ICE RUSES: FROM DECEPTION TO DEPORTATION

*Min K. Kam**

In 2005, the Immigration and Customs Enforcement (ICE) agency enacted a policy sanctioning its civil ICE agents to use strategic deception, known as "ruses," to facilitate community immigration enforcement operations. This policy provided agents a means to overcome the limitation that civil immigration arrest warrants are administrative as opposed to judicial in nature, which effectively precluded agents from entering a target's home without first obtaining consent. Since, civil ICE agents have deployed various ruses to lure targets outside of their homes or, more controversially, elicit consent to gain entry into their homes. Once inside, agents often conduct sweeping searches and execute "collateral arrests" of nontarget bystanders who are also suspected to be undocumented.

The Fourth Amendment has always tolerated some degree of law enforcement deception. But the existing body of law that delineates the constitutional limits of government deceit contemplates the use of ruses in only the criminal context, which assumes that criminal law enforcement officers are employing subterfuge only against purported criminals. Legal analysis of the use of deception in the civil immigration context is almost entirely lacking, largely because ICE ruse practices have escaped judicial scrutiny. This Note seeks to close this gap by examining both the legal and policy questions raised when a civil government agency uses deception against those who have committed a civil immigration infraction. It then proposes two limitations on the current policy that would address the constitutional concerns and better align it with the policy justification underlying the use of government deception.

* J.D. Candidate 2022, Columbia Law School. The author would like to thank Professor Daniel Richman for his invaluable guidance and the staff of the *Columbia Law Review* for their excellent editorial assistance.

INTRODUCTION

Three officers greeted Mr. Osny Sorto-Vasquez Kidd's mother when she answered the door one October morning in 2018.[1] One officer identified herself as a detective with the local police and said they were investigating a dangerous criminal who had purportedly been using the Kidd family's address to ship contraband through the mail.[2] After showing Mr. Kidd's mother a picture of an unknown man who was potentially putting her family in danger, the detective sought permission to enter their home.[3] In shock, Mr. Kidd's mother immediately gave her consent and invited the officers in.[4] Once inside the home, the officers began banging on doors and searched every room of the apartment.[5] And upon encountering Mr. Kidd's younger siblings, who at the time were between the ages of eleven and sixteen, they demanded to see their identification.[6] Realizing that Mr. Kidd was not on the premises, the detective reached Mr. Kidd by phone with the help of his mother.[7] On the call, the officer once again

1. Kidd v. Mayorkas, No. 2:20-cv-03512-ODW (JPRx), 2021 WL 1612087, at *1 (C.D. Cal. Apr. 26, 2021); see also Betsy Swan, DREAMer: ICE Used an Elaborate Ruse to Arrest Me, Daily Beast (Nov. 14, 2018), https://www.thedailybeast.com/dreamer-ice-used-an-elaborate-ruse-to-arrest-me?ref=scroll [https://perma.cc/Z5AR-YMTN].

2. Swan, supra note 1.

3. See id.; *Kidd*, 2021 WL 1612087, at *1.

4. *Kidd*, 2021 WL 1612087, at *1.

5. Id.

6. Id.

7. Id. The detective asked Mr. Kidd's mother if she could call her son. When Mr. Kidd answered his mother's call, he could hear his siblings crying and his mother frantically staitng that the police were at their house because there was a dangerous criminal "out to get" their family. Id. (internal quotation marks omitted).

identified herself as a detective, explained the investigation, and requested that they meet in person in order to guarantee his family's safety.[8] Two days later, as Mr. Kidd was exiting his apartment complex to meet with the detective, four officers wearing tactical vests with the word "POLICE" emblazoned on them approached him.[9] After checking Mr. Kidd's identification, the officers then revealed that they were not "detectives" from the local police but rather ICE agents who were tasked with arresting and detaining him.[10] At the time of his arrest, Mr. Kidd was a twenty-four-year-old undocumented immigrant from Honduras with Deferred Action for Childhood Arrivals (DACA) status.[11] However, he was deemed removable because he was considered a "fugitive" immigrant for failing to show up to immigration court sixteen years prior—he was eight years old at the time—and for having a misdemeanor DUI on his record.[12]

Mr. Kidd's experience is one of many stories that have emerged and shed light on the practice of civil ICE agents using strategic deception to locate and detain immigrants—a tactic internally known as a "ruse."[13] Ruses became an officially sanctioned ICE practice in 2005, when the then-Acting Director, John P. Torres, issued a memorandum formally endorsing ruses as an enforcement tool to be used by those in the Office of En-

8. Id.

9. Complaint at 20, Kidd v. Mayorkas, No. 2:20-cv-03512-ODW (JPRx) (C.D. Cal. Apr. 26, 2021), 2021 WL 1612087 [hereinafter *Kidd* Complaint].

10. Id.

11. Id. DACA is an executive order issued by the Obama Administration that temporarily defers deportation for certain individuals who came to the United States as children and are able to meet several guidelines. See Consideration of Deferred Action for Childhood Arrivals (DACA), USCIS, https://www.uscis.gov/DACA [https://perma.cc/3APC-JXG3] (last updated July 19, 2021). It also provides authorization of employment for a period of two years, subject to renewal. Id.

12. Swan, supra note 1.

13. See, e.g., Felipe De La Hoz, The ICE Ruse: How Agents Impersonate Local Law Enforcement and Lie to Make Arrests, Documented (June 18, 2018), https://documentedny.com/2018/06/18/the-ice-ruse-how-agents-impersonate-local-law-enforcement-and-lie-to-make-arrests/ [https://perma.cc/G8AM-43KT]. The word "ruse" is defined as "a wily subterfuge" and is considered synonymous with words like "trick," "stratagem," "maneuver," "artifice," "wile," and "feint." Ruse, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/ruse [https://perma.cc/K9S6-FWBU] (last visited Sept. 22, 2021). While all these words generally mean "an indirect means to gain an end, . . . ruse stresses an attempt to mislead by a false impression." Id.

forcement and Removal Operations (ERO)—the civil, rather than criminal, enforcement division of ICE[14]—in immigration arrest operations.[15] While most ERO agents act pursuant to an arrest warrant when conducting immigration arrests, the warrant is only administrative in nature, as opposed to judicial, effectively precluding agents from entering into a target's home without first obtaining consent.[16] Thus, since 2005, civil ICE agents have deployed ruses to lure targets outside of their homes to make immigration arrests or, more controversially, to elicit consent to gain entry into the target's residence without judicial warrants.[17]

Although ICE's ruse policy has been in effect for over fifteen years, the practice came under renewed public scrutiny when home raids proliferated under the Trump Administration and stories such as Mr. Kidd's emerged in mainstream media.[18] Five days after his inauguration, Presi-

---

14. ERO was formerly known as the Office of Detention and Removal Operations (DRO). DHS, Privacy Impact Assessment Update for the Enforcement Integrated Database: Risk Classification Assessment (RCA 1.0), ENFORCE Alien Removal Module (EARM 5.0), and Crime Entry Screen (CES 2.0) 2 n.2 (2012), https://www.dhs.gov/xlibrary/assets/privacy/privacy_piaupdate_EID_april2012.pdf [https://perma.cc/3FGX-54WQ]. ICE has two primary enforcement components: Homeland Security Investigations (HSI), which investigates criminal activity, and Enforcement and Removal Operations (ERO), which handles interior enforcement of civil immigration laws. See Joan Friedland, How ICE Blurs the Line Between Enforcement of Civil Immigration Violations and Enforcement of Criminal Laws, Nat'l Immigr. L. Ctr. (Aug. 27, 2019), https://www.nilc.org/2019/08/27/ice-blurs-line-between-civil-and-criminal-enforcement [https://perma.cc/9G5N-4VZQ].

15. Memorandum from John P. Torres, Acting Dir., ICE, to All Field Off. Dirs., ICE Acad. 1 (Aug. 15, 2005), https://www.immigrantdefenseproject.org/raids-foia/ (on file with the *Columbia Law Review*) [hereinafter Torres, Ruse Memo Aug. 2005]; see also Kari Burns, Hiding in Plain Sight: ICE's Deceptive Use of Ruses and False Personation, IMM Print (June 8, 2020), https://imm-print.com/hiding-in-plain-sight-ices-deceptive-use-of-ruses-and-false-personation/ [https://perma.cc/R6CW-PWGY].

16. Memorandum from Anthony J. Benedetti, Chief Couns. & Wendy S. Wayne, Dir., A Practice Advisory on INA Use of Administrative Warrants and True Warrants in Immigration and Criminal Enforcement 1–2 (Feb. 19, 2013), https://www.public-counsel.net/iiu/wp-content/uploads/sites/15/2014/07/ICE-Warrants-Practice-Advisory.pdf [https://perma.cc/A348-425R] (distinguishing between administrative warrants and judicial warrants); ICE Ruses, Immigrant Def. Project, https://www.immigrantdefenseproject.org/ice-ruses/ [https://perma.cc/M37Y-XHMS] [hereinafter ICE Ruses, Immi-grant Def. Project] (last visited Aug. 29, 2021) ("ICE agents use ruses to gain entry to homes without judicial warrants or to obtain information about the individual for whom they are looking . . . . ICE agents rarely have judicial warrants, so they need consent to be able to enter a home.").

17. Immigrant Def. Project, Ways That ICE Pretends to Be Local Police 1 (2020), https://www.immigrantdefenseproject.org/wp-content/uploads/ICE-Ruse-Flyer-ENG.pdf [https://perma.cc/5X3U-5G2Z]. ERO officials can only obtain an administrative Warrant of Removal, which is civil in nature. Unlike a judicial warrant, an administrative warrant does not allow agents to enter a home absent exigent circumstances or voluntary consent. See infra section I.B.

18. See, e.g., De La Hoz, supra note 13 (reporting that ICE officers have been known to misrepresent themselves as local law enforcement officers and probation officers for

dent Trump signed an executive order that reversed the Obama Administration's policy of prioritizing enforcement against convicted criminals, suspected gang members or terrorists, or people apprehended at the border, and instead placed any and all civil immigration violators, including those without any criminal history, as a priority for deportation.[19] Equipped with a broader authority to detain a more sweeping set of potential targets and encouraged by the Trump Administration's hardline stance against immigration and sanctuary cities,[20] ICE escalated its use of ruses in

---

years); Meagan Flynn, ICE Arrested an Undocumented Immigrant on Church Grounds. They Lied to Coax Him Out, Family and Attorney Say., Wash. Post (Sept. 17, 2020), https://www.washingtonpost.com/local/social-issues/glenmont-church-ice-deportation/2020/09/17/e57febd8-f855-11ea-be57-d00bb9bc632d_story.html (on file with the *Columbia Law Review*) (reporting how ICE agents allegedly lied to coax an undocumented immigrant from his home by saying they needed to check his ankle monitor, then detained him); Adam Harris, When ICE Raids Home, Atlantic (July 17, 2019), https://www.theatlantic.com/family/archive/2019/07/when-ice-raids-homes-immigration/594112/ [https://perma.cc/RUR5-Z5R8] (explaining that, over the past several years, there has been a shift in ICE policies from focusing on workplaces as targets of their raids to people's homes); Nausicaa Renner, As Immigrants Become More Aware of Their Rights, ICE Steps Up Ruses and Surveillance, Intercept (July 25, 2019), https://theintercept.com/2019/07/25/ice-surveillance-ruse-arrests-raids/ [https://perma.cc/FV94-RMBG] (reporting that ICE's use of ruses "has been more noticeable in the aftermath of President Donald Trump's repeated threats this summer to round up immigrants in 10 major U.S. cities"); Swan, supra note 1 (reporting that immigration lawyers say ICE ruses have become more common under the Trump Administration).

19. See Exec. Order No. 13,768, Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8799 (Jan. 25, 2017) ("We cannot faithfully execute the immigration laws of the United States if we exempt classes or categories of removable aliens from potential enforcement."); see also McKenzie Funk, How ICE Picks Its Target in the Surveillance Age, N.Y. Times (Oct. 2, 2019), https://www.nytimes.com/2019/10/02/magazine/ice-surveillance-deportation.html (on file with the *Columbia Law Review*) (last updated June 7, 2021) (describing how "[o]ne of Trump's first acts as president was to throw out his predecessor's priority list"); Tal Kop, Trump's Executive Orders Dramatically Expand Power of Immigration Officers, CNN (Jan. 28, 2017), https://www.cnn.com/2017/01/28/politics/donald-trump-immigration-detention-deportations-enforcement/index.html [https://perma.cc/Z3DA-6S9S] (explaining that Executive Order No. 13,768 "lays out a series of categories of undocumented immigrants that immigration law enforcement officials should prioritize for removing from the country" but that "experts say the descriptions include virtually every person in the country illegally"). While the administration has said that it would focus on targeting criminal immigrants, ICE has repeatedly stated that it would not "exempt classes or categories of removable [immigrants] from potential enforcement." See e.g., Press Release, DHS, Written Testimony of ICE Acting Director Thomas Homan for a House Committee on Appropriations, Subcommittee on Homeland Security Hearing Titled "Immigration and Customs Enforcement & Customs and Border Protection FY18 Budget Request" (June 13, 2017), https://www.dhs.gov/news/2017/06/13/written-testimony-ice-acting-director-house-appropriations-subcommittee-homeland [https://perma.cc/KV4Z-2BZJ].

20. Sanctuary cities are jurisdictions with policies that limit the collaboration between local law enforcement and ICE. Sanctuary Policies: An Overview, Am. Immigr. Council (Oct. 21, 2020), https://www.americanimmigrationcouncil.org/research/sanctuary-policies-overview [https://perma.cc/H6HA-MXBQ]. For a broader discussion on the tension between san-

both frequency and nature,[21] reigniting objections from immigrant rights advocates and the general public on the grounds that such practices are both inhumane and unconstitutional.[22] Despite the public outcry and questions surrounding their legality, ICE ruse practices have rarely faced court review, let alone court sanction.[23] And although the Biden Administration has reverted to the Obama-era immigration priorities[24] and there has been an overall decline in interior civil immigration enforcement since 2019 (in part due to the COVID-19 pandemic),[25] there is no indication

---

ctuary cities and aggressive immigration enforcement policies, see generally Kristina Cooke & Ted Hesson, What Are 'Sanctuary' Cities and Why Is Trump Targeting Them?, Reuters (Feb. 25, 2020), https://www.reuters.com/article/us-usa-immigration-crime/what-are-sanctuary-cities-and-why-is-trump-targeting-them-idUSKBN20J25R [https://perma.cc/ML6T-U2EW] (explaining how the Trump Administration has been intensifying its fight against Democratic-led sanctuary jurisdictions); Regarding a Hearing on "Sanctuary Jurisdictions: The Impact on Public Safety and Victims" Before the U.S. S. Comm. on the Judiciary, 116th Cong. 1 (2019) (statement of Timothy S. Robbins, Acting Exec. Assoc. Dir., ERO), https://www.judiciary.senate.gov/imo/media/doc/Robbins%20Testimony.pdf [https://perma.cc/RJU7-TJ2T] [hereinafter Robbins Testimony] (testifying that sanctuary jurisdictions hinder ICE's immigration law enforcement efforts and lead ICE to make arrests in the communities instead of a "secure jail environment"). For a list of sanctuary cities, see Sanctuary Jurisdictions, Ballotpedia, https://ballotpedia.org/Sanctuary_jurisdictions [https://perma.cc/XTZ7-N6P3] (last visited Sept. 1, 2021).

21. Burns, supra note 15; De La Hoz, supra note 13.

22. See, e.g., Burns, supra note 15; Joel Rubin, It's Legal for an Immigration Agent to Pretend to Be a Police Officer Outside Someone's Door. But Should It Be?, L.A. Times (Feb. 20, 2017), https://www.latimes.com/local/lanow/la-me-immigration-deportation-ruses-20170219-story.html (on file with the *Columbia Law Review*).

23. The *Kidd v. Mayorkas* class action, the case discussed at the start of the Introduction, is the first case that has brought attention to agency-wide ICE ruse practices and challenged the practice as a whole. See supra notes 1–12. Prior to the *Kidd* case, there were only two cases that have either acknowledged or addressed ICE's use of ruses to gain entry into an immigrant's home for civil deportation purposes. See Argueta v. Immigr. & Customs Enf't, No. 08–1652 (PGS), 2009 WL 1307236, at *2 (D.N.J. May 7, 2009); United States v. Hernandez-Juarez, No. SA-09-CR-19-XR, 2009 WL 693172, at *2 (W.D. Tex. Mar. 16, 2009).

24. Memorandum from David Pekoske, Acting Sec'y, DHS, to Troy Miller, Senior Off. Performing the Duties of the Comm'r, U.S. Customs & Border Prot., Tae Johnson, Acting Dir., USCIS, Tracey Renaud, Senior Off. Performing the Duties of Dir., ICE, Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities 2 (Jan. 20, 2021) (on file with the *Columbia Law Review*) (prioritizing enforcement against those who pose a national security, border security, or public safety threat). For a full review of President Joseph R. Biden's immigration-related executive orders, see President Biden's Executive Actions on Immigration, Ctr. for Migration Stud., https://cmsny.org/biden-immigration-executive-actions [https://perma.cc/LM4K-RLZ2] (last visited Sept. 1, 2021).

