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# Putting a Hold on Ice: Why Law Enforcement Should Refuse to Honor Immigration Detainers

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# COMMENT

# PUTTING A HOLD ON ICE: WHY LAW ENFORCEMENT SHOULD REFUSE TO HONOR IMMIGRATION DETAINERS

ALIA AL-KHATIB*

*Beginning in the 1980s, immigration law began to place greater emphasis on noncitizens' past criminal convictions as grounds for deportation. This shift led to the deportation of many noncitizens with strong ties to the United States. In its effort to deport noncitizens with criminal convictions, the Department of Homeland Security (DHS) has developed various programs through which local law enforcement can partner with Immigration and Customs Enforcement (ICE).*

*The immigration detainer, also known as an ICE hold, is one tool used by ICE to facilitate the deportation of noncitizens with criminal convictions. Immigration detainers are requests made by ICE to local law enforcement agencies to maintain custody of noncitizens, who are already detained for state or local charges, for a forty-eight hour period beyond that required in their criminal case. The practice of enforcing immigration detainers has led to the mistaken detention of U.S. citizens and the prolonged detention of noncitizens, including those with minor, nonviolent criminal convictions.*

*By issuing detainers without sufficient probable cause, ICE violates the Fourth Amendment rights of both noncitizens and U.S. citizens held under immigration detainers. Local law enforcement agencies violate the Fourth*

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*Amendment rights of individuals subject to immigration detainers when they enforce these detainers without probable cause. Local law enforcement agencies also violate due process rights of noncitizens when they prolong their detention under immigration detainers beyond the permitted forty-eight hour period.*

*Additionally, enforcing immigration detainers presents serious policy concerns. First, it diminishes immigrant communities' trust in law enforcement, a consequence that threatens public safety. Second, it may trigger local law enforcement officers' implicit racial biases such that they may target individuals for minor criminal offenses based solely on the belief that they may be deportable noncitizens. Third, enforcing detainers places an enormous financial cost on state and local law enforcement because the federal government does not pay for their enforcement according to the relevant regulation.*

*Because of the potential constitutional violations and these significant policy considerations, local law enforcement agencies should refuse to enforce immigration detainers. Some jurisdictions, such as the State of California and the city of New Orleans, Louisiana, have already limited the enforcement of immigration detainers. Other jurisdictions should adopt similar laws to protect the constitutional rights of both noncitizens and U.S. citizens.*

TABLE OF CONTENTS

## INTRODUCTION

In August 2009, Mario Cacho, a construction worker living in New Orleans, Louisiana, completed his sentence for disturbing the peace in the Orleans Parish Prison.[1] Instead of being released upon completing his sentence, Mr. Cacho remained incarcerated under an immigration detainer after U.S. Immigration and Customs Enforcement (ICE) asked the local prison to hold Mr. Cacho in its custody for forty-eight hours until ICE could determine whether to place him in deportation proceedings.[2] ICE chose not to retain custody of Mr. Cacho after the forty-eight hour period; however, the Orleans Parish Prison continued to hold him even though the permitted period under the detainer had expired.[3] Finally, the Orleans Parish Prison released Mr. Cacho into ICE custody but only after he took legal action and had spent a total of 164 days in the prison.[4] For those 164 days, Orleans Parish law enforcement deprived

1. Plaintiff's Original Complaint Preliminary Statement at 1, 6, Cacho v. Gusman, No. 2:11-cv-00225 (E.D. La. Feb. 2, 2011) [hereinafter Plaintiff's Original Complaint].

2. *Id.* at 6–7; *see ICE Detainers: Frequently Asked Questions*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/news/library/factsheets/detainer-faqs.htm (last visited Sept. 23, 2014) (defining an immigration detainer and the scope of ICE's authority to issue one, including that "[i]f ICE does not assume custody after 48 hours . . . , the local law enforcement authority (LEA) is required to release the individual").

3. Plaintiff's Original Complaint, *supra* note 1, at 7.

4. *See* Campbell Robertson, *New Orleans and U.S. in Standoff on Detentions*, N.Y. TIMES (Aug. 12, 2013), http://www.nytimes.com/2013/08/13/us/new-orleans-and-us-in-standoff-on-detentions.html (detailing Mr. Cacho's saga from his initial incarceration to his ultimate deportation to Honduras). Subsequently, the Orleans Parish Sheriff's Office adopted a policy that limits enforcement of immigration detainers to a few circumstances. *See Immigration and Customs Enforcement (ICE) Procedures*, ORLEANS PARISH SHERIFF'S OFFICE, https://immigrantjustice.org/sites/immigrantjustice.org/files/New%20Orleans%20Detainer%20Policy.pdf (last updated June 21, 2013) (permitting enforcement of immigration detainers only

Mr. Cacho of his liberty and subjected him to the abhorrent conditions at the prison.[5] Mr. Cacho's experience illustrates the potential harms, including severe Fourth Amendment and due process violations that can result from the enforcement of immigration detainers, a tool that ICE has relied heavily on in its attempts to prioritize the deportation of noncitizens who have been captured by the criminal justice system.[6]

Recognizing that it cannot deport all of the estimated 11.5 million unauthorized individuals who reside in the United States,[7] the U.S. Department of Homeland Security (DHS) has prioritized removing noncitizens who have criminal convictions or who pose national security threats.[8] In June 2011, John Morton, then-Director of ICE, articulated the federal government's civil immigration priorities in a memorandum regarding prosecutorial discretion in immigration enforcement.[9] These guidelines provided that ICE agents and attorneys can and should exercise discretion based on a variety of factors at any point in the immigration enforcement process and emphasized exercising discretion as early in the process as possible to

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when the individual subject to the detainer has been charged with specific crimes, such as murder or armed robbery).

