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Cover Page Footnote

This piece is dedicated to beloved Professor Keith Aoki, without whom I would never have written this article. May his legacy continue in those whom he inspired to go beyond their selfimposed limits. Many thanks to Dean Kevin Johnson, Professor Bill Ong Hing, Professor Lisa Pruitt, Errol Dauis, Julien Capers, William McKenna, and Lov Goel for their invaluable guidance.

Insecure Communities: Examining Local Government Participation in US Immigration and Customs Enforcement's "Secure Communities" Program

Rachel R. Ray*

In the last several years, suffering global economies, war, ethnic and racial tensions, natural disasters, and other exigencies have led to a steady stream of immigrants to the United States. They seek jobs, refuge, asylum, and better opportunities. In fiscal year 2010, the United States Immigration and Customs Enforcement (ICE) removed a record-setting 392,000 undocumented immigrants, half of which were convicted criminals.[1] Yet a careful look behind this impressive number would undoubtedly reveal families torn apart by the removal of undocumented spouses, parents, siblings, and children convicted only of nonviolent crimes, traffic violations, or other minor infractions.[2] ICE's own data shows that 79

* J.D., University of California, Davis School of Law, rrray@ucdavis.edu. This piece is dedicated to beloved Professor Keith Aoki, without whom I would never have written this article. May his legacy continue in those whom he inspired to go beyond their self-imposed limits. Many thanks to Dean Kevin Johnson, Professor Bill Ong Hing, Professor Lisa Pruitt, Errol Dauis, Julien Capers, William McKenna, and Lov Goel for their invaluable guidance.

[1] Press Release, Dep't of Homeland Sec., Secretary Napolitano Announces Record-Breaking Immigration Enforcement Statistics Achieved under the Obama Administration (Oct. 6, 2010), *available at* http://www.dhs.gov/ynews/releases/pr_1286389936778.shtm.

[2] *See, e.g.*, NDLON, *Petition to Secretary Napolitano*, http://action.altoarizona.com/p/dia/action/public/?action_KEY=4383 (last visited Nov. 18, 2010) (describing a petition sponsored by multiple community organizations opposing S-Comm) ("[recent statistics touted by DHS confirm that a historic record number of families have been torn apart under the Obama Administration's management of DHS."). ICE has also mistakenly attempted to deport citizens. *See, e.g.*, Lornet Turnbull, *Citizen Wrongly Held as Illegal Immigrant Gets $400,000*, SEATTLE TIMES (Feb. 24, 2011),

percent of people deported through its "Secure Communities" (S-Comm) program are noncriminals or were detained for lower-level offenses, such as traffic violations.[3] S-Comm is just one of many initiatives designed to identify and deport undocumented people, specifically those convicted of crimes. Try as it might, the US government has not yet found a successful way to deter illegal immigration, nor has it developed satisfactory immigration reform.

This article considers ICE's S-Comm program, options for local law enforcement agencies and local governments to resist complying with it, and ways to implement the program less stringently in cases involving noncriminal, undocumented immigrants. Further, this article explores the potential and actual problems that arise with S-Comm, as well as the legal framework for local enforcement of federal immigration laws. Next, this article includes specific examples of immigration enforcement and noncompliance in several counties in California, including Los Angeles, Santa Clara, and San Francisco. Finally, this article suggests improvements that the federal government should make to S-Comm to ensure that the program is just and constitutional. S-Comm has been flawed since its inception, and it must be changed.

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http://seattletimes.nwsource.com/html/localnews/2014325563_detained25m.html.

[3] *See ACLU Statement on Secure Communities*, AM. C.L. UNION (Nov. 10, 2010), http://www.aclu.org/immigrants-rights/aclu-statement-secure-communities (describing the dangers associated with S-Comm) ("Because it targets people at the time of arrest, S-Comm captures people who will never be charged with a state crime—including crime victims, witnesses, and individuals subjected to unconstitutional arrests.") [hereinafter *ACLU Statement*].

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I. INTRODUCTION

Historically, immigration enforcement in the United States has primarily been the task of the federal government. Criminal law enforcement, on the other hand, has been state governments' responsibility.[4] Immigration and criminal law were intended to remain distinct areas of enforcement. Though this division of enforcement remained intact for many years, it is changing in part because grounds for deportation or inadmissibility as an immigrant arise from violations of criminal laws.[5] Since the mid-1990s, state and local governments have become much more engaged in immigration enforcement. State and local law enforcement cooperation with immigration authorities, 287(g) agreements,[6] and legislation such as Arizona Senate Bill 1070 (SB 1070)[7] break down the traditional division between immigration enforcement and criminal law enforcement.[8] The US Immigration and Customs Enforcement's (ICE) "Secure Communities" program (S-Comm) is part of the breakdown of this division of enforcement.

This article examines S-Comm and its effects on local law enforcement agencies (LLEAs), local governments, and immigrant communities, and calls for changes to the program that should be made if it is to be

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[4] For more information about the intersection between criminal and immigration law, see Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 379 (2006) (discussing the roots of and motivation behind the merger of the two fields of law); *see also* Jennifer M. Chacon, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (Dec. 2009) (describing the trend of criminal prosecutions of migration-related offenses and the decreasing protections related to such prosecutions).

[5] *See* 8 U.S.C. § 1182(a)(2) (2010).

[6] Congress passed Section 287(g) of the Immigration and Nationality Act (8 U.S.C. § 1357(g)) in 1995, enabling state and local law enforcement agencies to enter into agreements with the federal government so that they may enforce immigration laws. *See infra* p. 364.

[7] S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (as modified by H.B. 2162, 49th Leg., 2d Reg. Sess. (Ariz. Apr. 30, 2010)) ("SB 1070"); A.R.S. § 11-1051(B).

[8] *See supra* note 4; *infra* Part IV.

implemented nationwide. Part II describes the steps involved in the S-Comm information-sharing process. Part III discusses S-Comm's potential and actual effects on public safety, family unity, and civil rights. Part IV examines the question of whether S-Comm exceeds the federal government's powers. Part V looks at "sanctuary cities" and other methods of resistance to S-Comm. This article concludes with suggestions for effectively reforming S-Comm by giving examples of the implementation of these reforms with the intention of remedying the detrimental impact of the program on immigrants and their communities. The federal government should allow local governments to opt out of S-Comm, and the government agencies responsible for the program and its oversight must ensure that federal, state, and local government employees implement recently proposed changes to the program.

II. THE SECURE COMMUNITIES INFORMATION-SHARING PROCESS

ICE introduced S-Comm[9] in March 2008, referring to it as a "comprehensive strategy to improve and modernize the identification and removal of criminal aliens from the United States."[10] Since its activation in October 2008, S-Comm has helped ICE identify and deport more than

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[9] I refer to "Secure Communities" as S-Comm throughout this article because I believe its actual effect on communities is to make them less "secure" by chilling crime reporting and negatively impacting domestic violence victims. *See, e.g.*, Marie C. Baca, *Immigration Initiative May Put Domestic Violence Victims at Risk*, CALIFORNIA WATCH (Mar. 3, 2011), http://californiawatch.org/dailyreport/immigration-initiative-may-put-domestic-violence-victims-risk-8993; Renee Feltz & Stokely Baksh, *Immigration Crackdown Creates Insecure Communities*, PUB. BROAD. SERV. (Aug. 19, 2010), http://www.pbs.org/wnet/need-to-know/security/video-immigration-crackdown-creates-insecure-communities/2964/.

[10] Press Release, U.S. Immigr. & Customs Enf., Desoto County to Benefit from ICE Strategy to Enhance the Identification, Removal of Criminal Aliens Uses Biometrics to Prioritize Immigration Enforcement Actions Against Convicted Criminal Aliens (Oct. 1, 2010), *available at* http://www.ice.gov/news/releases/1010/101001desoto.htm. [hereinafter Desoto County News Release].

86,616 undocumented immigrants convicted of crimes.[11] This number includes more than 12,200 "criminal aliens" convicted of serious crimes and over 29,500 "criminal aliens"[12] convicted of less serious crimes.[13] According to ICE, "criminal aliens" are undocumented immigrants convicted of a crime.[14] Undocumented immigrants who are charged with crimes, but not yet convicted, are not considered to be "criminal aliens."[15]

ICE classifies undocumented immigrants convicted of a criminal offense into three categories. Level 1 crimes present the greatest threat and include murder, manslaughter, rape, kidnapping, major drug offenses, and national security crimes.[16] Level 2 crimes present the second greatest threat and include minor property and drug offenses, such as larceny, fraud, burglary, and money laundering. Level 3 crimes include all "other offenses."[17] Level 2 and 3 crimes "account for the majority of crimes committed by aliens."[18]

Though ICE hopes to implement S-Comm nationwide by 2013, the agency is focusing first on "criminal aliens in locations where analysis determines they are most likely to reside."[19] As of June 30, 2011, S-Comm

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[11] U.S. IMMIGR. AND CUSTOMS ENF., NATIONWIDE ACTIVATED JURISDICTIONS (Jun. 30, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf [hereinafter NATIONWIDE ACTIVATED JURISDICTIONS].

[12] "Criminal aliens" is the term ICE uses to describe undocumented immigrants convicted of crimes. I use this ICE term strictly as a term of art.

[13] Desoto County News Release, *supra* note 10.

[14] *Id.*

[15] *Id.*

[16] U.S. IMMIGR. AND CUSTOMS ENF., MEMORANDUM OF AGREEMENT BETWEEN U.S. DEP'T OF HOMELAND SEC.& CUSTOMS ENF. & [STATE IDENTIFICATION BUREAU] TEMPLATE, *available at* http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesmoatemplate.pdf [hereinafter ICE-SIB AGREEMENT].

[17] *Id.*

[18] *Id.*

[19] *Secure Communities Deployment*, U.S. IMMIGR. AND CUSTOMS ENF., http://www.ice.gov/secure_communities/deployment/ (last visited Oct. 19, 2010), *text available at* D.A. King, *Coming Soon to Many Georgia Communities; DHS/ICE Secure Communities Program*, DUSTIN INMAN SOC'Y BLOG (Jan. 18, 2010, 2:39 PM),

was in place in 1,508 of 3,181 jurisdictions in forty-four states and territories.[20] For example, only 1 percent of jurisdictions in Kentucky, 4 percent of jurisdictions in both Pennsylvania and Wyoming, and 5 percent of jurisdictions in Montana had been activated as of June 30, 2011.[21] No jurisdictions in Alaska, Maine, Minnesota, New Hampshire, New Jersey, North Dakota, District of Columbia, or Vermont had been activated as of that same date. By contrast, 100 percent of jurisdictions in Arizona, California, Delaware, Florida, New Mexico, North Carolina, Ohio, Rhode Island, Texas, Virginia, West Virginia, and Wisconsin had been activated as of June 30, 2011.[22]

S-Comm was intended to increase public safety by prioritizing the identification and removal of undocumented immigrants with criminal convictions. S-Comm seeks to achieve this goal by enlisting LLEAs to submit arrestees' fingerprints to the State Identification Bureau (SIB) at the time of each booking.[23] ICE requests that LLEAs submit fingerprints electronically to the Integrated Automated Fingerprint Identification System (IAFIS) as soon as possible during the booking process.[24]

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http://thedustininmansociety.org/blog/?p=2910. Some of the problems that arose since DHS enacted S-Comm may be a consequence of its initial piecemeal implementation of the program. Had ICE rolled out the program nationally at one time, perhaps the highly problematic inconsistencies that counties are grappling with today could have been avoided.

[20] NATIONWIDE ACTIVATED JURISDICTIONS, *supra* note 11.

[21] *Id.*

[22] *Id.*

[23] U.S. IMMIGR. AND CUSTOMS ENF., SECURE COMMUNITIES STANDARD OPERATING PROCEDURES § 2.1 at 3 (Sep. 3, 2009), *available at* http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesops93009.pdf [hereinafter SOP].

[24] *Id.* § 3.1.1, at 7. IAFIS, the "largest biometric database in the world," is a national system available twenty-four hours a day to help solve and prevent crime through fingerprint searches, criminal history, alias, and image databases, and electronic exchange of fingerprints. *Integrated Automated Fingerprint Identification System*, FED. BUREAU OF

The SIB then transmits the fingerprints electronically to the Federal Bureau of Investigation's (FBI) Criminal Justice Information Services Division (CJIS).[25] State participants in the National Fingerprint File Program send fingerprints to CJIS at the time of the individual's initial arrest.[26] CJIS's receipt of the ten fingerprints initiates both IAFIS and United States Visitor and Immigrant Status Indicator Technology (US-VISIT) Automated Biometric Identification System (IDENT) searches.[27] If an IDENT search matches a fingerprint, CJIS automatically sends an Immigration Alien Query to the ICE Law Enforcement Support Center (LESC) in order to verify the individual's criminal history and immigration status.[28] LESC then creates and sends an Immigration Alien Response (IAR) to CJIS and the local ICE Detention and Removal Operations Office (DRO) within four hours of fingerprint submission to IAFIS and IDENT.[29] This entire process takes place before charges have been filed against the immigrant.

After receiving the IAR from the LESC, ICE determines whether to issue a detainer. ICE will file an immigration detainer if the noncitizen in question is charged with a Level 1 offense or if he or she has a Level 1 conviction that could result in removal. ICE files these detainers with the LLEA with custody of the individual at the time of booking.[30] Although ICE claims that S-Comm "prioritizes enforcement action toward the greatest threats to public safety" through the removal of "criminal aliens" convicted of crimes such as homicide, kidnapping, rape, and threatening

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INVESTIGATION, http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis (last visited Nov. 19, 2010).