25. For example, in FY2020, ERO made 28% fewer administrative arrests compared to FY2019. ICE, U.S. Immigration and Customs Enforcement Fiscal Year 2020 Enforcement and Removal Operations Report 4, https://www.ice.gov/doclib/news/library/reports/annual-report/eroReportFY2020.pdf [https://perma.cc/5C5S-ZM5L] [hereinafter ERO Fiscal Year 2020] (last visited Sept. 1, 2021). The report notes that pandemic-related policies and concerns played a part in the decline in numbers. Id.

that the Biden Administration has abandoned or repealed the 2005 memo. Thus, the ICE ruse policy remains in place and fully operative.

While courts have nationally upheld law enforcement ruses and deceptive practices to be permissible,[26] the authority to deceive is not unbounded and must stay within the constitutional limits delineated by a robust body of law.[27] But many of the established principles contemplated by existing law apply to the legality of ruses within the *criminal* context, in which the underlying assumptions are that law enforcement officers are armed with criminal enforcement powers and are employing deceptive tactics against purported criminals. Analysis on the use of deception in the civil immigration context, in which the officers' authority is administrative in nature and the targets are violators of civil immigration laws, is almost entirely lacking, largely because immigrants often forego challenging potential constitutional violations.[28] Among several reasons underlying this choice is the Supreme Court's decision in *INS v. Lopez-Mendoza,* which found that the exclusionary rule—the judicially created remedy that precludes the government from introducing evidence obtained in violation of an individual's constitutional rights[29]—does not automatically apply in deportation proceedings, rendering constitutional challenges almost entirely moot.[30] Thus, while constitutional protection is said to be highest against warrantless government intrusion into one's home,[31] the

---

26. See Lewis v. United States, 385 U.S. 206, 207–10 (1966). The Court, holding that the use of deception by an undercover police officer did not render consent invalid, refused to hold that the use of deception by law enforcement agents is per se unconstitutional. Id.

27. Pagán-González v. Moreno, 919 F.3d 582, 591–92 (1st Cir. 2019); see also *Lewis*, 385 U.S. at 209 ("The various protections of the Bill of Rights, of course, provide checks upon such official deception for the protection of the individual.").

28. Immigr. & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1044 (1984) (stating that over 97.5% of immigrants agree to voluntary deportation without a formal hearing). Another potential reason as to why this may be the case is the lack of a right to counsel guaranteed in deportation proceedings. See Access to Counsel, Nat'l Immigrant Just. Ctr., https://immigrantjustice.org/issues/access-counsel [https://perma.cc/WJE4-LAVN] (last visited Sept. 1, 2021).

29. Exclusionary Rule, Black's Law Dictionary (11th ed. 2019).

30. 468 U.S. at 1038 (stating that the exclusionary rule does not apply in a civil deportation proceeding absent two narrow exceptions: the egregious violation and widespread violation exceptions). Immigrants in civil deportation proceedings do not enjoy the same constitutional safeguards as defendants in criminal trial. Abel v. United States, 362 U.S. 217, 237 (1960); see also Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952) ("Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure."). For discussion of the *Lopez-Mendoza* case, see Nathan Treadwell, Fugitive Operations and the Fourth Amendment: Representing Immigrants Arrested in Warrantless Home Raids, 89 N.C. L. Rev. 507, 521–27 (2011).

31. Kyllo v. United States, 533 U.S. 27, 31 (2001) ("'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion.'" (quoting Silverman v. United States, 365 U.S. 505, 511 (1961))); Minnesota v. Carter, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring) ("[I]t

use of ICE ruses during home-raid operations have largely escaped judicial scrutiny.[32] This Note closes this gap by addressing both the legal and policy questions that are raised when a civil government agency employs deceptive tools, such as ruses, against those who have committed a civil immigration infraction.

This Note proceeds in three parts. Due to the dearth of law in the civil immigration context, Part I borrows the better-established criminal Fourth Amendment doctrinal framework to lay out the different analytical strands governing the Fourth Amendment and deceived-consent cases—including the circuit split that is at the center of ICE's most popular ruse of choice. It then proceeds to outline current ICE ruse policies and practices, illustrating the extensive range of artifice afforded to ERO agents. Part II assesses the constitutionality of ICE ruse tactics against the Fourth Amendment framework governing criminal use of deception that Part I delineates. It explores the interaction between valid consent pursuant to a ruse and the scope of consent analysis that informs ICE's conduct once inside the home, highlighting how ICE's civil authority to execute collateral arrests introduces unique legal challenges beyond those contemplated by ruses employed in the criminal context. Drawing on areas where ICE's conduct poses the most severe constitutional concerns, Part III proposes two limitations on ICE ruses and shows how these constraints are also supported by public policy.

I. ICE RUSES AND THE FOURTH AMENDMENT

The legality of ruses used to gain access to homes starts with the Fourth Amendment. Thus, section I.A begins by providing a brief overview of the Fourth Amendment doctrine and the consent exception and illustrates how its inquiry is sufficiently flexible to allow for some level of law enforcement deception. It then examines how various courts have grappled with the question of what degree of falsehood is necessary to render consent invalid, highlighting the circuit split governing the most controversial type of deception: purpose-based deception. Section I.B lays out the current landscape of ICE ruse policies and practices drawing on issued memoranda, training guides, news reports, judicial decisions, and other public sources.

---

is beyond dispute that the home is entitled to special protection as the center of the private lives of our people.").

32. See supra note 23.

A. *Criminal Framework of the Fourth Amendment and Deception*

In the criminal context, courts have long recognized deception as a well-established and effective tool in law enforcement.[33] Accordingly, courts have ruled that some level of law enforcement artifice may be considered lawful as long as it does not infringe upon any constitutional boundaries, including the rights guaranteed by the Fourth Amendment.[34]

The Fourth Amendment protects individuals' security and privacy interests against unreasonable searches and seizures by requiring all government agents to obtain a warrant, issued by a neutral and detached magistrate only upon a showing of probable cause, before intruding into an area where "a person has a constitutionally protected reasonable expectation of privacy."[35] This guarantee extends to both citizens and noncitizens[36] and provides a safeguard against both criminal and civil government actions.[37] Several exceptions exist, however, that allow for a circumvention

---

33. Sorrells v. United States, 287 U.S. 435, 441 (1932); see also United States v. Fera, 616 F.2d 590, 596 (1st Cir. 1980) ("[I]t is 'sometimes necessary and permissible for the Government to use stratagems, artifices, ruses, and undercover agents or investigators who may use assumed names and conceal their true identity . . . .'" (quoting the district court judge's jury instructions)); People v. Mastin, 115 Cal. App. 3d 978, 987 (1981) ("Deception is necessary at times to accomplish the mission of police officers and does not by itself violate the Constitution.").

34. Brokers' Choice of Am., Inc. v. NBC Universal, Inc., 757 F.3d 1125, 1146 (10th Cir. 2014); see also Lewis v. United States, 385 U.S. 206, 209 (1966) ("The various protections of the Bill of Rights, of course, provide checks upon such official deception for the protection of the individual.").

35. Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring); see also U.S. Const. amend. IV; United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976) ("The Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals."); Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972) ("[A]n issuing magistrate . . . must be neutral and detached . . . .").

36. Immigr. & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) (assuming that all persons in the United States, including undocumented immigrants, have Fourth Amendment rights); Au Yi Lau v. Immigr. & Naturalization Serv., 445 F.2d 217, 223 (D.C. Cir. 1971) ("[A]liens in this country are sheltered by the Fourth Amendment in common with citizens . . . ."). But see United States v. Verdugo-Urquidez, 494 U.S. 259, 272 (1990) (explaining that the assumption made in *Lopez-Mendoza* that the Fourth Amendment covers undocumented immigrants is not binding).

37. See Camara v. Mun. Ct. of S.F., 387 U.S. 523, 528, 534 (1967) (overturning Frank v. Maryland, 359 U.S. 360 (1959), and extending Fourth Amendment guarantees to administrative searches); see also Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978) (noting that the Fourth Amendment protects against warrantless intrusions during civil as well as criminal investigations because, "[i]f the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards").

It should be noted that the civil and criminal distinction does implicate some differences in the Fourth Amendment analysis. For example, the standard defining "probable cause" is lower in administrative searches compared to criminal searches. *Camara*, 387 U.S. at 538. But for the purposes of this Note, these doctrinal differences are irrelevant, as ICE

of the Fourth Amendment mandate. For example, the Fourth Amendment does not impose a warrant requirement for arrests made in public based on probable cause,[38] road checkpoints,[39] or searches conducted in exigent circumstances or pursuant to consent.[40] But to protect the legitimacy of the Fourth Amendment, these exceptions are narrowly circumscribed and carefully drawn,[41] especially when the intrusion is into one's home, an area that commands the highest constitutional protection.[42]

Thus, courts have generally upheld the validity of a ruse used in the execution of a search or seizure that was already within law enforcement's

---

ruse practices do not invoke any of the civil Fourth Amendment inquiry. For example, while there is a separate exception analysis carved out for administrative searches, these exceptions are not applicable as ICE is equipped with only an administrative arrest warrant, not an administrative search warrant. Treadwell, supra note 30, at 529–32 (distinguishing immigration raids from "'administrative warrant' searches in the course of administrative schemes designed to protect the public"); Benedetti & Wayne, supra note 16, at 1–3 (explaining the difference between "administrative warrants" and "true warrants" and how, unlike administrative arrest warrants, administrative search warrants, while operating under a lower probable cause standard, still require approval from a neutral magistrate or judge). And even if ICE agents were to obtain a judicially administered administrative search warrant, it still would not be sufficient to gain entry into a home. See Ill. Migrant Council v. Pilliod, 531 F. Supp. 1011, 1020–23 (N.D. Ill. 1982) (distinguishing search of a home from a search of a business and concluding that an entry into a dwelling, even for immigration purposes, commands the heightened probable cause standard necessary for criminal warrants). Finally, although an "administrative inspection" is an enumerated exception to the Fourth Amendment warrant requirement, immigration enforcement does not fall under the "heavily regulated and licensed industry" category that would trigger this exception to apply. See Fourth Amendment—Administrative Searches and Seizures, 69 J. Crim. L. & Criminology 552, 555 (1978) (explaining that the Supreme Court in *Barlow* established "a narrow exception to the fourth amendment involving only heavily regulated and licensed industries").

38. See, e.g., Payton v. New York, 445 U.S. 573, 586–87 (1980).

39. See Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 445 (1990) (allowing brief detention at surprise sobriety checkpoints).

40. See, e.g., Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 298–99 (1967) (holding that hot pursuit of an armed robber is an exigent circumstance justifying warrantless entry of a home and its full-scale search).

41. See Welsh v. Wisconsin, 466 U.S. 740, 749 (1984) (emphasizing "that exceptions to the warrant requirement are 'few in number and carefully delineated'" (quoting United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 318 (1972))); Jones v. United States, 357 U.S. 493, 499 (1958) ("The exceptions to the rule that a search must rest upon a search warrant have been jealously and carefully drawn, and search incident to a valid arrest is among them."). For a longer list of exceptions, see Michael J. Friedman, Another Stab at *Schneckloth*: The Problem of Limited Consent Searches and Plain View Seizures, 89 J. Crim. L. & Criminology 313, 317–18 (1998).

42. See, e.g., Kyllo v. United States, 533 U.S. 27, 31 (2001) ("'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion.'" (quoting Silverman v. United States, 365 U.S. 505, 511 (1961))).

lawful authority, such as pursuant to a judicial warrant or probable cause.[43] Finding it persuasive that the officers already had full authorization to enter the target's home and had implemented the subterfuge merely to gain access to an area they were already constitutionally permitted to enter, courts have generally held such ruses to be reasonable.[44]

But in circumstances where law enforcement do not possess a judicial warrant or probable cause that would provide an independent legal basis to access an individual's home and instead employ the ruse to circumvent the Fourth Amendment mandate by invoking one of its exceptions, the legal analysis of ruses becomes significantly less clear. For the purposes of this Note, one exception is particularly relevant: consent.

1. *Deceived Consent–Based Search.* — The Supreme Court has firmly held that a warrantless search conducted pursuant to consent meets the Fourth Amendment requirement.[45] Consent is considered valid when it is

---

43. United States v. Ramirez, 976 F.3d 946, 952 (9th Cir. 2020); William E. Ringel, Searches & Seizures, Arrests and Confession § 6:11 (2d ed. 2020); see also Leahy v. United States, 272 F.2d 487, 490 (9th Cir. 1959) ("There is no constitutional mandate forbidding the use of deception in executing a valid arrest warrant."). For a list of cases where ruse entries pursuant to a warrant were upheld, see United States v. Michaud, 268 F.3d 728, 733 (9th Cir. 2001) (finding that the defendant's "objection to the use of trickery to encourage her to open her hotel room door [was] unavailing, given the existence of a valid warrant"); United States v. Contreras-Ceballos, 999 F.2d 432, 435 (9th Cir. 1993) (finding that an officer was justified in claiming to be a Federal Express agent when executing a warrant); United States v. Salter, 815 F.2d 1150, 1151–52 (7th Cir. 1987) (finding no Fourth Amendment violation where, pursuant to a valid search warrant, the officer posed as a hotel clerk to lure the defendant to come out of the hotel room so that other officers, positioned outside the hotel room door, could enter when the defendant opened the door); Smith v. United States, 357 F.2d 486, 488 n.1 (5th Cir. 1966) (finding that an arresting officer, who had a valid arrest warrant, acting in the guise of a telephone repairman to effectuate an arrest is constitutionally permissible).

The through line in these cases is that the government had *probable cause* to enter into the individual's home. Where the government lacks probable cause, the rationale for these cases no longer applies. For example, in *United States v. Phillips*, the Ninth Circuit held that federal agents violated the Fourth Amendment by using a ruse to execute an arrest. 497 F.2d 1131, 1136 (9th Cir. 1974). There, while the agents had probable cause to arrest the defendant, id. at 1133, the agents did not have the authority to enter the defendant's office building to effect his arrest because they lacked probable cause to believe that the defendant would be inside, id. at 1136.

44. Ringel, supra note 43, § 6:11("The right of privacy is minimal when police have a warrant, because there is no right to refuse entry to the police, only a right to submit voluntarily." (citing State v. Valentine, 504 P.2d 84, 89 (Or. 1972))); see also *Leahy*, 272 F.2d at 490 (finding that the invasion to an individual's right was minimal and outweighed by the government's justification that the ruse aided in mitigating the possibility of a violent encounter or destruction of evidence that may have been likely if the officers announced their true identities before the entry).

45. See Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) ("It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent."); Katz v. United States, 389 U.S. 347, 358 n.22 (1967) ("A search to which an individual consents meets Fourth

voluntarily and freely given and is not a product of overt or implied coercion.[46] While it is undisputed that consent must be without coercion, the Fourth Amendment equivocates with respect to law enforcement's use of deception to obtain consent.[47] Acknowledging that deceptive tactics are often essential to detect and stop crime, several Supreme Court rulings have created enough room in the Fourth Amendment inquiry to allow for some government deception so long as the target's will is not overborne.[48] The Court instead determined that the voluntariness of consent drawn out through a ruse, like all other consent cases, should be governed by the fact-intensive totality of the circumstances test, where deceit is one among many factors that may be taken into consideration.[49] Thus, while acknowledging that "[t]he Fourth Amendment can be violated by guileful as well as forcible intrusions into a constitutionally protected area,"[50] courts have affirmed that deception is not inherently incompatible with valid consent.[51]

The slippery totality of the circumstances test, however, has left this area volatile and murky, allowing for little common understanding as to what degree of falsehood is necessary to invalidate consent.[52] Except for a

---

Amendment requirements . . . ." (citing Zap v. United States, 328 U.S. 624 (1946), vacated, 330 U.S. 800 (1947))).

46. See *Schneckloth*, 412 U.S. at 223, 228.

47. Roseanna Sommers, Commonsense Consent, 129 Yale L.J. 2232, 2243 (2020) ("In 2017, a divided Eleventh Circuit panel held that '[t]he Fourth Amendment allows some police deception so long as the suspect's 'will was not overborne.' Not all deception prevents an individual from making an 'essentially free and unconstrained choice.'" (alteration in original) (quoting United States v. Spivey, 861 F.3d 1207, 1214 (11th Cir. 2017))).

48. See, e.g., Lewis v. United States, 385 U.S. 206, 210 (1966) ("Were we to hold the deceptions of the [undercover] agent in this case constitutionally prohibited, . . . [s]uch a rule would, for example, severely hamper the Government in ferreting out those organized criminal activities that are characterized by covert dealings with victims who either cannot or do not protest."); Sorrells v. United States, 287 U.S. 435, 441 (1932) (collecting cases that stand for the proposition that "artifice and stratagem may be employed to catch those in criminal enterprises").

49. See *Spivey*, 861 F.3d at 1213; United States v. Harrison, 639 F.3d 1273, 1278 (10th Cir. 2011) ("[D]eception and trickery are among the factors that can render consent involuntary."); United States v. Turpin, 707 F.2d 332, 334 (8th Cir. 1983) ("Misrepresentations about the nature of an investigation may be evidence of coercion."); see also United States v. Drayton, 536 U.S. 195, 204 (2002) (listing a variety of behaviors that constitute easily identifiable acts of coercion).

50. Hoffa v. United States, 385 U.S. 293, 301 (1966).

51. 4 Wayne R. LaFave, Search & Seizure: A Treatise on the Fourth Amendment § 8.2(n) (6th ed. 2020) [hereinafter LaFave, Search & Seizure].