5. *See* Letter from Loretta King, Acting Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Marlin N. Gusman, Orleans Parish Criminal Sheriff 5 (Sept. 11, 2009), *available at* http://www.justice.gov/crt/about/spl/documents/parish_findlet.pdf (finding that Orleans Parish Prison failed to protect inmates from "harm and serious risk of harm from staff and other inmates" and that it also "fail[ed] to provide safe and sanitary environmental conditions").

6. Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dirs., All Special Agents in Charge, All Chief Counsel 2 (Dec. 21, 2012), *available at* http://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf [hereinafter December 2012 Morton Memo] (stating that enforcement of detainers should be consistent with ICE policies, which prioritize deporting noncitizens who have been convicted of certain criminal offenses).

7. *See* MICHAEL HOEFER ET AL., U.S. DEP'T OF HOMELAND SECURITY, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2011 1 (2012), *available at* https://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf (defining unauthorized immigrants as foreign-born noncitizens who are not legal U.S. residents).

8. Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All ICE Emps., 1–2 (Mar. 2, 2011), *available at* http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf [hereinafter March 2011 Morton Memo]; *see also* Cecilia Muñoz, *Immigration Update: Maximizing Public Safety and Better Focusing Resources*, WHITE HOUSE BLOG (Aug. 18, 2011, 2:00 PM), http://www.whitehouse.gov/blog/2011/08/18/immigration-update-maximizing-public-safety-and-better-focusing-resources (emphasizing the Obama Administration's strategy to invest resources in deporting individuals who threaten public safety or national security).

9. Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dirs., All Special Agents in Charge, All Chief Counsel 1–2 (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

save government resources.[10] Even though removal proceedings are civil,[11] not criminal, matters, ICE "focus[es] first on those who have been charged with or convicted of the most dangerous crimes."[12] These statements suggest that civil detention and removal of noncitizens as a result of a criminal offense targets only high-level offenders and those that clearly threaten public safety.[13]

In fiscal year 2013, ICE reported that ninety-eight percent of its removals met one of the agency's civil immigration removal priorities.[14] ICE also reported that fifty-nine percent of the 368,644 individuals it removed from the United States in fiscal year 2013 had previously been convicted of a crime.[15] Although ICE purports to remove *dangerous* criminals, from 2009 to 2011, it most often removed individuals for drug offenses and ordinary traffic violations.[16] Thus, the immigration enforcement system captures low-level offenders, many of whom have substantial familial ties to the United States.[17]

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10. *Id.* at 3–5.

11. *See infra* note 40 and accompanying text.

12. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, SECURE COMMUNITIES: A MODERNIZED APPROACH TO IDENTIFYING AND REMOVING CRIMINAL ALIENS 2010, *available at* http://www.ice.gov/doclib/secure-communities/pdf/sc-brochure.pdf.

13. March 2011 Morton Memo, *supra* note 8, at 1–2. Level 1 offenders are defined as those "aliens convicted of crimes, with a particular emphasis on violent criminals, felons, and repeat offenders" and include those individuals who "otherwise pose a serious risk to public safety." *Id.* at 2.

14. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, FY 2013 ICE IMMIGRATION REMOVALS 1–2 (2013), http://www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf [hereinafter FY 2013 ICE REMOVALS] (defining a "criminal offender" as an individual who has been convicted of one or more criminal offenses in the United States). While the definition of "criminal offender" excludes individuals who have committed civil traffic offenses, it includes individuals convicted of all levels of criminal offenses. *Id.* at 2.

15. *Id.* at 1.

16. IMMIGRATION POLICY CTR., AM. IMMIGRATION COUNCIL, A DECADE OF RISING IMMIGRATION ENFORCEMENT 4 (2013), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/enforcementstatsfactsheet.pdf. Immigration offenses were one of the three types of criminal convictions for which noncitizens were most frequently removed from the United States. *Id.* Immigration offenses can be also prosecuted as civil offenses, so categorizing them as criminal convictions is "somewhat misleading." *Id.*

17. *See, e.g.*, HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS): NON-CITIZENS DEPORTED MOSTLY FOR NONVIOLENT OFFENSES 2 (2009), http://www.hrw.org/sites/default/files/reports/us0409web.pdf (finding that between 1997 and 2007, seventy-two percent of the individuals deported from the United States were removed on account of committing nonviolent offenses); *see also* APPLIED RESEARCH CTR., SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 11 (2011), *available at* http://www.atlanticphilanthropies.org/sites/default/files/uploads/ARC_Report_Shattered_Families_FULL_REPORT_Nov2011Release.pdf (calculating that twenty-two percent of the individuals who were deported in 2011 had U.S.-citizen children); *New York Immigrant Family Unity Project*, VERA INST. JUST., http://www.vera.org/project/new-york-immigrant-family-unity-project (last visited Oct. 6, 2014) (noting that over 7,000 U.S.-citizen children in New York City lost a parent to deportation between 2005 and 2010).

