When Procedure Equals Justice: Facing the Pressing Constitutional Needs of a Criminalized Immigration System

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Over time, U.S. immigration law has taken on more and more of a criminal nature, wholeheartedly embracing the textual content and enforcement procedures of criminal law. Unfortunately, a similar expansion of criminal constitutional protections has not followed. On the one hand, immigration agents now have broad investigatory and enforcement powers, including the authority to conduct home raids and warrantless arrests. On the other hand, affected individuals have no right to demand a judicially issued search warrant or to suppress illegally obtained evidence. The contrast is striking. This Note argues that it is time to close the gulf between the law and reality. Immigration enforcement in its current form can no longer be classified as a civil field of law. Permitting it to continue without necessary constitutional protections endangers the privacy and safety of all persons within the United States. A quasi-criminal system of immigration procedural protections should be established.

I. INTRODUCTION

Imagine waking in the middle of the night to the sight of armed men shouting questions while waving a photograph of a person you have never seen before in your life. They leave after searching your house, interrogating your family, and arresting

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your father. Only later do you find out that they were federal immigration agents who had demanded entry on the basis of an administrative warrant issued for a suspected gang member who was ordered deported when he lived in your house five years ago. Your father, recently emigrated from the Dominican Republic, speaks little English and is detained for several hours at the local jail before being released, without any explanations from the authorities, to find his own way home.

This scenario represents very real possibilities created by the modern immigration enforcement system in the United States.[1] An immigration agent is a law enforcement officer comparable to a police officer.[2] Yet, when the officer is a federal immigration agent, the familiar procedural protections of the Fourth and Fifth Amendments become weak or non-existent. Why do fundamental differences exist in the procedures that govern a visit from law enforcement depending on whether it is conducted by police or immigration agents? These differences are the consequences of a constitutional interpretation inconsistent with the realities of the immigration system and its effect on American society.

Without proper procedure, the full and fair administration of justice is not possible. When a police officer knocks on the door of a private home, he is expected to have a search warrant, which is issued by a neutral adjudicator who found probable cause based on the available evidence.[3] In the alternative, an officer can enter

1. Raids on private homes by federal immigration agents, sometimes accompanied by local police officers, have become increasingly common around the country. *See, e.g.*, Nina Bernstein, *U.S. Raid on an Immigrant Household Deepens Anger and Mistrust*, N.Y. TIMES, Apr. 10, 2007, at B1; Henry Lee, *21 Illegal Immigrants Arrested in North Bay*, S. F. CHRON., Sept. 20, 2008, at B3; Nina Bernstein, *Hunts for "Fugitive Aliens" Lead to Collateral Arrests*, N.Y. TIMES, July 23, 2007, at B5; Sandra Forester, *Immigration Raids Spark Anger in Sun Valley Area*, IDAHO STATESMAN, Sept. 21, 2007, at 1. Raids are usually conducted by U.S. Immigration and Customs Enforcement ("ICE"), the primary investigative arm of the Department of Homeland Security, as part of ongoing enforcement measures such as Operation Community Shield and the National Fugitive Operations Program. *See generally* U.S. Immigration and Customs Enforcement, Topics of Interest, http://www.ice.gov/pi/topics/index.htm (last visited Nov. 9, 2008).

2. In fact, immigration agents may work side-by-side with police officers in enforcement actions. *See* discussion *infra* Part III.A. For descriptions of law enforcement roles in immigration, see U.S. Immigration and Customs Enforcement, *Working for ICE*, http://www.ice.gov/careers/workice.htm (Last visited Nov. 9, 2008).

3. 1-2 CRIMINAL CONSTITUTIONAL LAW §§ 2.01, 2.04 (Matthew Bender 2002). The warrant requirement serves as legal shorthand for the "reasonableness" of searches and seizures permitted by the Fourth Amendment. *Id*. at § 2.01. Exceptions to the warrant requirement do exist in certain special circumstances developed over time in the common

to search a home with the voluntary consent of an individual with authority inside.[4] If the officer finds a suspect covered by an arrest warrant, he can arrest him.[5] This constitutionally mandated procedure is undisputed.[6]

The text of the Fourth Amendment lacks an explicit remedy for violations of the no "unreasonable searches and seizures" standard. However, the Supreme Court has recognized that a rule without a remedy is a toothless threat.[7] The exclusionary rule was created in recognition of the need for a remedy to violations of the Fourth Amendment.[8] When constitutional procedures are violated by a police officer, the exclusionary rule prevents the use of evidence thus obtained.[9] Under the rule, a person subjected to an unreasonable search or seizure cannot be prosecuted and convicted on the basis of evidence tainted by that search or seizure.[10] By imposing the harsh result of excluding what could be key evidence from a trial, the exclusionary rule is intended to deter behavior by law enforcement that would violate constitutional protections.[11]

The warrant requirement and the exclusionary rule provide strong procedural protections to persons within the United States. Crafted by the Framers and elaborated by the courts, these procedures help to maintain the delicate balance between

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law. *See id*. at §§ 2.01 n.8, 3.02. However, reasonableness remains the overarching constitutional requirement. U.S. CONST. amend. IV.; 1-2 CRIMINAL CONSTITUTIONAL LAW § 2.01.

4. 1-3 CRIMINAL CONSTITUTIONAL LAW § 3.01.

5. Payton v. New York, 445 U.S. 573, 587–89 (1980); 1-2 CRIMINAL CONSTITUTIONAL LAW § 2.05.

6. The Fourth Amendment governs the constitutionally mandated procedure for government searches and seizures with regard to private individuals. The Fourth Amendment guarantees that:

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. Furthermore, the rights outlined by the Fourth Amendment fit within the broader framework of due process protections established by the Fifth Amendment. The Fifth Amendment protects "any person" from "be[ing] deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

7. Weeks v. United States, 232 U.S. 383, 393 (1914).

8. *Id.* at 391–94.

9. Wong Sun v. United States, 371 U.S. 471, 484–86 (1962); *Weeks*, 232 U.S. at 393; 1-2 CRIMINAL CONSTITUTIONAL LAW § 2.01.

10. 1-2 CRIMINAL CONSTITUTIONAL LAW § 2.01.

11. Mapp v. Ohio, 367 U.S. 643, 648 (1961).

protection from state intrusion and private violence. However, in the context of immigration law, these solid procedural protections are greatly weakened. First, an administrative warrant may replace the traditional criminal warrant, recalibrating the standards for a neutral adjudicator, a particularized description, and probable cause.[12] The inferior requirements of an administrative warrant increase the likelihood of unnecessary government intrusion on the privacy of law-abiding individuals.

Furthermore, when an immigration agent oversteps his bounds, the risk to the government is minimal because of a similar reduction in procedural protections during adjudication. Noncitizens[13] within the United States are entitled to a hearing before an immigration judge before an order of deportation can be issued.[14] While deportation hearings provide some process under the Fifth Amendment, they offer far fewer protections than a criminal trial. A key element of procedural protection in the criminal context is the deterrent effect of the exclusionary rule. Unfortunately, the exclusionary rule has been found generally inapplicable to the immigration context.[15] With lower ex ante requirements and little ex post punishment, immigration enforcement is ripe for due process violations.

