



## FUGITIVE OPERATIONS AND THE FOURTH AMENDMENT: REPRESENTING IMMIGRANTS ARRESTED IN WARRANTLESS HOME RAIDS\*

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*In the past several years, United States Immigration and Customs Enforcement (“ICE”) has made warrantless home raids a key component of interior immigration enforcement. Such raids, which frequently bring in otherwise law-abiding undocumented immigrants, violate the Fourth Amendment when they take place without the consent of a member of the household. Press and judicial accounts of such raids show that the agency now engages in widespread unlawful entries as well as violent, demeaning, and threatening conduct. This Article sets out a litigation theory for the defense of undocumented immigrants arrested in warrantless raids. The Article presents several viable but under-utilized grounds on which immigrants subjected to ICE misconduct may seek the suppression of illegally-acquired evidence and the dismissal of a deportation proceeding.*

*First, notwithstanding the limited application of the exclusionary rule in immigration proceedings, immigration courts follow an exception articulated by the Supreme Court in *INS v. Lopez-Mendoza*, allowing suppression of evidence obtained through “egregious violations of the Fourth Amendment.” Given that the protection of the home is central to the history and purpose of the Fourth Amendment, and given the heavy-handed and violent tactics ICE uses in home raids, immigrants should argue that such raids amount to egregious violations. Second, courts have a basis to broaden the reach of the exclusionary rule in light of the Supreme Court’s suggestion in *Lopez-Mendoza* that widespread constitutional violations by immigration authorities might justify such a step. Third, immigrants may call for suppression for ICE violations of agency regulations, which mirror Fourth Amendment and other protections. These litigation strategies could help re-establish a*

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*credible deterrent to ICE's abusive conduct and could provide immigration attorneys with a valuable tool for defending undocumented victims of home raids.*

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#### INTRODUCTION

Gladis Espitia, then six months pregnant, was home with visiting relatives when agents surrounded her house.<sup>1</sup> Some of the officers began to arrest her family members out on the lawn; others came to the front door and began yelling, threatening to break it down or use tear gas on the house.<sup>2</sup> As Ms. Espitia’s younger relatives hid in the bathroom, agents broke open the front door.<sup>3</sup> They began to lead Ms. Espitia and her family members out of the house,<sup>4</sup> threatening them with handguns.<sup>5</sup> As Ms. Espitia tried to console a frightened family member, an officer handcuffed her without asking who she was.<sup>6</sup> Another yelled at Ms. Espitia to stop crying.<sup>7</sup> The police did not suspect Ms. Espitia of any crime and the officers produced no warrant.<sup>8</sup>

Immigration courts often hear accounts like Ms. Espitia’s of home invasions, arbitrary arrests, threats of violence, and other human rights abuses, usually in the context of a noncitizen seeking asylum in light of

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1. First Amended Complaint at 17–19, *Mancha v. Immigration & Customs Enforcement*, No. 1:06-cv-2650 (N.D. Ga. June 14, 2007), 2007 WL 4718224; Eugenia Miranda, *Redadas de Inmigración en el Sureste de Georgia [Immigration Raids in Southeast Georgia]*, ATLANTA LATINO, Sept. 7, 2006 (on file with the North Carolina Law Review).

2. First Amended Complaint, *supra* note 1, at 17–18.

3. *Id.* at 18.

4. *Id.*

5. Miranda, *supra* note 1.

6. First Amended Complaint, *supra* note 1, at 18.

7. *Id.* at 16–18; Miranda, *supra* note 1.

8. First Amended Complaint, *supra* note 1, at 19.

persecution in her home country.<sup>9</sup> Ms. Espitia's home, though, is the United States: she is a citizen by birth, a resident of Oak Park, Georgia.<sup>10</sup> Her loved ones, some of them citizens and some noncitizens, were not rounded up by the security forces of a faraway government; her home was raided, without a warrant, by United States Immigration and Customs Enforcement ("ICE").<sup>11</sup>

Warrantless home raids have become a key element of contemporary immigration enforcement, a source of thousands of arrests and deportations for civil immigration violations.<sup>12</sup> The number of raids by ICE Fugitive

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9. See, e.g., *In re L-K-*, 23 I. & N. Dec. 677 (B.I.A. 2004) (evaluating an asylum application by a noncitizen injured during an invasion of her residence); *In re O-Z- & I-Z-*, 22 I. & N. Dec. 23, 25 (B.I.A. 1998) (evaluating an asylum application by noncitizens harassed and threatened at their home). The nation's immigration courts—more than fifty in number, under the Department of Justice's Executive Office for Immigration Review—determine whether noncitizens may be removed from the United States. *Office of the Chief Immigration Judge*, U.S. DEP'T OF JUSTICE., <http://www.justice.gov/eoir/ocijinfo.htm> (last visited Dec. 31, 2010). They conduct formal, adversarial proceedings in which the government can put forth evidence of the noncitizen's removability (formerly called "deportability"); noncitizens found removable may argue for various types of relief, such as asylum. *Id.* For a broader discussion of the role of immigration courts and immigration enforcement, see *infra* note 93 and accompanying text (arguing that immigration proceedings, though nominally civil, have become analogous to criminal proceedings and ought to incorporate some of the protections available in criminal proceedings).

10. First Amended Complaint, *supra* note 1, at 4.

11. *Id.* at 17–19. ICE is the agency charged with enforcing the nation's immigration laws throughout the interior of the United States. BESS CHIU ET AL., CARDOZO IMMIGRATION JUSTICE CLINIC, CONSTITUTION ON ICE: A REPORT ON IMMIGRATION HOME RAID OPERATIONS 3 (2009) [hereinafter CARDOZO IMMIGRATION JUSTICE CLINIC], 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). Founded in 2003 as a successor to the Immigration and Naturalization Service ("INS"), ICE carries out its mandate through a number of means, including investigations and arrests of individual noncitizens suspected of violating civil immigration restrictions. *Id.* at 3. While a number of programs within ICE make use of home raids, one—the National Fugitive Operations Program—has attracted the most attention, thanks to its dramatic growth and controversial methods. *Id.* at 5; MARGOT MENDELSON ET AL., MIGRATION POLICY INST., COLLATERAL DAMAGE: AN EXAMINATION OF ICE'S FUGITIVE OPERATIONS PROGRAM 1 (2009) [hereinafter MIGRATION POLICY INST.], available at [www.migrationpolicy.org/pubs/NFOP\\_Feb09.pdf](http://www.migrationpolicy.org/pubs/NFOP_Feb09.pdf). This program fields seven-person Fugitive Operations Teams ("FOTs"), nominally charged with locating "fugitive" noncitizens subject to outstanding deportation orders, with a particular emphasis on those posing a risk to the community or national security. CARDOZO IMMIGRATION JUSTICE CLINIC, *supra*, at 5. As this Article will discuss, critics have charged that FOTs have largely discarded this security focus, and that they instead raid homes in an effort to find and arrest as many undocumented immigrants as possible—most of those arrested by FOTs do not pose security threats, and most do not have a history of criminal convictions. *Id.* at 16–17; MIGRATION POLICY INST., *supra*, at 1–2.

12. See MIGRATION POLICY INST., *supra* note 11, at 7 (noting that Fugitive Operations raids are carried out without judicially issued warrants); Stella Burch Elias, "Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza, 2008 WIS. L. REV. 1109, 1129 (2008) (discussing the expansion of "Fugitive Operations" raids).

Operations Teams (“FOTs”) has grown dramatically in recent years.<sup>13</sup> Home raids have become increasingly controversial; they are the subject of considerable public and legislative anger for the disruptions they cause to immigrant families and communities.<sup>14</sup> They have come under judicial scrutiny as well,<sup>15</sup> since absent extenuating circumstances or the consent of residents, warrantless home invasions are illegal, a violation of the Fourth Amendment guarantee against unreasonable search and seizure.<sup>16</sup>

ICE contends that its agents do not enter homes without first obtaining the consent of a resident;<sup>17</sup> in contrast, immigrants and their advocates have charged that agents routinely force their way in, sometimes threatening residents in the process.<sup>18</sup> Other authors have addressed the factual dispute over how frequently Fourth Amendment violations occur in interior immigration enforcement.<sup>19</sup> This Article will address what legal consequences should flow from a Fourth Amendment violation if one is shown to underlie evidence introduced in a proceeding to deport a noncitizen. This Article sets out a litigation theory for the defense of undocumented immigrants facing deportation after warrantless home

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13. See Elias, *supra* note 12, at 1129.

14. See, e.g., *Broken Borders Need More than Lip Service*, USA TODAY, June 27, 2008, at 19A (discussing a speech by Senator Robert Menendez decrying constitutional rights violations in home raids); Will Oremus, *P.A. Sends Message on Federal Raids, Immigrants*, SAN JOSE MERCURY NEWS, Oct. 23, 2008, at 3B (discussing a Palo Alto resolution objecting to ICE violations of the rights of undocumented residents); Letter from Senator Kirstin Gillibrand to Janet Napolitano, Sec’y of Homeland Sec. (Feb. 5, 2009), available at [http://gillibrand.senate.gov/imo/media/doc/Napolitano\\_Raids1.pdf](http://gillibrand.senate.gov/imo/media/doc/Napolitano_Raids1.pdf) (demanding an end to warrantless home raids: “[t]hese types of practices are not only inhumane, they are illegal”); Letter from Senator Joseph Lieberman et al. to Michael Chertoff, Sec’y of Homeland Sec. (June 11, 2007), available at <http://dodd.senate.gov/?q=node/3936> (objecting to apparently warrantless home invasions in New Haven, Connecticut); Letter from Thomas Suozzi, Nassau Cnty. Exec., to Michael Chertoff, Sec’y of Homeland Sec. (Oct. 2, 2007), available at <http://web.archive.org/web/20080114130103/http://www.nassaucountyny.gov/agencies/countyexecutive/newsrelease/2007/10-2-2007.html> (calling for an investigation into practices during a series of home raids).

15. See, e.g., *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012 (9th Cir. 2008) (finding that a warrantless, nonconsensual home invasion constitutes an egregious constitutional violation so as to justify suppression of evidence thereby gathered).

16. See *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (“[W]ith few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.”); *Payton v. New York*, 445 U.S. 573, 586 (1980) (holding that, without consent to enter, exigent circumstances, or prior judicial authorization, the Fourth Amendment prohibits entry to effect an arrest).

17. Letter from Michael Chertoff, Sec’y of Homeland Sec., to Senator Christopher Dodd (June 14, 2007), available at <http://www.nytimes.com/packages/html/nyregion/20070723Chertoff.pdf>.

18. See *infra* Part II.A.2.

19. See, e.g., CARDOZO IMMIGRATION JUSTICE CLINIC, *supra* note 11, at 16–22; Elias, *supra* note 12, at 1147–48; Katherine Evans, *The ICE Storm in U.S. Homes: An Urgent Call for Policy Change*, 33 N.Y.U. REV. L. & SOC. CHANGE 561, 566 (2009).

raids—a theory that calls for evidentiary suppression for constitutional and regulatory violations.

After a summary of ICE’s practices during home raids, Part I of this Article will provide a brief overview of the Fourth Amendment’s protections,<sup>20</sup> and will discuss limitations on the role those protections play in the immigration courts.<sup>21</sup> Part II will show that, under the Fourth Amendment analysis applicable in the immigration courts, home raids violate constitutional norms so severely that they justify applying the exclusionary rule notwithstanding its limited role in removal proceedings. Part III sets out an alternative ground for evidentiary suppression following home raids, in light of the Supreme Court’s suggestion that it might consider broader application of the exclusionary rule should constitutional violations by immigration authorities become widespread. Finally, Part IV sets out yet another ground for suppression, rooted in regulations safeguarding the rights of those subject to ICE investigations.

Though the Supreme Court has weakened the utility of the Fourth Amendment in preventing unlawful immigration enforcement activities,<sup>22</sup> suppression remains a valuable, if underutilized, tool for protecting the rights of immigrants. Warrantless entry is a tactic at sharp odds with American legal tradition; as such, it is uniquely vulnerable to constitutional challenge.<sup>23</sup> This work discusses many of the questions, pitfalls, and possibilities that arise for advocates seeking evidentiary suppression in immigration proceedings.<sup>24</sup> It was written in the hope of encouraging more advocates to contest violations of their clients’ basic constitutional rights.

#### I. FUGITIVE OPERATIONS AND THE FOURTH AMENDMENT

A review of ICE’s recent conduct during home raids, drawing on mainstream news reports, agency records, judicial decisions, and other public sources, shows that such raids frequently involve nonconsensual warrantless entries and other rights violations. Before setting out litigation

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20. See *infra* Part I.B.

21. See *infra* Part I.C.

22. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984) (holding that the exclusionary rule does not apply in civil deportation proceedings). *But see id.* at 1050–51 (O’Connor, J., plurality opinion) (suggesting that the exclusionary rule might be appropriate for “egregious” constitutional violations, or more generally should violations become widespread).

23. See *infra* Part II.B.3.

24. Suppression cases present a number of practical difficulties—for example, the government may sometimes seek to establish alienage through evidence independent of the alleged rights violations. A number of articles have addressed in more depth the procedural complexities associated with motions to suppress. See, e.g., Maria T. Baldini–Potermin et al., *Motions to Suppress: Breathing New Life into the Exclusionary Rule in Removal Proceedings*, in 2008–2009 IMMIGRATION AND NATIONALITY LAW HANDBOOK 415, 420 (Richard J. Link ed., 2008).

approaches for challenging such misconduct, this Article will present a brief overview of the law of search and seizure, as well as the case law limiting its role in immigration proceedings.

A. *Fugitive Operations*

In a 2007 letter to members of the Connecticut delegation to the United States Congress, Homeland Security Secretary Michael Chertoff responded to criticisms of a New Haven enforcement operation by describing the agency's conduct. "I want to emphasize that it is not our policy for [Fugitive Operations Teams] to conduct 'raids,' or take an ad hoc approach to enforcing immigration law; rather, the policy is to focus their efforts on specific fugitive aliens at specific locations."<sup>25</sup> Prior to enforcement operations, ICE's Office of Detention and Removal Operations issues administrative warrants of removal; as Secretary Chertoff notes, "[a] warrant of removal is administrative in nature and does not grant the same authority to enter dwellings as a judicially approved search or arrest warrant."<sup>26</sup> On the day of the operation, officers approached the suspect's home and asked for permission to enter: "At no time did any ICE FOTs enter a dwelling without consent."<sup>27</sup> Agents asked how many other occupants were present, and asked them "to come into a common area for officer safety."<sup>28</sup> Secretary Chertoff suggested that agents questioned others as to their immigration status, and arrested both the principal identified in the warrant as well as any other occupants believed to be out of status (that is, without a lawful immigration status).<sup>29</sup>

Following that operation, New Haven Mayor John DeStefano, Jr. painted a different picture while addressing a commission created by labor unions and civil rights groups to investigate ICE practices. Mayor DeStefano spoke of

ICE agents entering homes, removing mothers carrying their babies out of their homes, removing some people from right out of the shower and others who were sleeping in their beds. The agents entered homes with guns drawn as if apprehending wanted murderers rather than potential administrative immigration law violators. And in all residences where ICE entered the homes, "officers did not show any warrants before entering" nor did they

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25. Letter from Michael Chertoff to Senator Christopher Dodd, *supra* note 17, at 2.

26. *Id.* For a discussion of the legal distinction between an administrative warrant of removal and a warrant that an impartial magistrate issues, see *infra* Part II.A.1.

27. Letter from Michael Chertoff to Senator Christopher Dodd, *supra* note 17, at 2.

28. *Id.*

29. *Id.* (noting that such questioning "does not constitute a Fourth Amendment seizure," and that "[a] warrant is not necessary when arresting someone who is in the country illegally").

“request permission,” but rather “pushed their way in.”<sup>30</sup>

Mayor DeStefano’s allegations fit a pattern noted nationwide: forced entries followed by roundups and interrogations of every occupant in the home. In 2009, the Immigration Justice Clinic at the Cardozo School of Law released a report on ICE home raid operations, prepared under the guidance of an advisory panel of law enforcement professionals.<sup>31</sup> The first public study reviewing ICE documentation to assess the prevalence of constitutional violations during raids, Cardozo’s report drew on hundreds of arrest records as well as news accounts and litigation documents.<sup>32</sup> The authors found “a suspiciously uniform pattern of misconduct,” beginning with coerced entry:

There is story after story of ICE agents, armed with only an administrative warrant, yelling and banging on doors and then forcing their way into homes in the pre-dawn hours by pushing their way in if residents unlock their doors, and otherwise climbing through windows or kicking in doors. Some residents report being awakened by the presence of armed ICE officers in their bedrooms who illegally gained entry through unlocked doors.<sup>33</sup>

Gladis Espitia’s story—her front door battered down by ICE agents after they threatened to “gas” her house—is egregious but not unique. Ms. Espitia’s co-plaintiff, Ranulfo Perez, was standing outside of his home when several agents parked on his yard and drew their weapons; one agent held Mr. Perez at gunpoint and pressed him against his truck for several minutes as other agents conducted a warrantless sweep of the home.<sup>34</sup> After an ICE officer allowed Mr. Perez to show his license and Social Security card, the agent released him, telling him that, as ICE would be in the area for two weeks, Mr. Perez and his family should leave so as to avoid future home invasions.<sup>35</sup>

During a Milford, Massachusetts raid, eight to ten ICE agents broke down a door, leaving behind shards from the door frame, and entered with guns drawn. A witness said: “[T]hey told everyone to lie down on the floor,

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30. NAT’L COMM’N ON ICE MISCONDUCT & VIOLATIONS OF 4TH AMENDMENT RIGHTS, RAIDS ON WORKERS: DESTROYING OUR RIGHTS 49 (2009) (quoting Mayor John DeStefano Jr., Boston Hearing).

31. CARDOZO IMMIGRATION JUSTICE CLINIC, *supra* note 11, at iii.

32. *Id.* at 9–10, 16.

33. *Id.* at 16–17.

34. First Amended Complaint, *supra* note 1, at 11–12.

35. *Id.* at 12–13.

they say [sic] not to move.”<sup>36</sup> In March 2008, agents in California told a resident that they would break his door down after he asked them to produce a search warrant.<sup>37</sup> That same year, a House subcommittee heard testimony from Marie Justeen Mancha, a teenage citizen from Georgia. Mancha was at home alone when agents came in through her unlocked front door and demanded information regarding her family’s immigration status.<sup>38</sup> Upon seeing her, one agent kept his hand on his gun “as if he was ready to take it out any minute.”<sup>39</sup>

These allegations add up to more than isolated occurrences; they reflect a nationwide pattern of forced entries. Recent suits alleging illegal searches during home raids have been filed in Arizona,<sup>40</sup> California,<sup>41</sup> Connecticut,<sup>42</sup> New Jersey,<sup>43</sup> New Mexico,<sup>44</sup> New York,<sup>45</sup> and Tennessee.<sup>46</sup> News reports have highlighted warrantless forced entries in many other locales.<sup>47</sup>

Perhaps most damning, local officials who initially cooperated with Fugitive Operations raids have accused ICE of forced entries. Following

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36. CARDOZO IMMIGRATION JUSTICE CLINIC, *supra* note 11, at 18 (quoting Aaron Nicodemus, *Illegal Aliens Arrested in Raid: Feds Nab 15 in Milford*, TELEGRAM & GAZETTE (Worcester, Mass.), Dec. 9, 2007, at B1).

37. *Id.* at 17 (citing Sandra Hernandez, *ICE Increases Use of Home Raids*, DAILY J. (L.A.), Mar. 26, 2008, at 1).

38. *Problems with ICE Interrogation, Detention, and Removal Procedures: Hearing Before the H. Subcomm. on Immigration, Citizenship, Refugees, Border Sec., & Int’l Law*, 110th Cong. 34–35 (2008) (testimony of Marie Justeen Mancha, Student, Tattnall County High School).

