Of *Katz* and "Aliens": Privacy Expectations and the Immigration Raids

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This Article examines privacy rights for noncitizens in the context of the recent immigration raids in peoples' homes and the workplace. The Immigration and Customs Enforcement Office is conducting these raids with general or defective warrants and executes them in a discriminating dragnet-style, mostly against Latinos. The Fourth Amendment, however, provides little protection to immigrants and their families. This Article explores how law's construction of immigrants' illegality interplays with Fourth Amendment doctrines of consent, reasonable expectation of privacy, pretextual stops, and administrative searches to deny immigrants privacy's protection. In addition, the Article explores the spread of immigration databases and the proliferation of federal and local regulation of spaces occupied by immigrants within the border to examine the legal justifications for these generalized and defective warrants. The Article concludes by urging courts to reconsider reliance on immigrants' unlawful presence in the U.S. to excuse law enforcement abuses and offers several legal and policy reasons in favor of privacy protection for noncitizens.

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INTRODUCTION

Immigrants and their families across the United States live in fear as Immigration and Customs Enforcement ("ICE") agents raid their neighborhoods, shopping centers, worksites, and homes in a nationwide hunt targeting millions of undocumented persons.[1] In the last two years, during which raids have intensified, ICE has rounded up tens of thousands of persons, detained them, charged hundreds with immigration crimes, and returned most to their countries of origin.[2] These raids wreak havoc on families and communities as children are left without parents and communities without workers.[3]

These raids are taking place when the United States as a nation is fiercely divided on how to address the presence and future flow of millions of unauthorized immigrants.[4] Because the raids seek to enforce U.S. immigration laws against persons who broke the law through unauthorized entry or overdue stays into the United States, some see the raids as neither illegal nor immoral. Especially to persons who view undocumented immigration as the cause of U.S. economic and social ills, ICE is finally doing its job of repairing the consequences of a porous border, including loss of jobs, increased crime, and the rising costs of public spending.[5]

The counterstory to anti-immigrant sentiment is vastly different and challenges the legality and morality of U.S. immigration policy. The thorny history of the United States-Mexico border reconfiguration at the turn of the century and noncompliance with the Treaty of

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[1] The Associated Press, *High Profile Raids Leave Immigrants Across U.S. Living in Fear*, INT'L HERALD TRIB., Feb. 20, 2007, *available at* http://www.iht.com/articles/ap/2007/02/21/america/NA-GEN-US-Immigration-Raids-Fear.php.

[2] *See infra* Part I.

[3] *See infra* Part II.

[4] A December 2006 Washington Post-ABC News Poll reveals that 29% of respondents called immigration bad and the same number called it good. About 39% said it makes no difference. Anthony Faiola, *Looking the Other Way on Immigrants: Some Cities Buck Federal Policies*, WASH. POST, Apr. 10, 2007, at A1.

[5] *See, e.g.*, Steven A. Camarota, Ctr. for Immigration Studies, *Use Enforcement to Ease Situation* (Oct. 23, 2005), http://www.thinkaz.org/documents/Useenforcementtoeasesituation_000.pdf (urging DHS to adopt policy of immigration attrition through enforcement, that is, forcing immigrants out by making United States less hospitable). *See generally* Center for Immigration Studies, Illegal Immigration, http://www.cis.org/topics/illegalimmigration.html (last visited Dec. 19, 2007) (containing links to several articles discussing social ills created by undocumented migration).

Guadalupe-Hidalgo is part of this narrative.[6] Further, an explanation of mass migration, particularly from Latin America into the United States, rooted in U.S. foreign and economic policies with sending nations, shifts the lens away from the individual agency of the immigrant toward a more complex story of responsibility of U.S. multinationals and employers who cause and profit from mass migration.[7] The complicit factors of under-enforced immigration law and economic gain to U.S. employers and consumers have allowed the creation of immigrant communities, which are now at stake.[8] The human rights angle of the story thus emphasizes the stakes of family, property, and community.

The prominence of the immigration issue in public discourse in 2007 forced Congress to seriously consider comprehensive immigration reform.[9] Ultimately, Congress did not act. Consequently, undocumented immigrants' hope of a path to legalization probably will have to wait until after the 2008 presidential election.[10] In the meantime, immigration raids have intensified and become a political battleground for anti-immigrant sentiment. Since 2002, the Department of Homeland Security ("DHS") has made inside-the-border enforcement of immigration a priority, particularly targeting undocumented workers, incarcerated immigrants, suspected gang members, and persons with a final order of removal.[11]

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[6] *See* RICHARD GRISWOLD DEL CASTILLO, THE TREATY OF GUADALUPE-HIDALGO: A LEGACY OF CONFLICT 173 (1990).

[7] Consider agriculture, for example. The United States' annual farm subsidies, combined with free trade agreements with most Latin American nations and a cheap supply of foreign agricultural workers on U.S. farms, have slowed down farm production in Latin America, displaced farmers from their homes and into the United States, and increased produce importation and profits for U.S. farmers. *See, e.g.*, Bert R. Pena & Amy Henderson, *U.S.-Mexico Agricultural Trade and Investment After NAFTA*, 1 U.S.-MEX. L.J. 259, 275 (1993); Calvin Terbeek, Comment, *Love in the Time of Free Trade: NAFTA's Economic Effects Ten Years Later*, 12 TUL. J. INT'L & COMP. L. 487, 504-07 (2004).

[8] *See generally* BILL ONG HING, DEPORTING OUR SOULS: VALUES, MORALITY, AND IMMIGRATION POLICY 8-51 (2006).

[9] Robert Pear & Jim Rutenberg, *Senators in Bipartisan Deal on Immigration Bill*, N.Y. TIMES, May 18, 2007, at A1; *Comprehensive Immigration Reform Bill Introduced in U.S. House of Representatives,* STAYING AHEAD WITH SAUL EWING: IMMIGR. REFORM BILL BULL. 1 (Saul Ewing LLP, Del., Md., N.J., Pa., D.C.), Mar. 2007, at 1-2, *available at* http://www.saul.com/common/publications/pdf_1263.pdf.

[10] Gail Russell Chaddock & Faye Bowers, *Immigration Bill Stalls Amid Calls for* '*Enforcement First*,' CHRISTIAN SCI. MONITOR, June 29, 2007, at 1.

[11] *See infra* Part II.

In this battle, not unlike the "war on drugs," which disproportionately targeted blacks,[12] a casualty has been noncitizens' Fourth Amendment rights. In the 1970s, the U.S. Supreme Court declared that the Fourth Amendment applied to immigration enforcement, even if with increased tolerance for racial profiling.[13] However, as discussed in this Article, through a subsequent series of sweeping decisions, the Fourth Amendment has become moribund, barely able to grant any privacy protections to noncitizens, particularly in the realm of immigration enforcement.

One significant explanation for this Fourth Amendment exceptionalism is the Court's early treatment of immigration as a matter of civil as opposed to criminal enforcement.[14] The characterization of immigration enforcement as administrative has colored the evolution of Fourth Amendment doctrine. In particular, by characterizing removal proceedings as nonpenal, the Court has, since 1984, precluded the Fourth Amendment's exclusionary remedy, except within the narrow "egregious violations" exception.[15] Moreover, the application of the consent doctrine in immigration enforcement under the most coercive circumstances increasingly defies the fictional premise that reasonable people feel free to walk away from law enforcement encounters. In immigration encounters, Fourth Amendment doctrine assumes the reasonable person is free to refuse questions of immigration agents at immigration checkpoints.[16] That same assumption applies during unannounced workplace raids conducted by dozens of armed immigration agents, some of whom question workers while others guard the exits;[17] or even during the execution of administrative warrants in a person's home while she is handcuffed for more than two hours.[18] The resulting picture is that

[12] *See* Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 406 (2007); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1301 (2004); David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237, 239.

[13] *See* United States v. Martinez-Fuerte, 428 U.S. 543, 545 (1976); United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975).

[14] *See* Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1894 (2000).

[15] INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984); Joseph J. Migas, *Exclusionary Remedy Available in Civil Deportation Proceedings for Egregious Fourth Amendment Violations*, 9 GEO. IMMIGR. L.J. 207, 209 (1995).

[16] *Martinez-Fuerte*, 428 U.S. at 558.

[17] INS v. Delgado, 466 U.S. 210, 218 (1984).

[18] Muehler v. Mean, 544 U.S. 93, 100-01 (2005).

when immigration agents target immigrants inside the border, the Fourth Amendment offers little protection. Immigrants are unprotected either because the exclusionary rule has no application in removal proceedings, or even when the exclusionary rule applies, as in criminal proceedings, most of those encounters are deemed nonseizures and nonsearches.

But what if this "reasonable" noncitizen learns to walk away from the immigration agent and refuses to answer his questions? This is a likely scenario because immigrant rights groups advise their clients to maintain a code of silence when they encounter "la migra."[19] Would immigrants then have a privacy expectation to refuse questions and even to walk away from ICE? Unfortunately, the answer appears to be no. Except in very limited circumstances, ICE is conducting this latest wave of raids with easy access to civil warrants in a way that expands the scope of its law enforcement power, compelling mandatory compliance.

Today, DHS's regulatory arm reaches into employer hiring practices,[20] university requirements for foreign students,[21] the government's distribution of public benefits,[22] and driver's licenses,[23] among other areas. In turn, this preoccupation has caused the proliferation of databases that, in most cases, grant ICE easy access to information about a person's immigration status as a worker,[24] student, [25] or driver.[26] With easy access to such information in these

[19] *See* Anna Gorman, *Immigrants Advised About Their Rights*, L.A. TIMES, Mar. 4, 2007, at B1.

[20] *See infra* Part I.A.

[21] *See* Michael A. Olivas, *IIRIRA, The Dream Act, and Undocumented College Student Residency*, 25 IMMIGR. & NAT'LITY L. REV. 323, 325 (2004) (discussing immigration laws' regulation of foreign students); Ty S. Wahab Twibell, *The Road to Internment Special Registration and Other Human Rights Violations of Arabs and Muslims in the United States*, 29 VT. L. REV. 407, 445, 455-56, 461-64 (2005).

[22] Richard A. Boswell, *Restrictions on Non-Citizens' Access to Public Benefits: Flawed Premise, Unnecessary Response*, 42 UCLA L. REV. 1475, 1476 (1995); Bill Ong Hing, *Don't Give Me Your Tired, Your Poor: Conflicted Immigrant Stories and Welfare Reform*, 33 HARV. C.R.-C.L. L. REV. 159, 159 (1998).

[23] Raquel Aldana & Sylvia Lazos, *"Aliens" in Our Midst Post-9/11: Legislating Outsiderness Within the Borders*, 38 UC DAVIS L. REV. 1683, 1711-22 (2005).

[24] *See infra* Part I.A.

[25] Victor C. Romero, *Noncitizen Students and Immigration Policy Post-9/11*, 17 GEO. IMMIGR. L.J. 357, 361 (2003) (describing adoption and implementation of Student and Exchange Visitor Information Service (SEVIS) database, which tracks foreign student compliance with visa conditions).

[26] *See* Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 180, 189 (2005)

databases, ICE can arm itself with civil warrants even where there is no particularized probable cause, to conduct raids in private or quasi-private spaces without having to seek the information directly from immigrants themselves. These warrants name no suspects. Rather, they are issued precisely to allow ICE to identify and arrest persons for removal or to charge them for criminal immigration violations. Indeed, ICE agents have employed this strategy in the latest wave of workplace raids.[27]

Moreover, ICE has easy access to more than 600,000 civil warrants to enforce against persons with prior removal orders who are labeled absconders or fugitives and who appear in their outdated databases.[28] While such "absconder warrants" target a particular suspect, their execution is no different than the indiscriminate targeting of immigrants that occurs in workplace raids. For example, despite the fact that the target often no longer lives at the address that appears in the database, no oversight occurs to protect third parties from privacy invasions. Not surprisingly then, ICE strategically enforces these warrants in people's homes to arrest as many persons who may be in the country without authorization, often relying on racial profiling and intimidating tactics in the process.[29]

In addition, inside-the-border enforcement is now occurring with the collaboration of local law enforcement, not only in places such as prisons, but also in routine traffic enforcement and other policing.[30] More disturbing, however, is the proliferation of local anti-immigrant ordinances that make it illegal for undocumented immigrants to loiter in public spaces, occupy housing, procure employment, or conduct business transactions.[31] These ordinances could also expand the

(describing that immigration violations, including persons holding expired visas and persons who did not comply with removal orders, are now listed in National Crime Information Center ("NCIC") database, which is available to squad cars enforcing traffic laws).

[27] *See infra* Part I.A.

[28] *See infra* Part I.B.

[29] *Id.*

[30] Kobach, *supra* note 26, at 197-99; *see also* Michael Hethmon, *The Chimera and the Cop: Local Enforcement of Federal Immigration Law*, 8 D.C. L. REV. 83, 89 (2004); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1085 (2004). *But see* Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1463-80 (2006) (discussing local sanctuary policies that protect immigrants seeking police assistance from federal immigration enforcement); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1381-84 (2006).

[31] *See* Raquel Aldana, *On Rights, Federal Citizenship, and the "Alien*," 46 WASHBURN

administrative policing arm of local law enforcement against noncitizens not just in public, but also into quasi-private spaces, such as workplaces, and even into private spaces, such as homes. Further, these ordinances may encourage the proliferation of databases and database information sharing to assist law enforcement in identifying immigration violations for reporting them to ICE. Subsequently, like the use of housing and zoning ordinances to police the poor,[32] the traditionally private spaces that persons occupy would become so heavily regulated by immigration restrictions that local police, like ICE, might be able to easily obtain civil warrants to arrest immigrants in the workplace, businesses, or universities, or even in private homes without probable cause.[33]

These civil immigration warrants are neither very different from nor less offensive to liberty values than the general warrants that originally inspired the Fourth Amendment. The infamous general search warrants in early U.S. history were issued by executives and legislators, without judicial intervention, with neither a probable cause requirement or oath, nor a description of the particular places to be searched and persons or things to be seized.[34] Today, immigration laws and codes authorize the compelled collection of information on ever-expanding databases over which persons retain no expectation of privacy and that become the basis for the issuance of warrants. Moreover, the *Camara*[35] legacy of balancing government regulatory powers against individual liberty interests[36] has validated the use of indiscriminate warrants to conduct immigration raids for decades.[37]

L.J. 263, 284 (2007); Michael J. Almonte, Note, *State and Local Law Enforcement Response to Undocumented Immigrants: Can We Make Rules Too?*, 72 BROOK. L. REV. 655, 671-78 (2007).

[32] *See* Robert C. Ellickson, *Controlling Chronic Misconduct in City Space: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1202-19 (1996) (surveying efforts to control homeless in public spaces); Nicole Stelle Garnett, *Relocating Disorder*, 91 VA. L. REV. 1075, 1088-98 (2005); Lorne Sossin, *The Criminalization and Administration of the Homeless: Notes on the Possibilities and Limits of Bureaucratic Engagement*, 22 N.Y.U. REV. L. & SOC. CHANGE 623, 640-46 (1996).

[33] *See infra* Part I.C.

[34] Geoffrey G. Hemphill, *The Administrative Search Doctrine: Isn't This Exactly What the Framers Were Trying to Avoid?*, 5 REGENT U. L. REV. 215, 218-20 (1995).

[35] Camara v. S.F. Mun. Court, 387 U.S. 523, 536 (1967).

[36] *See* Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 392 (1988).

[37] Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson, 799 F.2d 547, 553 (9th Cir. 1986) (agreeing with D.C. Circuit that immigrant workplace warrants require only reasonable belief unauthorized workers may be present and not that each be particularly named); Blackie's House of Beef, Inc. v. Castillo, 659 F.2d 1211, 1213

The principle mischief of the Fourth Amendment balancing doctrine is that it has redefined the probable cause requirement as one of a flexible inquiry of reasonableness, rather than requiring probable cause to fulfill the prerequisite of reasonableness.[38] Judicial preapproval becomes a mere procedural formality when warrants do not require particularized suspicion based on probable cause.