52. William E. Underwood, Note, A Little White Lie: The Dangers of Allowing Police Officers to Stretch the Truth as a Means to Gain a Suspect's Consent to Search, 18 Wash. & Lee J. C.R. & Soc. Just. 167, 179 (2011); see also LaFave, Search & Seizure, supra note 51, § 8.2(n) ("This . . . approach is admittedly subjective and unpredictable, as there is no common understanding as to what constitutes permissible deception in enforcing the criminal law.").

few misrepresentations that courts have uniformly found to vitiate consent—such as misrepresenting that the officer has a judicial warrant or that life-threatening or exigent circumstances are present[53]—lower courts are left to deal with an analytical framework based on an elusive notion of fairness and good faith.[54] In an attempt to clarify the doctrine, courts across various jurisdictions have divided cases involving searches where the consent was obtained pursuant to a ruse into two categories: deception as to identity and deception as to purpose.[55]

a. *Identity-Based Ruses.* — Although not a universally accepted stance,[56] courts generally adopt a more permissive attitude toward deception when the chosen ruse hides the officer's identity as law enforcement in order to obtain an invitation into private premises to either consummate or witness an illegal transaction.[57] Undercover operations are a classic example: Courts have found entry to be proper when law enforcement agents disguised themselves as narcotics customers,[58] firearms dealers,[59]

---

53. Almost every court has ruled that blatantly misleading ruses that would "convince the resident that he or she has no choice but to invite the undercover officer in . . . may not pass constitutional muster." United States v. Hardin, 539 F.3d 404, 424–25 (6th Cir. 2008) (internal quotation marks omitted) (quoting United States v. Copeland, 89 F.3d 836, 836 n.3 (6th Cir. 1996)). Such ruses include falsely representing that the officer has a search warrant, see Bumper v. North Carolina, 391 U.S. 543, 550 (1968) ("A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid . . . [or] that there was, in fact, [no] warrant at all."); fabricating life-threatening circumstances, such as gas leaks, fires, toxic fumes, or flooding, see, e.g., United States v. Giraldo, 743 F. Supp. 152, 154 (E.D.N.Y. 1990) (finding consent involuntary where agents, disguised as gas company workers, asked permission to enter a home to check for a gas leak); and manufacturing exigent circumstances, see *Harrison*, 639 F.3d at 1276 (finding consent involuntary where ATF agents told the defendant that they had a reason to believe that there was a bomb in his apartment); United States v. Montes-Reyes, 547 F. Supp. 2d 281, 290 (S.D.N.Y. 2008) (finding consent involuntary where agents created a false sense of exigent circumstances by claiming to be looking for a "missing girl"). The courts in these cases found the "misrepresentation of purpose so extreme that it deprives the individual of the ability to make a fair assessment of the need to surrender his privacy." 2 Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, Criminal Procedure § 3.10(c) (4th ed. 2020).

54. See LaFave, Search & Seizure, supra note 51, § 8.2(n); see also Georgia v. Randolph, 547 U.S. 103, 111 (2006) (noting that great significance should be placed on widely shared societal expectations of fairness in assessing a suspect's consent).

55. See LaFave, Search & Seizure, supra note 51, § 8.2(m)–(n) (distinguishing between purpose- and identity-based deceptions and organizing the treatise along this distinction by designating a separate section for each deception type).

56. For objections, see id. § 8.2(m).

57. See United States v. Ramirez, 976 F.3d 946, 953 (9th Cir. 2020) (noting that courts have traditionally admitted evidence obtained in undercover operations).

58. Lewis v. United States, 385 U.S. 206, 210 (1966).

59. United States v. Oakes, 564 F.2d 384, 386–87 (10th Cir. 1977).

and apartment hunters.[60] In approving these ruses, courts relied on the proposition that, when an individual acquiesces to an intrusion into an area otherwise protected by the Fourth Amendment, aware that it may disclose incriminating evidence, the consent is not considered vitiated "merely because it would not have been given but for the nondisclosure or affirmative misrepresentation which made the consenting party unaware of the other person's identity as a police officer."[61] Instead, courts deem the inviting individual to have "assumed the risk" when they freely made the choice to expose their criminal activity to an individual whom they know they cannot control.[62] Thus, the government's justification that undercover investigations are "essential in the detection of crime" is typically compelling enough to overcome the limited Fourth Amendment interest.[63]

b. *Purpose-Based Ruses.* — In contrast to identity-based ruses are those in which the deception goes to the purpose behind why law enforcement is seeking consent. Here, law enforcement officers identify themselves to the target of the ruse but then mislead the consenting individual as to the scope, nature, or purpose of their investigation.[64] Courts and academics have considered this type of deception to be inherently and meaningfully different than undercover ruses because when the government seeks cooperation based on its status as a government agent, individuals will likely respond with a "sense of obligation and a presumption of trustworthi-

---

60. United States v. Garcia, 997 F.2d 1273, 1280 (9th Cir. 1993); see also Northside Realty Assocs., Inc. v. United States, 605 F.2d 1348, 1354 (5th Cir. 1979), superseded by statute, Fair Housing Amendments Act of 198, Pub. L. No. 100–430, 102 Stat. 1619 (codified as amended at 42 U.S.C. § 3601 et seq. (2000)), as recognized in United States v. City of Jackson, 359 F.3d 727 (5th Cir. 2004) (rejecting the contention that evidence obtained by individuals who posed as prospective home buyers to investigate possible Fair Housing Act violations should be excluded); State v. Anglada, 365 A.2d 720, 721–22 (N.J. Super. Ct. App. Div. 1976) (finding consent where law enforcement posed as prospective home purchasers to gain entry into the defendant-real estate agent's home).

61. See LaFave, Search & Seizure, supra note 51, § 8.2(m).

62. See Hoffa v. United States, 385 U.S. 293, 303 (1966) ("The risk of being . . . deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak." (internal quotation marks omitted) (quoting Lopez v. United States, 373 U.S. 427, 465 (1963) (Brennan, J., dissenting))); cf. *Lewis*, 385 U.S. at 211 ("A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant.").

63. See Pagán-González v. Moreno, 919 F.3d 582, 591–92 (1st Cir. 2019); cf. *Hoffa*, 385 U.S. at 374 (finding that such undercover operation did not involve *any* Fourth Amendment interest); *Lewis*, 385 U.S. at 211 (same).

64. See United States v. Bosse, 898 F.2d 113, 115 (9th Cir. 1989) ("Special limitations apply when a government agent obtains entry by misrepresenting the scope, nature or purpose of the investigation.").

ness."[65] The balance of interests shifts significantly because a "private person has the right to expect that the government, when acting in its own name, will behave honorably."[66] Thus, purpose-based ruses have generated the most controversies among jurisdictions, leading to a circuit split that has left the landscape of this area of law with the widest margin of discrepancy.[67]

The Fifth and Ninth Circuits have articulated a per se rule invalidating consent obtained through a ruse where law enforcement officers lie about the nature, scope, or purpose of why they are seeking entry.[68] For example, in *United States v. Tweel*, the Fifth Circuit held that the government deception was grounds to invalidate consent when a government agent misled the defendant to believe that an investigation was civil in nature when, in fact, it was criminal.[69] There, an IRS agent sought to review the defendant's records as part of an audit of his tax return but failed to inform the defendant that the audit was conducted at the specific request of the Department of Justice as part of a criminal inquiry, even after the defendant probed the agent to see if there was an open criminal investigation.[70]

---

65. *Pagán-González*, 919 F.3d at 592; see also Alex G. Myers, Note, To Deceive or Not to Deceive: Law Enforcement Officers Gain Broader Approval to Use Deceptive Tactics to Obtain Voluntary Consent, 69 Mercer L. Rev. 627, 641–42 (2018) ("Specifically, in obvious encounters with law enforcement officers attempting to gain cooperation, suspects are implicitly informed of the risk their interaction may have regarding criminal liability . . . [and] individuals in administrative settings are entitled to rely on the representations of the government.").

66. Sec. & Exch. Comm'n v. ESM Gov't Sec., Inc., 645 F.2d 310, 316 (5th Cir. 1981).

67. See Myers, supra note 65, at 646 n.161.

68. See, e.g., United States v. Montes-Reyes, 547 F. Supp. 2d 281, 287 n.7 (S.D.N.Y. 2008). For a list of cases that have adopted a per se rule, see United States v. Ramirez, 976 F.3d 946, 950–56 (9th Cir. 2020) (invalidating consent where an FBI agent, wearing a jacket with only the word "police" on it, obtained consent by falsely claiming that there was a burglary when in fact he was investigating child pornography); Whalen v. McMullen, 907 F.3d 1139, 1144–47 (9th Cir. 2018) (invalidating consent where the government agent hid the real purpose of investigating a possible social security fraud with criminal liability by stating that that the investigation was for a potential identity theft ring in which the defendant was not a suspect); *ESM Gov't Sec., Inc.*, 645 F.2d at 311–18 (applying the exclusionary rule and denying an administrative subpoena because the subpoena was issued by improperly accessing the defendant's files where the agent failed to disclose the existence of an investigation and instead obtained access to company records by citing educational purposes); United States v. Parson, 599 F. Supp. 2d 592, 606–08 (W.D. Pa. 2009) (finding that the government failed to meet its burden to show voluntary consent where, inter alia, agents investigating child pornography gained entry and searched a computer after advising the defendant he might be a victim of identity theft); State v. Reiner, 628 N.W.2d 460, 469 (Iowa 2001) (invalidating consent where officers falsely assured the defendant that they were not looking for small quantities of drugs but only "meth labs" and "major dealers," but later used the small amount of drugs found during the warrantless search of the defendant's home to prosecute her).

69. 550 F.2d 297, 298–300 (5th Cir. 1997).

70. Id. at 298.

The court characterized the agent's action as "sneaky deliberate deception," with "flagrant disregard for the [defendant's] right."[71] Consequently, it refused to "condone [such] shocking conduct."[72] In *United States v. Bosse*, the Ninth Circuit found that the government violated the Fourth Amendment when an Alcohol, Tobacco, and Firearms (ATF) agent accompanied a state agent who had access to the defendant's home for a firearms license inspection and failed to clear up the misunderstanding that he was not a state agent but rather a federal agent with a separate purpose of observing the defendant's premises for potential illegal activity.[73] The court in *Bosse* held that the ATF agent's silence amounted to an affirmative misrepresentation because he should have known that the state agent's statement, "[he] is with me," would mislead the defendant into thinking they were both from the same government agency acting under the same purpose.[74]

For the Fifth and Ninth Circuits, purpose-based ruses, categorically, are a step too far to be within the constitutionally permissible confines of voluntariness. They find it is improper for the government to obtain access to evidence that "would otherwise be unavailable to [it] by invoking the private individual's [sense of civic duty to cooperate or] trust in his government, only to betray that trust."[75] Instead, the courts explain that individuals should be able to rely on the agent's representation when a "government agent . . . seeks an individual's cooperation based on his status as a government agent."[76]

The per se rule adopted by the Fifth and Ninth Circuits is by no means a unanimous position, however. The First Circuit,[77] the Seventh Circuit,[78]

---

71. Id. at 299.

72. Id. at 300.

73. 898 F.2d 113, 114–15 (9th Cir. 1990).

74. Id.

75. Id. at 115 (quoting Sec. & Exch. Comm'n v. ESM Gov't Sec., Inc., 645 F.2d 310, 316 (5th Cir. 1981)). See generally Adrian J. Barrio, Note, Rethinking *Schneckloth v. Bustamonte*: Incorporating Obedience Theory Into the Supreme Court's Conception of Voluntary Consent, 1997 U. Ill. L. Rev. 215 (reassessing the conception of voluntariness in light of modern psychological findings on authority and obedience and arguing that the idea of "voluntariness" in consent searches is a legal fiction because reasonable people rarely feel comfortable declining law enforcement requests and are often inclined to "reflexively obey authority figures").

76. *Bosse*, 898 F.2d at 115 (quoting *ESM Gov't Sec., Inc.*, 645 F.2d at 316).

77. See, e.g., Pagán-González v. Moreno, 919 F.3d 582, 593 (1st Cir. 2019) ("[T]he general consensus in the case law is that such deception, including lying about the purpose of an investigation, is not categorically off-limits in obtaining consent to search.").

78. See, e.g., United States v. Watzman, 486 F.3d 1004, 1007 (7th Cir. 2007) (noting that the government did not challenge the finding that a search was invalid where officers conducted a "phony 'burglary follow-up'" ruse to investigate child pornography and thus implying that there is room to argue that the purpose-based ruse was not sufficient to nullify voluntary consent).

the Eighth Circuit,[79] and the Eleventh Circuit[80] have resisted endorsing such a bright-line rule, preferring to assess the situation on a case-by-case basis under the totality of the circumstances test. For these jurisdictions, lying about the purpose of an investigation is not categorically off-limits as long as other relevant factors—such as the target's level of education;[81] whether the misrepresentation was explicit or merely misleading by silence;[82] and the use of force, physical coercion, or threats[83]—taken in their entirety do not amount to coercion that would invalidate consent.

B. *ICE Ruse Policies and Practices*

In its initial endorsement of ruse practices, the 2005 ICE Memorandum, written by then-Acting Director Torres, framed ruses as a tactic designed to "control the time and location" of a law enforcement encounter[84] for the purpose of "enhanc[ing] officer safety"[85] and "prevent[ing] violators from fleeing, thereby allowing for a safe arrest that does not place the violator, the arresting officer or bystanders at risk."[86] Under the justification that "[r]uses are used by virtually every law enforcement agency in the federal government,"[87] Torres directed all field officers to incorporate the addition to every course run by ERO and specifically mandated that the practice be taught to those in the National Fugitive Operations Program (NFOP).[88] NFOP is an initiative under ERO tasked with identifying, locating, apprehending, and removing fugitive immigrants,[89]

---

79. See, e.g., United States v. Turpin, 707 F.2d 332, 334 (8th Cir. 1983) (upholding the lawfulness of a consent search but stating that the "[m]isrepresentations about the nature of an investigation may be evidence of coercion").

80. United States v. Spivey, 861 F.3d 1207, 1214 (11th Cir. 2017) ("[While] 'fraud, deceit or trickery in obtaining access to incriminating evidence *can* make an otherwise lawful search unreasonable,' [it] does not mean that it *must*." (quoting United States v. Prudden, 424 F.2d 1021, 1032 (5th Cir. 1970))).

81. *Pagán-González*, 919 F.3d at 598.

82. United States v. Meier, 607 F.2d 215, 217 (8th Cir. 1979).

83. *Spivey*, 861 F.3d at 1216.

84. Torres, Ruse Memo Aug. 2005, supra note 15, at 1.

85. Memorandum from Marcy M. Forman, Dir., Off. of Investigations & John P. Torres, Acting Dir., Det. & Removal Operations, to All Special Agents in Charge, All ICE Attacheés & All Field Off. Dirs., ICE, Uses of Ruses in ICE Enforcement Operations 1 (Aug. 22, 2006), https://www.immigrantdefenseproject.org/raids-foia/ (on file with the *Columbia Law Review*) [hereinafter Forman & Torres, Ruse Memo Aug. 2006].

86. Memorandum from John P. Torres, Acting Dir., ICE, to All Field Off. Dirs., Uses of Ruses in Enforcement Operations 1 (Mar. 6, 2005), https://www.immigrantdefenseproject.org/raids-foia/ (on file with the *Columbia Law Review*) [hereinafter Torres, Ruse Memo Mar. 2006]; see also Forman & Torres, Ruse Memo Aug. 2006, supra note 85, at 1.

87. Torres, Ruse Memo Mar. 2006, supra note 86, at 1.

88. Torres, Ruse Memo Aug. 2005, supra note 15, at 1.

89. Fugitive immigrants are those who have an outstanding deportation order. DHS, Enforcement and Removal Operations: Fugitive Operations Handbook 5 (2010),

previously removed immigrants, and criminal immigrants at-large. It achieves this goal by dispatching Fugitive Operations Teams (FOTs) across the country to conduct at-large community arrests via employment and residential enforcement operations—commonly known as raids.[90]

1. *FOTs' Authority Under Administrative Warrants.* — When conducting targeted fugitive operations arrests, FOT agents often act pursuant to one of two ICE warrants:[91] either a Warrant for Arrest of Alien (I-200)[92] or a Warrant of Removal (I-205).[93] ICE warrants are administrative in nature

---

https://www.immigrantdefenseproject.org/raids-foia/ (on file with the *Columbia Law Review*) [hereinafter Fugitive Operations Handbook 2010] (defining fugitive immigrants as those "who have failed to comply with a final order of removal, deportation, or exclusion; or who have failed to report or appear as demanded by [ICE]").

90. See Letter from Karyn V. Lang, Dir., ICE Off. of Cong. Rels., to Rep. Zoe Lofgren, U.S. House of Representatives 3 (Mar. 14, 2007), https://www.publiccounsel.net/iiu/wp-content/uploads/sites/15/2014/07/ICE-Warrants-Practice-Advisory.pdf [https://perma.cc/A348-425R] [hereinafter Lang Letter] (stating that, when pursuing ICE fugitives, FOTs often locate targeted immigrants at their residence or places of employment); see also Immigrant Def. Project & Ctr. for Const. Rts., Defend Against ICE Raids and Community Arrests: A Toolkit to Prepare and Protect Our Communities 9 (2019), https://www.immigrantdefenseproject.org/raids-toolkit (on file with the *Columbia Law Review*) [hereinafter ICE Raid Toolkit].

At-large arrests are arrests conducted within the community as opposed to custodial arrests, which occur in a setting like a jail or prison. ICE, Fiscal Year 2017 ICE Enforcement and Removal Operations Report 6 & n.4, https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf [https://perma.cc/4KKK-G7TX] (last visited Sept. 22, 2021).