This Note argues that the existing interpretation of constitutional protections as applied to immigration enforcement has grown far too inconsistent with the realities of the procedural system. Over the years, the Supreme Court has deferred to the federal government's plenary power in establishing immigration procedure while continuing to classify immigration as a civil field of law.[16] In doing so, the Court has shielded the federal govern-

12. *See generally* Immigration and Nationality Act of 1952 § 287, 8 U.S.C. § 1357 (2007); Abel v. United States, 362 U.S. 217 (1960); Ramirez v. Webb, 835 F.2d 1153 (6th Cir. 1987); Blackie's House of Beef, Inc. v. Castillo, 659 F.2d 1211 (D.C. Cir. 1981).

13. Note on Terminology: The term "alien" is commonly used in the law to refer to persons residing within the borders of the United States who are not citizens or nationals of the United States. However, since the ordinary usage of the word includes the pejorative connotation of the excluded or outsider, this Note instead will use the term "noncitizen" whenever possible.

14. Immigration and Nationality Act of 1952 § 240, 8 U.S.C. § 1229a (2007).

15. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).

16. *See, e.g.*, Mathews v. Diaz, 426 U.S. 67, 79–80 (1976) (holding that political branches are responsible for regulating immigration); Harisiades v. Shaughnessy, 342 U.S. 580, 588–89, 594–95 (1952) (citing the political branches' power over immigration and reiterating the statement that "[d]eportation . . . has been consistently classified as a civil rather than a criminal procedure").

ment from the full force of the procedural safeguards required by the Fourth and Fifth Amendments. The looming shadow that immigration enforcement casts on the modern understanding of constitutional rights must be confronted head-on.

At present, immigration enforcement methods and overall societal viewpoints clearly demonstrate a shifting trend towards a punishment-based immigration system in the United States, collapsing the civil-criminal distinction relied upon by the Court in the immigration context.[17] The Court's reliance on such a formalistic interpretation should be abandoned in favor of considering the real and practical consequences of the denial of full constitutional protections in immigration enforcement. Immigration law has developed into a quasi-criminal system which demands the attendant procedural protections. The field of immigration law should no longer stand as the neglected stepchild of constitutional law. All persons within the United States, regardless of immigration status, are entitled to due process and equal protection under the laws of the United States.[18] As long as the Court continues to hide behind its decision to classify immigration law as a civil field, immigration law will fail to meet the fundamental fairness standard of constitutional due process.

This Note begins in Part II by laying out a brief history of two elements of procedure, which play key roles in criminal enforcement yet are lacking in immigration enforcement: the warrant requirement and the exclusionary rule. Part III explains current immigration enforcement procedure as permitted by federal statute and carried out by the immigration agencies, illustrating its expansive nature. Part IV describes the development of immigration law and how past judicial interpretations have shaped its peculiar relationship with the Constitution. Part V analyses the existing civil-criminal distinction applied to immigration law and demonstrates its disconnect from the true "quasi-criminal" nature

17. *See* discussion *infra* Part V.B.

18. *See* Plyler v. Doe, 457 U.S. 202 (1982) (striking down a Texas statute that denied a public education to undocumented children because the statute violated the Equal Protection Clause of the Fourteenth Amendment); Wong Wing v. United States, 163 U.S. 228 (1896) (holding that equal protection requires the Fifth and Sixth Amendments to apply to all persons within the United States); Yick Wo v. Hopkins, 118 U.S. 356 (1886) ("The Fourteenth Amendment is not confined to the protection of citizens . . . . [It applies] to all persons within the territorial jurisdiction [of the United States], without regard to any differences of race, of color, or of nationality.").

of immigration procedure. This Note then suggests possible changes in statutory and case law leading to the successful reform of immigration enforcement procedure.

II. A BRIEF HISTORY OF CRIMINAL PROCEDURE

In order to understand the differences between criminal and immigration enforcement procedure, it is necessary first to turn to traditional constitutional requirements of criminal investigations. There are two elements of criminal procedure that are particularly relevant in comparison with immigration law: the warrant requirement and the exclusionary rule. The warrant requirement, with some exceptions, applies to any law enforcement entry of the home. The exclusionary rule applies to deter violations of the required procedure.

A. THE WARRANT REQUIREMENT

The Fourth Amendment's scope and standard of protection against unreasonable search and seizure have shifted over the years. However, a private home has always held a special aura of protection. The idea that "every man's house is his castle" has both textual and historical underpinnings going back to the English roots of American common law.[19] Accordingly, the Supreme Court has repeatedly reiterated that the "physical entry of the home is the chief evil against which . . . the Fourth Amendment is directed."[20] As expressed by Justice Bradley in *Boyd v. United States*, an unjustifiable government invasion of a person's private home represents not only "the breaking of his doors, and the rummaging of his drawers," but "the invasion of his indefeasible right of personal security, personal liberty and private property."[21]

As a general rule, law enforcement must obtain a warrant prior to entry into a home in order to search or arrest.[22] To issue

19. *See, e.g.*, Payton v. New York, 445 U.S. 573, 596–97 (1980); Minnesota v. Carter, 525 U.S. 83, 94 (1998); Weeks v. United States, 232 U.S. 383, 390 (1914); WAYNE R. LAFAVE, 1 SEARCH AND SEIZURE § 2.3(b) (4th ed. 2007).

20. United States v. U.S. Dist. Court, 407 U.S. 297, 313 (1972).

21. 116 U.S. 616, 630 (1886).

22. *See Payton*, 445 U.S. at 586; Coolidge v. New Hampshire, 403 U.S. 443, 474–75 (1971).

a warrant, there must be probable cause, supported by oath or affirmation, and a particular description of the place to be searched and the persons or things to be seized.[23]

Probable cause is the "traditional standard" of the Fourth Amendment.[24] The Supreme Court has defined probable cause as a finding that "the facts and circumstances . . . are such as to warrant a man of prudence and caution in believing that the offense has been committed" or that evidence will be found.[25] However, the definition operates as a broad standard, not a bright-line rule: "The process does not deal with hard certainties, but with probabilities."[26] Thus, it is important that the determination is made through a careful balancing of facts in each individual case.[27]

Key to Fourth Amendment protection is the requirement that a probable cause determination be made by a "neutral and detached magistrate" rather than a prosecutor, police officer, or other "officer engaged in the often competitive enterprise of ferreting out crime."[28] Regardless of the good or bad intent of such an officer, his very status as a law enforcement official precludes neutrality.[29] An officer must therefore present his evidence to the magistrate.[30] In order for the information presented to meet the probable cause standard, the magistrate must determine that it is credible and sufficient.[31] The magistrate cannot rely on the word of the law enforcement officer alone.[32]

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23. U.S. CONST. amend. IV.
24. Arizona v. Hicks, 480 U.S. 321, 327 (1987).
25. Carroll v. United States, 267 U.S. 132, 161 (1925).
26. Illinois v. Gates, 462 U.S. 213, 231 (1983).
27. Wong Sun v. United States, 371 U.S. 471, 479 (1963).
28. *Id.*; Johnson v. United States, 333 U.S. 10, 13–14 (1948).
29. As the Court articulated in *Wong Sun v. United States*:

> The arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause. To hold that an officer may act in his own, unchecked discretion upon information too vague and from too untested a source to permit a judicial officer to accept it as probable cause for an arrest warrant, would subvert this fundamental policy.

Wong Sun, 371 U.S. at 481–82.