39. CARDOZO IMMIGRATION JUSTICE CLINIC, *supra* note 11, at 21 (quoting First Amended Complaint, *supra* note 1, at 9).

40. Solomon Moore, *Raid Leads to Colleague, Then Lawsuit*, N.Y. TIMES, Apr. 8, 2009, at A16.

41. Complaint at 1, *Reyes v. Alcantar*, No. 4:07-cv-02271-SBA (N.D. Cal. Apr. 26, 2007), 2007 WL 1511158.

42. Complaint at 1, *Barrera v. Boughton*, No. 3:07-cv-01436-RNC (D. Conn. Nov. 26, 2007), 2007 WL 4462095.

43. MIGRATION POLICY INST., *supra* note 11, at 24.

44. *See* Elias, *supra* note 12, at 1132.

45. Nina Bernstein, *Immigration Raids Single Out Hispanics, Lawsuit Says*, N.Y. TIMES, Sept. 21, 2007, at B3.

46. Julia Preston, *No Need for a Warrant, You’re an Immigrant*, N.Y. TIMES, Oct. 14, 2007, at C3.

47. *See, e.g.*, Sandra Forester, *Immigration Raids Spark Anger in Sun Valley Area*, IDAHO STATESMAN, Sept. 21, 2007, at 1 (“In some instances, federal agents rushed into the house when a child opened the door.”); Samuel G. Freedman, *Immigration Raid Leaves Sense of Dread in Hispanic Students*, N.Y. TIMES, May 23, 2007, at B7 (reporting warrantless entries, including one in which agents broke the window of a suspect’s apartment); Chao Xiong, *Immigration Case of Willmar Boy, 10, Goes to Court*, STAR TRIB. (Minneapolis-St. Paul), Oct. 4, 2007, <http://www.startribune.com/local/11557981.html> (discussing occasion when agents “burst into” home, interrogating nine-year-old child apart from parent); *see also* NAT’L NETWORK FOR IMMIGRANT & REFUGEE RIGHTS, OVER-RAIDED, UNDER SIEGE 7–9 (2008) (citing examples of warrantless home invasions).

operations in Nassau County, New York, in which 186 were arrested, Nassau County Police Commissioner Lawrence Mulvey stated he could not continue working with ICE “in good conscience.”<sup>48</sup> ICE claimed “consent to enter” each of the ninety-six homes targeted in the operation.<sup>49</sup> Commissioner Mulvey responded: “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 even under the best of circumstances*.”<sup>50</sup> Secretary Chertoff’s contention—that ICE does not enter homes without consent—is simply false.

While any law enforcement entry into the home is likely to seem threatening to residents, the accounts of ICE enforcement operations indicate that the agency uses excessive displays of force. The Fourth Amendment governs the use of force during arrests;<sup>51</sup> suffice it to say that officers may not lightly threaten to use tear gas against a suspect’s home, hold an unarmed and cooperating person at gunpoint against a car, or kick down a door with guns drawn.<sup>52</sup> The *New York Times* reported that in 2008, ICE agents used guns to threaten a nine-year-old and his parents after entering while his mother was showering.<sup>53</sup> The same article cited an immigration judge’s finding that agents forced a resident to stand in a common area in his underwear while they continued their warrantless search of his house.<sup>54</sup> ICE’s forced entries are not merely technical violations of the warrant requirement. They are sometimes violent,

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48. Nina Bernstein, *Raids Were a Shambles, Nassau Complains to U.S.*, N.Y. TIMES, Oct. 3, 2007, at B1.

49. CARDOZO IMMIGRATION JUSTICE CLINIC, *supra* note 11, at 16 (citing an Affidavit of Nassau County Police Commissioner Lawrence Mulvey).

50. *Id.*

51. *See* *Graham v. Connor*, 490 U.S. 386, 388 (1989) (holding that a claim of excessive force during an arrest is properly analyzed under Fourth Amendment standards).

52. *See* First Amended Complaint, *supra* note 1, at 11–13 (alleging that agents held a cooperating, unarmed suspect at gunpoint); CARDOZO IMMIGRATION JUSTICE CLINIC, *supra* note 11, at 17 (noting threat to break door down) (citing Sandra Hernandez, *ICE Increases Use of Home Raids*, DAILY J. (L.A.), Mar. 26, 2008, at 1); CARDOZO IMMIGRATION JUSTICE CLINIC, *supra* note 11, at 18 (citing Aaron Nicodemus, *Illegal Aliens Arrested in Raid: Feds Nab 15 in Milford*, TELEGRAM & GAZETTE (Worcester, Mass.), Dec. 9, 2007, at B1) (noting that agents forced open a suspect’s door with guns drawn); *see also* *Robinson v. Solano Cnty.*, 278 F.3d 1007, 1015 (9th Cir. 2002) (finding unconstitutional excessive force when police held an unarmed suspect at gunpoint); *United States v. Serna-Barreto*, 842 F.2d 965, 967 (7th Cir. 1988) (holding that suspicion of criminal activity alone does not justify holding suspects at gunpoint).

53. Nina Bernstein, *Report Says Immigration Agents Broke Laws and Agency Rules in Home Raids*, N.Y. TIMES, July 22, 2009, at A20.

54. *Id.*

intrusive and humiliating—in short, they offend the values underlying the Fourth Amendment.<sup>55</sup>

Home raids have grown far more frequent in recent years;<sup>56</sup> for the past several years, they have been a major component of ICE enforcement activity.<sup>57</sup> ICE's behavior—the violent entries, the threats, the disregard for personal privacy or peace of mind—has become lawless. Evidence now abounds that officers frequently enter without consent—that they threaten or intimidate residents, make misrepresentations of authority, push their way through open doors, or simply enter without waiting to speak to a resident at all.<sup>58</sup> With no valid warrants, no exigent circumstances, and often no valid consent, one major plank of ICE's interior enforcement efforts depends on routine violations of a core constitutional guarantee.

Such institutional lawlessness cannot survive without impunity.<sup>59</sup> Impunity is a condition all too familiar in the history of American law enforcement. Before *Mapp v. Ohio*,<sup>60</sup> the Supreme Court case which required the suppression of evidence following illegal searches by state police, impunity was the rule in roughly half of the states.<sup>61</sup> As the Supreme Court came to recognize, these states conferred judicial approval on such violations through the admission of illegally acquired evidence.<sup>62</sup> The Supreme Court has severely weakened the utility of the Fourth Amendment in preventing unlawful immigration enforcement activities.<sup>63</sup> This Article will show, however, that even in immigration matters, impunity is not a given: advocates can refashion a safeguard against warrantless home raids.

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55. See, e.g., *Silverman v. United States*, 365 U.S. 505, 511 (1961) (“The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”).

56. Sandra Hernandez, *ICE Increases Use of Home Raids*, DAILY J. (L.A.), Mar. 26, 2008, at 1.

57. See MIGRATION POLICY INST., *supra* note 11, at 3.

58. See sources cited *supra* notes 30–50.

59. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1055 (1984) (White, J., dissenting) (noting the lack of deterrents to unconstitutional conduct absent application of the exclusionary rule); Elias, *supra* note 12, at 1146–50 (noting the low deterrence value of ICE regulations protecting noncitizens).

60. 67 U.S. 643 (1961).

61. See *Elkins v. United States*, 364 U.S. 206, 224–25 (1960) (listing states allowing or prohibiting the use of evidence obtained through illegal searches and seizures).

62. See, e.g., *Mapp*, 367 U.S. at 651–53 (characterizing state remedies short of the exclusionary rule to be “worthless and futile” in deterring unlawful searches and seizures); *id.* at 670 (Douglas, J., concurring) (characterizing the use of unlawfully obtained evidence as “constitutional sanction”).

63. *Lopez-Mendoza*, 468 U.S. at 1050 (holding that the exclusionary rule does not apply in deportation proceedings). *But see id.* at 1050–51 (O'Connor, J., plurality opinion) (suggesting that the exclusionary rule might be appropriate for “egregious” constitutional violations, or more generally should violations become widespread).

*B. The Law of Search and Seizure: A Brief Overview*

A discussion of the legality of home raids must start with the Fourth Amendment, one of the Constitution's chief privacy safeguards. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."<sup>64</sup> It provides that warrants shall only issue "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."<sup>65</sup> The Amendment was drafted to answer fears that the expanded federal government contemplated in the Constitution might engage in the law enforcement abuses that characterized British rule immediately prior to the Revolution.<sup>66</sup> Harkening back to British abuse of "writs of assistance"—authorizations to engage in broad, invasive searches of many homes or businesses—Patrick Henry, then an Antifederalist Virginia legislator, introduced a proposed ban on general warrants; a later version was adopted as the Fourth Amendment to the Constitution.<sup>67</sup> The measure was popular with a public still wary of broad authority to search.<sup>68</sup>

The Fourth Amendment reaches searches and seizures; arrests, and other actions that interfere with freedom of movement, are considered seizures of the person.<sup>69</sup> Officers must justify many types of searches and seizures in advance, by obtaining a warrant from a neutral and detached magistrate.<sup>70</sup> Much debate surrounds the "warrant requirement," as some contend the growing list of exceptions has swallowed the rule.<sup>71</sup> The Fourth Amendment does not impose a warrant requirement on arrests in public.<sup>72</sup>

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64. U.S. CONST. amend. IV.

65. *Id.*

66. NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 92–96 (Leonard W. Levy ed., Da Capo Press 1970) (1937).

67. *Id.*; see also *Payton v. New York*, 445 U.S. 573, 583–85 (1980) (discussing the history of the provision).

68. WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING*, 602–1791, at lix–lxvii (2009).

69. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 16 (1968) (“[W]henver a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”).

70. See, e.g., *United States v. Chadwick*, 433 U.S. 1, 10–12 (1977) (discussing the application of the warrant requirement to searches of personal effects outside of the home).

71. See *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) (“Even before today’s decision, the ‘warrant requirement’ had become so riddled with exceptions that it was basically unrecognizable.”).

72. See, e.g., *Payton*, 445 U.S. at 586–87 (noting this “settled rule” but distinguishing arrests in the home).

Searches or arrests carried out in the home do require a warrant,<sup>73</sup> unless carried out under one of the myriad exceptions.<sup>74</sup> Case law has long emphasized that domestic privacy lies at the heart of the Amendment; the Supreme Court views intrusions into the home with skepticism.<sup>75</sup>

A search or seizure by law enforcement officials must generally be justified by probable cause, which exists “where the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of [wrongdoing] will be found.”<sup>76</sup> To make an arrest, an officer must likewise have probable cause—an objectively reasonable belief that the arrestee committed a crime.<sup>77</sup> Officers may detain a suspect for brief questioning even if they lack probable cause; such brief stops require only a reasonable suspicion of wrongdoing, a lower threshold that nevertheless requires that the officer’s belief be rooted in “specific and articulable facts.”<sup>78</sup> Finally, searches may be justified without a warrant or probable cause where the property owner gave valid consent to the search.<sup>79</sup>

The constitutionality of a given home raid might hinge on several distinct parts of a Fourth Amendment analysis. While the Department of Homeland Security (“DHS”) concedes that ICE agents conduct such enforcement actions without warrants as contemplated in the Fourth Amendment, DHS often claims that consent or some other legal basis justifies the warrantless entry.<sup>80</sup> Residents may, in turn, contend that agents forced their way in unlawfully.<sup>81</sup> After agents enter the home, they often round up other residents in a central area in the home, purportedly in the interests of officer safety, and question them about their immigration status;<sup>82</sup> these detentions may constitute seizures subject to the strictures of

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73. See *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (“With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.”).

74. For example, when an immediate search is necessary to prevent destruction of evidence. *United States v. McConney*, 728 F.2d 1195, 1199 (9th Cir. 1984).

75. *Kyllo*, 533 U.S. at 31.

76. *Ornelas v. United States*, 517 U.S. 690, 696 (1996). For example, to obtain a search warrant, an officer must show probable cause that a search of a place would likely reveal evidence or contraband subject to seizure. *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

77. *United States v. Sawyer*, 224 F.3d 675, 678–79 (7th Cir. 2000).

78. *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975).

79. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973).

80. See Letter from Michael Chertoff to Senator Christopher Dodd, *supra* note 17, at 2 (discussing administrative warrants of removal, noting that they do not “grant the same authority to enter dwellings as a judicially approved search or arrest warrant,” and claiming that ICE did not enter dwellings without consent during home investigations in Connecticut).

81. See *infra* Parts II.A.1–2.

82. See CARDOZO IMMIGRATION JUSTICE CLINIC, *supra* note 11, at 17 (noting reports that agents in home raids seize and question every resident); Letter from Michael Chertoff to Senator

the Fourth Amendment.<sup>83</sup> Subsequent searches for identification documents or other evidence likewise require a constitutional justification.<sup>84</sup> Any of these practices may violate the Fourth Amendment. Such a showing may help justify suppression of evidence gathered in the raid, though justifying suppression in immigration court requires a more exacting inquiry.<sup>85</sup>

C. *Lopez-Mendoza and Fourth Amendment Evidentiary Suppression in Immigration Proceedings*

Though Fourth Amendment case law most often concerns encounters between police and the populace, the Amendment reaches any government actor, including the officials who enforce civil immigration laws.<sup>86</sup> The treatment of immigration hearings as civil proceedings does affect the remedies available to victims of Fourth Amendment violations, but case law suggests evidentiary suppression remains available for “egregious violations” of constitutional rights.<sup>87</sup>

The text of the Fourth Amendment does not provide a remedy for violations, but in *Mapp v. Ohio* the Supreme Court interpreted the Amendment to require suppression of evidence in subsequent state criminal proceedings.<sup>88</sup> Subsequent decisions called into question the extent to which the Amendment itself requires the suppression of evidence obtained through an unreasonable search or seizure, and the Supreme Court now tends to characterize the exclusionary rule as a judicially created remedy rather than a right implicit in the Amendment itself.<sup>89</sup>

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Christopher Dodd, *supra* note 17, at 2–3 (noting that agents ask residents to enter a common area and arguing that questioning during home raids does not require an independent Fourth Amendment justification).

83. *See infra* Part II.A.4.

84. *See infra* Part II.A.3.

85. *See infra* Part I.C.

86. *See* *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044–45 (1984) (discussing the INS’s scheme for preventing Fourth Amendment violations by officers); *id.* at 1052 (Brennan, J., dissenting) (“The Government of the United States bears an obligation to obey the Fourth Amendment; that obligation is not lifted simply because the law enforcement officers were agents of the Immigration and Naturalization Service, nor because the evidence obtained by those officers was to be used in civil deportation proceedings.”).

87. *See, e.g., id.* at 1050–51 (O’Connor, J., plurality opinion) (suggesting suppression is appropriate for “egregious violations” of the Fourth Amendment); *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1019 (9th Cir. 2008) (suppressing evidence obtained through a warrantless entry that was found to constitute an egregious Fourth Amendment violation).

88. 367 U.S. 643, 655 (1961); *see also* *Weeks v. United States*, 232 U.S. 383, 398 (1914) (setting out the exclusionary rule as applied to the federal government).

89. *See, e.g., Hudson v. Michigan*, 547 U.S. 586, 594 (2006) (declining to suppress evidence obtained after a knock-and-announce violation); *United States v. Leon*, 468 U.S. 897, 938–39 (1984) (Brennan, J., dissenting) (arguing that the rule is a “direct constitutional command” upon the judicial branch); *United States v. Calandra*, 414 U.S. 338, 348 (1974) (“[T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its

The Supreme Court has always classed removal proceedings differently from criminal trials, suggesting that they are civil and non-punitive,<sup>90</sup> though many Justices have recognized that deportation works a severe harm on the noncitizen.<sup>91</sup> This civil-criminal distinction affects the protections available: for example, the Sixth Amendment right to assigned counsel applies only to “criminal prosecutions.”<sup>92</sup> But the civil-criminal distinction does not necessarily rule out the use of suppression as a remedy. As late as the 1970s, many assumed that noncitizens could seek suppression in removal proceedings for evidence gathered in violation of the Fourth Amendment.<sup>93</sup>

In *In re Sandoval*, the Board of Immigration Appeals (“BIA”) ruled that the exclusionary rule did not apply to immigration proceedings.<sup>94</sup> The

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deterrent effect, rather than a personal constitutional right of the party aggrieved.”). *But see Lopez-Mendoza*, 468 U.S. at 1051–52 (Brennan, J., dissenting) (arguing that the Amendment itself requires suppression of evidence).

90. *See, e.g., Lopez-Mendoza*, 468 U.S. at 1038 (“A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry. . . . The deportation hearing looks prospectively to the respondent’s right to remain in this country in the future.”); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952) (“Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure.”). However, according to the conference notes of Justice Blackmun, Justice Marshall did not believe that deportation proceedings were civil. Elias, *supra* note 12, at 1121 n.60. Some authors have taken up the argument that removal proceedings, in which the government seeks to strip the noncitizen of a liberty interest, are criminal or quasi-criminal. *See, e.g.,* Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 289 (2008); *see also Scheidemann v. INS*, 83 F.3d 1517, 1526–31 (3d Cir. 1996) (Sarokin, J., concurring) (urging the Supreme Court to reverse its “unrealistic” classification of deportation as civil); Baldini-Potermin et al., *supra* note 24, at 421 (discussing claims that immigration proceedings are now effectively criminal).

91. *See, e.g., Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 497 (1999) (Ginsburg, J., concurring) (arguing that “deportation is a penalty—at times a most serious one”); *Jordan v. De George*, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting) (considering deportation a “savage penalty,” and “a life sentence of exile”); *Fong Yue Ting v. United States*, 149 U.S. 698, 749 (1893) (Field, J., dissenting) (arguing, of the exclusion of long-term residents: “if a banishment of this sort be not a punishment, and among the severest of punishments, it would be difficult to imagine a doom to which the name can be applied”).

92. U.S. CONST. amend. VI.

93. *See, e.g., Lopez-Mendoza*, 468 U.S. at 1059 (White, J., dissenting) (noting that the 1980 edition of the field’s major treatise suggested the exclusionary rule was available); *see also* 6 GITTEL GORDON & CHARLES GORDON, IMMIGRATION LAW AND PROCEDURE § 137.03[2][g] (Matthew Bender & Co. rev. ed. 1992) (stating that evidence obtained through egregious conduct by INS officers that violates due process is suppressible).

94. 17 I. & N. Dec. 70, 70 (B.I.A. 1979). The Board of Immigration Appeals is a tribunal within the Department of Justice; it hears appeals from the immigration courts nationwide, and its decisions are binding on immigration judges. *Board of Immigration Appeals*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/eoir/biainfo.htm> (last visited Dec. 31, 2010). In most instances, the BIA does not hold oral argument. *Id.* BIA decisions are now reviewed chiefly by the United States courts of appeals. *Id.*; *see also* 8 U.S.C. § 1252(b)(2) (2006).

question came before the Supreme Court in *INS v. Lopez-Mendoza*, a consolidated appeal concerning two undocumented noncitizens in deportation proceedings that arose after workplace raids.<sup>95</sup> The decision describes the arrests in question as “peaceful.”<sup>96</sup> The Court, noting the civil nature of removal proceedings, applied a balancing test to determine whether the exclusionary rule was appropriate.<sup>97</sup> The Court purported to

weigh the likely social benefits of excluding unlawfully seized evidence against the likely costs. On the benefit side of the balance “the ‘prime purpose’ of the [exclusionary] rule, if not the sole one, ‘is to deter future unlawful police conduct.’ ” On the cost side, there is the loss of often probative evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication that therefore occurs.<sup>98</sup>

The Court saw the exclusionary rule as inappropriate in light of the streamlined nature of removal proceedings. It reasoned that so few noncitizens even challenged their removability, let alone the admissibility of the government’s evidence, that suppression was likely to have little deterrent effect on immigration officers.<sup>99</sup> The Court also claimed that civil suits and INS training procedures and regulations provided adequate deterrence against violations.<sup>100</sup>

In evaluating the costs of the exclusionary rule, the Court considered the loss of probative evidence and the release of noncitizens ineligible to remain in the country.<sup>101</sup> With respect to the latter, the Court assumed the release of noncitizens would require the judiciary to “close their eyes to ongoing violations of the law.”<sup>102</sup> The Court drew an analogy to other civil matters, such as proceedings to “order[] corrective action at a leaking hazardous waste dump.”<sup>103</sup> Two dissenting Justices took issue with the characterization of unlawful presence—generally treated as a civil matter—as an ongoing “crime.”<sup>104</sup> The Court likewise noted the difficulty in adjudicating a Fourth Amendment dispute following a workplace raid,

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95. 468 U.S. at 1034–37.