91. ICE Off. of the Principal Legal Advisor, 4th Amendment Training: Refresher for ERO FUG OPS 4 (2017), https://mijente.net/wp-content/uploads/2019/07/ICE-4th-Amendement-Training.pdf (on file with the *Columbia Law Review*). ICE officers primarily derive their authority to arrest immigrants believed to have committed civil immigration infractions from two federal statutes: Sections 236 and 287 of the Immigration and Nationality Act (INA). Hillel R. Smith, Cong. Rsch. Serv., LSB10362, Immigration Arrests in the Interior of the United States: A Primer 1 (2019) [hereinafter Smith, Primer]. INA § 236(a) provides that an immigration officer may arrest and detain an immigrant who is subject to removal upon an issuance of a warrant, 8 U.S.C. § 1226(a) (2018), with the two most common warrants being a Warrant for Arrest of Alien (I-200) or a Warrant of Removal (I-205). INA § 287(a), 8 U.S.C. § 1357, prescribes the power of ICE agents when acting without a warrant.

92. See 8 C.F.R. § 287.5(e)(2) (2021).

93. See id. § 241.2. An I-200 arrest warrant is for an allegedly deportable immigrant who does not already have a removal order against them, while an I-205 is issued subsequent to a removal order. Immigr. Legal Res. Ctr., ICE Warrants and Local Authority 1 n.3 (2017), https://www.ilrc.org/sites/default/files/resources/ice_warrants_may_2017.pdf [https://perma.cc/AZ4M-HWQ6] [hereinafter ILRC, ICE Warrants and Local Authority]. ICE arrest warrants are not the same as ICE search warrants to enter and inspect businesses. See Benedetti & Wayne, supra note 16, at 2–3 (citing Ill. Migrant Council v. Pilliod, 531 F. Supp. 1011, 1021–22 (N.D. Ill. 1982)) (distinguishing between "administrative warrants" and "true warrants" and explaining how because a "search of a home is different from a search of business," the relaxed probable cause standard needed to obtain a warrant of inspection to search a business is not applicable to warrants to search a home).

and therefore distinct from criminal arrest or search warrants.[94] They are issued exclusively for use by immigration officers to arrest individuals who are in violation of civil immigration laws, not criminal laws.[95] And more significantly, ICE warrants "do not grant the same authority as a [judicially-issued] criminal search or arrest warrant," as they are not contemplated by the Fourth Amendment.[96] Criminal warrants are reviewed and approved by a neutral official, such as a judge or a magistrate judge, who can act as a check to the law enforcement's discretion and potential arbitrariness by requiring a threshold standard of probable cause.[97] In contrast, ICE warrants can be generated by any one of the many immigration officials with a designated title within its own agency—at least fifty-two identified titles for Form I-200[98] and thirty-one titles for Form I-205[99]—based on a finding that a person is removable from the United States.[100] Reflecting the lower level of scrutiny involved, ICE warrants come with some constitutional limitations: They do not authorize agents to enter the "subject's residence or anywhere else affording a reasonable expectation of privacy"

94. See supra note 16 and accompanying text.

95. Smith, Primer, supra note 91, at 1–2 ("Reviewing courts have recognized that this administrative warrant may not serve as the basis for state or local law enforcement officials to arrest and detain an [immigrant], except when done under the terms of a cooperative agreement with federal authorities under INA § 287(g)."); see also ILRC, ICE Warrants and Local Authority, supra note 93, at 2–4 (explaining that "ICE warrants are not valid warrants and do not confer authority on local law enforcement to detain someone for civil immigration violations" and that "[t]here is no requirement for a local officer to take action based on an ICE warrant, because such action is outside their legal authority").

96. Lang Letter, supra note 90, at 3; see also Smith, Primer, supra note 91, at 2 ("Unlike judicial warrants, ICE warrants are purely administrative, as they are neither reviewed nor issued by a judge or magistrate, and therefore do not confer the same authority as judicially approved arrest warrants.").

97. See, e.g., Coolidge v. New Hampshire, 403 U.S. 443, 453 (1971) (finding a warrant issued by the Attorney General to be invalid because he was not a neutral magistrate); Johnson v. United States, 333 U.S. 10, 14 (1948) (finding that Fourth Amendment protection consists of requiring that those "inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime").

98. Officials who are authorized to issue arrest warrants for immigration violations include immigration enforcement agents, chief patrol agents, border patrol watch commanders, and directors of investigations. See 8 C.F.R. § 287.5(e)(2) (2021).

99. Officials who are authorized to issue warrants of removal include directors of ERO, field office directors, directors of Marine Operations, and group supervisors. Id. § 241.2.

100. Id. § 287.5(e)(2); see also ERO Letter to the American Public, ICE (Sept. 12, 2019), https://www.ice.gov/statements/enforcement-and-removal-operations-mythbuster [https://perma.cc/MY3X-KKCK] ("In fact, no judge in this country has the authority to issue a warrant for a civil immigration violation. Congress, by statute, vested this authorization solely to supervisory immigration officers.").

to effectuate an arrest.[101] They "merely allow[] for the target's [civil immigration] arrest"[102] so long as the officer locates the person outside of a constitutionally protected area.[103] If FOT agents wish to enter into a home, they must do so through the consent exception. If consent is denied, agents must "wait it out" until the identified fugitive immigrant leaves the constitutionally protected premises and goes to a public area.[104] And unlike criminal arrest warrants that authorize entry into the premises based on probable cause that the target is within the location,[105] ICE warrants provide FOTs with no legal basis to enter the home, even if the agents know that the person subject to the warrant is inside.[106]

Recognizing the constitutional issue posed by the distinction of authorities, NFOP's own regulations and policies incorporate the Fourth Amendment boundaries into its training materials.[107] These limitations, however, raise practical challenges in the field given that one of FOTs' primary enforcement mechanisms is home raids.[108] Thus, NFOP's policies, while emphasizing that entry into a home always requires consent, provide a means to circumvent this constraint by allowing their agents to employ ruses as a legitimate investigative technique to lure targeted individuals into a public space or to gain consent to enter their homes.[109]

---

101. Fugitive Operations Handbook 2010, supra note 89, at 16; see also Letter from Michael Chertoff, Sec'y, DHS, to Christopher Dodd, Sen., U.S. Senate 2 (June 14, 2007), https://www.scribd.com/document/22093146/Michael-Chertoff-Letter-to-Senator-Christopher-June-14-2007 [https://perma.cc/AE6A-7DY8] [hereinafter Chertoff Letter] (asserting that FOTs only entered a dwelling upon receiving consent).

102. ICE Off. of the Principal Legal Advisor, supra note 91, at 4.

103. ICE Administrative Removal Warrants (MP3), Fed. L. Enf't Training Ctrs., at 04:05–04:19, https://www.fletc.gov/audio/ice-administrative-removal-warrants-mp3 [https://perma.cc/RYT8-F7CE] [hereinafter FLETC Transcript] (last visited Sept. 1, 2020).

104. Id.

105. Payton v. New York, 445 U.S. 573, 603 (1980). A criminal arrest warrant, which is founded on probable cause, "implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." Id.

106. FLETC Transcript, supra note 103, at 03:37–04:04.

107. See, e.g., Fugitive Operations Handbook 2010, supra note 89, at 16 (warning FOT agents that, "[b]ecause neither a Warrant for Arrest of Alien (I-200) nor an administrative Warrant of Removal (I-205) authorizes [them] to enter the subject's residence or anywhere else affording a reasonable expectation of privacy, [they] must obtain voluntary consent before entering a residence"); ICE Off. of the Principal Legal Advisor, supra note 91, at 4 (explicitly stating that, "[e]ven with an administrative warrant, DHS officers need *consent* to enter an area that has a [reasonable expectation of privacy] to make an arrest[,] [i]ncluding a home, the curtilage of a home, or an individual's room in shared premises"); Lang Letter, supra note 90, at 3 ("Officers are required to obtain consent before they enter private residences or non-public areas of businesses.").

108. See generally Katherine Evans, The ICE Storm in U.S. Homes: An Urgent Call for Policy Change, 33 N.Y.U. Rev. L. & Soc. Change 561 (2009) (highlighting ICE's widespread reliance on home raids for civil immigration enforcement).

109. There is no categorical bar on using deception to obtain consent. See supra notes 47–51 and accompanying text.

2. *ICE's Sanctioned Ruses and Its Primary Choice.* — ICE's internal documents reveal that FOT agents are licensed with wide discretion in the type of ruses they can engage in. Designed to serve as a practical guide for agents on the ground, the Fugitive Operations Handbook and various ICE training manuals carefully delineate an extensive list of permissive ruses from which agents can select when seeking to make a fugitive arrest. Such tactics include: impersonating other law enforcement agencies;[110] identifying themselves as the "police" or "federal officers" without further specification;[111] wearing uniforms with only the word "police" on them without any additional visual marks that specify that they are affiliated with ICE;[112] dressing in plain clothes;[113] altering ICE vans by equipping them with ladders and tubing so that it no longer appears like a government transportation vehicle;[114] carrying boxes and clipboards to create an appearance that

110. Torres, Ruse Memo Aug. 2005, supra note 15, at 1. Prior to adopting the guise of a different agency, ICE agents must follow certain protocol outlined in the August 2005 Memorandum from former Acting Director John P. Torres. Id. For a discussion on those protocols, see infra text accompanying notes 235–243.

111. DHS, Verbal Techniques/Communication for Consent (n.d.), https://www.immigrantdefenseproject.org/raids-foia/ (on file with the *Columbia Law Review*) [hereinafter DHS, Verbal Techniques]. A spokesperson for the western region of ICE told NPR that, "[a]s a standard practice, special agents and officers . . . may initially identify themselves as 'police' during an encounter." Rebecca Hersher, Los Angeles Officials to ICE: Stop Identifying Yourself as Police, NPR (Feb. 24, 2017), https://www.npr.org/sections/thetwo-way/2017/02/24/517041101/los-angeles-officials-to-ice-stop-identifying-yourselves-as-police [https://perma.cc/S9ME-NBYS]; Swan, supra note 1 (noting that "[a]n ICE spokesperson said officers with the agency frequently identify themselves simply as police but do not claim to be with agencies other than ICE"). ICE has defended ICE agents' practice of identifying themselves as the police, stating that "police" is "a general term for law enforcement agents and that it is necessary to convey ICE agents' status to non-English speakers." Elizabeth Nolan Brown, 'We As Legislators Can't Keep ICE From Lying' About Being Local Cops, Reason (Aug. 25, 2017), https://reason.com/2017/08/25/legislators-cant-keep-ice-from-lying/printer/ [https://perma.cc/58H5-Y9Z7]; see also Hartford Mayor, Police Chief Say Immigration Agents Posed as Police, NBC Conn. (Mar. 20, 2017), https://www.nbcconnecticut.com/news/local/hartford-mayor-police-chief-condemn-immigration-agents-posing-as-police/32650/ [https://perma.cc/VXA7-6FVB] [hereinafter Hartford Mayor, NBC Conn.] (last updated Mar. 23, 2017) ("ICE agents and officers identify themselves as 'police' during an encounter because it is the universally recognized term for law enforcement . . . . Anyone giving credence to the idea that an ICE officer is not a legitimate police officer . . . is endangering public safety." (quoting Shawn Neudauer, ICE spokesperson)). ATF agents also identify themselves as police at times. Hersher, supra. A spokesperson for the U.S. Drug Enforcement Agency (DEA), however, stated that their agents generally describe themselves as DEA agents and not as police. Id.

112. Margot Mendelson, Shayna Strom & Michael Wishnie, Migration Pol'y Inst., Collateral Damage: An Examination of ICE's Fugitive Operations Program 6 (2009), https://www.migrationpolicy.org/pubs/NFOP_Feb09.pdf [https://perma.cc/Q2NZ-7ZDE]; ICE Ruses, Immigrant Def. Project, supra note 16.

113. Mendelson et al., supra note 112, at 6; see also ICE Ruses, Immigrant Def. Project, supra note 16.

114. ICE Off. of the Principal Legal Advisor, supra note 91, at 47.

ICE agents are dayworkers;[115] carrying fake business emblems and cards;[116] using fake photos to create an artificial investigation;[117] and posing as a delivery person[118] or a hit-and-run investigator.[119] The list of suggestions is not exhaustive, and except for a narrow set of ruses which it has identified as categorically impermissible,[120] ICE permits its officers to try new ruse tactics subject to prior approval.[121]

Although ICE agents are afforded a substantial range of ruses from which they can select, the most commonly reported ruse is the impersonation of local law enforcement officers, either explicitly or by implication.[122] FOT agents often conduct raids early in the morning,[123] dressed in plain clothes or clothes that mimic local law enforcement uniforms while hiding any badges or insignia that would indicate that they are immigration officers.[124] After representing themselves as government agents—either as the police, detectives, or probation officers—FOTs often succeed

---

115. Id.

116. Id.

117. ICE, 4th Amendment Presentation 35 (n.d.), https://www.immigrantdefenseproject.org/raids-foia/ (on file with the *Columbia Law Review*) [hereinafter ICE Presentation].

118. ICE Acad., ICE Fourth Amendment and Policy Refresher 7 (2014), https://www.immigrantdefenseproject.org/raids-foia/ (on file with the *Columbia Law Review*).

119. Id.

120. ICE's guidelines have set forth some constraints on ruses, most of which are drawn from Fourth Amendment and public policy concerns. See supra note 53. For example, ICE's Fourth Amendment training manuals strictly prohibit fabricating life-threatening emergencies (e.g., gas leak or fire) or manufacturing exigent circumstances (e.g., missing child or false bomb)—ruses that courts have consistently held as unconstitutional on the basis that, because the "misrepresentation of purpose [was] so extreme[,] . . . [it] deprive[d] the individual of the ability to make a fair assessment of the need to surrender his privacy." LaFave et al., supra note 53; see also ICE Presentation, supra note 117, at 37 (listing forbidden ruses).

121. ICE Presentation, supra note 117, at 36.

122. Immigrant Def. Project & Ctr. for Const. Rts., ICEwatch: ICE Raids Tactics Map 4 (2018), https://www.immigrantdefenseproject.org/wp-content/uploads/ICEwatch-Trends-Report.pdf [https://perma.cc/4SNS-EEHS] [hereinafter ICEwatch Trends Reports]. Please note that most of the collected stories are based on accounts that have occurred in sanctuary cities, focusing on New York City, Los Angeles, and San Francisco.

123. See, e.g., Flynn, supra note 18 (reporting that a ruse began before 7:00 AM); Story 1117, Staten Island, March 2019, *in* ICE Ruses, Immigrant Def. Project, supra note 16 (providing an account of an ICE ruse raid where agents came to the target's home at 6:20 AM in the morning); see also Argueta v. Immigr. & Customs Enf't, No. 08-1652 (PGS), 2009 WL 1307236, at *2 (D.N.J. May 7, 2009) (noting how agents conducted home raids anytime between 3:00 AM to 7:15 AM).

124. See, e.g., Mendelson et al., supra note 112, at 6 (discussing how "[ICE] agents sometimes [would] also wear uniforms identifying themselves as 'POLICE'"); ICE Ruses, Immigrant Def. Project, supra note 16 (discussing how pretending to be local police is a common ruse used by ICE); Renner, supra note 18 (reporting that ICE agents often wear navy blue uniforms and present themselves to be local law enforcement); see also *Argueta*, 2009 WL 1307236, at *2 (stating how ICE agents wore vests with only the words "police" printed on them).

in currying the resident's participation, including obtaining consent, by employing various fabrications. Accounts and testimonials show that agents have been known to ask occupants to review fake photos of "suspects" that are not known to anyone in the home;[125] use a stranger's photograph but the targeted person's name when describing a criminal suspect, prompting residents to either invite the officer inside or locate their friends or family to correct the error; claim someone is using the resident's name or address to commit a crime and requesting the occupant's cooperation in the investigation;[126] claim that someone in the house has been a victim of a crime such as identity theft or fraud;[127] and state that there is some issue, such as with the target's car, that they need to clear up.[128] In the case of a probation ruse, individuals on probation typically have no choice but to comply with officers' requests because the terms of their probation require them to permit probation officers to access their homes and persons.[129]

In almost all ruse interactions, FOT agents either seek entry into the home or request the occupant to step out of the protected premises to discuss their investigation, and then attempt to gain information as to the identity of the other residents or their whereabouts.[130] If the target is not at the residence at the time of the ruse, FOT agents try to reach the fugitive through the aid of the other occupants who are present.[131] Once in contact, the agents continue their misrepresentation until they are able to get the subject to a location where they can arrest them—usually somewhere in public, like outside of the individual's home or, more recently, outside of a specified local police department precinct.[132] In many of these cases, the targets do not find out that the people with whom they have been interacting are ICE agents up until or after their arrest.[133]

---

125. See, e.g., United States v. Hernandez-Juarez, No. SA-09-CR-19-XR, 2009 WL 693172, at *1 (W.D. Tex. Mar. 16, 2009) (noting that an ICE agent presented to the target's mom a picture of a stranger and asked if they could enter the premises to make sure the suspect wasn't there); Renner, supra note 18 (reporting that ICE agents often use a fake photo of a person, who is unknown to the resident with a name they do not recognize, to secure entry into the home for the purpose of verifying that no one at the residence fits the description).

126. See, e.g., *Kidd* Complaint, supra note 9, at 19–21.

127. ICEwatch Trends Report, supra note 122, at 9.

128. *Kidd* Complaint, supra note 9, at 22–23.