30. *Id.*; *Johnson*, 333 U.S. at 14.
31. *See* Illinois v. Gates, 462 U.S. 213, 238–40 (1983).
32. *Id.*

Finally, a warrant must be narrowly tailored by "particularly describing the place to be searched, and the persons or things to be seized."[33] Although the description need not be perfectly accurate, it must remain reasonable and cannot wander into the unconstitutional territory of open-ended, general searches.[34] By requiring a particular description before the issuance of a warrant, the Fourth Amendment provides an ex ante written record of the limits of a search and seizure, which can be relied upon by the individual whose privacy is being invaded.[35]

B. THE EXCLUSIONARY RULE

The text of the Fourth and Fifth Amendments does not provide a specific remedy for violations of the required procedural protections.[36] However, the Supreme Court recognized that a lack of remedy resulted in a lack of protection.[37] In response, the Court grafted the exclusionary rule into constitutional doctrine.[38] The exclusionary rule prohibits evidence obtained through a violation of the Fourth Amendment from being used to prosecute a criminal case.[39]

The courts have emphasized the importance of the exclusionary rule in enforcing the Fourth Amendment's requirements. As the Supreme Court stated in *Mapp v. Ohio*, without the exclusionary rule, the Fourth Amendment's "assurance against unreasonable federal searches and seizures would be 'a form of words', valueless and undeserving of mention in a perpetual charter of inestimable human liberties."[40] The exclusionary rule is not simply a remedy for violations of the Fourth Amendment, but an

33. U.S. CONST. amend. IV.

34. 1-2 CRIMINAL CONSTITUTIONAL LAW § 2.08[2] (2002); *see* Lo-Ji Sales v. New York, 442 U.S. 319, 325 (1979); Marron v. United States, 275 U.S. 192, 195 (1927).

35. 1-2 CRIMINAL CONSTITUTIONAL LAW § 2.08[2].

36. 1-2 CRIMINAL CONSTITUTIONAL LAW § 2.01.

37. Weeks v. United States, 232 U.S. 383, 393 (1914).

38. *See* Mapp v. Ohio, 367 U.S. 643, 649 (1961); *Weeks*, 232 U.S. at 398. Initially, the Supreme Court took the view that relevant evidence was admissible regardless of the methods, legal or illegal, used to obtain it. *See* Adams v. New York, 192 U.S. 585, 595 (1904). However, since the *Weeks* decision, the Court has discarded the *Adams* approach as a dangerous encouragement of police misconduct irreconcilable with the Fourth Amendment.

39. *Mapp*, 367 U.S. at 648; Wolf v. Colorado, 338 U.S. 25, 28 (1949).

40. *Mapp*, 367 U.S. at 655.

"essential part" of due process as articulated in the Fourth Amendment.[41]

Beyond proscribing the use of illegally obtained evidence in individual cases, the exclusionary rule serves as a general deterrent against law enforcement's natural desire to use any and all means to punish wrongdoers, even if those means cross the line of unreasonable search and seizure.[42] As a result, the Court has focused increasingly on the remedial effect of the exclusionary rule in justifying its existence.[43] Despite intermittent debates regarding the efficacy and application of the exclusionary rule, it remains an inviolable element of constitutional protection in criminal procedure.[44]

III. CURRENT IMMIGRATION ENFORCEMENT PROCEDURE

The broad provisions of the Immigration and Nationality Act grant expansive power to U.S. Immigration and Customs Enforcement, the federal agency in charge of immigration enforcement. Under the Immigration and Nationality Act, "[o]n a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States."[45] In addition, "[a]ny officer or employee of the [Immigration] Service authorized . . . by the Attorney General shall have power *without warrant* — (1) to interrogate any alien or person believed to be an alien . . . (5) to make arrests . . . if the officer or employee is performing duties related to the enforcement of the immigration laws . . . ."[46]

The grant of such powers seems inimical to the restraints imposed by the Fourth and Fifth Amendments on government invasions into private life and liberty. However, the Supreme Court has placed immigration enforcement procedure within the framework of administrative law by categorizing immigration as a civil field of law.[47] As such, the government is permitted a far

41. *Id.* at 654–58.
42. United States v. Calandra, 414 U.S. 338, 347–48 (1974).
43. *Id.*; Elkins v. United States, 364 U.S. 206, 217 (1960).
44. *See* 9 AM. JUR. 2D *Evidence* § 590 (2008).
45. Immigration and Nationality Act of 1952 § 236(a), 8 U.S.C. § 1226(a) (2007).
46. § 287(a) (emphasis added).
47. *See* discussion *infra* Part IV.B.2.

broader use of power in immigration than in the criminal arena. In addition, the Supreme Court has held that the exclusionary rule is inapplicable to immigration proceedings.[48] This part of the Note will explore how the Court's decisions have played out in the field, resulting in enforcement procedures that endanger the rights of citizens and non-citizens alike.

A. IMMIGRATION SEARCH AND SEIZURE

The civil categorization of immigration law permits an immigration agent enforcing immigration law to be treated as an administrative agent of the Department of Homeland Security rather than a criminal law enforcement official on par with a police officer.[49] As a result, while the Fourth Amendment requirements for search and seizure apply to non-citizens, the traditional standards are lowered in several ways.

First, the adjudicator issuing the administrative search or arrest warrant need not come from the judicial branch, but can instead be an administrator within ICE itself.[50] Permitting the warrant to issue from the same agency charged with investigating and punishing violations of immigration law ignores the "neutral" aspect of the warrant decisionmaker, which plays a central role in criminal warrant procedure. Second, the standards for probable cause and a particular description are lowered to accommodate the "administrative" nature of a search.[51] Even those reduced standards do not always apply, since the Supreme Court has interpreted the provisions of the Immigration and Nationality Act to place certain enforcement methods beyond the Fourth Amendment's domain of search and seizure.[52]

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48. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).

49. *See, e.g.*, Immigration and Nationality Act of 1952 § 287, 8 U.S.C. § 1357 (2007) (powers of immigration officers and employees); s*ee also* discussion *infra* Part IV.B.2.

50. Immigration and Nationality Act of 1952 §§ 236(a), 287(a); *see, e.g.*, United States v. Abdi, 463 F.3d 547, 551–52 (6th Cir. 2006); De Rincon v. Dep't of Homeland Sec., 539 F.3d 1133, 1136 (9th Cir. 2008).

51. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 268 (1973) (example of administrative search in immigration context). For detailed discussion of the administrative search and the reasonableness standard, see Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 406–07 (1988).

52. *See* Muehler v. Mena, 544 U.S. 93 (2005) (finding that detention of a lawful permanent resident in handcuffs for three hours as part of immigration raid for suspected

In immigration enforcement, the administrative warrant is used to search places of employment in order to arrest non-citizens violating immigration law.[53] Because an administrative warrant is not a criminal warrant, it cannot be used to enter private areas such as the home.[54] However, current enforcement practices in immigration have blurred beyond recognition this limitation on government invasions of privacy. Despite the lower civil standards of investigation permitted in immigration enforcement, immigration agents often work side-by-side with criminal law enforcement officers such as state and local police.[55] Enforcement operations such as Operation Community Shield and the National Fugitive Operations Program target non-citizens with criminal convictions or suspected of criminal activity.[56] Since local law enforcement must have a partnership agreement with ICE in order to cooperate in immigration enforcement, immigration agents have authority in such operations.[57] This mixture of immigration and criminal enforcement creates a gray area of procedural protections where an individual may be prosecuted for both types of offenses.

