Looking Past the Label: An Analysis of the Measures Underlying "Sanctuary Cities"

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I. INTRODUCTION

On July 1, 2015, Kate Steinle and her father were walking along Pier 14 in San Francisco when a bullet ricocheted off the pier and struck Kate in the back.[1] Tragically, Kate died later that day at San Francisco General Hospital.[2] Kate's untimely death sparked public outrage when authorities revealed that the shooter, Jose Ines Garcia Zarate, was an unauthorized immigrant released from custody pursuant

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1. *Sanctuary Cities: A Threat to Public Safety: Hearing Before the Subcomm. on Immigration & Border Sec. of the Comm. on the Judiciary*, 114th Cong. 37–38 (2015) (statement of Jim Steinle, Father of Kathryn Steinle, Pleasanton, Cal.).

2. Avianne Tan, *San Francisco Woman Shot, Killed While Strolling on Pier with Father in "Random Shooting"*, ABC NEWS (July 3, 2015, 3:58 PM), http://abcnews.go.com/US/san-francisco-woman-shot-killed-strolling-pier-father/story?id=32210463.

to a "sanctuary city" policy, despite having been previously deported five times and convicted of seven felonies.[3]

The finger-pointing between the local and federal government began instantly.[4] The United States Immigration and Customs Enforcement ("ICE") stated that its agents had issued a detainer requesting Zarate's continued custody.[5] But the Sheriff's Department claimed that San Francisco's Due Process for All Ordinance prohibited them from detaining Zarate pursuant to an immigration detainer once he became eligible for release from custody.[6] ICE spokeswoman Virginia Kice then clarified that ICE had also requested that the

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3. Rosanna Xia, *San Francisco Homicide Suspect Was Deported Five Times*, L.A. TIMES (July 3, 2015, 8:51 PM), http://www.latimes.com/local/lanow/la-me-ln-san-francisco-homicide-suspect-20150703-story.html. In reaction to Kate's death, the House of Representatives later passed a bill that increases the penalties for illegal reentry after prior removal. *See* Kate's Law, H.R. 3004, 115th Cong. (2017) (as passed by House, June 29, 2017). A jury acquitted Jose Ines Garcia Zarate of murder, apparently finding that the shooting was accidental. Holly Yan & Dana Simon, *Undocumented Immigrant Acquitted in Kate Steinle Death*, CNN (Dec. 1, 2017, 2:21 AM), http://www.cnn.com/2017/11/30/us/kate-steinle-murder-trial-verdict/index.html. This acquittal prompted another firestorm of public reaction, including tweets from President Donald Trump and the U.S. Department of Justice, the latter of which promoted a statement from Attorney General Jeff Sessions. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 3, 2017, 6:27 AM), https://twitter.com/realDonaldTrump/status/937297341266190336; Justice Department (@TheJusticeDept), TWITTER (Nov. 30, 2017, 8:28 PM), https://twitter.com/TheJusticeDept/status/936421628673691650. *See also* Press Release, U.S. Dep't of Justice, Attorney General Sessions Statement on the Verdict in People of the State of California vs. Jose Ines Garcia Zarate aka Juan Francisco Lopez Sanchez (Nov. 30, 2017), https://www.justice.gov/opa/pr/attorney-general-sessions-statement-verdict-people-state-california-vs-jose-ines-garcia.

4. *See* Emmett Berg, *San Francisco Sheriff, U.S. Officials Clash over Immigrant Suspect's Release*, REUTERS (July 10, 2015, 9:09 PM), http://www.reuters.com/article/us-usa-california-shooting-idUSKCN0PL02Z20150711.

5. *Id.*

6. *See* S.F., CAL., ADMIN. CODE ch. 12I, § 3(a) (2016); Press Release, Office of the Sheriff, City & Cty. of S.F., Sheriff Ross Mirkarimi Sets the Record Straight on the April 2015 Release of Juan Francisco Lopez-Sanchez and Offers Recommendations for the Future (July 10, 2015), http://www.sfsheriff.com/files/SFSD_PR_RM_07_10_15.pdf. Officials learned over the course of the prosecution that Mr. Lopez-Sanchez's real name is Jose Ines Garcia Zarate. *See* Yan & Simon, *supra* note 3.

Sheriff's Department notify ICE if they planned to release Zarate so that immigration authorities could take him into custody and deport him.[7] Nothing in San Francisco's ordinance prohibited the Sheriff's Department from communicating with ICE.[8] Sheriff Ross Mirkarimi, however, had ordered his staff not to inform ICE representatives of any impending release.[9]

This incident reflects a broader trend. States and municipalities are increasingly unwilling to assist federal agencies that are enforcing federal immigration law.[10] Indeed, at last count, over 300 localities

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7. *See* Lee Romney, *Family of Woman Allegedly Slain by Deportee Files Claims Against S.F. and U.S.*, L.A. TIMES (Sept. 1, 2015, 5:30 PM), http://www.latimes.com/local/lanow/la-me-ln-kate-steinle-claims-20150901-story.html; Xia, *supra* note 3.

8. *See* S.F., CAL., ADMIN. CODE ch. 12I, § 3(a) (2016) ("[L]aw enforcement official[s] shall not *detain* an individual on the basis of a civil immigration detainer after that individual becomes eligible for release from custody." (emphasis added)). *But see* Press Release, Office of the Sheriff, City & Cty. of S.F., San Francisco Sheriff Ross Mirkarimi Responds to Mayor Ed Lee's Call to Rescind ICE Contact Policy (July 16, 2015), http://www.sfsheriff.com/files/SFSD_PR_RM_07_16_15_1.pdf ("[San Francisco Mayor Ed Lee's] request to rescind the policy and require the SFSD to contact federal immigration officials would eviscerate the city's Due Process For All Ordinance . . . .").

9. Memorandum from Sheriff Ross Mirkarimi, S.F. Sheriff's Dep't, on Immigr. & Customs Enf't Contact and Comm. to All Personnel (Mar. 13, 2015) [hereinafter Mirkarimi Memorandum], http://www.catrustact.org/uploads/2/5/4/6/25464410/ice_contact,_signed.pdf ("The San Francisco Sheriff's Department (SFSD) policy is that there shall be limited contact and communication with ICE representatives absent a court issued warrant, a signed court order, or other legal requirement authorizing ICE access."). According to KPIX 5, a local San Francisco news station, this memorandum was distributed by Sheriff Mirkarimi after he discovered that his deputies had been making "secret phone calls" to ICE. *SF Sheriff Mirkarimi: Pier 14 Murder Could Happen In Any U.S. City; ICE Deserves Blame*, CBS SFBAYAREA (July 6, 2015, 10:14 PM), http://sanfrancisco.cbslocal.com/2015/07/06/sf-sheriff-mirkarimi-pier-14-murder-could-happen-in-any-u-s-city-ice-needs-to-step-up [hereinafter *Pier 14 Murder*]. Sheriff Mirkarimi lost his bid for re-election by a wide margin in November 2015. *Embattled San Francisco Sheriff Loses Re-election Bid*, ASSOCIATED PRESS (Nov. 4, 2015), http://bigstory.ap.org/article/8313a7a61cee4a07aeb18644d572c0c9/embattled-san-francisco-sheriff-loses-re-election-bid.

10. *See* Bryan Griffith & Jessica Vaughan, *Map 1: Sanctuary Cities, Counties, and State*, CTR. IMMIGR. STUD., http://cis.org/Sanctuary-Cities-Map (last updated Aug. 25, 2017) (providing a map identifying states, counties, and municipalities that

throughout the United States have adopted formal or informal policies that restrict local police cooperation with federal immigration enforcement efforts.[11] These jurisdictions are broadly referred to as "sanctuary cities."[12]

Kate Steinle's tragic death propelled sanctuary cities to the center of an ongoing immigration debate. Opponents of sanctuary cities argue that sanctuary measures violate federal law and compromise the safety of American citizens.[13] These positions gained significant momentum and political support when Republican presidential candidates denounced sanctuary cities to a national audience[14] and used Steinle's death as a rallying call.[15] Indeed, days after entering office, President Donald Trump signed an executive order directing the Attorney General and the Secretary of Homeland Security to strip federal funding from "sanctuary jurisdictions"

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limit the honoring of immigration detainer requests); *2014 Immigration Report*, NAT'L CONF. OF ST. LEGISLATURES (Jan. 7, 2015), http://www.ncsl.org/research/immigration/2014-immigration-report.aspx.

11. *See* Griffith & Vaughan, *supra* note 10; Marc R. Rosenblum, *Federal-Local Cooperation on Immigration Enforcement Frayed; Chance for Improvement Exists*, MIGRATION POL'Y INST. (July 2015), http://www.migrationpolicy.org/news/federal-local-cooperation-immigration-enforcement-frayed-chance-improvement-exists ("[M]ore than 360 jurisdictions that have passed laws to formally limit their cooperation with U.S. Immigration and Customs Enforcement . . . .").

12. No federal statute or regulation has defined the term "sanctuary." The Office of the Inspector General, however, has used it to reference "jurisdictions that may have state laws, local ordinances, or departmental policies limiting the role of local law enforcement agencies and officers in the enforcement of immigration laws." U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., AUDIT DIV., COOPERATION OF SCAAP RECIPIENTS IN THE REMOVAL OF CRIMINAL ALIENS FROM THE UNITED STATES 7 n.44 (Jan. 2007), https://oig.justice.gov/reports/OJP/a0707/final.pdf (redacted public version).

13. *See, e.g.*, Hans A. von Spakovsky, Opinion, *Sanctuary Cities Put Law-abiding Citizens at Risk*, WASH. TIMES (Dec. 8, 2015), http://www.washingtontimes.com/news/2015/dec/8/hans-von-spakovsky-sanctuary-cities-put-law-abidin.

14. Nick Gass, *'Sanctuary Cities' Under Fire in 2016 Campaign, Congress*, POLITICO (July 9, 2015, 6:48 PM), http://www.politico.com/story/2015/07/sanctuary-cities-under-fire-in-2016-campaign-congress-119933.

15. *See* Allison Weeks, *Trump Mentions Kate Steinle During Speech*, KRON4 (July 21, 2016, 8:36 PM), http://kron4.com/2016/07/21/trump-mentions-kate-steinle-during-speech.

because they "cause[] immeasurable harm to the American people and to the very fabric of our Republic."[16] Immigrant advocates, on the other hand, fiercely defend sanctuary cities. They claim that local participation in federal immigration enforcement undermines local community policing efforts, drains state and local resources, distracts police from their primary crime-fighting responsibilities, and causes untrained police officers to violate constitutional rights.[17]

This debate would be more informed and coherent if the media, politicians, and advocates did not lump numerous measures under the single heading of "sanctuary city." Opponents of sanctuary measures label any locality that limits its assistance to federal immigration authorities as an illegal safe haven for criminal aliens.[18] Likewise,

16. Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017). Some reports estimate that nearly $27 billion of federal funding goes to sanctuary cities across the country. ADAM ANDRZEJEWSKI & THOMAS W. SMITH, OPEN THE BOOKS, FEDERAL FUNDING OF AMERICA'S SANCTUARY CITIES 1 (2017), https://www.openthebooks.com/assets/1/7/Oversight_FederalFundingofAmericasSanctuaryCities.pdf. Facing substantial cuts in federal funding, cities have challenged the constitutionality of Trump's order. *See* Complaint for Declaratory and Injunctive Relief, City and County of San Francisco v. Trump, No. 4:17-cv-00485 (N.D. Cal. Jan. 31, 2017); Complaint for Declaratory Relief, City of Seattle v. Trump, No. 2:17-cv-00497 (W.D. Wash. Mar. 29, 2017). The United States District Court for the Northern District of California entered a preliminary injunction holding that the Attorney General and Secretary may enforce existing conditions of federal grants but that the President cannot unilaterally strip cities of all federal funding. *See* Order Granting the County of Santa Clara's and the City and County of San Francisco's Motions to Enjoin Section 9(a) of Executive Order 13678, County of Santa Clara v. Trump, 250 F. Supp. 3d 497 (N.D. Cal. 2017) (No. 17-cv-00574-WHO). Resistance to sanctuary measures is not limited to the federal government. Some states have begun to pass "anti-sanctuary" measures that prohibit local entities from adopting policies that limit the ability of local officers to participate in immigration enforcement. *See, e.g.*, TEX. GOV'T CODE ANN. § 752.053 (2017) (commonly referred to as S.B. 4).

17. *See, e.g.*, LYNN TRAMONTE, IMMIGR. POL'Y CTR., DEBUNKING THE MYTH OF "SANCTUARY CITIES": COMMUNITY POLICING POLICIES PROTECT AMERICAN COMMUNITIES 2 (2011), http://www.immigrationresearch-info.org/report/immigration-policy-center/debunking-myth-sanctuary-cities-community-policing-policies-protect.

18. *See* MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RS22773, "SANCTUARY CITIES": LEGAL ISSUES 1 (2009); *accord* Rose Cuison Villazor, *What Is a "Sanctuary"?*, 61 SMU L. REV. 133, 138 (2008) (analyzing the shift in the utilization of the term "sanctuary" and concluding that in the modern context it "has

supporters of sanctuary measures put forth the same policy arguments regardless of which sanctuary measure is being challenged.[19] The reality of sanctuary measures is more complex. Put simply, not all sanctuary cities are created equally. States and localities adopt various types of measures limiting their participation in federal immigration enforcement.

This Article discards the unitary, all-encompassing "sanctuary city" label and evaluates the distinct legal and policy issues surrounding differing types of sanctuary measures. Part II provides a brief history of the sanctuary movement. Part III discusses the impact of sanctuary measures on ICE's enforcement efforts. Part IV analyzes different types of sanctuary measures to determine (1) whether the measure violates the federal government's power to regulate immigration law, and (2) whether common public policy rationales asserted to support sanctuary cities support the measure itself. Part V concludes that the failure to distinguish between the differing measures underlying sanctuary cities has fueled misleading arguments on both sides of the debate and prevented clear thinking on the difficult issues surrounding each type of sanctuary measure.

II. BACKGROUND

The current "sanctuary" movement by states and localities developed over the course of decades, experiencing two major periods of expansion.

A. Religious Community Development of the "Sanctuary" Movement

In the 1980s, hundreds of thousands of refugees from El Salvador and Guatemala fled their homelands to escape civil unrest

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a negative connotation that is often described as illegal acts by local and state governments of federal immigration laws").

19. *See, e.g.*, Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247, 303–08 (2012); Corrie Bilke, Note, *Divided We Stand, United We Fall: A Public Policy Analysis of Sanctuary Cities' Role in the "Illegal Immigration" Debate*, 42 IND. L. REV. 165, 182–86 (2009).

and political turmoil.[20] The religious community in the United States provided humanitarian assistance—such as food, clothing, and shelter—to the refugees who successfully crossed the border.[21] They also helped the Salvadoran and Guatemalan refugees file applications for asylum in the United States.[22]

The Refugee Act of 1980 granted refugee status to

> any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .[23]

Church members believed that the Salvadorans and Guatemalans had a "well-founded fear of persecution" and would be allowed to remain in the United States.[24] However, very few of these asylum applications were granted.[25] Many religious congregations grew frustrated with the

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20. Reports estimated that around 500,000 Central American refugees entered the United States illegally in the early 1980s. *See* THE COMPTROLLER GENERAL, U.S. GEN. ACCOUNTING OFFICE, CENTRAL AMERICAN REFUGEES: REGIONAL CONDITIONS AND PROSPECTS AND POTENTIAL IMPACT ON THE UNITED STATES 3 (1984); ANN CRITTENDEN, SANCTUARY: A STORY OF AMERICAN CONSCIENCE AND THE LAW IN COLLISION xvi (1988); Robert Lindsey, *A Flood of Refugees from Salvador Tries to Get Legal Status*, N.Y. TIMES (July 4, 1983), http://www.nytimes.com/1983/07/04/us/a-flood-of-refugees-from-salvador-tries-to-get-legal-status.html?pagewanted=all.