In the immigration context particularly, the Fourth Amendment scale has tilted heavily in favor of the state. The trend toward eliminating noncitizens' expectations of privacy in the spaces they occupy inside the border cannot be detached from the ongoing war against undocumented migration. Local governments' interests in protecting the economy or the federal government's interest in controlling immigration or national security weigh heavily against the privacy interests of undocumented immigrants to hide their "illegality." Increasingly, local and federal laws have sought to make the mere presence of undocumented immigrants in U.S. spaces illegal, rendering them neither deserving nor reasonably expectant of privacy's protection.[39] Like cars[40] or certain "heavily regulated" businesses,[41] immigrants have become so regulated that any *Katz*[42] expectation of privacy to occupy spaces in silence without detection becomes unreasonable.

Worse yet, immigrants are treated like drugs or hazardous waste, which is precisely the imagery Justice Sandra Day O'Connor evoked in 1984 in *INS v. Lopez-Mendoza* to deny immigrants the exclusionary rule as a remedy:

> Presumably no one would argue that the exclusionary rule should be invoked to prevent an agency from ordering corrective action at a leaking hazardous waste dump if the evidence underlying the order had been improperly obtained, or to compel police to return contraband explosives or drugs to their owner if the contraband had been unlawfully seized.[43]

(D.C. Cir. 1981) (upholding constitutionality of immigration workplace warrant lacking particularized suspicion).

[38] Sundby, *supra* note 36, at 393-94.

[39] *See infra* Part I.

[40] David A. Harris, *Car Wars: The Fourth Amendment's Death on the Highway*, 66 GEO. WASH. L. REV. 556, 556 (1998).

[41] Hemphill, *supra* note 34, at 233-37; Lynn S. Searle, Note, *The "Administrative" Search from Dewey to Burger: Dismantling the Fourth Amendment*, 16 HASTINGS CONST. L.Q. 261, 273-88 (1989).

[42] Katz v. United States, 389 U.S. 347, 353 (1967).

[43] 468 U.S. 1032, 1046 (1984).

Thus, despite violation of their privacy by the Immigration and Naturalization Service ("INS"), immigrant workers can still be seized and discarded because of their illegality. Paraphrasing Justice Benjamin Cardozo's famous quote, Justice O'Connor concludes: "The constable's blunder may allow the criminal go free . . . but he should not go free within our borders."[44]

The latest example of denying undocumented immigrants all expectation of privacy occurred in February 2007 when the U.S. Department of Justice ("DOJ") announced a plan to collect DNA evidence from all undocumented persons arrested for any reason to include in the DNA database.[45] Before the announcement, DNA evidence had been collected solely from convicted felons,[46] a practice that perpetually erases any privacy expectations. Congress authorized this ample expansion of power in a largely unnoticed amendment[47] to the January 2006 renewal of the Violence Against Women Act,[48] purportedly to protect victims of sexual crimes.[49] The FBI anticipates that this new law would mean an increase of as many as 250,000 to one million new DNA samples per year.[50]

In this Article, I analyze the privacy implications of ICE's recent workplace and home raids. I also examine the further erosion of privacy expectations for noncitizens through the local regulation of the spaces they occupy in this country. I focus specifically on the town of Hazleton's anti-immigrant ordinances restricting housing for undocumented immigrants.[51] On July 26, 2007, U.S. Federal District Court Judge James Munley of Pennsylvania struck down Hazleton's ordinances based on due process concerns and federal preemption in immigration matters.[52] This ruling will halt, at least temporarily, Hazleton's implementation of the ordinances and may stall hundreds of other towns from implementing similar measures.[53] However,

[44] *Id.* at 1047.

[45] Julia Preston, *U.S. Set to Begin a Vast Expansion of DNA Sampling*, N.Y. TIMES, Feb. 5, 2007, at A1.

[46] *Id.*

[47] *Id.*

[48] Violence Against Women and Department of Justice Reauthorization Act of 2005 §§ 1003-1004, Pub. L. No. 109-162, 119 Stat. 2960, 3085-86 (codified at 18 U.S.C. § 3142 (2000 & Supp. V 2005); 42 U.S.C. § 1435(a) (2000)).

[49] Preston, *supra* note 45.

[50] *Id.*

[51] *See infra* Part I.C.

[52] Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 554 (M.D. Pa. 2007).

[53] Peter Elstrom, *Small-Town Quarrel, Big Implications*, BUS. WK., July 26, 2007, *available at* http://www.businessweek.com/bwdaily/dnflash/content/jul2007/

Hazleton's mayor, Louis Barletta, vowed to appeal the case all the way to the U.S. Supreme Court, if necessary.[54] This issue, then, is not disappearing anytime soon, and its privacy implications remain relevant.

Through these case studies, I reveal the trend to construct a *Katz* doctrine that excludes or undermines the expectation of privacy of noncitizens in a bounded construction of nationality to the detriment of the Fourth Amendment. In this construct, law enforcement abuses of power are tolerated, ignored, or worse yet, rationalized through law, on the faulty premise that "privacy" should not allow "illegality" to hide. The origins of the Fourth Amendment, however, dictate otherwise. The King of England's aim for general warrants was to find and arrest those who refused to pay legally mandated taxes.[55] Trumping the legitimacy of the King's laws, and today, immigration laws, the Fourth Amendment's purpose has always been to limit the state's abuses of privacy.

Immigration raid abuses include the issuance of civil warrants that are not substantiated on particularized probable cause. Instead, the warrants are often issued based on flawed information contained in databases whose information was never intended to have a law enforcement purpose.[56] These abuses also include the dragnet-like and intimidating execution of warrants in people's homes and in the workplace with devastating effects on families and communities.[57] Still more abuses include the racially charged nature that has always characterized immigration law enforcement.[58] Yet, courts have mostly turned a blind eye to these abuses by pretending that removal is not punishment, ignoring the fact that raids carry criminal consequences for many, or, worse yet, allowing the "illegality" of those arrested to justify law enforcement's wrongdoing.

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db20070726_264512.htm.

[54] *Id.*

[55] Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977, 981-82; *see also* Scott E. Sundby, *Protecting the Citizen "Whilst He Is Quiet": Suspicionless Searches, "Special Needs" and General* Warrants, 74 MISS. L.J. 501, 506-08 (2004) (noting that colonies had their own form of general warrants through writs of assistance authorizing customs officials to search for untaxed imported goods).

[56] *See infra* Part I.

[57] *See infra* Part I.

[58] Kevin R. Johnson, *Race Profiling in Immigration Enforcement*, 28 HUM. RTS. 23, 23 (2001).

I. THE RAIDS' MODUS OPERANDI

A. "Operation Wagon Train" and the Swift & Co. Workplace Raids

In December 2006, ICE agents, armed with civil search warrants procured by the DOJ and dressed in riot gear, stormed six Swift & Co. meatpacking plants in various cities to carry out Operation Wagon Train.[59] According to ICE, an investigation lasting ten months uncovered substantial evidence of Swift workers using stolen identities of U.S. citizens, namely their Social Security numbers ("SSNs") and dates of birth.[60] The investigation began when former Swift workers, who had been arrested for other violations, admitted to using other people's SSNs to procure employment at Swift & Co.[61] Tips also came from anonymous calls to ICE and by local police referrals.[62]

The civil warrants allowed ICE agents to search for and apprehend any undocumented worker encountered during those raids.[63] In order to identify those workers not authorized to work, ICE conducted on-site interviews of all employees, including legal residents and U.S. citizens.[64] ICE claims it did not prevent any workers from leaving the area during the interviews. Moreover, ICE claims that its agents did not frisk employees and limited interview questions to ascertaining the worker's immigration status, allowing them to make calls to family members if they needed to go home to verify their work eligibility.[65]

The workers, however, tell a much different story. At one plant, for example, workers describe that early in the morning several buses arrived with dozens of heavily armed federal agents accompanied by

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[59] Press Release, Dep't of Homeland Security, Remarks by Secretary of Homeland Security Michael Chertoff, Immigration and Customs Enforcement Assistant Secretary Julie Myers, and Federal Trade Commission Chairman Deborah Platt Majoras at a Press Conference on Operation Wagon Train (Dec. 13, 2006), *available at* http://www.dhs.gov/xnews/releases/pr_1166047951514.shtm [hereinafter DHS Press Release]; *see also* Nicole Gaouette, *Six Meat Plants Are Raided in Massive I.D. Theft Case; Swift & Co. Workers Are Accused of Immigration Violations and Using Stolen Social Security Numbers*, L.A. TIMES, Dec. 13, 2006, at A18.

[60] DHS Press Release, *supra* note 59.

[61] *Id.* at 3.

[62] *Id.*

[63] On December 8, 2006, ICE "applied for and was granted a civil administrative warrant by U.S. District Court Judge Figa." Respondent's Memorandum of Law in Response to the Order to Show Cause at 2, Yarrito v. Myers, No. 06-CV-2494-JLK-MJW (D. Colo. Dec. 18, 2006), *available at* http://www.ailf.org/lac/clearinghouse_122106_Dresponse.pdf [hereinafter Respondent's Memorandum of Law].

[64] *Id.* at 3-4.

[65] *Id.*

local police dressed in riot gear. While some ICE agents blocked all the entrances and exits and surrounded the factory, others entered the factory and gathered the entire workforce.[66] Some workers who tried to run were wrestled to the ground.[67] Some workers even assert that ICE agents responded with chemical sprays to subdue workers who did not understand the agents' commands.[68]

As a result of the raids, ICE arrested 1,282 workers on immigration violations and some existing criminal warrants.[69] Most workers arrested were placed in immigration removal proceedings. About 240 workers were charged criminally, mostly for the use of false or stolen SSNs.[70] The Swift & Co. raids are the largest worksite raid to date, with the largest before that executed in April 2006 against a company called IFCO Systems North America, during which 1,187 workers were arrested.[71] As of July 2007, targeted arrests of Swift employees have continued, whether documented or undocumented, based on allegations of document fraud or harboring of undocumented workers.[72]

Immigration worksite raids have occurred for decades.[73] In the past, complaints by government, employers, and civil rights groups of economic disruption and violations of civil liberties had convinced immigration officials to shift their efforts to immigration enforcement near the border and at checkpoints.[74] Recently, however, the landscape for worksite immigration enforcement has changed. In 2006, DHS Secretary Michael Chertoff made worksite enforcement a priority, announcing in April 2006 a nationwide immigration

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[66] Marc Cooper, *Lockdown in Greeley*, NATION, Feb. 26, 2007, at 11.

[67] *Id.*

[68] *Id.*

[69] DHS Press Release, *supra* note 59.

[70] Cooper, *supra* note 66, at 11; *see also* Julia Preston, *Illegal Worker, Troubled Citizen and Stolen Name*, N.Y. TIMES, Mar. 22, 2007, at A1 (reporting 148 workers were charged with identity theft).

[71] DHS Press Release, *supra* note 59.

[72] Jean Hopfensperger, *2 Illegal Immigrants Seized at Swift's Worthington Plant: Federal Officials Arrested 15 Other People at Swift & Co. Meatpacking Plans around the Country as Part of an Investigation into Identity Theft*, STAR TRIB. (Minneapolis-St. Paul), July 12, 2007, at 4B.

[73] Note, *Reexamining the Constitutionality of INS Workplace Raids After the Immigration Reform and Control Act of 1986*, 100 HARV. L. REV. 1979, 1979 (1987); *see also* Alfredo Mirandé, *Is There a "Mexican Exception" to the Fourth Amendment*?, 55 FLA. L. REV. 365, 370-72 (2003) (documenting case law involving workplace raids in 1970s).

[74] *See* Gaouette, *supra* note 59.

enforcement strategy that would aggressively target employers who knowingly or recklessly hire undocumented workers.[75]

ICE's new worksite enforcement strategy, begun in eleven major U.S. cities, adopts a comprehensive approach focusing on how undocumented workers enter the country and obtain identity documents, as well as targeting employers who knowingly hire such workers.[76] As a result of this strategy, the number of persons arrested in the workplace for being unable to prove legal immigration status jumped nearly tenfold since 2002 to 4,385 in fiscal year 2006.[77]

In addition, an increasing number of persons arrested during workplace raids are criminally prosecuted and face felony criminal charges with a real threat of jail time for violating immigration or other U.S. laws principally related to identity theft. In 2006, for example, that number was 716 of the total arrests (sixteen percent), up from only twenty-five in 2002 (five percent).[78] In fact, ICE today is effectively, even if deceivingly,[79] appealing to identity theft concerns, as well as to the image of foreigners as potential terrorists. This appeal increases the level of tolerance for civil rights erosions, especially of

[75] DHS requested $41 million in funds and 200 more ICE agents for fiscal year 2007 to implement a worksite enforcement strategy. Jerry Seper, *Agents Raid Job Sites for Illegals*, WASH. TIMES, Dec. 13, 2006, at A3.

[76] DHS Press Release, *supra* note 59.

[77] The following table illustrates the number of arrests arising from ICE raids in worksite enforcement investigations. U.S. Immigration and Customs Enforcement, Fact Sheets: Worksite Enforcement (Oct. 15, 2007), http://www.ice.gov/pi/news/factsheets/worksite.htm.

Fiscal Year	Criminal Arrests	Administrative Arrests
2002	25	485
2003	72	445
2004	160	685
2005	176	1,116
2006	716	3,667
2007	863	4,077

[78] DHS Press Release, *supra* note 59.

[79] Chertoff mischaracterizes the undocumented workers' use of fake SSNs or even real ones (often inadvertently) because workers are not, for example, running up someone else's credit card bill or pushing someone into financial ruin. Rather, as Mark Grey, director of the Iowa Center for Immigrant Leadership and Integration, describes, these workers are embroiled in "an elaborate choreography among the employers who need the immigrant workers, the immigrants who want these jobs, the communities who need them, the cattlemen who depend on them and the government whose basic motto has been: Don't ask, don't tell." Cooper, *supra* note 66, at 12.

privacy interests. Consider, for example, Chertoff's remarks in defense of worksite raids:

> [Document fraud] is a serious problem not only with respect to illegal immigration, but with respect to national security. And that's precisely the point made by the 9/11 Commission a couple of years ago, because illegal documents are not only used by illegal migrants, but they are used by terrorists who want to get on airplanes, or criminals who want to prey on our citizens. And so, as part of this overall strategy of worksite enforcement, we've gotten very focused on the question of those who exploit illegal documents and identity theft in order to pursue illegal acts. So yesterday's enforcement action [in the Swift Co. raids] demonstrates another step in this work site enforcement strategy. A tough stance against worksites that employ illegal aliens and against individuals and organizations that commit or facilitate identity theft or fraud.[80]

These workplace immigration raids are representative of Fourth Amendment exceptionalism for immigrant workers in the United States. It is not that the Fourth Amendment has no application in this context, but rather that privacy expectations about immigration status in the workplace have been eroded. Such erosion occurs through statutes authorizing the creation of databases from which ICE has easy access to obtain civil warrants to conduct raids without particularized suspicion. Unions representing some of the workers arrested during the Swift & Co. raids have filed complaints alleging, inter alia, Fourth Amendment violations when ICE arrested a large group of workers without a warrant and without reasonable suspicion.[81] The likely success of the litigation, however, is quite narrow even for workers who may have a remedy in criminal proceedings. Fourth Amendment

[80] DHS Press Release, *supra* note 59.