The reality is not only troubling to advocates but also undermines the government's decision to base eligibility for deportation on criminal conduct.[18]

Concerns about public safety also serve as the basis for the detention of noncitizens.[19] Many problems plague the immigration detention system, and critics have decried the detention of low-level offenders,[20] the conditions of immigration detention,[21] the mandate to detain a certain number of noncitizens each day,[22] and the

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18. *See* Shirley P. Leyro, *Exploring Deportation as a Causal Mechanism of Social Disorganization*, *in* OUTSIDE JUSTICE: IMMIGRATION AND THE CRIMINALIZING IMPACT OF CHANGING POLICY AND PRACTICE 138 (David C. Brotherton et al. eds., 2013) (stating that "the link between immigration and crime has been consistently debunked by empirical studies").

19. *See* 8 U.S.C. § 1226 (2012) (mandating that the government retain custody throughout removal proceedings of noncitizens who have committed certain crimes); Demore v. Kim, 538 U.S. 510, 518 (2003) (recognizing Congress's concern for the "increasing rates of criminal activity by aliens"); *see also* Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 45–46 (2010) (noting that immigration judges are "precluded from independently reviewing" ICE's decision to detain a noncitizen in removal proceedings). Immigrant detentions in 2012 reached 478,000, an "all-time high." JOHN. F. SIMANKSI & LESLEY M. SAPP, U.S. DEP'T OF HOMELAND SECURITY, IMMIGRATION ENFORCEMENT ACTIONS: 2012 1 (2013), *available at* http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_0.pdf.

20. *See, e.g.*, Steve Patrick Ercolani, *Why Are Immigrants Being Deported for Minor Crimes?*, THE ATLANTIC (Nov. 20, 2013, 11:34 AM), http://www.theatlantic.com/national/archive/2013/11/why-are-immigrants-being-deported-for-minor-crimes/281622 (questioning the mandatory detention and deportation of certain nonviolent offenders, including those classified as aggravated felons, and commenting on how the U.S. Congress has "expanded the definition" of an aggravated felony, which traditionally included violent crimes like murder, to include nonviolent crimes like perjury and obstruction of justice). *See generally Why Detain Nonviolent Immigrants?*, L.A. TIMES (Mar. 24, 2013), http://articles.latimes.com/2013/mar/24/opinion/la-ed-detainees-20130324 (urging legislators to consider alternatives to costly immigration detention).

21. *E.g.*, AM. CIVIL LIBERTIES UNION OF GA., PRISONERS OF PROFIT: IMMIGRANTS AND DETENTION IN GEORGIA 15–19 (2012), *available at* http://www.acluga.org/download_file/view_inline/42/244/%E2%80%8E (highlighting poor conditions in immigration detention facilities in Georgia, including inadequate medical care, limited visitation hours for friends and family, and deficient hygiene standards, among others). *See generally* DET. WATCH NETWORK, EXPOSE AND CLOSE, ONE YEAR LATER: THE ABSENCE OF ACCOUNTABILITY IN IMMIGRATION DETENTION 2–10 (2013), *available at* http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/expose_and_close_one_year_later.pdf (expanding on reports of documented abuse and inhumane conditions in ten immigrant detention facilities in the United States).

22. *See* Department of Homeland Security Appropriations Act of 2010, Pub. L. No. 111-83, 123 Stat. 2142, 2149 ("[F]unding made available under this heading shall maintain a level not less 33,400 detention beds through September 30, 2010[.]"); *see also Release of Criminal Detainees by U.S. Immigration and Customs Enforcement: Policy or Politics?: Hearing Before the Comm. on the Judiciary*, 113th Cong. 6–7 (2013) (statement of Rep. Zoe Lofgren, Member, H. Comm. on the Judiciary) (questioning the need to place certain immigrants in detention after ICE released 2228 detainees due to budgetary constraints, seventy-two percent of whom had no criminal history, and twenty-one percent of whom had misdemeanor convictions); *William* Selway & Margaret Newkirk, *Congress's Illegal-Immigration Detention Quota Costs $2 Billion a Year*, BLOOMBERG BUSINESSWEEK (Sept. 26, 2013), http://www.businessweek.com/articles/

troubling parallels between civil immigration detention and criminal punitive incarceration.[23] In order to detain and remove noncitizens based on their criminal convictions, immigration enforcement must enlist the assistance of state and local law enforcement.[24]

Created by statute in 1986,[25] immigration detainers, the tool ICE used to prolong Mr. Cacho's detention in the local jail, create a way for ICE to funnel noncitizens directly into its custody after they have been convicted of or arrested for any criminal offense by a local law enforcement agency.[26] By regulation, immigration detainers, also known as ICE holds, are requests from ICE to local law enforcement to maintain custody of an individual suspected of being deportable for forty-eight hours after that individual would otherwise have been released from the local police department's custody.[27] This period provides time for ICE to arrange a transfer of custody from local law enforcement to ICE.[28] As discussed further in this Comment, this extension of the noncitizens' period of detention raises significant constitutional concerns.

