens in evaluating the constitutionality of immigration enforcement action.[117] Although the Fourth Amendment rights of illegal immigrants are not well defined,[118] courts recognize that because immigration enforcement affects citizens, legal immigrants, and illegal immigrants,[119] ICE's actions cannot be evaluated under the assumption that only illegal immigrants will be affected.[120] Rather, courts consider the privacy interests of legal immigrants and citizens when evaluating the constitutionality of immigration enforcement, regardless of the immigration status of the person or persons that are the target of the operation.[121] Therefore, the privacy interest that must be weighed in determining the proper standard for ICE enforcement in the home is the well established Fourth Amendment privacy interest of citizens and legal immigrants, who will inevitably be affected by immigration enforcement activities.[122]

2. *Home Raids as Searches and Seizures?*

Not only does the Fourth Amendment apply to the immigration enforcement context in general, but it applies specifically to ICE behavior in executing initiatives such as "Operation Return to

114. United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254, 1271 (D. Utah 2003), *aff'd on other grounds*, 386 F.3d 953, 957 (10th Cir. 2004).

115. United States v. Brignoni-Ponce, 422 U.S. 873, 883-84 (1975).

116. U.S. CONST. amend. IV.

117. *See, e.g.*, INS v. Delgado, 466 U.S. 210, 213 n.1, 218 (1984); Zepeda v. INS, 753 F.2d 719, 722, 727 (9th Cir. 1983); Ill. Migrant Council v. Pilliod, 531 F. Supp. 1011, 1022-23 (N.D. Ill. 1982).

118. *See supra* notes 114-15 and accompanying text.

119. *See supra* notes 1-5 and accompanying text.

120. The Supreme Court has specifically recognized that the Fourth Amendment rights of citizens and legal immigrants must be considered in evaluating immigration enforcement activity. *See Brignoni-Ponce*, 422 U.S. at 882; Almeida-Sanchez v. United States, 413 U.S. 266, 273 n.5 (1973).

121. *See Brignoni-Ponce*, 422 U.S. at 882; *Almeida-Sanchez*, 413 U.S. at 273 n.5.

122. *See Brignoni-Ponce*, 422 U.S. at 882; *Almeida-Sanchez*, 413 U.S. at 273 n.5.

Sender" and "Operation Community Shield" because such behavior results in "searches" or "seizures" within the meaning of the Fourth Amendment.

a. Searches

A search occurs whenever the government invades a place where a person has a "reasonable expectation of privacy."[123] Such a determination depends on (1) whether the individual establishes a subjective expectation of privacy in the area searched, and (2) whether society recognizes that expectation as reasonable.[124] This standard was developed in criminal law but is cited in the ICE manual on arrest, search, and seizure and is applied in the civil context.[125] The subjective expectation of privacy held by ICE's targets in their homes is evidenced by the shock and trauma they experience when ICE agents enter their homes.[126] With regard to society's expectations, courts consistently find entry into homes, by either criminal or civil law enforcement agents, to constitute a search.[127] Indeed, defining government entry into the home as a search is so commonplace that it is not frequently discussed in judicial opinions.[128] This presumption applies no differently in the immigration context where lower federal courts have found physical entry into homes by law enforcement to be a search without even mentioning the "reasonable expectation of privacy" test.[129] Therefore, ICE's entry into a home pursuant to initiatives such as "Oper-

123. California v. Ciraolo, 476 U.S. 207, 211 (1986).

124. *Id.*; Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

125. U.S. DEP'T OF JUSTICE, INS MANUAL, THE LAW OF ARREST, SEARCH, AND SEIZURE FOR IMMIGRATION OFFICERS ch. 3, introductory cmt. (2008); *see also* Michigan v. Tyler, 436 U.S. 499, 504-06 (1978); Amos v. United States, 255 U.S. 313, 314-17 (1921).

126. *See, e.g.*, Aguilar Amended Complaint, *supra* note 2, at ¶¶ 187, 206; Arias Complaint, *supra* note 32, at ¶¶ 89-90; Mancha Complaint, *supra* note 32, at ¶¶ 27, 35, 66; Robert L. Smith, *Families Process Trauma of Raids*, CLEVELAND PLAIN DEALER, May 23, 2007, at A1.

127. *See* Thomas K. Clancy, *What Is a "Search" Within the Meaning of the Fourth Amendment?*, 70 ALB. L. REV. 1, 7 (2006). In the criminal context, the Supreme Court has found that because protection of the home is so rooted in Fourth Amendment jurisprudence, failure to recognize an expectation of privacy in the home would be to "erode the privacy guaranteed by the Fourth Amendment." Kyllo v. United States, 533 U.S. 27, 34 (2001).

128. *See* Clancy, *supra* note 127, at 7.