[81] Original Complaint — Class Action Request for Injunctive and Declaratory Relief and Damages at 8-10, 12-14, United Food & Commercial Workers Int'l Union v. Chertoff, No. 07-00188 (N.D. Tex. Sept. 12, 2007), *available at* http://www.ailf.org/lac/UFood-Complaint.pdf [hereinafter Class Action Request]. In addition, United Food and Commercial Workers Union filed a petition for habeas corpus and complaint for declaratory relief based on ICE's due process violations in conducting the raids. Petition for Writ of Habeas Corpus at 5-6, Yarrito v. Meyers, No. 06-CV-2494 (D. Colo. Dec. 13, 2006), *available at* http://www.ailf.org/lac/clearinghouse_122106_swifthabeas.pdf. That case, however, was closed when the district court judge determined that ICE had sufficiently corrected any constitutional deficiencies. Final Judgment at 1, *Yarrito*, No. 06-CV-2494 (D. Colo. Jan. 25, 2007), *available at* http://www.ailf.org/lac/clearinghouse_122106_yarrito.pdf.

violations will be difficult to establish under current Fourth Amendment doctrine. The threshold for a *Katz* reasonable expectation of privacy in a worker's immigration status is likely quite high in light of the heavily regulated nature of workplace immigration enforcement that allows unregulated databases, compels employer "collaboration," and sanctions general warrants.

1. On IRCA, Databases, and Employer "Collaboration"

With the passage of the Immigration Reform and Control Act of 1986 ("IRCA"),[82] employers are required to have their employees complete a government-issued Employment Eligibility Verification Form ("Form I-9") to establish that the employee is authorized to work in the United States.[83] The employee must complete and sign Form I-9 and present work authorization and identification documents, which employers must examine, copy, and retain for three years after the date of hire or one year after employment ends, whichever comes later.[84] The accepted documents that establish work authorization include a U.S. passport, social security card, or DHS-issued immigration documents such as a permanent residency card or a work authorization card, while identity documents are mostly U.S.-issued and include driver licenses and voter or military identification cards.[85] Employers retain these documents expressly to enforce the immigration restrictions on unauthorized employment against employers and workers in the workplace.[86]

To this end, Congress created the Basic Pilot Employment Verification Project ("Basic Pilot"), an electronic employment eligibility verification program, initially to operate in a few states.[87]

[82] Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, 3359 (1986) (codified as amended at 8 U.S.C. § 1324a (2000 & Supp. V 2005)).

[83] Immigration and Nationality Act (INA) of 1990, § 8 U.S.C. 1324a(b) (2000); 8 C.F.R. § 274a.2 (2000); *see also* NAT'L EMPLOYMENT LAW PROJECT, EMPLOYMENT WORK AUTHORIZATION VERIFICATION: FACT SHEET FOR WORKERS (2002), *available at* http://www.nelp.org/docUploads/pub147%2Epdf [hereinafter Fact Sheet for Workers].

[84] 8 C.F.R. § 274a.2(b)(2).

[85] *Id.* § 274a.2(b)(1)(v)(A)-(B).

[86] *Id.* § 274a.2(b)(4).

[87] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 401(b), Pub. L. No. 104-208, 110 Stat. 3009, 3009-655 to 3009-656. The original states included California, Florida, Illinois, New York, and Texas, and extended in 1999 to cover Nebraska. *"Basic Pilot" Employment Eligibility Verification Program Expanded Nationwide*, IMMIGRANTS' RTS. UPDATE (Nat'l Immigration Law Ctr., L.A., Cal.), Dec. 22, 2004, *available at* http://www.nilc.org/immsemplymnt/ircaempverif/irca060.htm.

Created in 1996, Basic Pilot permits employers to match employee Form I-9s against U.S. Bureau of Citizenship and Immigration Services ("CIS") and Social Security Administration ("SSA") databases for verification.[88] Congress set forth a limited list of employers required to participate in Basic Pilot. This included federal employers and other employers that an administrative law judge has required to participate as part of a cease and desist order issued under 8 U.S.C. § 1324a ("Unlawful Employment of Aliens.")[89] Congress also specifically provided, however, that the government "may not require any person or other entity to participate in a pilot program."[90]

Through Basic Pilot, employers should be able to detect false or made-up SSNs or those whose names and numbers do not match. Both the immigration and SSA databases are notoriously inaccurate, however, and significantly undermine Basic Pilot's utility.[91] In 2002, DHS hired Temple University and Westat to conduct an independent evaluation of Basic Pilot. The team identified several problems and recommended against larger-scale implementation.[92] These problems included CIS's failure to provide timely data; employer misuse of the database to prescreen applicants seeking employment; adverse employer action against workers who receive a tentative nonconfirmation in the first phase of verification; and employer failure to institute appropriate privacy safeguards.[93]

Nevertheless, Congress expanded employer use of Basic Pilot in 2003 to operate in all fifty states, subject to review and monitoring.[94]

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[88] NAT'L IMMIGRATION LAW CTR., BASIC INFORMATION BRIEF: DHS BASIC PILOT PROGRAM 3 (rev. Mar. 2007), *available at* http://www.nilc.org/immsemplymnt/ircaempverif/basicpilot_infobrief_brief_2007-03-21.pdf.

[89] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 402(e).

[90] *Id.* § 402(a).

[91] The SSA itself estimates that 17.8 million of its records contain discrepancies related to name, date of birth, or citizenship status. OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN, CONGRESSIONAL RESPONSE REPORT: ACCURACY OF THE SOCIAL SECURITY ADMINISTRATION'S NUMIDENT FILE, at ii (2006), *available at* http://www.ssa.gov/oig/ADOBEPDF/A-08-06-26100.pdf. The same report also notes that 4.8 million of the approximately 46.5 million noncitizen records contained in the SSA's database contain discrepancies. *Id.* at 11. The GAO also found that over 111,000 alien files were lost. GOV'T ACCOUNTABILITY OFFICE, IMMIGRATION BENEFITS: ADDITIONAL EFFORTS NEEDED TO HELP ENSURE ALIEN FILES ARE LOCATED WHEN NEEDED 4 (2006), *available at* http://www.gao.gov/new.items/d0785.pdf.

[92] TEMPLE UNIV. INST. FOR SURVEY RESEARCH & WESTAT, INS BASIC PILOT EVALUATION SUMMARY REPORT 41 (2002), *available at* http://www.nilc.org/immsemplymnt/ircaempverif/basicpiloteval_westat&temple.pdf.

[93] *Id.* at 41-42.

[94] Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156,

In 2004, DHS submitted a report to Congress to address the concerns outlined in the Temple/Westat report. This report noted that SSA's databases are currently able to automatically verify employment eligibility of less than fifty percent of the work-authorized noncitizens and recommended against expanding Basic Pilot into a large-scale national program until DHS and SSA addressed the databases' inaccuracies.[95] Basic Pilot, moreover, is unable to detect fraud when workers have appropriated another person's valid identification and work authorization documents.[96] Despite these shortcomings, approximately 12,000 employers across the United States today use Basic Pilot.[97]

Meanwhile, in July 2006, DHS instituted a program called ICE Mutual Agreement between Government and Employer ("IMAGE"), a collaborative agreement between government and businesses to reduce the hiring of undocumented workers.[98] For some companies, joining IMAGE, particularly after what happened to Swift & Co., is a way of avoiding ICE raids.[99] Under the program, businesses receive training on and must adhere to a series of "best practices," including using Basic Pilot, arranging for annual Form I-9 external audits, and establishing a procedure for reporting any violations or deficiencies to ICE.[100] Companies in compliance become "IMAGE certified," an industry standard that ICE believes will become common.[101] Companies participating in the program have already yielded results

117 Stat. 1944, 1944.

[95] U.S. CITIZENSHIP & IMMIGRATION SERVS., REPORT TO CONGRESS ON THE BASIC PILOT PROGRAMS 4-5 (2004), *available at* http://www.nilc.org/immsemplymnt/ircaempverif/basicpilot_uscis_rprt_to_congress_2004-06.pdf; *see also* GOV'T ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER EMPLOYER VERIFICATION AND WORKSITE ENFORCEMENT EFFORTS 5-6 (2005), *available at* http://www.gao.gov/new.items/d05813.pdf.

[96] GOV'T ACCOUNTABILITY OFFICE, *supra* note 95, at 6.

[97] NAT'L IMMIGRATION LAW CTR., THE BASIC PILOT PROGRAM: NOT A MAGIC BULLET 1 (rev. ed. Sept. 27, 2007), *available at* http://www.nilc.org/immsemplymnt/ircaempverif/e-verify_nomagicbullet_2007-09-17.pdf.

[98] Stinson, Morrison, Hecker LLP, *A New "IMAGE" for Immigration Compliance* (Aug. 2, 2006), http://www.lawatwork.com/news/2006/08/02/a_new_image_for_immigration_compliance.html.

[99] Darryl Fears & Krissah Williams, *In Exchange for Records, Fewer Immigration Raids: Businesses Skeptical of New Federal Program*, WASH. POST, Jan. 29, 2007, at A03.

[100] *Id.*

[101] Press Release, ICE, DHS Highlights Best Practices for Maintaining Legal Workforces: Unveils new industry partnership to help businesses make good hiring decisions (July 26, 2006), *available at* http://www.ice.gov/pi/news/newsreleases/articles/060726dc.htm.

for ICE. For example, ICE arrested several employees at the Smithfield Packing Company's hog slaughterhouse after the company handed over employee records to ICE in compliance with the IMAGE program.[102]

Additionally, the SSA has been sending so-called No-Match letters, about 130,000 every year,[103] which provide employers with a list of employees whose names or SSNs on their Wage and Tax Statement (Form W-2) do not match SSA records.[104] The SSA's stated purpose for this letter is to correct errors in its database, not to provide employers grounds for firing an employee or reporting him to immigration authorities.[105] However, some employers fire employees or report them to ICE out of fear that not doing so could make them liable for knowingly hiring undocumented workers or subject to IRS fines.[106]

In reality, employers face neither IRS[107] nor IRCA liability when they receive SSA No-Match letters.[108] However, in June 2006, ICE issued proposed rules regarding an employer's legal obligations upon receiving a No-Match letter.[109] The rule would allow ICE to use an employer's failure to act after receipt of these letters as evidence that the employer had "constructive knowledge" of an employee's work ineligibility.[110] Under the proposed rules, an employer must fire a

[102] Fears & Williams, *supra* note 99. As of January 2007, 541 of the 5000 Smithfield employees faced the prospect of job termination or arrest based on document discrepancies detected in their job applications through company audits. *Id.*

[103] N.C. Aizenman, *Bush Moves to Step Up Immigration Enforcement*, WASH. POST, Aug. 11, 2007, at A1.

[104] Fact Sheet for Workers, *supra* note 83.

[105] *See* SOC. SEC. ADMIN., RETIREMENT, SURVIVORS, AND DISABILITY INSURANCE: REQUEST FOR EMPLOYER INFORMATION 1 (2004), *available at* http://policy.ssa.gov/poms.nsf/lnx/0101199028?opendocument; *see also* SOC. SEC. ADMIN., SOCIAL SECURITY NUMBER VERIFICATION SERVICE HANDBOOK 19 (rev. ed. 2007), *available at* http://www.ssa.gov/employer/ssnvs_handbk.htm.

[106] *See* Lee Sustar, *Feds Greenlight Firing of Immigrant Workers: Bosses Take Aim at the Undocumented*, COUNTER-PUNCH, Sept. 15, 2006, http://www.counterpunch.org/sustar09152006.html.

[107] Letter from Thomas B. Dobbins, Dir., P'ship Outreach, IRS, to Michael O'Neill and Connie Davis, Info. Reporting Program Advisory Comm. (Sept. 24, 2003) (on file with author).

[108] NAT'L EMPLOYMENT LAW PROJECT, SSA "NO MATCH" LETTERS: TOP TEN TIPS FOR EMPLOYERS 1-2 (2006), *available at* http://www.nelp.org/docUploads/top_ten_tip2009060final.pdf.

[109] NAT'L IMMIGRATION LAW CTR., SUMMARY OF DHS-PROPOSED RULES: "SAFE HARBOR PROCEDURES FOR EMPLOYERS WHO RECEIVE A NO-MATCH LETTER" 1 (2006), *available at* http://www.nilc.org/immsemplymnt/ssa_related_info/ssanomatch_fedregs_summary.pdf.

[110] *Id.*

worker with a No-Match SSA letter if within ninety days that worker has failed to rectify the mistake.[111] Failure to do so could lead to stiff civil sanctions, $10,000 per violation, or prosecution.[112] On August 10, 2007, Secretary Chertoff and Commerce Secretary Carlos M. Gutierrez in a joint press conference presented a new immigration enforcement plan that includes the new SSA No-Match rule, which took effect in September 2007.[113] This move is very likely to provoke employers to fire even more, or report immediately to ICE, employees identified in SSA No-Match letters.[114]

Through Basic Pilot, IMAGE, and SSA No-Match letters, the federal government has institutionalized significant information sharing between DHS and employers to facilitate immigration laws' workplace enforcement. Essentially, IRCA delegated immigration oversight to private employers.[115]

2. On ICE's Scope of Enforcement Powers

Given the degree of access to a company's employee records that ICE currently enjoys, ICE's use of civil search warrants to raid the meatpacking plants is not surprising.[116] Getting the civil warrants was actually quite easy. Post-IRCA, employers have all the incentive to cooperate with ICE in order to limit their own liability. Swift & Co., for example, participated in Basic Pilot for at least a decade before the

[111] Perkins Coie, *Feds Enforcing Stricter "No Match" Regulations on Employee Work Documents* (Aug. 21, 2007), http://www.perkinscoie.com/news/pubs_detail.aspx?publication=1439&op=updates.

[112] *See id.*

[113] *See id.*

[114] Press Release, Migration Policy Inst., No-Match Letter Could Affect 1.5 Million Workers (Oct. 2007), *available at* http://www.migrationpolicy.org/pubs/BR5_SocialSecurityNoMatch_101007.pdf. On October 10, 2007, U.S. District Court Judge Charles R. Breyer of the Northern District in California issued an injunctive order against the regulation based on its conflict with the 1980 Regulatory Flexibility Act, and because the SSA databases' discrepancies could result in the firing of lawfully employed workers. Order Granting Motion for Preliminary Injunction, Am. Fed'n of Labor, v. Chertoff, No. C 07-04472 CRB, 2007 WL 2972952, at *4-7, 11-13 (N.D. Cal. Oct. 10, 2007).

[115] *See generally* Gillian E. Metzer, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003) (discussing trend to muddle private/public divide when government privatizes public functions).

[116] ICE applied for and was granted a civil administrative search warrant by U.S. District Court Judge Figa to assess the citizenship and immigration status of the Swift employees on December 8, 2006. *See* Respondent's Memorandum of Law, *supra* note 63, at 2.

raids.[117] Moreover, DHS regulations on IRCA enforcement leave employers that are subject to an investigation little room to refuse to cooperate. IRCA expressly authorized DHS access to examine evidence of any person or entity under investigation for immigration violations and to compel such participation by subpoena.[118] Moreover, IRCA mandated DHS to establish investigative procedures to enforce IRCA, even when DHS received complaints from individuals or entities.[119]

In this case, ICE leads regarding possible identify theft by workers employed at Swift & Co. initially came from interviews of former Swift & Co. employees convicted for unrelated crimes.[120] Tips also came from anonymous individuals who, pursuant to the Immigration and Nationality Act,[121] are able to report to ICE when they believe undocumented workers have been employed.[122] Based on these interviews, ICE allegedly discovered at least one "criminal ring" of persons supplying Swift & Co. workers with genuine U.S. birth certificates of individuals from Puerto Rico, as well as Social Security cards.[123]

Not surprisingly, in March 2006, ICE subpoenaed Swift & Co. employee records as part of its investigation into the alleged ring of SSN fraud connected to Swift & Co. workers.[124] Swift & Co. quickly complied with ICE and allowed it to review the Form I-9s.[125] Had Swift & Co. refused, ICE had the statutory authority to seek enforcement of the subpoena through a federal district court order.[126] Failure to comply with an ICE audit request or subpoena would also likely have had even more adverse practical consequences for Swift & Co., including raising ICE's suspicion of potential wrongdoing.