96. *Id.* at 1051 (O’Connor, J., plurality opinion).

97. *Id.* at 1041–42 (majority opinion); *accord* *United States v. Janis*, 428 U.S. 433, 454 (1976) (applying balancing test and weighing the costs and benefits of excluding unlawfully seized evidence).

98. *Lopez-Mendoza*, 468 U.S. at 1041 (quoting *Janis*, 428 U.S. at 446).

99. *Id.* at 1044.

100. *Id.* at 1044–46.

101. *Id.* at 1049–50.

102. *Id.* at 1046.

103. *Id.*

104. *Id.* at 1056–58 (White, J., dissenting); *id.* at 1061 (Stevens, J., dissenting) (stating general agreement with Justice White’s opinion).

explaining that such raids “occur in crowded and confused circumstances” which make it difficult to assess the legality of one particular arrest.<sup>105</sup> The majority saw the downsides of the exclusionary rule as significant enough to preclude Fourth Amendment suppression in removal proceedings.<sup>106</sup>

The holding in *Lopez-Mendoza* was qualified in important ways, however. Four Justices in the five-Justice majority were apparently unwilling to completely rule out an important remedy for constitutional violations.<sup>107</sup> The *Lopez-Mendoza* holding, they noted, did “not deal . . . with egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.”<sup>108</sup> Justice O’Connor’s plurality opinion cited *Rochin v. California*, a case excluding evidence obtained through gross physical abuse.<sup>109</sup> In a footnote, O’Connor noted that the Board of Immigration Appeals had crafted a rule suppressing evidence from unlawful arrests or searches where the use of such evidence would be fundamentally unfair, such as with respect to “evidence obtained as a result of a night-time warrantless entry into the aliens’ residence.”<sup>110</sup> Four dissenting Justices and four Justices in the majority thus carved out an exception in dicta for egregious violations of the Fourth Amendment or other liberties.<sup>111</sup> Four Justices in the majority also conditioned their

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105. *Id.* at 1049.

106. *Id.* at 1050.

107. *See id.* at 1050–51 (O’Connor, J., plurality opinion).

108. *Id.* As the U.S. Court of Appeals for the Second Circuit has noted, this standard “authorizes exclusion for violations that are egregious *either* because the violation ‘transgressed notions of fundamental fairness,’ *or* . . . ‘undermine[d] the probative value of the evidence obtained.’” *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 234 (2d Cir. 2006) (quoting *Lopez-Mendoza*, 468 U.S. at 1050–51). As the *Almeida-Amaral* court pointed out, in *Rochin*, the case cited by O’Connor, the gross physical abuse that the Court addressed did not undercut the probative value of the physical evidence recovered, which in that case was narcotics. *Id.* at 235 (“The pills were nonetheless suppressed because of the objectionable method used by the police to obtain them. Indeed, *Rochin* stated in no uncertain terms that reliability cannot be the sole touchstone of the Fourth Amendment.” (internal citations omitted) (quoting *Rochin v. California*, 342 U.S. 165, 173 (1952))).

109. *Lopez-Mendoza*, 468 U.S. at 1050–51 (O’Connor, J., plurality opinion); *Rochin v. California*, 342 U.S. 165, 173 (1952).

110. *Lopez-Mendoza*, 468 U.S. at 1051 n.5 (O’Connor, J., plurality opinion) (citing *In re Ramira-Cordova*, No. A21 095 659 (B.I.A. Feb. 21, 1980)). For the BIA rule, see *In re Toro*, 17 I. & N. Dec. 340, 343 (B.I.A. 1980).

111. *See Orhorhaghe v. INS*, 38 F.3d 488, 493 n.2 (9th Cir. 1994) (“Although only four justices joined in this portion of the opinion [suggesting suppression was appropriate for egregious violations] (Justices O’Connor, Blackmun, Powell, and Rehnquist), the four dissenters (Justices Brennan, White, Marshall, and Stevens) argued that the exclusionary rule ought *ordinarily* to apply in deportation hearings. Thus, to the extent such head-counting is a helpful way of reading Supreme Court opinions, there were eight votes on the *Lopez-Mendoza* Court for at least leaving open the possibility that the exclusionary rule might apply to egregious violations.”).

holding on the assumption that Fourth Amendment violations by INS agents were not a common occurrence.<sup>112</sup> They suggested that their “conclusions concerning the exclusionary rule’s value might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread.”<sup>113</sup>

This Article will demonstrate that given the weighty constitutional protection of the home, warrantless, nonconsensual entries by ICE agents are egregious violations of the Fourth Amendment. Warrantless home invasions are the “chief evil” prohibited by the Fourth Amendment, and the protection of the home is a central feature of the American constitutional tradition and the common law.<sup>114</sup> FOT raids go beyond the offensiveness inherent in an ordinary warrantless home invasion, as ICE agents often carry them out on scant evidence and with unnecessary force.<sup>115</sup> Eight Justices on the Court at the time of *Lopez-Mendoza* left open the possibility of suppressing evidence for “egregious” Fourth Amendment violations.<sup>116</sup> If the practices detailed above—kicking down a suspect’s front door and entering with guns drawn<sup>117</sup>—do not constitute an egregiously unreasonable search, it is difficult to imagine what might.

The Court in *Lopez-Mendoza* also left open a parallel claim for suppression: advocates can urge that widespread constitutional rights violations now justify wholesale reevaluation of the conclusions of the Court.<sup>118</sup> The conduct of interior immigration enforcement since *Lopez-Mendoza* provides a damning rejoinder to the Court’s conclusion that suppression is a weak deterrent to Fourth Amendment violations by

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112. See *Lopez-Mendoza*, 468 U.S. at 1044–45 (discussing the INS’s internal deterrents); *id.* at 1050 (O’Connor, J., plurality opinion) (suggesting there might be a different result if violations were “widespread”).

113. *Id.* (O’Connor, J., plurality opinion) (citing *United States v. Leon*, 468 U.S. 897, 928 (1984)).

114. See *infra* Part II.B.3.

115. CARDOZO IMMIGRATION JUSTICE CLINIC, *supra* note 11, at 16–22 (citing twenty-five examples of ICE misconduct nationwide since 2006); see, e.g., First Amended Complaint, *supra* note 1, at 11–12 (alleging that agents held an unarmed and cooperative suspect at gunpoint while conducting a warrantless search of his home, before suggesting he leave the neighborhood for several days to avoid being detained again); Aaron Nicodemus, *Illegal Aliens Arrested in Raid: Feds Nab 15 in Milford*, TELEGRAM & GAZETTE (Worcester, Mass.), Dec. 9, 2007, at B1 (describing how “eight to 10 ICE agents, with guns drawn, broke through the door,” and told the occupants to lie down on the floor while agents inspected each resident’s papers); see also *In re R-C- & J-C-*, slip op. at 11–12 (N.Y.C. Immigr. Ct., May 12, 2010) (finding that agents entered the respondents’ apartment without permission and pulled a gun on one respondent when he put his hand in his pocket) (on file with the North Carolina Law Review).

116. *Lopez-Mendoza*, 468 U.S. at 1050–51 (O’Connor, J., plurality opinion); *id.* at 1051 (Brennan, J., dissenting); *id.* at 1056 (White, J., dissenting); *id.* at 1060 (Marshall, J., dissenting); *id.* at 1061 (Stevens, J., dissenting).

117. See *supra* Part I.A.

118. See *Lopez-Mendoza*, 468 U.S. at 1050 (O’Connor, J., plurality opinion).

immigration officers, as ICE, now largely unchecked by the exclusionary rule, often engages in unconstitutional searches and seizures.<sup>119</sup> Home raids in particular represent such systematic and flagrant abuse of constitutional rights that they alone could justify the Supreme Court's reconsideration of *Lopez-Mendoza* under the "widespread violations" exception.<sup>120</sup>

Finally, the immigration courts have developed their own mechanisms for policing regulatory violations by officials, and the federal government has created a regulatory scheme that purports to protect some of the basic rights of noncitizens.<sup>121</sup> Advocates may make use of this scheme as a third alternative ground for suppression of evidence gathered in home raids, one which may in some instances justify suppression more readily than constitutional claims.<sup>122</sup>

*Lopez-Mendoza* weakened the exclusionary rule in a manner that has allowed routine violations of the constitutional rights of noncitizens, not to mention citizen victims of ICE raids.<sup>123</sup> But suppression is not a dead letter in immigration proceedings. ICE has, in a sense, revitalized suppression by the severity and scope of its own misconduct. Advocates have a number of claims that could safeguard the rights of noncitizens swept up in home raids. Institutional deterrents against constitutional violations by ICE officials have failed;<sup>124</sup> advocates ought to help fashion a new deterrent by vigorously asserting the constitutional and regulatory rights of their clients.

## II. SUPPRESSING EVIDENCE FOR EGREGIOUS FOURTH AMENDMENT VIOLATIONS DURING HOME RAIDS

Since *Lopez-Mendoza*, the United States courts of appeals have allowed suppression for egregious violations of the Fourth Amendment.<sup>125</sup> In *Lopez-Mendoza*, the Supreme Court also expressed a willingness to revisit the applicability of the exclusionary rule more generally, should authorities begin to engage in widespread violations of the Constitution. Advocates defending victims of home raids should assert their clients'

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119. Elias, *supra* note 12, at 1146–50.

120. *See infra* Part III.

121. *See infra* Part IV.

122. *See infra* Part IV. These regulations parallel constitutional protections. *See, e.g.*, 8 C.F.R. § 287.8(f)(2) (2010) (imposing a warrant requirement). As such, this Article will address constitutional claims first; practitioners may depend on constitutional case law to flesh out the parameters of regulatory provisions.

123. *See, e.g.*, First Amended Complaint, *supra* note 1, at 3–4, 9–11 (alleging that ICE agents forcibly entered the home of a citizen without a warrant).

124. Elias, *supra* note 12, at 1146–50.

125. *See infra* note 281.

rights through both of these avenues.<sup>126</sup> For either sort of challenge, the noncitizen must first prove that authorities violated her Fourth Amendment rights. This Article will thus set out ways to demonstrate constitutional violations in scenarios that regularly arise in reports of home raids.

A. *Showing Unconstitutionality: Warrantless Home Invasions Are Presumptively Unreasonable*

The warrant requirement remains at its strongest in the home: warrantless searches of private dwellings are presumptively unreasonable.<sup>127</sup> ICE may not justify entering homes without prior judicial authorization, consent, or exigent circumstances.<sup>128</sup> Since FOTs generally carry out pre-planned raids with administrative warrants insufficient to justify a home invasion,<sup>129</sup> they must justify entries based on consent.<sup>130</sup> Where officers force their way into homes, or where they enter through threats or false claims of authority, claims of consent must fail.<sup>131</sup> Even where ICE validly enters a home, however, their subsequent conduct may violate the Fourth Amendment. FOTs regularly sweep suspects' homes and round up all residents into common areas.<sup>132</sup> Even where ICE enters with the consent of residents, this type of indiscriminate detention and interrogation may work a separate Fourth Amendment violation if not

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126. See *infra* Parts II.B (egregious nature of home raids), III (widespread violations exception); see also *infra* Part IV (discussing related regulatory claims for suppression).

127. *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (citing *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990); *Payton v. New York*, 445 U.S. 573, 586 (1980)).

128. See *infra* Part I.B.

129. FOTs depend on arrest warrants that designated law enforcement officials issue pursuant to 8 C.F.R. § 287.5(e)(2), which provides a list of forty-nine different job titles authorized to issue warrants. The list includes “[p]atrol agents in charge” and “[a]ssistant patrol agents in charge.” 8 C.F.R. § 287.5(e)(2) (2010). Such warrants reflect the agency’s determination that a noncitizen is in violation of immigration law and is subject to arrest; since they do not reflect an independent judicial determination of probable cause, they are not warrants as contemplated by the Fourth Amendment. See *infra* Part II.A.1 (arguing that administrative warrants permissible in other contexts may not be used in immigration enforcement); see also Letter from Michael Chertoff to Senator Christopher Dodd, *supra* note 17, at 2 (noting that FOTs rely on administrative warrants that do not “grant the same authority to enter dwellings” as judicial warrants).

In some major enforcement operations, ICE has not obtained warrants at all. See, e.g., Bernstein, *supra* note 48 (“We didn’t have warrants . . . We don’t need warrants to make the arrests. These are illegal immigrants.” (quoting an ICE Office of Investigations special agent)).

130. See, e.g., Letter from Michael Chertoff to Senator Christopher Dodd, *supra* note 17, at 2 (claiming, of New Haven home raids, “[a]t no time did any ICE FOTs enter a dwelling without consent”).

131. See *infra* Part II.A.2 (discussing claims of consent and citing examples of nonconsensual entries).

132. See CARDOZO IMMIGRATION JUSTICE CLINIC, *supra* note 11, at 16–22 (discussing the pattern of suspicionless mass interrogation and citing examples); see also Letter from Michael Chertoff to Senator Christopher Dodd, *supra* note 17, at 2 (noting, in reference to New Haven raids, that FOTs ask that all persons present in the home enter common areas for officer safety).

justified by legitimate officer safety concerns or valid investigative purposes.<sup>133</sup> Finally, FOTs also carry out in-home searches (generally, for documents) that may exceed the scope of any plausible claims of consent.<sup>134</sup>

1. The Fourth Amendment Bars Home Raids Absent Consent, Exigent Circumstances, or a Judicially Issued Warrant

The Fourth Amendment prohibits unreasonable searches and seizures, and warrantless entries into the home are presumptively unreasonable.<sup>135</sup> This “basic principle of Fourth Amendment law” often arises in criminal cases when parties seek suppression of evidence for some allegedly unlawful home invasion,<sup>136</sup> but the warrant requirement applies to government intrusions unrelated to criminal investigations.<sup>137</sup> While the Supreme Court has created less exacting warrant standards for certain types of civil regulatory inspections, it has never suggested that law enforcement may force its way into a dwelling absent a judicially issued warrant, valid consent, or exigent circumstances.<sup>138</sup> ICE’s practice—entering homes with administrative warrants or no warrant at all<sup>139</sup>—thus violates the Fourth Amendment unless consent or exigent circumstances justify each entry.<sup>140</sup> For its part, the DHS has conceded that its administrative warrants do not justify entry without consent; the following discussion fleshes out a response should ICE assert a different position in litigation.<sup>141</sup>

Several Supreme Court decisions have upheld warrantless or “administrative warrant” searches in the course of administrative schemes

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133. See *infra* Part IV.

134. See *infra* Part III.

135. *Payton v. New York*, 445 U.S. 573, 586 (1980).

136. *Id.* (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 477 (1971)).

137. See *Michigan v. Tyler*, 436 U.S. 499, 506 (1978) (noting that “[s]earches for administrative purposes, like searches for evidence of crime, are encompassed by the Fourth Amendment” and fall under the warrant requirement); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 354, 359 (1977) (holding that a search conducted to seize property to satisfy unpaid taxes was subject to the warrant requirement of the Fourth Amendment); see also *Ill. Migrant Council v. Pilliod*, 531 F. Supp. 1011, 1020 (N.D. Ill. 1982) (upholding injunction restricting immigration raids in migrant dwellings and noting that the law requires judicially issued warrants for such raids).

138. See *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 528–30 (1967) (discussing earlier cases and noting that Fourth Amendment protections attach whether or not the person is suspected of criminal activity).

139. See *supra* notes 33–54 (describing warrantless, nonconsensual entries by ICE agents).

140. See *Ill. Migrant Council*, 531 F. Supp. at 1023–24 (requiring judicial warrants for INS dwelling searches).

141. See Letter from Michael Chertoff to Senator Christopher Dodd, *supra* note 17, at 2 (noting that administrative arrest warrants do not convey the same authority to enter as judicially issued warrants).

designed to protect the public. For example, *Michigan v. Tyler*<sup>142</sup> addressed a fire department's search of a business after a blaze believed to be the result of arson.<sup>143</sup> The Court upheld the searches the fire fighters carried out in the immediate wake of the fire, which the Court saw as necessary to identify the cause of the fire and to prevent a recurrence.<sup>144</sup> In *Camara v. Municipal Court of San Francisco*,<sup>145</sup> the Supreme Court suggested that housing-safety inspectors could obtain "area warrants" without individualized determinations of probable cause in order to carry out searches needed to safeguard the public.<sup>146</sup> *Camara* discussed a number of factors supporting the Court's finding that such searches would be reasonable. First, housing safety inspections enjoyed "a long history of judicial and public acceptance."<sup>147</sup> Second, the inspections were supported by the public interest in the abatement of "dangerous conditions."<sup>148</sup> The Court doubted that anything but house-to-house inspections could achieve "acceptable results."<sup>149</sup> Third, the inspections involved "a relatively limited invasion of the urban citizen's privacy": they were "neither personal in nature nor aimed at the discovery of evidence of crime."<sup>150</sup> The administrative scheme at issue did not allow for entry by force.<sup>151</sup>

As one federal court has found, home raids present a very different picture.<sup>152</sup> They are quite definitely "personal in nature," as they are at least nominally designed to effect the arrest and deportation of specific individuals.<sup>153</sup> Unlike a peaceful and routine search by a housing inspector, a home raid presents a severe intrusion into the residents' privacy, as officers corral every single resident of the house to interrogate them about their immigration status.<sup>154</sup> Unlike the *Camara* searches, moreover, immigration raids often involve the use of force, with armed officers who sometimes threaten residents.<sup>155</sup> *Camara* searches are used to avoid

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142. 436 U.S. 499 (1978).

143. *Id.* at 500.

144. *Id.* at 509–10. The Court went on to suppress evidence from subsequent warrantless searches the firefighters carried out long after the fire. *Id.* at 511.

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

146. *Id.* at 539–40.

147. *Id.* at 537 (citing *Frank v. Maryland*, 359 U.S. 360, 367–71 (1959)).

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 540.

152. *Ill. Migrant Council v. Pilliod*, 531 F. Supp. 1011, 1022–23 (N.D. Ill. 1982) (holding that dwelling searches by the INS meet none of the *Camara* factors and thus require traditional warrants).

153. See Letter from Michael Chertoff to Senator Christopher Dodd, *supra* note 17, at 1–2 (stating that FOTs aim to identify and arrest "specific" fugitives).