129. *See, e.g.*, United States v. Pacheco-Ruiz, 549 F.2d 1204, 1207 (9th Cir. 1976); United States v. Rodriguez, 532 F.2d 834, 839 (2d Cir. 1976).

ation Return to Sender" or "Operation Community Shield" constitutes a search for Fourth Amendment purposes.[130]

b. Seizures

ICE action results in seizures as well as searches. In the immigration context, the Supreme Court held that a seizure occurs when, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[131] The news stories and accounts in recently filed complaints demonstrate that in many instances people do not feel free to leave during an ICE home raid.[132] This is especially true when officers display guns,[133] engage in intimidating behavior,[134] and force all residents into one room for systematic questioning.[135] Finally, because these raids often take place in the home and often in the middle of the night, residents cannot leave without jeopardizing their safety or at least raising real suspicion that they are engaged in illegal activity.[136]

C. Specific Standards in the Immigration Enforcement Context

1. *Home Raid Cases*

Although the Fourth Amendment applies to the home raid context, and the ICE manual offers some standards as described above, case law offers very limited guidance about what behavior is constitutionally permissible in homes.

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130. For a discussion of circumstances under which such searches are permissible without a warrant see notes 62-88, 184-90, and accompanying text.

131. INS v. Delgado, 466 U.S. 210, 215 (1984) (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)). *Mendenhall* elaborates that:

> [C]ircumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

446 U.S. at 554.

132. *See supra* notes 39-49 and accompanying text.

133. Aguilar Amended Complaint, *supra* note 2, ¶ 104, 154; Mancha Complaint, *supra* note 32, ¶ 27; *see* Dyson, *supra* note 40.

134. Aguilar Amended Complaint, *supra* note 2, ¶¶ 107, 205, 209, 255; Mancha Complaint, *supra* note 32, ¶ 58; *see* Freedman, *supra* note 39.

135. Aguilar Amended Complaint, *supra* note 2, ¶¶ 120, 193; Arias Complaint, *supra*, note 32, ¶ 82.

136. These final two factors distinguish the home raid context from *INS v. Delgado*, where the Supreme Court found that no seizure had taken place during an INS workplace raid. In *Delgado*, factory workers were allowed to continue the tasks associated with their employment while INS agents walked around questioning individuals. 466 U.S. at 218.

Much of the existing guidance comes from federal district courts.[137] With regard to initial targeting of a home, the Ninth Circuit found that ICE agents may approach homes at any hour of the day without reasonable suspicion that illegal immigrants are present.[138] ICE may not, however, search a home without a warrant unless exigent circumstances exist.[139] Moreover, one federal court determined that the warrant necessary to search a home may not be the sort of administrative search warrant that is issued on less than traditional probable cause (the standard that is permissible for an ICE search of a business).[140] Rather, because home raids are more intrusive than other types of administrative searches, a warrant to search a home must be issued upon a "showing of probable cause to believe that the legitimate object of a search is located in a particular place."[141] Finally, with regard to the scope of permissible action once inside a home, the Second Circuit found that entry pursuant to a valid immigration arrest does not justify the search of an entire residence.[142] If, however, law enforcement is already detaining a person in the home for a criminal purpose, the Supreme Court held that ICE agents can question that person about their immigration status without a reasonable suspicion of alienage.[143]

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137. *See* Zepeda v. INS, 753 F.2d 719, 731 (9th Cir. 1983); United States v. Pacheco-Ruiz, 549 F.2d 1204, 1207 (9th Cir. 1976); United States v. Rodriguez, 532 F.2d 834, 838-39 (2d Cir. 1976); Ill. Migrant Council v. Pilliod, 531 F. Supp. 1011, 1022 (N.D. Ill. 1982).

138. *See Zepeda*, 753 F.2d at 731. The court held that to restrict INS officers in approaching homes would inhibit the INS from carrying out routine investigations. *Id.* In addition, the court struck down the portion of an injunction that prevented the INS from approaching homes between 8:00 p.m. and 7:00 a.m. in the absence of exigent circumstances or probable cause, finding that that the Fourth Amendment does not "appl[y] differently at different times of the day." *Id.*

139. *See Pacheco-Ruiz*, 549 F.2d at 1207 (finding no exigent circumstances to justify INS agent's entry where "[a] magistrate was presumably within reasonable distance and [t]here were enough officers present to make certain that until a warrant was issued no one could leave the premises without being checked for citizenship"); *see also Rodriguez*, 532 F.2d at 839; *Pilliod*, 531 F. Supp. at 1022.

140. *See Pilliod*, 531 F. Supp. at 1022.

141. *Id.* (quoting Steagald v. United States, 451 U.S. 204, 213 (1981)). In balancing the level of intrusion with immigration enforcement necessity the court also considered that administrative warrants have not been historically accepted, immigration presents no threat to public heath or safety, and that immigration laws can be enforced through other means. *See id.*

142. *See Rodriguez*, 532 F.2d at 839.

143. *See* Muehler v. Mena, 544 U.S. 93, 101 (2005) (finding that a "shift in purpose" does not need additional justification to be permissible for Fourth Amendment purposes).