ICE's March 2006 subpoena request was for all Form I-9s and supporting identity documents of all employees working at Swift's plant in Marshalltown, Iowa.[127] In this initial request, Swift & Co.

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[117] Complaint for Declaratory and Injunctive Relief at 1-2, Swift & Co. v. ICE, No. 2-06CV-314-J (N.D. Tex. Nov. 28, 2006), *available at* http://www.ailf.org/lac/clearinghouse_122106_ICEcomplaint.pdf [hereinafter Swift & Co. Complaint].

[118] INA, 8 U.S.C. § 1324a(e)(2)(C) (2000).

[119] *Id.* § 1324a(e)(1) (2000 & Supp. III 2003).

[120] DHS Press Release, *supra* note 59.

[121] § 1324a(e)(1).

[122] DHS Press Release, *supra* note 59.

[123] *Id.*

[124] Swift & Co. Complaint, *supra* note 117, para. 5.

[125] DHS Press Release, *supra* note 59.

[126] INA, 8 U.S.C. § 1324a(e)(2)(B).

[127] Swift & Co. Complaint, *supra* note 117, at 3.

provided 1,300 records, 665 of which ICE retained for further review.[128] In summer 2006, ICE issued similar subpoenas to the company's six other plants across the United States.[129] In addition, Swift & Co. also conducted an internal audit of any suspect document identified by ICE and identified a number of workers who, according to Swift & Co., "appear to have deliberately defeated the Basic Pilot verification program."[130] All of this readily available information permitted ICE to establish grounds for the civil immigration warrants.

Notably, Swift & Co. disagreed with ICE over the planned raids. In their place, Swift & Co. proposed a phased enforcement action that would allow it to identify and incrementally dismiss unauthorized workers from its plants.[131] In fact, Swift & Co. initially responded to the investigation without notifying ICE by interviewing approximately 450 suspect employees at several of its plants and found that ninety to ninety-five percent were ineligible to work.[132] The result was that 400 of these workers were terminated, quit, or did not show up for the scheduled interviews and were fired.[133] Swift & Co. also sought an injunction to stop the raids in late November 2006, arguing that the raids would place an unnecessary financial and operational burden on the company.[134] The federal district court judge denied the relief, however, reasoning that an injunction would "harm the public's interest in quickly catching such criminals, swiftly breaking up any rings which cause or contribute to [identify theft] harm, and minimize continuing damages to innocent citizens."[135]

Swift & Co.'s actions angered ICE because it now had no way of knowing how to find those workers and remove them or criminally charge them. Seizing on such examples, Chertoff faulted ICE's failure to curb more SSN fraud on SSA's inability to refer all instances where the same SSN is used on multiple occasions in multiple workplaces to ICE.[136] As a result, Chertoff is now seeking to have direct access to the SSA database, a move proscribed by statute:[137]

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[128] *Id.*

[129] *Id.*

[130] *Id.* at 4.

[131] *Id.*

[132] Injunctive Order at 7, Swift & Co. v. ICE, No. 2:06CV-314-J (N.D. Tex. Dec. 7, 2006), *available at* http://www.ailf.org/lac/clearinghouse_122106_ctorder.pdf.

[133] *Id.*

[134] Swift & Co. Complaint, *supra* note 117, at 7-8.

[135] Injunctive Order, *supra* note 132, at 9.

[136] DHS Press Release, *supra* note 59.

[137] *See* Privacy Act of 1974, Pub. L. 93-579, 88 Stat 1896, 1897-99 (protecting data

> If we were able to get the legal authority to do this kind of review of information, we could much more readily identify the kind of identity theft and identity fraud that we discovered in this case . . . I call on Congress . . . to take up this issue of revising the Social Security rules so we can further protect Americans from identity theft, and protect our borders against illegal immigration.[138]

Already, there have been several proposals to grant DHS such authority. Senator Wayne Allard, Republican of Colorado, has introduced legislation to authorize the SSA to share No-Match notices with DHS.[139]

3. Of General Warrants and the Swift & Co. Raids

During the Swift & Co. raids, ICE interviewed hundreds of present workers and reviewed each employee's Form I-9 records.[140] These actions were authorized by the warrants.[141] Even prior to IRCA, however, the courts had largely sanctioned similar questioning of workers to ascertain immigration eligibility when immigration agents possessed civil warrants lacking particularized suspicion.[142]

At the end of the raids, ICE found thousands of SSNs that it believed were being misused at Swift & Co. ICE then turned the numbers over to the Federal Trade Commission ("FTC"). The FTC runs the National Security Theft Clearinghouse ("Clearinghouse") and takes in consumer complaints about identity theft that it shares with more than 1,400 law enforcement partners.[143] The FTC ran these numbers through the Clearinghouse and found that some identities were being misused not only to procure employment, but also for credit card

from SSA use in absence of statute or regulation requiring verification of identity of individual).

[138] DHS Press Release, *supra* note 59.

[139] M.E. Sprengelmeyer, *Bill Aims at Data Loophole: Immigration Raids Prompted Allard Proposal*, ROCKY MTN. NEWS, Mar. 1, 2007, at 12.

[140] Respondent's Memorandum of Law, *supra* note 63, at 3-4.

[141] The Associated Press, *36 Arrested in Mishawaka Immigration Raid*, Mar. 7, 2007, *available at* http://www.thetimesonline.com/articles/2007/03/07/updates/breaking_news/doc45eee114b4138808006704.txt.

[142] *See* Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson, 799 F.2d 547, 547 (9th Cir. 1986); Blackie's House of Beef, Inc. v. Castillo, 659 F.2d 1211, 1211 (D.C. Cir. 1981).

[143] DHS Press Release, *supra* note 59.

fraud, student loan fraud, and tax evasion.[144] About the Swift & Co. raids, Chairman Deborah Platt Majoras of the FTC remarked:

> These arrests today demonstrate the power of interagency coordination. They show how enforcers from across the government, working together, can uncover and stop a scheme that harmed hundreds of U.S. citizens who simply were going about their lives.

Despite such rhetoric, fewer than sixty-five of the 1,200 persons arrested, about five percent, during the Swift & Co. raids were actually charged with identity theft.

4. Pretextual Raids

The sixty-five defendants facing criminal charges could challenge their arrests and any evidence seized on the ground that ICE abused its administrative investigative powers for the purpose of conducting law enforcement.[145] Assertions by Chertoff and Customs Enforcement Assistant Secretary Julie Myers of uncovering identity theft during Swift & Co. raids lends strong support for this claim,[146] as does the fact that during the raid, ICE asked the workers specific questions about how they obtained their identifications.[147] In addition, ICE agents denied union representatives access to the workers during the interviews for the stated reason that a criminal investigation was ongoing.[148] Ironically, however, the relatively low yield in criminal prosecutions is likely to preclude a plausible Fourth Amendment argument based on ICE's abuse of its broad immigration investigative authority for criminal law enforcement purposes.

In parallel cases, where the argument has been that the administrative function is only a pretext for criminal law enforcement, motions to suppress have not succeeded.[149] The Court's position is generally to avoid trying to guess the real intent or motivation of law enforcement officers when acting, approving the action as long as

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[144] *Id.*

[145] *See, e.g.*, Michigan v. Tyler, 436 U.S. 499 (1978) (requiring probable cause when government officials sought access to commercial establishment to gather evidence for criminal prosecution).

[146] *See supra* notes 79-80 and accompanying text.

[147] Petition for Writ of Habeas Corpus, *supra* note 81, at 5.

[148] *Id.*

[149] *See, e.g.*, Whren v. United States, 517 U.S. 806, 811 (1996) (stating ulterior motives need not necessarily invalidate police conduct that is otherwise justified by belief that violation of law has occurred).

officers have "objective" Fourth Amendment grounds.[150] Courts are likely to consider *Whren v. United States* controlling in this regard.[151] There, the Court refused to consider whether the true motives of police officers who detained a group of young men for a minor traffic infraction were to investigate them for drug possession.[152] The Court held that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[153]

One important distinction between *Whren* and the Swift & Co. raids, however, is that ICE lacked particularized probable cause to conduct the administrative function. Obtaining warrants to conduct workplace immigration raids, unlike traffic stops, has not required particularized suspicion.[154] In this regard, the raids are doctrinally more comparable to suspicionless vehicular checkpoints where other standards, such as randomness of stops and notice to drivers, rather than probable cause or reasonable suspicion, have satisfied the Fourth Amendment's requirement of reasonableness.[155] However offensive generalized warrants are to privacy, their judicial sanction in the immigration context would preclude a pretextual doctrine claim as long as ICE is conducting the administrative function as permitted by law.

Pretextual claims have been used to successfully challenge vehicle checkpoints, but only when the government's stated primary purpose cannot be justified as administrative. For example, in *City of Indianapolis v. Edmond*,[156] which involved random stops at a checkpoint to investigate drug crimes, police conceded that the checkpoint was primarily for the detection of drugs, which the Court considered primarily a criminal law enforcement purpose.[157] The *Edmond* facts differ from workplace immigration raids, however, given

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[150] *See* Craig M. Bradley, *The Reasonable Policeman: Police Intent in Criminal Procedure*, 76 MISS. L.J. 339, 340 (2006).

[151] *See* 517 U.S. 806.

[152] *Id.* at 818-19.

[153] *Id.* at 813.

[154] Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson, 799 F.2d 547, 553 (9th Cir. 1986) (agreeing with D.C. Circuit that immigrant workplace warrants require only reasonable belief unauthorized workers may be present and not that each be particularly named); Blackie's House of Beef, Inc. v. Castillo, 659 F.2d 1211, 1213 (D.C. Cir. 1981) (upholding constitutionality of immigration workplace warrant lacking particularized suspicion).

[155] *See* Mich. Dep't of Police v. Sitz, 496 U.S. 444, 453 (1990) (upholding sobriety checkpoint where officers stopped vehicles without reasonable suspicion, that is, when police used neutral guidelines for carrying out roadblock and its purpose was to protect public from drunk drivers).

[156] 531 U.S. 32, 32 (2000).

[157] *Id.* at 50-51.

that immigration enforcement is still their principal function, at least in terms of results. In these, the majority of persons arrested are solely being removed, rather than criminally charged, which may make the raids constitutionally permissive. Even after *Edmond*, drug enforcement at immigration or sobriety checkpoints is constitutionally permissive so long as the checkpoints remain primarily for an administrative purpose.[158]

5. Exceeding the Scope of the Warrant Execution or Consent

A narrower challenge is not to the unparticularized warrant itself but to its execution. Specifically, the challenge is that while civil immigration warrants authorize ICE to enter worksite premises to conduct an investigation, they do not authorize it to seize and search the workers to discover their immigration status, much less to question them about possible criminal identity theft charges. In fact, this challenge is the principal basis for the union's Fourth Amendment challenges filed on behalf of Colorado workers ensnared in the Swift & Co. raids.[159]

Indeed, some early federal district court decisions preceding IRCA affirmed that particularized probable cause was not required for immigration workplace warrants, but also held that INS could not execute such warrants to seize large numbers of workers and conduct dragnet-style questioning without reasonable suspicion or probable cause.[160]

These early cases, however, also recognized that Fourth Amendment doctrine offered ICE some flexibility to investigate once inside the premises, including acting within the reasonable scope of the warrant to identify the workers, if any, named in the warrant[161] or to engage in

[158] *See* Susan Lentz & Robert Charis, *Full Speed Ahead:* Illinois v. Lidster *and Suspicionless Vehicle Stops,* CRIM. L. BULL., Mar.-Apr. 2007, at pt. IV.

[159] Class Action Request, *supra* note 81, ¶¶ 33-36; *cf.* Petition for Writ of Habeas Corpus, *supra* note 81, ¶¶ 15-20.

[160] Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson 799 F.2d 547 (9th Cir. 1986) (remanding to modify injunction); Ill. Migrant Council v. Pilliod, 531 F. Supp. 1011, 1019-21 (N.D. Ill. 1982).

[161] Those early warrants named half a dozen or so workers and listed "others" who were believed to be working without authorization. *See* Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson, 643 F. Supp. 884, 889-90 (N.D. Cal. 1986).

consensual encounters with the workers,[162] which could lead to reasonable grounds to detain or arrest.

Unfortunately, the *INS v. Delgado*[163] precedent involving consensual encounters during workplace raids still offers ICE significant flexibility to question the workers and ascertain reasonable suspicion, even if workers refuse to answer questions. The problem with general warrants is precisely their undefined scope; thus, what constitutes its reasonable execution remains vague but is likely to lie somewhere between consensual encounters and indiscriminate seizures. In the early cases involving workplace raids with general warrants, courts drew the line when INS agents specifically targeted Hispanics, or persons who simply looked "foreign," for more than brief questioning, which led to their arrests.[164]

In *Delgado*, the INS moved systematically through a garment factory, asked employees to identify themselves, and asked them one to three questions about their citizenship.[165] During the survey, armed INS agents were stationed near the exits while other agents moved throughout the factory and questioned workers at their work areas.[166] The agents showed badges, had walkie-talkies, and carried arms, though they never drew their weapons.[167] ICE's factual description of the events in the Swift & Co. litigation is intended to suggest consent:

> Swift management then brought approximately 700 people in groups to the beef plant cafeteria . . . *no workers were prevented from leaving the area*. Upon entry into the cafeteria, an announcement was made by ICE (in both English and Spanish) *requesting* that all employees who were born in the United States move to one side of the cafeteria, and the remaining employees were asked to move to a different area . . . ICE agents then conducted interviews, limited to eliciting background information on each Swift employee to determine each employee's nationality and immigration status . . . If certain employees needed immigration documents outside the facility to confirm their lawful status, these employees were allowed to contact family and friends . . . *There were no locked doors, and no*

[162] *See id.* at 891-97. Notably, the California district court in this case rejected the plain view doctrine, as an alternative theory, reasoning the illegality of undocumented workers, unlike contraband, is not immediately apparent. *Id.* at 893.

[163] 466 U.S. 210, 218 (1984).

[164] *Int'l Molders'*, 643 F. Supp. at 893-95; *Pilliod*, 531 F. Supp. at 1020-21.

[165] 466 U.S. at 212.

[166] *Id.*

[167] *Id.*

> *one was prevented from leaving the area . . . Officers did not frisk the employees or act in anything but a calm and courteous manner so as to facilitate the safest environment possible.*[168]

The workers, of course, tell a much different story of intimidation, including an inability to contact family or lawyers and compelled detention leading to the arrests.[169] Even if a fact-finder were to embrace ICE's version of the raids, the *Delgado* facts and the raids at Swift & Co. differ sufficiently enough that an argument for consent may still be precluded.

In the Swift & Co. raids, ICE agents also surrounded the plants and covered each entrance and exit.[170] Another significant difference in the Swift & Co. raids is that ICE agents removed workers from their workstations and ordered them to the cafeteria for questioning and document verification.[171] Other factors courts may consider in distinguishing the Swift & Co. raids from *Delgado* are the number of ICE agents present during the raids, the length of detention during questioning, and discrepancies in testimony regarding ICE instructions to workers about the nature of the interviews.[172]

An unanswered question is how the courts will handle the apparent refusal of some workers to collaborate with ICE during the interviews at Swift & Co. In *Florida v. Royer,* the Court held that refusal to cooperate cannot alone be grounds to substantiate reasonable suspicion.[173] In *Illinois v. Wardlow*, however, the Court narrowed *Royer* and held that such refusal could be grounds if other factors exist that in combination could lead a reasonable law enforcement agent to conclude that a crime has or is about to be committed.[174] Here, Swift & Co. was armed with information that hundreds of Form I-9s did not match either SSA or CIS records. In light of this fact, a court could hold that refusal to answer a question on immigration status or identity along with other information possessed by ICE could be used to satisfy the reasonable suspicion standard laid out in *Wardlow*.