154. CARDOZO IMMIGRATION JUSTICE CLINIC, *supra* note 11, at 16–17.

155. See *supra* note 115.

“dangerous conditions” that jeopardize the health of city-dwellers; the administrative searches discussed in *Tyler* are used to prevent fires.<sup>156</sup> Immigration raids, on the other hand, are used for civil law enforcement, not to protect the public from immediate physical danger.<sup>157</sup> There is little to indicate that immigration authorities would be unduly hindered by the need to seek judicial approval before interfering with a core constitutional right; authorities have a host of other enforcement options at their disposal, such as workplace enforcement.<sup>158</sup> Finally, unlike housing safety inspections, forced home raids do not enjoy a “long history of judicial or public acceptance.”<sup>159</sup> Local, state, and federal officials have decried the use of home raids.<sup>160</sup> One federal court has imposed the use of traditional warrants.<sup>161</sup> When Congress created relaxed warrant provisions for border searches, it specifically exempted dwellings.<sup>162</sup>

The weight of experience counsels against creating a warrant exception for ICE home invasions, as ICE’s use of administrative arrest warrants has shown that the agency does not engage in the sort of fact-finding necessary to protect privacy and property rights. For example, in 2007, ICE agents raided a number of homes in Nassau County, New York, purportedly targeting gang members with past immigration violations.<sup>163</sup> After the raids, Nassau County Police Commissioner Lawrence Mulvey told the *New York Times* that ninety of the ninety-six administrative arrest warrants that ICE officials issued contained incorrect or outdated address information.<sup>164</sup> In one case, “agents were seeking a 28-year-old man with a

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156. *Camara*, 387 U.S. at 537; *Michigan v. Tyler*, 436 U.S. 499, 506 (1978).

157. The government acknowledges that most noncitizens caught up in home raids have no criminal conviction history. MIGRATION POLICY INST., *supra* note 11, at 1–2 (noting, based on government-provided statistics, that seventy-three percent of those arrested in recent years had no criminal convictions).

158. *See Ill. Migrant Council v. Pilliod*, 531 F. Supp. 1011, 1022–23 (N.D. Ill. 1982) (suggesting the warrant requirement would not impede immigration enforcement). In any case, the warrant requirement

is not an inconvenience to be somehow ‘weighed’ against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the ‘well-intentioned but mistakenly overzealous executive officers’ who are a part of any system of law enforcement.

*United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 315–16 (1972) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971)).

159. *Camara*, 387 U.S. at 537.

160. *See supra* note 14 and accompanying text.

161. *Ill. Migrant Council*, 531 F. Supp. at 1023–24.

162. 8 U.S.C. § 1357(a)(3) (2006) (allowing certain warrantless searches near the border, but excluding dwellings).

163. *Bernstein*, *supra* note 45.

164. *Id.*

photo taken when he was 7.”<sup>165</sup> ICE declined the police department’s offer to check its information against the county’s up-to-date database.<sup>166</sup> The data sources ICE has used to plan Fugitive Operations are outdated and unreliable. A 2007 report by the Department of Homeland Security’s Office of the Inspector General (“OIG”) quoted one ICE supervisor as saying that ICE’s database had “been neglected for the past 25 years.”<sup>167</sup> One analyst told the OIG that “approximately 50% of the data in the database is accurate, and there is more incomplete than inaccurate information.”<sup>168</sup> Unreliable administrative procedures cannot substitute for judicial determination when a central Fourth Amendment right is at stake.

“[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed,”<sup>169</sup> and it is a “basic principle” of the Fourth Amendment that a home invasion, whether to effect a search or an arrest, requires a judicially issued warrant, consent, or exigent circumstances.<sup>170</sup> Courts may not uphold such searches on administrative warrants by executive-branch officials; to do so would place a core constitutional guarantee in the hands of officers “engaged in the often competitive enterprise of ferreting out” violations of the law.<sup>171</sup> The Constitution “does not contemplate the executive officers of Government as neutral and disinterested magistrates,” and “those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks.”<sup>172</sup> Without prior judicial authorization, a warrantless home raid is presumptively unreasonable.

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165. *Id.*

166. *Id.*

167. OFFICE OF INSPECTOR GEN., DEP’T OF HOMELAND SEC., AN ASSESSMENT OF UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT’S FUGITIVE OPERATIONS TEAMS 15 (2007) [hereinafter OFFICE OF INSPECTOR GEN.], 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). While the agency subsequently switched to a different database system, the new platform incorporated data from the old, purportedly deficient and inaccurate system. MIGRATION POLICY INST., *supra* note 11, at 6–7.

168. OFFICE OF INSPECTOR GEN., *supra* note 167, at 20.

169. *Payton v. New York*, 445 U.S. 573, 585 (1980) (quoting *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 313 (1972)).

170. *Id.* at 587 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 477–78 (1971)).

171. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

172. *Almeida-Sanchez v. United States*, 413 U.S. 266, 280 (1973) (Powell, J., concurring) (quoting *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 317 (1972)); see also *McDonald v. United States*, 335 U.S. 451, 455–56 (1948) (“The right of privacy [is] deemed too precious to entrust to the discretion of those whose job is the detection of crime . . . . Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home.”).

## 2. Challenging Warrantless Entry: Rebutting Claims of Consent

Given the presumptive unreasonableness of any warrantless home entry,<sup>173</sup> ICE generally justifies FOT raids by claiming teams only enter dwellings with the consent of residents.<sup>174</sup> This Article will deal less with claims of exigent circumstances, given that home raids are generally pre-planned to a degree that would preclude a finding of exigent circumstances justifying a warrantless search.<sup>175</sup> ICE home raids appear to frequently involve coerced “consent”: FOTs frequently approach residences with several armed officers, who often mislead residents into believing they have legal authority to enter.<sup>176</sup> Some simply force their way into residences or threaten to kick down doors.<sup>177</sup> Under such circumstances, advocates should readily be able to show a Fourth Amendment violation.

The government bears the burden of proving that, under the totality of the circumstances, agents had a resident’s free and voluntary consent to search the dwelling.<sup>178</sup> Under this “‘jealously and carefully drawn’

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173. See *supra* Part II.A.1.

174. See, e.g., Letter from Michael Chertoff to Senator Christopher Dodd, *supra* note 17, at 2 (arguing that ICE carried out the New Haven home raids with the consent of residents).

175. See MIGRATION POLICY INST., *supra* note 11, at 6–7 (discussing the planning of FOT raids).

176. See, e.g., CARDOZO IMMIGRATION JUSTICE CLINIC, *supra* note 11, at 20 (citing Plaintiff’s Second Amended Complaint for Declaratory and Injunctive Relief and Damages at 16, *Arias v. U.S. Immigration & Customs Enforcement*, No. 07-CV-1959 ADM/JSM (D. Minn. Apr. 30, 2008), 2008 WL 4523531 (“When asked by Plaintiffs to identify themselves, Defendant ICE agents falsely claimed ‘It’s the Police!’ ”)); Stephanie Francis Ward, *Illegal Aliens on I.C.E.: Tougher Immigration Enforcement Tactics Spur Challenges*, 94 A.B.A. J. 44, 44 (2008) (reporting that when residents asked agents in one home raid whether they had a warrant, one agent replied, “[w]e don’t need one”).

177. See, e.g., *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1016–17 (9th Cir. 2008) (finding that ICE agents entered through the Respondent’s front door without permission); Class Action Complaint at 5, *Aguilar v. Immigration & Customs Enforcement*, No. 1:07-cv-08224-JGK (S.D.N.Y. Sept. 20, 2007) (alleging that ICE officers kicked in the plaintiff’s entry door without a warrant); First Amended Complaint, *supra* note 1, at 17 (“At least one of the Defendants threatened to break down the door and throw ‘gas’ inside the home if Plaintiff Espitia and her family did not comply with their orders.”); First Amended Complaint, *supra* note 1, at 20 (alleging that ICE agents damaged one door and four windows in warrantless entries into trailer homes); First Amended Complaint, *supra* note 1, at 11–13 (alleging that agents held a suspect at gunpoint outside of his home while effecting a warrantless, nonconsensual search of the house); CARDOZO IMMIGRATION JUSTICE CLINIC, *supra* note 11, at 17 (stating that when a resident asked agents for a search warrant, they “threatened to break his door down”). As discussed previously ICE’s claims of consent have attracted suspicion from local officials. After a series of raids in Nassau County, New York, Police Commissioner Lawrence Mulvey stated that he found ICE’s assertion of consent to enter every suspect home “not credible even under the best of circumstances.” CARDOZO IMMIGRATION JUSTICE CLINIC, *supra* note 11, at 16.

178. See *United States v. Mendenhall*, 446 U.S. 544, 557 (1980); *Schnecko v. Bustamonte*, 412 U.S. 218, 248–49 (1973).

exception,”<sup>179</sup> courts consider a number of factors in analyzing whether consent was voluntary; they look both to the characteristics of the encounter and to the characteristics of the person giving the purported consent.<sup>180</sup> Agents need not warn residents that they have the right to refuse consent to search: knowledge of the right to refuse consent is one factor, though it alone is not dispositive.<sup>181</sup> On the other hand, consent is not voluntary where it follows a false “claim of lawful authority” to search.<sup>182</sup> The Supreme Court has called such searches “instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent.”<sup>183</sup> For example, if officials state they will search with or without permission, the resident’s subsequent consent is not valid.<sup>184</sup>

Officer conduct may also show coercion, as where officers use physical force or outnumber or intimidate a suspect.<sup>185</sup> The time and location of a police encounter are also considerations. Courts often find nighttime searches to be nonconsensual, for example.<sup>186</sup> Finally, the resident’s own state of mind may help show coercion. Coercion is more likely where the resident speaks little English or where he feels intimidated by officers.<sup>187</sup> Courts are likewise more prone to find coercion where the person “consenting” had little experience in dealing with American law enforcement.<sup>188</sup>

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179. *Georgia v. Randolph*, 547 U.S. 103, 109 (2006) (quoting *Jones v. United States*, 357 U.S. 493, 499 (1958)).

180. *Schneckloth*, 412 U.S. at 226.

181. *Id.* at 227.

182. *Id.* at 233–34 (citing cases and discussing *Bumper v. North Carolina*, 391 U.S. 543, 548–49 (1968)).

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

184. *See, e.g., People v. Kaigler*, 118 N.W.2d 406, 413 (Mich. 1962) (“In view of Detective Harris’ statement that defendant’s home was going to be searched even if defendant did not give the keys to the police, it cannot be said that defendant consented free from duress and coercion.”); *see also Lightford v. State*, 520 P.2d 955, 957 (Nev. 1974) (holding that officer’s threat to kick the door in tainted consent).

185. *See, e.g., Harless v. Turner*, 456 F.2d 1337, 1338 (10th Cir. 1972) (noting that “coercion necessarily flowing from the presence of a number of sheriff’s officers”); *People v. Gonzalez*, 347 N.E.2d 575, 581 (N.Y. 1976) (noting force and restraint as factors, and finding coercion where many officers “swarmed” into suspect’s apartment).

186. *See, e.g., United States v. Calhoun*, 542 F.2d 1094, 1102 (9th Cir. 1976) (holding as erroneous the determination that consent for the nighttime search was voluntary); *Harless*, 456 F.2d at 1338 (listing factors demonstrating lack of consent, including the late hour of the search); *State v. Wolfe*, 398 So. 2d 1117, 1121 (La. 1981) (finding no consent for armed officers’ late-night entry).

187. *United States v. Isiofia*, 370 F.3d 226, 231–33 (2d Cir. 2004); *see also United States v. Benitez-Arreguin*, 973 F.2d 823, 826, 829 (10th Cir. 1992) (discussing and affirming trial court’s finding of no valid consent where the suspect spoke no English and the officer indicated he wanted to search the suspect’s bag only through hand gestures).

188. *See Gonzalez*, 347 N.E.2d at 581.

Consent to search is a fact-specific inquiry often hinging on small details. For example, if a suspect opens the door for police and, upon request, steps aside and motions for them to enter, he may have given valid consent.<sup>189</sup> If a suspect opens the door for police and steps aside without a word (say, to prevent the officers, whom he believes intend to enter, from knocking him down), he has not given valid consent.<sup>190</sup>

When the government seeks to justify a warrantless search based on consent, it must show the consent of an “individual possessing authority.”<sup>191</sup> For example, a roommate or other co-resident may give valid consent to search the common areas of an apartment,<sup>192</sup> and a landlord generally may not consent to the search of a tenant’s dwelling.<sup>193</sup> The Fourth Amendment protects homes both lavish and humble alike: courts have suppressed evidence gathered in boarding houses and other shared residences.<sup>194</sup> ICE may not seek the consent of one resident to search every private room in a shared home or boarding house and they cannot disregard doors separating separate dwellings in a shared building.<sup>195</sup>

Since the government bears the burden of showing voluntary consent,<sup>196</sup> noncitizens seeking suppression have the straightforward burden of proving that a search occurred absent a judicially issued warrant. ICE must justify such searches by officer testimony or otherwise. Often, the records ICE introduces into evidence make conclusory statements as to consent—for example, “[C]onsent to enter was obtained from Fabiola Gastelum-Lopez.”<sup>197</sup> ICE regulations require officers to record any consent entries.<sup>198</sup> Advocates should flesh out the circumstances of such searches,

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189. *Johnson v. State*, 635 S.E.2d 278, 282 (Ga. Ct. App. 2006).

190. *See United States v. Albrektsen*, 151 F.3d 951, 955 (9th Cir. 1998) (discussing examples of “implied consent”); *see also Turner v. State*, 754 A.2d 1074, 1083 (Md. Ct. Spec. App. 2000) (declining to find implied consent where suspect walked through front door without shutting it behind him).

191. *Georgia v. Randolph*, 547 U.S. 103, 109 (2006).

192. *Id.* (discussing conflicts between co-residents); *Illinois v. Rodriguez*, 497 U.S. 177, 189 (1990) (holding a search valid where police reasonably believed former cotenant had valid authority over premises to be searched).

193. *Chapman v. United States*, 365 U.S. 610, 616–17 (1961).

194. *See, e.g., McDonald v. United States*, 335 U.S. 451, 456 (1948) (involving a boarding house); *Anobile v. Pelligrino*, 303 F.3d 107, 119–20 (2d Cir. 2002) (citing cases to discuss the search of a racing jockey dormitory); *Smyth v. Lubbers*, 398 F. Supp. 777, 785 (W.D. Mich. 1975) (involving a college dormitory). The Supreme Court has distinguished motor homes by analogy to the “automobile exception.” *See California v. Carney*, 471 U.S. 386, 393 (1985).

195. *See Anobile*, 303 F.3d at 119–20 (“Privacy expectations are high in homes, or even private rooms.”).

196. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973) (citing *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)).

197. *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1017 (9th Cir. 2008) (quoting government evidence introduced in a suppression case).

198. 8 C.F.R. § 287.8(f)(2) (2010).

through testimony and physical evidence of officer conduct, whether or not ICE introduces evidence or claims of consent. ICE's use of especially coercive tactics may help to show egregiousness. The heavy-handed methods that ICE agents employ in FOT raids show that, all too often, such raids depend on intimidation rather than consent.<sup>199</sup>

### 3. Challenging ICE Searches Within the Home

Reports of home raids indicate that, after entering suspects' homes, officers frequently search the premises for documents indicating alienage, country of origin, or immigration status.<sup>200</sup> Even if the government establishes consent to enter a home, subsequent searches within a home may constitute separate Fourth Amendment violations. Consent searches must be delimited by the scope of consent, measured under a standard of "objective reasonableness."<sup>201</sup> That is, an officer with permission to enter a home may do so, but may not scour the house for evidence or break open locked containers within it unless it is "objectively reasonable" to infer permission to do so.<sup>202</sup>

The scope of consent is a fact-specific inquiry, though case law suggests a few principles valuable to victims of home raids.<sup>203</sup> For example, mere failure to object to additional searches does not, without more, expand limited consent.<sup>204</sup> On the other hand, where officers have general permission to search an area, they may look through unlocked containers, but not break open locks.<sup>205</sup> Finally, permission to enter a house does not, without more, justify a search of every room.<sup>206</sup> Given that FOTs conduct intensive, house-wide searches, many immigrants could likely prevail on scope-of-consent arguments even where the government can prove a consensual entry.

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199. See *supra* Part I.A.

200. See CARDOZO IMMIGRATION JUSTICE CLINIC, *supra* note 11, at 17–20.

201. *Florida v. Jimeno*, 500 U.S. 248, 251 (1991).

202. See *id.* at 251–52 (“It is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk, but it is otherwise with respect to a closed paper bag.”).

203. See generally 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 3.10(f) (3d ed. 2007) (detailing courts' treatment of the scope of consent based on a variety of factual scenarios).

204. See *United States v. Wald*, 216 F.3d 1222, 1228 (10th Cir. 2000) (citing *United States v. Gordon*, 173 F.3d 761, 766 (10th Cir. 1999)).

205. *Jimeno*, 500 U.S. at 251–52; see also *United States v. De La Rosa*, 922 F.2d 675, 679 (11th Cir. 1991) (upholding a search in which officers opened a notebook within a car they had general permission to search).

206. See, e.g., *United States v. Mejia*, 953 F.2d 461, 466 (9th Cir. 1991) (“[C]onsent to enter one's threshold for the limited purpose of talking about an investigation does not include permission to enter a bedroom occupied by a sleeping spouse.”).

#### 4. Challenging ICE Interrogation and Detention of Residents

ICE frequently enters homes on coerced “consent” in violation of the Fourth Amendment.<sup>207</sup> Advocates should attack the legality of such entries, and in turn the admissibility of evidence officers obtain through searches in the home or subsequent interrogations. ICE routinely detains and questions every person in a given home.<sup>208</sup> Advocates should also challenge the validity of such detentions, as each one constitutes a seizure subject to Fourth Amendment restrictions.<sup>209</sup> Then-Secretary of Homeland Security Michael Chertoff justified such questioning in light of agents’ statutory authority “to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States.”<sup>210</sup> Indeed, the Supreme Court has held that questioning a detained person as to her immigration status does not constitute a separate search or seizure and does not require an independent legal basis—that is, if officers have a legal basis to stop or arrest a person, they need no further justification to ask questions about the person’s immigration status.<sup>211</sup>

Former Secretary Chertoff articulated an officer safety rationale for routinely detaining every resident of a house during a raid.<sup>212</sup> While officer safety may justify brief detentions of bystanders, it does not justify full arrest without probable cause. Case law provides grounds for advocates to attack both the validity of bystander detentions (as unsupported by actual officer safety needs)<sup>213</sup> and their scope (as severe enough to constitute a full arrest requiring probable cause).<sup>214</sup> ICE may also seek to justify detaining collateral arrestees under the *Terry v. Ohio* standard, which allows brief, investigatory detentions based on articulable reasonable suspicion.<sup>215</sup> Advocates may argue that officers lacked a reasonable suspicion or that the

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207. See CARDOZO IMMIGRATION JUSTICE CLINIC, *supra* note 11, at 9–10.

208. See *id.* at 14, 16–22 (discussing a “national pattern” of such sweeps and citing examples).

209. *Terry v. Ohio*, 392 U.S. 1, 16 (1968) (noting that “whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person” within the meaning of the Fourth Amendment).

210. Immigration and Nationality Act § 287(a)(1), 8 U.S.C. § 1357(a)(1) (2006); see Letter from Michael Chertoff to Senator Christopher Dodd, *supra* note 17, at 2 (citing § 1357(a)(1)).

211. *Muehler v. Mena*, 544 U.S. 93, 100–01 (2005); see also *Florida v. Bostick*, 501 U.S. 429, 434–35 (1991) (“[M]ere police questioning does not constitute a seizure . . . even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual.”).

212. See Letter from Michael Chertoff to Senator Christopher Dodd, *supra* note 17, at 2–3 (noting that officers asked occupants present during New Haven home raids to enter common areas for officer safety).

213. See, e.g., *United States v. Maddox*, 388 F.3d 1356, 1362–63 (10th Cir. 2004) (describing limitations on the right to detain individuals on officer-safety grounds).