[25] SOP, *supra* note 23, § 2.1, at 3.

[26] *Id.*

[27] *Id.* § 2.1.1, at 4.

[28] *Id.*

[29] *Id.* § 3.1.6, at 7.

[30] *Id.* § 2.1.5, at 5.

national security (Level 1 offenders), the program permits ICE discretion regarding processing of Level 2 and 3 offenders.[31]

Under S-Comm, only ICE determines the individual's "alienage" and removability after a detainer is issued. ICE makes that determination based on an interview it conducts in person or via telephone or video teleconference;[32] however, an ICE field office will issue detainers, as deemed "appropriate," with the LLEA.[33] If an LLEA releases an undocumented immigrant before ICE issues a detainer, ICE may request information about the individual's location and identification from the LLEA.[34] Pursuant to the immigration detainer, ICE should assume custody of the undocumented immigrant within forty-eight hours (not counting Saturdays, Sundays, or federal holidays) of notification of an immigrant's release. After taking undocumented immigrants convicted of serious criminal offenses into custody, ICE will take "immediate action" to remove them.[35]

According to ICE, "[t]he biometric information sharing capability [involved in S-Comm] takes place at a federal level and happens automatically when a subject's fingerprints are submitted upon booking. This automatic process requires no change to law enforcement's daily

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[31] *Id*. § 1.0, at 3.
[32] *Id*. § 3.2.1., at 8.
[33] *Id*. § 3.1.7, at 8.
[34] *Id*. § 2.1.5, at 5.
[35] *Id*. § 3.2.4, at 8. "Normally, ICE will not remove an alien until pending criminal charges are adjudicated. If ICE wishes to remove an alien whose charges have not been adjudicated, ICE will make all efforts to inform the local LEA, the prosecutor and the court with jurisdiction over the criminal offense on the status of the subject's removal proceedings." *Id*. § 3.2.5.

operations."[36] Further, ICE's former[37] Memorandum of Agreement (MOA) between the Department of Homeland Security (DHS)/ICE and SIBs states:

> This MOA does not affect a state's existing relationship with the FBI CJIS Division. Rather, the MOA builds on and enhances that relationship. Neither the SIB nor any state or local LEA that is subject to this MOA will be responsible for determining an individual's immigration status or whether a particular conviction renders an individual removable pursuant to the INA.[38]

Despite the MOA and a recent directive issued by ICE Director John Morton, ICE requests that LLEAs abide by conditions stated in the immigration detainer.[39] LLEAs must not detain an undocumented immigrant for a period exceeding forty-eight hours. They must inform ICE if the subject is transferred or released, file the detainer in the subject's record or file, allow ICE officers and agents access to detainees, assist ICE in acquiring booking and/or detention information about detainees, comply with CJIS and US-VISIT rules, and include S-Comm in community policing and other outreach activities.[40] In fact, in order to take part in S-Comm and provide DHS with fingerprint data, LLEAs must make changes to their current technology or install new fingerprinting equipment.[41]

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[36] US IMMIGR. & CUSTOMS ENF., BENEFITTING LAW ENFORCEMENT THROUGHOUT THE UNITED STATES (2010), *available at* http://www.ice.gov/doclib/secure-communities/pdf/lea-benefits.pdf.

[37] As of August 2011, ICE will terminate all existing S-Comm MOAs. *See infra* p. 372.

[38] ICE-SIB AGREEMENT, *supra* note 15.

[39] Letter from John Morton, Dir., U.S. Immigr. & Customs Enf. (Aug. 5, 2011), *available at* http://dl.dropbox.com/u/27924754/Sec-Comm%20govlet%208-5-11.pdf.

[40] *Id.*; SOP, *supra* note 23, § 2.2.1–8, at 6.

[41] Kirk Semple, *Confusion Over Program to Spot Illegal Immigrants*, N.Y. TIMES, Nov. 10, 2010, at A26.

III. A NATION OF "SECURE" COMMUNITIES: S-COMM'S EFFECTS

When S-Comm began in 2008, ICE implemented the program in just fourteen LLEA jurisdictions. As of June 30, 2011, forty-seven percent of jurisdictions had applied the program, and DHS is on track to expand the program to all LLEAs across the country by 2013.[42] Fiscal year (FY) 2010 statistics show a 70 percent increase in removal of "criminal aliens" compared to FY 2008.[43] In 2010, S-Comm's implementation resulted in the arrest of 21,000 Level 1 offenders and more than 59,000 "convicted criminal aliens" total.[44] However, ICE's own data suggests that many detainers issued through S-Comm were placed against *noncriminal* individuals or those convicted of Level 2 or 3 crimes.[45] This action is not only in opposition to the program's purpose, but it is also unfair.

S-Comm has been widely criticized across the country by politicians, attorneys, law enforcement officials, and by advocates of immigrant rights, human rights, and domestic violence victims.[46] Some immigrant rights advocates analogize S-Comm to a nationwide version of Arizona's SB 1070;[47] S-Comm puts benign offenders—for example, those who miss a

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[42] NATIONWIDE ACTIVATED JURISDICTIONS, *supra* note 11.
[43] *Id.*
[44] *Secure Communities Deployment*, *supra* note 19.
[45] *See* US IMMIGR. & CUSTOMS ENF., SECURE COMMUNITIES: IDENT/IAFIS INTEROPERABILITY, MONTHLY STATISTICS THROUGH APRIL 30, 2011 (May 23, 2011), *available at* http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2011-feb28.pdf.
[46] *See* AMERICAN FRIENDS SERVICE COMMITTEE, PROJECT VOICE NEW ENGLAND, ET AL., RESTORING COMMUNITY: A NATIONAL COMMUNITY ADVISORY REPORT ON ICE'S FAILED "SECURE COMMUNITIES" PROGRAM (Aug. 2011), *available at* http://altopolimigra.com/documents/FINAL-Shadow-Report-regular-print.pdf.
[47] S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010); *see, e.g.*, Gabriel J. Chin et al., *Arizona Senate Bill 1070: A Preliminary Report on Legal Issues Raised by Arizona's New Statute Regulating Immigration*, 38 FORDHAM URB. L.J. 1, 35 (2010) (pinpointing the central legal issues raised by Arizona S.B. 1070); *see, e.g.*, Mary McThomas, *Federalism, States' Rights and Immigration Policy* (Am. Political Sci. Ass'n Working Paper 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1641907.

stop sign—at risk for deportation. Additionally, it implicitly encourages racial profiling while breaking down trust between immigrant communities and LLEAs.

To determine if S-Comm in its current iteration carries out its stated goal, it is necessary to examine the program's implementation. In February 2010, the Center for Constitutional Rights (CCR), the National Day Laborer Organizing Network (NDLON), and the Benjamin Cardozo Immigration Justice Clinic filed a Freedom of Information Act (FOIA) request for ICE documents concerning S-Comm.[48] In April 2010, the three groups filed a lawsuit in the Southern District of New York "due to the urgent public need for the requested records."[49] ICE responded by releasing important records, including cumulative data about S-Comm. Information released in response to CCR, NDLON, and Cardozo's FOIA request revealed that 79 percent of those deported under S-Comm had no criminal record or had been arrested or detained for low-level offenses.[50] As of June 30, 2010, 32 percent of individuals given over to ICE custody via S-Comm were noncriminals—up from 22 percent in FY 2009[51]—and 26 percent of S-Comm deportees also had no criminal records.[52] However, this number varied greatly by county and by state. For example, 82 percent of individuals in Travis County, Texas, and 54 percent of individuals deported through S-Comm in

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[48] Ctr. for Const. Rights et al., *Briefing Guide to "Secure Communities"—ICE's Controversial Immigration Enforcement Program New Statistics and Information Reveal Disturbing Trends and Leave Crucial Questions Unanswered* (Aug. 2, 2010), *available at* http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/NDLON_FOIA_Briefing%20guide.final.pdf [hereinafter CCR *Briefing Guide*].

[49] *National Day Laborer Organizing Network (NDLON) v. US Immigration and Customs Enforcement Agency (ICE)*, CTR. FOR CONST. RIGHTS, http://ccrjustice.org/secure-communities (last visited Oct. 21, 2011).

[50] CCR *Briefing Guide*, *supra* note 48.

[51] *Id*.

[52] *Id*.

Maricopa County, Arizona, had no criminal records.[53] ICE's own data indicates that ICE and LLEAs are not implementing S-Comm uniformly, nor as it was intended.

Detention and deportation of noncriminal, undocumented immigrants are just two of the risks posed by S-Comm. On June 17, 2011, ICE attempted to address concerns raised by immigrant and domestic violence victim activists.[54] ICE now encourages ICE officers, attorneys, and special agents to exercise their prosecutorial discretion and refrain from asserting the "full scope" of their authority to enforce immigration policy when appropriate.[55] In particular, ICE encourages favorably exercising prosecutorial discretion toward survivors of domestic violence or other serious crimes, as well as witnesses and plaintiffs in litigation regarding violations of civil rights or liberties.[56] However, these changes to S-Comm's implementation may prove to be inadequate. According to Thomas A. Saenz, Mexican American Legal Defense and Education Fund president and general counsel, ICE's reforms "amount to little more than lipstick on a pig, except that this is a snarling, vicious, and rabid pig that will continue to run rampant and inflict serious damage on families and communities across the nation."[57] Further,

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[53] *Id*. Maricopa County's high number may have been a result of the county's sheriff, who "is notorious for staging indiscriminate immigration raids." Editorial, *Immigration Bait and Switch*, N.Y. TIMES, Aug. 18, 2010, at A22.

[54] *See* Memorandum Regarding Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs, from John Morton, Dir., US Immigr. & Customs Enf., to all Field Office Directors, Special Agents in Charge, and Chief Counsel (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf [hereinafter Morton I]; *see also* Memorandum Regarding Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, John Morton, Dir., US IMMIGR. & CUSTOMS ENF. (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf [hereinafter Morton II].

[55] *See* Morton II, *supra* note 54.

[56] *Id*.

[57] *MALDEF Response to Secure Communities Program Changes*, MALDEF, http://www.maldef.org/news/releases/secure_communities_program_changes_response/.

the reform is likely premature because it was announced before ICE and the inspector general adequately reviewed the program. California Assemblymember Tom Ammiano proposes that ICE should suspend S-Comm and wait for the inspector general report so that they may develop better policies.[58] Described below are a number of other concerns, as well as comments on ICE's efforts to address such concerns.

A. Reduction in the Reporting of Crimes

S-Comm is a "source of anxiety"[59] for LLEAs, cities, and counties wanting to maintain a clear distinction between federal immigration enforcement and local law enforcement. Because S-Comm has only recently been deployed on a large scale, it remains unclear what the impact on local law enforcement practices will be. Negative impact in communities with large immigrant populations is of particular concern.

If immigrant communities view local law enforcement officers as enforcers of immigration law, LLEAs may lose the confidence of immigrants.[60] Law enforcement agencies rely on this confidence in order to receive compliance with the law and during criminal proceedings.[61] According to Charlie Beck, Los Angeles chief of police, "[S-Comm causes] a divide where there's a lack of trust, a lack of reporting, a lack of

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[58] Press Release, Tom Ammiano, Assemblymember, Cal. State Assembly, "Cosmetic 'Reforms' to S-Comm More Spin than Substance" (June 17, 2011), *available at* http://asmdc.org/members/a13/news-room/press-releases/item/2935-cosmetic-reforms-to-s-comm-more-spin-than-substance [hereinafter *Cosmetic Reforms*].

[59] Semple, *supra* note 41, at A30. For an illustration of local law enforcement's anti-immigration stance in the rural South, *see* Lisa R. Pruitt, *Latina/os, Locality, and Law in the Rural South*, 12 HARV. LATINO L. REV. 135, 159 (2009).

[60] Interview with Kevin Johnson, Dean, UC Davis Sch. of Law, in Davis, CA (Oct. 13, 2010) [hereinafter Dean Johnson Interview].

[61] *Id*.

cooperation with police."[62] If LLEAs expand their duties to include immigration matters, undocumented immigrants will likely feel uncomfortable reporting crime, "thus encouraging criminals to further victimize [immigrant] communities and spread into the community at large."[63] Criminals may target undocumented immigrants if they know that as victims, those immigrants and their communities are unlikely to cooperate with police who are known to be involved in reporting undocumented immigrants to immigration officials.[64] Further, immigrant communities are closely knit. Once information circulates that arrest, even without conviction, can lead to deportation, there may be a rise in resistance to or evasion of arrest and an imposition of "new layers of fear and isolation" on immigrants.[65] Unfortunately, ICE's June 2011 changes do not specifically address this concern, possibly because DHS and ICE take the position that "it remains the responsibility of each jurisdiction to abide by its constitutional obligation to avoid discriminatory policing."[66]

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[62] Leslie Berenstein Rojas, *LAPD Chief on Secure Communities: "It Tends to Cause a Divide,"* MULTI-AMERICAN (June 3, 2011), http://multiamerican.scpr.org/2011/06/lapd-chief-on-secure-communities-it-tends-to-cause-a-divide/ (quoting an interview by Patt Morrison with Charlie Beck, Chief, L.A. Police Dep't, in Los Angeles, Cal. (June 2, 2011), *available at* http://www.scpr.org/programs/patt-morrison/2011/06/02/19343/ask-the-chief-update-with-lapds-top-cop-charlie-be).