Another remaining question is whether, during these raids, ICE could have compelled workers to disclose their identity for purposes

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[168] Respondent's Memorandum of Law, *supra* note 63, at 2-5 (emphasis added).

[169] *See supra* notes 66-68 and accompanying text.

[170] *See* Cooper, *supra* note 66.

[171] U.S. District Judge Mary Lou Robinson noted as much when denying Swift's injunction request. Injunctive Order, *supra* note 132, at 8, 10.

[172] *See supra* notes 168-69.

[173] 460 U.S. 491, 497-98 (1983).

[174] 528 U.S. 119, 125 (2000).

of locating persons actually named in the warrant, as was ICE's practice with the early warrants. ICE could argue that finding the workers named in the warrant requires engagement of workers in brief questioning. Interestingly, ICE, in the Swift & Co. raids, shifted away from a model of indiscriminate questioning of workers into one resembling an administrative checkpoint where all workers, including citizens and lawful permanent residents, are subjected to brief questioning under standardized procedures. In permanent immigration car checkpoints near the border, courts have considered the suspicionless questioning of drivers about their immigration status reasonable under the Fourth Amendment.[175] Of course, workplaces are not like immigration checkpoints. They are not required to be permanent, fixed locations; they may not be near the border; workers do not have prior notice of the raids; and, unlike public highways, workplaces comprise a greater zone of privacy.

In summary, IRCA's delegation of immigration enforcement to private employers, with the ensuing proliferation of databases, and interagency information sharing about workers' immigration status have combined with preexisting doctrines permitting unparticularized warrants and flexible consensual encounters in immigration raids to significantly erode workers' expectations of privacy. The recent workplace immigration raids, exemplified by the Swift & Co. experience, closely resemble the general warrants that inspired the adoption of the Fourth Amendment.

B. Home ICE Raids: "Operation Return to Sender"

Since 2002, ICE has put in place various enforcement programs designed to apprehend persons it labels as fugitives or absconders, terms that refer mostly to persons who did not comply with removal orders against them.[176] The National Fugitive Operations Program ("NFOP") was established on February 25, 2002, under the umbrella of ICE's Office of Detention and Removal.[177] DHS estimates that more than 623,000 absconders live in the United States.[178] In response, ICE

[175] United States v. Martinez-Fuerte, 428 U.S. 543, 545-46 (1976).

[176] *See* Kevin Lapp, *Pressing Public Necessity: The Unconstitutionality of the Absconder Apprehension Initiative*, 29 N.Y.U. REV. L. & SOC. CHANGE 573, 574 (2005).

[177] U.S. Immigration and Customs Enforcement, National Fugitive Operations Program, http://www.ice.gov/pi/dro/nfop.htm (last visited Dec. 25, 2007) [hereinafter NFOP].

[178] DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., AN ASSESSMENT OF UNITED STATES' IMMIGRATION AND CUSTOMS ENFORCEMENT'S FUGITIVE OPERATIONS TEAMS 3 (2007), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_07-34_Mar07.pdf.

has deployed fifty-two Fugitive Operations Teams nationwide to apprehend these so-called fugitives by conducting raids in people's homes.[179] ICE expected that this number would increase to seventy-five teams in 2007.[180]

In its initial stages, INS specifically targeted "priority" absconders, a category that included persons with removal orders from countries with an al Qaeda presence and subsequently persons with a criminal history.[181] In May 2006, however, DHS launched "Operation Return to Sender," which casts a wider net and targets all persons with a preexisting removal order.[182] Since the program's inception, ICE has identified over 25,000 persons who are in the United States in violation of immigration law.[183] Of these, more than one-third were not the people ICE originally targeted.[184]

1. Of *Katz*, Unreliable Data, and the Merging of Immigration and Criminal Databases

The implementation of the absconder initiatives involved several preliminary steps. First, the NFOP prepared the cases of immigration fugitives for entry into the National Crime Information Center Database ("NCIC"),[185] an FBI-operated federal criminal database containing individuals' criminal histories that is also available to local law enforcement. In 1996, Congress authorized the inclusion of deported "felons" records in the NCIC[186] to help authorities identify

[179] Press Release, U.S. Immigration and Customs Enforcement, More than 300 Arrested in ICE Operation Targeting Illegal Alien Fugitives and Immigration Violators in San Diego and Imperial Counties (Apr. 3, 2003), *available at* http://www.ice.gov/pi/news/newsreleases/articles/070403sandiego.htm [hereinafter ICE Press Release].

[180] Nina Bernstein, *Hunts for "Fugitive Aliens" Lead to Collateral Arrests*, N.Y. TIMES, July 23, 2007, at B1.

[181] Lapp, *supra* note 176, at 574-75.

[182] ICE Press Release, *supra* note 179.

[183] Ernesto Londoño, *Database Is Tool in Deporting Fugitives: Police Officers Find Illegal Immigrants in Warrant Searches*, WASH. POST, June 12, 2003, at A1.

[184] Elliot Spagat, *Immigration Raids Net Many Not on the Radar*, THE ASSOCIATED PRESS, Apr. 6, 2007, *available at* http://oneoldvet.com/?page_id=856.

[185] Memorandum from Larry Thompson, Deputy Att'y Gen., to the INS Comm'r, FBI Dir., U.S. Marshall Serv. Dir., and U.S. Att'ys, § A, at 1 (Jan. 25, 2002), *available at* http://news.findlaw.com/hdocs/docs/doj/abscndr012502mem.pdf [hereinafter Thompson Memorandum].

[186] Under the INA, felons are persons removed for the commission of an aggravated felony as defined in the Act, which is not necessarily a felony under federal or state criminal law. Immigration and Nationality Act (INA) of 1990, 8 U.S.C. § 1101(a)(43) (2000).

and prosecute persons for illegal re-entry.[187] Until then, the long-standing policy had been to keep immigration law enforcement information separate from that of criminal law enforcement. Now, the NCIC contains records of persons with civil immigration removal orders, whether or not they also have a criminal history. The database contains around 247,500 ICE warrants, more than half of which are for people with old removal orders, while the rest are records of persons removed for the commission of crimes.[188] To date, the few court challenges to the inclusion of civil immigration records in the NCIC database have failed.[189]

Subsequently, the NFOP divided the immigration fugitives by judicial district based on the most current address available. Then, the relevant portion of each file was transmitted to the appropriate field office and assigned to an apprehension team.[190] The NFOP also became the clearinghouse for all leads on immigration fugitives gleaned from information received from law enforcement or other sources vaguely referred to as "intelligence assets."[191]

The apprehension teams arresting "priority" absconders comprised both immigration and FBI agents,[192] though ICE alone has conducted the most recent raids. The apprehension teams procured warrants to execute the raids based on information compiled on each absconder from their immigration records. At least some of the information gathered from the arrests was then entered into a criminal database.[193]

Unfortunately, much of the information that forms the basis for these fugitive warrants is unreliable. Immigration agencies have been notorious for atrocious record-keeping and faulty databases, including errors in removal order files.[194]

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[187] A person previously removed who re-enters or attempts to re-enter may be punished with up to two years imprisonment. *Id.* § 1326(a) (2000). This sentence can increase up to ten years if the person who re-enters or attempts to enter was removed because of the commission of three or more misdemeanors or one nonaggravated felony. The sentence can increase up to 20 years if the removal was for the conviction of an aggravated felony. *Id.* § 1326(b).

[188] Londoño, *supra* note 183.

[189] *Id.*

[190] Thompson Memorandum, *supra* note 185, at 2.

[191] ICE Press Release, *supra* note 179.

[192] *Id.*

[193] The Thompson Memorandum did not specify whether this database is the NCIC or a different one. Instead there is a reference to entry into a "Computerized Reporting System." Thompson Memorandum, *supra* note 185, at 4.

[194] Memorandum from Glenn A. Fine, Inspector Gen., U.S. Dep't of Justice, on Immigration and Nationalization Service's Removal of Aliens Issued Final Orders (Feb. 25, 2003), *available at* http://www.usdoj.gov/oig/reports/INS/e0304/memo.pdf

Several other factors also result in incorrect records. First, many of the removal orders date back years,[195] which increases the probability that persons other than the person subject to the removal order live at the address when the warrant is finally executed. Second, DHS relies on the addresses provided by noncomplying immigrants, who often move to avoid immigration authorities. Third, address changes reported to immigration agencies often are not recorded in the databases.[196] In addition, many persons in the databases are not even aware of their removal orders because notice was sent to the incorrect address or because DHS never gave the immigrant notice of her removal order.[197] As a result, the administrative warrants are often issued on the basis of incorrect information about the person's place of residence,[198] or against people who do not know they have a removal order at all.

Consider the story of Elizabeth Pozada, a Peruvian national, who did not know she had a four-year-old removal order against her when ICE showed up at her door in late 2006. She thought her case for political asylum was on appeal since her initial denial in 2001. In fact, Pozada had been living in the United States for fifteen years when ICE agents came knocking and arrested her and her husband in their South Florida home.[199] Two weeks after her arrest, Pozada was released to

[hereinafter Fine Memorandum]. "Our interviews and recent reports prepared by GAO and the INS Office of Internal Audit confirm that the INS continues to face significant data accuracy problems. During this review, we compared data from the INS's and EOIR's alien case tracking and management systems and found name, nationality, and case file number discrepancies, as well as cases missing from the electronic files . . . . According to INS, data discrepancies are caused by data entry errors, incompatibilities between the systems, and the lack of a system for correcting data inconsistencies." *Id.* *See generally* Thomas W. Donovan, *The American Immigration System: A Structural Change with a Different Emphasis*, 17 INT'L J. REFUGEE L. 574 (2005) (discussing how INS's administrative disarray led to its replacement with Department of Homeland Security in 2002); Catherine Etheridge Otto, *Tracking Immigrants in the United States: Proposed and Perceived Needs to Protect the Borders of the United States*, 28 N.C. J. INT'L L. & COM. REG. 477 (2002) (discussing series of proposed databases and technological improvements to track immigrants inside United States).

[195] *See* Ruth Morris, *U.S. Adding Fugitive Squads that Target Immigrants Who Ignore Expulsion Orders*, S. FLA. SUN SENTINEL, Feb. 26, 2007, *available at* http://oneoldvet.com/?page_id=281.

[196] Michelle Wucker, *The Top Ten Ways America Gets Immigration Wrong*, AM. IMMIGRATION L. FOUND., June 19, 2006, http://www.ailf.org/ipc/wucker_topten.shtml.

[197] DHS and immigration courts are authorized to issue removal orders in absentia. Immigration and Nationality Act (INA) of 1990, 8 U.S.C. § 1229a(b)(5) (2000).

[198] *See* The Associated Press, *supra* note 1.

[199] Morris, *supra* note 195.

settle her "affairs," including having to leave behind a house in foreclosure and her eight-year-old, U.S.-born son, who would have to move in with her brother, a naturalized U.S. citizen.[200]

Unfortunately, even knowing that an administrative warrant could contain the wrong address, ICE's strategic practice in conducting these raids has been to round up every person living in the home, ask for proof of immigration status, and arrest those unable to provide it. ICE acts in the hope, not under reasonable suspicion much less probable cause, that some of the current residents in the home are also undocumented. For example, during an East Hampton, New York, raid in March 2007, ICE executed ten warrants to arrest twenty-eight persons "discovered" to be in the country without authorization during the raid.[201] As is standard practice, several armed ICE agents came to the door before dawn, knocked, and yelled to open up. Once inside, the agents inquired about every occupant's immigration status, allegedly for officer safety.[202]

Not surprisingly, when ICE shows up to execute warrants, those living in the home are not always undocumented immigrants. Regardless, if the residents have brown skin, they will experience the same terror and intimidation. Consider the story of Christina Ramos, a U.S. citizen and student at the University of Colorado, her U.S.-citizen brother, a friend living with them, and her parents who are lawful permanent residents from El Salvador. On March 13, 2007, at about 7:30 a.m., ICE agents jumped out of their van and pulled out their guns, blocked the Ramos's driveway and yelled at Ramos, who was outside her home.[203] When Ramos ran inside to take shelter, ICE officers refused to identify themselves, chased her, tackled another resident, searched everyone residing in the home for weapons, and repeatedly screamed at them to verify their immigration status.[204]

Immigration raids also affect mixed-status families — families comprising both documented and undocumented citizens or residents. The Pew Hispanic Center has found that there are 6.6 million unauthorized families in the United States, where at least one head of

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[200] *Id.*

[201] *See* Taylor K. Vecsey, *Clergy Calls for Investigation of Federal Raid: Did Immigration Agents Violate Civil Rights?*, E. HAMPTON STAR, Mar. 1, 2007, *available at* http://www.easthamptonstar.com/DNN/Default.aspx?tabid=1448.

[202] *Id.*

[203] Katie Kerwin McCrimmon, *Citizen Wants Apology for Raid: Immigration Agents Search Legal Residents*, ROCKY MTN. NEWS (Denver, Colo.), Mar. 24, 2007, at 4.

[204] *Id.* For a similar story involving a home raid against an immigrant family with legal status, see Samuel G. Freedman, *Immigration Raid Leaves Sense of Dread in Hispanic Students*, N.Y. TIMES, May 23, 2007, at B1.

household is undocumented, comprising a total of 14.6 million people, most of them U.S. citizens or lawful residents.[205] In fact, 3.1 million U.S.-born citizen children have at least one parent who is undocumented.[206] As a result, ICE has raided homes with U.S. citizen children. One such child is Kebin Reyes, who at seven years old was taken into custody along with his father, Noe Reyes, who had been ordered deported in 2000.[207] Whether ICE even had a warrant is unclear.[208] Nonetheless, the child was taken into custody so as not to leave him alone, despite requests by his father to allow him to call relatives.[209] The child is reported to have remained locked in a cell with his father for about ten hours until picked up by an uncle.[210] During the ordeal, Kebin was given only bread and water, while agents repeatedly denied his father's requests to make calls.[211]

2. The Litigation

In the Bay Area, where ICE has arrested more than 800 people in house raids conducted mostly during four months in early 2007, the American Civil Liberties Union of Northern California and the Lawyer's Committee for Civil Rights filed a Freedom of Information Act ("FOIA") request with ICE. The FOIA request lists serious concerns about aspects of the raids, including ethnic profiling and misuse of warrants.[212]

Other immigration rights groups have filed suits seeking injunctive relief and compensatory damages on behalf of immigrants arrested during fugitive raids.[213] A key example is Central Legal, Inc.'s lawsuit on behalf of more than fifty immigrants arrested in their homes during an April 2007 raid in Willmar, Minnesota. Their complaint alleges

[205] JEFFREY S. PASSEL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATIONS IN THE U.S. 11-12 (2007), *available at* http://pewhispanic.org/files/reports/61.pdf.

[206] *Id.*

[207] Mark Prado, *ACLU Files Suit on Behalf of Child Taken in Immigration Raid*, OAKLAND TRIB., Apr. 27, 2007, *available at* http://findarticles.com/p/articles/mi_qn4176/is_20070427/ai_n19063631.

[208] *Id.*

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] Melissa McRobbie, *ACLU Seeks Records On Raids; Group Wants ICE Training Materials Among Other Things*, PALO ALTO DAILY NEWS, Mar. 7, 2007, *available at* http://www.paloaltodailynews.com/article/2007-3-7-03-07-07-smc-immigration.