21. *See* Douglas L. Colbert, *The Motion in Limine: Trial Without Jury—A Government's Weapon Against the Sanctuary Movement*, 15 HOFSTRA L. REV. 5, 31–34 (1986); Villazor, *supra* note 18, at 138–41.

22. *See* Colbert, *supra* note 21, at 34; Villazor, *supra* note 18, at 134–35.

23. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended at 8 U.S.C. §§ 1157–59 (2000)).

24. Colbert, *supra* note 21, at 33.

25. *See* Ignatius Bau, *Cities of Refuge: No Federal Preemption of Ordinances Restricting Local Government Cooperation with the INS*, 7 LA RAZA L.J. 50, 50 (1994) (noting that between 1983 and 1991, the INS granted only 3% of Salvadoran and 2% of Guatemalan applications for asylum); Jeffrey L. Romig, Comment, *Salvadoran Illegal Aliens: A Struggle to Obtain Refuge in the United States*, 47 U. PITT. L. REV. 295, 299 (1985) ("For example, in Fiscal Year 1983, 163 Salvadoran

limited administrative remedy that the federal government provided, and they declared themselves "sanctuaries" for the refugees.[26]

In due course, the religious community's sanctuary initiative led state and local governments to join the movement and enact policies opposing the federal government's limited grant of asylum to the refugees.[27] Among the safeguards that states and localities provided were assurances that state and local employees—primarily police officers—would not ask about a refugee's immigration status or report immigration statuses to the federal government.[28] Over time, these sanctuary laws transformed from specific protections for Salvadoran and Guatemalan refugees to more general protections for all immigrants.[29]

B. Increased Interior Enforcement and the Expansion of the "Sanctuary" Movement

The second wave of sanctuary measures came decades later in the wake of federal enforcement initiatives that sought the assistance of state and local governments. According to estimates, the number of

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asylum requests were granted and 6,576 were rejected. In Fiscal Year 1984, 328 requests were granted and 13,045 were denied.").

26. *See* Bau, *supra* note 25, at 51; Colbert, *supra* note 21, at 24, 37, 43–44.

27. *See, e.g.*, S.F., CAL., RES. 1087-85 (Dec. 27, 1985); Exec. Dep't. of the Commonwealth of Mass., Refugee Policy, Exec. Order No. 257 (Oct. 4, 1985); Ithaca, N.Y., Res. Sanctuary for Salvadoran and Guatemalan Refugees (July 17, 1985); Cambridge, Mass., Res. Declaring the City a Sanctuary (Apr. 8, 1985); Berkeley, Cal., Res. 52,596 (Feb. 19, 1985); San Jose, Cal., Res. Concerning U.S. Immigration and Naturalization Service Enforcement Policies (Apr. 24, 1984); *see also* Jorge L. Carro, *Municipal and State Sanctuary Declarations: Innocuous Symbolism or Improper Dictates?*, 16 PEPP. L. REV. 297, 297 n.2 (1989) (citing over twenty such resolutions).

28. *See supra* note 27.

29. *See, e.g.*, S.F., CAL., ADMIN. CODE ch. 12H.2 (1989) ("No department, agency, commission, officer or employee of the City and County of San Francisco shall use any City funds or resources to assist in the enforcement of Federal immigration law or to gather or disseminate information regarding the immigration status of individuals in the City and County of San Francisco unless such assistance is required by Federal or State statute, regulation or court decision."); N.Y.C., Exec. Order No. 124 (1989), *repealed by* N.Y.C., Exec. Order No. 34 (May 13, 2003) (prohibiting city officers or employees from transmitting information about an alien to federal immigration authorities unless required by law, authorized in writing by the alien, or the alien was suspected of criminal activity).

unauthorized immigrants residing in the United States increased from approximately 3.5 million in 1990 to over 10 million in 2002.[30] The public became increasingly concerned about the growing number of unauthorized immigrants, especially after the tragic events of September 11, 2001.[31] These concerns pushed the federal government to undertake various enforcement initiatives.[32]

ICE implemented multiple programs—for example, the 287(g) program and the Criminal Alien Program—that sought the assistance of state and local governments in the enforcement of immigration laws.[33] The 287(g) program "delegat[ed] certain immigration enforcement functions to specially trained state and local law enforcement officers," and the Criminal Alien Program enabled federal officers to screen, detain, and remove aliens from local prisons and jails.[34] Despite the implementation of these programs, the unauthorized immigrant population continued to rise.[35]

In 2008, ICE launched the Secure Communities program.[36] This program allowed ICE to screen persons arrested by local law enforcement without having a federal officer physically present at the local jail or prison.[37] Generally, when state and local law enforcement officers arrest a person, they take the person's fingerprints and forward

30. Robert Warren & Donald Kerwin, *Beyond DAPA and DACA: Revisiting Legislative Reform in Light of Long-Term Trends in Unauthorized Immigration to the United States*, 3 J. ON MIGRATION & HUM. SECURITY 80, 85 (2015).

31. *See generally* Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 MINN. L. REV. 1369 (2007) (discussing the changes to immigration enforcement in the wake of the terrorist attacks on September 11, 2001).

32. *See id.* at 1369–70.

33. MARC R. ROSENBLUM & WILLIAM A. KANDEL, CONG. RESEARCH SERV., R42057, INTERIOR IMMIGRATION ENFORCEMENT: PROGRAMS TARGETING CRIMINAL ALIENS 1 (2012).

34. *Id.*

35. *See* Warren & Kerwin, *supra* note 30, at 85.

36. *See generally* U.S. IMMIGRATION & CUSTOMS ENF'T, 1ST QUARTERLY STATUS REPORT (APRIL–JUNE 2008) FOR SECURE COMMUNITIES: A COMPREHENSIVE PLAN TO IDENTIFY AND REMOVE CRIMINAL ALIENS (Aug. 2008).

37. *See* Adam B. Cox & Thomas J. Miles, *Legitimacy and Cooperation: Will Immigrants Cooperate with Local Police Who Enforce Federal Immigration Law?* 14–15 (N.Y. Univ. Sch. of Law & Legal Theory Research Paper Series, Working Paper No. 12, 2015), http://lsr.nellco.org/cgi/viewcontent.cgi?article=1547&context=nyu_plltwp.

them to the Federal Bureau of Investigation's ("FBI") Integrated Automatic Fingerprint Identification System for a background check.[38] Under the Secure Communities program, the FBI would automatically forward these fingerprints to ICE.[39] ICE would then enter the fingerprints into its Automated Biometric Identification System ("IDENT"), which contains the fingerprints of (1) non-citizens who were previously deported or overstayed their visas, (2) non-citizens who are lawfully in the United States but who might be deported if convicted of a crime, and (3) citizens who naturalized after their fingerprints were entered into the IDENT database.[40] If an arrestee's fingerprints matched those of a person in the IDENT database, ICE personnel would then review the information in the IDENT databases and other databases to determine whether to place an "immigration detainer" on the person.[41] The detainer would ask local law enforcement agency to extend custody of the person for 48 hours beyond the scheduled release so that ICE could transfer the person to federal custody and commence deportation proceedings.[42]

Despite ICE's claim that the Secure Communities program prioritized "individuals who present the most significant threats to public safety as determined by the severity of their crime [and] their criminal history,"[43] immigrant advocacy groups reported that the program increased the deportation of persons who had not been convicted of any offense.[44] These objections multiplied as a number

38. *Id.*

39. *Id.*

40. Cox & Miles, *supra* note 37, at 15. The database does not contain fingerprints of unauthorized immigrants who have not been previously fingerprinted by immigration officials. *See id*.

41. *See* MICHAEL JOHN GARCIA & KATE M. MANUEL, CONG. RESEARCH SERV., R43457, STATE AND LOCAL "SANCTUARY" POLICIES LIMITING PARTICIPATION IN IMMIGRATION ENFORCEMENT 16 n.96 (2015); Cox & Miles, *supra* note 37, at 15.

42. *See* Cox & Miles, *supra* note 37, at 15.

43. *Secure Communities*, U.S. IMMIGRATION & CUSTOMS ENF'T, https://www.ice.gov/secure-communities (last updated Oct. 30, 2017); *see also* Memorandum from John Morton, Dir., Immigration Customs Enforcement, to All Immigration Customs Enforcement Employees, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011), http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf.

44. *See, e.g.*, AM. IMMIGRATION COUNSEL ET AL., COMMENTS ON U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT DRAFT DETAINER POLICY 1–3 (2010),

of states passed motor vehicle laws that increased the number of unauthorized immigrants who were arrested, rather than given citations, for minor traffic violations.[45] Immigrant advocates claimed that the Secure Communities program undermined the legitimacy of local police in the eyes of immigrants, decreasing cooperation with local officers.[46] As a result, several jurisdictions adopted policies requiring local law enforcement agencies to decline immigration detainer requests for at least some unauthorized immigrants.[47]

The detainer resistance gained steam when lower courts indicated that municipalities could face monetary liability for prolonging a person's period of detention.[48] These decisions prompted nearly 300 jurisdictions to adopt "anti-detainer policies" that limit or prohibit the detention of persons subject to ICE detainers.[49] This refusal to cooperate with federal immigration authorities drastically increased the number of so-called sanctuary cities and put the spotlight back on immigration policy.

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https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/NGO-DetainerCommentsFinal-10-1-2010.pdf.

45. David A. Martin, *Resolute Enforcement Is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 J. L. & POL. 411, 446 (2015).

46. *See* Rachel Zoghlin, *Insecure Communities: How Increased Localization of Immigration Enforcement Under President Obama Through the Secure Communities Program Makes Us Less Safe, and May Violate the Constitution*, 6 AM. U. MODERN AM. 20, 22–24 (2010). *See generally* NIK THEODORE, DEP'T OF URBAN PLANNING & POLICY, UNIV. OF ILL. AT CHI., INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT (2013), http://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF (providing survey evidence indicating that the Secure Communities program undermined relations between local law enforcement and immigrant communities). This Article further explores the validity of this policy rationale at *infra* Part IV.

47. *See, e.g.*, Berkeley, Cal., Jail Regulations, General Order J-1(139) (Dec. 12, 2012); Milwaukee Cty. Bd. of Supervisors, Res. File No. 12-135 (June 4, 2012); Santa Clara Cty., Cal., Policy 3.54 Civil Immigration Detainer Requests (Oct. 18, 2011).

48. This Article discusses these cases and the legal issues surrounding detainers at length below. *See infra* Part IV.

49. Cox & Miles, *supra* note 37, at 19; *see also* Griffith & Vaughan, *supra* note 10.

As this brief history demonstrates, there is no consensus on the meaning of the term "sanctuary city."[50] This has led to sloppy and incoherent arguments by parties on both sides of the debate. Immigrant advocates put forth the same set of policy arguments regardless of the measure at issue.[51] And restrictionists broadly proclaim that sanctuary cities violate federal law without identifying which measure is illegal.[52] For the most part, both sides argue as if there is a single "sanctuary" policy at issue.

In reality, states and localities have implemented various types of measures to limit their participation in federal immigration enforcement efforts. These measures include (1) declining ICE's immigration detainer requests, (2) restricting communication with federal immigration authorities, (3) barring police inquiries or investigations into a person's immigration status, and (4) preventing police officers from making arrests for violations of federal immigration law. These four categories encompass the majority of measures underlying the "sanctuary city" label and will illustrate the differing issues that underlie each type of sanctuary measure.

III. IMMIGRATION ENFORCEMENT AND THE IMPACT OF SANCTUARY MEASURES

A critical evaluation of sanctuary measures must rely on two underlying premises: (1) federal immigration laws are currently under-enforced; and (2) sanctuary measures contribute to such under-enforcement.

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50. In fact, one scholar devoted an entire law review article to tracing the use of the term "sanctuary." *See* Villazor, *supra* note 18.

51. *See, e.g.*, TRAMONTE, *supra* note 17; Bilke, *supra* note 19, at 182–86.

52. *See, e.g.*, Salvatore Colleluori, Jessica Torres, & Cristina López G., *Fox News Falsely Claims "Sanctuary Cities" Violate Federal Immigration Law*, MEDIA MATTERS FOR AM. (July 7, 2015, 6:22 PM), http://mediamatters.org/research/2015/07/07/fox-news-falsely-claims-sanctuary-cities-violat/204286 (compiling statements made on Fox News that sanctuary cities violate federal law).

A. Level of Immigration Enforcement

Reasonable people have differing views on whether federal officials over- or under-enforce federal immigration law. On one hand, lawyers who represent immigrants and other immigration advocacy groups view current enforcement practices as too harsh, believing enforcement causes fear and broken families. Indeed, the media,[53] empirical studies,[54] and academic scholarship[55] have documented the harsh effects of deportation laws on immigrant families. On the other hand, those favoring enforcement claim that immigration enforcement is too lax. In support of this view, they cite the decreasing number of interior deportations during the Obama Administration, the substantial unauthorized immigrant population, and the number of criminal aliens released from custody each year.[56] Ultimately, determining the "correct" level of effective immigration enforcement presents tradeoffs about which people will always disagree.

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53. *See, e.g.*, Sonia Nazario, *The Heartache of an Immigrant Family*, N.Y. TIMES (Oct. 14, 2013), http://www.nytimes.com/2013/10/15/opinion/the-heartache-of-an-immigrant-family.html; Hirokazu Yoshikawa & Carola Suárez-Orozco, *Deporting Parents Hurts Kids*, N.Y. TIMES (Apr. 20, 2012), http://www.nytimes.com/2012/04/21/opinion/deporting-parents-ruins-kids.html.

54. *See, e.g.*, RANDY CAPPS ET AL., URBAN INST., PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA'S CHILDREN (2007), https://www.urban.org/sites/default/files/publication/46811/411566-Paying-the-Price-The-Impact-of-Immigration-Raids-on-America-s-Children.PDF.

55. *See, e.g.*, Kalina Brabeck & Qingwen Xu, *The Impact of Detention and Deportation on Latino Immigrant Children and Families: A Quantitative Exploration*, 32 HISP. J. BEHAV. SCI. 341 (2010) (evaluating the mental health difficulties experienced by children whose parents were deported or detained); INT'L HUMAN RIGHTS LAW CLINIC, UNIV. OF CA., BERKELEY, SCH. OF LAW ET AL., IN THE CHILD'S BEST INTEREST? THE CONSEQUENCES OF LOSING A LAWFUL IMMIGRANT PARENT TO DEPORTATION (2010), https://www.law.berkeley.edu/files/Human_Rights_report.pdf (discussing the effects of deportation on children).