[63] Gail Pendleton, *Local Police Enforcement of Immigration Laws and its Effects on Victims of Domestic Violence*, AM. BAR ASS'N COMM'N ON DOMESTIC VIOLENCE (2010), *available at* http://www.nationalimmigrationproject.org/legal_archives/Archive_Local%20Enforcement%20and%20Domestic%20Violence-1.doc.

[64] Anne B. Chandler, *Why is the Policeman Asking for My Visa? The Future of Federalism and Immigration Enforcement*, 15 TULSA J. COMP. & INT'L L. 209, 233 (2008).

[65] *Id*. *See also* Editorial, *supra* note 53.

[66] Memorandum from Margo Schlanger, Officer for Civil Rights & Civil Liberties, Dep't of Homeland Sec. & Gary Mead, Exec. Assoc. Dir., US Immigr. & Customs Enf., To all ICE and CRCL Personnel (June 14, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/complaintprotocol.pdf.

B. Explicit or Implicit Racism

According to ICE, S-Comm *reduces* ethnic and racial profiling.[67] However, data obtained via the CCR/NDLON/Cardozo FOIA request suggests that S-Comm actually contributes to and conceals racial profiling.[68] S-Comm enables willing state and local law enforcement officials to stop and arrest individuals based upon their appearance. Those suspected to be undocumented can be arrested and deported.[69] Because S-Comm sends fingerprints to ICE at the booking stage, rather than at the charging or conviction stage, ICE is notified almost instantaneously after a law enforcement official arrests an undocumented immigrant. This facet of the program may encourage LLEAs to arrest individuals they deem "foreign-looking" in order to send their fingerprints to ICE.[70] Aware of this possibility, ICE uploaded a briefing to YouTube on June 20, 2011 that includes a warning to LLEAs that decisions to arrest or book should not be

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[67] CCR *Briefing Guide*, *supra* note 48.

[68] CCR *Briefing Guide*, *supra* note 48. *See also* Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1076 (April 2010) (discussing the long-standing use of racial profiling by law enforcement and two Supreme Court cases that, in effect, permit such profiling) ("Unfortunately, the events of September 11, 2001, noticeably slowed the movement to end racial profiling. To the contrary, the US government relied heavily on racial, national origin, and religious profiles in the newly proclaimed 'war on terror.' The comeback of racial profiling and its subsequent retrenchment reveals the difficulties of racial minorities relying on the political process in pursuit of social justice and suggests the need for different minority groups to work together politically in order to eliminate racial profiling.").

[69] CCR *Briefing Guide*, *supra* note 48.

[70] *See, e.g.*, *ACLU Statement*, *supra* note 3; *see also* Bill Ong Hing, *Understanding SB1070 From the Lens of Institutionalized Racism and Civil Rights*, RACE EQ. PROJECT E-NEWSL. (Legal Servs. of N. Cal., Inc., Sacramento, Cal.), Sept. 30, 2010, http://www.equity.lsnc.net/understanding-sb1070-from-the-lens-of-institutionalized-racism-and-civil-rights/; Jason G. Idilbi, *Local Enforcement of Federal Immigration Law: Should North Carolina Communities Implement 287(g) Authority?*, 86 N.C. L. REV. 1710, 1725–28 (2008).

based on perceptions of race, ethnicity, or ability to speak English.[71] Any decline in the amount of racial profiling related to S-Comm has not yet been documented.

Though law enforcement officers' motivations may not be entirely clear, the following story illustrates the possibility that officers may stop individuals based on appearance. Felipe, a twenty-nine-year-old Mexican national who has lived in the United States since he was four years old, has no ability to become a US citizen unless he marries a US citizen.[72] One afternoon in early 2010, two police officers pulled him over while he was driving home from work in Santa Barbara, California. Felipe was not speeding. When he asked the officers why he had been stopped, they did not answer his question.

After asking for Felipe's license and registration, the officers learned that the car was insured and that Felipe did not have a state-issued driver's license, which is not a statutorily deportable offense. He had with him a Mexican driver's license and a passport. Stating that both the license and passport were clearly fakes, the officers arrested Felipe for felony possession of fraudulent documents. Felipe asked the officers if he could call someone to get another form of identification, but they refused to let him. The officers also said that they had received a report of a car like Felipe's in a nearby city and suspected him of transporting drugs in his car. Felipe consented to a search, and the officers found nothing. Felipe was taken to the county jail where, during the booking process, officers asked

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[71] ICE Secure Communities, *Secure Communities Briefing #1: What Law Enforcement Needs to Know*, YOUTUBE (June 20, 2011), http://www.youtube.com/watch?v=jUdeqg5TpHA&feature=youtube [hereinafter *Briefing #1*].

[72] Interview with anonymous immigration advocate in Davis, CA. This interview was conducted under a mutual agreement of confidentiality to protect both the advocate and "Felipe." (Feb. 22, 2011) (names and other details have been changed in order to protect anonymity).

him about his immigration status. When he refused to answer, the officers said they had already fingerprinted him and there was no record of his immigration, so they "knew" he was undocumented.

The officers told Felipe that they were going to detain him until the next day, when ICE would pick him up. They said they had placed an ICE hold on him, so it would be best if he simply disclosed his status to the police because ICE was going to deport him regardless. Fortunately for Felipe, he had attended community education seminars for immigrants and understood some of what the police were telling him. Felipe is also a fluent English speaker, whereas many immigrants who are detained by police do not speak English and are not assisted by a translator. While he was interrogated and detained, Felipe felt like the officers were making fun of him. It was not clear what they planned to do with Felipe; they said things to each other like, "make it the maximum; he's not getting out anyway."

When Felipe's mother called the jail and asked for his charges, the officer said he could not disclose them because of Felipe's ICE hold. As a result, Felipe's mother could not post bail. Felipe's cousin learned of his arrest and immediately drove to the jail, where a different officer told her she could post a $20,000 bail. Felipe's cousin was able to get him out on bail thirty minutes before ICE arrived the following day. Felipe retained an immigration attorney—in addition to a public defender—and the prosecutor dropped the fraudulent document charges at his arraignment. The only remaining charge was for driving without a license.

Felipe's account of his arrest and detention illustrates what may have been a racially—or ethnically—motivated stop. Had Felipe not had the help of his cousin or been unable to post bail, he would have been torn away

from his family and deported for a nonviolent crime. Unfortunately, Felipe's story is not unique.[73]

Though LLEAs should be responsible for discriminatory policing, DHS's Office for Civil Rights and Civil Liberties (CRCL) and ICE offer a complaint procedure for state and LLEA enforcement of S-Comm.[74] Through the complaint process after an investigation, CRCL will provide recommendations, including the referral of matters to authorities such as police oversight bodies or state attorneys general, identification of LLEA officers who may require disciplinary investigation, and increased training for officers on civil rights issues.[75] However, unlike 287(g), through which state and local law enforcement agencies can partner with ICE through an MOA, "ICE need not have a formal partnership with the local law enforcement agencies whose arrests trigger an information flow to ICE through [S-Comm]."[76] Consequently, CRCL may not have a "compulsory process" for complainants, and may not have the ability to require state and local law enforcement agencies to comply with CRCL/ICE investigations. According to ICE and CRCL,

> [the complaint investigation] process is useful to ensure that DHS's activities do not function as a conduit or incentive for discriminatory policing, but it is important to note (and ICE will state, if asked) that DHS/ICE oversight of Secure Communities does not put DHS or ICE in a position to superintend all law

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[73] For other stories, see *Costs and Consequences: The High Price of Policing Immigrant Communities*, ACLU OF N. CAL. (Feb. 2011), http://www.aclunc.org/docs/criminal_justice/police_practices/costs_and_consequences.pdf.
[74] *See, e.g.*, Schlanger & Mead, *supra* note 66.
[75] *Id*.
[76] *Id*.

> enforcement conduct in jurisdictions where Secure Communities has been activated.[77]

ICE further states that civil rights and/or community policing mechanisms that may aide in fulfilling LLEAs' responsibility to abide by the constitutional obligation to avoid discriminatory policing have "nothing to do with Secure Communities or immigration enforcement. Accordingly, DHS will not discourage development or use of such mechanisms."[78] The position ICE and CRCL seemingly take regarding discriminatory practices suggests that government entities may either turn a blind eye to such practices or may choose not to regulate states or LLEAs with discriminatory practices. Additionally, CRCL consists of just six full-time employees and has a FY 2011 budget of $1.2 million, which is less than one ten-thousandth of DHS's budget for 2011. With minimal capacity and limited resources, CRCL lacks the ability to oversee the roughly 1,508 jurisdictions in which S-Comm is activated. The Office would be stretched thin by handling complaints from the 3,181 jurisdictions nationwide in which ICE plans to implement the program.[79]

C. Deportation of Individuals Convicted of Nonviolent Crimes

As stated above, S-Comm leaves the fates of Level 2 and Level 3 offenders up to the discretion of ICE officials, and ICE statistics show that the majority of individuals deported under S-Comm were arrested for allegedly committing nonviolent crimes.[80] For example, in Travis, Texas,

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[77] *Id*.
[78] *Id*.
[79] *See* DEP'T OF HOMELAND SEC., FY 2011 BUDGET IN BRIEF, *available at* http://www.dhs.gov/xlibrary/assets/budget_bib_fy2011.pdf.
[80] CCR *Briefing Guide*, *supra* note 48; *see also* Teresa A. Miller, *Lessons Learned, Lessons Lost: Immigration Enforcement's Failed Experiment with Penal Severity*, 38 FORDHAM URB. L.J. 217 (2010) (exploring how immigration enforcement followed the

82 percent of S-Comm deportations are of noncriminals, while in San Diego, California, the figure is 63 percent.[81] These deportations may cause more harm than good because undocumented immigrants play an integral role in the US economy.[82] Many undocumented people live their lives for years as law-abiding workers, occupying jobs many US citizens would not.[83] If S-Comm's stated goal is deporting "criminal aliens," these numbers suggest that ICE is not implementing the program in ways that meet that goal.

ICE has made efforts to provide guidance for its officials making deportation decisions, but these officials are still allowed full discretion. In June 2011, ICE's director, John Morton, issued a memorandum to ICE personnel to provide direction as to the use of prosecutorial discretion to ensure that immigration enforcement is focused on ICE's priorities.[84] Among the factors to be considered when exercising prosecutorial discretion are a person's criminal history, whether an individual poses a clear risk to national security, and whether an individual has an "egregious record" of immigration violations.[85] However, Morton's memo concludes by stating that a favorable exercise of discretion by ICE personnel is not a right, and that nothing in the memo "should be construed to prohibit the

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"tough on crime" movement in the criminal justice system and contributed to the over-incarceration of immigrants).

[81] CCR *Briefing Guide*, *supra* note 48.

[82] *See* KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS (New York Univ. Press 2007); *see also* Gordon H. Hanson, COUNCIL ON FOREIGN RELATIONS, *The Economic Logic of Illegal Immigration*, (April 2007), http://www.google.com/url?sa=t&source=web&cd=2&ved=0CCMQFjAB&url=http%3A%2F%2Fwww.cfr.org%2Fcontent%2Fpublications%2Fattachments%2FImmigrationCSR26.pdf&ei=5849TqfwGO6rsAKTs9gD&usg=AFQjCNEH_n8oj23aWPfpThhDvPp57hBzPA.

[83] *Id*.

[84] *See* Morton II, *supra* note 54.

[85] *Id*.

apprehension, detention, or removal of any alien unlawfully in the United States or to limit the legal authority of ICE or any of its personnel to enforce federal immigration law."[86] Because ICE personnel possess such broad discretion, they may still choose to exercise it in favor of deporting more individuals, rather than to focus solely on the most serious offenders.[87]

D. Wrongful Deportation

ICE files tens of thousands of cases in immigration courts each year and many are either thrown out or declared futile, creating a backlog in the courts and further highlighting ineffective government immigration reforms.[88] Over the past five years, immigration court judges (IJs) terminated almost ninety-five thousand cases because there were no grounds for removal.[89] IJs granted relief in more than one hundred fifty thousand cases during that same period of time. In total, nearly two hundred fifty thousand individuals were affected by futile ICE filings in the FY 2006–10 period,[90] and nearly 31 percent of ICE requests for deportation were rejected during the last quarter of FY 2010, up from roughly 25 percent the previous year.[91] In FY 2010, immigration courts in Los Angeles, Miami, New York City, and Philadelphia turned down more than half of ICE removal requests.[92]

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[86] *See* ICE, Letter from John Morton, *supra* note 39.
[87] For more information regarding prosecutorial discretion in immigration law, *see Understanding Prosecutorial Discretion in Immigration Law*, IMMIGR. POL'Y CTR. (June 29, 2011), http://www.immigrationpolicy.org/just-facts/understanding-prosecutorial-discretion-immigration-law.
[88] *See* TRAC REPORTS, INC., *ICE Seeks to Deport the Wrong People*, (Nov. 9, 2010), http://trac.syr.edu/immigration/reports/243/.
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id*.

These statistics demonstrate that governmental efforts to remove undocumented immigrants can be shockingly ineffective. Some failures result from poorly designed immigration reform programs like S-Comm. In fact, such programs may undermine public faith in the government's ability to implement effective changes,[93] and may be costly and ineffective at both the law enforcement and court levels. As such, this is another area where both ICE and immigrants would benefit from the use of prosecutorial discretion. Such discretion would help unclog the overburdened immigration court system, lighten caseloads for ICE attorneys and immigrant advocates alike, and prevent unnecessary removal proceedings and deportations.