[213] The American Immigration Law Foundation, Litigation Relating to ICE Raids, http://www.ailf.org/lac/clearinghouse_122106_ICE.shtml (last visited Dec. 25, 2007).

that the raids were conducted without a warrant and that ICE agents identified themselves as police before storming into homes to arrest the residents.[214] The ACLU also filed a civil lawsuit challenging Kebin Reyes's detention on Fourth and Fifth Amendment grounds,[215] while the Ramoses are simply waiting for an apology.[216] More recently, immigrant rights groups filed a lawsuit challenging the New Haven raids, which occurred only two days after the city adopted a program to issue identification cards to all residents, including undocumented immigrants, to allow access to banking, library, and other public services.[217]

Hundreds of similar newspaper stories echo the concerns detailed in these lawsuits. It is difficult to conceive how the Fourth Amendment could reasonably allow law enforcement to execute dragnets on people's homes without obtaining any warrant or by obtaining warrants based on flawed databases. Nevertheless, here too, as with challenging workplace raids, actual Fourth Amendment violations are difficult to establish. Some immigrants are removed immediately without a hearing and thus without an opportunity to raise a Fourth Amendment challenge.[218] Similarly, those in removal proceedings also lack a remedy because the exclusionary rule is unlikely to protect them in the hearing, even if a violation is found.[219] Immigrants who face criminal charges or motions to enjoin will encounter Fourth Amendment doctrines that are quite favorable to ICE, as explored below. Additionally, civil suits for damages must overcome liability shields for government agencies and their officials, including the doctrine of qualified immunity.[220]

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[214] Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief and Damages at 17, Arias v. ICE, No. 07-CV-1959 ADM/JSM (C.D. Minn. July 27, 2007), *available at* http://www.ailf.org/lac/Arias-ammcmpl.pdf.

[215] Complaint for Violations of the Fourth and Fifth Amendments to the United States Constitution, Reyes v. Alcantar, No. 07-02271 (N.D. Cal. Apr. 26, 2007), *available at* http://www.ailf.org/lac/Reyes-Complaint.pdf.

[216] McCrimmon, *supra* note 203.

[217] *Immigrant Advocacy Groups Sue Over New Haven Raids*, HARTFORD COURANT, Aug. 11, 2007, at B7.

[218] Pre-existing removal orders are enforced without a hearing. Immigration and Nationality Act (INA) of 1990 § 240(d), 8 U.S.C. § 1229a(d) (2000).

[219] The violation must rise to the level of egregiousness for the exclusionary remedy to apply. *See generally* Migas, *supra* note 15 *passim* (analyzing narrow Fourth Amendment challenges that meet egregiousness standard).

[220] Civil lawsuits to challenge immigration agents' abuses are difficult to win in part because of doctrines, such as qualified immunity, but also because of immigrants' diminished constitutional protections. Officers are only civilly liable when their conduct violates clearly established constitutional rights of which a reasonable person

a. Defective Warrants

ICE's primary reliance on information from immigration databases as a basis for issuing warrants could be grounds for a Fourth Amendment challenge, at least when the information in the warrants contains errors. Specifically, the challenge would allege ICE's knowing and exclusive reliance on inaccurate immigration databases to certify the existence of removal orders, the person's identity, or his address, is insufficient for substantiating probable cause.

There are several considerations that could undermine this challenge. First, courts have not required foolproof evidentiary reliability in finding probable cause and may tolerate some degree of database inaccuracy.[221] Second, courts may tolerate immigration inaccuracies even more when they result from an immigrant's own failure to accurately report her residence change to immigration authorities. Finally, the "good faith exception" to the exclusionary rule could provide ICE with an excuse if its reliance on the warrants, despite errors, is viewed as executed in good faith.

A 2003 study of immigration removal records revealed that discrepancies in identity and address information occurred in seven percent of the 308 cases of immigrant files with final orders, and eleven percent of the 470 cases of aliens from states that sponsor terrorism.[222] Whether this statistic is sufficient for courts to invalidate warrants that rely solely on immigration data is an open question. However, parallel challenges to the FBI's NCIC database, which is also known for its inaccuracies,[223] have not been successful.[224] In those challenged cases, however, there existed corroborating information and thus the databases were not the sole basis for substantiating

should have known. *See generally* Steve Helfand, *Desensitization to Border Violence & the* Bivens *Remedy to Effectuate Systemic Change*, 12 LA RAZA L.J. 87, 121 (2001); Stephen A. Rosenbaum, *Keeping an Eye on the I.N.S.: A Case for Civilian Review of Uncivil Conduct*, 7 LA RAZA L.J. 1, 36 (1994).

[221] *See* Arizona v. Evans, 514 U.S. 1, 16-17 (1995) (upholding use of evidence obtained from false arrest record that was product of clerical error); United States v. Hines, 564 F.2d 925, 928 (10th Cir. 1977) (finding that reliance upon FBI's NCIC database to substantiate probable cause for arrest was acceptable).

[222] OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REPORT NO. 1-2003-004, THE IMMIGRATION AND NATURALIZATION SERVICES' REMOVAL OF ALIENS ISSUES FINAL ORDERS 14 (2003), *available at* http://www.npr.org/documents/2005/mar/doj_alien_removal.pdf.

[223] *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE AUDIT REPORT: 05-27, REVIEW OF THE TERRORIST SCREENING CENTER: EXECUTIVE SUMMARY (2005), *available at* http://www.usdoj.gov/oig/reports/FBI/a0527/exec.htm.

[224] United States v. Davis, 568 F.2d 514, 515 (6th Cir. 1978); *Hines*, 564 F.2d at 928.

probable cause.[225] This fact could distinguish the immigration raid cases from those challenging reliance on the NCIC during traffic stops.

Were courts to accept probable cause challenges to immigration warrants based on erroneous data, ICE could still rely on the good faith exception to the exclusionary rule. The good faith doctrine as established in *United States v. Leon* excuses errors, including computer errors, as long as law enforcement believes in "good faith" that the warrant was valid.[226] In essence, this doctrine has excused inadvertent or even negligent disregard of warrant inaccuracies by police, except when that disregard is "substantial and deliberate."[227]

In *Arizona v. Evans*, for example, the Court applied the good faith exception to deny the suppression of a marijuana joint discovered during police execution of an arrest warrant that, unbeknownst to the officer, had been quashed.[228] *Evans* is distinguishable from the ICE database errors, however, because in *Evans* the error was attributable to a justice court clerk who failed to inform the warrant section of the sheriff's office that a judge had ordered the warrant quashed.[229] However questionable the premise that the deterrence purpose of the exclusionary rule is intended to curtail solely police and not also judicial misconduct,[230] ICE warrant errors are attributable to DHS record-keeping and data entry, except for those based on an immigrant's own failure to provide accurate information. Errors attributable to law enforcement entities as a whole could exempt the application of the good faith rule since good faith is measured against the collective knowledge of law enforcement officers, not solely those who execute the warrant.[231]

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[225] *See Davis*, 568 F.2d at 515; *Hines*, 564 F.2d at 928.

[226] 468 U.S. 897, 919-21 (1984).

[227] *Id.* at 908-09 (quoting Franks v. Delaware, 438 U.S. 154, 171 (1978)). *See generally* Andrew E. Taslitz, *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 MISS. L.J. 483, 490-93 (2006) (explaining holding in *United States v. Leon*).

[228] 514 U.S. 1, 3 (1995).

[229] *Id.*

[230] *Id.* Similarly, in *Illinois v. Krull*, 480 U.S. 340, 350-53 (1987), the Court applied the good faith exception when police relied on a statute later declared unconstitutional to conduct a search. There, the Court similarly concluded that the exclusionary rule deterrence was not intended by the legislature.

[231] *See* Taslitz, *supra* note 227, at 502-04.

b. Unconstitutional Warrant Execution

ICE's dragnet strategy when enforcing individual removal order warrants may also exceed the reasonable scope of the warrants' execution. Several questions arise here. The first question involves the constitutional "knock and announce" requirement before the execution of warrants.[232] Immigrant rights groups have advised their clients not to open the door when ICE arrives. Does ICE have authority to force entry into the home? If so, how long must ICE wait? With criminal warrants, the knock and announce requirement only requires law enforcement to wait a reasonable time for occupants to respond to their knock, after which they may enter by force.[233] What is a reasonable waiting period, furthermore, is partly up to the discretion of law enforcement, particularly in cases where evidence might be easily disposed or destroyed.[234]

Unlike drugs, however, immigrants are not disposable, though they admittedly can hide. In fact, in contrast to criminal warrants, ICE's administrative warrants do not require immigrants to answer the door or allow entry.[235] Were a pattern of refusal to develop, however, courts might be more willing to create similar exceptions to the knock and announce rule as have developed in criminal cases.[236] ICE has reportedly announced themselves as police rather than as immigration agents.[237] Even if courts recognize this practice as a violation of the knock and announce rule, a remedy may not exist. Of note is the Court's recent holding that knock and announce violations would not require suppression of all related evidence.[238]

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[232] *See* Wilson v. Arkansas, 514 U.S. 927, 927 (1995) (holding that factor for considering reasonableness of search is whether officers knock and announce their presence and authority before entering dwelling, as required by common law).

[233] WILLIAM E. RINGEL, EXECUTION OF WARRANTS, SEARCHES AND SEIZURE, ARRESTS, AND CONFESSIONS § 6:10 (2007).

[234] United States v. Banks, 540 U.S. 31, 31 (2003) (approving forceful entry after officers knocked, announced, and waited for 15 to 20 seconds and evidence sought involved cocaine).

[235] *See* Bernstein, *supra* note 180 (reporting on DHS Secretary Chertoff's explanation that civil immigration warrants do not permit ICE to force entry); Jerry Seper, *Outnumbered in a Hunt for Aliens: Force of 200 Charged with Tracking 400,000 Criminals, "Absconders*," WASH. TIMES, July 20, 2004, at A1 (describing same practice).

[236] *Banks*, 540 U.S. at 31.

[237] *Bay Area Communities in Uproar Over Raids*, EL TECOLOTE ONLINE, Mar. 22, 2007, http://news.eltecolote.org/news/view_article.html?article_id=268824dad47cb14d56fe4eced7a0a113.

[238] Hudson v. Michigan, 126 S. Ct. 2159, 2163-64 (2006).

The second issue raised by ICE's warrant execution practices is the reasonableness of the scope of warrant's execution once ICE gains home entry: may ICE reasonably seize and question all the occupants in the home about their immigration status? Unfortunately, under some circumstances, the answer may be yes. In *Muelher v. Mena*,[239] police officers, armed with a criminal search warrant based on probable cause that Raymond Romero had been involved in a gang-related drive-by shooting, executed the warrant and detained respondent Iris Mena in handcuffs and then asked her about her immigration status.[240] The Court considered the handcuffing a reasonable seizure under the Fourth Amendment as a necessary measure to protect officer safety.[241] The officers, however, then proceeded to ask Mena about her immigration status. The Court reversed the Ninth Circuit on the immigration status questioning issue, holding that there is no requirement of particularized reasonable suspicion for purposes of inquiring into citizenship status.[242] Instead, the Court expanded the legal fiction of consent. Even though Mena had been handcuffed for more than two hours, the Court sanctioned ICE's questioning of her immigration status without reasonable suspicion.[243] In essence, the Court did not consider inquiry into Mena's immigration status as an additional seizure under the Fourth Amendment requiring independent justification.

Mena may be read narrowly to hold that a person otherwise legally detained may be asked "consensually" about her immigration status without an additional need for reasonable suspicion. It is unclear, however, whether Mena could have been compelled to answer the questions if she had refused to answer. In other words, can the residents of a home who are not the targets of an arrest warrant refuse to answer questions about their immigration status? Generally, in nonconsensual encounters, the Court has required reasonable suspicion to compel a person to disclose his or her identity.[244] Here, however, we return to the question of what ICE officers can reasonably do during warrant execution, beyond consensual inquiries, which is a question also relevant to workplace raids.[245]

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[239] 544 U.S. 93, 95-96 (2005).

[240] *Id.*

[241] *Id.* at 100.

[242] *Id.* at 95.

[243] *Id.*

[244] Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt County, 542 U.S. 177, 181-83 (2004).

[245] *See supra* notes 159-75 and accompanying text.

Unlike workplace raids, home raids may offer ICE agents broader discretion to compel residents to disclose their identity. First, ICE could argue that asking residents their name and even, perhaps, requiring identification may be necessary to identify whether the person is the one named in the warrant. Second, ICE may argue that officer safety compels identification.

The safety justification is less convincing, however, when, unlike *Mena*, the case does not involve a violent precedent. Despite the rhetorical force of words like "fugitives" and "absconders," the ICE warrants enforce the law against persons who failed to comply with a removal order, not violent criminals. The requirement to force disclosure of a person's immigration status is even less reasonable. The reality is that, in most cases, ICE is likely to claim to possess reasonable suspicion to make the inquiry based on factors such as foreign appearance, language and identity documents, and even the refusal to answer questions.[246]

c. Pretextual Enforcement

The absconder initiative has a clear criminal law enforcement nature. Especially in its initial stages, an independent aim of the raids was to investigate terrorist leads and arrest persons with a criminal history.[247] But even outside these categories, absconders are not solely immigration violators but also criminals per se, as they could face up to four years of incarceration for failure to depart after a removal order.[248] The entry of absconders' names into the NCIC, moreover, indicates immigration agencies' shift to treat absconders as criminals and not solely as immigration violators. That all the specific targets of the absconder initiative are per se criminals under the law distinguishes absconder raids from the workplace raids because working without authorization in the United States is not yet a federal crime, unless the person engages in identify theft.[249]

[246] Illinois v. Wardlow, 528 U.S. 119, 125 (2000) (refusing to cooperate can be one of several factors to establish reasonable suspicion).

[247] *See supra* note 181 and accompanying text.

[248] Immigration and Nationality Act (INA) of 1990, 8 U.S.C. § 1253 (2000 & Supp. V. 2005).

[249] Working without authorization in the United States continues to constitute solely a civil immigration violation, despite recent legislative efforts to impose criminal sanctions. *See* Enic Trucios-Haynes, *Civil Rights, Latinos, and Immigration: Cybercades and Other Distortions in the Immigration Reform Debate*, 44 BRANDEIS L.J. 637, 652-53 (2006).

This distinction between the absconder home raids and workplace raids could bar ICE from relying on the pretextual doctrine to justify reliance on its administrative powers to conduct criminal enforcement. The pretextual doctrine confers broad discretion on ICE to conduct criminal law enforcement,[250] but courts might be more willing to draw the line where all the targets of the arrests could face criminal liability.[251] Ironically, ICE could argue in its defense that, as executed, the absconder ICE raids primarily serve an administrative immigration function: to detect and remove immigration violators, and not to criminally charge them. In fact, ICE retains discretion to treat all absconders as immigration violators rather than as criminals. Moreover, ICE arrests not only the absconders but also co-residents who are immigration violators but not criminals, as mere unlawful presence is not yet criminal under the immigration laws. Thus, to the extent that ICE is primarily opting to pursue removal for the persons arrested, courts might still be willing to justify the program under the pretextual doctrine.

d. Racial Profiling

When ICE instituted the "priority" absconder program to target primarily Muslims and persons of Arab descent, equal protection violations were explicit.[252] With the expansion of the "fugitive initiatives" to include the more than 600,000 persons with removal orders, the program is now at least facially neutral. Its disparate targeting of Latino immigrants, however, is documented in nearly all media stories detailing the raids.[253] Courts are unlikely to consider these challenges at least in the context of Fourth Amendment doctrine. For example, the Court has directed defendants in "driving while black" cases to raise charges of disparate law enforcement in civil rights lawsuits rather than in the context of the Fourth Amendment.[254]

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[250] *See supra* notes 149-53 and accompanying text.