56. *See, e.g.*, Robert Law, *Thank Trump for America's Return to Real Immigration Enforcement*, THE HILL (Aug. 14, 2017, 9:40 AM), http://thehill.com/blogs/pundits-blog/immigration/346444-thank-trump-for-americas-return-to-real-immigration; Byron York, *Trump's Radical Immigration Plan: Enforce the Law*, WASH. EXAMINER (Jan. 26, 2017, 11:28 PM), http://www.washingtonexaminer.com/byron-york-trumps-radical-immigration-plan-enforce-the-law/article/2613124;

David Martin, a leading immigration scholar and immigration reform advocate, argues that both sides *should* prefer increased enforcement.[57] In his article, *Resolute Enforcement Is Not Just for Restrictionists*, Martin points out that effective enforcement is a political prerequisite to a more expansive immigration policy.[58] Martin demonstrates that "widespread and visible failures of immigration enforcement, especially when they lead to rapidly rising populations of unauthorized migrants in local communities throughout the nation, create momentum for new restrictive legislation."[59] This legislation makes expanding *legal* immigration politically impossible.[60]

Regardless of one's view on how much enforcement is optimal, "[t]he federal power to determine immigration policy is well settled."[61] Indeed, "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens."[62] To the extent that state and local measures stifle the enforcement of federal laws, the policy rationales justifying such impairment should be evaluated critically.

For these reasons, this Article works from the premise that federal immigration law is under-enforced. That is, this Article assumes the validity of enhanced enforcement efforts and addresses arguments that jurisdictions may nonetheless wish to limit the involvement of local officers in such enforcement.[63]

B. The Effect of Sanctuary Measures on ICE

Within the Department of Homeland Security ("DHS"), three agencies enforce federal immigration laws: U.S. Immigration and Customs Enforcement ("ICE"); U.S. Customs and Border Protection

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57. Martin, *supra* note 45, at 417–18.

58. *Id.* at 417–20.

59. *Id.* at 417.

60. *Id.* at 415–21.

61. Arizona v. United States, 567 U.S. 387, 395 (2012).

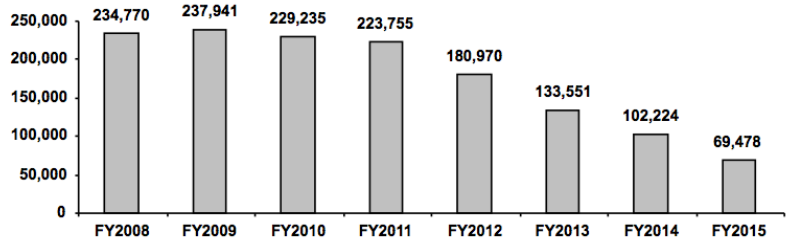
62. Fiallo v. Bell, 430 U.S. 787, 792 (1977) (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)).

63. Again, I recognize that many believe that federal immigration law is over-enforced and would justify sanctuary measures on this ground. This Article does not purport to address the appropriate level of immigration enforcement.

("CBP"); and U.S. Citizenship and Immigration Services ("USCIS").[64] ICE is primarily responsible for immigration enforcement efforts in the country's interior.[65] Its core missions include "the identification and apprehension of criminal aliens and other priority aliens located in the United States; and . . . the detention and removal of those individuals apprehended in the interior of the United States as well as those apprehended by CBP officers and agents patrolling our nation's borders."[66]

In recent years, ICE has struggled to successfully carry out either of these missions. Scholars have concluded that "[t]he weakest part of our current immigration system is interior enforcement."[67] ICE statistics, presented in Figure 1, support such claims.

Figure 1: Fiscal Year 2008-2015 Removals



Source: 2015 ICE ENFORCEMENT REPORT

Interior removals declined over 70% from 2008 to 2015. This dramatic decrease in removals cannot be attributed to declining unauthorized immigrant population levels, which remained between 11 and 12

64. U.S. DEP'T OF HOMELAND SEC., ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT: FISCAL YEAR 2015 1 (2015) [hereinafter 2015 ICE ENFORCEMENT REPORT], https://www.ice.gov/sites/default/files/documents/Report/2016/fy2015removalStats.pdf.

65. *What We Do*, U.S. IMMIGRATION & CUSTOMS ENF'T, https://www.ice.gov/overview (last updated Mar. 20, 2017) ("While certain responsibilities and close cooperation with U.S. Customs and Border Protection, U.S. Citizenship and Immigration Services, and others require significant ICE assets near the border, the majority of immigration enforcement work for ICE takes place in the country's interior.").

66. 2015 ICE ENFORCEMENT REPORT, *supra* note 64, at 1.

67. Martin, *supra* note 45, at 425.

million during this time period.[68] Nor can it be attributed to a decrease in ICE appropriations, which increased from around five billion in 2008 to just under six billion in 2015.[69]

The decrease in interior removals is likely the result of a number of changing variables. For one, the Obama Administration shifted immigration enforcement resources from the interior to the border.[70] This shift in resources and a statistical padding of the deportation numbers allowed the Administration to play both sides of the fence politically. The Obama Administration told the public that deportation levels were at record highs by modifying the formula for calculating deportation statistics to include more border arrests, presumably in an attempt to gain support for immigration reform.[71] At the same time, the Administration told immigrant advocacy groups that ICE focused interior removal efforts only on individuals who posed serious public safety and national security threats.[72] Indeed, in 2008, only 38% of the

68. Jens Manuel Krogstad, Jeffrey S. Passel & D'Vera Cohn, *5 Facts About Illegal Immigration in the U.S.*, PEW RES. CTR.: FACT TANK (Apr. 27, 2017), http://www.pewresearch.org/fact-tank/2017/04/27/5-facts-about-illegal-immigration-in-the-u-s.

69. *See* GUILLERMO CANTOR, MARK NOFERI & DANIEL MARTÍNEZ, AM. IMMIGR. COUNCIL, ENFORCEMENT OVERDRIVE: A COMPREHENSIVE ASSESSMENT OF ICE'S CRIMINAL ALIEN PROGRAM 8 (2015), https://www.americanimmigrationcouncil.org/sites/default/files/research/enforcement_overdrive_a_comprehensive_assessment_of_ices_criminal_alien_program_final.pdf.

70. MATT GRAHAM, BIPARTISAN POLICY CTR., ISSUE BRIEF: INTERIOR IMMIGRATION ENFORCEMENT BY THE NUMBERS 1 (July 2015), http://cdn.bipartisanpolicy.org/wp-content/uploads/2014/03/BPC-Interior-Enforcement-Numbers.pdf.

71. Stephen Dinan, *Deportations Come Mostly from Border, DHS Chief Says*, WASH. TIMES (Mar. 12, 2014), http://www.washingtontimes.com/news/2014/mar/12/deportations-come-mostly-from-border-dhs-chief-say ("[M]ore than half of [the] removals that were attributed to ICE [were] actually a result of Border Patrol arrests that wouldn't have been counted in prior administrations . . . .").

72. Alan Silverleib, *Obama's Deportation Record: Inside the Numbers*, CNN POL. (Oct. 19, 2011, 5:59 PM), http://www.cnn.com/2011/10/19/politics/deportation-record (reporting that President Obama told Hispanic journalists that the statistics were "a little deceptive" and that there has been "a much greater emphasis on criminals than non-criminals").

234,770 removals were previously convicted of a crime.[73] By 2015, more than 90% of the 69,278 removals were convicted criminals.[74] Ultimately, the Administration's political strategy played a significant role in the declining interior enforcement efforts.

In addition, the backlog in immigration courts has prevented the prompt removal of unauthorized immigrants from the United States. According to Transactional Records Access Clearinghouse data, there were roughly 185,000 pending cases in immigration courts in 2008.[75] In 2015, there were over 450,000 pending cases.[76] This backlog has a ripple effect: more unauthorized immigrants remain in detention for longer periods of time, which drains ICE's financial resources, consequently limiting ICE's ability to identify and detain other unauthorized immigrants.[77]

Finally, and most importantly for the purposes of this Article, a lack of cooperation from local law enforcement has impaired interior enforcement. In 2006, a report produced by the Congressional Research Service listed 32 cities and 2 states that had sanctuary policies.[78] At last count, over 300 localities throughout the United States have adopted formal or informal policies that restrict police cooperation with federal immigration enforcement efforts.[79] In written

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73. U.S. DEP'T OF HOMELAND SEC., ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT: FISCAL YEAR 2014 5 (2014) [hereinafter 2014 ICE ENFORCEMENT REPORT], https://www.ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf.

74. 2015 ICE ENFORCEMENT REPORT, *supra* note 64, at 8.

75. Transactional Records Access Clearinghouse, *Backlog of Pending Cases in Immigration Courts as of July 2017*, SYRACUSE UNIV., http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php (last visited Nov. 3, 2017).

76. *Id.*

77. *See* NAT'L IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION: RUNAWAY COSTS FOR IMMIGRATION DETENTION DO NOT ADD UP TO SENSIBLE POLICIES (2013), https://immigrationforum.org/wp-content/uploads/2014/10/Math-of-Immigation-Detention-August-2013-FINAL.pdf.

78. LISA M. SEGHETTI, STEPHEN R. VIÑA & KARMA ESTER, CONG. RESEARCH SERV., RL32270, ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT 21 (2006).

79. *See* Griffith & Vaughan, *supra* note 10 (providing a map identifying states, counties, and municipalities that limit the honoring of immigration detainer requests); *see also* Rosenblum, *supra* note 11 ("[M]ore than 360 jurisdictions that have passed

testimony to the House Oversight and Government Reform Committee, ICE Director Sarah R. Saldaña stated that a "significant factor impacting removal operations has been the increase in state and local jurisdictions that are limiting their partnership, or wholly refusing to cooperate, with ICE immigration enforcement efforts."[80] The following subsections evaluate how specific sanctuary measures influence ICE's interior enforcement efforts.

1. Measures Limiting or Prohibiting Immigration Detainers

Since the 1950s, federal authorities have used immigration detainers as a part of their enforcement efforts.[81] In recent years, a multitude of state and local jurisdictions have enacted measures that limit or prohibit the detention of persons subject to immigration detainers.[82] Some measures prevent local officers from honoring detainers in the absence of a serious criminal charge.[83] Other measures bar officials from honoring immigration detainers unless the federal government agrees to fully reimburse the expenses incurred in complying with the ICE detainer.[84] Still other measures sweep more

laws to formally limit their cooperation with U.S. Immigration and Customs Enforcement . . . .").

80. *A Review of the Department of Homeland Security's Policies and Procedures for Apprehension, Detention, and Release of Non-Citizens Unlawfully Present in the United States: Hearing Before H. Comm. on Oversight and Gov't Reform*, 114th Cong. 4 (2015) (statement of Sarah R. Saldaña, Director, U.S. Immigration and Customs Enforcement).

81. KATE M. MANUEL, CONG. RESEARCH SERV., R42690, IMMIGRATION DETAINERS: LEGAL ISSUES 1 (2015). An "immigration detainer" is a document by which ICE requests that a local law enforcement agency extend custody of the person for forty-eight hours beyond his or her scheduled release so that ICE can transfer the person to federal custody and commence deportation proceedings. GARCIA & MANUEL, *supra* note 41, at 13–17.

82. Cox & Miles, *supra* note 37, at 19; *see also* Griffith & Vaughan, *supra* note 10.

83. *See, e.g.*, CAL. GOV'T CODE § 7282.5(a)(1) (2014) (allowing officers to honor immigration detainers only if the individual has been convicted of a "serious or violent felony"); Berkeley, Cal., Jail Regulations, General Order J-1(139) (Dec. 12, 2012); Milwaukee Cty. Bd. of Supervisors, Res. File No. 12-135 (June 4, 2012).

84. *See, e.g.*, Memorandum from R.A. Cuevas, Jr., Miami-Dade Cty. Attorney, to Bd. of Cty. Comm'rs, Miami-Dade Cty. (Dec. 3, 2013) (on file with the Clerk of the Board of County Commissioners of Miami-Dade County, Florida)

broadly, preventing officials from honoring immigration detainers without a court order or warrant.[85]

ICE's extensive use of detainers in the Secure Communities program led to many of these measures.[86] A vital innovation of the program was the creation of ICE's IDENT screening system, which allows ICE to automatically screen the immigration status and deportation eligibility of every person arrested by local law enforcement agencies.[87] As the figures in Table 1 illustrate, the IDENT system enhances ICE's efforts to locate unauthorized immigrants.

Table 1: ICE IDENT Statistics

		FY2009	FY2010	FY2011	FY2012	FY2013	FY2014
Fingerprint Submissions	Total	828,119	3,376,754	6,920,061	9,661,320	11,164,734	11,086,825
Alien IDENT Matches	*LESC L1	12,785	40,216	70,971	128,912	190,951	169,191
	**LESC L2/3	82,879	207,950	277,999	307,465	339,068	383,478
	Total	95,664	248,166	348,970	436,377	530,019	551,669

*LESC L1: Alien charged with or convicted of an aggravated felony
**LESC L2/3: Alien charged with or convicted of a crime other than an aggravated felony

Source: U.S. DEP'T OF HOMELAND SEC., ICE'S USE OF IDENT/IAFIS INTEROPERABILITY 2 (2015), *available at* https://www.ice.gov/sites/default/files/documents/FOIA/2015/sc_stats_YTD2015.pdf.

Anti-detainer measures cannot prevent the IDENT screening system from identifying unauthorized immigrants,[88] but they do impair ICE's apprehension efforts. From January 2014 to September 2015,

("Miami-Dade Corrections and Rehabilitations Department may, in its discretion, honor detainer requests issued by United States Immigration and Customs Enforcement only if the federal government agrees in writing to reimburse Miami-Dade County for any and all costs relating to compliance with such detainer requests . . . ."); SANTA CLARA COUNTY, CAL., POLICY 3.54 (2011); COOK COUNTY, ILL., CODE OF ORDINANCES § 46-37 (2011) ("The Sheriff of Cook County shall decline ICE detainer requests unless there is a written agreement with the federal government by which all costs incurred by Cook County in complying with the ICE detainer shall be reimbursed.").

85. *See, e.g.*, Boston, Mass., Boston Trust Act (June 27, 2014), https://cliniclegal.org/sites/default/files/boston_ma_0.pdf.

86. *See supra* Section II.B.

87. *See supra* Section II.B.

88. Because the FBI transmits fingerprints to the IDENT database, a locality can opt out of sharing fingerprints with ICE only by declining to provide fingerprint images to the FBI, which is unlikely to occur. Martin, *supra* note 45, at 449.

law enforcement agencies across the country declined 18,646 ICE detainers.[89] Jurisdictions that limit their cooperation with ICE accounted for 17,355 of these declined detainers.[90] California jurisdictions, which are subject to a statewide anti-detainer measure,[91] were responsible for 11,171 declined detainers.[92]

ICE reports that these rejections decrease the number of criminal aliens apprehended, forcing ICE to divert resources to the development and execution of operations to locate and arrest at-large criminal aliens.[93] Instead of taking custody of aliens in jails, ICE must send officers into the field to find the subject, conduct surveillance, and execute a potentially dangerous operation to apprehend the subject.[94] This process eliminates the benefits of the IDENT screening system and leads to decreased interior enforcement.[95]

2. Measures Preventing Employees from Sharing Information with Federal Immigration Authorities

Some jurisdictions have restricted local government employees from sharing information with federal immigration authorities.[96]

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89. Morgan Smith & Jay Root, *Jails Refused to Hold Thousands of Immigrants Sought by Feds*, TEX. TRIB. (Jan. 15, 2016, 6:00 AM), http://www.texastribune.org/2016/01/15/34-texas-counties-declined-hold-deportable-immigra (reporting on data collected from ICE). ICE did not start collecting data on declined detainers until January 2014. *See* 2014 ICE ENFORCEMENT REPORT, *supra* note 73.