214. See *infra* Parts II.A.4(a)–(b).

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

detention was so severe as to constitute a de facto arrest beyond the limits of *Terry*.<sup>216</sup>

*a. House Sweeps and Collateral Detentions During Home Raids*

Though a home raid often has a nominal target, such as a particular absconder or “criminal alien,” ICE FOTs often detain every person in the home.<sup>217</sup> Former Secretary Chertoff described the practice used in a series of home raids in New Haven, Connecticut: “[A]fter consent [to enter the home] was obtained, the occupant was asked how many other individuals were in the house. If other persons were present, those individuals were asked to come into a common area for officer safety.”<sup>218</sup> Agents then questioned the other residents as to their immigration status.<sup>219</sup>

Chertoff’s dry description is at odds with first-person accounts: ICE agents often enter homes at night, sometimes with weapons drawn, and demand that the frightened and confused residents gather in a common area as agents ransack the house in search of documents.<sup>220</sup> Advocates have charged that “officer safety” is a pretext and that ICE aims to maximize “collateral arrests” obtained through intimidating in-home interrogation.<sup>221</sup>

*b. The Validity of “Protective” Sweeps and Collateral Detentions Under Maryland v. Buie, Muehler v. Mena, and Homeland Security Regulations*

The Supreme Court has discussed “protective sweeps” of homes in which officers conduct a “cursory visual inspection” of a house for possible armed confederates who may attack officers during a valid in-home arrest.<sup>222</sup> The Supreme Court has never, however, ruled on the validity of

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216. See *infra* Part II.A.4(c); see, e.g., *Dunaway v. New York*, 442 U.S. 200, 212 (1979).

217. CARDOZO IMMIGRATION JUSTICE CLINIC, *supra* note 11, at 16–17.

218. Letter from Michael Chertoff to Senator Christopher Dodd, *supra* note 17, at 2.

219. *Id.* at 2–3.

220. See CARDOZO IMMIGRATION JUSTICE CLINIC, *supra* note 11, at 16–17 (“Once inside the homes, the lawsuits, suppression motions and news accounts all tell a similar story of ICE agents abandoning focus on a purported target and instead immediately seizing and questioning all occupants about their immigration status . . . . [O]nce ICE agents . . . detain all occupants, they generally conduct an illegal non-consensual search of the premises looking for evidence of the occupants’ immigration status . . . .”) (endnote omitted); see also Plaintiffs’ Second Amended Complaint for Declaratory and Injunctive Relief and Damages at 18, *Arias v. U.S. Immigration & Customs Enforcement*, No. 07-CV-1959-ADM-JSM (D. Minn. Apr. 30, 2008), 2008 WL 4523531 (“[A]gents went room to room, searching each room, rooting through closets, dressers, beds, and generally leaving a mess of personal property in their wake. Any Latino persons found were brought to a central location in the home to be detained and interrogated by additional ICE agents. Latinos were then interrogated, often aggressively and invariably in handcuffs.”).

221. See CARDOZO IMMIGRATION JUSTICE CLINIC, *supra* note 11, at 16–17.

222. *Maryland v. Buie*, 494 U.S. 325, 327 (1990).

detentions for officer safety during a warrantless home invasion.<sup>223</sup> Case law suggests—and at least one circuit has held—that during a warrantless entry, officials may not detain others on the scene without “a ‘reasonable belief, based on specific and articulable facts[,]’ that the individual poses a danger.”<sup>224</sup> Under such a standard, ICE must justify its practice of rounding up and interrogating entire households through case-specific facts, not blanket assertions of officer safety concerns. Since ICE FOTs routinely target non-dangerous immigrants,<sup>225</sup> advocates can and should challenge such detentions as Fourth Amendment seizures unsupported by probable cause or reasonable suspicion.

While the Supreme Court has never set out a standard governing the detention of bystanders during a warrantless home invasion, related opinions provide some guidance. In *Maryland v. Buie*,<sup>226</sup> the Supreme Court established a standard allowing a “properly limited protective sweep in conjunction with an in-home arrest.”<sup>227</sup> Officers may conduct a sweep of the home if they have “a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.”<sup>228</sup> They may conduct only a “ cursory inspection” focused on those parts of the home that could harbor an attacker.<sup>229</sup>

The *Buie* Court discussed the principles set out in *Chimel v. California*,<sup>230</sup> which suggested that a warrantless search in the home must be limited, its scope “ ‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible.”<sup>231</sup> The *Buie* Court specifically

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223. See *Michigan v. Summers*, 452 U.S. 692, 701, 703 (1982) (allowing detention of residents of a home, absent individualized suspicion, during the execution of a judicially issued search warrant, but distinguishing warrantless searches by noting the “prime importance” of the warrant in the determination that the detentions were valid).

224. *United States v. Maddox*, 388 F.3d 1356, 1363 (10th Cir. 2004) (alteration in original) (quoting *Buie*, 494 U.S. at 337). In *Maddox*, the court upheld the detention of a bystander during the in-home arrest of a known drug trafficker, in light of a number of factors: the officer was outnumbered, the home was the site of previous violent crimes, the arrest took place around nightfall, and the officer had reason to believe the bystander might be armed. *Id.* at 1366; see also *Buie*, 494 U.S. at 334–35 (emphasizing that officers must have a reasonable suspicion of danger for even a “ cursory” protective sweep of the premises during a warrantless arrest in a home).

225. See MIGRATION POLICY INST., *supra* note 11, at 13 (noting that, based on data provided by DHS, “fugitive aliens posing a threat to the community or with a violent criminal conviction represented just 2 percent of all arrests in FY 2007.”).

226. *Buie*, 494 U.S. 325 (1990).

227. *Id.* at 337.

228. *Id.* at 336–37. *Buie* distinguished the situation addressed in *Chimel v. California*, 395 U.S. 752, 763 (1969), which allowed for a more intensive search for weapons or destructible evidence in the area immediately around a suspect; officers may conduct such a search only incident to a valid custodial arrest. *Buie*, 494 U.S. at 336–37.

229. *Buie*, 494 U.S. at 335.

230. 395 U.S. 752 (1969).

231. *Id.* at 762 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)).

declined to broaden a preexisting rule, from *Michigan v. Summers*,<sup>232</sup> which allowed detention of residents without reasonable suspicion during the execution of a judicially issued search warrant for contraband.<sup>233</sup> *Summers* depended upon

the fact that the police had obtained a warrant to search respondent's house for contraband. A neutral and detached magistrate had found probable cause to believe that the law was being violated in that house and had authorized a substantial invasion of the privacy of the persons who resided there.<sup>234</sup>

In contrast, officer conduct during even a valid warrantless home invasion must be limited in scope; the *Chimel* and *Buie* Courts rejected the premise that "simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require."<sup>235</sup> "Officer safety" detentions should thus require at least a basis equivalent to that underlying a valid protective sweep: "a reasonable belief, based on specific and articulable facts," that the detained individuals pose a threat.<sup>236</sup>

As former Secretary Chertoff indicated, FOTs detain all residents they encounter in a home as a matter of course.<sup>237</sup> Most home raids target noncitizen "fugitives" who do not pose a threat to public safety and do not have a record of violent crime.<sup>238</sup> Reasonable suspicion requires a specific and articulable basis; in *Buie*, for example, officers based their concerns on the nature of the crime in question, a multi-person armed robbery.<sup>239</sup> Absent a factual basis, mere recitation of officer safety concerns does not convey "carte blanche for law enforcement officers to detain any third party, using any means, as an adjunct to a lawful arrest."<sup>240</sup> During raids, ICE is not justified in corralling and interrogating family members, including children, without any specific and articulable facts sufficient to raise valid officer safety concerns. Even where officers can initially justify an "officer

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232. 452 U.S. 692 (1981).

233. *Buie*, 494 U.S. at 334–35 n.2 (citing *Summers*, 452 U.S. at 701).

234. *Summers*, 452 U.S. at 701.

235. *Buie*, 494 U.S. at 336 (quoting *Chimel*, 395 U.S. at 766–67 n.12).

236. *United States v. Maddox*, 388 F.3d 1356, 1363 (10th Cir. 2004) (quoting *Buie*, 494 U.S. at 337).

237. Letter from Michael Chertoff to Senator Christopher Dodd, *supra* note 17, at 2; *see also* CARDOZO IMMIGRATION JUSTICE CLINIC, *supra* note 11, at 16–17 (citing lawsuits, suppression motions, and news reports claiming that ICE agents "immediately detain all occupants" upon entering a home).

238. MIGRATION POLICY INST., *supra* note 11, at 13.

239. *Buie*, 494 U.S. at 327–28.

240. *Maddox*, 388 F.3d at 1367.

safety” detention, they may not lawfully detain occupants for longer than is necessary to ensure agent safety.<sup>241</sup> Detention of “collateral” arrestees beyond the time it takes to arrest the principal target would violate the Fourth Amendment.<sup>242</sup> Based on distinctions in established case law, advocates have ample grounds to attack such detentions.

*c. The Validity of Collateral Detentions Under Terry v. Ohio*

The government has an alternative basis through which it may seek to justify collateral detentions: it may argue that they are justified by *Terry v. Ohio*,<sup>243</sup> which allows brief investigatory stops supported by a reasonable, articulable suspicion of wrongdoing.<sup>244</sup> *Terry* stops, however, are limited in scope; particularly intrusive conduct by officers may exceed the lawful bounds of such a stop.<sup>245</sup> Advocates may challenge such stops where ICE agents used unnecessary force, restraint, or intimidation, since confinement beyond the scope of a *Terry* stop requires probable cause.<sup>246</sup>

Investigatory stops by immigration officers require “reasonable suspicion, based on specific articulable facts,” that the target is “engaged in an offense against the United States or is an alien illegally in the United States.”<sup>247</sup> It is not clear whether the presence of one undocumented immigrant in a house gives officers reason to suspect that every other resident is in violation of immigration laws; some courts have made it quite clear they will only accept an individualized, particularized suspicion, one sufficient to distinguish “illegal aliens from American citizens and legal aliens.”<sup>248</sup> A suspect’s foreign name or appearance is not enough.<sup>249</sup>

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241. In *Buie*, for example, the protective sweep was upheld because it lasted “no longer than [was] necessary to dispel the reasonable suspicion of danger and in any event no longer than it [took] to complete the arrest and depart the premises.” 494 U.S. at 335–36; *see also* *Muehler v. Mena*, 544 U.S. 93, 102 (2005) (discussing but not resolving the respondent’s contention that her detention lasted longer than the execution of the search warrant and was thus unlawful); *Maddox*, 388 F.3d at 1367 (“[P]rotective detention must be for officer safety purposes only . . . [and] ‘the protective detention must be no more than necessary to protect the officer[s] from harm.’”) (third alteration in original) (quoting *Buie*, 494 U.S. at 333).

242. *See* *United States v. Oguns*, 921 F.2d 442, 447 (2d Cir. 1990) (“Once police eliminate the dangers that justify a security sweep—safety of police, destruction of evidence, escape of criminals—they must, barring other exigencies, leave the residence. Were this not the rule, searches begun as minor intrusions on domestic privacy would expand beyond their legitimate purposes. This concern is particularly germane to government-citizen encounters where, as here, agents subsequently seek the resident’s consent to search his domicile.”).

243. 392 U.S. 1 (1968).

244. *Id.* at 21.

245. *Florida v. Royer*, 460 U.S. 491, 499–500 (1983).

246. *Id.* at 496; *see also* *Dunaway v. New York*, 442 U.S. 200, 212 (1979) (declining to apply a balancing test and requiring probable cause for detention not amounting to a formal arrest).

247. 8 C.F.R. § 287.8(b)(2) (2010) (articulating a standard that parallels the language of *Terry*, 392 U.S. at 21).

248. *Orhorhaghe v. INS*, 38 F.3d 488, 497 (9th Cir. 1994).

Certainly a suspect's "mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause";<sup>250</sup> some courts have found that it does not give rise to reasonable suspicion, either.<sup>251</sup> Even where agents present some basis for believing that one resident is in violation of an immigration law, they must justify detaining others through particularized information suggesting that the others are themselves unlawfully present.

Even with reasonable suspicion, however, *Terry* only justifies brief and minor investigative stops; an arrest, whether formal or de facto, requires probable cause.<sup>252</sup> While drawing the line between an investigatory stop and a de facto arrest may not be easy,<sup>253</sup> the courts of appeals have made it clear that particularly intrusive officer conduct may amount to de facto arrest.<sup>254</sup> Courts have set out "no bright line that distinguishes an investigative detention from an arrest,"<sup>255</sup> though courts accept invasive measures, such as handcuffs or displays of weapons, where officers had reason to believe the suspect was dangerous.<sup>256</sup> The Tenth Circuit, for example, has stated that handcuffs constitute "a far greater level of intrusion," acceptable in a *Terry* stop only if a prudent officer would have

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249. *Id.*; see also *United States v. Brignoni-Ponce*, 422 U.S. 873, 885–86 (1975) ("[A]pparent Mexican ancestry . . . would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country.").

250. See *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) (holding that the execution of a search warrant at a bar did not justify searching a customer who happened to be present).

251. *State v. Morris*, 72 P.3d 570, 580 (Kan. 2003).

252. *United States v. Sharpe*, 470 U.S. 675, 691 (1985) (Marshall, J., concurring); see also *Dunaway v. New York*, 442 U.S. 200, 212 (1979) (requiring probable cause for a de facto arrest and noting that reasonable suspicion is sufficient only for "intrusions [falling] far short of the kind of intrusion associated with an arrest").

253. See *Sharpe*, 470 U.S. at 685 (upholding a twenty-minute detention under the circumstances and noting that precedent "may in some instances create difficult line-drawing problems in distinguishing an investigative stop from a de facto arrest").

254. See, e.g., *United States v. Lopez-Arias*, 2003 FED App. 0336P, ¶¶ 13–16, 344 F.3d 623, 627–28 (6th Cir. 2003) (finding a de facto arrest where police drew weapons in apprehending drug suspects, and discussing factors for such arrests, including "the transportation of the detainee to another location, significant restraints on the detainee's freedom of movement involving physical confinement or other coercion preventing the detainee from leaving police custody, and the use of weapons or bodily force" (quoting *United States v. Richardson*, 949 F.2d 851, 857 (6th Cir. 1991))).

255. *Id.* at 628.

256. *Id.*; see also *Flowers v. Fiore*, 359 F.3d 24, 30 (1st Cir. 2004) (upholding a *Terry* stop in which officers drew weapons to approach an apparently armed suspect); *United States v. Hamlin*, 319 F.3d 666, 678–82 (4th Cir. 2003) (finding that handcuffing did not convert stop to an arrest, since defendant had made "repeated attempts to reach toward his groin area" and said he would not allow search); *Gallegos v. City of Los Angeles*, 308 F.3d 987, 992 (9th Cir. 2002) (upholding a *Terry* stop in which officers drew weapons on a suspected burglar).

reason to think them appropriate.<sup>257</sup> Similarly, weapons may convert a *Terry* stop into a full arrest requiring probable cause, unless the circumstances warrant their use.<sup>258</sup> For example, “pointing guns at a suspect may elevate a seizure to an ‘arrest’ in most scenarios.”<sup>259</sup> The Seventh Circuit has opined that “it would be a sad day for the people of the United States if police had *carte blanche* to point a gun at each and every person of whom they had an ‘articulable suspicion’ of engaging in criminal activity.”<sup>260</sup>

The Supreme Court has also placed the burden on the government to “demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.”<sup>261</sup> The Tenth Circuit has suggested that such a burden is not met through a categorical statement that drug dealers pose a threat to officer safety.<sup>262</sup> ICE agents may not use *Terry* to justify the use of violent and threatening conduct against people suspected of nothing more than civil immigration violations.<sup>263</sup>

While the boundary between a *Terry* seizure and a full-fledged arrest is a fact-specific one, ICE FOTs clearly overstep it during many home raids. Officers often force entry into homes; they handcuff residents or tell

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257. *United States v. Melendez-Garcia*, 28 F.3d 1046, 1052 (10th Cir. 1994); *see also* *United States v. Acosta-Colon*, 157 F.3d 9, 18 (1st Cir. 1998) (noting that while handcuffs may be justified in some *Terry* stops, police “may [not] handcuff suspects as a matter of routine”); *Washington v. Lambert*, 98 F.3d 1181, 1189–90 (9th Cir. 1996) (setting out a test for circumstances where handcuffing will not convert a *Terry* stop into an arrest); *Baker v. Monroe Twp.*, 50 F.3d 1186, 1193 (3d Cir. 1995) (handcuffing unjustified where officer lacked reason to feel threatened).

258. *Baker*, 50 F.3d at 1193 (noting that in a *Terry* stop, “use of guns and handcuffs must be justified by the circumstances”); *see also* *United States v. Sinclair*, 983 F.2d 598, 603 (4th Cir. 1993) (allowing the use of drawn weapons as a “reasonable precaution” given the circumstances (quoting *United States v. Seni*, 662 F.2d 277, 283 (4th Cir. 1981))); *United States v. Del Vizo*, 918 F.2d 821, 825 (9th Cir. 1990) (finding that drawing a weapon on a cooperative suspect, forcing him to lie down, and handcuffing him constituted a *de facto* arrest); *United States v. Ceballos*, 654 F.2d 177, 184 (2d Cir. 1981) (approaching with guns drawn was not a valid *Terry* stop where suspect was apparently only a low-level drug trafficker); *Commonwealth v. Bottari*, 482 N.E.2d 321, 324 (Mass. 1985) (approaching suspects with guns drawn was improper absent specific “fear-provoking circumstances”).

259. *United States v. Perdue*, 8 F.3d 1455, 1463 (10th Cir. 1993); *see also* *Robinson v. Solano Cnty.*, 278 F.3d 1007, 1013–14 (9th Cir. 2002) (finding excessive force in a civil suit where police pointed a gun at an apparently unarmed misdemeanor suspect).

260. *United States v. Serna-Barreto*, 842 F.2d 965, 967 (7th Cir. 1988).

261. *Florida v. Royer*, 460 U.S. 491, 500 (1983).

262. *Melendez-Garcia*, 28 F.3d at 1052–53; *see also* *Ceballos*, 654 F.2d at 184 (holding “generalization” that drug traffickers are violent “insufficient to justify the extensive intrusion” of approaching suspect with guns drawn under the *Terry* rubric).

263. *See* MIGRATION POLICY INST., *supra* note 11, at 7 (noting that most FOT arrestees have no record of criminal convictions).

them to lie down; they shout threats and orders.<sup>264</sup> Officers sometimes threaten residents by entering with guns drawn.<sup>265</sup> In a few cases, officers have held cooperative and unarmed residents at gunpoint.<sup>266</sup> Such tactics, when directed at a non-dangerous and cooperative resident, are the indicia of a full arrest, not a *Terry* stop. Since arrest without probable cause violates the Fourth Amendment, advocates should seek to suppress evidence stemming from the unlawful detention of collateral victims of home raids.

*B. Warrantless Home Invasions as Inherently Egregious*

The *Lopez-Mendoza* Court dealt with “the exclusion of credible evidence gathered in connection with peaceful arrests by INS officers;”<sup>267</sup> eight Justices left open the possibility of suppressing evidence obtained through “egregious violations of Fourth Amendment or other liberties.”<sup>268</sup> Justice O’Connor’s brief treatment of this exception suggests that warrantless entries into the home may constitute egregious violations.<sup>269</sup> Two courts of appeals later set out guidance as to the scope of the exception: the Ninth Circuit has held warrantless home invasions to be egregious per se, and the Second Circuit’s standards for egregiousness should reach conduct common in Fugitive Operations raids.<sup>270</sup> More importantly, the origins and contemporary interpretation of the Fourth Amendment show that the home enjoys a unique status in the American law of search and seizure.<sup>271</sup> Respect for this status compels application of the exclusionary rule for Fourth Amendment violations in the home.<sup>272</sup>

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264. See, e.g., CARDOZO IMMIGRATION JUSTICE CLINIC, *supra* note 11, at 21–22 (citing *In re M-*, slip op. (S.F. Immigr. Ct., Aug. 16, 2007) (noting that officers forced their way into a residence and handcuffed a pregnant woman to a chair during a raid)); Nicodemus, *supra* note 115 (reporting that agents broke into residence with guns drawn and ordered residents to lie down).