B. IMMIGRATION PROCEDURE AFTER SEARCH AND SEIZURE

As the interior enforcement arm of the Department of Homeland Security's immigration unit, ICE carries out searches and seizures according to its mandates. In most circumstances, once

gang members is not a Fourth Amendment seizure); INS v. Delgado, 466 U.S. 210 (1984) (holding that systematic interrogation of workers in factory with INS agents stationed at exits is not a search).

53. *See, e.g.*, *Delgado*, 466 U.S. at 211–13.

54. WILLIAM E. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS § 14:3 (West 2008).

55. Since 1996, the Immigration and Nationality Act has explicitly provided for joint operations with state and local law enforcement officers. Immigration and Nationality Act of 1952 § 287(g), 8 U.S.C. § 1357(g) (2007). Such operations are within the ACCESS program developed by ICE to implement § 287(g). *See* U.S. Immigration and Customs Enforcement *Ice Access*, http://www.ice.gov/partners/dro/iceaccess.htm (last visited Nov. 10, 2008).

56. *See generally* U.S. Immigration and Customs Enforcement Public Information, http://www.ice.gov/pi/topics/index.htm (last visited Nov. 10, 2008). The validity of the "criminal" designation employed by ICE is contested by some legal scholars. *See* Jennifer M. Chacon, *Whose Community Shield?: Examining the Removal of the "Criminal Street Gang Member*," 2007 U. CHI. LEGAL F. 317 (2007).

57. Immigration and Nationality Act of 1952 § 287(g).

evidence has been obtained and an arrest has been made, a removal case must go through an adjudication process before any permanent orders can be issued.[58] At any point during or after the removal hearing, the government may take the non-citizen into custody and such detention is not subject to judicial review.[59]

Sections 239 and 240 of the Immigration and Nationality Act set forth the procedure for initiating and conducting a removal hearing.[60] First, the non-citizen is issued a "notice to appear" by the government, which states the time and place the proceedings will take place.[61] The non-citizen has the option to obtain counsel at his own expense.[62] At the removal hearing, an immigration judge hears evidence from the government and the non-citizen.[63] The judge also has the authority to interrogate any party or witness.[64] At the conclusion of the hearing, the judge renders a decision, which is final unless appealed.[65] The Federal Rules of Evidence are only loose guidelines for the removal hearing, and the exclusionary rule does not apply.[66] If the non-citizen fails to attend his hearing, he can be ordered deported in absentia.[67] Together, the procedural requirements for a removal hearing set a low standard at odds with the seriousness of the possible end results.

58. § 240, 8 U.S.C. § 1229a (removal proceedings). When the non-citizen has recently arrived in the United States, expedited removal proceedings, which do not even include a removal hearing, may apply. § 235(b)(1), 8 U.S.C. § 1225(b)(1).

59. § 236(c), (e), 8 U.S.C. § 1226(c), (e).

60. §§ 239–240, 8 U.S.C. §§ 1229–1229a.

61. § 239.

62. § 292, 8 U.S.C. § 1362. In contrast, a criminal defendant has the right to counsel at the expense of the government if unable to provide his own counsel. U.S. CONST. art. VI.; Gideon v. Wainwright, 372 U.S. 335 (1963). In *Gideon*, the Supreme Court emphasized the importance of counsel, acknowledging that a person's right to be heard alone often is insufficient to ensure a fair legal proceeding. *Gideon*, 372 U.S. at 344–45.

63. Immigration and Nationality Act of 1952 § 240 (b)(1).

64. *Id.*

65. § 240(a)(1).

66. JOSEPH A. VAIL, ESSENTIALS OF REMOVAL AND RELIEF 128–30 (Stephanie L. Browning ed., American Immigration Lawyers Association 2006).

67. Immigration and Nationality Act of 1952 § 240(b)(5), 8 U.S.C. § 1229a(b)(5) (2007). Unless the non-citizen can prove a failure to receive notice, a demonstration of exceptional circumstances is necessary to rescind the removal order, and discretionary relief may be limited. § 240(b)(5)(C), (b)(7).

IV. THE DEVELOPMENT OF IMMIGRATION LAW

In order to grasp the reasoning behind immigration enforcement procedure, it is necessary to understand the underpinnings of substantive immigration law. Two principles have shaped the current state of immigration law: the plenary power doctrine and the civil law designation. These principles were developed primarily through Supreme Court case law, although the Court had little textual grounding with which to work.

With the scant mention immigration receives in the text of the Constitution itself, the combination of both principles has caused the field of immigration law to veer far from the standards and rights upheld in other areas of constitutional law. The weight of history and precedent has served thus far to maintain the inequities of the status quo despite many indications that immigration law is out of step with modern constitutional principles. The Supreme Court's willingness to acknowledge other mistakes of the past while permitting them to persist in the field of immigration law remains an appalling precedent that should not continue to exist.[68] This part traces the evolution and intersection of the plenary power doctrine and the civil law designation in order to demonstrate their weaknesses.

A. THE PLENARY POWER DOCTRINE

The only direct mention of immigration in the Constitution is the Naturalization Clause.[69] Nevertheless, the federal government, with the support of the Supreme Court, has exercised the power to regulate non-citizens and remove them from the country since the founding of the United States.[70] The Court has repeatedly acknowledged the plenary power doctrine as the source of the federal government's exclusive authority in regulating immigration and has struck down state and local laws which conflicted with this authority.[71]

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68. *See infra* Part V.A.

69. The Naturalization Clause states that "Congress shall have Power . . . To establish an uniform Rule of Naturalization." U.S. CONST. art. I, § 8, cl. 4.

70. *See* discussion of the Aliens Act of 1798 *infra* Part IV.C.

71. *See, e.g.*, Mathews v. Diaz, 426 U.S. 67 (1976); Graham v. Richardson, 403 U.S. 365, 377–80 (1971); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 418–20 (1948);

The immigration plenary power doctrine was first established by the Supreme Court in *Chae Chan Ping v. United States*, otherwise known as *The Chinese Exclusion Case*.[72] The petitioner, Chae Chan Ping, was a Chinese laborer denied entry into the United States under a newly enacted federal statute.[73] The petitioner argued that the federal statute acted as an expulsion of Chinese laborers and was therefore proscribed by pre-existing entry treaties between the U.S. and China.[74] In response, the Supreme Court stated that while treaties and federal laws of the United States were considered "the supreme Law of the Land," second only to the Constitution, they were themselves of equal authority under the Constitution.[75] As a sovereign nation, the United States retained the prerogative to alter or abandon its treaty obligations.[76] Thus, the Court found that Congress was not restrained by the existing treaties from exercising its constitutional power to enact the statute.[77]

The Court went on to explain in detail why the federal government had the exclusive right to regulate immigration, establishing the plenary power doctrine.[78] In *Chae Chan Ping*, the Court discussed what it considered a nation's inherent power to preserve sovereignty and national security.[79] As the Court expressed it,

> [t]he power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in

Hines v. Davidowitz, 312 U.S. 52, 62–68 (1941); Truax v. Raich, 239 U.S. 33, 42 (1915); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

72. 130 U.S. 581 (1889). *See also* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 27 (2006).

73. *Chae Chan Ping*, 130 U.S. at 589.

74. *Id.* at 589–601.

75. *Id.* at 600–01; U.S. CONST. art. VI, cl. 2.

76. *Chae Chan Ping*, 130 U.S. at 601–03.