Similar to its policies surrounding immigration detention and removal, ICE ostensibly prioritizes issuing detainers for dangerous criminal offenders.[29] The data available about immigration detainer

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2013-09-26/congresss-illegal-immigration-detention-quota-costs-2-billion-a-year (unpacking the costs of a daily quota for immigration detention).

23. *E.g.*, Maunica Sthanki, *Deconstructing Detention: Structural Impunity and the Need for an Intervention*, 65 RUTGERS L. REV. 447, 456 (2013) (explaining that "[t]he immigration detention system largely follows a criminal incarceration model" and that the government holds many immigrant detainees "in criminal jails or detention facilities that resemble criminal jails").

24. ICE consolidated its enforcement programs that partner with state and local law enforcement in the Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS) program. *Fact Sheet: ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS)*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/news/library/factsheets/access.htm (last visited Sept. 23, 2014) [hereinafter *Fact Sheet: ICE ACCESS*]. The programs include, among several others, the Secure Communities program, which uses technology and information sharing to help local communities identify and remove criminal noncitizens, and the Border Enforcement Security Task Force (BEST), which works with law enforcement to identify and disrupt criminal organizations that threaten U.S. border security. *Id.*

25. *See infra* notes 50–53 and accompanying text.

26. *See ICE Detainers: Frequently Asked Questions*, *supra* note 2 (stating that detainers "are critical for ICE to be able to identify and ultimately remove criminal aliens who are currently in federal, state, or local custody"); *see also* Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 165 (2008) [hereinafter Lasch, *Enforcing the Limits*] (noting that, without detainers, noncitizens charged with or convicted of certain offenses would be released from custody).

27. 8 C.F.R. § 287.7 (2014).

28. *ICE Detainers: Frequently Asked Questions*, *supra* note 2.

29. *See* December 2012 Morton Memo, *supra* note 6, at 2–3 (revising the immigration detainer form and articulating ICE's priorities for immigration detainer enforcement).

enforcement illustrates, however, that ICE predominantly issues detainers for low-level offenders and individuals with no criminal history.[30] For example, from October 1, 2011 to January 31, 2013, approximately forty-eight percent of immigration detainers were issued for individuals with no prior criminal conviction.[31] Only fourteen percent of individuals held under immigration detainers were Level 1 offenders.[32] Ordinary traffic offenses, driving under the influence, and simple marijuana possession were the three most frequent convictions for individuals with ICE detainers.[33] State-specific reports similarly found that ICE issued the majority of detainers for low-level offenders.[34]

This Comment argues that immigration detainers as enforced violate the Fourth and Fourteenth Amendments of the U.S.

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30. *Few ICE Detainers Target Serious Criminals*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Sept. 17, 2013), http://trac.syr.edu/immigration/reports/330 [hereinafter TRAC, *ICE Detainers*]. The Transactional Records Access Clearinghouse (TRAC) at Syracuse University gathers, researches, and distributes data concerning the activities of the federal government; TRAC uncovers much of its information about the government's activities from the government's responses to TRAC's Freedom of Information Act (FOIA) requests. *Transactional Records Access Clearinghouse*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE http://trac.syr.edu/aboutTRACgeneral.html (last visited Sept. 23, 2014).

31. TRAC, *ICE Detainers*, *supra* note 30. In addition to past criminal convictions, ICE considers the charge for which the individual was initially detained by local law enforcement; however, ICE failed to provide TRAC with any data regarding pending charges. *Id.*

32. *Id.* The three classifications are Level 1, Level 2, and Level 3. Level 1 offenders include aggravated felons and those who have been convicted of two or more crimes punishable by more than one year. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-708, SECURE COMMUNITIES: CRIMINAL ALIEN REMOVALS INCREASED, BUT TECHNOLOGY PLANNING IMPROVEMENTS NEEDED 10 tbl.1 (2012) [hereinafter GAO, SECURE COMMUNITIES].

33. TRAC, *ICE Detainers*, *supra* note 30.

34. *See, e.g.*, KATHERINE BECKETT & HEATHER EVANS, IMMIGRATION DETAINER REQUESTS IN KING COUNTY, WASHINGTON: COSTS AND CONSEQUENCES 10 (2013), *available at* https://immigrantjustice.org/sites/immigrantjustice.org/files/Detainer%20Cost–King%20County%20WA.pdf (finding that four out of the five people detained under an immigration detainer did not have a felony conviction); RANDY CAPPS ET AL., MIGRATION POLICY INSTITUTE, DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT (2011) *available at* http://www.immigrationresearch-info.org/report/migration-policy-institute/delegation-and-divergence-study-287g-state-and-local-immigration-e (finding that certain counties in the State of Maryland issued eighty percent of their detainers against low-level and traffic offenders); ANDREA GUTTIN, AM. IMMIGRATION COUNCIL, THE CRIMINAL ALIEN PROGRAM: IMMIGRATION ENFORCEMENT IN TRAVIS COUNTY, TEXAS 9 fig.1 (2010), http://www.immigrationpolicy.org/sites/default/files/docs/Criminal_Alien_Program_021710.pdf (finding that fifty-eight percent of immigration detainers in 2008 in Travis County, Texas were placed against individuals who had been charged with misdemeanors); AARTI SHAHANI, JUSTICE STRATEGIES, NEW YORK CITY ENFORCEMENT OF IMMIGRATION DETAINERS: PRELIMINARY FINDINGS 2 (2010), *available at* http://www.immigrantjustice.org/sites/immigrantjustice.org/files/NYC%20Detainer%20Report.pdf (failing to find any correlation between eligibility for deportation and the seriousness of the offense for which a detainer was issued).