E. Impact on Domestic Violence Survivors and Their Families

Past repercussions of local immigration enforcement on noncitizen domestic violence survivors suggest that S-Comm will also have a severely detrimental effect on this vulnerable population.[94] The negative impacts of local immigration enforcement on survivors of domestic violence may manifest in several ways. Most significantly, survivors of domestic violence are occasionally arrested wrongfully as the "primary aggressor" in a relationship, or through dual arrests.[95] These survivors, already traumatized,

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[93] *Id.*; *see also* Sam Dolnick, *Finished Probation in '80s, but Now Facing Deportation*, N.Y. TIMES CITY ROOM BLOG (Oct. 29, 2010, 11:37 AM), http://cityroom.blogs.nytimes.com/2010/10/29/given-probation-in-80s-but-now-facing-deportation/?ref=todayspaper.

[94] COLO. COALITION AGAINST DOMESTIC VIOLENCE, *Secure Communities Program Fact Sheet*, (Sept. 2010) (on file with author) [hereinafter COLO. COALITION Fact Sheet]; *Fact Sheet: Intersection of Domestic Violence and the Secure Communities Program* (Sept. 2010) (on file with author); *see also* Pendleton, *supra* note 63.

[95] COLO. COALITION Fact Sheet, *supra* note 94; *see also* Lisa R. Pruitt, *Place Matters: Domestic Violence and Rural Difference*, 23 WIS. J.L. GENDER & SOC'Y 347, 403 (2008) (discussing racial and ethnic barriers preventing immigrants and other women from accessing law enforcement and other resources in rural areas); Ashley Arcidiacono, Comment, *Silencing the Voices of Battered Women: How Arizona's New Anti-*

may then be detained by ICE. Secondly, domestic violence offenders often report or threaten to report their victims to ICE or the police as a method of further victimization.[96] Offenders may separate or threaten to separate survivors from their children through deportation or arrest, leaving children in the abusers' custody, which may be physically or emotionally harmful to them.[97] S-Comm provides an easy method for offenders to engage in such behavior.

Survivors of domestic violence are already an at-risk group with considerable inhibitions about calling law enforcement, and S-Comm may further deter them from attempting to take protective measures.[98] If their communities equate police with ICE agents, immigrant survivors of abuse will hesitate to call the police to notify them.[99] This will also inhibit domestic violence survivors from taking advantage of protective forms of immigration relief like the Violence Against Women Act (VAWA)[100] that might help them gain independence from their abusers.[101] Additionally, immigrant domestic violence survivors may not wish to report abuse if they

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Immigration Law "SB1070" Prevents Undocumented Women from Seeking Relief Under the Violence Against Women Act, 47 CAL. W. L. REV. 173 (2010) (analyzing the effects of several provisions of Ariz. S.B. 1070 that negatively affect battered undocumented women); Michelle Decasas, Comment, *Protecting Hispanic Women: The Inadequacy of Domestic Violence Policy*, 24 CHICANO-LATINO L. REV. 56, 73 (2003) (discussing the effects of state domestic violence mandatory arrest policies on undocumented and immigrant women).

[96] *See* BRENDA K. UEKERT ET AL., THE NAT'L CTR. FOR STATE COURTS, SERVING LIMITED ENGLISH PROFICIENT (LEP) BATTERED WOMEN: A NATIONAL SURVEY OF THE COURTS' CAPACITY TO PROVIDE PROTECTION ORDERS 21 (2006), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/216072.pdf.

[97] *Id.*

[98] *See* Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 870 (2009) ("The reluctance of victims to report and testify about domestic violence makes domestic violence one of the hardest crimes to prosecute.").

[99] *See* Idilbi, *supra* note 70, at 1729–33.

[100] 18 U.S.C. § 2261 (2006).

[101] *See* Pendleton, *supra* note 63.

believe that someone will turn their abusers in to ICE.[102] S-Comm currently has no protections in place for domestic violence survivors at the arrest stage, thus providing no safety net for survivors who police arrest simultaneously with their absuers.[103] Without such protections, law enforcement cannot adequately respond to all domestic violence crimes.[104]

As evidenced by proposed changes in Morton's memos, ICE took note of S-Comm's potential to harm survivors of domestic violence. Both the memo addressing prosecutorial discretion generally and the memo addressing prosecutorial discretion in cases involving certain survivors, witnesses, and plaintiffs address the need for particular care and consideration in the cases of domestic violence survivors. In these cases, ICE personnel should "exercise all appropriate prosecutorial discretion to minimize any effect that immigration enforcement may have on the willingness and ability of victims, witnesses, and plaintiffs to call police and pursue justice."[105] Absent special circumstances, it is against ICE policy to initiate removal proceedings against individuals known to be immediate crime survivors or witnesses.[106] ICE further reiterates that there are provisions of the Trafficking Victims Protection Act (TVPA)[107] and VAWA that provide protections for victims of domestic violence and other crimes. Despite these reminders, immigrant rights advocacy groups remain

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[102] *See* Decasas, *supra* note 94 at 72.
[103] For suggested protections, see *infra* p. 384.
[104] COLO. COALITION Fact Sheet, *supra* note 94; *see also* Shankar Vedantam, *Call for Help Leads to Possible Deportation for Hyattsville Mother*, WASH. POST, Nov. 1, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/11/01/AR2010110103073.html. For suggested steps for police and prosecutors to take to encourage immigrant community members to report domestic violence, *see* Pendleton, *supra* note 63 at 4–5.
[105] Morton I, *supra* note 54.
[106] *Id*.
[107] Victims of Violence and Protection Act of 2000, Pub. L. No. 106-386, §§101–13, 114 Stat. 1464 (codified as amended in scattered sections of the U.S.C.).

skeptical that ICE and LLEAs will exercise proper discretion and enforcement.[108]

F. Detention for More than Forty-Eight Hours

An ICE detainer allows an LLEA to maintain custody of an individual after local jurisdiction ends.[109] After ICE issues a detainer, transfer of custody from LLEAs to ICE is not instantaneous. In theory, once ICE issues a detainer, a locality should not hold an individual for more than forty-eight hours before he or she is transferred to ICE.[110] In practice, however, LLEAs often unlawfully detain individuals until after the detainer expires.[111] Unfortunately, unlike in criminal cases, indigent individuals in civil matters do not have a recognized right to government-funded counsel.[112] Many individuals who are held on detainers are not aware that they have recourse for wrongful detention, or even that LLEAs are detaining them unlawfully.[113] ICE detainers also place administrative burdens on LLEAs

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[108] Brittney Nystrom, *Cosmetic Changes Are Not Enough: Secure Communities Program Needs Sweeping Reform*, IMMPOLITIC BLOG (July 19, 2011), http://www.immigrationforum.org/blog/display/cosmetic-changes-are-not-enough-secure-communities-program-needs-sweeping-r/.

[109] 8 C.F.R. § 287.7 (2010) ("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, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.").

[110] *Id.*

[111] In Sacramento County, for example, ICE sometimes takes more than forty-eight hours to pick up detainees. In fact, one individual in a Sacramento detention facility had been detained—as of March 2011—since September 2010 due to a pending ICE hold. Telephone Interview with Jason Ramos, Deputy, Media Relations, Sacramento County Sheriff (Feb. 16, 2011) [hereinafter Ramos Interview].

[112] Immigration and Nationality Act (INA) of 1952 § 240(b)(4)(a), 8 U.S.C. § 1229(a)(4)(a) (2006).

[113] IMMIGR. POLICY CTR., AM. IMMIGR. COUNCIL, *Immigration Detainers: A Comprehensive Look*, (Feb. 17, 2010), http://www.immigrationpolicy.org/just-facts/immigration-detainers-comprehensive-look. Some inmates held under detainer for longer than forty-eight hours have been fortunate enough to obtain damages; *see, e.g.*,

and expose them to potential civil liability for illegal arrests or for detaining individuals for unlawful periods.

In June 2011, ICE attempted to address the issue of prolonged detention by crafting a revised detainer form, which ICE now sends to LLEAs to emphasize that state and local authorities must not detain an individual for more than forty-eight hours.[114] The new form requires that LLEAs provide arrestees with a copy, which notifies the arrestee that he or she should not be detained beyond forty-eight hours.[115] The form provides the phone number for the ICE Joint Intake Center, which arrestees may call if they have a complaint relating to the detainer or civil rights or civil liberties violations.[116] ICE also plans to release a YouTube video briefing on ICE detainers, which may elaborate on proper compliance with detainers.[117]

If ICE is able to ensure that LLEAs comply with the forty-eight hour maximum detention, and if ICE follows through with investigations of arrestees' complaints, the agency may see some improvement in this area. However, in localities with strained budgets and overcrowded detention centers, LLEA vigilance in complying with custody limitations will likely not be satisfactory.

Jacqueline Stevens, *Deported New York City Resident Alleging Unlawful Detention Wins $145,000 Settlement from NYC and So Can You!*, STATES WITHOUT NATIONS BLOG (Sept. 9, 2009, 6:05AM), http://stateswithoutnations.blogspot.com/2009/09/deported-new-york-city-resident.html; Third Amended Complaint, Cecil O. Harvey v. City of New York, et al., No. 07 Civ. 0343 (NG)(LB) (E.D.N.Y. Oct. 30, 2008), *available at* http://www.lawso.ucsb.edu/faculty/jstevens/113/HarveyComplaint1008.pdf.

[114] DEP'T OF HOMELAND SEC., IMMIGRATION DETAINER—NOTICE OF ACTION (June 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf.

[115] *Id.*

[116] *Id*.

[117] *See Briefing #1*, *supra* note 71.

G. Improper Implementation

Dealing with immigration "crime" is a matter distinct from detecting traffic violations or handling serious crimes such as robbery or murder. Most regulations governing traditional law enforcement are significantly less complex than immigration laws.[118] State law enforcement officials are not likely to receive special training in immigration enforcement, which puts legal immigrants at risk for being mistaken as undocumented.[119] Further, ICE iterates time and again that S-Comm places no new burden on LLEAs. In fact, when LLEAs take on the burden of immigration enforcement, resources traditionally available for normal crime prevention are no longer at LLEAs' disposal.[120]

Neither DHS nor Congress oversees S-Comm's implementation satisfactorily,[121] though greater oversight may arise after ICE's June 2011 changes to the program. In 2010, the ACLU requested that the DHS Office of Inspector General audit the program for racial profiling and other abuses, as well as compliance with ICE's priorities.[122] Beginning in June 2011, ICE and CRCL started examining S-Comm data to identify LLEAs that may engage in "improper police practices," in an effort to improve S-Comm's implementation.[123] Also in June 2011, DHS Secretary Janet Napolitano

[118] *See* Chandler, *supra* note 64, at 233.
[119] *See id.*
[120] *See* Petition by Nat'l Day Laborer Org. Network to Sec'y Napolitano, Dep't of Homeland Sec., http://action.altoarizona.com/p/dia/action/public/?action_KEY=4383 (last visited Dec. 12, 2011).
[121] *See ACLU Statement*, *supra* note 3.
[122] *See id.*
[123] DEP'T OF HOMELAND SEC., OFF. CIV. RTS. CIV. LIBERTIES, *Overview of CRCL/ICE Quarterly Statistical Monitoring of Secure Communities* (last revised Dec. 14, 2011), http://www.hsdl.org/?abstract&did=682235; DEP'T OF HOMELAND SEC., *Secure Communities: Statistical Monitoring*, (last revised Nov. 16, 2011), http://www.ice.gov/doclib/secure-communities/pdf/statisticalmonitoring.pdf [hereinafter *Statistical Monitoring*].

created the Task Force on Secure Communities,[124] a subcommittee of the Homeland Security Advisory Council (HSAC).[125] The task force released its findings and recommendations in September 2011, including criticism of S-Comm's failure to adequately target serious offenders and reduce confusion in the program's implementation.[126]

While greater federal government oversight might address some of the detrimental effects of S-Comm, the federal government may not have the authority to enforce the program. The following section considers the appropriate roles of federal and local governments in immigration regulation and enforcement—and whether the federal government has that authority.

IV. IMMIGRATION IS NO LONGER AN EXCLUSIVELY FEDERAL ISSUE: FEDERALISM AND THE AUTHORITY TO IMPLEMENT AND ENFORCE IMMIGRATION REFORM

The Tenth Amendment of the US Constitution reserves powers not expressly delegated to the federal government for the states.[127] Although the power to regulate immigration does not appear explicitly in the Constitution, it is generally understood that this power is reserved for the

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[124] Notably, five members of the nineteen-member task force resigned in disagreement with the rest of the committee, including a retired police chief and union members. Elise Foley, *Secure Communities Task Force Releases Recommendations, Five Members Resign in Disagreement*, HUFFINGTON POST, Sept. 16, 2011, http://www.huffingtonpost.com/2011/09/16/secure-communities-task-force_n_966318.html.

[125] DEP'T OF HOMELAND SEC., TASK FORCE ON SECURE COMMUNITIES, FINDINGS AND RECOMMENDATIONS 4 (Sept. 2011), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/SComm%20Task%20Force%20Report%20091611.pdf [hereinafter TASK FORCE].

[126] *Id*. at 11–14.