77. *Id.* at 602–04

78. *Id.* at 603–10. Legal scholars have various opinions regarding whether the Supreme Court considered the plenary power doctrine a power implied by the Constitution, an extraconstitutional power inherent in the sovereignty of nations or an amalgamation of both. *See, e.g.*, MOTOMURA, *supra* note 72, at 27; Anne E. Pettit, Note, *"One Manner of Law": The Supreme Court, Stare Decisis and the Immigration Law Plenary Power Doctrine*, 24 FORDHAM URB. L.J. 165, 177–78, 219 n.67 (1996).

79. *Chae Chan Ping*, 130 U.S. at 603–10; MOTOMURA, *supra* note 72, at 29.

> the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.[80]

In addition, the Court has justified the plenary power doctrine by combining a structural argument with a textual argument based on the Naturalization Clause. The structural argument hinges on a mismatched cobbling together of various aspects of constitutional power granted exclusively to the federal government, particularly the power to regulate foreign affairs and to declare war.[81]

Three years later, the Supreme Court reiterated the plenary power doctrine in *Nishimura Ekiu v. United States*, stating that:

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations . . . . It belongs to the political department of the government . . . .[82]

Not only did the Court find that the federal government held exclusive power to regulate immigration, but it held that the power was also limited to the *political* branches of the federal government: in other words, Congress and the President.

As a result, the plenary power doctrine created an extremely deferential standard for courts to apply in considering the constitutionality of government conduct in the area of immigration law.[83] More than a century later, the judicial branch continues to

80. *Chae Chan Ping*, 130 U.S. at 609.

81. *See* Toll v. Moreno, 458 U.S. 1, 10 (1982); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990); Pettit, *supra* note 78, at 173.

82. *Nishimura Ekiu*, 142 U.S. at 659.

83. The judicial deference that resulted from the immigration plenary power doctrine has been discussed by many legal scholars. *See, e.g.*, Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853 (1987); MOTOMURA, *supra* note 72, at 27.

defer, with few exceptions, to the political branches when faced with a constitutional issue in immigration law. The lack of any real checks and balances in the field is dangerous. As Professor Motomura points out, Congress and the executive branch seldom question the constitutionality of their own actions, thus leaving non-citizens at the mercy of political opinion.[84]

B. THE CIVIL-CRIMINAL DISTINCTION

1. *History of the Civil-Criminal Distinction*

The distinction between criminal and civil proceedings has always been a part of American law.[85] References to "criminal" cases in the Fifth and Sixth Amendments are examples of its importance to constitutional interpretation.[86] Because the Supreme Court has relied on the civil-criminal distinction in determining the procedural protections mandated by the Constitution, it is important to correctly label a particular type of proceeding.[87] The issue of labeling has surfaced in many fields of law in addition to immigration.[88]

Traditionally, the Supreme Court has considered the determination a matter of statutory construction, deferring to Congress and the statutory text itself.[89] In *United States v. Ward*, the Court laid out a two-step process of statutory inquiry:

> First . . . determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. Second, where Congress has indicated an intention to establish a civil penalty . . . inquire[ ] further whether the statutory

84. MOTOMURA, *supra* note 72, at 27.

85. *See* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1348 (1991).

86. U.S. CONST. amend. V, VI.

87. United States v. Ward, 448 U.S. 242, 248 (1980).

88. *See* Cheh, *supra* note 85, at 1349.

89. *Ward*, 448 U.S. at 248–49.

> scheme was so punitive either in purpose or effect as to negate that intention.[90]

Because of the deferential standard, the Court stated "that 'only the clearest proof could suffice to establish the unconstitutionality of a statute'" for falling on the wrong side of the civil-criminal distinction.[91]

For a period of time, the Court shifted to a judicial focus on the penal nature of a particular statute to determine its civil or criminal status and the applicability of constitutional protections.[92] In *United States v. Halper*, the Supreme Court considered the issue of double jeopardy with regard to the criminal and civil false-claims acts.[93] In applying the protections against double jeopardy, the Court minimized the role of statutory interpretation, stating:

> [W]hile recourse to statutory language, structure, and intent is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general matter, the approach is not well suited to the context of the "humane interests" safeguarded by the Double Jeopardy Clause's proscription of multiple punishments. This constitutional protection is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state.[94]

The Court found that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment" and therefore deserves procedural protections traditionally designated for "criminal" cases.[95]

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90. *Id.* (citations omitted).
91. *Id.* (quoting Flemming v. Nestor, 363 U.S. 603, 617–21 (1960)).
92. United States v. Halper, 490 U.S. 435, 447–50 (1989) (double-jeopardy clause); Austin v. United States, 509 U.S. 602, 610, 620–22 (1993) (excessive fines clause).
93. *Halper*, 490 U.S. 435.
94. *Id.* at 447 (internal citation omitted).
95. *Id.* at 448–49.

It now appears that the Supreme Court has largely returned to the deferential statutory construction standard established in *Ward*, at least as the initial step in the civil-criminal analysis.[96] In *Hudson v. United States*, the Court rearticulated a series of factors, originally established in *Kennedy v. Mendoza-Martinez*, to consider in making the necessary distinction:

> (1) "whether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of scienter"; (4) "whether its operation will promote the traditional aims of punishment — retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."[97]

However, the Court emphasized that the language and intent of the statute was the overriding consideration.[98]

2. *The Civil-Criminal Distinction in Immigration Law*

Immigration law is treated as a civil rather than criminal field of law enforcement.[99] Immigration's designation as a civil field of law and initial exemption from the procedural protections of the Constitution were a result of the Supreme Court's interpretation of the plenary power doctrine.

In 1893, the Supreme Court first dealt with the issue of deportation, or expulsion, in the case of *Fong Yue Ting v. United States*.[100] Fong Yue Ting was a Chinese laborer arrested for not having a certificate of residence in violation of the Geary Act of

96. Hudson v. United States, 522 U.S. 93, 96 (1997).

97. *Id.* at 99–100 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963)).

98. *Id.* at 100.

99. *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) (holding that the exclusionary rule does not apply to immigration hearings).

100. 149 U.S. 698 (1893).

1892, which rendered him deportable.[101] A large part of the majority opinion dealt with the plenary power doctrine, repeating the power of a sovereign nation argument articulated in *Nishimura Ekiu* and *Chae Chan Ping*.[102] The Court affirmed in *Fong Yue Ting* that:

> [An] order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend.[103]

According to the Court, because deportation was simply an exercise of the immigration plenary power, it could not be a punishment.[104] In addition, the Court could not express an opinion on the merits of the contested immigration statute or deportation proceedings because plenary power made them the sole domain of the political branches.[105]

By pinning the supposedly non-penal nature of deportation to the plenary power doctrine, the Court elevated immigration enforcement above the easy reach of the civil-criminal debate played out in other fields of law. Yet, the Court has continuously relied on the assumption that the process of removing non-citizens from the United States is not a punishment in order to find that it cannot be a criminal proceeding and is not entitled to the relevant procedural protections.[106] The Court's reasoning around the civil nature assumption has allowed it to dodge the hard ques-

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101. *Id.* Fong's deliberate refusal to obtain a certificate was part of a community movement calculated to test the constitutionality of the Geary Act in court. MOTOMURA, *supra* note 72, at 34–35.

102. *Fong Yue Ting*, 149 U.S. at 711–15. *See also* Nishimura Ekiu v. United States, 142 U.S. 651 (1892); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

103. *Id.* at 730.

104. *Id.* at 728–31.