90. *See* Smith & Root, *supra* note 89.

91. CAL. GOV'T CODE § 7282.5(a) (2014) (limiting the ability of jurisdictions within California to honor ICE's immigration detainers). See CALIFORNIA TRUST ACT, http://www.catrustact.org (last visited Nov. 3, 2017), for further information on the California TRUST Act.

92. Smith & Root, *supra* note 89.

93. 2014 ICE ENFORCEMENT REPORT, *supra* note 73, at 5.

94. *See* Jessica Vaughan, *Number of Sanctuaries and Criminal Releases Still Growing*, CTR. FOR IMMIGR. STUD. (Oct. 30, 2015), http://cis.org/Sanctuaries-Criminal-Releases-Growing.

95. The California TRUST Act is credited with sharply reducing the number of deportations in California. *AP Report: California Immigrant Deportations Plummet After TRUST Act*, CBS SFBAYAREA (April 6, 2014), http://sanfrancisco.cbslocal.com/2014/04/06/immigration-deportation-trust-act.

96. *See* S.F., CAL., ADMIN. CODE ch. 12H.2 (1989) ("No department, agency, commission, officer or employee of the City and County of San Francisco shall use

These restrictions bar multiple forms of potential communication. First, communication-restricting measures may prevent local law enforcement officers from relaying information obtained during the course of an arrest or investigation that concern the individual's immigration status. The IDENT database only identifies non-citizens who were previously deported, non-citizens who overstayed their visas, and non-citizens who are lawfully in the country but might be deported if convicted of a crime.[97] State and local officers could supplement ICE's existing identification efforts by relaying status-related information acquired through their investigations and arrests.[98] Communication-restricting measures prohibit such communication, preventing ICE from identifying or taking custody of unauthorized immigrants that are not in the IDENT database.

For example, from May 2006 to April 2013, Colorado law *required* law enforcement officers to report an arrestee to ICE if there was probable cause to believe that the arrestee was not legally present in the United States.[99] During this time period, there were approximately 4,507 deportations proceedings per year.[100] But after Colorado repealed the law, deportation proceedings dropped to 3,058

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any City funds or resources to assist in the enforcement of Federal immigration law or to gather or disseminate information regarding the immigration status of individuals in the City and County of San Francisco unless such assistance is required by Federal or State statute, regulation or court decision."); N.Y.C., Exec. Order No. 124, (1989), *repealed by* N.Y.C., Exec. Order No. 34 (May 13, 2003), http://www.nycourts.gov/library/queens/PDF_files/Orders/ord124.pdf (prohibiting the transmission of information about unauthorized immigrants to federal immigration authorities unless the immigrant was suspected of criminal activity); Me. Exec. Order No. 13 FY 04/05 (2004), *rescinded by* Me. Exec. Order 08 FY 11/12 (2011) (prohibiting the sharing of information about an unauthorized immigrant with federal immigration authorities unless the unauthorized immigrant is involved in illegal activity other than unlawful status).

97. *See* Cox & Miles, *supra* note 37, at 15.

98. *See id.*

99. COLO. REV. STAT. § 29-29-103(2)(a)(I) (2006) (repealed 2013).

100. These statistics were gathered using the immigration tracking tools provided by The Transactional Records Access Clearinghouse ("TRAC"), a research institution that systematically uses the Freedom of Information Act ("FOIA") to gather data on immigration. These tools can be accessed at http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php and http://tracfed.syr.edu/index/index.php?layer=cri.

per year.[101] While this correlation may be attributable to a variety of factors (such as a decreasing unauthorized immigrant population in Colorado, small sample size, or decreasing efficiency in immigration proceedings),[102] it supports the intuitive notion that preventing local law enforcement officers from relaying information about an individual's immigration status hinders ICE's ability to identify and apprehend unauthorized immigrants.

In addition, communication-restricting measures prevent local law enforcement officers from notifying ICE representatives of an unauthorized immigrant's impending release. In July 2015, ICE began issuing formal requests, known as "247N Forms," that ask local law enforcement agencies to notify ICE of the pending release of a suspected removable individual at least 48 hours prior to release.[103] In the following three months, state and local law enforcement agencies rejected 219 such requests, 94% of which were for unauthorized immigrants with a prior criminal record.[104] And these are only the formal requests. Presumably, without communication-restricting measures in place, local law enforcement officers would voluntarily contact and inform ICE of an impending release. According to KPIX 5, a local San Francisco news station, San Francisco sheriff's deputies "resented" the city's communication-restricting measure and wanted to cooperate with ICE "to get illegal immigrant criminals off the street"—so much so that the San Francisco Sheriff sent out a memorandum ordering deputies to stop making "secret phone calls" to ICE.[105] In sum, prohibiting local officers from communicating with federal authorities undoubtedly reduces the number of criminal aliens that ICE apprehends.

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101. *See id.*

102. The numbers could also be skewed by the fact that police officers were required—rather than permitted—to communicate. *See* discussion i*nfra* Part III.B.3.

103. *See* 2015 ICE ENFORCEMENT REPORT, *supra* note 64, at 5; Smith & Root, *supra* note 89.

104. *See* 2015 ICE ENFORCEMENT REPORT, *supra* note 64, at 5 (providing data released by ICE).

105. *See Pier 14 Murder*, *supra* note 9; Mirkarimi Memorandum, *supra* note 9.

3. Measures Restricting Inquiries or Investigations into a Person's Immigration Status

A number of local jurisdictions have enacted measures that restrict inquiries or investigations into an individual's immigration status. Some of these measures broadly limit all local officials from gathering information about an individual's immigration status.[106] Other measures prevent law enforcement officers from questioning an individual about his or her immigration status except as part of a criminal investigation.[107] Still other measures provide specific restrictions that prohibit law enforcement officers from questioning witnesses and victims of crimes.[108] Policymakers typically couple these inquiry-restricting measures with other measures, such as communication-restricting measures or restrictions on law enforcement officers' ability to arrest unauthorized immigrants.[109] As a result, the extent to which inquiry-restricting measures affect ICE's interior enforcement efforts is difficult to evaluate in isolation.

With respect to a local officer's ability to inquire as to a person's immigration status, there are three potential "states":

- **State 1**: Local officers are *prohibited* from inquiring into immigration status (inquiry-restricting sanctuary measure);

106. *See, e.g.*, S.F., CAL., ADMIN. CODE ch. 12H.2 (1989) (prohibiting the gathering of information about immigration status subject to a few exceptions); CHI., ILL., CHI. MUN. CODE ch. 2-173-020 (2012) (providing that, subject to specific exceptions, "[n]o agent or agency shall request information about or otherwise investigate . . . the citizenship or immigration status of any person . . . .").

107. *See, e.g.*, Special Order No. 40, L.A., Cal. Police Dept., Undocumented Aliens (Nov. 27, 1979), http://www.lapdonline.org/assets/pdf/SO_40.pdf ("Officers shall not initiate police action with the objective of discovering the alien status of a person."); D.C., Mayor's Order No. 2011-174, at 2 (Oct. 19, 2011) [hereinafter D.C. Order] (stating that public safety officials "shall not inquire about a person's immigration status . . . for the purpose of initiating civil enforcement of immigration proceedings that have no nexus to a criminal investigation").

108. *See, e.g.*, D.C. Order, *supra* note 107 ("It shall be the policy of Public Safety Agencies not to inquire about the immigration status of crime victims, witnesses, or others who call or approach the police seeking assistance.").

109. *See, e.g.*, S.F., CAL., ADMIN. CODE ch. 12H (1989).

- **State 2**: Local officers are *permitted* to inquire into immigration status (no measure in place); and
- **State 3**: Local officers are *required* to inquire into immigration status (287(g)-type measure).

The effect of an inquiry-restricting policy should be measurable in a jurisdiction that has transitioned from State 1 to State 2 *and* has a policy of reporting immigration statuses to ICE—for example, a jurisdiction that has transitioned from a "don't ask, do tell" policy[110] to a "permitted to ask, do tell" policy, or vice-versa.[111] Unfortunately, I have been unable to identify such a jurisdiction. Even if such a jurisdiction exists, it would be difficult to make headway in the analysis, as there is no easily accessible source of information on the number of ICE referrals or deportations from each jurisdiction.

However, one can draw inferences about the importance of inquiry-restricting measures to ICE's interior enforcement efforts from currently available information. In Houston, Texas, the Harris County Sherriff's Office implemented both the Secure Communities and 287(g) jail program.[112] Local officers in the 287(g) jail program systematically make inquiries into arrestees' immigration statuses,[113]

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110. A "don't ask, do tell" policy occurs when a jurisdiction restricts officials' ability to inquire as to an individual's immigration status but permits officials to transmit status information to ICE if that information comes to their attention. *See, e.g.*, N.Y.C., Exec. Order No. 34 (May 13, 2003); *see also* Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 601–02 (2008) (examining New York's "don't ask, do tell" policy). *See generally* Adam M. Samaha & Lior J. Strahilevitz, *Don't Ask, Must Tell—And Other Combinations*, 103 CAL. L. REV. 919 (2015) (evaluating situations in which asking and telling are either mandated or prohibited by legal rules).

111. Seemingly, the jurisdiction must have a "do tell" policy in order for the effects of an inquiry-restricting measure to be analyzed. If a jurisdiction has transitioned from "permitted to ask, don't tell" policy to "don't ask, don't tell" policy, there would seemingly be no effect on referral or deportation rates because both policies restrict officers from transmitting status information to ICE.

112. Jessica Vaughan, *A Tale of Two Programs: Secure Communities v. 287(g)*, CTR. FOR IMMIGR. STUD. (Mar. 12, 2010), https://cis.org/Vaughan/Tale-Two-Programs-Secure-Communities-vs-287g.

113. RANDY CAPPS ET. AL, MIGRATION POL'Y INST., DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT 14 (2011), http://www.migrationpolicy.org/research/delegation-and-divergence-287g-state-and-local-immigration-enforcement.

which results in State 3 (systematic inquiries into immigration statuses). Harris County Sheriff's Office statistics show that 53% of the 12,247 unauthorized immigrants identified by its 287(g) officers from March 2008 through September 2009 were not in the IDENT system.[114]

This number reflects a transition from State 1 (inquiry-restricting measure) to State 3 (systematic inquiries into immigration statuses). Accordingly, the extent to which Harris County's data demonstrates the effects of an inquiry-restricting measure depends on the frequency with which local officers inquire about an arrestee's immigration status when they are allowed, but not required, to do so. If officers with authority to make status inquiries routinely make such inquiries, Harris County's increased identification numbers support the conclusion that inquiry-restricting measures significantly impair identification efforts by local law enforcement officers and consequently weaken ICE's interior enforcement. But if officers do not inquire into immigration statuses despite having permission, these numbers do not accurately reflect the effect of inquiry-restricting measures. In essence, it depends on whether State 2 is closer to State 1 or State 3.

4. Measures Barring Local Law Enforcement from Arresting Unauthorized Immigrants for Federal Immigration Law Violations

Finally, some states and localities have adopted policies that restrict or bar police officers from arresting unauthorized immigrants for violations of federal immigration law. Some of these measures prohibit local law enforcement from arresting unauthorized immigrants for civil violations of federal immigration law,[115] such as

114. *See* Vaughan, *supra* note 112.

115. *See, e.g.*, OR. REV. STAT. § 181.850(1) (2014) ("No law enforcement agency of the State of Oregon or of any political subdivision of the state shall use agency moneys, equipment or personnel for the purpose of detecting or apprehending persons whose only violation of law is that they are persons of foreign citizenship present in the United States in violation of federal immigration laws."); SAN JOSE POLICE DEP'T, SAN JOSE POLICE DEPARTMENT DUTY MANUAL 501 (2015) (redacted public version) ("Officers will not detain or arrest any person not suspected of a State felony or State or local misdemeanor or infraction violation solely on the basis of the person's citizenship or status under civil immigration laws."); D.C. Order, *supra* note 107 ("No person shall be detained solely on the belief that he or she is not present

unlawful presence in the United States.[116] Others prevent local law enforcement from arresting unauthorized immigrants for criminal violations of federal immigration law,[117] such as unlawful entry.[118]

The use of state and local law enforcement officers working in the United States to arrest unauthorized immigrants for violations of federal immigration law could have a significant effect on ICE's interior enforcement efforts. With an estimated 11 to 12 million unauthorized aliens living in the United States[119] and fewer than 6,000 enforcement agents at its disposal,[120] unauthorized immigrants outnumber ICE agents by a ratio of approximately 2,000-to-1. Adding more than 800,000 state and local law enforcement officers nationwide with the power to arrest would provide ICE with substantial manpower.[121]

State and local law enforcement officers are not barred from arresting aliens who have violated criminal provisions of the

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legally in the United States or that he or she has committed a civil immigration violation.").

116. Immigration and Nationality Act ("INA") of 1965 § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i) (2012). The removal of aliens "has been consistently classified as a civil rather than a criminal procedure." Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952).

117. *See, e.g.*, PHX. POLICE DEP'T, ORDER OPERATIONS MANUAL 1.4.3.P (2011) ("The investigation and enforcement of federal laws relating to illegal entry and residence in the United States is specifically assigned to [Homeland Security Investigations]."), https://www.phoenix.gov/policesite/Documents/operations_orders.pdf.

118. 8 U.S.C. § 1325 (2012).

119. *See* Krogstad, Passel & Cohn, *supra* note 68.

120. In 2016, ICE had 5,800 deportation officers and enforcement agents, many of which are stationed at the borders. U.S. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2016 47 (2015), http://www.dhs.gov/sites/default/files/publications/FY_2016_DHS_Budget_in_Brief.pdf.

121. *See* Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 181 (2005). The National Law Enforcement Officers Memorial Fund recently estimated that there were 900,000 sworn law enforcement officers now serving in the United States. *Law Enforcement Facts*, NAT'L LAW ENF'T OFFICERS MEM'L FUND, http://www.nleomf.org/facts/enforcement (last visited Nov. 3, 2017).