265. NAT’L COMM’N ON ICE MISCONDUCT & VIOLATIONS OF 4TH AMENDMENT RIGHTS, *supra* note 30, at 49 (providing testimony of New Haven Mayor John DeStefano, Jr., concerning ICE raids in his community).

266. See, e.g., First Amended Complaint, *supra* note 1, at 11–12.

267. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1051 (1984) (O’Connor, J., plurality opinion).

268. *Id.* at 1050; see also *supra* Part I.C (discussing dissents supporting the exclusionary rule in immigration proceedings).

269. See discussion *infra* Part II.B.1.

270. See *infra* Part II.B.2.

271. See, e.g., *Silverman v. United States*, 365 U.S. 505, 511 (1961).

272. See *infra* Part II.B.3. This section focuses on the argument that any warrantless home invasion, without consent or exigent circumstances, constitutes an egregious violation of the Fourth Amendment, given the weighty protection that residences enjoy in American privacy jurisprudence. The argument this Article makes is, at its core, a historical one: violations in the home are egregious in that they offend a core value of the Fourth Amendment. See *infra* Part II.B.3. While there is little case law distinguishing egregious constitutional violations from lesser violations, see *infra* note 287, the decisions available suggest that one important consideration is

1. The *Lopez-Mendoza* Exception for “Egregious Violations of the Fourth Amendment”

The Supreme Court has not defined the scope of *Lopez-Mendoza*’s exception for “egregious violations of the Fourth Amendment.”<sup>273</sup> Instead, the concurring Justices cited in a footnote two examples of evidence the Board of Immigration Appeals (“BIA”) suppressed for egregious violations: an “admission of alienage obtained after [requests] for counsel had been repeatedly refused,”<sup>274</sup> and “evidence obtained as a result of a night-time warrantless entry into the aliens’ residence.”<sup>275</sup> The latter case, *In re Ramira-Cordova*, is unpublished, but the Department of Justice also raised *In re Ramira-Cordova* in its submission to the Court as an example of the BIA’s approach.<sup>276</sup> In doing so, the Department of Justice commended the BIA’s decision as “a balanced response to the problem of Fourth Amendment violations committed by INS officers.”<sup>277</sup>

The concurring Justices in *Lopez-Mendoza* likewise cited *Rochin v. California*,<sup>278</sup> a criminal case preceding the full development of the exclusionary rule.<sup>279</sup> In *Rochin*, the Court suppressed morphine pills officers had obtained through a “conscience-shocking” due process violation: a forced, warrantless home entry followed by physical abuse and

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the extent to which the officers knew or should have known that their conduct was unconstitutional. *See Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1449 (9th Cir. 1994) (quoting *Adamson v. Comm’r*, 745 F.2d 541, 545 (9th Cir. 1994)) (defining egregious violations to include “deliberate violations of the fourth amendment, or . . . conduct a *reasonable officer should have known* is in violation of the Constitution”); *In re Toro*, 17 I. & N. Dec. 340, 343–44 (B.I.A. 1980) (allowing evidence because the officers acted in good faith). History and text can resolve such an inquiry: the home is the subject of such longstanding and unambiguous constitutional protection that no officer can claim that he or she engaged in a warrantless home raid reasonably and in good faith. *See Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1018 (9th Cir. 2008).

While advocates are certainly justified in calling for a categorical rule that violations of the warrant clause in home raids are inherently egregious in light of the status the home enjoys, advocates should still underscore any facts showing the severity of a particular raid—say, racial bias, unnecessarily prolonged detention, or the use of force or threats. *See Almeida-Amaral v. Gonzalez*, 461 F.3d 231, 235–37 (2d Cir. 2006) (discussing factors which may show egregiousness). Unlawful searches may also violate ICE regulations; evidence obtained through violations may be suppressible on independent grounds not requiring any inquiry into egregiousness. *See infra* Part IV.

273. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984) (O’Connor, J., plurality opinion).

274. *Id.* at 1051 n.5 (O’Connor, J., plurality opinion) (citing *In re Garcia*, 17 I. & N. Dec. 319, 321 (B.I.A. 1980)).

275. *Id.* (citing *In re Ramira-Cordova*, No. A21 095 659 (B.I.A. Feb. 21, 1980)).

276. Brief for the Petitioner, *Lopez-Mendoza*, 468 U.S. 1032 (No. 83-491), available at <http://www.usdoj.gov/osg/briefs/1983/sg830057.txt>.

277. *Id.*

278. 342 U.S. 165 (1952).

279. *Lopez-Mendoza*, 468 U.S. at 1051 (O’Connor, J., plurality opinion) (citing *Rochin*, 342 U.S. at 172).

induced vomiting.<sup>280</sup> As lower courts have acknowledged, the citation to *Rochin* was not intended to limit the exception to gross physical abuse.<sup>281</sup> The concurring Justices cited without comment two BIA decisions suppressing evidence for conduct falling far short of the physical abuse in *Rochin*.<sup>282</sup> They described the exception as “egregious violations of the Fourth Amendment or other liberties,”<sup>283</sup> a phrase that would be clumsy if intended only to reach conduct of the sort in *Rochin*, which centered on the Due Process Clause and not the Fourth Amendment.<sup>284</sup> The concurring Justices thus suggested that the exception went beyond physical abuse, and the task of fleshing out its parameters fell to the courts of appeals.

## 2. The “Egregious Violations” Exception in the Courts of Appeals

Only two circuits have set out clear standards for assessing whether a constitutional violation rises to the level of egregiousness.<sup>285</sup> Most of the other circuits have raised and disposed of claims of egregiousness without setting out a standard.<sup>286</sup> Under the interpretations adopted in the Second and Ninth Circuits, warrantless home entries should be considered egregious per se, and the unnecessary violence that FOTs employ certainly should show egregious violations in many home raids.<sup>287</sup>

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280. *Rochin*, 342 U.S. at 172.

281. See, e.g., *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1449 (9th Cir. 1994); see also *Almeida-Amaral v. Gonzalez*, 461 F.3d 231, 235 (2d Cir. 2006) (suggesting evidence suppressible for, inter alia, arrests predicated upon racial profiling).

282. *Lopez-Mendoza*, 468 U.S. at 1051 n.5 (O’Connor, J., plurality opinion) (citing *In re Ramira-Cordova*, No. A21 095 659 (B.I.A. Feb. 21, 1980) (suppressing evidence obtained in a home raid); *In re Garcia*, 17 I. & N. Dec. 319, 321 (B.I.A. 1980) (suppressing an admission of alienage obtained after request for counsel had been repeatedly refused)).

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

284. See *Rochin*, 342 U.S. at 172.

285. See *Almeida-Amaral*, 461 F.3d at 235–37; *Gonzalez-Rivera*, 22 F.3d at 1448–52.

286. See, e.g., *Gonzalez-Reyes v. Holder*, No. 07-60203, 2009 WL 484246, at \*54 (5th Cir. Feb. 26, 2009) (holding that repeated questioning in a raised voice does not rise to the level of egregiousness); *Kandamar v. Gonzales*, 464 F.3d 65, 74 (1st Cir. 2006) (refusing to find egregiousness); *United States v. Olivares-Rangel*, 458 F.3d 1104, 1118 n.11 (10th Cir. 2006) (citing the *Lopez-Mendoza* examples of egregiousness, including “a night-time warrantless entry into the aliens’ residence”); *United States v. Bowley*, 435 F.3d 426, 430–31 (3d Cir. 2006) (referencing the examples in *Lopez-Mendoza*); *United States v. Navarro-Diaz*, 2005 FED App. 0351P, ¶¶ 21–23, 420 F.3d 581, 587 (6th Cir. 2005) (same); *Rampasard v. U.S. Att’y Gen.*, No. 04-15038, 2005 WL 2045029, at \*1 (11th Cir. Aug. 26, 2005) (per curiam) (finding that allegations of interrogation did not support a finding of egregiousness); *Navarro-Chalan v. Ashcroft*, 359 F.3d 19, 23 (1st Cir. 2004) (refusing to find egregiousness for voluntary statements made while not in custody); *Martinez-Camargo v. INS*, 282 F.3d 487, 493 (7th Cir. 2002) (ruling without reaching the question of egregiousness).

287. See, e.g., sources cited *supra* notes 52, 115.

*a. Warrantless Home Invasions as Egregious Under the Ninth Circuit's "Bad Faith" Approach*

The Court of Appeals for the Ninth Circuit has found that warrantless home invasions constitute egregious violations. The court of appeals defined as egregious any "deliberate violations of the Fourth Amendment" and any actions "a reasonable officer should know" violate the Constitution.<sup>288</sup> The Ninth Circuit noted that "the *Lopez-Mendoza* court's citation to *Rochin* was [not] meant to limit 'egregious violations' to those of physical brutality."<sup>289</sup> The court of appeals addressed home raids in particular in *Lopez-Rodriguez v. Mukasey*,<sup>290</sup> finding that a peaceful but warrantless home entry constituted an egregious Fourth Amendment violation: "Few principles in criminal procedure are as well established as the maxim that 'the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.'"<sup>291</sup>

*b. Warrantless Home Invasions as Egregious Under Second Circuit Precedent*

The Court of Appeals for the Second Circuit has set out different principles in assessing egregiousness, and while it has not ruled on a home invasion case, its standards for egregiousness ought to encompass warrantless home raids. The Second Circuit's principles have focused on arrests, rather than searches, holding in one case that "the egregiousness of a constitutional violation cannot be gauged solely on the basis of the validity (or invalidity) of the stop, but must also be based on the characteristics and severity of the offending conduct."<sup>292</sup> *Almeida-Amaral v. Gonzalez*<sup>293</sup> focused on an outdoor stop allegedly predicated upon racial profiling.<sup>294</sup> The court alluded to the Ninth Circuit's rule that a stop based on race ("or some other grossly improper consideration") would amount to

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288. *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1448 (9th Cir. 1994). This approach focuses on whether the violations were good faith errors or bad faith violations of clear constitutional norms; the "good faith" approach has not been adopted by other circuits. *See, e.g., Melnitsenko v. Mukasey*, 517 F.3d 42, 47–48 (2d Cir. 2008) (emphasizing the "severity" of the violation, rather than the officers' intentions). As the next sections will discuss, courts should consider home raids egregious violations under either standard.

289. *Gonzalez-Rivera*, 22 F.3d at 1449 (quoting *Adamson v. Comm'r*, 745 F.2d 541, 545 n.1 (9th Cir. 1984)).

290. 536 F.3d 1012 (9th Cir. 2008).

291. *Id.* at 1018 (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)).

292. *Almeida-Amaral v. Gonzalez*, 461 F.3d 231, 235 (2d Cir. 2006).

293. 461 F.3d 231 (2d Cir. 2006).

294. *Id.* at 232, 237.

an egregious Fourth Amendment violation.<sup>295</sup> Absent such an improper motivation, a stop might constitute an egregious violation in light of the conduct's "severity," that is, whether it is "gross or unreasonable . . . e.g., when the initial stop is particularly lengthy, there is a show or use of force, etc."<sup>296</sup> The Second Circuit cautioned: "[W]e do not intend to give an exhaustive list of what might constitute an egregious violation of an individual's rights. We emphasize these principles only because they are especially germane to the facts and circumstances of the case before us."<sup>297</sup> To date, the Second Circuit has not announced whether the same principles apply to searches in the home as opposed to seizures in public.

While advocates can and should emphasize the case-specific severity of intrusions into client homes—the use of force or intimidation, for example—there is also room to argue that home invasions are inherently severe violations. American law has always borne out such a conclusion.<sup>298</sup> In *Almeida-Amaral*, one of the possible indices of severity was a lengthy, suspicionless stop.<sup>299</sup> While such an encounter may no doubt be a significant deprivation of rights, a home raid is certainly more severe in constitutional terms: the security of the home is central to the Fourth Amendment.<sup>300</sup> If the examples in *Almeida-Amaral* are any guide, nonconsensual home entries qualify as egregious violations.

### 3. The "Chief Evil" Prohibited by the Fourth Amendment: Warrantless Home Invasions in Historical Context

As the Supreme Court has long emphasized, protection of the home is at the core of the Fourth Amendment.<sup>301</sup> Warrantless, unjustified home invasions therefore necessarily constitute an egregious violation of the Amendment. Accordingly, the Supreme Court has "jealously and carefully drawn" exceptions to the warrant requirement.<sup>302</sup> It has long seen strict adherence to the warrant procedure as required in order to "[minimize] the danger of needless intrusions."<sup>303</sup> The Court has consistently emphasized the objective severity of home invasions in spite of significant changes to

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295. *Id.* at 235.

296. *Id.* at 235–36; *see also* *Melnitsenko v. Mukasey*, 517 F.3d 42, 47–48 (2d Cir. 2008) (focusing on the "severity" of a stop).

297. *Almeida-Amaral*, 461 F.3d at 235 n.1.

298. *See infra* Part II.B.3.

299. 461 F.3d at 236.

300. *Payton v. New York*, 445 U.S. 573, 585–86 (1980).

301. *Silverman v. United States*, 365 U.S. 505, 511 (1961).

302. *Jones v. United States*, 357 U.S. 493, 499 (1958); *see also* *Kyllo v. United States*, 533 U.S. 27, 31 (2001) ("With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.").

303. *Payton*, 445 U.S. at 585–86.

the Court's perspective on the nature of other Fourth Amendment protections.<sup>304</sup> The warrantless home raid is the paradigmatic Fourth Amendment violation, the "chief evil against which the wording of the Fourth Amendment is directed."<sup>305</sup> Such invasions not only prompted the adoption of the Amendment, they were a major trigger in the American Revolution.<sup>306</sup> The sanctity of the home and the necessity of the warrant procedure are bedrock constitutional principles. If a warrantless home raid is not an egregious search, it is difficult to imagine what is.

*a. Home Raids in Supreme Court Precedent: The Archetypal Fourth Amendment Violation*

In *Payton v. New York*,<sup>307</sup> which imposed the warrant requirement on in-home arrests, Justice Stevens noted: "[F]reedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment."<sup>308</sup> The Supreme Court has called warrantless house searches "abhorrent to our laws."<sup>309</sup> For more than a century, the Court has denounced them as violations of the "indefeasible right of personal security."<sup>310</sup> The *Payton* Court summarized this principle: "The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms."<sup>311</sup>

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304. See *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) (discussing the erosion of the warrant requirement from the 1960s onward and citing a catalog of emerging exceptions); see also *Kyllo*, 533 U.S. at 31 (noting that warrantless searches of the home are unreasonable with "few exceptions").

305. *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 313 (1972); see also *Silverman*, 365 U.S. at 511 ("The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.").

306. See *infra* Part II.B.3.b.

307. 445 U.S. 573 (1980).

308. *Id.* at 587 (quoting *Dorman v. United States*, 435 F.2d 385, 389 (D.C. Cir. 1970) (en banc)).

309. *Agnello v. United States*, 269 U.S. 20, 32 (1925).

310. *Boyd v. United States*, 116 U.S. 616, 630 (1886); see also *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (citing *Silverman*, 365 U.S. at 511) (noting that protection of the home lies at the "core" of the Amendment); *Michigan v. Clifford*, 464 U.S. 287, 296–97 (1984) (Powell, J., plurality opinion) ("[P]rivacy interests are especially strong in a private residence"); *McDonald v. United States*, 335 U.S. 451, 453 (1948) (noting that the Fourth Amendment and warrant requirement "mark[] the right of privacy as one of the unique values of our civilization").

311. 445 U.S. at 589.

The Supreme Court has repeatedly used the “special protection” of the home to distinguish other searches seen as less intrusive.<sup>312</sup> When the Burger Court upheld Environmental Protection Agency aerial surveillance of a Dow Chemical plant it stated: “The intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and buildings of a manufacturing plant.”<sup>313</sup> The line of cases that reduced the Fourth Amendment protection of businesses and automobiles did so by distinguishing them from dwellings.<sup>314</sup>

In contrast to the limited protection it gives to businesses or vehicles, the Fourth Amendment prohibits essentially any intrusion of the home absent a warrant or exigent circumstances. The Supreme Court has best illustrated this principle in its willingness to suppress evidence following de minimis in-home searches. It is well-settled that technical trespass on the home may work an unreasonable search.<sup>315</sup> But the Supreme Court has also suppressed evidence obtained through the use of passive imaging technology that does not involve any physical contact with the home.<sup>316</sup> In *Kyllo*, the Court suppressed images that showed nothing more than the relative temperature of different parts of a house, used to identify heat lamps used in marijuana cultivation.<sup>317</sup> As Justice Scalia put it, “[I]n the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes.”<sup>318</sup> In *Arizona v. Hicks*,<sup>319</sup> the Court suppressed evidence obtained in what it termed a “dwelling-place search,” in which officers lawfully present in the home conducted a cursory inspection of the bottom of a turntable.<sup>320</sup>

The warrant requirement is procedural in nature, but that does not diminish its significance. In requiring judicial authorization, the Supreme Court has said:

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312. See, e.g., *Segura v. United States*, 468 U.S. 796, 810 (1984); *Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984); *Camara v. Mun. Court*, 387 U.S. 523, 531 (1967); *Wong Sun v. United States*, 371 U.S. 471, 484 (1963).

313. *Dow Chem. Co. v. United States*, 476 U.S. 227, 236 (1986).

314. See, e.g., *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (Blackmun, J., plurality opinion) (distinguishing building searches); *Chambers v. Maroney*, 399 U.S. 42, 48 (1970) (noting that weaker warrant protections attach to automobiles as compared to houses).

315. See *Silverman v. United States*, 365 U.S. 505, 512 (1961) (prohibiting any physical intrusion “by even a fraction of an inch”).

316. *Kyllo v. United States*, 533 U.S. 27, 40 (2001).

317. *Id.* at 35.

318. *Id.* at 37.

319. 480 U.S. 321 (1987).

320. *Id.* at 328; *id.* at 333 (O’Connor, J., dissenting) (characterizing the actions of the police as a reasonable “cursory inspection”).

We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals . . . . The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.<sup>321</sup>

The Supreme Court's unwillingness to countenance warrantless home invasions has driven many of the expansions of Fourth Amendment protections. *Rochin v. California*<sup>322</sup> ended in physical abuse "that shock[ed] the conscience," but it began with a warrantless home entry.<sup>323</sup> The Supreme Court first applied the exclusionary rule in the home raid case, *Weeks v. United States*.<sup>324</sup> It broadened the exclusionary rule's reach to state proceedings in *Mapp v. Ohio*,<sup>325</sup> in which police entered the suspect's home apparently using a fake warrant.<sup>326</sup> Court cases protecting the home also show some rare alliances: Justice Scalia wrote the majority opinions in *Hicks* and *Kyllo*, and Justice Thomas joined him in the latter along with Justices Breyer, Ginsburg, and Souter.<sup>327</sup> If Fourth Amendment disputes in general show a divide between liberal and conservative thinkers, Justices in both camps place a great deal of emphasis on protecting the home.<sup>328</sup>

The reach of the warrant requirement outside of the home has waned under the Burger, Rehnquist, and Roberts Courts.<sup>329</sup> As *Hicks* and *Kyllo* show, though, the special status of the home has weathered momentous changes in the interpretation of the Fourth Amendment. As the Court has made abidingly clear, where agents kick down a suspect's front door,<sup>330</sup> they violate "the conception of human rights enshrined in [our] history'

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321. *McDonald v. United States*, 335 U.S. 451, 455–56 (1948).

322. 342 U.S. 165 (1952).

323. *Id.* at 172.

324. 232 U.S. 383, 393–94 (1914) (requiring the exclusion of evidence obtained by warrantless house searches by federal agents).

325. 367 U.S. 643 (1961).

326. *Id.* at 645.

327. *Arizona v. Hicks*, 480 U.S. 321, 322 (1987); *Kyllo v. United States*, 533 U.S. 27, 27 (2001).