[127] U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

federal government under the "Naturalization Clause"—Article I, Section 8, Clause 4 of the Constitution.[128] Because the power of immigration regulation and enforcement is set aside for the federal government, the federal government cannot co-opt state resources for enforcement.

During the early 1990s, the federal government crossed the line separating state and federal powers. In 1993, Congress enacted the Brady Handgun Violence Prevention Act (Brady Act),[129] amending the 1968 Gun Control Act.[130] The Brady Act called for interim provisions that instructed local law enforcement officials to participate in background checks required under the Gun Control Act.[131] The federal government enlisted chief law enforcement officials (CLEOs) in administering federal laws, a responsibility that belongs to the executive branch.[132] On *certiorari*, in *Printz v. United States*, the US Supreme Court held that the Brady Act's imposition of a background check requirement on CLEOs was

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[128] The clause states, "Congress shall have Power . . . To establish a uniform Rule of Naturalization." U.S. CONST. art. I § 8, cl. 4. This clause is problematic because federal immigration law addresses much more than just naturalization. *See* Chandler, *supra* note 64, at 210. Another potential call for state and local immigration enforcement may be INA § 103(a)(10). That regulation grants the Attorney General (AG) the power to authorize, but not to *compel*, state and local officers to enforce immigration law if he or she determines that an "actual or imminent mass influx of aliens arriving . . . presents urgent circumstances requiring an immediate Federal response." 8 U.S.C. § 110 (2010). If the AG concludes that there is such an influx, he or she "may authorize any State or local law enforcement officer, with the consent of the head of the department, agency, or establishment under whose jurisdiction the individual is serving, to perform or exercise any of the powers, privileges, or duties conferred or imposed by this Act or regulations issued thereunder upon officers or employees of the Service." *Id*. For a history of immigration in North America, *see* James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 35 (2010).

[129] Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993).

[130] Gun Control Act of 1968, 18 U.S.C. § 922 (2011).

[131] Printz v. United States, 521 U.S. 898, 904 (1997).

[132] *Id.*

unconstitutional.[133] The Court also held that the law improperly co-opted state officers to enforce federal regulations and eroded the system of "dual sovereignty," undermining the separation of powers.[134] This dual sovereignty enables states to retain autonomy, even though many powers are reserved to the federal government.[135]

Further, *Printz* prohibits the federal government from ordering state and local governments to perform certain tasks.[136] In *Printz*, the government described the executive branch's historical use of state executive officers to administer federal programs. This description noted that the first Congresses enacted statutes requiring state courts to record citizenship applications, register aliens pursuing naturalization, issue certificates of registry, and send to the secretary of state summaries of such applications and other naturalization records.[137] *Printz*'s progeny stated that the executive branch imposed these obligations with the states' consent and could not be enforced without it.[138] Judges may enforce federal law; Congress, however, is bound by the Constitution and cannot force state officers to carry out federal mandates, even for "limited, non-policymaking help in enforcing [such] law[s]."[139]

In the majority opinion of *Printz*, Justice Scalia cited *New York v. United States* for the proposition that Congress cannot require states to enforce or enact a federal regulatory program.[140] *Printz* expanded that prohibition by

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[133] *Id*. at 935.
[134] *Id*.
[135] *Id.* at 899.
[136] *Id*. at 904.
[137] *Id.* at 905–06.
[138] United States v. Jones, 109 U.S. 513, 519–20 (1883).
[139] *Printz*, 521 U.S. at 927.
[140] New York v. United States, 505 U.S. 144, 166 (1992).

> In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to

denying Congress the ability to evade commandeering issues by directly enlisting state officers to enforce or enact federal programs.[141] Justice Scalia wrote:

> The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.[142]

By denying counties the ability to opt out of S-Comm, is the government implicitly issuing a directive requiring the states to address the "problem" of immigration? Do USCIS and ICE have the power to make a program like S-Comm mandatory—or the ability to command state officers to enforce or administer such a regulatory program?[143] According to HSAC's Task Force,

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> regulate individuals, not States. As we have seen, the Court has consistently respected this choice. We have always understood that even 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. . . . The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

Id. (citations omitted).

[141] *Printz*, 521 U.S. at 935.

[142] *Id.*

[143] *Id.* In 1996, section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) encouraged information sharing between state and local entities and federal entities, providing:

> Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

"DHS should clarify the statutory authority it relies upon to assert that local participation in Secure Communities is mandatory."[144] Because the federal government cannot commandeer state actors, courts may have to probe the issues present in *Printz* as they relate to S-Comm.[145]

ICE is adamant that, under S-Comm, "state and local law enforcement officers are not deputized, do not enforce immigration law, and are not tasked with any additional responsibilities," and that "only federal officers make immigration decisions, and they do so only after a completely independent decision by state and local law enforcement to arrest an individual for a criminal violation of state law separate and apart from any violations of immigration law."[146] However, in practice, not all states and LLEAs find the distinction to be so clear.

Those concerned about separation of powers have raised questions about the fuzzy line between state and federal duties relating to immigration enforcement through S-Comm. District of Columbia Councilmember Jim Graham (D-Ward 1) expressed his disappointment over localities' inability to opt out of S-Comm due to the "blurred line" between activities conducted by the Metropolitan Police Department and immigration officers.[147] Graham

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8 U.S.C. § 1373 (2010). However, the constitutionality of § 642(a) has not been litigated fully. *See* Chandler, *supra* note 64.

[144] *See* TASK FORCE, *supra* note 125, at 15.

[145] 287(g) agreements, however, allow the government and localities to curtail the issue of commandeering by entering in to memorandums of understanding. For more on 287(g) agreements, *see infra* p. 363.

[146] *Secure Communities: Get the Facts*, US IMMIGR. & CUSTOMS ENF., http://www.ice.gov/secure_communities/get-the-facts.htm (last visited Dec. 12, 2011).

[147] Shankar Vedantam, *Local Jurisdictions Find They Can't Opt Out of Federal Immigration Enforcement Program*, WASH. POST, Sept. 30, 2010, http://www.washingtonpost.com/wp-dyn/content/story/2010/09/30/ST2010093007299.html [hereinafter Vedantam, *Local Jurisdictions*].

and the rest of the council sponsored a bill in May 2010 to opt out of S-Comm.[148] Graham stated:

> We had a bright line, and that has increased trust and confidence in our police among immigrant communities. That will now vanish. . . . It makes the local police department an arm of the federal immigration authority in a way that has not been true in the District of Columbia. . . . It also distracts scarce police resources—they have to hold people until ICE can get to them. We want those resources devoted to crime-fighting.[149]

Graham's concerns speak not only to the federalism issues S-Comm implicates, but also to the state resources that LLEAs potentially divert to the federal program at the expense of other law enforcement tasks.

Despite political and social disapproval of S-Comm's "blurred line," courts are not likely to invalidate S-Comm under *Printz*. S-Comm may be "yet another example of local and federal agencies working together effectively to keep our communities safe."[150] Critics of local enforcement of immigration laws may be "too quick to read local actions directed toward immigrants as a subset of the national immigration controversy while ignoring the underlying local issues involved."[151] When courts maintain the belief that only federal reform can solve local immigration problems, they may unintentionally limit state and local responses.[152] Such responses must

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[148] *See* Tim Craig, *D.C. Council: Boycott Arizona, Don't Share Arrest Data with Feds*, WASH. POST D.C. WIRE BLOG (May 4, 2010, 11:27 AM), http://voices.washingtonpost.com/dc/2010/05/dc_council_boycott_arizona_don.html.

[149] Vedantam, *Local Jurisdictions*, *supra* note 147. "Of course, state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress." DeCanas v. Bica, 424 U.S. 351, 365 (1976).

[150] Desoto County News Release, *supra* note 10.

[151] Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1624 (2008).

[152] *See id.*; *see also* Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 609–10 (2008) (discussing roles of all levels of

strike a careful balance to maintain a constitutionally proper separation of powers under *Printz*.

In light of S-Comm, localities may or may not be mere creatures of the state.[153] If a state opts to implement S-Comm, must localities also implement it? Another important concern is whether the federal government should subject immigration enforcement to centralized control. Centralized control may allow for greater uniformity of the law's substance and enforcement, better oversight, and greater efficiency than decentralized control.[154] In contrast, decentralized control allows localities to better cater to the interests, attitudes, and needs of their communities, while creating a platform for experimenting with evolving enforcement systems.[155]

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government in immigration enforcement in a "de facto [federal, state, and local] multi-sovereign regime"); *see also* Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 72 (2007) ("For better and for worse, effective federal immigration enforcement often depends upon the extensive participation of state and local officials. This is particularly true regarding enforcement against immigrants who have been convicted of crimes in this country.").

[153] *See* Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907).

[154] *See* Chandler, *supra* note 64, at 231.

[155] *See id.* While the federalism debate surrounding immigration regulation presents an opportunity for reform, the United States is in need of broader immigration policy reform. The federal government should not

> dragoon states or localities into enforcement of immigration policies with which they disagree. States and localities should decide for themselves how to weigh the advantages of enforcing federal immigration policy—criminal or civil—against its significant costs. I would be much more trusting of local governments' decisions to enforce federal immigration laws if they would give up their qualified immunity for mistakes that occur as a result and would spell out for the citizenry the heightened risks they face when those predisposed to conventional crime can take advantage of immigrant fears of cooperating with law enforcement.

Id. at 242. For an interesting take on immigration reform, see Jennifer Gordon, *Workers Without Borders*, N.Y. TIMES, March 9, 2009, at A27, *available at* http://www.nytimes.com/2009/03/10/opinion/10gordon.html; *see also* Keith Aoki & John Shuford, *Welcome to Amerizona—Immigrants Out!: Assessing "Dystopian Dreams" and*

However, any deference to local judgment should be narrowly tailored for the purpose of opting out of S-Comm. Sweeping deference to local governments could lead to sweeping permission across the country for programs like Arizona SB 1070.[156] Among other things, SB 1070 prevents state and county officials and agencies from adopting policies that limit enforcement of federal immigration law, and it requires that state and county officials and agencies make reasonable attempts to determine the immigration status of persons who come in to "lawful" contact with LLEAs.[157]

On May 26, 2011, the Supreme Court ruled on a state immigration law in *Chamber of Commerce v. Whiting*.[158] In that case, the Court held that an Arizona law prohibiting employers from hiring undocumented immigrants (the Legal Arizona Workers Act) was not preempted by federal law because it falls within an exemption established by the 1986 federal Immigration Reform and Control Act.[159] In its analysis of applied preemption, the Court pointed to precedents establishing that "a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act," and determined that that threshold was not met in *Whiting*.[160] The

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"Usable Futures" of Immigration Reform, and Considering Whether "Immigration Regionalism" Is an Idea Whose Time Has Come, 38 FORDHAM URB. L. J. 1 (2010) (contemplating the pros and cons of "immigration regionalism" as a form of immigration reform).

[156] S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

[157] *Id*.

[158] Chamber of Commerce of U.S. v. Whiting, 131 S.Ct. 1968, 1985 (2011) (internal citations omitted).

[159] *Id*.

[160] *Id*.; *see also* Mark Walsh, *Raising Arizona High Court Eyes State's Punishments for Hiring Unauthorized Aliens*, A.B.A. J., Dec. 2010, at 20.

holding in *Whiting* suggests that the Court may be willing to uphold other state and local immigration enforcement initiatives.[161]

A. 287(g) Agreements and MOAs

Some critics view S-Comm as an expansive version of 287(g) agreements. Section 287(g) of the Immigration and Nationality Act (INA), which Congress passed in 1995, permits state and LLEAs to enter into agreements with the federal government via MOAs.[162] These MOAs allow appropriately trained officers to carry out immigration law activities, such as identification, processing, and detention of undocumented immigrants, in addition to their regular work.[163] The executive branch supervises state officers acting under 287(g) agreements, and state employees or officers acting under 287(g) authority shall be considered "to be acting under color of [f]ederal authority" for liability purposes.[164] Critics argue that officers are being commandeered, but this assertion would be easily challenged because officers acting pursuant to 287(g) agreements perform their functions as federal actors.[165] Further, the United States Code affirmatively states that 287(g) does not compel state officials to report anyone's immigration status to the US Attorney General (AG) or even to cooperate with the AG in identifying, arresting, or removing undocumented immigrants.[166]

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[161] Kristina M. Campbell, *The Road to S.B. 1070: How Arizona Became Ground Zero for the Immigrants' Rights Movement and the Continuing Struggle for Latino Civil Rights in America*, 14 HARV. LATINO L. REV. 1, 12 (2011).

[162] 8 U.S.C. § 1357(g). This law enables states and localities to enforce immigration laws pursuant to a signed agreement with the US Attorney General, but cannot be construed to require states or localities to sign such an agreement.

[163] *See id.*

[164] "An officer or employee of a State or political subdivision of a State shall be subject to the directions and supervision of the Attorney General." 8 U.S.C. § 1357(g).

[165] *See* McThomas, *supra* note 45.