129. Id. at 24.

130. ICEwatch Trends Report, supra note 122, at 9; see also DHS, Verbal Techniques, supra note 111 (instructing ICE agents on how to "[e]mploy verbal strategies in order to obtain consent to enter a residence," including by asking intelligence gathering questions to determine how many people live in the home and whether they are currently inside the home).

131. ICE Raid Toolkit, supra note 90, 30–31.

132. Id.

133. See ICEwatch Trends Report, supra note 122, at 10, 30.

Reviewing ICE's current ruse policy and practices, it is clear that FOTs leverage the entire landscape of deception, including both identity- and purpose-based ruses. It is also apparent that some of FOTs' actions—especially their primary ruse choice of impersonating the local police—sits at the margins of what is considered constitutional conduct under the criminal Fourth Amendment analysis.

II. LEGAL ANALYSIS OF ICE RUSES

Part II assesses the legality of ICE ruses and demonstrates how ICE ruses are at the outer boundary of constitutionally permissive behavior. Section II.A draws on the contours of deceived consent–based searches in the criminal context that Part I maps out to determine whether consent obtained through ICE ruses is valid. Assuming that valid consent is found, section II.B conducts a scope of consent analysis and identifies and explores the potential risks associated with ruses in the civil immigration context. This Part concludes that entry obtained through ruses can trigger ICE's statutory grant of authority to conduct collateral arrests, allowing agents to indiscriminately sweep up targets and bystanders inside the home, which goes well beyond the conduct and authority contemplated in the criminal context.

A. *Valid Consent Pursuant to ICE Ruses*

According to ICE's internal documents, sanctioned ruses can "run the gamut from announcing that you are with [ERO] and looking for a person other than the target to adopting the guise of another agency (federal, state or local) or that of a private entity."[134] Where FOT agents' chosen artifice is identity-based—such as posing as a delivery person or a day-worker—such practices are likely considered lawful under the criminal framework.[135] ICE's most popular ruse selection of masquerading as a different type of government official, however, falls squarely in the crosshairs of the purpose-based-deception circuit split.[136]

Under the Fifth or Ninth Circuit's per se rule, ICE's preferred ruse would be deemed as categorically violative of the Fourth Amendment. By misrepresenting the purpose of their investigation, FOT agents invoke the target's sense of duty while creating a false impression that the target is in the presence of someone who will not and cannot lead to adverse immigration consequences.[137] Moreover, for ruses involving false claims that the

134. Torres, Ruse Memo Aug. 2005, supra note 15, at 1.

135. See supra section I.A.1.a.

136. See supra section I.A.1.b.

137. See, e.g., United States v. Tweel, 550 F.2d 297, 299–300 (5th Cir. 1997) (finding consent involuntary where an IRS agent failed to apprise the target of the criminal nature

target is a victim of a potential crime, the concern underlying purpose-based ruses becomes more prominent, as it induces the targets to place their trust in law enforcement with the expectation that they are there to help them, not harm them.[138] For probation ruses, courts are likely to find this type of deception to be even more coercive given that the targets are legally obligated to comply with residence checks conducted by probation officers.[139]

The legal analysis, however, does not lend itself to clear outcomes in jurisdictions that have refused to embrace the Fifth and Ninth Circuits' per se bar on purpose-based ruses. Under the totality of the circumstances test, courts consider both the characteristics of the accused and the details of the encounter.[140] Relevant factors include the time and location of the encounter;[141] the consenter's lack of education;[142] the consenter's proficiency in the English language;[143] the consenter's prior experience in dealing with American law enforcement;[144] the number of officers present

---

of the investigation and thus misled the target to believe that he was not at risk of criminal charges).

138. Kidd v. Mayorkas, No. 2:20-cv-03512-ODW (JPRx), 2021 WL 1612087, at *7 (C.D. Cal. Apr. 26, 2021) (denying the government's motion to dismiss on the grounds that there were sufficiently plausible facts to support the plaintiff's claim that ICE agents violated his Fourth Amendment rights when they disguised themselves as local police officers and pretended to protect the plaintiff's family from a dangerous criminal); see also United States v. Parson, 599 F. Supp. 2d 592, 603 (W.D. Pa. 2009) (determining that a ruse claiming that the suspect was a victim of identity theft is an extreme misrepresentation that is similar to the unlawful fake warrant ruse used in Bumper v. North Carolina, 391 U.S. 543, 550 (1968)).

139. See De La Hoz, supra note 13; see also People v. Fernandez, 599 N.Y.S.2d 405, 406 (Sup. Ct. 1993) (finding that police officers posing as parole officers to get the defendant to open the door where they could conduct a warrantless arrest was coercive because the defendant had a legal obligation to comply with residence checks).

140. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).

141. See, e.g., Kaupp v. Texas, 538 U.S. 626, 631–32 (2003) (per curiam) (finding that a search in the "middle of the night" was nonconsensual); Krause v. Commonwealth, 206 S.W.3d 922, 926 (Ky. 2006) (finding that a 4:00 AM raid counseled against finding voluntary consent).

142. See, e.g., Payne v. Arkansas, 356 U.S. 560, 562 (1958) (finding that the target's fifth-grade-level education weighed against a finding of voluntariness).

143. See, e.g., United States v. Isiofia, 370 F.3d 226, 233 (2d Cir. 2004) (suggesting that the accused's lack of facility with English militated against a finding of voluntariness); United States v. Hernandez-Juarez, No. SA-09-CR-19-XR, 2009 WL 693172, at *4 (W.D. Tex. Mar. 16, 2009) (finding consent involuntary when the ruse was used upon a non-English speaking immigrant). But see Chertoff Letter, supra note 101, at 2 (nothing how each FOT is assigned a Spanish-speaking officer).

144. See e.g., People v. Gonzalez, 347 N.E.2d 575, 581 (N.Y. 1976) (noting that the defendants had "very limited prior contact with the police"); cf. United States v. Kon Yu-Leung, 910 F.2d 33, 41 (2d Cir. 1990) (claiming that the defendant's prior experience with law enforcement supported a finding of voluntariness).

during the interaction;[145] and finally, the use of deception.[146] Although there may be a compelling argument that, even under the totality of the circumstances, using ruses against vulnerable immigrant populations who are not fluent in English and lack the sophistication to adequately protect themselves against potentially unlawful government intrusion should amount to coercion, it is far from clear that these ICE ruse practices would always necessitate a finding that the consent is invalid.

Moreover, FOT agents have two avenues by which they can skirt the line and narrowly stay within the constitutional ambit. First, FOT agents can engage in implied rather than overt misrepresentation: They can state that they are "the police" or a "federal officer" without further specifying their connection to immigration and either make no mention of the purpose of their visit or define their investigation in sufficiently vague terms so that it would encompass their actual purpose.[147] Although various communities have protested against ICE's use of the word "police" on the grounds that the target immigrants will almost always associate the term with the local police department,[148] and ICE's own internal understanding seems to suggest that the use of those terms while withholding ICE-identifying information is a form of subterfuge,[149] such representation is

---

145. See, e.g., United States v. Mendenhall, 446 U.S. 544, 554 (1980) (noting that the "threatening presence of several officers" can indicate a nonconsensual encounter).

146. See, e.g., United States v. Spivey, 861 F.3d 1207, 1213 (11th Cir. 2017) ("Deceit can . . . be relevant to voluntariness."); United States v. Montes–Reyes, 547 F. Supp. 2d 281, 287–90, 287 n.7, 288 n.10 (S.D.N.Y. 2008) (holding that the use of a ruse to gain entry can render consent involuntary under the totality of the circumstances).

147. See supra note 111 and accompanying text; see also infra section II.B.2.

148. See, e.g., Doug Smith, Los Angeles Officials Urge ICE Agents to Stop Identifying Themselves as Police, L.A. Times (Feb. 23, 2017), https://www.latimes.com/local/lanow/la-me-ln-la-officials-protest-ice-tactics-20170223-story.html (on file with the *Columbia Law Review*) [hereinafter Smith, LA Officials Urge ICE Agents] ("There is no question that in the city of Los Angeles, the word 'police' means LAPD . . . ." (internal quotation marks omitted) (quoting Los Angeles City Attorney Mike Feuer)); Natalie Delgadillo, Can States and Cities Stop ICE From Impersonating Police?, Governing (Aug. 24, 2017), https://www.governing.com/topics/public-justice-safety/gov-california-ab1440-ice-police-immigrants.html [https://perma.cc/2KMM-UWTA] (reporting that former California Governor Jerry Brown signed a symbolic bill, AB 1440, which would forbid immigration officers from referring to themselves as police officers under California state law); Press Release, Nydia M. Velázquez, Congresswoman, Velázquez Seeks to Block Immigration Feds From Identifying as Local Police (July 11, 2019), https://velazquez.house.gov/media-center/press-releases/velazquez-seeks-block-immigration-feds-identifying-local-police-0 [https://perma.cc/C8XY-8N8A] (reporting that Congress-woman Nydia M. Velázquez introduced a bill that would prohibit immigration officers from wearing any clothes bearing the word "police").

149. Mendelson et al., supra note 112, at 6 (reporting that FOTs have engaged in undercover work by dressing in plain clothes or wearing uniforms identifying themselves as police). In one of ICE's training materials designed to teach ICE agents effective verbal techniques, it explicitly instructs that ICE agents should identify themselves as the "[p]olice" or "[f]ederal [o]fficers" without reference to a specific police department. DHS, Verbal Techniques, supra note 111. This is illuminating in two ways: First, ICE's justification for

not considered illegal, and may not even be seen as an explicit lie.[150] And where there is no affirmative misrepresentation and the agent's action merely contributes to and exploits the consenter's ignorance, rather than actively misleads the target, courts are more likely to find consent to be valid.[151] Given the social context, however, one can analogize such practices to an "affirmative-misrepresentation-by-silence" as held in the *Bosse* case—especially in circumstances where FOT agents have actively hidden any ICE-identifying marks. Regardless, the lack of express deception would likely shift the legal analysis in favor of upholding the voluntariness of consent.

Second, FOT agents can employ ruses not to enter into protected premises but to lure the target out. In *Payton v. New York*, the court emphasized that "the Fourth Amendment has drawn a firm line at the entrance to the house," implying that the privacy concerns that are at their peak when inside the home are no longer applicable once the target steps outside the home.[152] This does not mean that ruses used to coax people out of their homes are per se constitutional.[153] In both situations, privacy rights are still invaded.[154] But generally, courts have deemed it unobjectionable when the police engage in some affirmative misrepresentation that causes

---

using the word "police" as a universal symbol of law enforcement to facilitate the establishment of authority to non-English speakers does not apply to the term "federal officers." See supra note 111. Second, the express prohibition against referencing specific police departments seems to be a way to sidestep ICE's own internal protocol of getting prior approval from other government agencies when engaging in a ruse. DHS, Verbal Techniques, supra note 111; see also Fugitive Operations Handbook 2010, supra note 89, at 16. Both imply that ICE's verbal tactic of representing themselves as the "police" or "federal officers" is a technique to trick the targets into giving their consent.

150. Smith, LA Officials Urge ICE Agents, supra note 148; Delgadillo, supra note 148; see also Brown, supra note 111 (reporting how ICE representatives contend that the word "police" encompasses ICE agents because it is a universally recognized word for law enforcement).

151. See United States v. Richardson, 583 F. Supp. 2d 694, 708–10 (W.D. Pa. 2008) (finding that an officer's representation of investigating "illegal credit card activity" was vague enough to encompass the defendant's illegal credit card charged to access child pornography); see also United States v. Briley, 726 F.2d 1301, 1304–05 (8th Cir. 1984) (finding that "officers' cryptic statement that they had matters to discuss" with the suspect without specifying their intention to arrest him did not amount to deceitful misrepresentation); State v. Rodgers, 349 N.W.2d 453, 457–58 (Wis. 1984) (finding that the deputies' statement to the defendant's mother indicating that they wanted to talk to her son without further elaborating on their plan to arrest the defendant did not amount to deception).

152. 445 U.S. 573, 590 (1980).

153. See ICE Off. of the Principal Legal Advisor, supra note 91, at 46 ("[E]ven ruses to lure people out of a home have been held to be coercive."); see also Ciampi v. City of Palo Alto, 790 F. Supp. 2d 1077, 1096 (N.D. Cal. 2011) ("A deception used to gain entry into a home and a ruse that lures a suspect out of a residence is a distinction without much difference" (quoting People v. Reyes, 98 Cal. Rptr. 2d 898, 902 (Ct. App. 2000))).

154. *Reyes*, 98 Cal. Rptr. 2d at 902.

the arrested person to leave the interior of the residence.[155] The governing question, once again, is whether the agents lured the target outside by coercion.[156] While it is unclear exactly what degree of deception is necessary to amount to coercion when agents employ the ruse not to breach a protected area but to lure the target out of it, the courts have generally held that the officers' deception must be more severe to cross the unconstitutional threshold.[157] But the fact that ruses used by FOT agents to entice the fugitive target outside are more elaborate in nature—such as when agents designate a local police precinct as the public meeting location—may weigh in favor of finding consent to be coerced.[158]

Exploring the breadth of ICE ruse practices against the indistinct boundaries of laws governing deception and consent within the criminal context, there is a viable argument that at least a subset of artifice used by FOTs would be within constitutional limits. If valid consent is found, FOTs' subsequent conduct within the home is analyzed under a separate scope of consent inquiry.

B. *Scope of Consent, Collateral Arrest, and the Deception Puzzle*

Finding valid consent is a threshold Fourth Amendment question in consent-based search cases. But once law enforcement crosses into a constitutionally protected area, a different legal framework becomes operative

---

155. United States v. Pierson, 219 F.3d 803, 804–05 (8th Cir. 2000) (finding that the defendant was lawfully arrested without a warrant when he exited his motel room after the police telephoned him, saying that they were hotel management and requesting the defendant come to the front desk); State v. Bentley, 975 P.2d 785, 787–88 (Idaho 1999) (finding that the police who had an arrest warrant for the defendant that could be executed only in a public place properly used subterfuge when "requesting that he show them his car registration" to lure him outside); State v. Gilmore, 697 S.W.2d 172, 175 (Mo. 1985) (finding no *Payton* violation where the police used an informant to induce the defendant to leave his residence for the purported purpose of committing another robbery). These cases all involve law enforcement having probable cause to make an arrest but lacking a warrant, thus prohibiting them from entering a constitutionally protected area absent consent or exigent circumstance, *Payton*, 445 U.S. at 590—similar to the authority granted to ICE warrants.

156. LaFave, Search & Seizure, supra note 51, § 6.1(e).

157. United States v. Nora, 765 F.3d 1049, 1054 (9th Cir. 2014) (finding that the defendant's arrest constructively occurred "inside" because the police's action of "surrounding his home and ordering him to come out at gunpoint" coerced the defendant to exit his home); United States v. Creighton, 639 F.3d 1281, 1288–89 (10th Cir. 2011) (treating an arrest that happened outside as an in-premises arrest when the defendant exited the premises in response to the police's "threat to send a police dog into the home unless Defendant promptly exited" and believed that exigent circumstances were present); United States v. Saari, 272 F.3d 804, 809 (6th Cir. 2001) (holding that the officers' conduct of eliciting the defendant to step outside by drawing their guns "constituted a constructive entry and in-home arrest").

158. See *Reyes*, 98 Cal. Rptr. 2d at 902 (noting that, when police employ "trickery" to seek entry into or to lure persons out of private spaces, "the dispositive issue ought to be the nature of the ruse employed" for finding valid consent); see also supra notes 130–133 and accompanying text.

and informs the officers' conduct inside the home. The Supreme Court has long condemned law enforcement's use of "general exploratory searches" within constitutionally protected premises performed in the hope that they might find incriminating evidence.[159] And in the context of consent-based searches, the Seventh Circuit in *United States v. Dichiarinte* specifically held that the government "may not obtain consent to search on the representation that they intend to look only for certain specified items and subsequently use that consent as a license to conduct a general exploratory search."[160] Courts curb the risk of such searches by asking whether the search conducted was within the scope of the consent given.[161] Because valid consent opens the door for law enforcement to enter into a constitutionally protected area that would have been otherwise inaccessible, FOT agents' action and authority granted inside the home and how it contrasts to the authority provided to law enforcement in the criminal context merits attention.

1. *Comparing ICE and Criminal Law Enforcement Authorities Governing Conduct in Homes.* — The administrative nature of ICE warrants embraces a narrower scope of authority when compared to criminal judicial warrants and thus imposes additional barriers to FOT agents' conduct outside of the home. But once agents cross the threshold and gain entry inside the home, the relative positions flip and FOT agents are afforded significantly more latitude than those granted to officers in the criminal setting.

During home enforcement operations, FOTs are authorized to execute what are commonly known as collateral arrests, which are arrests of bystanders who are not initially targeted but happen to be present at the time of the search and whom FOT agents believe are removable.[162] While ICE's use of this tactic is not new, there was a surge in reported collateral arrests in 2017 when President Trump broke with the Obama Administration's policy of discouraging such arrests and "unshackled" agents to be

---

159. See, e.g., Go-Bart Importing Co. v. United States, 282 U.S. 344, 358 (1931) ("It was a lawless invasion of the premises and a general exploratory search in the hope that evidence of crime might be found."); see also United States v. Rabinowitz, 339 U.S. 56, 62–63 (1950) ("[Prior Supreme Court] cases condemned general exploratory searches, which cannot be undertaken by officers with or without a warrant."), overruled in part on other grounds by Chimel v. California, 395 U.S. 752 (1969).