105. *Id.*

106. Carlson v. Landon, 342 U.S. 524, 537–38 (1952); Bugajewitz v. Adams, 228 U.S. 585, 591 (1913); Wong Wing v. United States, 163 U.S. 228, 231 (1896).

tions presented by the criminalization of modern immigration law. While non-citizens have been extended some procedural protections under the Constitution in other arenas, the civil label on immigration law persists in severely limiting the force of those protections within the immigration system itself.

C. IMMIGRATION LAW OVER TIME

A survey of the history of immigration law demonstrates how the field has evolved over the years, highlighting the failure of constitutional principles to keep pace with the law of immigration procedure. Only ten years after the ratification of the Constitution, Congress enacted its first statute regulating "immigration," although it was targeted more at political enemies of the administration at the time rather than a concern over non-citizens.[107] The constant influx of people during the early years of the United States meant that the concept of "non-citizens" or immigrants was far removed from its present-day definition.[108] The Aliens Act or "An Act Concerning Aliens" of June 1798 conferred on the President the power to order deported and to remove aliens considered a threat to the nation.[109] The Act had little effect beyond partisan political maneuvers and was not long-lasting; it was allowed to expire after its initial enactment period of two years.[110]

Congress did not begin to truly flex its unenumerated power to regulate the exclusion and removal of classes of individuals until the late nineteenth century.[111] Regrettably, the government's first exercises of immigration power reflected the discriminatory social and constitutional norms of the period. While immigration was generally encouraged, federal immigration laws targeted specific races and ethnicities, particularly the Chinese, for restrictions and exclusion.[112] The legislative records surrounding the enactment of the Chinese exclusion laws clearly demonstrat-

107. *See* Library of Congress, *Primary Documents in American History: Alien and Sedition Acts*, http://www.loc.gov/rr/program/bib/ourdocs/Alien.html (last visited Nov. 10, 2008).

108. *See* MOTOMURA, *supra* note 72, at 18.

109. *See generally Alien and Sedition Acts*, *supra* note 107; VAIL, *supra* note 66, at 1.

110. *Alien and Sedition Acts*, *supra* note 107.

111. VAIL, *supra* note 66, at 1.

112. *See* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 93, 97–130 (2007).

ed the prejudices of federal legislators and, by extension, the American public.[113] The Supreme Court cases which established the plenary power doctrine and the civil classification of immigration law were decided in the shadow of such unjust laws.[114]

Since its foundations, U.S. immigration law has evolved gradually from the exclusion of classes of undesirables and certain nationalities to the modern system of family and employment preferences tied to country quotas.[115] The original statute that was the basis for the current Immigration and Nationality Act was passed in 1952.[116] General grounds of inadmissibility and deportability, both termed removability under the current statute, were established for health, crime, immigration violation, security risk, and public charge reasons.[117] The complexity and detail of the existing immigration system is worlds away from its origins. Despite the statutory shift away from immigration's discriminatory beginnings, the persistence of immigration jurisprudence from those early days permits the inequities present in the current system.

V. A CRITICAL ANALYSIS OF THE CIVIL-CRIMINAL DICHOTOMY

As previously discussed, the Supreme Court uses the plenary power doctrine to justify treating immigration law as a purely political power vested in the political branches of the federal government.[118] As a result, the legislative and executive branches of the federal government join in wielding extraordinary authority over the lives of non-citizens regardless of the length or depth of their residency in the United States.

The Supreme Court has found that the Fifth Amendment protection of due process applies to the immigration context as an exception to the plenary power doctrine.[119] Unfortunately, the

113. *Id.*

114. *See supra* Part IV.A–B.

115. VAIL, *supra* note 66, at 1–5.

116. *Id.* at 4; Immigration and Nationality Act of 1952, Pub. L. No. 82–414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101 *et seq*.).

117. VAIL, *supra* note 66, at 4.

118. *See supra* Part IV.A.; Mahler v. Eby, 264 U.S. 32, 40–41 (1924).

119. For an in-depth discussion of the origins and development of the procedural due process exception, see Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1632–51 (1992).

political branches have not been greatly constrained by due process because of the civil classification of immigration law. A fresh application of the civil-criminal distinction to the current immigration system reveals the fallacy of the present classification.

Despite the Supreme Court's continued insistence that immigration remains a civil field of law, the modern realities of the immigration system tell a different story. Immigration law and its enforcement procedures have evolved into a quasi-criminal system, which operates under civil procedural protections but are based on criminal laws and results in criminal punishment. This Part argues that the justifications for the civil designation of immigration law are weak and should be overturned in a thorough reanalysis by the Court. The Court has not hesitated to overrule past mistakes and correct prior interpretations in other areas of the law. It should not be afraid to reexamine the faults in the precedent upholding the current immigration system and face the necessary changes.

A. UNRELIABLE PRECEDENT

The Supreme Court has continuously relied on the reasoning that excluding or removing non-citizens from the United States is not a punishment and therefore cannot be a criminal proceeding.[120] The logic and accuracy of reasoning based on the penal versus non-penal dichotomy has been much criticized by scholars and courts.[121]

Indeed, the Court itself has questioned the civil classification of immigration law. In *Galvan v. Press*, Justice Frankfurter wrote:

120. Carlson v. Landon, 342 U.S. 524, 537–38 (1952); Bugajewitz v. Adams, 228 U.S. 585, 591 (1913); Wong Wing v. United States, 163 U.S. 228, 231 (1896).

121. Scheidemann v. INS, 83 F.3d 1517, 1526–31 (3d Cir. 1996) (Sarokin, J., concurring); ELIZABETH HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS 33–35 (1985); Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 373–75 (2001); Lisa Mendel, Note, *The Court's Failure To Recognize Deportation As Punishment: A Critical Analysis of Judicial Deference*, 5 SUFFOLK J. TRIAL & APP. ADV. 205 (2000).

> In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress . . . much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. And since *the intrinsic consequences of deportation are so close to punishment for crime*, it might fairly be said also that the ex post facto Clause, even though applicable only to punitive legislation, should be applied to deportation.[122]

The Court ultimately, however, chose to cling to the volume of existing precedent as a sufficient justification for the classification.[123]

Stare decisis plays a primary role in the development of American common law. However, the Supreme Court has not hesitated to overturn judicial precedents on constitutional issues in light of clear indications of past mistakes.[124] For example, the Court has taken the necessary steps to reverse itself regarding racial segregation[125] and the criminalization of homosexual activity.[126] While these reversals were landmark cases on extremely controversial issues, immigration enforcement procedure is an area of law that affects the entire nation and deserves no lesser treatment. The consequences of immigration enforcement procedure call for a reconsideration of precedent by the Court.

B. A FRESH LOOK AT THE CIVIL-CRIMINAL CLASSIFICATION

The Ward-Hudson test for the civil and criminal distinction has been clearly stated by the Supreme Court.[127] First, the existence of an express or implied congressional intent must be con-

122. 347 U.S. 522, 530–31 (1954) (emphasis added).

123. *Id.* at 531–32 ("[T]he slate is not clean. As to the extent of the power of Congress under review, there is not merely 'a page of history,' but a whole volume.") (internal citation omitted).

124. Recalling the words of Justice Brandeis's dissent in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405–11 (1932), the Supreme Court has stated: "It is common wisdom that the rule of stare decisis is not an 'inexorable command,' and certainly it is not such in every constitutional case." Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992).

125. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

126. Lawrence v. Texas, 539 U.S. 558 (2003).

127. *See supra* Part IV.B.1.

sidered.[128] If classification remains unclear, then the punitive nature of the statute should be considered, taking into account the seven Hudson-Kennedy factors.[129]

1. *Statutory Language*

Section 237 of the Immigration and Nationality Act establishes the general classes of deportable aliens.[130] The key provision states that "[a]ny alien who is present in the United States in violation of this Act or any other law of the United States . . . is deportable."[131] Deportation is therefore the government's goal in a successful immigration enforcement case. In applying the Ward-Hudson test to immigration, it is necessary to determine whether the statutory provisions describing deportation demonstrate an express or implied congressional intent for making the proceedings civil or criminal.

Delving into the language of the Immigration and Nationality Act reveals that although there is no express statement of intent, there are indications of a criminal law framework. The statutory definition for "order of deportation" offers no enlightenment. It states only that such an order is "the order of . . . such administrative officer . . . [responsible] for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation."[132] However, the deportation provisions repeatedly use the language of criminal law.

Criminal grounds represent an important part of the deportability provisions of the present Immigration and Nationality Act. Non-citizens may be deportable for committing crimes categorized as "crimes of moral turpitude," "aggravated felonies," controlled substances offenses, firearm offenses, crimes of domestic violence, and other "miscellaneous crimes."[133] In addition, non-citizens convicted of a failure to register as required by immigra-

128. United States v. Ward, 448 U.S. 242, 248 (1980); Hudson v. United States, 522 U.S. 93, 96 (1997).
129. *Ward*, 448 U.S. at 248–49.
130. Immigration and Nationality Act of 1952 § 237, 8 U.S.C. § 1227 (2007).
131. § 237(a)(1)(B).
132. § 101(a)(47)(A), 8 U.S.C. § 1101(a)(47)(A).
133. § 237(a)(2)(A)–(E), 8 U.S.C. § 1227(a) (2)(A)–(E).

tion law or falsification of immigration documents are also subject to deportation.[134]

The Immigration and Nationality Act defines criminal grounds for deportation, particularly "crimes of moral turpitude" and "aggravated felonies," by viewing state and federal criminal law through a complex and convoluted lens established by statute and case law.[135] Criminal sentences also serve as factors in determining the deportability of individuals.[136] Providing another language support for the classification of deportation as a criminal punishment, sections 274C and 274D refer to monetary fines specifically as "civil penalties."[137] The current statutory scheme inextricably intertwines immigration law with criminal law. Deportation is imposed criminal punishment in all but name.

2. *The Hudson-Kennedy Factors*

This section will apply the Hudson-Kennedy factors one by one. First, "whether the sanction involves an affirmative disability or restraint." It is difficult to argue that deportation does not meet this factor. During the deportation process, the government has the right to detain an individual. When an order of deportation is issued, the government has the right to physically remove an individual from the United States against the will of the individual.[138]

The second factor concerns the question of whether a finding of scienter is necessary before the sanction is imposed.[139] This factor is less clear. Several parts of section 237 refer to actions taken "knowingly," with "purpose," or "willfully" in describing the grounds for deportation.[140] On the other hand, parts of the section also refer to status violations, which lack the requirement of mental state.

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134. § 237(a)(3)(A)–(B).

135. § 101(a)(43); VAIL, *supra* note 66, at 26–60.

136. Immigration and Nationality Act of 1952 § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2007).

137. §§ 274C, 274D, 8 U.S.C. §§ 1324c, 1324d.

138. § 241, 8 U.S.C. § 1231.

139. Scienter is a finding that an individual possessed the degree of knowledge or intent making the person legally responsible for the consequences of his act or omission. BLACK'S LAW DICTIONARY (8th ed. 2004).

140. *See, e.g.*, Immigration and Nationality Act of 1952 § 237(a)(1)(E), (a)(1)(G), (a)(3)(A), 8 U.S.C. § 1227(a)(1)(E), (a)(1)(G) (2007).

Factor five asks whether the behavior to which the sanction is applied is already a crime. The criminal grounds of deportation speak eloquently to this factor. By tying existing crimes to deportation, the Immigration and Nationality Act has made deportation an end result of committing a crime.

Factors four and six deal with the theoretical bases for the civil-criminal distinction: retribution, deterrence and alternative purposes. A comparison with other "civil" forms of enforcement address the issue of alternative purposes. In the administrative arena, there are several civil fields beyond immigration law that employ search and seizure procedure to obtain evidence of violations. The enforcement of environmental regulations is one area where the federal government often seeks to inspect commercial private property, while the enforcement of welfare laws requires the inspection of private homes.[141] The permissible enforcement procedure is very similar. Enforcement agents for the environmental and welfare agencies obtain administrative warrants to inspect private property. The lower standards for probable cause are justified by the argument that inspection searches are necessary for the protection of public health, safety, and welfare.[142] These reasons speak to alternative government purposes.

Unlike these other administrative regimes, immigration law is intimately connected to the rights of life, liberty, and property governed by the Fifth Amendment. An immigration search and seizure can lead to evidence or an arrest that can take an individual permanently away from his family and home. The Supreme Court has itself acknowledged the harsh effects of a decision to deport an individual.[143] The punitive effect of deportation goes to the retributive goal of immigration enforcement. In addition to punishing an individual for violating immigration law, deportation goes directly to deterring the individual and noncitizens in general from future violations.

141. *See, e.g.*, United States v. Stauffer Chem. Co., 464 U.S. 165, 166–67 (1984) (concerning EPA's use of administrative warrant to inspect chemical plant); Wyman v. James, 400 U.S. 309, 313 (1971) (finding that home visitation was a reasonable administrative tool for the state welfare agency).

142. *See* Donna Mussio, *Drawing the Line Between Administrative and Criminal Searches: Defining the "Object of the Search" in Environmental Inspections*, 18 B.C. ENVTL. AFF. L. REV. 185, 190 (1990).

143. Galvan v. Press, 347 U.S. 522, 531 (1954).

It can be argued that the alternative purposes of deportation are to control the presence of unauthorized persons at the borders and in the interior of the United States. However, the often permanent separation of a person from his home and family in the United States through deportation supports a charge of excessiveness.

3. *The Need for Change*

In addition to its explicit textual reliance on criminal law, immigration law follows the same procedural steps in enforcement.[144] Non-citizens, analogous to criminals entering the criminal justice system, enter the immigration system when accused of violating the law. Immigration agents enforce the law by conducting searches and arrests of violators. Evidence obtained is presented in a hearing. The adjudicator considers written evidence and witness testimony before rendering a decision. For the non-citizen, the decision can result in freedom or a sentence of detention and removal. However, unlike the criminal, the non-citizen cannot expect the full protections of the Constitution during his progression from investigation to decision. The procedural protections all persons in the United States enjoy against state interference have continually been upheld by the Supreme Court, except in the complex area of immigration enforcement. In deferring to the political branches through the plenary power doctrine, the Court has abdicated its role as constitutional interpreter of the nation's laws.

The level of judicial deference granted by the Supreme Court to federal immigration law is not justified or mandated by the Constitution. As a judicial construct, the plenary power doctrine is only weakly grounded in the text of the Constitution.[145] Even assuming the correctness of the plenary power doctrine, the Supreme Court has not granted the same level of deference to other areas of the law where the government has "plenary power." In the areas of national security, interstate commerce, Indian af-

144. *See supra* Part II–III.