2. *Workplace Enforcement Cases*

In other contexts, however, the application of the Fourth Amendment to immigration law is better established. With regard to workplace enforcement, courts have sanctioned warrants issued on less than the probable cause which is necessary in criminal law.[144] Such warrants were first sanctioned in *Camara v. Municipal Court*,[145] where the Supreme Court found that although a municipal health inspection could not be conducted in a home without a search warrant, a warrant for a health inspection could be issued on a lower standard of probable cause.[146] Because the standard for probable cause can "take into account the nature of the search that is being sought," the court found that "'probable cause' to issue a warrant to inspect . . . exist[s] if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."[147]

In *Blackie's House of Beef, Inc. v. Castillo*, the D.C. Circuit applied this framework to the immigration enforcement context and held that the INS could not enter a business without a warrant or exigent circumstances.[148] Based on the nature of an INS workplace search, the court found that "flexible" probable cause in the workplace enforcement context required that a warrant contain "sufficient specificity and reliability to prevent the exercise of unbridled

144. *See* Blackie's House of Beef, Inc. v. Castillo, 659 F.2d 1211, 1223 (D.C. Cir. 1981).

145. 387 U.S. 523 (1967).

146. *See id.* at 538.

147. *Id.* Although not universally applied in administrative search and seizure cases, this "flexible" concept of probable cause is unique to the context of administrative warrants. *See* Griffin v. Wisconsin, 483 U.S. 868, 878 n.4 (1987); s*ee also* Barry Jeffrey Stern, *Warrants Without Probable Cause*, 59 BROOK. L. REV. 1385, 1396-97 (1994). It does not apply to "probable cause" as the term describes the quantum of suspicion necessary to search or seize without a warrant, nor does it apply to the issuance of a criminal search warrant. *See Griffin*, 483 U.S. at 878 n.4. Although criminal law enforcement also balances government and individual interests when determining the level of suspicion necessary for a search or seizure without a warrant, a lower level of cause in the criminal context is characterized as "reasonable suspicion," rather than a lower level of probable cause. *See id.* Indeed, the Supreme Court rejected a balancing test for probable cause in the criminal context because police officers, who have "limited time and expertise" need a "single, familiar standard." Dunaway v. New York, 442 U.S. 200, 213-14 (1979). Throughout this Note, this lower standard of probable cause for the issuance of administrative warrants will be referred to as "flexible probable cause" in order to avoid confusion with the traditional standard.

148. *See Blackie's*, 659 F.2d at 1223. Note, however, that the INS may enter if given consent to do so.

discretion by law enforcement."[149] In *Blackie's*, this standard was satisfied by a warrant that stated: the location to be searched, the time of the search, restricted the search to only those areas "where aliens were likely to be hiding," and contained general descriptions of the persons sought.[150] The warrant was also supported by surveillance of the business establishment and an affidavit from an anonymous employee of Blackie's.[151]

In the event that ICE agents attempt to search a business based on consent rather than a warrant, consent must not be based on "duress or coercion, express or implied."[152] Whether ICE agents obtained valid consent will be "determined from the totality of all the circumstances."[153] For example, courts have found voluntary consent to search a business when immigration agents did not make threats, show force, or reveal their weapons,[154] and found consent to be involuntary when agents acted in a way that "would leave a reasonable person with the belief that he had no choice but to consent to the raid."[155]

Once ICE agents are lawfully inside a business, agents may question employees without seizing them for Fourth Amendment purposes unless "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[156] Under this standard, courts have found that physical restraint and instructions not to move or leave constitute seizures.[157] On the other hand, systematic questioning of factory employees, even when INS blocks workplace exits, does not constitute a seizure for Fourth Amendment purposes.[158] If a seizure occurs, it must be based on "reasonable suspicion that the particular worker is an illegal alien" in order to be permissible under the Fourth Amendment.[159] As noted above, the "reasonable suspicion" standard is lower than the traditional probable cause stan-

149. *See id.* at 1225 (citing Delaware v. Prouse, 440 U.S. 648, 654 (1979)).

150. *See id.*; Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson, 799 F.2d 547, 553 (9th Cir. 1986) (applying the *Blackie's* standard).

151. *See Blackie's*, 659 F.2d at 1227.

152. Jenkins v. INS, 108 F.3d 195, 198 (9th Cir. 1997).

153. *Id.*

154. *See id.*

155. *Int'l Molders'*, 799 F.2d at 554.

156. INS v. Delgado, 466 U.S. 210, 215 (1984) (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)).

157. *See* Pearl Meadows Mushroom Farm v. Nelson, 723 F. Supp. 432, 446 (N.D. Cal. 1989).

158. *See Delgado*, 466 U.S. at 216, 218.