160. 445 F.2d 126, 129 (7th Cir. 1971).

161. Florida v. Jimeno, 500 U.S. 248, 251 (1991) (noting that "[t]he scope of a search is generally defined by its expressed object" and discussing the acceptable scope of a consensual search of a car (citing United States v. Ross, 456 U.S. 798 (1982))).

162. Nina Bernstein, Hunts for 'Fugitive Aliens' Lead to Collateral Arrests, N.Y. Times (July 23, 2007), https://www.nytimes.com/2007/07/23/nyregion/23operation.html (on file with the *Columbia Law Review*) ("[O]ther[] [persons that FOTs] encounter during an operation can be questioned as to their right to be in the United States, and 'if deemed to be here illegally, may be arrested without warrant.'" (quoting Michael Chertoff, Sec'y of DHS)).

able to look beyond the target identified on the ICE warrant.[163] Recent ICE reports corroborate media reporting that a larger portion of the immigrant population is getting swept up through collateral arrests.[164] Many of these individuals who are arrested through this method have no prior criminal history other than civil violations of their immigration status.[165]

---

163. Press Briefing by Press Secretary Sean Spicer, White House (Feb. 21, 2017), https://trumpwhitehouse.archives.gov/briefings-statements/press-briefing-press-secretary-sean-spicer-022117/ [https://perma.cc/43HK-H5GM] ("The President wanted to take the shackles off individuals in these agencies . . . ."); see also Press Release, ICE, Statement From ICE Acting Director Tom Homan on California Sanctuary Law (Oct. 6, 2017), https://www.ice.gov/statements/statement-ice-acting-director-tom-homan-california-sanctuary-law [https://perma.cc/48D6-L65E] (signaling that ICE would be conducting more at-large arrests where collateral arrests would inevitably result); Maha Ahmed, ICE's Latest Raids Swept Up More Than 500 Whose Only Crime Was Being in the United States, Mother Jones (Aug. 2, 2017), https://www.motherjones.com/politics/2017/08/ices-latest-raids-swept-up-more-than-500-whose-only-crime-was-being-in-the-united-states/ [https://perma.cc/MJ5W-YJNL] (reporting on a raid that swept up 520 undocumented immigrants with no criminal records and claiming that collateral detention has increased significantly under the Trump Administration); Nick Miroff, Deportations Slow Under Trump Despite Increase in Arrests by ICE, Wash. Post (Sept. 28, 2017), https://www.washingtonpost.com/world/national-security/deportations-fall-under-trump-despite-increase-in-arrests-by-police/2017/09/28/1648d4ee-a3ba-11e7-8c37-e1d99ad6aa22_story.html (on file with the *Columbia Law Review*) ("Under the Obama Administration, ICE agents seeking to arrest a suspect would not typically ask for the documents of relatives and other people living with the suspect. Now they have more discretion to do so, resulting in additional collateral arrests, including potential deportees with no criminal record.").

164. In FY2016, immigration violators without criminal convictions or charges constituted 13% of the total at-large administrative arrests. See ICE, Fiscal Year 2018 ICE Enforcement and Removal Operations Report 6 fig.4 https://www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf [https://perma.cc/8QKH-2HE5] [hereinafter ERO Fiscal Year 2018] (last visited Sept. 1, 2021). In FY2017, that number increased to 22% and to 27% in FY2018. Id. The total number of arrests of immigration violators without criminal convictions or charges was 10,987 in FY2018. Id. The total number of fugitive arrests was 2,791. Id. at 5 tbl.2. Making a generous assumption that all fugitive arrests consisted only of immigrants without prior convictions or charges, fugitive arrests would constitute 25% of the total arrests of immigration violators without criminal convictions or charges. The remaining 75% likely comes from worksite enforcement and collateral arrests. See Press Release, ICE, ICE Arrests 156 Criminal Aliens and Immigration Violators During Operation Keep Safe in Chicago Area (May 25, 2018), https://www.ice.gov/news/releases/ice-arrests-156-criminal-aliens-and-immigration-violators-during-operation-keep-safe [https://perma.cc/M8JP-V2TA] (last updated Oct. 16, 2018) (confirming that, of the 156 individuals arrested, 106 (68%) were at-large collateral arrests for whom agents did not obtain warrants for arrests); Ahmed, supra note 163 (noting that 520 of the 650 people that ICE detained during a weekly operation in July 2016 had no criminal records).

It should be noted that this analysis does not take into account the change in administration, as immigration numbers in general have been skewed due to the COVID-19 pandemic. See ERO Fiscal Year 2020, supra note 25.

165. See, e.g., Ahmed, supra note 163; Ben Leonard, Under Trump Arrests of Undocumented Immigrants With No Criminal Record Have Tripled, NBC News (Aug. 13, 2018),

When asked for a legal basis of ICE's ability to make collateral arrests, ICE officials cite to its statutory authority granted by the Immigration and Naturalization Act (INA).[166] 8 U.S.C. § 1357(a) outlines ICE's power when acting without a warrant, and it specifically authorizes agents to question suspected undocumented immigrants for proof of legal status and subsequently make a warrantless arrest if the agent has a "reason to believe that the [individual is] . . . in violation of [immigration] law or regulation and is likely to escape before a warrant is obtained for his arrest."[167] Per ICE's own protocol, once FOT agents secure entry into a target's dwelling, they are permitted to ask the occupant how many other people are in the house.[168] And if other individuals are present, agents may request that they all gather in the common area under the justification of "officer safety."[169] In narrow circumstances in which there are "articulable facts warranting a reasonable belief there is a person posing a danger to officers [or] others on the scene," agents are permitted to conduct a protective sweep.[170] Agents can then question the legal status of any other individual they encounter.[171] If an occupant is unable to proffer adequate identification and is deemed a flight risk, agents are permitted to conduct a warrantless arrest of the purported undocumented immigrant.[172] These collateral arrests can be made even if agents fail to locate or arrest the initial target.[173]

This, however, seems to be a significantly broader reach when compared to the authority granted to law enforcement officers under similar

---

https://www.nbcnews.com/politics/immigration/under-trump-arrests-undocumented-immigrants-no-criminal-record-have-tripled-n899406 [https://perma.cc/2LK4-HQBW].

166. See Chertoff Letter, supra note 101, at 2.

167. 8 U.S.C. § 1357(a)(1) authorizes ICE agents to interrogate any immigrant or person believed to be an immigrant as to their right to be or remain in the United States. 8 U.S.C. § 1357(a)(1) (2018). It then lists two circumstances in which warrantless immigration arrests are deemed permissible: First is when an immigrant, in the presence or view of the immigration officer, is entering or attempting to enter the United States unlawfully, and second is when the immigration officer has "reason to believe" that the immigrant is in the United States in violation of the law and is likely to escape before a warrant can be obtained. Id. § 1357(a)(2). "[T]he [phrase] 'reason to believe' in § 1357(a)(2) requires the equivalent of probable cause, . . . which in turn requires a particularized inquiry." Moreno v. Napolitano, 213 F. Supp. 3d 999, 1007 (N.D. Ill. 2016) (citation omitted).

168. Chertoff Letter, supra note 101, at 2.

169. Id.

170. ICE Acad., supra note 118, at 8; Letter from Peter T. Edge, Deputy Exec. Assoc. Dir., to All Special Agents-in-Charge, ICE Training and Policy Statement 1 (Apr. 10, 2013) (on file with the *Columbia Law Review*).

171. ICE Acad., supra note 118, at 8.

172. 8 U.S.C. § 1357(a)(2).

173. See generally Michael Barbaro, A Day With I.C.E., N.Y. Times: The Daily Podcast (July 31, 2017), https://www.nytimes.com/2017/07/31/podcasts/the-daily/the-daily-a-day-with-ice.html [https://perma.cc/JS3R-RPK3] (reporting a story of a collateral arrest in which ICE agents visited a residence at 6:00 am looking for a target who had a criminal record but instead encountered and then subsequently detained the target's father, who had no past criminal record other than his civil immigration violation).

circumstances in the criminal context. Several Supreme Court rulings have outlined criminal law enforcement's permissible conduct once inside a home: For example, the Court has established that, if the police come across any evidence in "plain view" that is "immediately apparent" as incriminating, officers have the authority to make a warrantless seizure under the plain view exception as long as the officer had lawful access to the vantage point from which the item was viewed.[174] But the "immediately apparent" requirement is met only when the officers have "probable cause to believe that an object in plain view is [evidence of a crime] without conducting some further search of the object."[175] Applying the doctrine to ICE home enforcement operations, the only "evidence" that FOT agents are able to seize are people—bystanders who are present at the time of the search—and the only incriminating character that is at issue is the individual's legal status. But outside of an arbitrary or inappropriate basis, such as race[176] or a direct confession, the unlawful status of an individual cannot be said to be "immediately apparent" for the purpose of this doctrine. A request to see identification documents or other evidence for proof of legal status would constitute as "some further search" that would render the plain view exception unavailing in the criminal context.

The directive that allows FOTs to conduct a protective sweep and question the occupants about their legal status again extends beyond the policy's criminal counterpart. The language closely mimics the holding of *Maryland v. Buie*, which governs protective sweeps in the criminal setting.[177] *Buie* held that "the Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene."[178] The sweep must not be "longer than necessary to dispel the reasonable suspicion of danger" and for the officers to

---

174. Horton v. California, 496 U.S. 128, 136–37 (1990).

175. Minnesota v. Dickerson, 508 U.S. 366, 375 (1993); see also United States v. Ochs, 595 F.2d 1247, 1258 (2d Cir. 1979); United States v. Gonzalez Athehorta, 729 F. Supp. 248, 259 (E.D.N.Y. 1990) ("The incriminating nature of an object is immediately apparent if the police have probable cause to believe it is evidence of a crime, but if an item must be moved even slightly, to ascertain its incriminatory nature, the requirement of the plain view doctrine is not satisfied." (citations omitted)).

176. See, e.g., Ill. Migrant Council v. Pilliod, 540 F.2d 1062, 1070 (7th Cir. 1976), aff'd in part, rev'd and remanded in part en banc, 548 F.2d 715 (7th Cir. 1977) (mem); cf. Complaint for Declaratory and Injunctive Relief at 3–5, Nava v. Dep't of Homeland Sec., 435 F. Supp. 3d 880, 885 (N.D. Ill. 2020) (alleging that ICE agents are "neither trained nor instructed" to make the particularized finding that an arrestee is a potential flight risk that is required to make a proper collateral arrest, but rather make assumptions based on racial profiling).

177. 494 U.S. 325, 327 (1990).

178. Id. at 337.

"complete the arrest and depart the premises."[179] Thus, under the *Buie* rationale, FOTs may gather those in the premises and even interrogate the occupants about possession of dangerous weapons to secure the premises and complete the arrest of the target, but the justification does not provide a basis for immigration-related questioning.

ICE may also cite to federal regulation as the basis for its broad powers exercised in the home. 8 C.F.R. § 287.8 provides:

> If the immigration officer has a reasonable suspicion, based on specific articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is an [immigrant] illegally in the United States, the immigration officer may briefly detain the person for questioning.[180]

This standard directly parallels the language of *Terry v. Ohio*,[181] commonly known as the "stop and frisk" case.[182] *Terry* is a criminal procedure case that allows a very narrow exception for police to briefly detain a person *on the streets* for investigative and safety purposes if they can point to "'specific and articulable facts' that give rise to reasonable suspicion that a particular person has committed, is committing, or is about to commit a crime."[183] And "[w]hile 'reasonable suspicion' is a less demanding standard than probable cause . . . , [t]he officer must be able to articulate more than an 'inchoate and unparticularized suspicion or "hunch"' of criminal activity."[184]

The Supreme Court has not yet addressed the constitutionality of *Terry*-style searches and seizures within the home.[185] Numerous circuits, however, have ruled that *Terry*-style pat downs conducted inside a home are permissible as long as the officer entered the home lawfully either through valid consent or exigent circumstances.[186] But similar to *Buie*, the main reasoning behind the extension of *Terry* searches into the home is officer safety and thus the courts have required an individualized suspicion

---

179. Id. at 336.

180. 8 C.F.R. § 287.8 (2021).

181. 392 U.S. 1 (1968).

182. David A. Mackey, *Terry v. Ohio*, Britannica (June 29, 2016), https://www.britannica.com/event/Terry-v-Ohio [https://perma.cc/6YTG-6GEZ].

183. United States v. Monsivais, 848 F.3d 353, 357 (5th Cir. 2017) (quoting United States v. Hill, 752 F.3d 1029, 1033 (5th Cir. 2014)) (discussing *Terry*, 392 U.S. at 30).

184. Illinois v. Wardlow, 528 U.S. 119, 123–24 (2000) (quoting *Terry*, 392 U.S. at 27).

185. United States v. Curtis, 490 F. Supp. 3d 1183, 1199 (S.D. Tex. 2020).

186. Id. at 1199–201. Cases in which law enforcement had a valid search warrant would be governed by Michigan v. Summers, 452 U.S. 692, 705 (1981), which allows detention of residents without reasonable suspicion during execution of a judicially issued search warrant.

that the suspect is armed.[187] As the Court in *Terry* articulated, an investigatory stop entails "more than the governmental interest in investigating crime"; there is also the "more immediate interest" of "the neutralization of danger to the policeman in the investigative circumstance."[188] The federal regulation, while borrowing the language from *Terry*, does not carry over the same rationale and, again, seems to overstep the appropriate law enforcement conduct contemplated by *Terry* in the criminal context. In cases of civil immigration arrests, given the data suggesting that the majority of immigrants swept up through collateral arrests have no criminal history,[189] there is little basis to assume that FOT agents' routine round-up of entire households is justified by case-specific and articulable facts supporting a reasonable suspicion that the bystanders were dangerous. Moreover, even under the federal regulation standard, it is doubtful whether the presence of one undocumented immigrant in a house gives officers reason to suspect that every other resident is in violation of immigration laws.[190]

2. *Ruse Contraction and Expansion on Scope of Consent.* — Despite ICE's expansive authority to conduct collateral arrests, ICE's training guides strictly advise that agents are not to exceed the scope of consent, as "[c]onsent to enter a home is not consent to search the entire home."[191] "The scope of a search is generally defined by its expressed object"[192] and the "places in which there is probable cause to believe that it may be found."[193] The standard of measuring the scope of a suspect's consent under the

187. See, e.g., United States v. Darensbourg, 236 F. App'x 991, 994 (5th Cir. 2007) (per curiam) (upholding a *Terry* pat-down conducted within a defendant's home on the grounds that it was reasonable for the police to believe the occupants were involved in drug trafficking and therefore were possibly armed); United States v. Romain, 393 F.3d 63, 75 (1st Cir. 2004) (holding that, once an officer is legitimately on residential premises pursuant to consent or other lawful authority, individualized suspicion that a person is armed may justify a frisk); United States v. Brooks, 2 F.3d 838, 842 (8th Cir. 1993) (finding that a bulge in the suspect's pocket provided the police a sufficiently reasonable and particularized suspicion to justify a protective pat down of the suspect for weapons); United States v. Flippin, 924 F.2d 163, 165–66 (9th Cir. 1991) (finding that the defendant's action of grabbing her bag while the officer turned away in addition to the fact that the officer saw the defendant's companion armed with a large knife the prior day provided reasonable and particularized suspicion to search her bag for weapons).

188. *Terry*, 392 U.S. at 23, 26.

189. See supra notes 164–165 and accompanying text; see also infra notes 259–261 and accompanying text.

190. Treadwell, supra note 30, at 542.

191. ICE Off. of the Principal Legal Advisor, supra note 91, at 3. Administrative agencies may obtain a warrant of inspection, which is different than an administrative warrant of arrest.

192. Florida v. Jimeno, 500 U.S. 248, 251 (1991) (citing United States v. Ross, 456 U.S. 798, 823–24 (1982)).

193. *Ross*, 456 U.S. at 824.

Fourth Amendment is "objective reasonableness."[194] It asks what the typical reasonable person would have understood by the exchange between the officer and the suspect, calling for a fact-intensive analysis that largely focuses on the interaction between the two parties.[195] Thus, where the object of consent is limited to a search for narcotics, the search does not extend to inspecting documents, even if the suspect communicates his consent in sweeping terms.[196]

In cases where a consent-based search was conducted pursuant to a ruse, it is unclear as to how the scope of consent analysis interacts with ICE's legal authority to conduct collateral arrests. At least one immigration case suggests that the courts deprioritize the statutory grants of authority and assess the legality of collateral arrests of the undocumented immigrant in a more straightforward scope of consent analysis.[197] In *United States v. Hernandez-Juarez*, the ICE agent deployed a photo ruse—a deceptive tactic in which the agent shows the resident a photo of a stranger to gain consent to enter and investigate—against the target's mother, knowing that, if he showed a picture of her son, who was a fugitive immigrant, she would refuse to cooperate.[198] She gave her consent for the officers to come inside and check whether the man in the photo was present in her home. During the search, the agent did not find the target but instead encountered a sleeping couple, whom he woke up to question their legal status.[199] Upon verifying the woman's lawful status—but not the man's—the agent arrested and detained him.[200] The Western District of Texas found that the agent's action of interrogating the couple violated the scope of consent because the expressed object contemplated by the consent was the man in the photo.[201] The court stated that the "typical reasonable person would have understood that the exchange between the agent and [the target's mother] would have amounted at most to allowing a search of the premises for the man in the ruse photograph," suggesting that the consent

194. *Jimeno*, 500 U.S. at 252.