145. In *Without Justice for All*, Dr. Elizabeth Hull questions the textual basis for the plenary power doctrine, returning to the fact that the Constitution grants Congress power over naturalization alone without mentioning immigration or deportation. ELIZABETH HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS 149–50 (1985).

fairs, and even foreign affairs, the Court has wielded its power to interpret the constitutionality of federal legislation despite the existence of "plenary power."[146] The Court stated in *Perez v. Brownell*:

> Broad as the power in the National Government to regulate foreign affairs must necessarily be, it is not without limitation. The restrictions confining Congress in the exercise of any of the powers expressly delegated to it in the Constitution apply with equal vigor when that body seeks to regulate our relations with other nations.[147]

Immigration statutes issued under the federal government's plenary power should be equally subject to judicial review.

The Court relies too heavily on the so-called "civil nature" of immigration law as a reason not to extend full procedural protections to the area of immigration enforcement. In relying on the civil-criminal distinction, the Court permits terminology to stand in for legal reasoning. The argument that deportation is simply a civil proceeding for the removal of unlawful non-citizens from the country ignores the reality of the results.[148]

In addition, it is important to recall that the Supreme Court has found the exclusionary rule generally inapplicable to the immigration context.[149] Therefore, evidence obtained by any violations of Fourth or Fifth Amendment protections by ICE agents is not excluded from later deportation hearings in front of an immigration judge. The Court has justified its application of the Fourth Amendment without the exclusionary rule through the civil-criminal distinction.

The explicit justification for the exclusionary rule is deterrence of unlawful enforcement activity. In immigration enforcement, the Court has held that since the identity of an unlawful alien would not be suppressed by the exclusionary rule, the value of the rule is outweighed by the costs to enforcement.[150] By focus-

146. *Id.* at 223 n.5.

147. Perez v. Brownell, 356 U.S. 44, 58 (1958), *overruled on another point of law by* Afroyim v. Rusk, 387 U.S. 253 (1967).

148. *See* discussion *supra* Part V.B.2.

149. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).

150. *Id.*

ing only on procedural protections as applied to undocumented non-citizens, the Court has confined the rule to those found guilty of violating U.S. law. The Court has failed to consider the effect on non-citizens with legal status and citizens, who would be equally harmed by any unlawful actions of immigration enforcement. Without the exclusionary rule to deter them, ICE agents can carry out their duties in ways that result in even citizens being swept up in erroneous enforcement proceedings.[151]

Permitting the weak application of procedural protections in immigration enforcement presents dangers to U.S. citizens and non-citizens alike. Too much discretionary power in the hands of administrative agents promotes violations of existing due process protections, and the harsh consequences of such violations in immigration law exacerbates the danger.

With the increasing criminalization of immigration law, the Court can no longer draw easy limits around the rights of non-citizens. The Supreme Court's careful dance around the edges of immigration law no longer serves as a sufficient guarantee of the procedural rights of non-citizens and citizens alike when they encounter the power of the immigration officials.

4. *A Proposal for Reform: Quasi-Criminal Law*

It is time for the immigration system to meet the standards of "fundamental fairness" required by constitutional due process. The Supreme Court should remove the formalistic barriers it is has relied on and take up the much needed task of reinterpreting due process protections. Looking beyond the plenary power doctrine and civil classification will revitalize judicial doctrine in immigration law.

The quasi-criminal nature of modern immigration law should be acknowledged openly by the Court and by Congress. Two routes to a solution are possible. First, the Court could strike down existing provisions of the Immigration and Nationality Act which grant the investigatory and enforcement powers of immigration officials. Second, Congress itself could embark on the

151. Eunice Moscoso, *Teen U.S. Citizen Terrified at Immigration Raid*, COX NEWS SERVICE, Feb. 14, 2008, *available at* http://www.coxwashington.com/reporters/content/reporters/stories/2008/02/14/CITIZEN_RAIDS14_COX.html.

broad reform of immigration law that the field so badly needs. Since the current immigration system is complex and interconnected, the best solution would come from a combination of judicial and legislative action.

There are several key changes that are necessary to bring the immigration system in line with current constitutional interpretation. First, immigration warrants should be issued only by a judicial officer with sufficient review authority: an immigration judge within the Executive Office for Immigration Review ("EOIR") or a federal judge. ICE agents should be placed in a role analogous to police officers by requiring them to submit evidence to the judicial officer in order to obtain the warrant.

In light of the quantity of immigration proceedings nationwide, an immigration judge would be the most feasible judicial officer to make warrant decisions. While an immigration judge is an administrative law judge and therefore lacks the same protections for judicial independence of an Article III judge, the judge's duties and responsibilities at least do not encompass the investigatory role of an ICE agent.[152] Since 1983, immigration judges have been a part of the EOIR rather than a part of the Immigration and Nationalization Service, the precursor of ICE. However, they remain under the control of the Department of Justice.[153] Making the EOIR an independent agency would go much farther in ensuring the sound judgment of immigration judges without placing an additional burden on federal judges. With sufficient protections, an immigration judge would be better placed to develop an expertise in immigration law without external pressures, hopefully leading to fewer mistakes in the time-pressured situation of issuing a warrant.

Second, the procedural protections followed in criminal investigations should be applied to the immigration context. Immigration warrants should only be issued by the immigration judge when the presented evidence meets the established standard for

152. *See* U.S. Department of Justice, Executive Office for Immigration Review Background Information, http://www.usdoj.gov/eoir/background.htm (last visited Nov. 10, 2008).

153. Recent events have illustrated the dangers of political influence on judicial appointments. Emma Schwartz & Jason McLure, *DOJ Made Immigration Judgeships Political*, LEGAL TIMES, May 30, 2007, *available at* http://www.law.com/jsp/article.jsp?id =900005555415.

probable cause. The exigent circumstances permitting warrantless searches and seizures in the criminal context need to be modified to apply to immigration investigations. Such modifications should take into account the fact that a violation of immigration law does not have the same connotations of violence and danger as a violation of existing criminal law. The provisions of the Immigration and Nationality Act which grant overly broad administrative enforcement powers should be revised to reflect the necessary criminal procedural protections. Provisions permitting the issuance of warrants and warrantless arrest by immigration officials should be eliminated or modified to include a requirement for judicial oversight.

Finally, to make certain the added procedural protections are respected, the exclusionary rule should apply fully to immigration proceedings. In order to apply the exclusionary rule, it will be necessary to implement a set of mandatory immigration rules of evidence, ensuring the threat of exclusion has a real deterrent effect. The presence of formal rules of evidence will also contribute to maintaining the professional standards of presiding judges by limited discretion. The rules can be tailored to the special evidentiary needs of the removal hearing, taking into account the need to present a wide array of evidence spanning many areas and time periods of an individual's life.

VI. CONCLUSION

In the field of immigration enforcement, the Supreme Court has relied too long on the formalistic distinction between civil and criminal law in interpreting the applicability of the Fourth and Fifth Amendments. Not only are the precedents in the field of immigration law based on weak textual and legal foundations, but they are out of line with the evolution of constitutional interpretation. The statutory framework and implementation of immigration enforcement demonstrates that it is a system of criminal investigation and punishment held only to civil law standards. The current system fails to include the necessary procedural protections of criminal investigation and adjudication. This combination poses an insupportable danger to the constitutional rights of citizens and non-citizens alike by failing to rein in violations of the Fourth and Fifth Amendment. It is time for all persons within the United States to be protected equally from any

constitutional violations by the Immigration and Customs Enforcement agency as those by any other law enforcement agency.