[166] 8 U.S.C. § 1357(g). A staff attorney with a social justice organization in North Carolina coordinates the organization's immigrant rights work. He believes that the overlapping jurisdiction between 287(g) agreements and S-Comm creates difficulty in

ICE has not established the extent of its guidance over 287(g), although the law calls for ICE supervision of state and local officials. As a result, ICE field officials have different understandings of the nature and extent of their responsibilities as supervisors. For example, one official stated that the agency does not directly supervise LLEAs in the 287(g) program.[167] In contrast, another ICE official said that ICE supervisors provide "frontline support" for the program.[168]

For the first several years of S-Comm's existence, it was unclear in what capacity LLEAs acted when they sent fingerprints to IFAIS. Were they state actors or federal actors? Did LLEAs' acts fall within the doctrine of "concurrent enforcement,"[169] which is authorized only where "state enforcement activities do not impair federal regulatory interests"?[170] ICE has since clarified that the power to enforce immigration rests exclusively with DHS.[171]

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determining which of the cases that come to him are a result of 287(g) enforcement and which are S-Comm cases. Telephone Interview with Anonymous Attorney (Oct. 7, 2010, 10:00 AM) (Anonymity is preserved here at the request of the attorney) [hereinafter Interview with NC Attorney]; Ramos Interview, *supra* note 111.

[167] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 09-381T, IMMIGRATION ENFORCEMENT: CONTROLS OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS SHOULD BE STRENGTHENED 4 (Mar. 4, 2009) (testimony of Richard M. Stana, Dir., Homeland Sec. & Justice), *available at* http://www.gao.gov/new.items/d09381t.pdf.

[168] *Id.* For more information regarding the effectiveness of 287(g), *see* IMMIGR. POLICY CTR., AM. IMMIGR. COUNCIL, GIVING FACTS A FIGHTING CHANCE: ANSWERS TO THE TOUGHEST IMMIGRATION QUESTIONS (2010), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/Giving_Facts_a_Fighting_Chance_100710.pdf.

[169] Lozano v. City of Hazelton, 620 F.3d 170, 218 (3d Cir. 2010), *vacated*, 131 S.Ct. 2958 (2011).

[170] Gonzales v. Peoria, 722 F.2d 468, 474 (9th Cir. 1983), *overruled on other grounds by* Hodgers-Durgin v. de la Vina, 199 F.3d 1037 (9th Cir. 1999) (en banc).

[171] *See Briefing #1*, *supra* note 71.

Regardless of the role LLEAs play when participating in S-Comm, the program's activities must be funded. The next section discusses who should provide this funding.

B. The Financial Impact of Implementing S-Comm

ICE planned to spend $1.4 billion of congressional allowances in FY 2009 on "criminal alien enforcement,"[172] but it is unclear how much of the funding localities received specifically for implementing S-Comm. Though ICE budgeted $200 million for "Secure Communities/Comprehensive Identification and Removal of Criminal Aliens (SC/CIRCA)" in 2010, its enacted budget does not detail specifically how it would allocate those funds. The budget does state that $43.5 million of new funding, and forty-six full-time employees, were allocated to S-Comm.[173] The US Department of Justice's FY 2011 Budget Request calls for an $11 million increase to its Executive Office for Immigration Review (EOIR) budget, which will support hiring more IJs and Board of Immigration Appeals (BIA) attorneys needed to address an increase in caseload resulting from DHS programs such as S-Comm.[174]

Even though DHS and ICE claim that S-Comm does not impose costs on localities, and that local sheriffs are just agreeing to hold individuals until ICE can pick them up, the individuals held by LLEAs pursuant to detainers are not actually in ICE custody. While these individuals remain in LLEA

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[172] U.S. IMMIGR. AND CUSTOMS ENF., *Secure Communities Program Presentations* (2009), http://www.ice.gov/doclib/foia/secure_communities/securecommunitiespresentations.pdf.

[173] *ICE Fiscal Year 2010 Enacted Budget*, U.S. IMMIGR. AND CUSTOMS ENF. (Nov. 5, 2009), http://www.ice.gov/doclib/news/library/factsheets/doc/2010budgetfactsheet.doc; *see also* Nancy Lofholm, *Program to Find Criminal Illegal Immigrants Hampered in Colo. By Pricey Equipment*, DENVER POST, July 6, 2011, http://www.denverpost.com/news/ci_18415336.

[174] US DEP'T OF JUSTICE, FY 2011 BUDGET REQUEST, *available at* http://www.justice.gov/jmd/2011factsheets/pdf/enforce-immigration-laws.pdf.

custody, those LLEAs must use their resources to detain them. According to Anjali Bhargava, former deputy county counsel at the Santa Clara County Counsel's Office, ICE provides no "trickle down" funding specifically for communities implementing S-Comm.[175] LLEAs may nevertheless be able to recuperate some of their expenses via the State Criminal Alien Assistance Program (SCAAP).[176] SCAAP provides federal reimbursements to states and localities that have borne costs for detaining undocumented immigrants with at least one state or local felony conviction, or two misdemeanor convictions, for at least four or more consecutive days.[177]

While SCAAP benefits LLEAs, it not likely an effective solution to the problem of funding S-Comm. LLEAs incur greater costs as the number of required detainers increases. Over time, a larger amount of LLEAs' resources will be devoted to detaining undocumented individuals.[178] While reimbursement may be secured through SCAAP, localities may have to advance the money and hope for repayment in the future. Additionally, jurisdictions typically request more in reimbursements than SCAAP can pay.[179] The Government Accountability Office (GAO) found that SCAAP payments to the four states with the highest number of SCAAP undocumented immigrants in FY 2003 covered less than 25 percent of the

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[175] Telephone Interview with Anjali Bhargava, former Deputy Cnty. Counsel, Santa Clara Cnty. Counsel's Office (Oct. 5, 2010).

[176] Bureau of Justice Assistance, *State Criminal Alien Assistance Program* (SCAAP), U.S. DEP'T OF JUSTICE, http://www.ojp.usdoj.gov/BJA/grant/scaap.html (last visited Nov. 20, 2010) [hereinafter SCAAP]. For a discussion of funding issues present in 287(g) Agreement enforcement, *see* Idilbi, *supra* note 70, at 1743–41.

[177] SCAAP, *supra* note 176.

[178] For more information on the economic ramifications of immigration enforcement at the local level, *see* Huyen Pham & Pham Hoang Van, *The Economic Impact of Local Immigration Regulation: An Empirical Analysis*, 32 CARDOZO L. REV. 485, 518 (2010).

[179] OFFICE OF THE INSPECTOR GEN. AUDIT DIV., U.S. DEP'T OF JUSTICE, AUDIT REPORT 07-07, COOPERATION OF SCAAP RECIPIENTS IN THE REMOVAL OF CRIMINAL ALIENS FROM THE UNITED STATES (Jan. 2007), *available at* http://www.justice.gov/oig/reports/OJP/a0707/final.pdf.

approximate cost to detain those individuals.[180] In FY 2003, SCAAP payments covered just 12 percent of estimated detention costs for California, 14 percent for Arizona, 7 percent for Florida, and 24 percent for New York.[181]

State governments are also unable to adequately cover expenses that LLEAs incur implementing S-Comm. For example, California's constitution requires that the state reimburse local governments for expenditures they incur in implementing legislative- or state-agency-mandated programs.[182] Because S-Comm is a federal program, however, the state may not be constitutionally required to fund it.[183] For example, California's constitution only mandates funding when the state adopts a regulation pursuant to a federal mandate and has no choice in the manner of its execution.[184] Because of the mixed messages regarding whether S-Comm is a federal mandate, this constitutional provision may or may not apply. If California's constitutional provision does apply, California counties would be able to appeal to the Commission of State Mandates to request funding. As it stands, California counties do not receive state funding for implementing S-Comm and, as mentioned above, SCAAP

[180] *Id.*
[181] *Id.*
[182] "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service [with the exception of] (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." CAL. CONST. art. 13B, § 6.
[183] *See* Cnty of Los Angeles v. Comm'n on State Mandates, 2 Cal. Rptr. 3d 419 (Ct. App. 2003); Cnty of Los Angeles v. Comm'n on State Mandates, 38 Cal. Rptr. 2d 304 (Ct. App. 1995), *holding modified sub nom*; Dep't of Fin. v. Comm'n on State Mandates, 122 Cal. Rptr. 2d 447 (Ct. App. 2002); Hayes v. Comm'n on State Mandates, 15 Cal. Rptr. 2d 547 (Ct. App. 1992).
[184] CAL. CONST. art. 13B, § 6.

reimbursement fails to cover the entire cost of detaining undocumented immigrants at the LLEA level.

Though immigration has historically been a federal issue, state and local governments have varying methods of addressing and implementing immigration enforcement. As local governments take on immigration regulation tasks, thus incurring risks and financial burdens, the federal government toes the line between commandeering and allowing optional compliance with immigration regulation at the local level. Local compliance via 287(g) has its costs, and some localities may wish to refuse to enforce immigration all together. The following section will discuss a unique approach for limiting immigration enforcement at the local level.

V. SANCTUARY CITIES AS A METHOD OF RESISTANCE TO S-COMM

In the 1980s, many US cities adopted "sanctuary city" policies or designations designed to protect undocumented immigrants.[185] During that time, churches across the United States sheltered Central Americans escaping civil wars in their home countries.[186] The term "sanctuary city" may describe municipalities that have adopted "sanctuary, non-cooperation, or confidentiality policies for undocumented residents, which may be viewed as inclusionary types of laws."[187] Such policies may be *de jure* or *de facto* and may be manifested by prohibiting use of municipal funds for enforcing federal immigration laws or by requiring municipal employees to refrain from inquiring about an individual's immigration status.[188] When

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[185] Rose Cuison Villazor, *What Is a "Sanctuary"?*, 61 SMU L. REV. 133, 135 (2008).
[186] SAN FRANCISCO, CAL., ADMIN. CODE ch. 12H (1989), *available at* http://www.sfgsa.org/index.aspx?page=1069 [hereinafter ADMIN. CODE].
[187] Rose Cuison Villazor, *"Sanctuary Cities" and Local Citizenship*, 37 FORDHAM URB. L.J. 573, 577 (2010).
[188] Some critics believe that sanctuary city efforts may have inadvertently helped open the door for states and localities to enforce immigration. The idea of sanctuary cities may have been better packaged as a public safety initiative. By agreeing not to participate in

LLEAs refuse to enforce immigration laws, are they enforcing a "sanctuary" policy, or are they simply refusing to take on a task performed historically by the federal government? Though the answer varies, sanctuary cities like San Francisco may have a stronger argument for opting out of programs like S-Comm.

A. San Francisco's "Sanctuary"

The San Francisco Board of Supervisors first declared the city a sanctuary city in 1989, prohibiting city employees from assisting ICE with arrests or immigration investigations unless required by warrant or state or federal law.[189] Representing one of the governments that "[has] stood firmly against repressive immigration proposals in Congress and immigration raids that separate families," former San Francisco mayor Gavin Newsom issued an executive order in February 2007 asking city departments to develop training and procedures on the city's Sanctuary Ordinance.[190]

San Francisco's Sanctuary Ordinance prohibits any San Francisco city or county agency, commission, department, employee, or officer from using any city funds or resources to assist in the enforcement of federal immigration law, or the dissemination or gathering of information about the immigration status of persons in the city or county *unless* required by state or federal regulation, statute, or court decision.[191] Such assistance includes cooperating or assisting, in an individual's official capacity, with any

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activities such as assisting ICE with arrests or immigration investigations, undocumented immigrants will likely be more willing to provide information to police and comply with local law enforcement investigations. *See* Dean Johnson Interview, *supra* note 60.

[189] ADMIN. CODE, *supra* note 185.

[190] *Id.* In 2007, Newsom also vowed to discourage federal officials from performing immigration raids. Peter Fimrite, *Newsom Says S.F. Won't Help with Raids*, S.F. CHRON., April 23, 2007, at B-1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/04/23/BAGOHPDLLT1.DTL#ixzz11t698wiI.

[191] ADMIN. CODE, *supra* note 185, § 2.

USCIS detention, investigation, or arrest procedure dealing with alleged violations of federal immigration law provisions.[192]

The ordinance, however, does not prohibit (nor should it be construed as prohibiting) law enforcement officers from identifying and reporting persons pursuant to federal or state regulation or law who, after being booked for the alleged commission of a felony, are in custody and suspected of violating civil provisions of immigration laws.[193] Further, the ordinance does not preclude San Francisco County or City actors[194] from reporting arrests of previously convicted felons to USCIS, cooperating with USCIS requests for information about convicted felons, or reporting information as per federal or state statute, court decision, or regulation.[195] Perhaps the most important protection that the ordinance provides is its prohibition against county or city employees, officers, or law enforcement agencies stopping,

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[192] Such assistance also includes, but is not limited to:

> (b) Assisting or cooperating, in one's official capacity, with any investigation, surveillance or gathering of information conducted by foreign governments, except for cooperation related to an alleged violation of City and County, State or federal criminal laws.
>
> (c) Requesting information about, or disseminating information regarding, the immigration status of any individual, or conditioning the provision of services or benefits by the City and County of San Francisco upon immigration status, except as required by federal or State statute or regulation, City and County public assistance criteria, or court decision.
>
> (d) Including on any application, questionnaire or interview form used in relation to benefits, services or opportunities provided by the City and County of San Francisco any question regarding immigration status other than those required by federal or State statute, regulation or court decision.

Id.