Immigration and Nationality Act ("INA").[122] Under ICE's 287(g) program's task force model, which the Obama Administration phased out in late 2012, state or local law enforcement agencies could extend their authority by entering into a joint Memorandum of Agreement ("MOA"), under which ICE delegated authority for immigration enforcement.[123] Authority under the 287(g) program's task force model included

> not only the power to arrest, but also the power to investigate immigration violations, the power to collect evidence and assemble an immigration case for prosecution or removal, the power to take custody of aliens on behalf of the federal government, and other general powers involved in the enforcement of immigration laws.[124]

While there is no reliable data source pertaining to immigration enforcement by state and local officers through their inherent arrest power, statistics gathered through the 287(g) program show that even a limited number of state and local law enforcement officers can increase interior enforcement if they are not prohibited from making arrests. From October 2009 to August 2010, with only nineteen jurisdictions participating, 287(g) task force officers issued over 800

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122. The U.S. Supreme Court in *Arizona v. United States* ruled that state and local officers could not make arrests for *civil* immigration status violations without federal authorization. 567 U.S. 387, 410–11 (2012). The Court did not determine whether local law enforcement officers are also precluded from making arrests for criminal violations of federal immigration law, but lower courts have consistently allowed such arrests. *See, e.g.*, Estrada v. Rhode Island, 594 F.3d 56, 65 (1st Cir. 2010); United States v. Vasquez-Alvarez, 176 F.3d 1294, 1296 (10th Cir. 1999) ("[S]tate law-enforcement officers have the general authority to investigate and make arrests for violations of federal immigration laws."); Gonzales v. Peoria, 722 F.2d 468, 475 (9th Cir. 1983) (holding that "federal law does not preclude local enforcement of the criminal provisions" of federal immigration law), *rev'd on other grounds* Hodgers-Durgin v. De La Vina, 199 F.3d 1037 (9th Cir. 1999) (en banc).

123. *See* 8 U.S.C. § 1357(g)(1)–(2) (2012) (authorizing the Attorney General to enter into a written agreement with state and local authorities to enforce immigration laws); *Arizona*, 567 U.S. at 407–08; *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION & CUSTOMS ENF'T, https://www.ice.gov/factsheets/287g (last visited Nov. 3, 2017).

124. Kobach, *supra* note 121, at 196.

detainers.[125] While this is a limited data set, the ability of local police to make immigration arrests is undoubtedly "the quintessential force multiplier."[126] The policy wisdom of such a practice is, of course, a separate question that Part IV will address.

IV. EVALUATION OF LEGALITY AND POLICY RATIONALES OF SANCTUARY MEASURES

This Part conducts a legal analysis and policy evaluation of each measure. The legal analysis sections test the broad claim that sanctuary cities are illegal by evaluating the legality of each type of sanctuary measure under current doctrine. The policy evaluations focus on determining whether the policy rationales commonly put forward to justify sanctuary cities support individual sanctuary measures.[127]

A. Measures Limiting or Prohibiting Immigration Detainers

1. Legal Analysis

To determine the legality of measures limiting or prohibiting immigration detainers, two legal issues must be evaluated. First, we must determine whether ICE's detainer practices are within its statutorily prescribed authority. If so, the issue becomes whether states and localities must comply with ICE's detainers. The following subsections address each of these issues in turn.

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125. CAPPS, *supra* note 113, at 21.

126. Kobach, *supra* note 121, at 179.

127. To be clear, the policy analysis below does not purport to address all potential rationales supporting the passage of various types of sanctuary city measures. Sanctuary city measures may have the power to influence the moral and social acceptability of immigration practices, cause political movements, create litigation, or "convince the federal government to allocate enforcement resources elsewhere in order to address conduct criminalized under both state and federal regimes." *See* Austin L. Raynor, *The New State Sovereignty Movement*, 90 IND. L.J. 613, 634–45 (2015) (describing the purposes served by state opposition laws). I do not attempt to tackle these issues. Rather, I focus on the policy rationales most commonly put forward to justify sanctuary measures.

i. ICE's Statutory Authority to Issue Immigration Detainers

The INA did not specifically address the issuance of immigration detainers until 1986. Prior to this date, the INS seems to have issued detainers pursuant to its general powers under the INA.[128] These powers include "the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens,"[129] the power to establish categories of non-citizens who are inadmissible,[130] and the power to remove unauthorized immigrants.[131]

In 1986, Congress enacted the Anti-Drug Abuse Act,[132] which amended the INA to explicitly authorize the issuance of detainers for unauthorized immigrants arrested for "any law relating to controlled substances."[133] Because the INA, as amended, only addresses detainers for controlled-substance offenses, commentators and advocates for immigrants' rights have argued that ICE's regulations and detainer practices exceed its statutory authority by issuing detainers for non-substance-abuse offenses.[134] ICE, however, seems to have taken the position that immigration detainers are still permissible pursuant to its general authority over immigration enforcement.

In 2009, the U.S. District Court for the Northern District of California addressed this issue in *Committee for Immigrants Rights of Sonoma County v. County of Sonoma*.[135] The court reviewed DHS's detainer regulations under the two-part test set forth in *Chevron, U.S.A. v. Natural Res. Defense Council*: (1) has Congress directly spoken to the precise question at issue; and (2) if not, is the agency's interpretation consistent with the purposes of the statute?[136] According to the court's *Chevron* analysis:

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128. MANUEL, *supra* note 81, at 4.

129. INA § 103(a)(5), 8 U.S.C. § 1103(a)(5) (2012).

130. *See* 8 U.S.C. § 1182 (2012).

131. *See* 8 U.S.C. § 1227 (2012).

132. The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207 (1986).

133. 8 U.S.C. § 1357(d) (2012).

134. MANUEL, *supra* note 81, at 10.

135. 644 F. Supp. 2d 1177 (N.D. Cal. 2009).

136. *Id.* at 1196–97. *See also generally* 467 U.S. 837, 842–45 (1984) (setting forth the test and rationale for *Chevron* deference).

> The fact that § 1357 does not expressly authorize ICE to issue detainers for violations of laws other than laws relating to controlled substances hardly amounts to the kind of unambiguous expression of congressional intent that would remove the agency's discretion at *Chevron* step one. Rather, the court finds that because Congress left a statutory gap for the agency to fill, *Chevron* step two requires the court to defer to the agency's reasonable interpretation of the statute so long as the interpretation is consistent with the purposes of the statute.[137]

The court also found that DHS's regulations were "consistent with the purpose of the statute . . . . [g]iven the broad authority vested in the Secretary of Homeland Security to establish such regulations as she deems necessary for carrying out her authority to administer and enforce laws relating to the immigration and naturalization of aliens."[138] The court noted that the provisions of Section 287 should not be construed "as expressly limiting the issuance of immigration detainers solely to individuals violating laws relating to controlled substances."[139]

However, this is just one district court opinion. In future legal challenges to sanctuary measures, jurisdictions and local law enforcement agencies might defend themselves by arguing that ICE's detainer practices fall outside Congress's delegated statutory authority. It remains to be seen how other courts will define ICE's statutory authority.

It is possible that courts in future cases may not have to address this issue at all. The United States House of Representatives recently passed a bill "clarifying the authority of ICE detainers," and specifically authorizing the issuance of detainers "for the alleged violation of any criminal or motor vehicle law."[140] If this law passes, it would resolve any ambiguity in the scope of ICE's statutory authority to issue detainers.

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137. *Id.* at 1198.

138. *Id.*

139. *Id.* at 1199.

140. No Sanctuary for Criminals Act, H.R. 3003, 115th Cong. (2017).

ii. ICE Immigration Detainers—Optional or Required

Assuming that ICE is acting within its delegated powers, the issue becomes whether state and local jurisdictions are required to honor immigration detainers. Arguments that anti-detainer measures are illegal rely primarily on a DHS regulation which states:

> Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency *shall* maintain custody of the alien for a period not to exceed 48 hours . . . in order to permit assumption of custody by the Department.[141]

The word "shall" indicates that the action is mandatory,[142] but the title of this particular section is "[t]emporary detention at Department *request*."[143] This language arguably leaves the regulation ambiguous as to whether local jurisdictions are required to hold unauthorized immigrants under an immigration detainer.

Generally, an agency's interpretation of its own ambiguous regulation is "controlling unless plainly erroneous or inconsistent with the regulation."[144] DHS has taken the position that states and localities are not required to hold unauthorized immigrants pursuant to detainers.[145] Indeed, in 2010, the DHS changed the detainer form (Form I-247) to indicate ICE "requested," rather than required, the continued custody of an unauthorized immigrant.[146] Federal courts

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141. 8 C.F.R. § 287.7(d) (2017) (emphasis added).

142. *See, e.g.*, Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998) ("The mandatory 'shall'. . . normally creates an obligation impervious to judicial discretion."); Rastelli v. Warden, Metro. Correctional Center, 782 F.2d 17, 23 (2d Cir. 1986) ("The use of a permissive verb—'may review' instead of 'shall review'—suggests a discretionary rather than mandatory review process.").

143. 8 C.F.R. § 287.7(d) (emphasis added).

144. Auer v. Robbins, 519 U.S. 452, 461 (1997) (internal quotation marks omitted) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)). That said, there has been growing discomfort with *Auer* deference on the Supreme Court. *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1213 (2015) (Thomas, J., concurring in the judgment); Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 616–17 (2013) (Scalia, J., concurring in part and dissenting in part).

145. Defendant's Answer at ¶ 24, Moreno v. Napolitano, No. 11-cv-05452, (N.D. Ill. Dec. 27, 2012) (characterizing detainers as requests).

146. MANUEL, *supra* note 81, at 3.

have agreed with DHS's interpretation, characterizing detainers as requests.[147]

Irrespective of DHS's interpretation, current Supreme Court jurisprudence on the Tenth Amendment likely requires detainers to be requests, rather than mandatory orders. In *Galarza v. Szalczyk*, the U.S. Court of Appeals for the Third Circuit stated that the anti-commandeering principles of the Tenth Amendment prevent federal officials from requiring state and localities to detain unauthorized immigrants for them.[148] According to the court, if ICE required states and localities to detain unauthorized immigrants for the federal government, they would have to "expend funds and resources to effectuate a federal regulatory scheme,"[149] which the Supreme Court held impermissible in both *New York v. United States*[150] and *Printz v. United States*.[151]

Given DHS's interpretation of its own regulation and the Constitution's anti-commandeering constraints, state and local measures preventing law enforcement from complying with detainer requests appear to be permissible under current federal law.

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147. Ortega v. U.S. Immigration & Customs Enf't, 737 F.3d 435, 438 (6th Cir. 2013) ("[A] detainer [is issued] . . . the institution to keep custody of the prisoner for the [federal immigration] agency or to let the agency know when the prisoner is about to be released."); Liranzo v. United States, 690 F.3d 78, 82 (2d Cir. 2012) ("ICE issued an immigration detainer to [correctional facility] officials requesting that they release Liranzo only into ICE's custody . . . ."); United States v. Uribe-Rios, 558 F.3d 347, 350 n.1 (4th Cir. 2009) ("A detainer is a . . . request that another law enforcement agency temporarily detain an alien . . . ."); United States v. Female Juvenile, A.F.S., 377 F.3d 27, 35 (1st Cir. 2004) ("[A]n INS detainer . . . serves as a request that another law enforcement agency notify the INS before releasing an alien from detention . . . .").

148. 745 F.3d 634, 644 (3d Cir. 2014); *see also* Order Granting the County of Santa Clara's and the City and County of San Francisco's Motions to Enjoin Section 9(a) of Executive Order 13678 at 40–41, Cty. of Santa Clara v. Trump, 250 F. Supp. 3d 497 (N.D. Cal. 2017) (No. 17-cv-00574-WHO).

149. *Galarza*, 745 F.3d at 644.

150. 505 U.S. 144, 161 (1992).

151. 521 U.S. 898, 925 (1997).

2. Policy Analysis

Having determined that anti-detainer measures are legal, this Section continues by analyzing the public policy rationales underlying such measures. As mentioned above, immigration advocacy groups broadly claim that local participation in federal immigration enforcement distracts police officers from their primary crime-fighting responsibilities, compromises community-policing efforts, causes untrained police officers to violate constitutional rights, and depletes state and local resources. The following subsections evaluate whether these propositions support the implementation of anti-detainer measures.

i. Detainers Do Not Directly Distract Police

An analysis of the manner in which ICE issues detainers reveals that honoring immigration detainers does not directly distract police from their crime-fighting responsibilities. When local officers arrest a person, they often obtain the person's fingerprints and submit them to the FBI so that they can obtain information on the person's criminal history.[152] The FBI forwards these fingerprints to ICE personnel, who utilize the IDENT database to determine whether to issue an immigration detainer.[153] This process confines the role of local law enforcement by "adding digital transactions, *entirely internal to the federal role*, within the standard practice that police already employ for checking the fingerprints of arrested persons."[154] In short, immigration detainers do not directly distract police because they do not require local enforcement agencies to change their routines, divert officer efforts, or determine the immigration status of arrestees.

152. *See* Cox & Miles, *supra* note 37, at 14–15.

153. *Id.* at 15.

154. Martin, *supra* note 45, at 441 (emphasis added).

ii. Evidence Suggests That Honoring Immigration Detainers Does Not Alter the Rate at Which Police Solve Crimes, and There Are Insufficient Data to Determine Whether Compliance with Immigration Detainers Causes a Decrease in Crimes Reported by Unauthorized Immigrants

Some local law enforcement agencies[155] and immigration advocacy groups[156] claim that local enforcement of federal immigration law undermines community-policing efforts. Anti-detainer measures are necessary, these proponents have argued, to secure the trust and cooperation of the immigrant community.[157] A Police Foundation report succinctly captured this sentiment:

> [L]ocal police involvement in immigration enforcement could have a chilling effect on immigrant cooperation. Immigrant witnesses and victims of crime, many of whom already bring with them fear and mistrust of police due to experiences with authorities in their home countries, would be less likely to report crimes and cooperate as witnesses. Without this cooperation, law enforcement will have difficulty apprehending and successfully prosecuting criminals, thereby reducing overall public safety for the larger community.[158]

Immigrant advocates relied on this theory to attack the use of immigration detainers and generate resistance to the Secure Communities program.[159]

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155. *See, e.g.*, Michael Hennessey, *Secure Communities Destroys Public Trust*, S.F. GATE (May 1, 2011, 4:00 AM), http://www.sfgate.com/opinion/article/Secure-Communities-destroys-public-trust-2373213.php.

156. Groups such as The National Day Laborers Organizing Network, the American Civil Liberties Union, and others argued that immigration detainers issued through the Secure Communities program impaired relations between police and immigrant communities. *See* Cox & Miles, *supra* note 37, at 17.

157. *See* Cox & Miles, *supra* note 37, at 2.

158. ANITA KHASHU, POLICE FOUND., THE ROLE OF LOCAL POLICE: STRIKING A BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES 23 (2009), https://www.policefoundation.org/wp-content/uploads/2015/06/The-Role-of-Local-Police-Narrative.pdf.

159. *See* Cox & Miles, *supra* note 37, at 17.