Constitution.[35] ICE violates an individual's Fourth Amendment rights when it issues and enforces an immigration detainer without probable cause, and the local law enforcement agency (LEA) violates an individual's Fourth Amendment rights when it enforces a detainer that lacks probable cause. Following the initial issuance, when noncitizens remain detained beyond the forty-eight hour period without charges, the LEA continues to violate their Fourth Amendment rights because it has not provided them with a probable cause determination. The LEA violates noncitizens' procedural due process rights by failing to implement fair procedures to ensure their timely release from custody.

Because of the potential for serious constitutional violations and because immigration detainers are merely requests,[36] state and local LEAs should refuse to enforce these detainers. If state and local LEAs choose not to enact such a blanket policy, then they should refuse to enforce detainers against low-level offenders and promulgate clear guidelines that provide safeguards against due process violations.[37] For individuals with pending criminal cases, local jails should follow individualized determinations made by judicial officers rather than enforce the immigration detainers.

Part I of this Comment examines the growing intersection of criminal law and immigration law and how this convergence has led to ICE's increased reliance on state and local law enforcement and the use of immigration detainers. It explains the statutory and regulatory authority for immigration detainers and the constitutional protections afforded to noncitizens, both upon the issuance of the immigration detainer and after the forty-eight hour period has elapsed. Part II analyzes the constitutional violations that result from enforcing immigration detainers—specifically, violations of the Fourth and Fourteenth Amendments. Part III highlights additional concerns that should motivate state and local legislatures to limit

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35. *See* Zadvydas v. Davis, 533 U.S. 678, 693–94 (2001) (holding that noncitizens in deportation proceedings are entitled to due process); Yamataya v. Fisher (*The Japanese Immigrant Case*), 189 U.S. 86, 101 (1902) (establishing that noncitizens have a right to due process before deportation, regardless of their immigration status in the United States). *See generally* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (concluding that the Fourteenth Amendment applies to noncitizens because by its terms, it protects "person[s]" instead of only "citizen[s]").

36. 8 C.F.R. § 287.7(a) (2014).

37. An example of the latter can be found in a settlement agreement for a lawsuit filed on behalf of individuals held under immigration detainers beyond the forty-eight hour period permitted by federal regulation. Settlement Agreement and Stipulation of Dismissal Upon Termination of Agreement at 12, Brizuela v. Feliciano, No. 3:12cv226 (JBA) (D. Conn. Feb. 19, 2013).

immigration detainer enforcement, namely immigrant communities' distrust of law enforcement, implicit biases in police departments that may lead to racial discrimination, and the cost of detainer enforcement for state and local LEAs. Finally, this Comment concludes that state and local jurisdictions have the power to and should refuse to enforce immigration detainers.

## I. BACKGROUND

The growing convergence of immigration law and criminal law over the past few decades has led the federal government to rely increasingly on state and local law enforcement agencies to perform certain immigration enforcement functions.[38] The immigration detainer is one important tool that the federal government uses to facilitate the deportation of noncitizens caught by the criminal justice system.[39] Despite the intersection of criminal law and immigration law, deportation proceedings and decisions related to the removal or exclusion of noncitizens are civil, not criminal, matters.[40] However, because adjudicators frequently base deportation decisions on criminal conduct, questions arise about what criminal procedural protections, if any, should apply in deportation proceedings.[41]

### *A. The Criminalization of Immigration Law over the Past Three Decades*

From the 1980s forward, the intersection of criminal and immigration law has increased significantly.[42] Because the U.S. criminal justice system disproportionately impacts individuals based

38. *See Fact Sheet: ICE ACCESS*, *supra* note 24 (listing various programs through which local law enforcement agencies can partner with ICE).

39. *See* sources cited *supra* note 26 (explaining that immigration detainers are essential tools for ICE to use to identify and deport criminal noncitizens in law enforcement custody).

40. *See, e.g.*, *Zadvydas*, 533 U.S. at 690 (recognizing that removal proceedings are civil, not criminal, matters and thus "nonpunitive in purpose and effect"); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (explaining that deportation of a noncitizen is not punishment for the commission of a crime but merely "a method of enforcing the return to his own country of an alien who has not complied" with certain conditions of his residence).

41. *See* Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 313 (2000) (stating that the deportation of a person based on a prior conviction, without taking into account the person's rehabilitation or whether the person provides a benefit to family members residing in the United States, closely resembles punishment for that prior offense).