[193] *Id.*

[194] Defined as "department, agency, commission, officer or employee[s]." *Id.*

[195] *Id.*

questioning, detaining, or arresting individuals exclusively because of their immigration status or national origin.[196]

Long-time San Francisco sheriff Michael Hennessey has consistently been outspoken in his criticism of San Francisco's potential implementation of S-Comm. In May 2010, Hennessey wrote a letter to then-California Attorney General Jerry Brown requesting assistance in opting out of S-Comm.[197] Hennessey's concern was that S-Comm conflicted with San Francisco's Sanctuary Ordinance.[198] He stated that his department had "delivered" more than 3,100 people to ICE, and that he intended to continue reporting "foreign-born individuals" charged with felonies, or having a felony, or having "previous ICE contact in their criminal histories," directly to ICE.[199] After a meeting with ICE officials on November 9, 2010, San Francisco did not opt out of S-Comm due to ICE's explanation that counties cannot prevent the data sharing necessary for S-Comm's implementation.[200] At the same meeting, ICE's S-Comm director, David Venturella, reportedly stated that LLEAs were not required to respond to detainers.[201] Under Sheriff Hennessey's latest policy, undocumented immigrants arrested for

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[196] *Id.*
[197] Letter from Michael Hennessey, Sheriff, San Francisco (May 18, 2010), *available at* http://uncoverthetruth.org/wp-content/uploads/Sheriff-Hennessey-Ltr-Opting-Out-of-S-1-Comm-5-18-2010.pdf.
[198] *Id.*
[199] *Id.* According to the US Census Bureau, 34.4 percent of San Francisco County residents between 2005 and 2009 were foreign born. *State and County QuickFacts*, U.S. CENSUS BUREAU, *available at* http://quickfacts.census.gov/qfd/states/06/06075.html (last visited Mar. 10, 2011).
[200] Elise Foley, *San Francisco won't opt out of Secure Communities*, THE WASH. INDEPENDENT, Nov. 9, 2010, http://washingtonindependent.com/103084/san-francisco-wont-opt-out-of-secure-communities.
[201] *Id.*

misdemeanors will not be held in LLEA custody while ICE checks their status under S-Comm.[202]

B. Congressional Restriction on Sanctuary Cities

In 1996, Congress enacted a law stating that state and local government entities may not be prohibited from sending information to or receiving information from the INS (now USCIS) regarding individuals' immigration statuses.[203] The "clear target" of provisions like this was non-enforcement attempts by localities like San Francisco's Sanctuary Ordinance.[204] The city of New York challenged Congress's "anti-sanctuary measure" shortly after it was enacted.[205] The court in *City of New York v. United States* held that Section 434 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform Act) and Section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) did not force state or local governments to administer federal programs in violation of the Tenth Amendment.[206] According to the court, New York City's sovereignty argument asked the court to

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[202] *SF Sheriff Plans to Defy Fed's Secure Communities Program*, (KTVU television broadcast, May 30, 2011), *available at* http://www.ktvu.com/news/28067653/detail.html.
[203] 8 U.S.C. § 1644 (2010).
[204] Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1635–36 (2008). Notably, the Loophole Elimination and Verification Enforcement Act (LEAVE), authored by former US Senator Gary Miller (R-Calif.), would forbid sanctuary cities from obtaining funds from the DOJ and DHS for immigration enforcement. *See* Joshua Rhett Miller, *DOJ Gave Millions to Illegal Immigrant 'Sanctuaries,' Report Finds*, FOX NEWS (Nov. 12, 2010), http://www.foxnews.com/us/2010/11/12/doj-gave-millions-sanctuary-communities-report-finds/.
[205] *See* Su, *supra* note 204.
[206] City of New York v. United States, 179 F.3d 29, 35 (2d Cir. 1999). Both the Welfare Reform Act and IIRIRA prohibited state and local governments from restricting employees from voluntarily providing information about individuals' immigration status to INS.

> [t]urn the Tenth Amendment's shield against the federal government's using state and local governments to enact and administer federal programs into a sword allowing states and localities to engage in passive resistance that frustrates federal programs. If Congress may not forbid states from outlawing even voluntary cooperation with federal programs by state and local officials, states will at times have the power to frustrate effectuation of some programs. Absent any cooperation at all from local officials, some federal programs may fail or fall short of their goals unless federal officials resort to legal processes in every routine or trivial matter, often a practical impossibility.[207]

The *City of New York* decision and the 1996 law demonstrate congressional and judicial discouragement of local resistance to federal immigration laws. However, sanctuary policies and policies such as Los Angeles's Special Order Number 40 still withstand challenges.

C. Los Angeles's Special Order Number 40

In 1979 the Los Angeles Board of Police Commissioners adopted a policy that lead to Special Order Number 40, which states that Los Angeles Police Department Officers shall not "initiate police action with the objective of discerning the alien status of a person. Officers shall not arrest or book person [*sic*] for [illegal entry]."[208] In *Sturgeon v. Bratton*, a California Court of Appeals found that Special Order Number 40 did not conflict with 8 U.S.C. § 1373, which addresses "voluntary" exchange of information between government entities or officials and federal immigration enforcement agencies.[209]

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[207] *Id*.
[208] Special Order No. 40, Office of the Chief of Police of Los Angeles (Nov. 27, 1979), *available at* http://www.lapdonline.org/get_informed/pdf_view/44798.
[209] Sturgeon v. Bratton, 174 Cal. App. 4th 1407, 1411 (2009).

Local choices like implementing sanctuary ordinances and Special Order Number 40 evince localities' desire to have a say as to whether they enforce immigration laws. As such, self-declared sanctuary cities have a stronger argument for opting out of S-Comm. The next section will discuss if and how cities like San Francisco might be able to opt out of the program.

VI. OPTING OUT AS A SOLUTION FOR CITIES AND LOCAL LAW ENFORCEMENT AGENCIES

Over the past year-and-a-half, states and localities have had difficulty determining ICE's stance regarding whether they can opt out of S-Comm. On September 7, 2010, Homeland Security Secretary Janet Napolitano sent a letter to Zoe Lofgren, member of the US House of Representatives (D-CA) and chair of the House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, explaining the conditions under which an LLEA may opt out of S-Comm.[210] Napolitano's letter stated that

> [a] local law enforcement agency that does not wish to participate in the Secure Communities deployment plan must formally notify the Assistant Director for the Secure Communities program, David Venturella. . . . The agency must also notify the appropriate state identification bureau by mail, facsimile, or e-mail. If a local law enforcement agency chooses not be activated in the Secure Communities deployment plan, it will be the responsibility of that agency to notify its local ICE field office of suspected criminal aliens.[211]

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[210] Letter from Janet Napolitano, Sec., Dep't of Homeland Sec. to the Hon. Zoe Lofgren, Member, US House of Representatives and Chair, House Subcomm. on Immigr., Citizenship, Refugees, Border Security, and Int'l Law, and Committee on the Judiciary (Sept. 7, 2010), *available at* http://uncoverthetruth.org/wp-content/uploads/Z-Lofgren_Response-from-USDOJ-and-DHS.09.08.2010.pdf.
[211] *Id*.

ICE described a similar opt-out procedure in a memo released in late August 2010.[212] On September 8, 2010, Assistant US Attorney General Ronald Weich responded to a letter from Lofgren asking for a "clear explanation of how local law enforcement agencies may opt out of Secure Communities by having the fingerprints they collect and submit to the SIBs checked against criminal, but not immigration, databases."[213] Weich's letter echoed Napolitano's instructions.[214]

Despite these official responses, local jurisdictions are finding that they cannot opt out of S-Comm.[215] An anonymous senior ICE official stated that

> Secure Communities is not based on state or local cooperation in federal law enforcement. The program's foundation is information sharing between FBI and ICE. State and local law enforcement agencies are going to continue to fingerprint people and those fingerprints are forwarded to FBI for criminal checks. ICE will take immigration action appropriately.[216]

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[212] Elise Foley, *ICE Changes Its Mind on Secure Communities Opt-Out*, WASH. INDEPENDENT, Oct. 1, 2010, http://washingtonindependent.com/99382/ice-changes-its-mind-on-secure-communities-opt-out. The memo stated:

> If a jurisdiction does not wish to activate on its scheduled date in the Secure Communities deployment plan, it must formally notify its state identification bureau and ICE in writing (email, letter or facsimile). Upon receipt of that information, ICE will request a meeting with federal partners, the jurisdiction, and the state to discuss any issues and come to a resolution, which may include adjusting the jurisdiction's activation date in or removing the jurisdiction from the deployment plan.

Id.

[213] Letter from Ronald Weich, Asst. Att'y Gen., U.S. Dep't of Justice, to Hon. Zoe Lofgren, Chair, House Subcomm. on Immigr., Citizenship, Refugees, Border Sec. & Int'l Law (Sept. 8, 2010), *available at* http://crocodoc.com/yzmmKP.

[214] Letter from Janet Napolitano, *supra* note 210.

[215] Vedantam, *Local Jurisdictions*, supra note 147.

[216] *Id.*

As a result, the only option for a local jurisdiction to opt out of S-Comm is if the state declines to send fingerprints to the FBI, thus withholding them from ICE.[217] Because prosecutors and law enforcement need to know the criminal histories of arrestees, this method is unrealistic. The ICE official said that municipalities could, however, choose to have immigration authorities withhold the reason for someone's detention, but those municipalities would still be required to detain the individual.[218]

In October 2010, CCR, NDLON, and the Kathryn O. Greenberg Immigration Justice Clinic of the Cardozo School of Law filed suit in federal court alleging ICE's noncompliance with a FOIA request and seeking a writ of mandamus ordering ICE to release documents explaining how communities can opt out of S-Comm.[219] At that time, Arlington, Virginia, San Francisco, and Santa Clara, California, had all submitted formal requests to opt out of the program.[220] In February 2011, CCR, NDLON, and the Justice Clinic released S-Comm documents they obtained through the FOIA suit.[221] Their guide to the documents, and the documents themselves, chronicle the confusion regarding opting out of S-Comm, and

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[217] *Id.*
[218] *Id.*
[219] Marcos Restrepo, *Immigrant Rights Groups File Injunction for Secure Communities Opt-Out Info*, FLA. INDEPENDENT, Oct. 28, 2010, http://floridaindependent.com/12096/immigrant-rights-groups-file-injunction-for-secure-communities-opt-out-info.
[220] For a summary of the opt-out dilemma, see Suzanne Gamboa, *Documents Show Local-Federal Immigration Program Only Voluntary Until A City Says 'No, Thanks,'* 1310 NEWS, http://www.1310news.com/news/world/article/184549--documents-show-local-federal-immigration-program-only-voluntary-until-a-city-says-no-thanks?ref=topic&name=Japan&title=.
[221] *Newly Released Secure Communities Documents Signal Opening for Local Opt-Out*, UNCOVER THE TRUTH BLOG (Feb. 17, 2011), http://uncoverthetruth.org/featured/newly-released-secure-communities-documents-signal-opening-for-local-opt-out/; Ctr. for Const. Rights et al., *Preliminary Briefing Guide: Newly Released Documents Chronicle Agency's Deception About Opting-Out of "Secure Communities" Program* (Feb. 17, 2011), http://ndlon.org/feb/foiabrief.pdf.

reiterate that, although ICE publicly announced that S-Comm is a "mandatory" program, the agency remained unclear about a legal basis for mandatory implementation.[222]

On July 6, 2011, CCR, Cardozo, and NDLON issued a fact sheet outlining more information extracted from their FOIA requests. This fact sheet details the FBI's intention that S-Comm be a part of its Next Generation Identification Project (NGI).[223] NGI aims to reduce criminal and terrorist activities by expanding criminal history information biometric identification services.[224] NGI will include digital photographs for automated facial recognition scans, as well as iris scans and voice identification.[225] According to the fact sheet prepared by CCR, Cardozo, and NDLON, the FOIA documents demonstrate that the FBI, rather than DHS, was the first agency to seek mandatory implementation of S-Comm—and that the FBI fears that states' ability to opt out of S-Comm may promote states' questioning their participation in NGI.[226]

ICE Director John Morton issued a memorandum on August 5, 2011 declaring that an MOA is not required for any jurisdiction to activate or operate S-Comm.[227] This demonstrates the federal government's investment in implementing S-Comm mandatorily, even if the program exists to the detriment of state and local laws. Morton stated that "[o]nce a state or local

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[222] *Id*.
[223] Ctr. for Const. Rights, et al., *Next Generation Identification: The FBI's 'Big Brother' Surveillance Agenda*, UNCOVER THE TRUTH BLOG (July 6, 2011), http://uncoverthetruth.org/wp-content/uploads/7-6-11-Scomm-NGI-Fact-Sheet.pdf [hereinafter CCR, *Next Generation*].
[224] *Next Generation Identification*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/ngi (last visited Aug. 9, 2011).
[225] *Id*.
[226] *See* CCR, *Next Generation*, *supra* note 223.
[227] Letter from John Morton, Dir., U.S. Immigr. & Customs Enf., to Hon. Jack Markell, Gov. of Del. (Aug. 5, 2011), *available at* http://dl.dropbox.com/u/27924754/Sec-Comm%20govlet%208-5-11.pdf.

law enforcement agency voluntarily submits fingerprint data to the federal government, no agreement with the state is legally necessary for one part of the federal government to share it with another part."[228] Consequently, ICE will terminate all existing S-Comm MOAs.[229] Chris Newman, the legal director of NDLON, declared that ICE's August 5 announcement "shows that ICE also systematically misled the states, engaging in protracted negotiations—at substantial cost to the American public—for what it now claims are sham contracts."[230] Mr. Newman's remark reflects widespread frustration with the lack of clarity and consistency that the government has provided since S-Comm's inception.