328. *See, e.g., Coolidge v. New Hampshire*, 403 U.S. 443, 474–75 (1971) ("Both sides to the controversy [over the warrant requirement] appear to recognize a distinction between searches and seizures that take place on a man's property—his home or office—and those carried out elsewhere. It is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, . . . [absent] 'exigent circumstances.'").

329. *See California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) (discussing the proliferation of "exceptions" to the warrant requirement since the 1960s).

330. *See supra* notes 25–58.

and Constitution.”<sup>331</sup> Such an intrusion must amount to an egregious violation of the Fourth Amendment.

*b. Fugitive Operations and the Roots of the Fourth Amendment*

The emphasis that courts place on protecting the home reflects the roots of the Fourth Amendment, both in the common law and the conditions that precipitated the American Revolution. The Colonial anger leading up to the Revolution was driven in significant part by searches and seizures by customs officials acting pursuant to “writs of assistance.”<sup>332</sup> In the view of many colonists, the authority of the customs agent rose to “petty tyranny” because it interfered with rights sacrosanct in Anglo-American law: “That a man’s house was his castle was one of the most essential branches of English liberty, a privilege totally annihilated by” the use of general warrants.<sup>333</sup> English law’s focus on the protection of the home had deep historical roots. Edward Coke, “‘as the greatest authority of his time on the laws of England,’ ”<sup>334</sup> was one of many scholars to argue that the common law prohibited warrantless in-home arrests.<sup>335</sup> The maxim that “a man’s house is his castle” is often attributed to Coke; Professor Nelson Lasson, however, traces connections to Roman law and before: “Cicero expressed the general feeling in this matter when he said in one of his orations: ‘What is more inviolable, what better defended by religion than the house of a citizen. . . . This place of refuge is so sacred to all men, that to be dragged from thence is unlawful.’ ”<sup>336</sup>

Against the backdrop of the common law, American colonists—and, later, Americans—objected to unfettered searches, whether supported by general warrants or no warrant at all. In 1774, the Continental Congress challenged the power of customs agents “to break open and enter houses,

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331. *Hudson v. Michigan*, 547 U.S. 586, 620 (2006) (Breyer, J., dissenting) (quoting *Wolf v. Colorado*, 338 U.S. 25, 28 (1949)).

332. LASSON, *supra* note 66, at 51.

333. *Id.* at 60; *see also* *Payton v. New York*, 445 U.S. 573, 596–97 (1980) (“[I]n England and in the Colonies ‘the freedom of one’s house’ was one of the most vital elements of English liberty.”).

334. *Payton*, 445 U.S. at 594 n.36 (quoting A. HOWARD, *THE ROAD FROM RUNNYMEDE* 118–19 (1968)).

335. *Id.* at 593–95 (citing various early English commentators). In *Payton*, Justice Stevens quoted Edward Coke: “[N]either the Constable, nor any other can break open any house for the apprehension of the party suspected or charged with the felony.” *Id.* at 594 n.37 (quoting 4 EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 177 (1644)).

336. LASSON, *supra* note 66, at 15. William Cuddihy discusses the history of the maxim from its Roman origins through its role in the formation of the Fourth Amendment. CUDDIHY, *supra* note 68, at lix–lxvii. By 1760, the “castle” trope connoted not just personal privacy but a limitation on government action; a public consensus had emerged that treated house searches not authorized by specific warrants as a violation of privacy rights. *Id.* at lxiv.

without the authority of any civil magistrate.”<sup>337</sup> This attitude outlasted the Revolution: years later, the specter of colonial-era home invasions drove the adoption of the Fourth Amendment. During the Constitutional Convention, Antifederalists and others objected to the proposed document’s lack of safeguards.<sup>338</sup> As Patrick Henry put it during Virginia’s ratifying convention, “When these harpies are aided by excisemen, who may search, at any time, your houses and most secret recesses, will the people bear it?”<sup>339</sup> Henry followed his speech several days later with the introduction of a prohibition on general warrants; that provision grew into the broader Fourth Amendment.<sup>340</sup> Its quick uptake reflected the consensus, in the years around the Revolution, that unchecked authority to search posed a significant threat to liberty.<sup>341</sup> Essayists of the day included warrantless searches in their concerns, analogizing them to the pre-Revolution “general warrant” searches that had so antagonized the colonists.<sup>342</sup> Just as the practice of unjustified home invasions helped prompt the Revolution, the fear of such intrusions was the central motivation behind the adoption of the Fourth Amendment. The archetypal Fourth Amendment violation,<sup>343</sup> a warrantless home raid, is inherently egregious.

#### 4. The Benefits of a Per Se Rule Governing Home Invasions

The *Lopez-Mendoza* Court raised a number of policy objections to applying the exclusionary rule to immigration proceedings.<sup>344</sup> Should judges raise such concerns against advocates arguing for a rule that warrantless home raids are per se egregious, advocates can readily distinguish raid cases on policy grounds. The *Lopez-Mendoza* majority based its holding in part on a belief that applying the exclusionary rule would be a weak deterrent given the infrequent use of motions to suppress in immigration proceedings.<sup>345</sup> But a clear-cut rule focused on a particular and highly prevalent type of violation could have much greater deterrent effect, forcing ICE to move away from home raid tactics at odds with the

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337. CUDDIHY, *supra* note 68, at 779; LASSON, *supra* note 66, at 75.

338. CUDDIHY, *supra* note 68, at 674 (noting that Antifederalist authors “predicted that general warrants, writs of assistance, and general excise searches without warrant would be among the consequences of ratification” of the proposed Constitution).

339. LASSON, *supra* note 66, at 92.

340. *Id.* at 95–96; *see also Payton*, 445 U.S. at 583–585 (discussing the history of the provision).

341. CUDDIHY, *supra* note 68, at lix–lxviii.

342. *Id.* at 780–81.

343. *See id.* at 781 (describing the early national “consensus against promiscuous, warrantless house searches” that furnished the constitutional mandate against unreasonable searches).

344. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1043–45 (1984).

345. *Id.* at 1044.

Constitution. The *Lopez-Mendoza* Court emphasized the record-keeping problems associated with adjudicating suppression in workplace raids: such “arrests occur in crowded and confused circumstances.”<sup>346</sup> In contrast, home raids may be more easily tracked. ICE agents are already required to record the circumstances of any home entry, including the name of any person who consents to such entry.<sup>347</sup> The record will also show whether the agents obtained a warrant, and, if so, upon what evidence the magistrate granted it.<sup>348</sup> Courts will thus automatically have evidence as to the two most important factual questions in assessing the legality of a home entry: the presence of a warrant and the presence of consent. Given the relative ease and deterrent value of suppression in the home raid context, advocates can show that home raids present a very different picture than the types of enforcement contemplated in *Lopez-Mendoza*.

Courts must closely scrutinize intrusions into the home, as such intrusions are considered the “chief evil” restricted by the Fourth Amendment. Absent a warrant or exigent circumstances, even the slightest such intrusion is illegal. The frightening methods ICE employs in home raids underscore the extent to which any home invasion impairs a basic human right.<sup>349</sup> Advocates in the Ninth Circuit have already succeeded in establishing that warrantless home raids constitute an “egregious violation.”<sup>350</sup> The Supreme Court has suggested such a result, both in *Lopez-Mendoza* itself and through the long constitutional emphasis on the sanctity of the home.<sup>351</sup> As an enforcement method radically inconsistent with American law, ICE home raids are ripe for challenge as inherently egregious violations of the Fourth Amendment.

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346. *Id.* at 1049.

347. 8 C.F.R. § 287.8(f)(2) (2010). Thanks to Peter Markowitz and Jaya Vasandani for directing my attention to this provision.

348. *Id.*

349. *See, e.g.*, First Amended Complaint, *supra* note 1, at 11–13 (alleging that agents held a cooperative suspect at gunpoint); *id.* at 17–19 (alleging agents threatened to “gas” a suspect’s house if she did not accede to warrantless entry); *id.* at 9 (alleging that an agent “had his hand on his gun as if he was ready to take it out at any minute” when dealing with an unaccompanied fifteen-year-old citizen in another raid); CARDOZO IMMIGRATION JUSTICE CLINIC, *supra* note 11, at 17 (reporting that agents threatened to kick down a suspect’s front door in one raid); *see also* *Hudson v. Michigan*, 547 U.S. 586, 620 (2006) (Breyer, J., dissenting) (noting that home invasions violate the “‘conception of human rights enshrined in [our] history’ and Constitution” (quoting *Wolf v. Colorado*, 338 U.S. 25, 28 (1949))); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at art. 12 (Dec. 10, 1948) (“[N]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence”).

350. *See supra* Part II.B.2.a.

351. *See supra* Part II.B.3.

III. WIDESPREAD AND SYSTEMATIC CONSTITUTIONAL VIOLATIONS  
DURING ICE HOME RAIDS JUSTIFY REVISITING THE HOLDING IN *LOPEZ-  
MENDOZA*

The *Lopez-Mendoza* Court conditioned its holding on the premise that Fourth Amendment violations were not widespread in interior immigration enforcement and that the government had “already taken sensible and reasonable steps to deter Fourth Amendment violations by its officers.”<sup>352</sup> Of the five Justices unwilling to apply the exclusionary rule, four cautioned: “Our conclusions concerning the exclusionary rule’s value might change if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread.”<sup>353</sup> As other commentators have argued, ICE now engages in widespread and unchecked misconduct; this predicate of the *Lopez-Mendoza* holding has so eroded as to justify suppression for any Fourth Amendment violations.<sup>354</sup> ICE home raids present a particularly clear picture, given the frequency of warrantless entries by FOTs.<sup>355</sup> *Lopez-Mendoza* depended upon the assumption that Fourth Amendment violations by the INS were infrequent, unplanned, and adequately redressed. Present-day home raids include widespread, systematic, and severe violations of constitutional rights.<sup>356</sup> These violations arise in large part from ICE policy, in particular its lapses in training and supervision, not from the misconduct or mistakes of individual officers.<sup>357</sup> Accordingly, advocates should argue that contemporary ICE practices justify more judicial scrutiny of home raids in particular, whether or not courts are ready to revisit *Lopez-Mendoza* in general.

A. “Widespread Violations,” *Before and After Lopez-Mendoza*

A recent article by Stella Burch Elias, a Harvard lecturer, casts light on the assumptions that underpinned *Lopez-Mendoza* and shows that ICE misconduct has eroded the factual basis for that decision.<sup>358</sup> Drawing on the conference notes of Justice Blackmun, seen at the time as the “fifth vote” that consolidated the *Lopez-Mendoza* majority,<sup>359</sup> Elias notes that the Court

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352. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984).

353. *Id.* at 1050 (O’Connor, J., plurality opinion).

354. *See supra* notes 11, 14.

355. *See infra* Part III.A.

356. *See infra* Part III.A.

357. *See infra* Part III.B.

358. Elias, *supra* note 12, *passim*.

359. *Id.* at 1121 n.59 (noting that Justice Blackmun’s clerk wrote at the time that Justice O’Connor circulated a draft to Justice Blackmun because she saw him as the “ ‘fifth vote and she wants to nail down her Court’ ” (quoting Memorandum from Anna Durand, law clerk, to Justice

saw the availability of other putative deterrents—INS rules, procedures, and training aimed at preventing rights violations—as “perhaps the most important reason for” limiting evidentiary suppression in removal proceedings.<sup>360</sup> The Court found that the INS had “its own comprehensive scheme for deterring Fourth Amendment violations by its officers.”<sup>361</sup>

[T]he INS has developed rules restricting stop, interrogation and arrest practices. These regulations require that no one be detained without reasonable suspicion of illegal alienage, and that no one be arrested unless there is an admission of illegal alienage or other strong evidence thereof. New immigration officers receive instruction and examination in Fourth Amendment law, and others receive periodic refresher courses in law.<sup>362</sup>

At least some on the Court believed these measures were effective. Justice Blackmun argued, before the Court granted certiorari, that violations by INS officers were not widespread enough to justify hearing the case.<sup>363</sup> “Chief Justice Burger believed that INS was ‘better than most police departments’ at preventing constitutional violations from occurring.”<sup>364</sup> The final opinion noted that motions to suppress were rarely made and rarely granted in removal proceedings.<sup>365</sup>

Whatever their value at the time of *Lopez-Mendoza*, these deterrent measures have failed to prevent the abuses that now pervade interior immigration enforcement. As Elias points out, constitutional violations during raids have become a nationwide problem: her work cites press reports, civil complaints, and public hearings alleging violations in more than twenty states.<sup>366</sup> Noncitizens in removal proceedings are not guaranteed attorneys and often cannot afford them; many defend themselves from jail.<sup>367</sup> Under such conditions, it is likely that many

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Harry Blackmun 407/83–491 (May 23, 1984) (on file with Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C.)).

360. *Id.* at 1122.

361. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044 (1984).

362. *Id.* at 1044–45 (citation omitted).

363. *See* Elias, *supra* note 12, at 1111.

364. *Id.* at 1122 (quoting Justice Harry Blackmun, Conference Notes, 407/83–491 (April 20, 1984) (on file with Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C.)). Justice O’Connor kept the language over Justice Burger’s objections; as such, that passage of her decision is a four-justice opinion, though four dissenting justices supported applying the exclusionary rule in immigration proceedings, with or without evidence of widespread violations. *See id.*; *Lopez-Mendoza*, 468 U.S. at 1033–34, 1051–52, 1060–61.

365. *Lopez-Mendoza*, 468 U.S. at 1044.

366. *See* Elias, *supra* note 12, at 1129–33.

367. *See id.* at 1134–35.

violations go unnoticed and unreported; thus, the violations actually litigated reflect “the tip of the iceberg.”<sup>368</sup>

Elias’s article presents a useful road map for claims under the “widespread violations exception.”<sup>369</sup> This Article will not retread the same issues, but will add a narrower and additional claim: the widespread violations in home raids in particular justify reconsideration of the exclusionary rule in that context. Recent history suggests that violations in the home are disproportionately frequent and severe. For instance, a recent report by the United Nations Human Rights Council Special Rapporteur on the human rights of migrants criticized the increasing use of “forceful” and warrantless house sweeps, citing an incident in which two young children awoke to find officers arresting their parents.<sup>370</sup> Another report, sponsored by labor unions and civil rights organizations, discussed similar abuses: officers entering “with guns drawn,” rousing sleeping residents.<sup>371</sup> Home raids have prompted lawsuits nationwide.<sup>372</sup> They have also elicited a substantial outcry from elected officials, angered both by the illegality of warrantless entries and by the lack of respect ICE has shown immigrant communities.<sup>373</sup> In one congressional hearing, Rep. Lynn Woolsey testified that ICE had yet to develop policies to protect the children, often citizens, of those arrested in home raids. She stated: “[A] constituent of mine, Katherine Gibney, the Principal at the San Pedro Elementary School in San Rafael, testified about how school officials cared for frightened students during last year’s raids and rode the buses to make sure students didn’t return to empty homes.”<sup>374</sup>

At least one immigration judge has found that ICE’s conduct amounts to widespread constitutional violations. In suppressing evidence of alienage used against two brothers arrested in a raid of their shared apartment, Immigration Judge Philip Morace found that “their case is part of a widespread practice of warrantless and consentless home raids by ICE

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368. *Id.* at 1135 (quoting Ward, *supra* note 176, at 50).

369. *Id.* at 1116.

370. Special Rapporteur on the Human Rights of Migrants, *Addendum: Mission to the United States of America*, ¶¶ 65–66, Human Rights Council, U.N. Doc. A/HRC/7/12/Add.2 (Mar. 5, 2008) (by Jorge Bustamante).

371. NAT’L COMM’N ON ICE MISCONDUCT & VIOLATIONS OF 4TH AMENDMENT RIGHTS, *supra* note 30, at 49 (citing the testimony of John DeStefano, Jr., Mayor, New Haven, Conn.).

372. *See, e.g.*, Complaint, *supra* note 41, at 2; MIGRATION POLICY INST., *supra* note 11, at 24; Elias, *supra* note 12, at 1132; Bernstein, *supra* note 45; Moore, *supra* note 40.

373. *See, e.g.*, Oremus, *supra* note 14; Letter from Senator Kirstin Gillibrand to Janet Napolitano, *supra* note 14; Letter from Senator Joseph Lieberman et al. to Michael Chertoff, *supra* note 14; Letter from Thomas Suozzi to Michael Chertoff, *supra* note 14.

374. *Immigration Raids—Postville and Beyond: Hearing Before the H. Subcomm. on Immigration, Citizenship, Refugees, Border Sec., and Int’l Law of the H. Comm. on the Judiciary*, 110th Cong. 20 (2008) (testimony of Rep. Lynn Woolsey).

agents, resulting in Fourth Amendment violations.”<sup>375</sup> The court rested its conclusion that violations were now “not uncommon” on a number of exhibits the respondents submitted, including the Cardozo Immigration Justice Clinic’s report and news articles discussing ICE’s tactics.<sup>376</sup>

Even leaving aside other unconstitutional practices in interior immigration enforcement, home raids alone reflect a widespread and severe pattern of misconduct. Whether or not the *Lopez-Mendoza* Court was correct that violations were infrequent in the 1980s, during recent years, one major plank of ICE’s interior enforcement efforts has depended on routine violations of a core constitutional guarantee.

*B. ICE Policy Demonstrates Malign Neglect of Fourth Amendment Rights*

*Lopez-Mendoza* suggested that constitutional violations in immigration enforcement were typically the accidental byproducts of crowded, confusing, mass-arrest operations.<sup>377</sup> In a workplace raid affecting hundreds, one could argue, it is likely that officers will take at least one person aside for questioning without reasonable suspicion. Suppression may be more difficult to justify if violations reflect occasional, accidental departures from agency policy.<sup>378</sup> More than two decades later, though, constitutional violations cannot be considered deviations from typical ICE practice; the conduct of home raids shows a degree of official lawlessness that the *Lopez-Mendoza* Court did not foresee.<sup>379</sup> The agency’s practices have deteriorated to an extent that undercuts the assumptions of the Court and underscores the deterrent value of evidentiary suppression.

Institutional safeguards against constitutional rights violations steadily weakened in the years following *Lopez-Mendoza*. Within two years of *Lopez-Mendoza*, a federal court found “an ‘evident systematic policy and practice of fourth amendment violations’ by INS.”<sup>380</sup> Recent experience suggests that the agency’s own training procedures, the principal safeguard the *Lopez-Mendoza* Court discussed,<sup>381</sup> no longer adequately address Fourth Amendment concerns. Elias cites an instance in which an ICE agent told one resident that officials could enter a private home without a

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375. *In re R-C- and J-C-*, slip op. at 16–17 (N.Y.C. Immigr. Ct., May 12, 2010).

376. *Id.* at 2–3, 11 n.6.

377. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044–45 (1984).

378. *Cf. id.* at 1050–51 (O’Connor, J., plurality opinion) (suggesting suppression might be justified should violations become widespread).

379. *See supra* Part III.A.

380. *Int’l Molders’ & Allied Workers’ Local Union v. Nelson*, 799 F.2d 547, 551 (9th Cir. 1986) (quoting *INS v. Delgado*, 466 U.S. 210, 218 n.6 (1984)).