159. *See* Martinez v. Nygaard, 831 F.2d 822, 827 (9th Cir. 1987).

dard,[160] and is defined as "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion."[161] For example, such suspicion may be supported by an employee's failure to produce a green card,[162] but Hispanic appearance alone cannot support a reasonable suspicion.[163]

3. *Vehicle Cases*

An additional source of insight into the application of the Fourth Amendment to immigration enforcement can be found in law regarding stopping and searching vehicles. Except at the border or its "functional equivalent,"[164] ICE may not stop a vehicle without reasonable suspicion that it "contain[s] aliens who are illegally in the country."[165] In forming such a reasonable suspicion, an officer can consider the make of the car, driving patterns, whether the car appears heavily laden, the area in which the car is located, physical characteristics typical of Mexican citizens, and other factors relevant in light of the officers' experience.[166]

Once a vehicle is stopped, it may not be searched without a warrant, consent or probable cause.[167] Although the Immigration and Nationality Act provides that ICE agents have the power to conduct warrantless searches of vehicles within a "reasonable distance" from the border,[168] courts have explicitly stated that this

160. *See supra* notes 54-56 and accompanying text.

161. Terry v. Ohio, 392 U.S. 1, 21 (1968).

162. *Martinez*, 831 F.2d at 828.

163. *See* Pearl Meadows Mushroom Farm v. Nelson, 723 F. Supp. 432, 447 (N.D. Cal. 1989).

164. An example of a functional equivalent of the border would be an airport where an international flight has landed, or an intersection where a road coming from the border meets another. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 272-73 (1973).

165. United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975). In *Brignoni-Ponce*, the Supreme Court found that a roving border patrol could not, consistent with the Fourth Amendment, stop a car based solely on the presence of people of apparent Mexican descent within the car. *Id.* at 885-86. Note that apparent Mexican descent can be considered as one of many factors justifying a stop. *Id.* at 886-87.

166. *See id.* at 884-85.

167. *Almeida-Sanchez*, 413 U.S. at 274-75. The *Almeida* court disagreed as to whether a warrant for the vehicle search could be issued on a flexible probable cause standard. *Id.* at 270 n.3. In his concurrence, Justice Powell advocated a *Camara*-type warrant that would be issued based on the "[predictable] incidence of illegal transportation of aliens on certain roads" and a "predetermined schedule" of enforcement operations. *Id.* at 283 (Powell, J., concurring). There is no mention of a lesser standard of probable cause in the absence of a warrant.

168. *See* 8 U.S.C. § 1357(a)(3) (2008). A reasonable distance is defined as 100 miles. 8 C.F.R. § 287.1(a)(2) (2008).

does not give ICE free reign to conduct searches within this radius.[169] Rather, a warrant, consent, or probable cause is required unless a search takes place at the border or its "functional equivalent."[170]

III. Application of Existing Immigration Enforcement Standards to the Home: Evaluation of Current Practices and a Call for Reform

A. Extension of Workplace and Vehicle Enforcement Standards to the Home

Although Fourth Amendment standards from vehicle and workplace enforcement do not account for the special protection afforded to the home in Fourth Amendment jurisprudence, they can provide guidance in determining appropriate standards for initiatives such as "Operation Return to Sender" and "Operation Community Shield." As explained above, Fourth Amendment standards in civil cases are determined by balancing the law enforcement interest at stake with the extent of Fourth Amendment intrusion on individuals.[171] Therefore, a comparison of the law enforcement and individual interests at stake in home raids with those at stake in other immigration enforcement contexts will help determine whether standards developed for vehicles and workplaces are appropriately applied to the home.

In the home context, the law enforcement interests are significant. According to the DHS Office of Immigration Statistics, the unauthorized immigrant population of the United States rose from 8.5 million in 2000 to 11.6 million in 2006.[172] Faced with frustration expressed by citizens around the country over Congress' failure to create workable immigration policy, the federal government faces enormous pressures to combat illegal immigration.[173] Because

169. *See* United States v. Lonabaugh, 494 F.2d 1257, 1260-61 (5th Cir. 1973) (citing *Almeida-Sanchez*, 413 U.S. at 272).

170. *Almeida-Sanchez*, 413 U.S. at 272, 275.

171. *See supra* note 112 and accompanying text.

172. Michael Hoefer et al., Dep't of Homeland Sec., Office of Immigration Statistics, Estimates of the Unauthorized Immigrant Population in the United States 2-3 (2006), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ill_pe_2006.pdf.

173. *See, e.g.*, Ruth Ellen Wasem, Cong. Research Serv., Immigration Reform: Brief Synthesis of Issue (2007), *available at* http://fpc.state.gov/documents/organization/91856.pdf ("There is a broad-based consensus that the U.S. immigration system is broken."); Alex Kotlowitz, *Our Town*, N.Y. Times Mag., Aug. 5, 2007, at 30 (quoting Arizona governor Janet Napolitano's statement to Congress that "[o]ne of the practical effects of [Congress's] failure to effectively address immigration reform

large numbers of immigrants tend to live together in concentrated communities,[174] and even in single-family homes,[175] initiatives that target illegal immigrants in their homes have the potential to vastly increase the numbers of immigration arrests. Although significant, this government interest is no greater in the home than in other areas of immigration enforcement where ICE faces the same difficulties. Indeed one federal court found that law enforcement interests are diminished in the home raid context precisely because there are other less intrusive ways to enforce immigration law.[176]

On the other hand, the privacy interests at stake in the home raid context are much greater than in the vehicle or workplace context because of the special protection afforded to the home by the Fourth Amendment.[177] When a person drives onto the open road or reports to work, they may no longer have a reasonable expectation of privacy[178] and may be subjected to a number of intrusive measures as part of everyday life such as traffic stops[179] or workplace drug tests.[180] The Supreme Court has repeatedly distinguished the expectation of privacy in these settings from the expectation of privacy in the home.[181] Thus, because courts recognize invasion of homes as the greatest Fourth Amendment intru-

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'is that Arizona, and states across the nation, must now continue to address this escalating problem on their own.'").