There are two reasons, at least in theory, that unauthorized immigrants would not cooperate with local law enforcement engaged in the enforcement of federal immigration laws: legitimacy-based reasons and risk-based reasons. The argument that detainers impair community policing derives from the theory that local participation in federal immigration enforcement causes immigrants to see police as less legitimate.[160] The idea is that, if local police enforce immigration law, unauthorized immigrants will no longer believe that the officers are acting in their interests, leading immigrants to see the police as less legitimate.[161] This loss of legitimacy, in theory, makes unauthorized immigrants less likely to assist the police, despite the fact that interacting with the police will not increase their risk of deportation.[162] Professors Adam Cox and Thomas Miles explain:

> Risk assessments are not central to this account, because cooperation is based more on beliefs about whether it is just for local police to assist in federal immigration enforcement, about whether such involvement will lead immigrants to be treated unfairly by the police, and ultimately about whether involvement undermines the legitimacy of the police.[163]

Immigrant advocates support this theory with data gathered through a randomized telephone survey of 2,004 Latinos living in Chicago, Houston, Los Angeles, and Phoenix.[164] According to the survey, local involvement in the enforcement of federal law does affect immigrant attitudes about cooperation.[165] Forty-nine percent of foreign-born Latinos reported that increased local involvement in immigration enforcement would make them less likely to contact police officers to report a crime.[166] This number increased to 70% among those who identified themselves as undocumented.[167]

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160. *Id.* at 21.
161. *Id.*
162. *Id.*
163. *Id.*
164. *See* THEODORE, *supra* note 46, at i.
165. *Id.* at 5–6.
166. *Id.* at 6.
167. *Id.* at 5.

This survey, however, measured participants' *beliefs*, not their actual *behavior*. Professors Cox and Miles overcame this shortcoming by conducting an extensive empirical study that evaluated the effect of the Secure Communities program on the rates at which the police solved crimes.[168] If community cooperation increases the police's ability to solve crimes, then less cooperation should have made it harder for police to solve crimes. Thus, any impact Secure Communities had on community cooperation should have been evident in the clearance rates of participating jurisdictions.

Yet the empirical evidence that Professors Cox and Miles gathered showed that activating Secure Communities had no effect on the ability of police to solve crimes.[169] One possible interpretation of these findings is that Secure Communities did not cause immigrants to see local police as less legitimate.[170] Another possibility is that immigrants cooperate for reasons unrelated to their trust of the police—such as self-interest or personal moral standards.[171] Regardless, evidence indicates that immigration detainers do not impair the ability of the police to solve crimes, undermining this policy justification for anti-detainer measures.

The police's ability to solve crimes does not necessarily inform our understanding of the rate at which unauthorized immigrants are reporting crimes. The honoring of immigration detainers, unlike some other measures discussed below, does not directly increase the risk of deportation for unauthorized immigrants who are victims of crimes. However, a lack of understanding regarding the scope of local cooperation with federal authorities could lead to unreported crimes. Further evaluation of the effect of sanctuary measures on the rate at which unauthorized immigrants report crimes is needed to fully analyze this policy rationale.

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168. *See* Cox & Miles, *supra* note 37.

169. *Id.* at 37 ("The precision of [our study] is such that if activation of Secure Communities caused even a one percentage point reduction in clearance rates, it would be statistically significant. Thus, the failure to detect an effect of Secure Communities on clearance rates is not due to a lack of precision; it is due to the absence of any actual effects.").

170. *Id.* at 49.

171. *Id.* at 48.

iii. Some Immigration Detainers May Violate Constitutional Rights

Immigration advocacy groups also claim that immigration detainers are unconstitutional.[172] To support their position, these groups point to a handful of federal court decisions that have allowed constitutional claims to proceed against local governments honoring immigration detainers.[173] But a more careful evaluation of immigration detainers reveals that they are only unconstitutional in specific contexts.

First, immigration detainers do not appear to issue through a method that promotes racial discrimination by state or local officers. When ICE issues an immigration detainer, local officers are not asked to determine or inquire as to an arrestee's immigration status; they are simply asked to maintain custody of the arrestee.[174] Thus, the honoring of ICE's detainer requests does not increase the risk of unconstitutional discrimination because local police are not given any opportunity to make judgments on the basis of race.

Second, no court has found that immigration detainers violate procedural due process.[175] Procedural due process protections

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172. *ACLU-MN Warns Minnesota County Sheriffs: Immigration Detainers Are Unconstitutional*, AM. CIVIL LIBERTIES UNION (May 7, 2014), https://www.aclu.org/news/aclu-mn-warns-minnesota-county-sheriffs-immigration-detainers-are-unconstitutional; Angela F. Chan, *ICE, What Part of Unconstitutional Do You Not Understand?*, HUFFINGTON POST: THE BLOG (Mar. 20, 2015, 12:03 PM), http://www.huffingtonpost.com/angela-f-chan/ice-what-part-of-unconstitutional_b_6907788.html.

173. *See, e.g.*, Moreno v. Napolitano, No. 11 C 5452, 2014 U.S. Dist. LEXIS 138576, at *2 (N.D. Ill. Sept. 30, 2014) (denying the government's motion for judgment on the pleadings on plaintiff's claim that ICE's use of detainers violates the requirement for probable cause); Morales v. Chadbourne, 996 F. Supp. 2d 19 (D.R.I. 2014) (denying motion to dismiss plaintiff's Fourth Amendment claim); Villars v. Kubiatowski, 45 F. Supp. 3d 791, 807 (N.D. Ill. 2014) (declining to dismiss claims concerning an ICE detainer issued "without probable cause that [the plaintiff] committed a violation of immigration laws"); Miranda-Olivares v. Clackamas Cty., No. 3:12-cv-02317-ST, 2014 U.S. Dist. LEXIS 50340, at *1 (D. Or. Apr. 11, 2014) (granting summary judgment to the plaintiff on a Fourth Amendment claim); Galarza v. Szalczyk, No. 10-cv-06815, 2012 U.S. Dist. LEXIS 47023, at *1 (E.D. Pa. Mar. 30, 2012) (denying motion to dismiss plaintiff's Fourth Amendment claim).

174. Martin, *supra* note 45, at 441–42.

175. For an extensive analysis of procedural due process in the context of immigration detainers, see MANUEL, *supra* note 81, at 25–27.

minimize the "mistaken or unjustified deprivation of life, liberty, or property" by requiring the government to afford certain procedures before taking away such interests.[176] To determine if given procedures satisfy due process, courts generally consider the three factors set out by the Supreme Court in *Mathews v. Eldridge*: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of such interest with the given procedures; and (3) the government's interest.[177] In the context of immigration detainers, detainees have an interest in being free from government detention.[178] The government, on the other hand, has an interest in the detention of unauthorized immigrants "during the limited period necessary for their removal proceedings" to ensure that the detainees do not evade such proceedings.[179] Moreover, the government has an interest in minimizing the fiscal and administrative burdens that additional procedures would entail.[180] Because both the detainee and the government have interests, the current procedural safeguards associated with the issuance of detainers could play a key role in a due process analysis.[181]

Finally, immigration detainers might lead to violations of the Fourth Amendment in specific contexts. Some courts have found that unauthorized immigrants are entitled to the protection of the Fourth Amendment,[182] which guarantees "[t]he right of the people to be secure

176. Carey v. Piphus, 435 U.S. 247, 259 (1978).

177. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

178. Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("The Fifth Amendment's Due Process Clause forbids the Government to 'deprive' any 'person . . . of . . . liberty . . . without due process of law.' Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.").

179. Demore v. Kim, 538 U.S. 510, 526 (2003); *see also* Carlson v. Landon, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of this deportation procedure.").

180. *Mathews*, 424 U.S. at 321 (explaining that the government's interests include "fiscal and administrative burdens that the additional or substitute procedures would entail.").

181. MANUEL, *supra* note 81, at 27.

182. *See* cases cited *supra* note 173. The Supreme Court appeared to assume that unauthorized immigrants had Fourth Amendment rights in *INS v. Lopez-Mendoza*. 468 U.S. 1032, 1046–51 (1984). However, the Court later clarified that "*Lopez-Mendoza* was limited to whether the Fourth Amendment's exclusionary rule

in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."[183] Extending the custody of an individual who otherwise would have been released arguably results in a "seizure[]" under the Fourth Amendment,[184] but the Fourth Amendment only prohibits "unreasonable" seizures.[185] Accordingly, if the Fourth Amendment extends to unauthorized immigrants, the grounds for the immigration detainer must be considered to determine whether the seizure was "unreasonable."

ICE uses immigration detainers to request extended detention on multiple grounds: (1) a warrant of arrest for removal proceedings; (2) a removal order; and (3) reasonable belief that an individual is an unauthorized immigrant subject to removal.[186] If there is a warrant of arrest for removal proceedings or a removal order, the seizure is presumably reasonable under the Fourth Amendment.[187] Potential Fourth Amendment issues exist only when local law enforcement agencies hold individuals without "probable cause to believe that the individual in question was subject to removal from the United States."[188] The assertion that detainers are unconstitutional when issued without probable cause, which may be evident from information available in the IDENT system, differs from the claim that all immigration detainers are unconstitutional. More data is needed before conclusions may be drawn on how often potential constitutional violations occur.

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should be extended to civil deportation proceedings; it did not encompass whether the protections of the Fourth Amendment extend to illegal aliens in this country." United States v. Verdugo-Urquidez, 494 U.S. 259, 272 (1990).

183. U.S. CONST. amend. IV.

184. Galarza v. Szalczyk, No. 10-cv-06815, 2012 U.S. Dist. LEXIS 47023, at *30–31 (E.D. Pa. Mar. 30, 2012) ("The Amended Complaint alleges that Mr. Galarza would have been released on bail three days prior to his actual release but for the immigration detainer issued by defendant Szalczyk. Therefore, the immigration detainer caused a seizure of Mr. Galarza.").

185. U.S. CONST. amend. IV.

186. MANUEL, *supra* note 81, at 20.

187. *Id.* Indeed, the plaintiff class in *Moreno* excluded unauthorized immigrants who were held pursuant to detainers issued based on warrants of arrest for removal proceedings, charging documents initiating removal proceedings, or orders of deportation or removal. *See* Moreno v. Napolitano, No. 11 C 5452, 2014 U.S. Dist. LEXIS 138576, at *7 (N.D. Ill. Sept. 30, 2014).

188. *Moreno*, 2014 U.S. Dist. LEXIS 138576, at *24–25.

iv. Immigration Detainers Might Deplete State and Local Resources

There are two ways in which—at least in theory—immigration detainers might deplete state and local resources. First, given that cooperation with ICE detainers is voluntary,[189] local governments could be held liable if their detainer practices violate state or federal law.[190] If localities accept all immigration detainer requests, they face potential liability if there is not probable cause to support a detainer.[191]

The level of litigation exposure, however, could seemingly be limited through procedural changes at the local and federal level. To hold a local government unit liable for a constitutional violation under 42 U.S.C. § 1983, a plaintiff must show that "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by [a local] body's officers."[192] Thus, local government units can be held liable if they have a policy of honoring detainers without ensuring that there is probable cause. If ICE provides local law enforcement agencies with information supporting their detainer request and local officers make an individualized determination based on these facts, *Monell* might protect the local government unit from liability under 42 U.S.C. § 1983 and qualified immunity would likely protect the officer.[193]

The more prevalent costs facing state and local governments are those incurred while complying with ICE's immigration detainer requests. According to immigration advocacy groups and local jurisdictions, local jails must absorb significant costs to house unauthorized immigrants subject to federal detainers. For example, Miami-Dade County noted in its resolution enacting an anti-detainer measure that compliance with ICE detainers "cost the taxpayers"

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189. *See supra* Section IV.A.1.ii.

190. *See supra* Section IV.A.2.iii.

191. *See supra* Section IV.A.2.iii.

192. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978).

193. *See* Harlow v. Fitzgerald, 457 U.S. 800, 809 (1982) (setting out the qualified immunity inquiry); Martinez v. California, 444 U.S. 277, 284 (1980) (finding that federal qualified immunity applies even if a federal cause of action is being asserted in state courts).

$1,002,700 in 2011 and $667,076 in 2012.[194] Researchers estimated that King County, Washington (Seattle), would have saved $1.8 million in 2011 by refusing to comply with ICE's detainer requests.[195] Finally, Harris County, Texas (Houston), estimated that that its county jail spent approximately $24 million in 2013 complying with ICE's immigration detainers.[196]

But one cannot take these numbers at face value. First, it is hard to determine how much of these estimated costs derive directly from honoring ICE's detainers. ICE's immigration detainers generally request that local law enforcement agencies hold arrestees for up to forty-eight hours after their scheduled release.[197] Many jurisdictions, however, have enacted local policies that deny pre-trial release to non-citizens against whom ICE has lodged detainers.[198] For example, in King County, researchers found that arrestees subject to ICE detainers stayed in jail, on average, almost a month longer than others.[199] Similarly, from October 2011 to July 2014, the Harris County Jail reportedly housed 40,703 inmates with federal detainers for 891,150 days, which averages out to almost 22 days per detainee.[200] Accordingly, a large amount of these estimated costs could be attributable to local policies that extend custody beyond the 48 hours

194. Miami-Dade County, Fla., Res. No. R-1008-13 (Dec. 3, 2013). Miami-Dade County later changed its anti-detainer policy and agreed to fully cooperate with federal authorities after President Donald Trump's executive order threatening to strip funds from "sanctuary cities." Alan Gomez, *Miami-Dade Commission Votes to End County's "Sanctuary" Status*, USA TODAY (Feb. 17, 2017, 3:06 PM), http://www.usatoday.com/story/news/nation/2017/02/17/miami-dade-county-grapples-sanctuary-city-president-trump-threat/98050976/.

195. KATHERINE BECKETT & HEATHER EVANS, IMMIGRATION DETAINER REQUESTS IN KING COUNTY, WASHINGTON: COSTS AND CONSEQUENCES 4 (2013).

196. Dan Hill, *Interactive: The Cost of Jailing Undocumented Immigrants*, TEX. TRIB. (July 21, 2014), http://www.texastribune.org/2014/03/04/cost-of-jailing-undocumented-immigrants/ (providing data on all county jails in Texas from October 2011 to June 2014).

197. *See* GARCIA & MANUEL, *supra* note 41, at 15–16.

198. *See* Cox & Miles, *supra* note 37, at 22; *see also* Ingrid V. Eagley, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126 (2013) (providing details on policies in major cities such as Los Angeles and Houston).

199. BECKETT & EVANS, *supra* note 195, at 3.

200. *See* Hill, *supra* note 196.

requested by ICE. Furthermore, the precision of the estimated costs is questionable. The marginal costs of additional days of detention likely vary, depending on factors, such as the capacity level at the jail, that fluctuate over time.[201] The researchers providing estimates of the costs to King County attempted to take these factors into account,[202] but it seems unlikely that local jurisdictions act with similar precision when generating their estimates.

Finally, state and local costs may be offset in a variety of manners. For one, the federal government reimburses some of the costs incurred by local governments through the State Criminal Alien Assistance Program ("SCAAP").[203] SCAAP provides federal funding to states and localities that incurred costs for incarcerating undocumented criminal aliens with at least one felony or two misdemeanor convictions for at least four consecutive days.[204] This program distributes millions of dollars to jurisdictions nationwide. In fiscal year 2015, for example, Harris County received $862,429 and Miami-Dade County received $101,088.[205] The SCAAP program made similar distributions at the state level in 2015, with the Texas Department of Criminal Justice receiving around $8.2 million and the State of California receiving more than $44.1 million.[206] These reimbursements may reduce the actual costs incurred at the local level. Moreover, increased state and local detention costs may reduce expenses in other areas of state and local budgets. In 2007, the Congressional Budget Office published a paper indicating that the cost of providing public services to the unauthorized immigrant population exceeds the amount unauthorized immigrants pay in state and local

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201. *See* Cox & Miles, *supra* note 37, at 22–23 n.84.