[251] *See, e.g.*, City of Indianapolis v. Edmond, 531 U.S. 32 (2000) (striking down car drug checkpoint because primary purpose of narcotics interdiction could not be rationalized in terms of highway safety but for scourge of illegal drugs).

[252] *See* Lapp, *supra* note 176, at 586-89.

[253] The disparate targeting of Latino workers is also evident in workplace raids, which primarily occur in segregated workspaces occupied primarily by Brown or Latino workers. *See* Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 965-66 (2006).

[254] *See* David Harris, "*Driving While Black" and Other Traffic Offenses: The Supreme*

Moreover, the Court has tolerated racial targeting in immigration enforcement, at least at immigration checkpoints and as a factor in the determination of reasonable suspicion in traffic enforcement.[255] These cases are nominally distinguishable on the basis of how invasive the practices are in the context of home searches. Yet, to the extent that warrants allow such searches, courts may not view the presence of ICE in the home as offensive to the Fourth Amendment.

In summary, even though ICE executes defective warrants to conduct dragnet raids in people's homes and disproportionately targets Latinos, current Fourth Amendment jurisprudence offers little protection to immigrants.

C. The Future of Local Immigration Raids: The Hazleton Anti-Immigrant Ordinances

Since the events of 9/11, anti-immigrant groups like the Federation of American Immigration Reform (FAIR) and the U.S. English-Only, Inc. have been supporting or promoting local efforts to pass anti-immigrant ordinances or include them as propositions in key local elections.[256] In 2006 alone, at least seventy-eight state immigration-related bills were approved in thirty-three states.[257] These ordinances range from denying the undocumented basic worker protections to restricting their access to higher education and other state benefits, such as denying them driver's licenses, barring them from congregating as day laborers, and prohibiting them from speaking Spanish.[258] The ordinances also include housing and employer restrictions, such as the 2006 Hazleton, Pennsylvania anti-immigrant ordinances that sought to bar the undocumented from taking jobs,

Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 550-51 (1997). Unfortunately, a remedy for selective immigration enforcement may not be available under equal protection grounds. *See* DAVID COLE, ENEMY ALIEN: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 204 (2003) (discussing Court's tolerance of ethnically selective targeting). *But see* Lapp, *supra* note 176, at 592-600.

[255] *See* Mirandé, *supra* note 73, at 372-74.

[256] *See* Edward Sifuentes, *FAIR Could Join Escondido to Defend Rental Ban*, N. COUNTY TIMES (San Diego, Cal.), Oct. 28, 2006, *available at* http://www.nctimes.com/articles/2006/10/29/news/top_stories/22_03_2810_28_06.txt; Howard Witt, *It's Official: English-Only Movement Gains Traction: Hispanic Leaders Alarmed*, CHI. TRIB., Oct. 15, 2006, at 4.

[257] Summer Harlow, *Small Towns Play Big Role on Immigration: Fear of Persecution Forces Many to Move*, NEWS J. (Wilmington, Del.), Oct. 15, 2006, *available at* http://www.ijjblog.org/2006/10/small_towns_big_role_immigrati.html.

[258] Aldana, *supra* note 31, at 270-85.

renting apartments, or engaging in other commercial transactions. These housing and employer ordinances would have required employers, landlords, and businesses to monitor the immigration status of workers and tenants. They also sought to impose both civil and criminal penalties on employers, landlords, or businesses that violated the restrictions.

1. The Hazleton Ordinances

Beginning in July 2006, the City of Hazleton passed a series of four anti-immigrant ordinances designed to target and expel undocumented immigrants from the town.[259] On July 13, 2006, Hazleton passed the Illegal Immigration Relief Act Ordinance, which it subsequently replaced in September 2006 with Ordinance 2006-18, in response to litigation challenging the July ordinance's constitutionality.[260] On December 28, 2006, also in response to the litigation, the Hazleton City Council amended Ordinance 2006-18 by adopting Ordinance 2006-40, which added section 7 dealing with the ordinances' procedures and implementation.[261] In addition, in August 2006, Hazleton passed Ordinance 2006-13, titled "Establishing a Registration Program for Residential Rental Properties."[262] On December 28, 2006, Hazleton also enacted Ordinance 2006-35 with the same title.[263]

Under section 4, Ordinance 2006-18 forbids any entity doing business in the city of Hazleton to hire or continue to employ any worker who is not authorized to work under U.S. immigration laws.[264] All business entities that apply for a permit to engage in any type of work in Hazleton must sign an affidavit "affirming that they do not knowingly utilize the services of an unlawful worker."[265] Ordinance 2006-18 also seeks to deny "illegal alien[s]," defined as persons "not lawfully present in the United States" the ability to obtain housing in

[259] Not discussed in this Article is Hazleton, Pa., Ordinance 2006-10 (July 13, 2006), *available at* http://www.aclupa.org/downloads/Originalordinance.pdf, which is an English-only provision.

[260] *See* Hazleton, Pa., Ordinance 2006-18, § 2 (Sept. 8, 2006), *available at* http://www.aclu.org/pdfs/immigrants/hazleton_secondordinance.pdf.

[261] Memorandum of Law in Support of Plaintiffs' Opposition to Hazleton's Cross Motion for Summary Judgment at 1-2, Lozano v. Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (No. 3:06cv01586) [hereinafter Memorandum of Law].

[262] *Id.*

[263] *Id.*

[264] Ordinance 2006-18, § 4(A).

[265] *Id.*

Hazleton based on their immigration status. [266] Specifically, the ordinance prohibits the harboring of "illegal aliens," which includes "to let, lease, or rent a dwelling unit to an illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of the law."[267] Violation of these terms by employers, businesses, or landlords could result, inter alia, in civil penalties and denial of licenses.[268]

To enforce both the employment and housing restrictions, the Hazleton ordinances rely on existing federal databases or else try to establish citywide registration records.[269] In regards to the employment restrictions, for example, a complaint by any city official or entity to the Hazleton Code Enforcement Office ("Code Enforcement Office") would trigger an investigation that would require an employer to provide the identity of the alleged undocumented workers within three days.[270] In turn, the Code Enforcement Office would seek to verify the worker's authorization to work through Basic Pilot.[271] Ordinance 2006-18, in fact, mandates that all city agencies enroll and participate in the Basic Pilot Program, and conditions the award of city contracts or business grants exceeding $10,000 on participation in Basic Pilot.[272] Even when Ordinance 2006-18 does not require such enrollment, those employers that do not enroll risk exorbitant penalties.[273]

The housing provisions go even further by requiring the creation of a tenant registration system. Ordinance 2006-13 requires all occupants of rental units to obtain an "occupancy permit."[274] To obtain the permit, an applicant must provide "[p]roper identification showing proof of legal citizenship and/or residency."[275] Under the ordinance, Hazleton's Code Enforcement Office officials determine whether each tenant presented proof of legal immigration status. Tenants who allow additional tenants in the rental unit must first obtain written permission from the landlord. In turn, those additional

[266] *Id.* §§ 3(D), 5(A).

[267] *Id.* § 5(A)(1).

[268] *Id.* §§ 4(B)(3)-(4), 5(B)(8).

[269] Memorandum of Law, *supra* note 261, at 13-16.

[270] *Id.* § 4(B)(1)-(3).

[271] *Id.* § 4(B)(5); *see supra* Part I.A.1.

[272] Ordinance 2006-18, § 4(C), (D).

[273] *Id.* § 4(B)(5), (E).

[274] Hazleton, Pa., Ordinance 2006-13, § 7b (Aug. 15, 2006), *available at* http://www.aclu.org/pdfs/immigrants/hazleton_firstordinance.pdf.

[275] *Id.*

occupants must obtain their own permits.[276] Further, tenants must inform the city when they move or when members of their family move out.[277] Thus, all tenants who do not own their home must disclose, in addition to their immigration status, their place of residence, as well as information about their associations.

All Hazleton landlords are barred from renting to unregistered tenants.[278] The housing restrictions would be enforceable upon receipt by the Code Enforcement Office of any complaint by a city official, business entity, or resident.[279] Hazleton's Code Enforcement Office then has the responsibility of using the identity information provided by the landlord[280] or tenant upon registration[281] to verify the person's immigration status with the federal government. Though the process for immigration verification is not specified in the ordinances, Hazleton officials have clarified in documents submitted in the litigation challenging the ordinances that verification would consist of seeking authority from the federal government to use or access the Systematic Alien Verification for Entitlements ("SAVE") Program.[282]

SAVE administers and controls access to information contained in the Verification Information System ("VIS") database.[283] This database is nationally accessible and contains selected immigration status information compiled from more than sixty million records.[284] SAVE allows federal, state, and local government agencies and licensing bureaus to obtain immigration status information in order to determine noncitizen applicants' eligibility for public benefits.[285] In order to join the SAVE program and acquire access to VIS, an agency must first establish a Memorandum of Understanding with the SAVE Program, and then establish a purchase order to pay for VIS transaction fees. Access to SAVE is subject to CIS resource limitations and other legal or policy criteria.[286] SAVE was actually designed

[276] *Id.* § 10(b).

[277] *Id.* § 7(b).

[278] Ordinance 2006-18, § 5(A).

[279] *Id.* § 5(B)(1).

[280] *Id.* § 5(B)(3).

[281] Ordinance 2006-13, § 7(b)(1)(g).

[282] Ordinance 2006-18, § 5(B)(3).

[283] *See* U.S. Citizenship and Immigration Services, Systematic Alien Verification for Entitlements (SAVE) Program, http://www.uscis.gov/portal/site/uscis (search for "SAVE"; follow top hyperlink for "Systematic Alien Verification for Entitlements (SAVE) Program") (last visited Dec. 25, 2007).

[284] *Id.*

[285] *Id.*

[286] *Id.*

primarily to permit federal and local entities to determine an applicant's eligibility to receive certain public benefits. It was never intended to provide a final finding of fact or conclusion of law about the applicant's immigration status in the United States.[287]

2. The Litigation on Privacy

In September 2006, the ACLU, joined by several law firms and nonprofits, filed a complaint in the U.S. District Court for the Middle District of Pennsylvania against the City of Hazleton challenging the ordinances on behalf of several named plaintiffs, including several undocumented noncitizen adults, as well as children and U.S. citizen children of the undocumented.[288] The ACLU also filed for a temporary restraining order, which the district court granted on October 31, 2006.[289] Trial began on March 12, 2007.[290] On July 26, the district court invalidated the ordinances on preemption and due process grounds, but it dismissed the privacy allegations based on lack of factual information that would allow the court to balance the individuals' with the government's privacy interests.[291] Despite this outcome, the issue may resurface on appeal and the challenge is worth considering in this Article.

The complaint alleged, inter alia, violations of privacy rights based on the ordinances' housing registration and immigration verification provisions. In addition to these provisions, Ordinance 2006-40 would have required landlords to cure violations of the housing restrictions either by initiating eviction proceedings, giving notice to quit, or extracting additional identifying information from the tenant or occupant.[292] Thus, under the ordinance, the onus fell on the landlord

[287] *See* Responsibility of Certain Entities To Notify the Immigration and Naturalization Service of Any Alien Who the Entity "Knows" Is Not Lawfully Present in the United States, 65 Fed. Reg. 58,301-01, 58,302 (Sept. 28, 2000) ("A Systematic Alien Verification for Entitlements (SAVE) response showing no Service record on an individual or an immigration status making the individual ineligible for a benefit is not a finding of fact or conclusion of law that that individual is not lawfully present.").

[288] First Amended Complaint at 5-19, Lozano v. Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (No. 3:06cv1586).

[289] Temporary Restraining Order at 12-13, *Lozano*, 496 F. Supp. 2d 477 (No. 3:06cv1586).

[290] Press Release, ACLU, Trial Begins in Landmark Challenge to Anti-Immigrant Laws in Hazleton, PA: Laws Would Legitimize Discrimination against Immigrant Community, Groups Charge (Mar. 12, 2007), *available at* http://www.aclu.org/immigrants/discrim/28976prs20070312.html.

[291] *Lozano*, 496 F. Supp. 2d at 554.

[292] Hazleton, Pa., Ordinance 2006-40, § 7(D) (Dec. 26, 2006), *available at*

to obtain highly confidential documents proving lawful status. The complaint protested that the ordinances did not impose any confidentiality obligation on the landlords who receive such information.[293] Moreover, under the ordinances, this information would then be provided to the Code Enforcement Office for purposes of verification, and in the case of a complaint, the information must be retained.[294]

Even worse, because the ordinances did not provide any prohibition against subjecting tenants to searches, private or public officials could have conducted unlimited searches. With respect to the latter, the ordinances specified that the following persons were authorized to enforce them: "The Chief of Police, Any Police Officer, Code Enforcement Officer, the Fire Chief, the Deputy Fire Chief, a Health Officer, and the Director of Public Works."[295] Further, in the course of the litigation, Hazleton officers participating in the litigation clarified that "police powers" could be used to "preserv[e] the public health, safety and morals" of Hazleton, as well as to abate public nuisances.[296] In the "Findings and Declaration of Purpose" in Ordinance 2006-18, the city stated that the presence of undocumented immigrants in Hazleton is per se a public nuisance and "a harm to the health, safety, and welfare of authorized U.S. workers and legal residents in the city."[297] It is therefore reasonable to presuppose that the ordinances sought to authorize searches to uncover immigration violations.

3. Local Immigration Raids?

At the same time that Congress and federal immigration agencies seek to increase local enforcement collaboration with immigration enforcement,[298] local governments are passing their own ordinances to control or restrict undocumented immigration. What are the implications of these ordinances for future immigration raids

http://www.aclu.org/pdfs/immigrants/hazleton_thirdordinance.pdf.

[293] Memorandum of Law, *supra* note 261, at 73.

[294] *Id.* at 78.

[295] Hazleton, Pa., Ordinance 2006-35, § 8 (Dec. 13, 2006), *available at* http://www.aclu.org/pdfs/immigrants/hazleton_ordinance_200635.pdf; Hazleton, Pa., Ordinance 2006-13, § 8 (Aug. 15, 2006), *available at* http://www.aclu.org/pdfs/immigrants/hazleton_firstordinance.pdf.

[296] Memorandum of Law, *supra* note 261, at 79.

[297] Hazleton, Pa., Ordinance 2006-18, § 2 (Sept. 8, 2006), *available at* http://www.aclu.org/pdfs/immigrants/hazleton_secondordinance.pdf.

[298] *See* Pham, *supra* note 30, at 1374.

conducted by local law enforcement? Some local police are already enforcing immigration laws during traffic stops, in prisons, and, at times, even when responding to other local policing duties.[299] The Hazleton ordinances and similar ordinances throughout the country, which seek to impose employment and housing restrictions, open the door wider to questions about how and whether local police will also regulate workplaces and homes. Here too, there is a trend to employ federal databases containing information on immigration for purposes of local immigration enforcement.

One thing is certain: like federal enforcement, local immigration enforcement will be characterized as regulatory in nature, particularly when the consequences continue to be nonpenal. In Hazleton, undocumented tenants and workers will be forced out of workplaces and homes, and possibly reported to immigration agencies, but not prosecuted per se. Nevertheless, these consequences are all extremely harsh, and criminal prosecution, as in the federal immigration enforcement context for such crimes as identity theft and fraud, remains a strong possibility.

An interesting parallel exists between these new anti-immigrant ordinances and attempts by local police to regulate disorder among the homeless and poor. For many generations, local police enforced laws criminalizing public order offenses, such as vagrancy, loitering, and public drunkenness, until the courts stepped in to declare them unconstitutional under doctrines such as the prohibition against status crimes.[300] These legal challenges, however, encouraged the proliferation of order-maintenance policies that replaced criminal with administrative enforcement, namely through property regulation tools like zoning laws.[301] Here again, the relaxed criminal safeguards in the context of administrative law enforcement has made it possible for these measures to survive judicial scrutiny at a significant "cost of rights."[302] Local anti-immigrant ordinances, such as those in Hazleton, if successful, have the potential to exponentially multiply the number of law enforcement officers involved in immigration raids, and are likely to suffer from similar "costs of rights," including to the Fourth Amendment.