174. *See* Ford Fessenden, *The New Crossroads of the World*, N.Y. TIMES, Aug. 27, 2006 at 14NJ.

175. *See id.*

176. *See* Ill. Migrant Council v. Pilliod, 531 F. Supp. 1011, 1022-23 (N.D. Ill. 1982).

177. *See supra* notes 58-61 and accompanying text.

178. *See* O'Connor v. Ortega, 480 U.S. 709, 717 (1987) (noting that employees' "expectations of privacy in their offices, desks, and file cabinets . . . may be reduced by virtue of actual office practices and procedures, or by legitimate regulation"); New York v. Class, 475 U.S. 106, 112-13 (1986) (indicating that there is a lower expectation of privacy in automobiles because, inter alia, "'[a] car has little capacity for escaping public scrutiny' . . . [and is] subject [to] pervasive regulation by the State" (quoting Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion))).

179. *See* Illinois v. Lidster, 540 U.S. 419, 427 (2004).

180. *See* Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 624 (1989).

181. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 271 (1973). Notably, Justice Powell's *Almeida* concurrence, which advocates a lesser probable cause standard for the vehicle searches, specifically mentions that Fourth Amendment concerns are less pronounced in the vehicle context than in the home. *Id.* at 279; *see also Lidster*, 540 U.S. at 424 ("The Fourth Amendment does not treat a motorist's car as his castle."); *O'Connor*, 480 U.S. at 717-18 ("An office is seldom a private enclave free from entry by supervisors, other employees, and business and personal invitees . . . the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis."); *Class*, 475 U.S. at 112-13 ("One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects.").

sion—and the law enforcement interests involved in home raids are no greater than those in other methods of immigration enforcement—the level of Fourth Amendment protection for home raids should be at least as great as that afforded in either the workplace or vehicle stop context. As noted earlier, at least one federal court has required greater protection for immigration raids in the home than in vehicle and workplace settings.[182]

B. Minimal Protections Required for Home Raids

1. *Current Home Enforcement Behavior Tested Against Workplace and Vehicle Standards*

If the officers charged with carrying out immigration enforcement in the home were required to respect the Fourth Amendment guidelines that are in place in the vehicle and workplace enforcement contexts, initiatives such as "Operation Return to Sender" and "Operation Community Shield" would look very different. For instance, if the reasonable suspicion requirement from the vehicle stop context were applied to home raids, ICE would not be able to target a home without specific and articulable facts which, along with inferences from those facts, reasonably warrant intrusion into the home to seek out illegal immigrants.[183] Additionally, application of the voluntary consent standards from the workplace search context would mean that ICE would not be able to enter or search a home unless agents procured consent without implied or express coercion or duress.[184] Further, if the standard for vehicle searches were applied to home raids, officers would not be able to search a home without valid consent, a warrant or probable cause to believe that illegal immigrants were on the premises.[185] Even if the lower standard of probable cause from the workplace search warrant context were applied to home searches, ICE could not proceed without a judicial warrant containing "sufficient specificity and reliability to prevent the exercise of unbridled discretion by law enforcement," and supported by evidence that illegal immigrants are present within the home.[186]

182. *See supra* notes 140-41 and accompanying text.
183. *See supra* notes 160-61 and accompanying text.
184. *See supra* notes 152-55 and accompanying text.
185. *See supra* notes 165-67 and accompanying text.
186. *See supra* notes 146-49 and accompanying text.

2. *Lessons from ICE's Own Internal Guidelines*

ICE's own manual for arrest, search, and seizure supports application of these minimal protections to the home raid context. Although the manual does not contain explicit guidelines for targeting homes, it provides that a home may not be searched without a warrant or probable cause.[187] Exceptions to the warrant requirement track criminal law and include consent, search incident to a valid arrest, and exigent circumstances.[188] The manual contains detailed guidelines about what constitutes valid consent.[189] It explains that, among other factors, an officer should take into account a resident's level of education or intelligence, as well as whether a person knows he can refuse consent.[190] The manual also makes clear that valid consent cannot be obtained through coercion, threats, or tricks, and explains that "mere failure to object to a search or otherwise resist is not consent."[191] With regard to a search incident to a valid arrest, such a search can only include the area within the immediate control of the suspect.[192] Finally, the manual authorizes searches pursuant to exigent circumstances if the officers have probable cause to search, and "some exigency or compelling urgency requires immediate action in order to protect law enforcement personnel or the public, or to prevent the destruction of contraband evidence."[193] In determining whether exigent circumstances exist, the manual notes that courts will consider:

> (1) the gravity or violent nature of the crime; (2) whether the suspect is believed to be armed; (3) a clear showing of probable cause to believe that the suspect committed the offense; (4) likelihood that the suspect will escape absent swift action; (5) level of force utilized in effecting the entry; (6) reason to believe that the suspect is on the premises; and (7) insufficient time to obtain even a telephonic warrant.[194]

187. *See* U.S. DEP'T OF JUSTICE, *supra* note 125, at ch. 3, pt. A(1).