202. *See* BECKETT & EVANS, *supra* note 195.

203. *See State Criminal Alien Assistance Program (SCAAP)*, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, https://www.bja.gov/ProgramDetails.aspx?Program_ID=86#horizontalTab7 (last visited Nov. 11, 2017).

204. *Id.* This reimbursement policy, specifically the requirement that the criminal alien be detained for four days, does not align with ICE's 48-hour request.

205. *Id.* (follow "Archives" hyperlink; click hyperlink titled "FY 2015 SCAAP Award List").

206. *Id.*

taxes.[207] Immigration detainers and increased interior enforcement could lead to a reduction of these expenses, which further reduces the actual cost of honoring immigration detainers.

Jurisdictions enacting anti-detainer measures and immigration advocacy groups seem to have glossed over these considerations. And even if the true cost of honoring detainers is significant, jurisdictions do not have to categorically reject detainers; they could simply bar officials from honoring immigration detainers unless the federal government agrees to substantially reimburse the expenses incurred in complying with the detainer.[208]

B. Measures Preventing Employees from Sharing Information with Federal Immigration Authorities

1. Legal Analysis

While the previous section illustrates that not all sanctuary measures are illegal, restrictionists' claims of illegality may be warranted with respect to communication-restricting measures. The Supremacy Clause establishes that federal law is "the supreme Law of the Land."[209] Accordingly, the Supremacy Clause invalidates state and local laws that "interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution . . . ."[210]

In 1996, acting pursuant to its authority over immigration, Congress sought to curb state and local measures restricting communication with federal immigration authorities in the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA")[211] and the Illegal Immigration Reform and Immigrant

207. CONG. BUDGET OFFICE, THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS 9–10 (2007), https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/reports/12-6-immigration.pdf.

208. *See supra* note 84 (listing jurisdictions that have adopted such measures).

209. U.S. CONST. art. VI, § 1, cl. 2.

210. Gibbons v. Ogden, 22 U.S. 1, 211 (1824).

211. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105 (codified at 8 U.S.C. § 1644 (2012)).

Responsibility Act ("IIRIRA").[212] Provisions in these statutes expressly preempt inquiry-restricting measures that prevent local officials from voluntarily providing information regarding an individual's "immigration status" to federal immigration authorities.[213] PRWORA § 434 states:

> Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.[214]

Similarly, IIRIRA § 642 prevents state and local governments from restricting the sending, receiving, maintaining, or exchanging of information with federal immigration authorities regarding the "immigration status" of an individual.[215]

Shortly after these provisions were enacted, the City of New York brought suit to challenge their constitutionality.[216] The City argued that the provisions facially violate the Tenth Amendment.[217] However, Supreme Court jurisprudence interpreting the Tenth

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212. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-546 (codified at 8 U.S.C. § 1373 (2012)).

213. GARCIA & MANUEL, *supra* note 41, at 4. Note, "the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by" the federal governments power over immigration. DeCanas v. Bica, 424 U.S. 351, 355, (1976). But PRWORA § 434 and IIRIRA § 642 both expressly state that they apply "[n]otwithstanding any other provision of Federal, State, or local law . . . ." 8 U.S.C. §§ 1373, 1644.

214. 8 U.S.C. § 1644.

215. 8 U.S.C. § 1373(b) (2012) ("Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual: (1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service; (2) Maintaining such information; (3) Exchanging such information with any other Federal, State, or local government entity.").

216. City of New York v. United States, 971 F. Supp. 789, 791 (S.D.N.Y. 1997), *aff'd*, 179 F.3d 29 (2nd Cir. 1999).

217. *Id.*

Amendment only prevents Congress from "commandeering" state or local governments to enact or administer federal regulatory programs.[218] Neither PRWORA nor IIRIRA *forces* state or local governments to provide federal immigration authorities with immigration status information.[219] Rather, these provisions merely prohibit measures that prevent state and local officials from voluntarily providing information regarding an individual's immigration status to federal immigration authorities.[220] Recognizing the distinction between commandeering local officials and protecting the voluntary exchange of information, the federal district court dismissed the City's claim and the Second Circuit affirmed this decision.[221] Accordingly, state and local measures that restrict local officials from sharing information regarding the "immigration status" of an individual could likely be challenged on preemption grounds.

To avoid conflicts with PRWORA § 434 and IIRIRA § 642, some jurisdictions have enacted communication-restricting measures that only inhibit the sharing of information about the "incarceration status or release date" of an unauthorized immigrant.[222] One could argue that such measures do not run afoul of PRWORA or IIRIRA because they do not prohibit officials from sharing information about an individual's "immigration status."[223] In 2012, however, then-ICE Director John Morton claimed that these measures may violate IIRIRA

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218. Printz v. United States, 521 U.S. 898, 918 (1997) (stating that the federal government cannot "force[] [the] participation of the States' executive in the actual administration of a federal program"); New York v. United States, 505 U.S. 144, 166 (1992) ("[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.").

219. 8 U.S.C. §§ 1373, 1644 (2012).

220. *See* 8 U.S.C. §§ 1373, 1644.

221. *City of New York*, 971 F. Supp. at 791. A few months after the Second Circuit decision, the Supreme Court held that a federal statute regulating the dissemination of information collected by state authorities did not violate the Tenth Amendment. Reno v. Condon, 528 U.S. 141 (2000). This holding seems to support the Second Circuit's ruling.

222. *See, e.g.*, COOK COUNTY, ILL., CODE OF ORDINANCES § 46-37(b) (2011) ("County personnel shall not expend their time responding to ICE inquiries or communicating with ICE regarding individuals' incarceration status or release dates while on duty.").

223. GARCIA & MANUEL, *supra* note 41, at 15 n.86.

§ 642 if they prevent local officials from responding to ICE inquiries.[224] It remains to be seen how broadly courts will construe PRWORA § 434 and IIRIRA § 642.

2. Policy Analysis

Even if communication-restricting measures comply with federal law, the generic policy rationales used to justify sanctuary cities do not provide strong support for communication-restricting measures.

i. Communicating with ICE Does Not Distract Local Officers from Their Crime-Fighting Responsibilities

Supporters of sanctuary measures have provided no substantial evidence that communicating with ICE distracts local officers from their crime-fighting responsibilities. On the contrary, an argument could be made that local officers often communicate with ICE *in furtherance* of their crime-fighting responsibilities. The burdens of communicating are minimal. Local officers interviewed for this Article indicated that responding to ICE requests or initiating communication with ICE was "as simple as picking up the phone."[225] The benefits of communicating with ICE, on the other hand, appear significant. A report generated by ICE shows that nearly 1,900 of the 8,000 criminal aliens released by state and local authorities under anti-detainer measures from January to August 2014 were subsequently arrested for another crime within that eight-month period.[226] Given the minimal time and resources required to provide information to ICE, it

224. *See* Letter from John Morton, Dir., ICE, to Toni Preckwinkle, Cook Cty. Bd. President (Jan. 4, 2012), *in* THE ALL-IN-ONE GUIDE TO DEFEATING ICE HOLD REQUESTS: APPENDIX 4, LETTERS FROM PUBLIC OFFICIALS ON DETAINER POLICIES 1–2, http://www.ilrc.org/files/documents/all_in_one_guide_appendix_4.pdf.

225. Interview with Robert Hodges, Officer, Greenville Police Dep't (Apr. 5, 2016). ICE typically issues its request for release information through 247N forms, which asks local police to notify them by mail, email, or fax of an impending release. See U.S. DEP'T OF HOMELAND SEC., REQUEST FOR VOLUNTARY NOTIFICATION OF RELEASE OF SUSPECTED PRIORITY ALIEN, http://trac.syr.edu/immigration/reports/402/include/I-247N.pdf, for a copy of DHS's 247N Request Form.

226. *See* 2014 ICE ENFORCEMENT REPORT, *supra* note 73, at 2.

seems highly unlikely that the burden of communicating with ICE outweighs the crime-fighting benefits of such communication. Indeed, according to a San Francisco news station, a local sheriff's deputies often ignored the San Francisco's communication-restricting measure in order "to get illegal immigrant criminals off the street."[227]

ii. Communicating with ICE Likely May or May Not Impair Community Policing Efforts

Immigrant advocates and local law enforcement agencies often claim that any local participation in federal immigration enforcement undermines community-policing efforts.[228] However, the legitimacy-based theory that communication between local police and federal authorities reduces unauthorized immigrant cooperation seems weak, given the empirical evidence finding that immigration detainers did not impair the ability of local police to solve crime.[229] If honoring immigration detainers did not affect clearance rates,[230] it seems unlikely that the lesser measure of communicating with ICE would impair the ability of police to solve crimes.

It is possible that communication with federal authorities introduces a risk-based reason for not cooperating with the police that is not present with respect to immigration detainers. But the extent to which increased communication would affect unauthorized immigrants' assessment of the perceived risk associated with cooperating is unknown. Studies analyzing the rate at which unauthorized immigrants report crimes have relied on limited data and reached conflicting results.[231]

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227. *See Pier 14 Murder*, *supra* note 9.

228. *See supra* Section IV.A.2.ii.

229. *See supra* Section IV.A.2.ii.

230. *See* Cox & Miles, *supra* note 37, at 37.

231. *See generally* Dane Hautala et. al, *Predictors of Police Reporting Among Hispanic Immigrant Victims of Violence*, 5 RACE & JUST. 235 (2015); Elizabeth Fussell, *The Deportation Threat Dynamic and Victimization of Latino Migrants: Wage Theft and Robbery*, 52 SOC. Q. 593 (2011); Callie Marie Rennison, *Reporting to the Police by Hispanic Victims of Violence*, 22 VIOLENCE & VICTIMS 754 (2007).

iii. Communicating with ICE Does Not Violate Constitutional Rights

Nothing in the Constitution prohibits state and local governments from sending, receiving, maintaining, or exchanging information with federal immigration authorities. Communication itself does not prolong the detention of an arrestee or increase the risk of unconstitutional discrimination. Thus, this policy rationale provides no support for communication-restricting measures.

iv. Communicating with ICE Does Not Deplete State and Local Resources

Finally, communicating with ICE does not significantly deplete state and local resources. The costs of communicating with ICE via telephone, email, or fax are *de minimis*. Furthermore, unlike the risks associated with immigration detainers,[232] states and municipalities do not face the threat of increased liability or litigation costs because communication itself does not prolong the detention of an arrestee. If anything, it is more likely that communication-restricting measures increase the financial burden on state and local resources. As discussed, the cost of providing public services to the unauthorized immigrant population exceeds the amount unauthorized immigrants pay in state and local taxes.[233] By preventing ICE from identifying and taking custody of an unauthorized immigrant, state and local officers could increase the number of unauthorized immigrants using state and local resources.

C. Measures Preventing Inquiries or Investigations into a Person's Immigration Status

1. Legal Analysis

The legality of inquiry-restricting measures is an open question that turns, yet again, on the preemption doctrine. Although no federal legislation expressly addresses inquiries into a person's immigration

232. *See supra* Section IV.A.2.iv.

233. CONG. BUDGET OFFICE, *supra* note 207, at 9.

status,[234] one could argue that the information-sharing provisions of IIRIRA and PRWORA impliedly preempt restrictions on status-related inquiries.[235] Inquiry-restricting measures implicate two forms of implied preemption: field preemption and obstacle preemption.[236]

Under the field preemption doctrine, the Constitution precludes state and local governments from regulating conduct in a field where Congress has expressed its intent to "occupy an entire field."[237] Here, neither the legislative history nor the wording of any federal legislation indicates a "clear and manifest purpose of Congress" to oust state authority to control the inquiries of state and local officials.[238] Thus, the field preemption doctrine likely does not bar inquiry-restricting measures.

The obstacle preemption doctrine provides a stronger argument. Obstacle preemption precludes state and local laws that "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[239] This doctrine is easy to state but difficult to apply. Indeed, the Supreme Court has explicitly held that determining "[w]hat is a sufficient obstacle is a *matter of judgment*, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects . . . ."[240]

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234. In *Sturgeon v. Bratton*, the plaintiff claimed the language of IIRIRA § 642 that prohibits local entities from "in any way restrict[ing]" the *sending* of information to ICE should be read to expressly preempt local measures on *obtaining* information that might be later be communicated to ICE. 95 Cal. Rptr. 3d 718, 731 (Ct. App. 2009).

235. GARCIA & MANUEL, *supra* note 41, at 13. See also *supra* Section IV.B.1, for the text of the information-sharing provisions in IIRIRA and PRWORA.

236. Justice Clarence Thomas and Professor Caleb Nelson, among others, have persuasively questioned the constitutionality of implied preemption doctrines that are divorced from statutory text. *See* Wyeth v. Levine, 555 U.S. 555, 582–604 (2009) (Thomas, J., concurring); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 231–32 (2000) (questioning the validity of obstacle preemption). My analysis is based on the current state of preemption doctrine, but I note the strong criticisms against an expansive reading of field and obstacle preemption.

237. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 115 (1992); *see also* Arizona v. United States, 567 U.S. 387, 399 (2012).

238. *See* De Canas v. Bica, 424 U.S. 351, 357 (1976).

239. Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (citation omitted).

240. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000) (emphasis added).

A Congressional Research Service report suggests that a federal court would not find inquiry-restricting measures impliedly preempted:

> [G]iven that the *Arizona* Court held that state and local police were largely preempted from making arrests for immigration status violations, it seems unlikely that a federal court would find that state or local measures that limited police questioning of persons about their immigration status would be viewed as preempted by the INA.[241]

One could argue, however, that the purpose of the information-sharing provisions of IIRIRA and PRWORA is to increase the ability of federal authorities to identify unauthorized immigrants, and inquiry-restricting measures frustrate that goal. Ultimately, the issue comes down to how broadly or narrowly courts characterize the federal purpose.[242]

2. Policy Analysis

i. Allowing Police to Make Status-Related Inquiries Might Distract Police from Their Crime Fighting Responsibilities in the Field

Some scholars and advocates claim that status-related inquiries distract police from their primary responsibility of preventing and investigating crimes.[243] This claim is certainly plausible, but it remains unproven. Reliable empirical data is needed to determine the validity of this factual assertion and the magnitude of the harms associated with

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241. GARCIA & MANUEL, *supra* note 41, at 13.

242. To date, only one state court has considered this issue: *Sturgeon v. Bratton*. 95 Cal. Rptr. 3d 718 (Ct. App. 2009). In a cursory analysis, the court concluded that inquiry-restricting measures were not impliedly preempted. *Id.* at 730–731. Given the difficulty of applying the obstacle preemption doctrine, it is difficult to predict how other courts would address a preemption challenge.

243. *See* HANNAH GLADSTEIN ET AL., MIGRATION POLICY INST., BLURRING THE LINES: A PROFILE OF STATE AND LOCAL POLICE ENFORCEMENT OF IMMIGRATION LAW USING THE NATIONAL CRIME INFORMATION CENTER DATABASE, 2002–2004 10 (2005).

status inquiries.[244] Even without data, two straightforward considerations suggest that categorical opposition to status inquiries goes too far.