381. *Lopez-Mendoza*, 468 U.S. at 1044–45.

warrant.<sup>382</sup> A report by the Migration Policy Institute specifically cites deficient training of FOTs—for example, ICE does not offer national “refresher” courses to reinforce or update officers’ understanding of the law.<sup>383</sup> The operational culture of FOTs reflects little caution: FOTs plan their operations using databases widely considered inaccurate and outdated, increasing the risk that they will mistakenly approach the wrong homes.<sup>384</sup> This is hardly the only area in which the agency exhibits a “basic lack of care.”<sup>385</sup> As one example, Elias cites the troubling increase in accidental deportations of United States citizens as a pattern reflecting growing insensitivity to civil rights.<sup>386</sup>

At times, ICE has also created institutional incentives to maximize arrests, incentives which may have had an especially corrosive effect on civil rights. As the Migration Policy Institute report shows, FOTs were initially designed to focus on individual noncitizens who posed a danger to their communities.<sup>387</sup> In 2004, teams were given an arrest quota that “prioritized dangerousness, stating that at least 75 percent of the individuals apprehended had to be fugitive aliens with criminal convictions.”<sup>388</sup> Two years later, however, ICE increased this quota by seven hundred percent and dropped the numerical emphasis on dangerous fugitives.<sup>389</sup> As a result, teams were under enormous pressure to arrest ordinary status violators; they began to arrest large numbers of noncitizens posing no threat to the community.<sup>390</sup> ICE now reports that it has stopped using arrest quotas to guide FOTs.<sup>391</sup> It is yet unclear what effect the change will have on the number of collateral arrests.

Remedies such as civil suits target “bad apples”—officers who depart from institutional norms.<sup>392</sup> The violations common to FOT raids, however, are widespread and uniform,<sup>393</sup> reflecting the culture and policies of the

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382. See Elias, *supra* note 12, at 1148 (citing Ward, *supra* note 176, at 44).

383. MIGRATION POLICY INST., *supra* note 11, at 23 (quoting OFFICE OF INSPECTOR GEN., *supra* note 167, at 29–30).

384. See *supra* text accompanying notes 164–68.

385. Elias, *supra* note 12, at 1149 (quoting Ward, *supra* note 176, at 47).

386. See *id.* at 1148–49.

387. MIGRATION POLICY INST., *supra* note 11, at 1.

388. *Id.* at 10 (citing OFFICE OF INSPECTOR GEN., *supra* note 167, at 8).

389. *Id.* (citing N.C. Aizenman & Spencer S. Hsu, *US Targeting Immigrant Absconders*, WASH. POST, May 5, 2007, at A1).

390. *Id.* at 11.

391. See Anna Gorman, *Immigration Official Says Agents Will No Longer Have Quotas*, L.A. NOW (Aug. 17, 2009, 3:53 PM), <http://latimesblogs.latimes.com/lanow/2009/08/immigration-official-said-agents-will-no-longer-have-quotas-.html>.

392. See, e.g., *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 392–94 (1971) (creating a civil remedy for Fourth Amendment violations by federal agents).

393. See CARDOZO IMMIGRATION JUSTICE CLINIC, *supra* note 11, at 16–17 (citing an apparent pattern of misconduct).

agency.<sup>394</sup> They require a restored judicial safeguard. *Lopez-Mendoza* was premised on the Court's belief that immigration officials had put in place adequate checks against abuse. Those checks have failed; ICE agents nationwide act as if the warrant requirement is a dead letter. As eight Justices suggested, *Lopez-Mendoza* ought not survive such a dramatic deterioration in agency conduct.<sup>395</sup>

#### IV. SUPPRESSING EVIDENCE FOR REGULATORY AND DUE PROCESS VIOLATIONS DURING HOME RAIDS

Though home raids cut to the heart of the Fourth Amendment's protection, they also implicate other rights that may, in turn, offer advocates powerful alternative claims for evidentiary suppression. ICE falls under a regulatory regime that mirrors and, in places, goes beyond the protections the Constitution affords.<sup>396</sup> Immigrants have prevailed in some motions seeking evidentiary suppression for violations of these regulatory rights; advocates often raise them alongside constitutional claims.<sup>397</sup>

Agencies must comply with their own regulations.<sup>398</sup> Where an agency's regulatory violations affect the rights of outsiders, federal courts have sometimes demonstrated a willingness to intervene even where the regulations provide no private right of action.<sup>399</sup> The immigration courts have done the same: in *In re Garcia-Flores*,<sup>400</sup> the BIA set out standards for the exclusion of evidence from removal proceedings where immigration enforcement agents violated agency regulations protecting the rights of noncitizens.<sup>401</sup> In that case, the respondent contended that agents obtained the evidence against her through an unlawful interrogation in which they did not advise her of her right to counsel.<sup>402</sup> Citing a regulation<sup>403</sup> that

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394. *See supra* Part III.A.

395. *See supra* Part II.B.

396. *See, e.g.*, 8 C.F.R. § 287.8(f)(2) (2010) (prohibiting officers from entering a suspect's residence without a warrant or consent).

397. *See, e.g.*, *In re Perez*, No. A95-748-837, slip op. at 16 (L.A. Immigr. Ct. Feb. 10, 2009), available at <http://www.aclu-sc.org/downloads/8/994425.pdf> (suppressing evidence obtained through an interrogation in violation of agency regulations); *In re A- P-*, slip op. at 1 (B.I.A. July 22, 2010) (remanding for a suppression hearing in light of respondent's Fourth Amendment, Due Process and regulatory claims) (on file with the North Carolina Law Review).

398. *See, e.g.*, *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("[W]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures . . . even where the internal procedures are possibly more rigorous than otherwise would be required.").

399. *See, e.g.*, *United States v. Shaughnessy*, 347 U.S. 260, 268 (1954) (vacating a deportation order due to regulatory violations during proceedings); *Montilla v. INS*, 926 F.2d 162, 170 (2d Cir. 1991) (holding that violations of the regulatory right to counsel in a removal proceeding justified reversal and remand without requiring a showing of prejudice).

400. 17 I. & N. Dec. 325 (B.I.A. 1980).

401. *Id.* at 328-29.

402. *Id.* at 326.

required basic rights advisories for those in immigration custody, she called on the BIA to suppress statements she made during the interrogation.<sup>404</sup>

The BIA formulated its rule in light of principles drawn from past Supreme Court immigration cases.<sup>405</sup> While it noted that courts hold agencies to scrupulous observance of their own procedures, it found that precedent did not require invalidation of proceedings or suppression of evidence following every regulatory violation.<sup>406</sup> It found the argument for suppression strongest where the agency violated a regulation implementing protections that the Constitution or federal law require.<sup>407</sup> The BIA nevertheless recognized that agencies are bound by their regulations even where those regulations are more rigorous than the requirements of statutes or the Constitution.<sup>408</sup> The Board thus found suppression justified for a violation if the regulation served some “purpose of benefit” to the noncitizen, whether “procedural or substantive,” and only if the violation prejudiced an interest protected by the regulation.<sup>409</sup> The BIA suggested that the requisite prejudice was of a narrow kind: an effect on the outcome of the proceeding.<sup>410</sup> But it also called for stronger protection where Constitutional rights are at stake: “[w]here compliance with the regulation is mandated by the Constitution, prejudice may be presumed,” justifying suppression without a specific demonstration of prejudice to the outcome.<sup>411</sup>

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403. 8 C.F.R. § 287.3(c) (1977), amended by 62 Fed. Reg. 10312 (March 6, 1997). The court noted that it was unclear whether the regulation required pre-interrogation warnings; the regulation was later updated to reflect the government’s view that no pre-interrogation warnings were required. *In re Garcia-Flores*, 17 I. & N. Dec. at 327 n.3. The regulation has since been further modified; for a discussion of the current provision, see *infra* notes 430–33 and accompanying text.

404. *In re Garcia-Flores*, 17 I. & N. Dec. at 326.

405. *See id.* at 328 (citing *Bridges v. Wixon*, 326 U.S. 135, 152–53 (1945), in which the Supreme Court invalidated a deportation order entered after violations of the noncitizen’s regulatory rights).

406. *Id.* at 327.

407. *Id.* at 328; *see Bridges v. Wixon*, 326 U.S. 135, 152 (1945) (invalidating a deportation order based on evidence obtained in violation of regulations intended “to afford [the alien] due process of law”).

408. *In re Garcia-Flores*, 17 I. & N. Dec. at 328 (citing *Morton v. Ruiz*, 415 U.S. 199, 235 (1974)).

409. *Id.* at 328–29 (citing *United States v. Calderon-Medina*, 591 F.2d 529, 531 (9th Cir. 1979)).

410. *Id.* at 328 (adopting the Ninth Circuit’s “prejudice” test to determine whether a violation harmed the noncitizen’s interests “in such a way as to affect potentially the outcome of their deportation proceeding” (citing *United States v. Calderon-Medina*, 591 F.2d 529, 532 (9th Cir. 1979))); *id.* at 329 (“We will accordingly remand . . . to allow the respondent the opportunity to demonstrate that the investigating officer’s action prejudiced her interests that were protected by the regulation and that such prejudice affected the outcome of the deportation proceedings.”).

411. *Id.* at 329. The Board found the regulation in question was not one justifying such a presumption of prejudice, that is, the Constitution did not mandate compliance. *Id.*

Many Homeland Security regulations serve to protect the rights of noncitizens, thus satisfying the “purpose or benefit” prong of the *In re Garcia-Flores* inquiry and justifying suppression for violations that prejudice the outcome of subsequent removal proceedings.<sup>412</sup> Several such regulations parallel constitutional protections so closely as to justify a presumption of prejudice.<sup>413</sup> One regulation prohibits officers from entering “a residence including the curtilage of such residence” without a warrant or consent.<sup>414</sup> Officers must record any entry by consent, including, if possible, the identity of the person consenting.<sup>415</sup> The Constitution clearly compels compliance with the regulatory warrant requirement, which mirrors the Fourth Amendment protection of the home.<sup>416</sup> As such, an immigration judge must treat nonconsensual, warrantless home invasions as creating a presumption of prejudice that justifies suppression of any evidence obtained thereby.<sup>417</sup> In effect, this provision, along with the *In re Garcia-Flores* rule,<sup>418</sup> would justify suppression of evidence gathered in unlawful entries without any inquiry into egregiousness.

Other regulations govern arrest and investigatory detentions. For instance, one provides that noncitizens may be arrested only in light of a “reasonable belief” that they are in violation of immigration laws,<sup>419</sup> a standard which courts have treated as equivalent to probable cause.<sup>420</sup> Investigatory stops must be “brief,” and they require reasonable suspicion.<sup>421</sup> Again, these regulations track the constitutional requirement almost precisely.<sup>422</sup> Other provisions require officers to identify themselves and to seek a warrant prior to arrest unless they have a reason to believe the suspect may escape.<sup>423</sup> Officers may only use force when they have “reasonable grounds to believe that such force is necessary”; they must use the least degree of force appropriate under the circumstances.<sup>424</sup> This may

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412. *Id.* at 328–29; *see, e.g.*, 8 C.F.R. § 287.8 (2010) (limiting the power of immigration officers).

413. *In re Garcia-Flores*, 17 I. & N. Dec. at 329; *see, e.g.*, § 287.8(f)(2).

414. § 287.8(f)(2). The provision also applies to businesses and farms, but it contains an exception for certain searches near the border. 8 C.F.R. § 287(a)(3).

415. § 287.8(f)(2).

416. *See supra* Part II.A.1.

417. *In re Garcia-Flores*, 17 I. & N. Dec. at 328–29.

418. *Id.*

419. § 287.8(c).

420. *See, e.g.*, *United States v. Moya-Matute*, 559 F. Supp. 2d 1189, 1210 (D.N.M. 2008) (discussing § 287.8(c)(2) as an example of authority to arrest on probable cause).

421. § 287.8(b).

422. *See supra* Part II.A.4.

423. § 287.8(c) (requiring warrants unless the officer has “reason to believe that the person is likely to escape,” and requiring officers to identify themselves after arrest and declare the reason for the arrest).

424. § 287.8(a).

be seen as equivalent to the Fourth Amendment restriction on the use of force, a standard of “objective reasonableness.”<sup>425</sup>

Finally, several regulations control interrogation and custody. As a baseline, officers may not use “threats, coercion or physical abuse” to obtain statements or waivers of rights.<sup>426</sup> The Due Process Clause commands compliance with this provision<sup>427</sup>—indeed, the Due Process Clause separately justifies the suppression of coerced confessions.<sup>428</sup> DHS regulations also require that an officer arresting a noncitizen without a warrant must advise her of her right to counsel and inform her that her “statement[s] may be used against [her].”<sup>429</sup> This provision, though, is susceptible to different interpretations. It applies to a noncitizen “placed in formal proceedings.”<sup>430</sup> *In re Garcia-Flores* interpreted a predecessor provision as requiring rights advisories at some point, not necessarily prior to interrogation.<sup>431</sup> A “warning” after interrogation may be of little use to a detainee; as such, at least one immigration judge has, in the absence of controlling case law on the new regulation, interpreted it to require pre-interrogation warnings.<sup>432</sup>

In either case, this protection is not an absolute constitutional command under prevailing interpretations of the Due Process Clause. While the due process prohibition of coercive interrogation certainly applies to those detained by immigration authorities, the federal judiciary

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425. *Graham v. Connor*, 490 U.S. 386, 399 (1989).

426. § 287.8(c)(2)(vii).

427. *See Blackburn v. Alabama*, 361 U.S. 199, 205–06 (1960) (barring the use of coercion to obtain confessions).

428. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050–51 (1984) (O’Connor, J., plurality opinion) (leaving open the possibility of suppression for violations of “fundamental fairness” and citing a Due Process suppression case as an example, *Rochin v. California*, 342 U.S. 165 (1952)); *Cuevas-Ortega v. INS*, 588 F.2d 1274, 1277 (9th Cir. 1979) (“Deportation proceedings must conform to traditional standards of fairness encompassed in due process; and accordingly, statements made by an alien used to support deportation must be voluntarily made.”); *In re Toro*, 17 I. & N. Dec. 340, 343 (B.I.A. 1980) (citing, as an example of evidence suppressible on fundamental fairness grounds, involuntary statements, as in *Bong Youn Choy v. INS*, 279 F.2d 642 (9th Cir. 1960)).

429. § 287.3(c). A different provision requires that officials give detained juveniles a specific notice of rights, Form I-770. 8 C.F.R. § 236.3(h) (2010). This provision is intended to ensure that detained juveniles can contact adult relatives. *See In re Maria E-E-M*, A98-428-903, slip op. at 2 (N.Y.C. Immigr. Ct. Sept. 6, 2007), available at <http://bibdaily.com/pdfs/E-E-M-%20IJ%20Romig%209-6-07.pdf>. At least one immigration judge has terminated a removal proceeding for noncompliance with this regulation. *See id.*

430. § 287.3(c).

431. *In re Garcia-Flores*, 17 I. & N. Dec. 325, 327 n.3 (B.I.A. 1980).

432. *In re Perez*, No. A95 748 837, slip op. at 15 (L.A. Immigr. Ct. Feb. 10, 2009), available at <http://www.aclu-sc.org/downloads/8/994425.pdf> (“[B]ased on the language of the regulation, the Court finds a reasonable interpretation to be that unless an alien is subject to expedited removal . . . , any alien who is arrested without a warrant is entitled to the requisite advisals prior to being interrogated.”).

has refused to extend *Miranda*-like protections outside of the context of criminal proceedings.<sup>433</sup> Still, should immigration judges find that the regulation requires pre-interrogation warnings after a warrantless arrest, the provision would be fertile ground for suppression cases. Many home raids involve de facto arrests followed by in-home interrogations producing admissions of alienage.<sup>434</sup> In such a case, a failure to give warnings clearly harms the noncitizen's right to remain silent and seek the advice of counsel; this may readily prejudice the outcome of a proceeding in which the government's burden is to prove alienage.<sup>435</sup>

Indeed, in many home raids, officers obtain prejudicial statements (and occasionally physical evidence such as passports) only through a series of regulatory violations—warrantless entry, interrogation, searches—each of which may be a but-for cause of the evidence of alienage and thus prejudicial to the rights of the noncitizen.<sup>436</sup> The government violates regulations when it enters a home without consent or a warrant, when it rounds up residents through threats and intimidation, when it uses unreasonable force (for example drawing weapons or shoving) against compliant and unarmed people suspected of no crime, and when it questions them in an intimidating and coercive manner.<sup>437</sup> Homeland Security officials are not above the law; they must be held to strict compliance with their agency's regulations, particularly those implicating constitutional rights. There are few rights more important or more basic than the right to be left alone in one's home, the right to be free from coercive interrogation, and the right to be free from arbitrary detention. Under *In re Garcia-Flores*, noncitizens have strong claims to safeguard those rights.

#### CONCLUSION

This Article aims to help advocates show that home raids rise beyond mere illegality—that they often reflect egregious constitutional violations. Its central approach to the question of egregiousness, emphasizing the historical interpretation of the Fourth Amendment, could be termed a legalistic one, rooted in constitutional text and tradition; this is intended to supplement, not replace, litigation strategies emphasizing the lived

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433. See *Lopez-Mendoza*, 468 U.S. at 1039 (citing cases holding that pre-interrogation warnings are not required for those detained on suspicion of immigration violations).

434. See *supra* Part I.A.

435. See, e.g., *Murphy v. INS*, 54 F.3d 605, 608–10 (9th Cir. 1995) (discussing the government's burden of proof in removal proceedings).

436. See *supra* Part I.A. (citing examples of warrantless entries, searches, arrests and interrogation).

437. See, e.g., *supra* notes 47–49.

experiences of raid victims. While this Article seeks to help readers convince a tribunal of the offensiveness of a particular home invasion, I would like to close with a few words about the significance of suppression cases and Fugitive Operations in the evolving law of immigrant rights.

Suppression cases may not be cost-effective. They are pointless in many instances, as where the government can produce independent evidence of alienage.<sup>438</sup> They are difficult to litigate, often prompting hostility from immigration judges.<sup>439</sup> Noncitizens who succeed in suppressing evidence and terminating proceedings may nevertheless be ineligible to obtain a lawful immigration status.<sup>440</sup> Advocates must, of course, help their clients come to an informed decision as to whether a suppression motion is worth the effort, in relation to other claims for relief.

Immigrant rights organizations must make their own conclusions in assigning resources, and bottom-line cost effectiveness—the number of clients they can help with the staff available—must be a major criterion. It is not the only one, though. Home raid litigation can vindicate the civil rights of immigrants in ways that reach beyond the courtroom. Suppression cases and related litigation can expose abuses otherwise ignored by the mainstream English-language press.<sup>441</sup> They can help bring oft-overlooked civil rights concerns to the attention of the political branches.<sup>442</sup>

Home raids are lawless for a reason: the condition of “illegality” pushes immigrants to the margins of American life, and presenting home raids in constitutional terms can emphasize immigrants’ humanity. While the Warrant Clause enshrines a vision of privacy rights rooted in a particular culture and a different era,<sup>443</sup> the popular and official response to home raids shows that those rights resonate deeply today<sup>444</sup>—that they carry profound meaning for Americans across the political spectrum.

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438. See CARDOZO IMMIGRATION JUSTICE CLINIC, *supra* note 11, at 24–25; Baldini-Potermin et al., *supra* note 24, at 423 (noting that motions to suppress would be ineffective where the respondent had prior negative history before the immigration courts). *But see In re R-C- & J-C-*, slip op. at 16–17 (N.Y.C. Immigr. Ct., May 12, 2010) (suppressing evidence from one of respondent’s prior immigration applications as “fruit of the poisonous tree,” where agents had located the evidence only after egregious violations of respondent’s constitutional rights).

439. Baldini-Potermin et al., *supra* note 24, at 425.

440. *Id.* at 423.

441. See, e.g., Bernstein, *supra* note 53 (reporting an immigration judge’s ruling that a Staten Island home raid included egregious constitutional violations); Thomas MacMillan, *ICE Cases Melt Away*, NEW HAVEN INDEP., June 8, 2009, [http://newhaven-independent.org/archives/2009/06/judge\\_ice\\_viola.php](http://newhaven-independent.org/archives/2009/06/judge_ice_viola.php).

442. See, e.g., *supra* note 14 (comments of public officials on civil rights violations in home raids).

443. See *supra* Part II.B.3.b.

444. See *supra* note 14.