188. *Id.* at pts. B(1)-(3).

189. *See id.* at pt. B(2).

190. *See id.*

191. *Id.*

192. *See id.* at pt. B(1).

193. *Id.* at pt. B(3) (citing Warden v. Hayden, 387 U.S. 294, 298-99 (1967)).

194. *Id.* (citing Welsh v. Wisconsin, 466 U.S. 740, 753 (1984); United States v. Echegoyen, 799 F.2d 1271 (9th Cir. 1986); United States v. Gomez, 652 F. Supp. 715, 718 (S.D.N.Y. 1987)).

3. *Is ICE Complying with These Minimum Requirements?*

Current practices for immigration enforcement in the home do not comply with the guidelines set forth in the ICE manual or the minimal protections in place in the vehicle or workplace enforcement contexts. As evidenced by complaints of targeting based on childhood photos,[195] repeated mistaken entries of the same home,[196] and ICE refusal to consult police records in determining which homes to target,[197] ICE engages in a practice of targeting homes without meeting the lower standard of "reasonable suspicion" required even to stop a vehicle.[198] Once ICE targets a home, agents use threats, intimidation, and sometimes even force to obtain entry.[199] This practice violates voluntary consent standards applied in workplace immigration enforcement and cited in ICE's own internal guidelines.[200] After gaining entry, ICE agents often proceed to search the entire home for illegal immigrants,[201] a practice that is prohibited by case law in the vehicle and workplace enforcement contexts,[202] as well as ICE's manual for arrest, search, and seizure.[203]

These searches do not fall under any of the exceptions to the warrant requirement recognized in criminal law and outlined in ICE's internal guidelines. Because exchanges between ICE agents and residents do not even reveal consent to enter,[204] there is no evidence of valid consent to search. With regard to searches incident to a valid arrest, an examination of ICE practices and collateral arrest statistics reveals that ICE routinely searches each room of a home in order to arrest as many illegal immigrants as possible, even if only one person is named on the administrative warrant.[205] Such behavior exceeds the scope of a search incident to a valid arrest by going beyond the area within the immediate control of the suspect.[206] Finally, it is doubtful that exigent circumstances exist frequently in the home raid context given that immigration vio-

195. *See supra* note 23 and accompanying text.
196. *See supra* notes 16-17 and accompanying text.
197. *See supra* notes 21-22 and accompanying text.
198. *See supra* notes 165-68 and accompanying text.
199. *See supra* notes 40-45 and accompanying text.
200. *See supra* notes 188-91 and accompanying text.
201. *See supra* notes 47-49 and accompanying text.
202. *See supra* notes 146, 165-68 and accompanying text.
203. *See supra* note 187 and accompanying text.
204. *See supra* notes 39-45 and accompanying text.
205. *See supra* notes 47-50 and accompanying text.
206. *See supra* note 192 and accompanying text.

lations are civil, non-violent crimes, and residents are unlikely to flee their homes before ICE agents can obtain a warrant.[207]

C. Home Enforcement Reform Through Existing Standards: Specific Proposals

By following Fourth Amendment standards from other immigration enforcement contexts in carrying out initiatives such as "Operation Return to Sender" and "Operation Community Shield," as well as complying with its own internal guidelines, ICE could significantly curb practices that implicate Fourth Amendment rights. Certain measures, such as enforcing existing consent guidelines and creating guidelines for initial targeting of homes, are potentially beneficial but would be difficult to enforce. The most effective way to reform ICE's home enforcement program through the existing immigration scheme is to require court-ordered warrants for ICE's home raids.

One possible method of reforming ICE's home enforcement program is to enforce the existing guidelines for obtaining valid consent for entry and search of a home. These guidelines have been in place throughout the course of "Operation Return to Sender" and "Operation Community Shield" and, at least according to anecdotal evidence, have not been followed.[208] Increased enforcement of these guidelines, however, is unlikely to be successful because there is no reliable way to monitor compliance. Assuming that the offending officers cannot be relied upon to report to their own non-consensual entries, the only way to know about violations of the consent guidelines is for witnesses or victims of non-consensual entries to report these violations to law enforcement or the courts. This is unlikely to happen in the immigration enforcement context because many victims of home raids do not know their Fourth Amendment rights or may be reluctant to seek legal redress for fear of legal retribution.[209] Additionally, because of the limited application of the exclusionary rule in immigration proceedings,[210] victims of raids have little motivation to speak out about non-consensual entry. Furthermore, even if a witness to or subject of a home raid complains about an ICE officer entering a

207. *See generally supra* note 194 and accompanying text.