195. Id.

196. United States v. Dichiarinte, 445 F.2d 126, 129 (7th Cir. 1971). When the police asked if the defendant had drugs at home, the defendant responded, "I have never seen narcotics. You guys come over to the house and look, you are welcome to." Id. at 128; see also *Ross*, 456 U.S. at 824 ("Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase.").

197. United States v. Hernandez-Juarez, No. SA-09-CR-19-XR, 2009 WL 693172, at *2–4 (W.D. Tex. Mar. 16, 2009).

198. Id. at *2.

199. Id. at *1.

200. Id.

201. Id. at *4.

did not give the agent license to search the sleeping couple, clearly neither of whom was the man in the photo.[202]

The *Hernandez-Juarez* case demonstrates the dynamic between deceit, scope of consent, and collateral arrests: A ruse used to gain entry into the home can restrict government action inside the home and potentially place a cap on the extent of statutory authority accorded to FOT agents to conduct collateral arrests.[203] Directly applying the *Hernandez-Juarez* logic to the deceptive schemes discussed in the previous section,[204] the vague lines that govern the validity of consent come more into focus and suggest that a large portion of the collateral arrests conducted pursuant to a deceived consent–based search may be unconstitutional under a scope of consent analysis. For example, if an FOT agent uses a male name for a fictitious criminal they are investigating, the scope of consent analysis would likely preclude them from searching female occupants. If an agent poses as a delivery person, they would have no basis to ask a bystander for their identification. Or, if an FOT agent represents that a fabricated criminal is using the occupant's address to conduct a dangerous crime, the object of the consent would likely not contemplate the consenter's young children.[205]

But different permutations of hypothetical ruses—for example, if a specific photograph is not presented to the consenter or if an agent claims someone in the house is a victim of identity theft—expose the danger of exploratory searches that can arise when consent is obtained via a ruse: If FOTs can choose a subterfuge that constricts the scope of the search inside the home, then they can equally craft one that can expand it.[206] In other words, officers can use deceit to distort the boundaries of the scope such that it encompasses the objects they desire to search.

---

202. Id. The court initially held for the defendant on the ground that consent was not voluntarily given when analyzed under the totality of the circumstances test. The court, however, took a step further to rule for the defendant on a second ground: It found that, even if the consent was valid, the agent violated the scope of consent given.

203. See Abel v. United States, 362 U.S. 217, 237 (1960) ("We conclude, therefore, that government officers who effect a deportation arrest have a right of incidental search analogous to the search permitted criminal law-enforcement officers."); but see id. (stating that, because the "deportation proceedings are not subject to the constitutional safeguards for criminal prosecutions, . . . [s]earches for evidence of crime present situations demanding the greatest, not the least, restraint upon the Government's intrusion into privacy").

204. See supra section II.B.

205. Cf. Kidd v. Mayorkas, No. 2:20-cv-03512-ODW (JPRx), 2021 WL 1612087, at *1 (C.D. Cal. Apr. 26, 2021) (describing how the officers sought the identification of Mr. Kidd's younger siblings, who at the time were between the ages of eleven and sixteen). Applying the *Hernandez-Juarez* analysis, the consent that Mr. Kidd's mother gave to the officers in response to their photo ruse would not have permitted the officers to seek the identification of Mr. Kidd's younger siblings. Id.

206. See Friedman, supra note 41, at 314–15 (noting the tension between consent searches and plain view doctrine).

People v. Zamora is a case that exemplifies how law enforcement can achieve a much broader authorization to search by either carefully crafting the consent request or by keeping the consent request intentionally vague so that, when the consent is given, it includes what the officers seek to find and seize.[207] In *Zamora*, police officers employed a purpose-based ruse to gain entry into the defendant's apartment.[208] They sought evidence that would corroborate the victim's description of the apartment to meet the probable cause threshold necessary for a search warrant.[209] After an initial refusal, the defendant ultimately gave consent when the officers falsely represented that they wanted to "take a quick look" at the layout of the apartment to aid in the investigation of the domestic dispute in the adjacent apartment. In the apartment, the officers found an unfilled waterbed frame that matched the victim's description.[210] They subsequently obtained a warrant to arrest him, and the court upheld the search as valid.[211]

Applying this logic to ICE ruse practices, one can see the risk involved in the dynamic between deception and the scope of consent. For example, FOT agents are prohibited from conducting protective sweeps unless they have a reasonable belief that the property is harboring a dangerous individual.[212] To circumvent that restriction, FOT agents can craft a ruse that would embrace access to the entire dwelling or to a bystander's identification, which would maximize their chances of making a collateral arrest. In other words, this perplexing dynamic between deception and scope of consent may cajole unsuspecting occupants into allowing FOTs—agents who originally had no independent legal authority to access the inside of their home—to conduct what they perceive to be a harmless investigation, only to find the entire household detained and potentially deported.

Examining ICE ruses under the criminal Fourth Amendment framework illustrates a complicated picture of the legality of the policy. What is clear, however, is that current ICE ruse practices stretch the Fourth Amendment limits within the meaning of the criminal context. And while there are viable arguments that certain ICE ruses are unconstitutional, by parsing out each analytical strand of the Fourth Amendment doctrine governing deception in the criminal context, it is also possible to see that what first appears to be a violation might be deemed to be or manipulated into constitutionally permitted conduct. This opens up many questions regarding the legal and social consequences of ICE ruses, which have never been addressed due to the lack of visibility and availability of effective remedies,

207. Id. at 342–43.

208. People v. Zamora, 940 P.2d 939, 941 (Colo. App. 1996).

209. Id.

210. Id.

211. Id. at 944.

212. See supra note 170 and accompanying text.

such as the exclusionary rule. The next Part of this Note takes these limits into consideration to propose a new policy governing ICE ruse practices.

III. PROPOSAL FOR THE NEW ICE RUSE POLICY

Part III proposes two constraints on current ICE ruse practices and proceeds to discuss the public policy support for each of the proposed limitations.

Examining the outer limits of ICE ruses and Fourth Amendment analysis, this Note identifies two areas where current ICE ruse practices potentially exceed constitutional boundaries set within the criminal context: purpose-based ruses and collateral arrests made pursuant to a ruse. These practices not only pose legal challenges but also run counter to the policy rationale for law enforcement's use of deception: public safety. To mitigate the risk of potential constitutional violations and harm to public safety, this Note proposes that ICE update its policies by placing categorical bars on the two identified behaviors.

Law enforcement chicanery has always evoked some criticism of varying scope and intensity because it unavoidably inflicts a social harm:[213] Deception naturally erodes the trust between the government and its people and undermines the perception of government fairness and propriety.[214] Consequently, some have argued that all forms of deception to gain consent should be considered unlawful.[215] As one author put it, "public officials should [never] be expected to resort to tactics which violate the standards of dignity and probity [even] for the conduct of government or society generally . . . [because] [a]ny departure from the highest standards . . . [may] not only foster[] cynicism in the public at large, but a callousness in the officials' themselves."[216] The Supreme Court, however, refused to categorically forbid law enforcement's reliance on deceit to elicit consent on the grounds that such a categorical prohibition would "severely hamper the Government in ferreting out those organized criminal activities

---

213. See LaFave, Search & Seizure, supra note 51, § 8.2(m).

214. United States v. Alverez-Tejada, 491 F.3d 1013, 1017 (9th Cir. 2007) ("If people can't trust the representations of government officials, the phrase 'I'm from the government and I'm here to help' will become even more terrifying.").

215. See Friedman, supra note 41, 316–17 (arguing that a suspect should be warned of the potential scope of a search upon granting officers consent).

216. LaFave, Search & Seizure, supra note 51, § 8.2(n) (internal quotation marks omitted) (quoting Model Code of Pre-Arraignment Procedure 355–56 (1975)); see also Johnson v. United States, 333 U.S. 10, 17 (1948) (finding that law enforcement chicanery "obliterate[s] one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law"); Alexander v. United States, 390 F.2d 101, 110 (5th Cir. 1968) ("Intimidation and deceit are not the norms of voluntarism. In order for the response to be free, the stimulus must be devoid of mendacity. We do not hesitate to undo fraudulently induced contracts. Are the disabilities here less maleficent?").

that are characterized by covert dealings."[217] In other words, use of deception has been justified on a public safety rationale. Thus, the boundary-drawing exercise to determine when a government deception no longer becomes acceptable should trace the lines of when the social harm that the government subterfuge causes outweighs the public safety benefit it provides. Both purpose-based ruses and collateral arrests made pursuant to deceived consent, however, jeopardize rather than increase public safety.

A. *Bar to a Purpose-Based Ruse*

Purpose-based ruses have elicited the most controversy among the circuits, with two circuits placing a categorical bar on such types of deception, because the potential harm inflicted on the relationship between law enforcement and the public is at its greatest.[218] This risk, however, is further heightened in the context of ICE ruses due to the policy issues unique to civil immigration.

ICE has often attributed its aggressive ramp up of community arrests and use of tougher tactics, including more frequent use of ruses, to sanctuary policies.[219] ICE has reasoned that the cities' noncooperation leaves their agents with no choice but to crack down on communities.[220] This, however, seems to directly contradict the logic behind sanctuary policies. There are numerous justifications as to why a jurisdiction may choose to adopt sanctuary policies, but one of the most prevalent arguments is resident safety.[221] Research has shown that a cooperative relationship between law enforcement and immigrant communities can enhance public safety and reduce crime.[222] Trust is considered an essential component of effective policing,[223] and local law enforcement's involvement with ICE can erode immigrants' trust in their local government.[224] Based on a study con-

---

217. Lewis v. United States, 385 U.S. 206, 210 (1966).

218. See supra section I.A.1.b.

219. See supra note 20.

220. See, e.g., Robbins Testimony, supra note 20, at 1–2.

221. Naomi Tsu, What Is a Sanctuary City Anyway?, Learning for Just., https://www.tolerance.org/classroom-resources/texts/what-is-a-sanctuary-city-anyway [https://perma.cc/79AU-ZN97] (last visited Sept. 1, 2021).

222. See Just. for Immigrants, Frequently Asked Questions on Sanctuary Cities 2 (2020), https://justiceforimmigrants.org/wp-content/uploads/2020/03/FAQ-Sanctuary-City.pdf [https://perma.cc/5ZLW-ZBRY].

223. Cmty. Rels. Servs., DOJ, Importance of Police-Community Relationships and Resources for Further Reading 1–4 (2015), https://www.justice.gov/crs/file/836486/download/ [https://perma.cc/5DUC-4X6P] ("Strong relationships of mutual trust between police agencies and the communities they serve are critical to maintaining public safety and effective policing.").

224. See Tom K. Wong, S. Deborah Kang, Carolina Valdivia, Josefina Espino, Michelle Gonzalez & Elia Peralta, U.S. Immigr. Pol'y Ctr., How Interior Enforcement Affects Trust in

ducted by the U.S. Immigration Policy Center, "[W]hen local law enforcement officials work with ICE on federal immigration enforcement," immigrants are "statistically significantly less likely to . . . trust that [local law enforcement] will keep them, their families, and their communities safe, protect the rights of all people, including undocumented immigrants, equally, protect the confidentiality of witnesses to crimes even if they are undocumented, and protect undocumented immigrants from abuse or discrimination."[225] Research indicates that this breach of trust can have a broad range of "chilling effects" that may contribute to a higher degree of social harm and isolation.[226] By blurring the line between local law enforcement and federal immigration enforcement, studies show that undocumented immigrants are less likely to report crimes to the police, either as victims or as witnesses, due to fear that their interaction with local law enforcement will subject them to adverse civil immigration consequences.[227]

While ICE's policy to employ ruses already inheres a harm that is implicit to government deceptive tactics, FOTs' favored ruse of impersonating local police, either by overt or implied misrepresentation, obliterates the line between local law enforcement and federal immigration officers altogether, inflicting the exact harm that sanctuary policies seek to remedy. Moreover, unlike other purpose-based deception, in which law enforcement's misrepresentation of the purpose or nature of the investigation risks harming their own government status, FOTs' most popular ruse choice implicates a third-party harm: It erodes the integrity of the local police department, which may in turn compromise public safety and

---

Law Enforcement 9 (2019), https://usipc.ucsd.edu/publications/usipc-working-paper-2.pdf [https://perma.cc/3RRU-DBM5] ("In other words, 28.5% of respondents are less likely to say that they trust that police officers and sheriffs would protect the rights of all people, including undocumented immigrants, equally when local law enforcement officials work with ICE on federal immigration enforcement.").

225. Id. at 2.

226. Id. at 14.

227. Cecilia Menjívar, William Paul Simmons, Daniel Alvord & Elizabeth Salerno Valdez, Immigration Enforcement, the Racialization of Legal Status, and Perceptions of the Police, 15 Du Bois Rev. 107, 108 (2018) ("In this climate of dramatically increased deportations and expanded police involvement in immigration enforcement, community-police relations are threatened . . . ."); Just. for Immigrants, supra note 222, at 2–3 ("Requiring local law enforcement entities to enforce federal immigration laws complicates the responsibility to protect and serve the local community of which they are a part."); Tom K. Wong, Karina Shklyan, Anna Isorena & Stephanie Peng, U.S. Immigr. Pol'y Ctr., The Impact of Interior Immigration Enforcement on the Day-to-Day Behaviors of Undocumented Immigrants 17 (2019), https://usipc.ucsd.edu/publications/usipc-working-paper-1.pdf [https://perma.cc/63DP-ZFUD] (finding that, "when local law enforcement officials work with ICE on federal immigration enforcement, undocumented immigrants are 60.8% less likely to report crimes they witness to the police, [and] 42.9% less likely to report crimes they are victims of to the police").

generate a community harm that is greater than the harm that the ruse seeks to mitigate.

This third-party harm is evidenced by ICE's own internal tension between the agency's civil and criminal enforcement divisions. In 2018, nineteen Homeland Security Investigations (HSI) agents wrote a letter to the then-Department of Homeland Security (DHS) Secretary, Kirstjen Nielsen, advocating for the restructuring of ICE into two separate agencies: HSI and ERO.[228] As the basis for their proposal, agents reasoned that, because HSI—the criminal arm of ICE which specializes in investigating "transnational criminal organizations that facilitate cross border crimes impacting [U.S.] communities and national security"—resides under the same bureaucratic umbrella as ERO, the two branches are often "erroneously combined," which has been detrimental to HSI's mission to investigate criminal matters unrelated to immigration.[229] HSI's "perceived linkage to the politics of civil immigration" has caused many jurisdictions to refuse to work with HSI or partner with HSI only on the condition that the "ICE" name is excluded from any public-facing information.[230] This "public confusion" regarding the two "disparate functions performed by the ERO and HSI [has] . . . unnecessarily impacted" HSI's abilities to build criminal cases—such as international drug-smuggling operations, sex-trafficking rings, and cross-border gangs like MS-13[231]—and has caused the division to expend limited resources to clarify the organizational differences and its independence from ERO.[232] In other words, HSI's affiliation with ERO has not only damaged HSI's standing with the community but it has also compromised, not helped, its mission to "disrupt and dismantle criminal organizations operating around the world."[233]

Beyond ICE's internal strife, several external parties have also lodged complaints about their association with ERO. In 2005, ICE faced public backlash after ICE officers claimed to be U.S. Occupational Safety and Health Administration (OSHA) officials and set up a "mandatory safety

---

228. See Letter from Agents, Homeland Sec. Investigations, to Kirstjen Nielsen, Sec'y, DHS 1–4 (June 28, 2018) (on file with the *Columbia Law Review*) [hereinafter HSI Letter]; see also Alexia Fernández Campbell, 19 Top Ice Investigators Ask DHS Officials to Split Up the Agency, Vox (June 29, 2018), https://www.vox.com/policy-and-politics/2018/6/29/17517870/ice-agents-dhs-break-up-ice (on file with the *Columbia Law Review*); Brittny Mejia, 'Even the Cops Don't Like Us Anymore': Under Trump, ICE Is Despised and Divided, L.A. Times (June 30, 2018), https://www.latimes.com/local/lanow/la-me-ln-ice-conflict-20180630-story.html (on file with the *Columbia Law Review*). For an explanation of the difference between HSI and ERO, see supra note 14 and accompanying text.

229. See HSI Letter, supra note 228, at 4.

230. Id.

231. Campbell, supra note 228 (explaining the type of criminal cases HSI agents investigate and explaining how they involve "a lot of collaboration with local police").

232. See HSI Letter, supra note 228, at 4.

233. Homeland Security Investigations, ICE, https://www.ice.gov/about-ice/homeland-security-investigations [https://perma.cc/D48C-RSLL] (last updated Sept. 1, 2021).

training" for employees of federal contractors at an Air Force base.[234] The operation was condemned by members of Congress, federal and state health and safety agencies, and labor groups on the grounds that ICE's deceptive strategy jeopardized the public's trust in government safety officials. In response to the widespread outcry, ICE updated its ruse policy to bar health and safety ruses in 2006.[235] The updated policy conceded that the "use of ruses utilizing the name of agencies and companies involved in the administration of health and safety programs can impede the functions of those organizations by creating a perception that these organizations are acting as an enforcement tool of ICE," thereby "undermin[ing] the efforts to increase safety in the workplace and undercut[ting] workers [sic] willingness to report workplace safety violations based on a fear of law enforcement action being initiated against the reporting worker."[236] ICE declared that it would no longer permit the use of this particular ruse.[237] Subsequently, under the same policy consideration, ICE also forbade the use of subterfuge involving misrepresentation as religious workers or census takers without prior approval from the ICE Assistant Secretary.[238] And, according to the most recent Fourth Amendment training guide, ICE agents are prohibited from representing themselves as private employees of a real business, such as FedEx or UPS.[239] Moreover, recognizing that such ruses could "affect the public image" of the impersonated agency or "raise security concerns for their employees," ICE has implemented procedural safeguards in addition to the bars against specific ruses.[240] Current

234. See Steven Greenhouse, Immigration Sting Puts 2 U.S. Agencies at Odds, N.Y. Times (July 16, 2005), https://www.nytimes.com/2005/07/16/politics/immigration-sting-puts-2-us-agencies-at-odds.html (on file with the *Columbia Law Review*) (reporting how ICE, disguised as OSHA, conducted a workplace sting operation to arrest forty-eight undocumented immigrants).