42. *See* Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 118 (2012) (explaining that Congress started criminalizing immigration law in the 1980s when it revised the Immigration and Nationality Act (INA) "to more closely integrate criminal and immigration law").

on race and class,[43] the use of criminal conduct as a proxy for immigrant desirability[44] leads to troubling results, such as the deportation of individuals with strong ties to the United States.[45]

*1. Changes to criminal and immigration law in the 1980s*

Beginning in the 1980s, Congress began to pass legislation that increased noncitizens' risk of deportation as a result of criminal conduct.[46] In 1986, Congress passed the Immigration Reform and Control Act (IRCA),[47] which imposes sanctions upon employers who knowingly employ undocumented immigrants.[48] A short provision in the IRCA provides that for noncitizens with criminal convictions, deportation proceedings "shall" begin "as expeditiously as possible after the date of the conviction."[49] In 1986, Congress also passed the Anti-Drug Abuse Act (ADAA).[50] The ADAA changed the inadmissibility provisions of the Immigration and Nationality Act (INA)[51] so that any conviction related to any controlled substance in

43. *See infra* note 60 and accompanying text (providing several scholars' criticism of the criminal justice system as one that takes advantage of and further isolates marginalized groups).

44. *Cf. Removal of Criminal and Illegal Aliens: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong. 14 (1996) [hereinafter *Hearing: Removal of Criminal and Illegal Aliens*] (statement of David A. Martin, General Counsel, Immigration and Naturalization Service) (stating that the Immigration and Naturalization Service (INS) promptly implemented certain measures included in the Antiterrorism and Effective Death Penalty Act (AEDPA) to ensure "maximum removals of criminal aliens").

45. *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 372 (2006) (observing that the convergence of criminal law and immigration has negatively impacted lawful permanent residents and other long-term resident noncitizens, groups that were previously protected from deportation as a result of legal and cultural barriers); *see also* Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 EMORY L.J. 1243, 1247 (2013) (arguing that to curtail the harsh consequences of criminal deportations, noncitizens' right to remain should be based on more than citizenship, such as length of residence and family connections).

46. *See* Ryan D. King et al., *Employment and Exile: U.S. Criminal Deportations, 1908–2005*, 117 AM. J. OF SOC. 1786, 1797 (2012) (indicating that the passage of the Immigration Reform and Control Act (IRCA) in 1986 was a major turning point as related to criminal deportations).

47. Pub. L. No. 99-603, 100 Stat. 3359 (1986).

48. *Id.* § 101(a), 100 Stat. 3360. IRCA added sections 274A, 274B, and 274C to the Immigration and Nationality Act and prohibits employers from hiring undocumented immigrants. 8 U.S.C. § 1324a(a)(1) (2012).

49. 8 U.S.C. § 1229(d)(1). The enactment of this legislation also catalyzed the use of jails and prisons as facilities to house noncitizens subject to removal proceedings. *See* Immigration Reform and Control Act § 702 (requiring the Department of Defense to provide the Attorney General with a list of facilities that could be used to detain noncitizens within sixty days of the date of IRCA's enactment).

50. Pub. L. No. 99-570, 100 Stat. 3207 (1986).

51. Pub. L. No. 82-414, 66 Stat. 163 (1952). Prior to 1996, the inadmissibility grounds were considered "exclusion" grounds. After Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-

the United States, a state, or a foreign country would make a noncitizen inadmissible.[52] Notably, the ADAA also created immigration detainers, but they are meant to be issued only against noncitizens convicted of controlled substance offenses.[53] The Anti-Drug Abuse Act of 1988[54] then created the category of an aggravated felony, a classification unique to immigration law that makes a noncitizen deportable based on certain categories of criminal conduct.[55] The Anti-Drug Abuse Act also mandated that aggravated felons be detained upon completion of their criminal sentence while their deportation proceedings are pending.[56]

The criminalization of immigration law ran parallel to, and in some ways depended on, a significant shift in the criminal punishment model. Beginning in the late 1980s, the model for criminal conduct was characterized as a more punitive one that emphasized confinement and incapacitation.[57] Support for this position emerged by painting issues of crime as "race-neutral."[58]

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208, 110 Stat. 3009-546 (1996), however, noncitizens who were previously considered excludable for not meeting certain criteria upon entry were then deemed to be inadmissible. STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 420–21 (5th ed. 2009). Thus, a noncitizen could be physically present in the United States but never have been admitted. *See* 8 U.S.C. § 1101(a)(13)(A) (defining "admission" as "lawful entry . . . after inspection and authorization by an immigration officer"). Individuals who are inadmissible may be subject to deportation on both inadmissibility and deportability grounds. *See* LEGOMSKY & RODRÍGUEZ, *supra* at 420–21 (distinguishing between inadmissibility and deportability).

52. Under the deportability provisions, a noncitizen is deportable if, after admission, the noncitizen has been convicted of violating, attempting to violate, or conspiring to violate "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance." 8 U.S.C. § 1227(a)(2)(B)(i). The statute contains an exception for a single offense for possession of thirty grams or less of marijuana for personal use. *Id.* Any noncitizen who is, or any time after admission was, a drug abuser or addict is also deportable. *Id.* § 1227(a)(2)(B)(ii).

53. *Id.* § 1357(d).

54. Pub. L. No. 100-690, 102 Stat. 4181.

55. *Id.* §§ 7341–43. The original aggravated felony definition included only murder, drug trafficking offenses, and illicit trafficking of firearms. *Id.* § 7342.

56. *Id.* § 7343.

57. *See* King, *supra* note 46, at 1796–98 (explaining that the period from 1987–2005 represented a "categorical shift in crime control more generally, one that severely curtailed administrative and judicial discretion and reemphasized punitive sanctions," and adding that the new punitive model was also characterized by a "dramatic curtailment of judicial discretion"); McLeod, *supra* note 42, at 130 (criticizing the convergence of criminal and immigration law because it allowed problematic aspects of the criminal punishment model, such as reliance on incarceration and excessive punishment, to be incorporated into an immigration regulatory setting).

58. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 48 (2012) (arguing that former President Ronald Reagan mastered this sort of "color-blind rhetoric" related to welfare and crime and that such rhetoric exploited racial hostility and resentment).

Notably, the "tough on crime" stance extended across party lines.[59] Scholars and advocates have argued that this shift in the 1980s cultivated a criminal justice system that primarily targets people of color and greatly disadvantages those who lack the resources to afford legal representation.[60]

As support for incarceration as punishment grew during this period, the number of deportations of noncitizens labeled as criminals also grew.[61] The race-neutral rhetoric created during the 1980s bolstered the use of criminal convictions as grounds for deporting immigrants.[62] Although some may believe that criminal convictions are an appropriate proxy for whether noncitizens should be allowed to remain in the United States,[63] basing deportability on criminal conduct subjects any noncitizen with a criminal conviction, including those with strong ties to the United States, to possible deportation.[64] For many individuals, a criminal conviction results in a

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59. *See* King, *supra* note 46, at 1800 (explaining that deportation as a form of punishment has increased and is not necessarily linked to political conservatism).

60. *See, e.g.*, ALEXANDER, *supra* note 58, at 180 ("[The criminal justice system] is a set of structural arrangements that locks a racially distinct group into a subordinate political, social, and economic position . . . ."); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 5 (1999) (arguing that the policy of mass incarceration in the criminal justice system actually depends on race and class disparities of defendants in the system); Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance after* Gideon v. Wainwright, 122 YALE L.J. 2150, 2171 (2012) ("In [the criminal justice] system, poverty, not justice, dictates outcomes.").

61. SIMANKSI & SAPP, *supra* note 19, at 1 (reporting that "an all-time high" of 199,000 criminal noncitizens were removed from the U.S. in 2012); *see also* MARY DOUGHERTY ET AL., U.S. DEP'T OF HOMELAND SECURITY, IMMIGRATION ENFORCEMENT ACTIONS: 2004 1 (2005), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/AnnualReportEnforcement2004.pdf (stating that 88,897 criminal noncitizens were removed from the U.S. in 2004 and seventy-seven percent of them were from Mexico).

62. Some scholars have condemned the use of criminal conduct as a basis for deportation and have alleged it perpetuates racial injustice. *See, e.g.*, Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111, 1117 (1998) (providing an historical account of ways that racism has infected immigration law); Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639, 665–66 (2011) (arguing that the convergence of criminal and immigration law serves to further exclude, discriminate, and marginalize Latinos in the United States).

63. *See Is Secure Communities Keeping Our Communities Secure?: Hearing Before the Subcomm. on Immigration Policy and Enforcement of the H. Comm. on the Judiciary*, 112th Cong. 6 (2011) [hereafter *Hearing: Is Secure Communities Keeping Our Communities Secure?*] (statement of Rep. Lamar Smith, Chairman, Comm. on the Judiciary) ("Who wouldn't want to deport a criminal immigrant?"); 141 CONG. REC. 15,039 (1995) (statement of Sen. Spencer Abraham) (arguing that noncitizens with criminal convictions must be deported as rapidly as possible or they will "prey on more American citizens").

64. *See* McLeod, *supra* note 42, at 130–51 (detailing how the criminal-immigration convergence negatively impacts U.S. citizens, lawful permanent

myriad of negative consequences,[65] but for noncitizens, a criminal conviction may also result in permanent separation from their families, homes, and jobs.[66] Unlike criminal defendants, however, noncitizens in removal proceedings do not have a right to counsel.[67] As a result, more than half of noncitizens are not represented in deportation proceedings.[68] Further, criminal convictions make many forms of removal relief impossible, even for those with strong ties in the United States.[69] The severe consequences of criminal convictions for noncitizens create doubt about whether the system truly serves civil, rather than punitive, objectives.[70]

*2. Immigration law and enforcement in the 1990s and beyond*

Beginning in 1990, it became more difficult for immigrants to seek relief because the preceding Immigration Act of 1990 eliminated most forms of discretionary relief from deportation.[71] The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of

residents, and other groups of immigrants as well as how the system expends unnecessary resources).

65. *See* ALEXANDER, *supra* note 58, at 141–58 (discussing common consequences of criminal convictions, such as the inability to obtain housing, difficulty finding employment, and hefty debts from court fees).

66. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010) (recognizing that deportation is a "particularly severe penalty" (internal quotation marks omitted)); Woodby v. Immigration & Naturalization Serv., 385 U.S. 276, 285–86 (1966) (requiring "clear, unequivocal, and convincing evidence" to prove the grounds of deportation in removal proceedings because of the "drastic deprivations" that result from deportation); *see also* HUMAN RIGHTS WATCH, *supra* note 17, at 12–16 (arguing that the state's power to deport should be limited when it infringes upon certain human rights, like the "fundamental right to live together with close family members, including minor children").

67. *See* 8 U.S.C. § 1229a(b)(4)(A) (2012) (stating that noncitizens may be represented by counsel at their own expense in removal proceedings).