208. *See supra* notes 40-45, 197-98 and accompanying text.

209. *See* Helfand, *supra* note 45, at 107 (explaining that because of language barriers and fears of retaliation on themselves or illegal family members, even documented immigrants are unlikely to bring legal action); Schulz, *supra* note 45, at 153-54.

210. *See supra* notes 108-09 and accompanying text.

home without valid consent, their account of the incident is unlikely to be credited. In these situations, the judge or supervising officer frequently must evaluate evidence consisting only of the ICE agent's account and the complaining party's account. This inquiry often results in favorable rulings for law enforcement.[211]

Another method of using existing guidelines to address Fourth Amendment concerns in the home enforcement context would be to set standards for initial targeting of the home. For example, DHS could create guidelines for entry pursuant to an administrative arrest warrant, analogous to those in the criminal context, which require that officers must have a reasonable belief that the suspect resides at the home in question and is present at the time of entry.[212] The Ninth Circuit has refused to implement a similar requirement because it inhibits immigration officers in the course of their investigations.[213] However, as outlined above, the Fourth Amendment intrusion at stake in the immigration enforcement context is significant.[214] Moreover, requiring a reasonable belief of the presence of illegal immigrants in the home is not a substantial deviation from the existing Fourth Amendment limitations on immigration enforcement. ICE agents cannot stop a vehicle absent a reasonable suspicion that the vehicle contains illegal immigrants, and ICE agents cannot even briefly detain a person in a workplace unless they have a reasonable suspicion that the person is an illegal immigrant.[215] It is difficult to support an assertion that ICE should be permitted to target a house on a lower degree of suspicion than is necessary to stop a vehicle or briefly detain a person.[216] Because

211. Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 818 (2005) (explaining that "courts have found consent to be voluntary even if the circumstances show a significant (if not overwhelming) amount of compulsion"); Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 212 (2002) ("Only if the police behave with some extreme degree of coercion beyond that inherent in the police-citizen confrontation will a court vitiate the consent.").

212. *See supra* notes 83-89 and accompanying text.

213. *See* Zepeda v. INS, 753 F.2d 719, 722, 730-31 (9th Cir. 1983) (reversing a preliminary injunction that required INS agents to have a reasonable suspicion that illegal immigrants were present before they approached a home).

214. *See supra* notes 175-81 and accompanying text.

215. *See supra* notes 157-67 and accompanying text.

216. Reasonable belief is not expressly equated with reasonable suspicion, and at least one court has specifically distinguished the two standards. Edwards, *supra* note 84, at 366-67 (citing Alabama v. White, 456 U.S. 325, 330 (1990)). Both standards, however, require less proof than probable cause, but require objective evidence to justify the search or seizure. *See id.* at 366-68. *Compare supra* notes 84-88 and accompanying text (listing factors that may be taken into account in forming a reasonable

ICE frequently targets homes based on inaccurate, outdated information, or based on no information at all, a requirement of reasonable suspicion or belief would curb the number of homes that are mistakenly entered to execute arrest warrants for immigration violations.

Although guidelines for when a home may be targeted would curb the number of mistaken home entries by ICE agents, guidelines regulating the initial approach of a home present many of the same enforcement problems as consent guidelines. Compliance is difficult to monitor because there is rarely hard evidence of whether the ICE agent possessed a "reasonable belief" of residence or presence. Therefore, ICE cannot easily conduct internal investigations to determine compliance, but must rely on either immigrant communities or ICE agents themselves speak out about Fourth Amendment violations. Moreover, as discussed above, initiatives such as "Operation Return to Sender" and "Operation Community Shield" do not contemplate entry simply to arrest the specific person named on the administrative warrant. Rather, ICE enters homes seeking to apprehend as many illegal immigrants as possible, and thus searches homes within the meaning of the Fourth Amendment. Therefore, the Fourth Amendment protection in place should reflect the nature of ICE's activity and require more safeguards than are necessary for simple entry to make an administrative arrest.

Instead of guidelines then, because ICE engages in searches within the meaning of the Fourth Amendment, a court-ordered search warrant should be required for home raids.[217] A judicial search warrant is required for searches of vehicles and workplaces which enjoy much less Fourth Amendment protection than the home. Requiring judicial search warrants for home raids would result in a substantial decrease in random and mistaken home entries. If ICE agents were required to obtain approval from a neutral decisionmaker before entering a home, instances of entry

belief), *with supra* notes 160-63 and accompanying text (listing factors that may be taken into account in forming a reasonable suspicion).