235. Katherine Torres, Immigration Agency Say It Will Put OSHA Ruses on Ice, EHS Today (Mar. 27, 2006), https://www.ehstoday.com/archive/article/21913305/immigration-agency-say-it-will-put-osha-ruses-on-ice (on file with the *Columbia Law Review*); cf. Josh Cable, ICE: OSHA Ruse Was a 'Mistake', EHS Today (Feb. 26, 2006), https://www.ehstoday.com/archive/article/21909009/ice-osha-ruse-was-a-mistake (on file with the *Columbia Law Review*) (discussing ICE's regret about impersonating OSHA while reaffirming the validity of ruses as effective law enforcement tools and refusing to rule out the possibility of employing similar ruses in extreme circumstances in the future).

236. Forman & Torres, Ruse Memo Aug. 2006, supra note 85, at 1.

237. Id.; Torres, Ruse Memo Mar. 2006, supra note 86, at 1.

238. Fugitive Operations Handbook 2010, supra note 89, at 16; see also Jacqueline Stevens, ICE Agents' Ruse Operations, Nation (Dec. 18, 2009), https://www.thenation.com/article/archive/ice-agents-ruse-operations/ [https://perma.cc/V298-P25J] ("According to an unnamed ICE official responding to questions sent by e-mail, ICE agents regularly impersonate civilians and rely on other tricks, some of which are illegal, in order to arrest longtime US residents who have no criminal history.").

239. ICE Off. of the Principal Legal Advisor, supra note 91, at 48; see also Torres, Ruse Memo Aug. 2005, supra note 15, at 2 ("Private entities can be particularly sensitive to the use of their name in law enforcement operations.").

240. Torres, Ruse Memo Aug. 2005, supra note 15, at 2.

policy dictates that FOT Team Leaders must first notify the cover agency it plans to mimic before carrying out the artifice and provide it with an opportunity to object.[241] If the prospective cover agency raises concerns, an FOT supervisor must notify the Headquarters Fugitive Operation Unit (HQ/FOU) within forty-eight hours of receiving the complaint.[242] HQ/FOU will then weigh the affected agency's equities against the "well-known and inherent advantages that a ruse offers."[243]

ICE's impersonation of local police has evoked similar objection from local governments and the broader public. Several city officials have taken action in response to reports demonstrating a "pattern of ICE agents making representations that erroneously suggest they are local police, in order to gain access to homes or otherwise make an arrest."[244] For example, on October 9, 2020, Mayor Bill DeBlasio of New York City wrote a letter to ICE addressing this very issue. Stating that "NYPD does not want ICE agents stating or implying that they represent the NYPD," Mayor DeBlasio demanded that ICE immediately cease this practice, as "these types of activities jeopardize the willingness and comfort of immigrant New Yorkers in interacting with the NYPD on crucial matters involving public safety and local law enforcement."[245] City officials for Los Angeles, California; Hartford, Connecticut; and Nashville, Tennessee, have also written to ICE demanding that its agents halt any impersonation of their local police department or use of the word "police" without specifying that they are ICE on the grounds that such actions undermine the trust that officers have worked so hard and so long to build.[246] In addition, former California Governor Jerry Brown signed a bill barring federal authorities from presenting themselves as California law enforcement officers by clarifying that

241. Id.

242. Id.; Fugitive Operations Handbook 2010, supra note 89, at 16.

243. Torres, Ruse Memo Aug. 2005, supra note 15, at 1–2; see also Fugitive Operations Handbook 2010, supra note 89, at 16 (noting the line of decisionmakers when a cover agency raises an objection). This policy implies that the cover agency's objection is not the dispositive factor when considering whether to move forward with the proposed ruse.

244. Letter from Bill DeBlasio, Mayor, N.Y.C., to Tony H. Pham, Senior Off. Performing Duties of Dir., ICE & Thomas Decker, Field Off. Dir., ICE 1 (Oct. 9, 2020), https://www1.nyc.gov/assets/immigrants/downloads/pdf/NYC-Mayor-Letter-to-ICE-Ruses-10-9-2020.pdf [https://perma.cc/2T6N-AF8H].

245. Id. at 1–2.

246. Hersher, supra note 111; see also Hartford Mayor, NBC Conn., supra note 111 (discussing the Hartford mayor's and police chief's condemnation of ICE police impersonation as well as similar complaints raised by Los Angeles city officials); Ariana Maia Sawyer, Mayor to ICE: Stop Posing as Police, Undermining Trust in Nashville Kurdish Community, Tennessean (June 14, 2017), https://www.tennessean.com/story/news/local/2017/06/14/mayor-ice-stop-posing-police-undermining-trust-nashville-kurdish-community/397907001/ [https://perma.cc/8W27-FK8E] (reporting on the Nashville Mayor's criticisms of ICE's impersonation of local police to investigate Kurdish immigrants). In response to the letter, ICE officials argued that stating that they are the "police" does not constitute an impersonation of LAPD specifically. Hersher, supra note 111.

ICE agents are not licensed peace officers.[247] A New York Congresswoman has also proposed a bill that would prohibit ICE from wearing any clothes with the word "police" on the grounds that "immigration officers compromise the public's ability to distinguish between local and federal officers," which in turn "makes everyone less safe, as it reduces trust in local law enforcement when people think that the police are immigration agents."[248]

The social harm and public policy concerns implicated by ICE ruses are further exacerbated by the lack of remedy and accountability imposed on law enforcement in the civil immigration context. Despite the public solidarity against ICE ruse practices, most of the efforts made on the local level are merely symbolic because they are entirely unenforceable.[249] And despite ICE's own protocol mandating their agents to notify the cover agency whom they desire to impersonate prior to carrying out the ruse,[250] a cover agency's objection does not necessarily prohibit FOT agents from moving forward with their chosen tactic.[251] Moreover, the outrage exhibited by the various local police groups suggests that FOT agents are not in compliance with its own procedures. And due to the lack of constitutional protection afforded in deportation proceedings—including the Supreme Court's holding in *INS v. Lopez-Mendoza,* which refused to extend the exclusionary rule to deportation proceedings[252]—most civil immigration cases escape the reach of judicial review, leaving law enforcement's use of deception virtually unchecked.[253] Thus, despite operating on limited authority of an administrative arrest warrant, which disallows ICE agents to enter into a home even when there is sufficient probable cause that a target is inside the premises,[254] FOT agents are virtually free to carry out

247. Cal. Pen. Code § 830.85 (2018); see also Derek Fleming, California Bans ICE From Masquerading as Police Officers, Courthouse News Serv. (July 25, 2017), https://www.courthousenews.com/california-bans-ice-masquerading-police-officers/ [https://perma.cc/SY58-NGRK] (discussing the California bill that clarifies that federal ICE agents are not licensed peace officers, thus prohibiting them from portraying themselves as police officers).

248. Press Release, Nydia M. Velázquez, Congresswoman, Velázquez Seeks to Block Immigration Feds From Identifying as Local Police (Apr. 6, 2017), https://velazquez.house.gov/media-center/press-releases/velazquez-seeks-block-immigration-feds-identifying-local-police [https://perma.cc/BR78-H4RH].

249. See Fleming, supra note 247 (noting that, because federal law preempts state law, this bill is merely symbolic and not enforceable).

250. See supra notes 241–243 and accompanying text.

251. See supra note 243 and accompanying text.

252. 468 U.S 1032, 1051 (1984) ("At issue here is the exclusion of credible evidence gathered in connection with peaceful arrests by INS officers. We hold that evidence derived from such arrests need not be suppressed in an INS civil deportation hearing.").

253. Id. at 1044 (finding that, on average every year, each INS agent arrests about 500 undocumented immigrants and, among those who are arrested, only about a dozen challenge their arrests).

254. See supra note 106 and accompanying test.

the most damaging type of ruse indiscriminately with almost no repercussions.

B. *Bar to Collateral Arrests Made Pursuant to Deceived Consent*

Undergirding every court's ruling to uphold government deception is the key assumption that it would be used against *criminals* who are engaged in serious criminal enterprises.[255] The fundamental issue in ICE ruse cases—especially where collateral arrests are subsequently made inside the home—is that the targets are not the typical criminals contemplated by these rulings.

Over the past three decades, DHS has justified massive investments in its immigrant detention and deportation infrastructure on national security and public safety grounds by conflating undocumented immigrants' illegality with criminality.[256] Numerous studies and research, however, have found that there is no causal link between immigrants with illegal status and higher local crime rates.[257] FOTs have repeatedly asserted that

---

255. See, e.g., Lewis v. United States, 385 U.S. 206, 210 (1966) (stating that a categorical prohibition would "severely hamper the Government in ferreting out those organized criminal activities that are characterized by covert dealings"); Sorrells v. United States, 287 U.S. 435, 441 (1932) ("The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law."); Pagán-González v. Moreno, 919 F.3d 582, 591–93 (1st Cir. 2019) ("It is beyond debate that deception is a well-established and acceptable tool of law enforcement . . . . Indeed, undercover investigations in which government agents misrepresent their identities are ubiquitous and viewed as essential in the detection of crime.").

256. ICE Raid Toolkit, supra note 90, at 4–5; see also Steve Chapman, Column: In the Debate, Trump Kept Demonizing Immigrants, Chi. Trib. (Oct. 23, 2020), https://www.chicagotribune.com/columns/steve-chapman/ct-column-trump-immigrants-catch-release-chapman-20201023-4kokf77g4rhijog7aol5pn65z4-story.html [https://perma.cc/8HY4-5564] ("From the beginning, he's combined pitiless policies with venomous rhetoric. In announcing his candidacy in 2015, he said of Mexicans coming to the U.S.: 'They're bringing drugs. They're bringing crime. They're rapists.'") (quoting Donald J. Trump, then-Presidential Candidate)).

257. See, e.g., Robert Farley, Is Illegal Immigration Linked to More or Less Crime?, FactCheck (June 27, 2018), https://www.factcheck.org/2018/06/is-illegal-immigration-linked-to-more-or-less-crime/ [https://perma.cc/5VUF-JPL9] ("[T]here aren't readily available nationwide crime statistics broken down by immigration status. But the available research that estimates the relationship between illegal immigration and crime generally shows an association with lower crime rates."); Anna Flagg, Is There a Connection Between Undocumented Immigrants and Crime?, Marshall Project (May 13, 2019), https://www.themarshallproject.org/2019/05/13/is-there-a-connection-between-undocumented-immigrants-and-crime/ [https://perma.cc/F5JL-9493] ("The analysis found that crime went down at similar rates regardless of whether the undocumented population rose or fell. Areas with more unauthorized migration appeared to have larger drops in crime rates, although the difference was small and uncertain."); Rubén G. Rumbaut, Police Found., Undocumented Immigration and Rates of Crime and Imprisonment: Popular Myths and Empirical Realities 123–24 app. D (2015), https://www.policefoundation.org/wp-

they "prioritize enforcement efforts toward noncitizens who present a heightened threat to national security and public safety, such as transnational gang members, child sex offenders and noncitizens with prior convictions for violent crimes."[258] But the data does not corroborate its assertions.

While it is true that most immigrants who are arrested by ERO agents do have some prior criminal conviction, over one out of every three immigrants arrested have no prior criminal convictions on their record.[259] When isolating the data for at-large community arrests in which ruse tactics are mostly employed and collateral arrests are largely conducted, the proportion of immigrants who have no criminal convictions, including immigration-related criminal offenses, increases to nearly half.[260] And among those who do have criminal records, traffic-related charges constitute the largest portion of immigration arrests made based on either criminal charges or criminal conviction, which are far from the types of crimes that the FOTs have identified in their priority list.[261]

Moreover, despite ERO's rhetoric conflating civil immigration infractions and crime, ICE's own internal bureaucratic structure that diverges between the civil and criminal line into two separate divisions suggests otherwise.[262] For example, ERO's purported objectives of targeting dangerous criminals often significantly overlap with the missions and responsibilities

---

content/uploads/2015/06/Appendix-D_0.pdf [https://perma.cc/9SF8-GK38] (presenting statistics demonstrating that the rise of undocumented immigrants was correlated with *declining* crime rates, most notably in the city and areas with high immigration concentration); see also Michael T. Light & Ty Miller, Does Undocumented Immigration Increase Violent Crime?, 56 Criminology 370, 384 (2018) ("Increased concentrations of undocumented immigrants are associated with statistically significant decreases in violent crime."); Alex Nowrasteh, New Research on Illegal Immigration and Crime, Cato at Liberty (Oct. 13, 2020), https://www.cato.org/blog/new-research-illegal-immigration-crime-0/ [https://perma.cc/Q5WF-STSE] (claiming that the criminal conviction rate of undocumented immigrants is 45% below that of native-born Americans in Texas). But see John R. Lott, Jr., Undocumented Immigrants, U.S. Citizens, and Convicted Criminals in Arizona 2 (Feb. 10, 2018), https://ssrn.com/abstract=3099992 [https://perma.cc/LF87-9TC3] (stating that, based on all prisoners who entered Arizona state prison from 1985 to 2017, statistics indicated that undocumented immigrants were 146% more likely to be convicted for crimes than other Arizonians).

258. Overview: Fugitive Operations, ICE, https://www.ice.gov/fugitive-operations/ [https://perma.cc/GNC6-5A5Q] (last updated Sept. 16, 2021).

259. ICE, Fiscal Year 2019 ICE Enforcement and Removal Operations Report 13, https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf [https://perma.cc/9WU7-BPVY] (last visited Sept. 2, 2021). The report indicates that 66% of ERO administrative arrests had a prior criminal conviction in FY2018 and 64% in FY2019. See id.

260. Cf. id. (reporting that 55% of at-large administrative arrests had prior criminal conviction in FY2018 and 57% in FY2019).

261. ERO Fiscal Year 2018, supra note 164, at 4; see also supra text accompanying note 258.

262. Friedland, supra note 14; see also supra text accompanying notes 228–232.

that are within the purview of the HSI. Currently, FOTs' public-facing communications emphasize that their enforcement priorities are against those who pose "heightened threat to national security and public safety, such as transnational gang members, child sex offenders and noncitizens with prior convictions for violent crimes."[263] But ICE already has a separate arm that is explicitly tasked with apprehending the exact types of criminals that ERO claims to target.[264] Thus, even ICE's own organizational structure implies that ERO's main objectives and functions are civil in nature, not criminal.

Finally, even if ICE's initial targets are, in fact, individuals who pose a threat to national security and public safety, which would provide a valid basis for ICE's use of ruses, ICE's subsequent executions of collateral arrests would undermine that justification.[265] Numerous reports have confirmed that collateral arrests often grab more civil immigration violators with no criminal record than those who do.[266] Thus, in order to adhere to the policy rationale underlying government deception in the criminal context, FOTs' ability to conduct collateral arrests should be curtailed if they choose to employ a ruse as part of their enforcement strategy.

Under these circumstances, the idea of ruses, which have been framed as an essential tool for law enforcement to effectively ferret out and protect the public from the ills of crime, does not seem to hold when the tool hits down hardest on those who are not criminals. By adopting the Fifth and Ninth Circuits' bar on purpose-based deception and precluding agents from conducting collateral arrests in homes where they've gained entry pursuant to a ruse, updated ICE ruse practices may mitigate the constitutional and social concerns raised by the public.

CONCLUSION

Ruses have been a formally endorsed ICE practice since 2005, providing civil ICE agents a means of gaining entry to an otherwise inaccessible, constitutionally protected area—the home—to conduct civil immigration arrests. Since their adoption, immigration rights advocates and the general public have voiced objection against the practice on both legal and social policy grounds. Despite the public outcry, ICE ruses have largely

263. Overview: Fugitive Operations, supra note 258.

264. Homeland Security Investigations, supra note 233 ("HSI has broad legal authority to conduct federal criminal investigations into . . . a wide array of transnational crime, including: terrorism; national security threats; narcotics smuggling; transnational gang activity; child exploitation; human smuggling and trafficking; . . . and human rights violations and war crimes.").

265. Elliot Spagat, ICE Operations Targeting People With Criminal Convictions Often End in 'Collateral' Arrests, Long Beach Post News (July 15, 2019), https://lbpost.com/news/ice-operations-criminal-convictions-low-target-arrests/ [https://perma.cc/82XX-4T28].

266. See supra note 164–165 and accompanying text.

escaped judicial scrutiny due to various protections and obstacles surrounding civil immigration proceedings. Borrowing the more well-established body of law in the criminal context and analyzing current ICE ruse practices against the existing Fourth Amendment doctrinal framework governing deception paints a complicated picture: ICE ruse practices often sit at the margins of, and may even exceed, constitutionally permissible behavior, and those very practices run afoul of the rationale undergirding the sanction of deception by law enforcement. This Note proposes an updated ICE ruse policy that considers and adjusts for the identified risks.