First, as Professor Peter Schuck noted, "the supposed conflict between the crime-fighting responsibilities of state and local police and their work on immigration cases may be more apparent than real."[245] Indeed, the criminals that police target are *sometimes* unauthorized immigrants with prior convictions.[246] Thus, allowing status inquiries that may lead to identification and eventual removal could further officers' efforts to fight crime.

Second, while inquiry-related distractions might be a legitimate concern for officers in the field, the argument does not seem to carry as much weight when officers are interacting with arrestees that are already in custody. Including status inquiries in routine booking questions surely would not present a significant distraction, and it would direct inquiries towards those persons that ICE targets for apprehension and removal.[247]

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244. Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 75 (2007).

245. *Id.* (proposing a greater role for state and local authorities in enforcing federal immigration law).

246. *Id.*; *see also* U.S. DEP'T OF HOMELAND SEC., LAW ENFORCEMENT SYSTEMS & ANALYSIS: DECLINED DETAINER OUTCOME REPORT (2014) (providing statistics on the number of crimes committed by unauthorized immigrants who were released from state and local custody under anti-detainer measures); Linda Reyna Yanez & Alfonso Soto, *Local Police Involvement in the Enforcement of Immigration Law*, 1 TEX. HISP. J.L. & POL'Y 9, 11 (1994) (stating that local police benefitted from increased deportations by reducing "criminal activity attributed to the unlawful flow of aliens.").

247. *See* Memorandum from Jeh Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas Winkowski, Acting Dir., ICE et al. (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (providing the Department of Homeland Security's civil immigration enforcement priorities).

ii. Allowing Police to Make Status Inquiries May Impair Community Policing Efforts

Many jurisdictions have enacted inquiry-restricting measures to foster an atmosphere of trust between the local police and the immediate community they serve.[248]

To date, no empirical evidence shows that allowing status inquiries affects cooperation from unauthorized immigrants at the margin. Professors Cox and Miles generated empirical evidence showing that honoring *immigration detainers* did not impair the ability of local police to solve crimes.[249] But honoring immigration detainers does not increase the risk of removal for persons cooperating with local law enforcement. The availability of status inquiries turns every police encounter into a point of potential immigration screening, which ultimately could lead to removal.[250] This added risk-based element prevents us from drawing any conclusions from the existing empirical evidence relating to detainers.

As a result, we are left with tough questions and no data to provide answers. Do status inquiries alter unauthorized immigrants' perceptions of police legitimacy or the risks associated with cooperation? Do status inquiries actually have a significant affect on immigrants' cooperative behavior? If status inquiries by officers in the field impair community policing, would these inquiries in the custodial context mitigate those negative consequences? Without answers to these questions, the validity of this policy rationale and optimal method of implementation remain unknown.

iii. Allowing Police to Make Status Inquiries May Lead to Constitutional Violations

Advocates also argue that allowing state and local officers to make status-related inquiries leads to civil rights violations, in particular unconstitutional discrimination and unreasonable searches

248. *See supra* notes 106–108.

249. *See* Cox & Miles, *supra* note 37, at 36–37.

250. *Id.* at 20.

and seizures.[251] The gist of the argument is that "police officers do not have the benefit of experience that federal officers possess" and cannot determine "legal status without stepping on the constitutional rights of those lawfully present."[252] This is a factual assertion with very little case law to support the theory that such unconstitutional practices are prevalent. The absence of case law may be due to the difficulty of proving a constitutional violation with a race-neutral policy: plaintiffs challenging status-related inquiries must show that officers acted with a racially discriminatory purpose or that they were questioned solely because of their race.[253] This is a high bar that advocates argue insulates state and local officers from liability.

On the other hand, officers may be considering race *among other factors* when initiating questioning.[254] While the risk of unconstitutional discrimination is a serious one, it should not be conflated with the argument against racial profiling. Courts have generally found that the Constitution does not prohibit officers from

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251. *See* Yanez & Soto, *supra* note 246, at 12 ("The danger [of state and local enforcement of federal immigration law] reaches a worrisome level if one considers that the potential for civil rights violations lurks not only over undocumented aliens but over legally admitted aliens and U.S. citizens as well."); KAREN TUMLIN & RICHARD IRWIN, NAT'L IMMIGRATION LAW CTR., RACIAL PROFILING AFTER HB 56: STORIES FROM THE ALABAMA HOTLINE 1–3 (2012), http://www.nilc.org/wp-content/uploads/2016/02/Alabama-Stories-2012-08-23_final.pdf. Some advocates may also point to the Fourth Amendment. However, so long as a person has been lawfully seized and questioning does not prolong this seizure, the Fourth Amendment allows status-related inquiries, with or without reasonable suspicion. *See* Muehler v. Mena, 544 U.S. 93, 101–02 (2005).

252. Greg K. Venbrux, *Devolution or Evolution? The Increasing Role of the State in Immigration Law Enforcement*, 11 UCLA J. INT'L L. & FOREIGN AFF. 307, 330 (2006).

253. *See* McCleskey v. Kemp, 481 U.S. 279, 292 (1987) ("[T]o prevail under the Equal Protection Clause, [the party alleging discrimination] must prove that the decision makers in *his* case acted with discriminatory purpose."); Washington v. Davis, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.").

254. The prevalence of racial profiling in state and local law enforcement has been addressed in a number of studies. *See, e.g.*, Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 983–87 (1999).

considering race among other factors; race just cannot be the sole factor for their actions.[255] When officers consider race along with other factors, the issue becomes whether racial profiling is acceptable. There are a variety of views on the validity of racial profiling in law enforcement practices. Some believe that "racial profiling is unjustified because it is discriminatory and unconstitutional, ineffective, and probably counterproductive."[256] This is not the place to analyze the validity of using racial profiling to enforce immigration laws. Rather, the point here is simply that the validity of racial profiling in law enforcement is in itself a debatable proposition.

Regardless of one's views on the prevalence of constitutional violations and the validity of racial profiling, the constitutional-violations policy argument does not lead to the conclusion that status inquiries should be categorically forbidden. The discrimination argument loses force if status inquiries are systematic and routine. Without officer discretion, the risk of race-based questioning is largely mitigated. Thus, categorical opposition to all types of status inquiries seems to go too far.

iv. Status Inquiries Do Not Deplete State and Local Resources

Lastly, allowing state and local officers to make status inquiries does not deplete state and local resources. State and local governments could be held liable for civil rights violations under 42 U.S.C. §

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255. *See generally* JODY FEDER, CONG. RESEARCH SERV., RL31130, RACIAL PROFILING: LEGAL AND CONSTITUTIONAL ISSUES 2–6 (2012) (evaluating challenges to racial profiling brought under the Fourth Amendment and Fourteenth Amendment); *see also* United States v. Brignoni-Ponce, 422 U.S. 873, 886–87 (1975) ("The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens."); United States v. Anderson, 923 F.2d 450, 455 (6th Cir. 1991) ("[S]uspicions based solely on the race of the person stopped cannot give rise to a reasonable suspicion justifying a *Terry* stop."). *But see* United States v. Montero-Camargo, 208 F.3d 1122, 1132 (9th Cir. 2000) ("The likelihood that in an area in which the majority—or even a substantial part—of the population is Hispanic, any given person of Hispanic ancestry is in fact an alien, let alone an illegal alien, is not high enough to make Hispanic appearance a relevant factor in the reasonable suspicion calculus.").

256. Karin D. Martin & Jack Glaser, *Racial Profiling*, *in* DEBATES ON U.S. IMMIGRATION 496 (Judith Gans et al. eds., 2012).

1983.[257] However, given the difficulty of proving such claims, states and municipalities face limited liability exposure.

D. Measures Barring Local Law Enforcement from Arresting Unauthorized Immigrants for Federal Immigration Law Violations

1. Legal Analysis

No federal law compels immigration enforcement by state and local officers, and, as discussed above, any such requirement would raise Tenth Amendment commandeering issues.[258] Thus, measures prohibiting local law enforcement from arresting unauthorized immigrants on the basis of federal immigration law do not appear to raise any significant legal issues.

2. Policy Analysis

i. Allowing State and Local Police to Make Arrests Based on Federal Immigration Law Might Distract Police from Their Crime-Fighting Responsibilities

The argument that the ability to make arrests based on federal immigration law diverts police manpower away from preventing and investigating crimes faces the same deficiencies discussed in the prior section: the conflict between crime-fighting and immigration enforcement may be more apparent than real.[259] Without reliable empirical work, there is no way to confirm the existence and magnitude of the supposed harms.

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257. 42 U.S.C. § 1983 (2012) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .").

258. *See supra* Section IV.B.1.

259. Schuck, *supra* note 244, at 75.

ii. Allowing Police to Make Arrests May Impair Community Policing Efforts

If state and local participation in immigration enforcement does impair community-policing efforts, the power to arrest seems to be the type of police action most likely to cause such impairment. The ability to arrest—unlike immigration detainers and communication with federal authorities—increases the risk of removal for unauthorized immigrants interacting with police. Thus, even if Cox and Miles's research undermines the procedural justice theory,[260] the risk of arrest may deter unauthorized immigrants from cooperating with local police.

Some claim that this risk is exaggerated because the federal government offers "U visas" to victims of crimes who cooperate with police.[261] U visas, however, do not protect every unauthorized immigrant who cooperates with police. U visas only protect victims of specified crimes "who have suffered mental or physical abuse and are helpful to government officials in their investigation."[262] Moreover, the government caps U visas at 10,000 per year,[263] an allotment that was filled within two months during 2013.[264] Accordingly, the claim that U visas obviate the risks associated with police cooperation seems unsubstantiated.

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260. *See supra* Section IV.A.2.ii.

261. *See Sheriffs Say Sanctuary City Policies Do Not Increase Cooperation Between Illegal Aliens and Local Police*, NUMBERSUSA, https://www.numbersusa.com/news/sheriffs-say-sanctuary-city-policies-do-not-increase-cooperation-between-illegal-aliens-and (last updated Mar. 1, 2017, 10:05 AM); *"You and Your Family Are in Real Danger": Judge Jeanine Blasts Sanctuary Cities*, FOX NEWS INSIDERS (July 12, 2015, 11:11 AM), http://insider.foxnews.com/2015/07/12/judge-jeanine-blasts-sanctuary-cities-wake-kate-steinles-murder-illegal-immigrant.

262. *Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status (last updated Aug. 25, 2017).

263. *Id.*

264. Amy Grenier, *Immigrant Victims Left Waiting After U.S. Reaches U Visa Cap*, AM. IMMIGRATION COUNCIL (Dec. 16, 2013), http://immigrationimpact.com/2013/12/16/immigrant-victims-left-waiting-after-u-s-reaches-u-visa-cap/.

All that said, a number of questions remain. It is unclear how much the ability to arrest increases unauthorized immigrants' fear of removal, which presumably is already substantial. Moreover, the survey data used to support this policy argument measured the beliefs and attitudes of unauthorized immigrants, not their actual cooperation with police. As the empirical evidence by Professors Cox and Miles demonstrates, the two do not always correlate.[265] At this point, the most that can be said about this policy argument is that it may support arrest-restricting measures. Whether the possibility of community-policing impairment is sufficient to outweigh the benefits generated by increased state and local participation in immigration enforcement is a separate question altogether.

iii. Allowing Police to Make Arrests Based on Federal Immigration Law May Lead to Constitutional Violations

Next, sanctuary advocates claim that allowing state and local officers to make arrests based on federal immigration law would increase civil rights violations.[266] As discussed above, the prevalence of such violations is unknown. The decision in *Arizona v. United States* may limit the potential for civil rights violations. In *Arizona v. United States*, the Supreme Court held that state and local officers were preempted from making arrests for civil violations of federal immigration law.[267] Removing officers' abilities to arrest for a civil violation of federal law, specifically unlawful presence in the United States, seemingly eliminates the situation in which officers would be most likely to make an unconstitutional arrest. To make an arrest for a criminal violation, officers will necessarily have to look to factors in addition to race—such as information indicating that the person entered the country illegally—before making an arrest, thus limiting

265. Cox & Miles, *supra* note 37, at 37; *see also* THEODORE, *supra* note 46.

266. *See, e.g.*, Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 982 (2004) ("[L]ocal authorities untrained in the nuances of immigration law and inexperienced in the detection of illegal immigration may be tempted to rely solely on prohibited factors like the person's race, foreign appearance, or use of a foreign language like Spanish.").

267. Arizona v. United States, 567 U.S. 387, 410 (2012).

the chances of civil rights violation.[268] Ultimately, this policy rationale may be a valid one, but its force will depend on the prevalence of civil rights violations and the inability of training to cure such violations.

iv. Increased Arrests Might Deplete State and Local Resources

In theory, there are two ways in which allowing immigration arrests could deplete state and local resources. First, state and local government could face monetary liability for civil rights violations. As discussed above, however, it is not clear how many violations would actually occur. Moreover, even if civil rights violations occur, it will not necessarily deplete state and local resources. For state law claims, state sovereign immunity and damage caps often protect states and localities.[269] For federal law claims, 42 U.S.C. § 1983 provides limited opportunities for recovery. "State officers in their official capacities, like States themselves, are not amenable to suit for damages under § 1983."[270] Additionally, *Monell* prevents judgments against municipalities under 42 U.S.C. § 1983 unless "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by [a local] body's officers."[271] Thus, the threat of a monetary judgment against a state or locality, while present, seems to cause a low level of financial exposure.

Second, making arrests reintroduces the costs of detaining unauthorized immigrants until ICE assumes custody. As the considerations surrounding this issue are addressed at length above with respect to detainers, I will not rehash the arguments here.

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268. Immigration advocates would likely respond that arrests for unlawful presence will simply be replaced by pretextual, racially driven arrests for minor crimes, such as speeding. But this factual assertion has no empirical support. Moreover, under the current Fourth Amendment jurisprudence, "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." Whren v. United States, 517 U.S. 806, 813 (1996).

269. *See* Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 449, 483 n.457 (2016).

270. Arizonans for Official English v. Arizona, 520 U.S. 43, 69 n.24 (1997).

271. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978).

V. CONCLUSION

As the preceding analysis demonstrates, both sides of the sanctuary city debate exaggerate their positions. Supporters of sanctuary cities put forth policy rationales that are unproven or inapplicable to each type of measure. Meanwhile, opponents of sanctuary cities overextend their argument that sanctuary measures are illegal. Ultimately, failing to distinguish between the differing measures underlying sanctuary cities produces misleading arguments and prevents thorough analyses of important issues.

States and municipalities face difficult choices moving forward. They must analyze the magnitude of the purported harms and benefits of sanctuary measures, which is difficult to do given the lack of data on the effects of sanctuary measures. At the same time, states and municipalities must take into account the Trump Administration's threats to strip sanctuary cities of federal funding and proposed legislation that would permit "[a]ny individual . . . who is the victim of a murder, rape, or any felony" to bring suit against a State or political subdivision if "the State or political subdivision released the alien from custody prior to the commission of such crime as a consequence of the State or political subdivision's declining to honor a detainer."[272]

Legal questions surrounding the implementation of sanctuary measures are untested, and the policy ramifications of sanctuary measures remain unknown. My hope is that this evaluation fosters more intelligent analyses and reason-based solutions to an emotionally charged issue and empowers state and local policymakers to consider the difficult issues that sanctuary measures implicate.

272. No Sanctuary for Criminals Act, H.R. 3003, 115th Cong. (2017).