217. Whether this search warrant should be issued pursuant to the traditional probable cause standard or the flexible probable cause standard is beyond the scope of this Note. However, because the appropriate probable cause standard is determined by weighing the law enforcement interests with the level of Fourth Amendment intrusion, the probable cause standard necessary for home searches would most likely be greater than in the workplace context, because the Fourth Amendment interests are more significant, while the law enforcement interests are no greater. *See supra* notes 170-80 and accompanying text.

and search based on outdated information or no information at all would be significantly curbed.

Further, judicial search warrants would be an enforceable check on immigration enforcement misconduct because, unlike consent or reasonable belief guidelines, there is documentary evidence of whether or not an officer procured a warrant. Therefore, ICE need not rely on victims of violations to bring non-compliance to light, but rather can conduct its own internal investigations. Further, a determination of compliance would not require an assessment of competing recollections regarding the coercive or reasonable nature of an agent's conduct, but could rest on whether the agent submitted sufficient evidence to convince a neutral decisionmaker to issue a warrant.

In response to such a policy proposal, ICE might protest that obtaining search warrants before home raids would waste time and resources and thereby hinder the removal of illegal immigrants.[218] However, such a policy would not require any greater time or resources than are currently expended in obtaining search warrants for workplaces, a procedure that immigration enforcement has followed for quite some time.[219] Indeed, one federal court specifically found that such a process is not unduly burdensome.[220]

ICE might also claim that because initiatives such as "Operation Return to Sender" and "Operation Community Shield" are entirely based on the consent of residents, no search warrant is necessary.[221] A related argument would be that no search warrant is necessary because ICE enters homes only to execute arrest warrants.[222] These arguments fail because safeguards in place to prevent law enforcement misconduct should reflect the nature of the operation as it is actually carried out. There is no doubt that in the home enforcement context, as in other immigration enforcement schemes and criminal law, no search warrant is required when an officer obtains valid consent or satisfies requirements for entry pur-

218. *See* Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 623 (1989) ("[T]he government's interest in dispensing with the warrant requirement is at its strongest when, as here, 'the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.'" (quoting Camara v. Mun. Court, 387 U.S. 523, 533 (1967))).

219. *See supra* notes 146-48 and accompanying text.

220. Ill. Migrant Council v. Pilliod, 531 F. Supp. 1011, 1023 (N.D. Ill. 1982) ("We hardly think INS will be crippled if it is not permitted to conduct those searches which a magistrate believes are not warranted . . . .").

221. *See* Aguilar Memorandum of Law, *supra* note 10, at 12.

222. *See supra* notes 11-13 and accompanying text.

suant to an arrest.[223] Other immigration enforcement schemes and criminal law, however, have policies of requiring search warrants when these exceptions are not met.[224] In the context of ICE home raids, reports from communities across the country, confirmed by large numbers of "collateral" arrests, reveal an enforcement scheme in which entry into homes is obtained by coercion and entire homes are searched for illegal immigrants.[225] Despite this evidence, ICE does not have a policy of requiring search warrants when this type of enforcement is carried out. If ICE continues to conduct an enforcement program that operates by entering and searching private homes for illegal immigrants, court-ordered search warrants should be required to ensure compliance with the Fourth Amendment.

Conclusion

ICE's targeting, entry and search of homes through initiatives such as "Operation Return to Sender" and "Operation Community Shield" raises serious Fourth Amendment concerns. Because constitutional standards for home entry have largely been developed in the criminal context and immigration enforcement has traditionally targeted workplaces and vehicles rather than homes, there is no ready standard for determining when an immigration search complies with the Fourth Amendment. However, given the high level of privacy interests, and that at present there are fewer protections for the home under "Operation Return to Sender" and "Operation Community Shield" than exist for immigration workplace raids or vehicle stops and searches, such an inquiry is necessary.

Applying the balancing test used to determine Fourth Amendment standards for civil law enforcement reveals that the Fourth Amendment interests at stake when ICE raids a home are greater than those at stake when ICE targets workplaces and vehicles. On balance, the government interests in conducting home raids for immigration enforcement are no greater than in other areas of immigration enforcement. Therefore, courts and DHS must require ICE agents carrying out home raids to comply with the standards in place in other immigration enforcement contexts: a reasonable suspicion requirement for targeting, voluntary consent for entry, and a judicial warrant or probable cause for searches. ICE's inter-

223. *See supra* notes 64, 84 and accompanying text.
224. *See supra* notes 63, 146, 167 and accompanying text.
225. *See supra* notes 33-49 and accompanying text.

nal guidelines support application of these standards to the home raid context by requiring valid consent for entry and probable cause or a warrant for searches.

Reforms proposed here include following existing guidelines regarding valid consent, creating guidelines for initial targeting of homes, and obtaining court-ordered warrants before entering homes pursuant to initiatives such as "Operation Return to Sender" and "Operation Community Shield." All of these reforms would be beneficial. However, given the importance of the privacy interests at stake and the difficulty of enforcing compliance with internal law enforcement guidelines, this Note argues that a court-ordered search warrant is the most effective way to ensure that ICE's entry of homes to enforce immigration law complies with the Fourth Amendment.