Mr. Morton enclosed a fact sheet with his August 5 memorandum, which addresses frequently asked questions about S-Comm. Among the questions answered is: "[c]an a state or local law enforcement agency choose not to have fingerprints it submits to the FBI checked against DHS' system?"[231] ICE responded that

> Secure Communities is mandatory in that, once the information-sharing capability is activated for a jurisdiction, the fingerprints that state and local law enforcement voluntarily submit to the FBI to be checked against the DOJ's biometric identification system for criminal history records are automatically sent to DHS's biometric system to check against its immigration and law enforcement records.[232]

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[228] *Id*.
[229] *Id*.
[230] Julian Aguilar, *Feds: Secure Communities Not Optional*, THE TEX. TRIB., Aug. 5, 2011, http://www.texastribune.org/immigration-in-texas/immigration/feds-secure-communities-staying-place/.
[231] *Secure Communities: Frequently Asked Questions, Addendum to Governor Notifications*, U.S. IMMIGR. & CUSTOMS ENF. (Aug. 5, 2011), at 5, *available at* http://dl.dropbox.com/u/27924754/Sec-Comm%20FAQ%208-5-11.pdf [hereinafter *ICE FAQs*].
[232] *Id*.

ICE goes on to affirm that states and LLEAs may not choose to have fingerprints processed by the federal government only to check an individual's criminal history, nor may states or LLEAs ask that "identifications" resulting from DHS's fingerprint processing be withheld from local ICE field offices.[233] This recent information from ICE reinforces the agency's position that states and localities may not opt out of S-Comm. It appears now that the only option states and local jurisdictions have is to elect not to receive information about identifications resulting from DHS's fingerprint databases provided to local ICE field offices.[234]

A. Affirmative Actions for Non-Complying Cities

Prior to ICE's August 5 fact sheet describing S-Comm's mandatory requirements, it was unclear how much a locality could do to affirmatively resist participation in the program. Passively, a city may still be able to decline to arrest undocumented immigrants, and sheriffs can refuse to issue ICE detainers, but these options give rise to complications. If a locality has a sanctuary policy, it may be able to decline compliance with detainers due to S-Comm's conflict with the policy.[235]

Because S-Comm shares data between two federal departments (DHS and FBI), the only way a jurisdiction could avoid taking part in S-Comm is by refusing to send fingerprints to the federal justice system,[236] even though they have the legal authority to decide when to hold an individual subject to an ICE detainer.[237] However, ICE has since declared that this is not an

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[233] *Id*. at 5–6.
[234] *Id*.
[235] *See infra* Part V.
[236] *See* Semple*, supra* note 41.
[237] Memorandum from Immigr. Justice Clinic, Benjamin N. Cardozo School of Law on Local Discretion to Not Hold Detainees Subject to Immigration Detainers (Apr. 16, 2010) (on file with the author).

option,[238] and, as stated above, this choice would seriously undermine the crime-fighting functions of LLEAs.[239] LLEAs that decline to share fingerprints with the Justice Department would lose access to state and federal criminal databases.[240]

LLEAs still have the power to elect whether to review the information DHS returns to them in response to the fingerprints.[241] However, the choice not to review this information does little more than turn a blind eye to practices in which LLEAs do not want to participate. The choice leaves localities with little control: ICE maintains the ability to initiate deportation of individuals in question, regardless of an LLEA's position on the matter.[242] Further, since ICE's termination of MOAs, states no longer have the option to request that the MOAs be revised to better align the agreements with local priorities.

Some activists would choose a more court-based, and perhaps more proactive, method of protest. They believe that government trial attorneys are not enforcing their stated priorities and that immigration courts should weigh in. One possible method for bringing issues with S-Comm to DHS's attention is to file complaints in all cases that are not responding to Level 1 or Level 2 criminals. This would place a large burden on the court and force DHS to implement more than just the policy directive that is currently S-Comm.[243]

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[238] *See ICE FAQs*, *supra* note 231.
[239] *Id*.
[240] *See* Semple, *supra* note 41.
[241] *See id*.; *see also ICE FAQs*, *supra* note 231.
[242] *See id.*
[243] *See* Interview with NC Attorney, *supra* note 166.

B. S-Comm in California and Assemblymember Ammiano's TRUST Act

In May 2009, the California Department of Justice entered into an MOA with ICE regarding implementation of S-Comm in the state.[244] Since then, S-Comm has been activated in all fifty-eight LLEA jurisdictions, including Santa Clara County.[245] When Santa Clara County received information from ICE in October 2009, the county understood the program as voluntary and did not take action or return a questionnaire about current county jail booking practices.[246]

ICE notified Santa Clara County in April 2010 of its plan to activate S-Comm in the jurisdiction.[247] Although the Board of Supervisors had not approved participation, ICE activated S-Comm in the county in May 2010, stating that approval from the Board was not required.[248] Despite a unanimous decision by the Board to opt out of the program, S-Comm in Santa Clara County led to 523 individuals being arrested or booked into ICE custody from the beginning of May 2010 until the end of September 2010.[249] One hundred thirty-three of those individuals had no criminal record.[250] Implementation in Santa Clara County also led to 241 people removed from the United States, eighty-one of whom had no criminal record.[251]

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[244] Memorandum of Agreement Between Dep't of Homeland Sec. Immigr. & Customs Enf. and Cal. Dep't of Justice Bureau of Criminal Identification and Info. (May 8, 2009), *available at* http://www.ice.gov/doclib/foia/secure_communities/securecommunitiescaliforniamoa10april2009.pdf.
[245] NATIONWIDE ACTIVATED JURISDICTIONS, *supra* note 11, at 2.
[246] *See* Press Release, Santa Clara County Denied Opt-Out of S-Comm (Nov. 10, 2010), *available at* http://lawprofessors.typepad.com/immigration/2010/11/santa-clara-county-denied-opt-out-of-s-comm.html.
[247] *Id*.
[248] *See id.*
[249] *Id.*
[250] *Id.*
[251] *Id.*

Despite statements that localities may not opt out of S-Comm, Santa Clara and several other counties are looking for ways to minimize the effects of the program. For example, Santa Clara County's counsel presented a report to the Santa Clara County Board of Supervisors' Public Safety and Justice Committee suggesting that the board direct the county administration to make certain that no county funds are used to "provide unreimbursed assistance to [US] Immigration and Customs Enforcement, including assistance requested through immigration detainers," except as prescribed by law.[252] Taking the report into account, the committee instructed the county counsel and other county departments to collaborate and develop a recommendation about complying with detainers that also considers public safety.[253]

On the state level, California Assemblymember Tom Ammiano introduced the TRUST Act (AB 1081) in February 2011. AB 1081, labeled the Transparency and Responsibility Using State Tools Act, or "TRUST Act," calls for modifications to the now-rescinded MOA between California's Bureau of Criminal Identification and Information and DHS regarding S-Comm.[254] The TRUST Act would authorize counties to participate in S-Comm only upon submission of an authorized request to ICE by the county's legislative body,[255] thus allowing counties to choose whether to participate in the program. The TRUST Act also provides

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[252] Report from Anjali Bhargava, Deputy Cnty. Counsel, Santa Clara Cnty. Counsel, to Santa Clara Cnty. Board of Supervisors' Pub. Safety & Justice Comm. Regarding U.S. Immigr. & Customs Enf.'s Secure Communities Program (Dec. 2, 2010), *available at* http://www.sccgov.org/keyboard/attachments/Committee%20Agenda/2010/December%202,%202010/202898007/KeyboardTransmittalWeb203302392.PDF.

[253] E-mail from Anjali Bhargava, Deputy Cnty. Counsel, Santa Clara Cnty. Counsel's Office (Feb. 17, 2010, 12:37 PM) (on file with author).

[254] A.B. 1081, 2011–12 Leg. Sess., Reg. Sess. (Cal. 2011), *available at* http://leginfo.ca.gov/pub/11-12/bill/asm/ab_1051-1100/ab_1081_bill_20110608_amended_sen_v96.html.

[255] *Id*. § 7282(a)(1).

directives for safeguards against racial profiling, protections for victims of crime, including survivors of domestic violence, and a requirement that ICE establish a complaint process and provide quarterly statistics on S-Comm on its website.[256] The act passed the California Assembly in May 2011, and will be revised in early January before it goes to the state senate.[257] Though Ammiano's act addresses the important concerns S-Comm's implementation raises, it may not be viable in light of ICE's rescission of MOAs. If ICE's June 2011 reforms are effective—and ICE officials and attorneys do indeed exercise care and discretion in immigration enforcement—the TRUST Act's goals may be met nonetheless if ICE officials protect survivors of domestic violence and shift their focus to serious offenders and those who pose a threat to national security.

California is not alone in its resistance to S-Comm. Illinois, Massachusetts, and New York have also resisted participation in the program.[258] While states and counties continue to explore ways to work around or avoid S-Comm, the federal government should implement more reforms to the program and ensure that ICE follows through with its recent changes. The next section details suggested reforms, including the ability for localities like Santa Clara to opt out.

VII. S-COMM RE-ENVISIONED: REFORMS TO A POTENTIALLY INEVITABLE PROGRAM

Unfortunately for many immigrants, S-Comm will be a nationwide reality in the very near future. Though communities should make their own

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[256] *Id*. §7282(a)(2)–(5).
[257] Press Release, Tom Ammiano, Assemblymember, California State Assembly, "TRUST Act 2.0" to be unveiled in January as Ammiano Urges State Officals to Step up Leadership (Sept. 8, 2011), http://asmdc.org/members/a13/news-room/press-releases/item/2945-trust-act-20-to-be-unveiled-in-january-as-ammiano-urges-state-officials-to-step-up-leadership.
[258] *See Cosmetic Reforms*, *supra* note 57.

adjustments to the program, S-Comm as a whole would benefit from a number of changes in order to make the program more cost-effective and less detrimental to immigrants and their families.[259] HSAC's Task Force recommendations include: increasing transparency and clarifying what S-Comm is and how it works, increasing consistency among DHS's immigration enforcement programs, working with state and local officials to "develop trust" in S-Comm, reaffirming enforcement priorities and ensuring that S-Comm adheres to its goals, and exercising discretion in enforcement.[260] The recommendations below reflect some of the task force's suggestions, and go further to ensure greater protection for immigration communities.

First, individuals arrested for suspected acts of domestic violence should not be screened for S-Comm programs until they are convicted. This delay in sending fingerprints could spare wrongly arrested victims of domestic violence the additional torment of deportation. Second, S-Comm should screen only those individuals convicted of serious Level 1 offenses, and only upon conviction (rather than at the pre-conviction stage), and not Level 2 or 3 offenders who are not a threat to public safety. Though ICE would not likely accept such a change or allow counties to adopt the practice, this change would curb the number of individuals trapped in deportation proceedings, reduce the cost of implementing S-Comm, and limit deportation to those immigrants who are serious criminals.

DHS should rethink its stance on S-Comm's mandatory implementation requirement and provide clear procedures and guidelines for options available to states and counties firmly opposed to S-Comm. This will enable those jurisdictions to comply with or decline to comply with the program in

[259] The changes in this section were suggested by a nonprofit organization in the Southwest working tirelessly for immigrants' rights by engaging in immigration policy reform and community organizing. The organization prefers to remain anonymous.
[260] *See* TASK FORCE, *supra* note 125, at 15–16.

ways that are both constitutional and consistent with local public policy. All participating jurisdictions should also be trained on illegal racial or ethnic profiling in an effort to avoid discriminatory police practices.[261]

In order to determine the actual effects and efficacy of S-Comm, quarterly data collection and analysis made available to the public should include more than just match rates, proportions of "lower-level alien offenders," and removal proportions.[262] For instance, the information could include the number of searches localities conducted using S-Comm databases, and the number and level of "hits" obtained through S-Comm disaggregated by the number of hits where charges were not filed, where charges were later dismissed, or where there is no conviction, as well as the number of incorrect "hits."

Most importantly, the federal government should explicitly allow local governments, especially sanctuary cities, and LLEAs to opt out of S-Comm. By doing so, the federal government would appropriately respect local authorities' judgment.[263] Once a locality opts out, the FBI should not share fingerprints from that locality with ICE. Respecting local judgment is not inconsistent with DHS's stated goals for S-Comm (e.g., deporting criminals) especially in regard to Level 1 offenders, who ICE will deport regardless.

If these safeguards are not implemented, and if ICE's reforms are ineffective, S-Comm will continue to threaten the civil liberties and safety of immigrants and US citizens alike, especially people of color.[264]

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[261] *The Criminal Alien Program: Immigration Enforcement in Prisons and Jails*, IMMIGR. POLICY CTR. (Feb. 17, 2010), http://www.immigrationpolicy.org/just-facts/criminal-alien-program-immigration-enforcement-prisons-and-jails.
[262] *See Statistical Monitoring*, *supra* note 123.
[263] *See* Aoki & Shuford, *supra* note 155.
[264] *See ACLU Statement*, *supra* note 3.

VIII. CONCLUSION

Through S-Comm, ICE requests that local governments participate in the historically federally regulated area of immigration. While it is unclear whether S-Comm exceeds the federal government's power, it is clear that the program's repercussions are far reaching and that many of them are destructive. In order to avoid some of the devastating consequences on LLEAs, families, employers, and state and local governments, the federal government must make changes to S-Comm. The government should defer to local governments' judgments by allowing them to opt out of the program, and DHS and CRCL must ensure that their proposed changes actually take effect.