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[299] *See, e.g.*, Kobach, *supra* note 26 (describing local enforcement of immigration laws).

[300] Nicole Stelle Garnett, *Relocating Disorder*, 91 VA. L. REV. 1075, 1077-78 (2005).

[301] *Id.* at 1078-79.

[302] *Id.* at 1078.

II. THE RAIDS' UNREASONABLENESS

In immigration law, reliance on the characterization of immigration raids as administrative to allow for more flexible law enforcement has becoming increasingly difficult to justify. In other administrative law contexts, the Court's adoption of a balancing test that pairs the government's interest against that of the individual has led to the erosion of privacy interests.[303] Professor Scott Sundby cautioned almost two decades ago against *Camara's* unlimited application beyond so-called administrative searches, given that terms like "administrative search" or "inspection" are neither self-defining nor self-limiting.[304] This observation is particularly pertinent in the immigration context where, increasingly, what were once civil immigration violations have now been criminalized, resulting in an unprecedented cooperation between criminal and immigration law enforcement. Indeed, immigration and other law enforcement agencies have pretextually relied on the more flexible immigration law enforcement power to conduct criminal investigations to also charge persons with nonimmigration crimes, including allegations of identity theft, terrorism, and drugs. Yet, the civil sanctions and procedures of immigration enforcement are dire, and the liberty interests no less substantial than in the criminal context. Immigrants linger in mandatory detention centers. Deportation separates them from family and destroys their stakes in property, community, and jobs. To insist, therefore, on the legal fiction of punitive versus nonpunitive consequences to justify fewer constitutional protections for immigrants, including privacy, is not only illogical but disingenuous. It undermines the pain experienced by the "other," whose constructed "illegality" strips them even of rights intended to protect against governmental overreach and abuses.

Several scholars have documented, especially in the last twenty years, how immigration control has increasingly adopted the practices and priorities of the criminal justice system.[305] Congress has created a

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[303] *See* Clancy, *supra* note 55, at 1003-15, 1023-36; Hemphill, *supra* note 34, at 218-20; Searle, *supra* note 41, at 273-88; Sundby, *supra* note 36, at 392; Steven T. Wax, *The Fourth Amendment, Administrative Searches and the Loss of Liberty*, 18 ENVTL. L. 911, 917-27 (1988) (arguing that expansion of administrative search has led to loss of liberty).

[304] Sundby, *supra* note 36, at 406-07.

[305] *See, e.g.*, Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007) (surveying how immigration law has been borrowing criminal law's priorities, theories and methods but not its procedural aspects); Teresa A. Miller, *Citizenship and Severity:*

host of new immigration crimes, ranging from illegal re-entry to the most recent attempt to criminalize simple immigration presence.[306] Further, criminal prosecution for immigration violations has increased rapidly, as have criminal penalties for such violations.[307] This trend is even more disturbing because, in most cases, an immigrant's tenuous connection to a crime is constructed solely based on their attempt to flee from economic and sometimes political repression. These so-called criminals who falsify their immigration documents include asylum seekers and workers who cross the border or overstay their visas and falsify documents in order to work.[308] As a result of workplace raids more than 700 persons are facing criminal charges for identity theft or other immigration violations, while some employers have been criminally charged for knowingly hiring the undocumented.[309] The Swift & Co. raids alone yielded at least sixty-five persons who are facing serious identity theft charges.[310] Several of them have already pled guilty to fraud charges and face a possible maximum sentence of ten years in prison and a $250,000 fine.[311]

Civil immigration enforcement, moreover, has become more punitive and difficult to distinguish from criminal enforcement. Mandatory immigration detention, previously reserved for the most dangerous persons, is now broadly applied in almost all removal cases.[312] Indeed, immigration detainees are currently the fastest

Recent Immigration Reforms and the New Penology, 17 GEO. IMMIGR. L.J. 611 (2003) (clarifying relationship between today's harsh immigration reforms and severe criminal control); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crimes, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006) (arguing that membership theory plays role in convergence of criminal and immigration law by deeming regulated immigrant unworthy of membership in society).

[306] In 2005, the House of Representatives passed a bill that would have created several additional crimes, including criminalizing the presence of the undocumented. *See* Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005).

[307] *See* Legomsky, *supra* note 305, at 476-82, Miller, *supra* note 305, at 639-40; Stumpf, *supra* note 305, at 384.

[308] *See* Miller, *supra* note 305, at 649-50.

[309] The Associated Press, *supra* note 1; *see also* Jerry Seper, *Janitor-Service Chiefs Charged in Illegal Ring*, WASH. TIMES, Feb. 23, 2007, at A1 (discussing criminal indictments of IFCO Systems North America and Rosenbaum-Cunningham International Inc. employers).

[310] Sprengelmeyer, *supra* note 139.

[311] The Associated Press, *Six More Plead Guilty in Aftermath of Immigration Raid*, Apr. 18, 2007, *available at* http://oneoldvet.com/?page_id=1037#25.

[312] Miller, *supra* note 305, at 614-15; Stumpf, *supra* note 305, at 391.

growing segment of the jail population in the United States.[313] Most persons picked up in the latest wave of immigration raids have been detained. Only a few have been released for humanitarian reasons or because they were eligible for some other type of immigration relief. In fact, those charged with any immigration crime or those with a criminal history will not be eligible for bond or any other avenue of relief from detention.[314]

The criminal justice parallels in immigration enforcement, however, have not resulted in correspondingly greater constitutional protections for immigrants. As Professor Stephen H. Legomsky explains, the criminal justice system has been asymmetrically imported into the immigration control context.[315] The enforcement aspects of criminal justice have been imported, without the bundle of procedural and substantive rights recognized in criminal cases.[316] This asymmetry has meant that decision makers are left with no incentive to balance immigrants' interests against the government's interest to control immigration.[317]

In the Fourth Amendment context, the asymmetry applies even when the immigrant is charged criminally rather than placed in removal proceedings. Again, pretextual doctrines permit prosecutors to rely on the significantly more relaxed immigration-related Fourth Amendment doctrines to justify the reasonableness of searches and arrests.[318] In addition, at times, even when a Fourth Amendment violation is recognized, there is no remedy. Such is the case, for example, with the most common federal immigration crime charged — illegal re-entry.[319] There, exclusion of any unlawfully seized evidence does not remedy the Fourth Amendment violation because the defendant's identity is never suppressible as the fruit of an unlawful arrest and the government can prove its case simply by providing proof of a prior removal order and the defendant's renewed presence in the United States.[320]

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[313] *See* Miller, *supra* note 305, at 648-49.

[314] *Id.* at 635-36.

[315] Legomsky, *supra* note 305, at 472.

[316] *Id.*

[317] *Id.* at 473.

[318] *See supra* Part I.

[319] *See generally* James P. Fleissner & James A. Shapiro, *Sentencing Illegal Aliens Convicted of Reentry After Deportation: A Proposal for Simplified and Principled Sentencing*, 8 FED. SENT'G REP. 264 (1996) (discussing recent and various congressional measures that have resulted in increased prosecution of illegal re-entry).

[320] Daniel P. Blank, Note, *Suppressing Defendant's Identity and Other Strategies for Defending Against a Charge of Illegal Reentry After Deportation*, 50 STAN. L. REV. 139,

Of course, when the immigrant does not face criminal charges for his immigration transgressions, his privacy right is even less meaningful, given the tendency of courts to undervalue the liberty interest of persons not in criminal proceedings. In the immigration context, the courts' insistence that deportation is not punishment has translated into an unjustifiable legal tolerance for the pain that immigrants experience from their, at times, permanent expulsion from the United States, despite their long-term residence and vested stakes in this country.

The recent immigration raids leave us with stories that document the devastation of deportation on families as well. In Massachusetts, for example, Governor Deval Patrick called immigration raids' effect on families a "humanitarian crisis," when the state had to make childcare arrangements for at least thirty-five children, ranging from infants to age sixteen, whose parents were among at least 361 workers, mostly women, who were arrested during a raid at the Michael Bianco, Inc. leather factory.[321] Additionally, in Massachusetts, ICE denied social workers attempting to advocate on behalf of the children access to the detainees because it was a law enforcement issue.[322] When DHS complied with Governor Patrick's plea to halt flights to detention centers in other states, DHS released sixty persons, who identified themselves as a primary parent, on humanitarian grounds.[323] In some cases, their children had stayed with family and friends, while community groups stepped in to locate other children and provide them with care.[324] At least one seven-month-old child, however, who breastfed, required a feeding tube after being separated from his mother for two days during the raid.[325] The degree of harm caused to children, many who happened to be U.S. citizens, in the Massachusetts

140-41 (1997).

[321] Monica Rhor, *Immigration Raids Can Divide Families*, WASH. POST, Mar. 12, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/03/11/AR2007031100762.html; David Weber, *Mass. Protests Feds' Immigration Flights*, WASH. POST, Mar. 9, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/03/08/AR2007030800181.html.

[322] Weber, *supra* note 321.

[323] *Id.*

[324] *Id.*

[325] David Weber, *Delahunt Says Congress Will Investigate Immigration Raid*, ASSOCIATED PRESS, Mar. 11, 2007, *available at* http://www.boston.com/news/local/massachusetts/articles/2007/03/11/delahunt_says_congress_will_investigate_immigration_raid/.

raids has prompted a congressional investigation by the House Subcommittee on Immigration.[326]

To improve the plight of immigrants and to claim greater constitutional protection on their behalf, scholars have argued that deportation should be treated as punishment given the emphasis on retribution, deterrence, and incapacitation that bear on theories of deportation.[327] However, privacy interests should not depend on the type of consequences the persons might experience when they are invaded. Privacy interests are intended to protect, among other things, "freedom of thought," "solitude in one's home," "control of information about oneself," and "protection of one's reputation," harms that occur regardless of whether a person is criminally charged or faces no "criminal" consequences.[328]

Beyond these personal autonomy conceptions of privacy, there is also the notion of privacy's relationship to antitotalitarianism. In his influential article, *The Right to Privacy*, Professor Jed Rubenfeld suggested that privacy should be defined as "the fundamental freedom not to have one's life too totally determined by a progressively more normalizing state."[329] Thus, to Rubenfeld, privacy should protect against a "creeping totalitarianism, an unarmed occupation of individuals' lives."[330] In this regard, the consequences to the individual should matter less in assessing the reasonableness of law enforcement action. This again illustrates the fallacy of the balancing approach. The reasonableness of privacy invasions by the state should not be judged against the relative interest of the state or the individual. Rather, they should be guided by the application of the original reasonableness principles of the Fourth Amendment, including the requirements for particularized warrants and probable cause.

Finally, privacy rights for immigrants should be recognized, despite their constructed illegality, because there are compelling policy reasons for protecting privacy in certain spaces.[331] In the workplace,

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[326] *Id.*

[327] Legomsky, *supra* note 305, at 511-15; *see also* Kanstroom, *supra* note 14, at 1893-94. *See generally* Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305 (2000) (discussing deportation as punishment).

[328] *See* Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1088 (2002).

[329] Jeb Rubenfeld, *The Right to Privacy*, 102 HARV. L. REV. 737, 784 (1989).

[330] *Id.*

[331] *See* Solove, *supra* note 328, at 1142-43 (arguing that privacy should be constructed by law to safeguard important societal interests, even if these would not be protected under reasonable expectation of privacy analysis).

for example, immigration raids have devastated employers, the well-being of small towns, and the economic well-being of the entire nation.[332] The reality is that immigrant workers dominate certain industries, including agriculture and meatpacking plants like that of Swift & Co. "Ridding" the country of twelve million undocumented workers through raids is not only unrealistic but incredibly disruptive.

These raids also significantly undermine the rights of all workers. Unfortunately, the vulnerability of undocumented workers and their diminished labor protections render them vulnerable to employers or even employees who might report them to immigration in order to undermine efforts to improve their working conditions.[333] Further, these raids and the ensuing dearth of workers in certain communities have been so disruptive that communities have devised ill-conceived strategies that further undermine workplace rights. In Colorado, for example, as immigrant workers are arrested or leave because of the state's anti-immigration ordinances, the state has instituted a program to permit low-risk inmates to harvest the crops, replacing migrant workers in the fields.[334] Under the program, farmers pay a fee to the states in exchange for the work of volunteer inmates, who are paid about sixty cents a day.[335] This prison program has precedents in Arizona where last year, about sixty prisoners worked in watermelon fields, replacing migrant workers.[336] Other states facing similar labor shortages, including Iowa, are considering similar measures.[337] The cynicism embodied in these proposals is that the very same undocumented workers arrested by the immigration raids and subsequently charged with identity theft crimes could end up being the very ones who fill these jobs as prisoners, especially given the rising statistics of immigrants imprisoned for immigration crimes.

Likewise, home raids invade the most intimate sphere of privacy protection under the Fourth Amendment. In the home, privacy is conceptualized as a form of intimacy; the home is a space where privacy is not just essential to individual self-creation, but also to

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[332] *See* Jennifer Talhelm, *Senators Question Immigration Raids Against Meatpacker*, POST-INDEP. (Denver, Colo.), Jan. 22, 2007, *available at* http://cbs4denver.com/politics/local_story_023102531.html.

[333] *See* Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform,* 36 HARV. C.R.-C.L. L. REV. 345, 346-48 (2001).

[334] Dan Frosch, *Inmates Will Replace Wary Migrants in Colorado Fields*, N.Y. TIMES, Mar. 4, 2007, at A1.

[335] *Id.*

[336] *Id.*

[337] *Id.*

human relationships, including families.[338] The immigration raids executed in people's homes during the early hours of the day purposefully target entire families and small enclaves of immigrant communities that have chosen to share the intimate space of mutual residence.

Here, citizens and noncitizens coexist and relate to one another in the most intimate of spaces. There is no ongoing criminal activity inside the home, other than the constructed illegality of one or a few of the residents. During the raids, most residents are getting up, preparing to commence their days, to have breakfast, to go to school, or to work. True, some arrests must occur in the home. However, these should be restricted in scope to safeguard intimacy by only allowing for the arrest of the warrant's actual target and only when immigration agents have reasonable grounds for believing the target still lives in the home.

CONCLUSION

The UC Davis School of Law's Symposium, titled "*Katz v. U.S.*: 40 Years Later," for which I write this Article, turned out to be more a reflection about the failing of *Katz* or its unfulfilled promise, rather than a celebration. Part of the explanation lies in *Katz*'s inherent doctrinal flaws, but also in the subsequent distortion of the doctrine.

We can blame technological advancements, for example, for some of the distortion, but beyond that, this immigration case study reveals the intolerance for recognizing the privacy expectations of "undesirable" persons or activities. Such has been the case in the constructed "illegality" of immigrants, which has had a corrosive effect on privacy, including in spaces such as the home, where citizens still receive heightened privacy protection. The web of Fourth Amendment doctrines that undermine privacy protections for immigrants is more complex than the effect of *Katz* alone. However, *Katz* plays a central role. Immigrants' attributed "blame" for crossing the border or overstaying their visas render them undeserving of an expectation of privacy in the spaces they occupy in the United States. This blame justifies the proliferation of immigration databases, the issuance of general and defective warrants based on such databases, and the dragnet-like and discriminatory enforcement of administrative warrants. But is this right? Was the Fourth Amendment intended to protect solely the so-called innocent? Or was its purpose to curtail abuses of policing powers, particularly against vulnerable groups?

[338] Solove, *supra* note 328, at 1121.

Courts must reconsider these questions as they examine the legality of the current raids.