68. *See, e.g.*, Matt Adams, *Advancing the "Right" to Counsel in Removal Proceedings*, 9 SEATTLE J. FOR SOC. JUST. 169, 172 (2010) (noting that seventy percent of individuals in removal proceedings in Tacoma and Seattle, Washington immigration courts were unrepresented in 2008); The Steering Comm. of the N.Y. Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings: New York Immigrant Representation Study Report: Part 1*, 33 CARDOZO L. REV. 357, 363 (2011) (reporting that in New York City, sixty percent of detained immigrants and twenty-seven percent of non-detained immigrants were unrepresented when their cases were completed).

69. *See, e.g.*, 8 U.S.C. § 1158(b)(2)(B)(i) (making individuals with aggravated felony convictions ineligible for asylum); *id.* § 1229b(a)(3) (stating that lawful permanent residents are ineligible for cancellation of removal—a form of deportation relief—if they have an aggravated felony conviction).

70. *See* Pauw, *supra* note 41, at 333–34 (arguing that the current application of criminal grounds of exclusion illustrates Congress's punitive intent in immigration laws because remedial purposes do not justify the sanctions).

71. The Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, also had implications for deportations based on criminal conduct. *See supra* note 52 (explaining that 8 U.S.C. § 1227(a)(2)(B)(i) made attempted as well as completed criminal acts involving controlled substances deportable offenses).

1996[72] made significant changes to the INA and immigration enforcement and further increased the use of past criminal conduct as grounds for deportation.[73] In an effort to capture more noncitizens who interacted with the criminal justice system in a variety of capacities, IIRIRA greatly broadened the definition of criminal conviction.[74] Commenting on the severity of the criminal deportation provisions of IIRIRA, the U.S. Supreme Court stated, "Under contemporary law, if a noncitizen has committed a removable offense after the 1996 effective date of these amendments, his removal is practically inevitable."[75] IIRIRA also created the 287(g) provision of the INA, which allows local law enforcement agencies to perform specific immigration enforcement functions.[76]

Along with IIRIRA, the Anti-Terrorism and Effective Death Penalty Act (AEDPA)[77] expanded the list of crimes for which a noncitizen could be deported.[78] It expanded the definition of aggravated felonies to include various nonviolent offenses, such as forgery and counterfeiting.[79] Although criminal conduct has been a basis for deportation for nearly a century,[80] these legislative changes vastly expanded its use for that purpose. Immigration law now allows for the expulsion of classes of individuals based on categories of criminal activity.[81] These changes also made it significantly easier to deport noncitizens with criminal histories, even lawful permanent residents.[82]

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72. Pub. L. No. 104-208, 110 Stat. 3009-546.

73. IIRIRA also established new inadmissibility and deportability provisions. *See* LEGOMSKY & RODRÍGUEZ, *supra* note 51, at 420–21 (distinguishing between inadmissibility and deportability).

74. *See* H.R. Rep. No. 104-879, at 123 (1997) ("[IIRIRA] broadens the definition of 'conviction' for immigration law purposes to include all aliens who have admitted to or been found to have committed crimes. This will make it easier to remove criminal aliens, regardless of specific procedures in States for deferred adjudication or suspension of sentences.").

75. Padilla v. Kentucky, 130 S. Ct. 1473, 1480 (2010).

76. *See infra* Part I.B.1 (discussing the implementation of 287(g) agreements and problems arising from that initiative).

77. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

78. AEDPA modified the INA's deportability provision related to crimes involving moral turpitude to include crimes for which a sentence of one year or longer *may* be imposed. 8 U.S.C. § 1227(a)(2)(A)(i) (2012). AEDPA also allowed state and local law enforcement to detain individuals who are unlawfully present in the United States, were previously convicted of felonies, and were deported from or left the United States after their felony convictions. *Id.* § 1252c.

79. *Id.* § 1101(a)(43). For these offenses to trigger an aggravated felony designation, they must carry a potential one-year term of imprisonment. *Id.* AEDPA also created a presumption of deportability for aggravated felons. *Id.* § 1228(c).

80. King et al., *supra* note 46, at 1795 (noting that legislation in 1917 was the first of its kind in the United States to call for the deportation of noncitizens who received jail sentences for multiple crimes involving moral turpitude).

81. *See Hearing: Removal of Criminal and Illegal Aliens*, *supra* note 44, at 15 (statement of David A. Martin, General Counsel, Immigration and Naturalization

After September 11, 2001, immigration enforcement methods shifted significantly.[83] In 2002, the Homeland Security Act[84] established the Department of Homeland Security (DHS) and gave DHS a primary mission to protect against terrorist threats.[85] Congress placed ICE within DHS with the stated mission "to promote homeland security and public safety through the criminal and civil enforcement of federal laws governing border control, customs, trade and immigration."[86] Because many deportation grounds depended on criminal conduct by this time, ICE's programs enlist state and local LEAs, which directly interact with individuals who have committed criminal offenses.[87]

### *B. Enlisting Local Law Enforcement and the Function of the Immigration Detainer*

The federal government could not use criminal convictions as a proxy for deportation eligibility without enlisting state and local LEAs.[88] Although state and local legislatures have created their own

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Service) (explaining that, under AEDPA, individuals are deportable for a crime involving moral turpitude even if they were not sentenced to any jail time and even if they have been lawful permanent residents for many years).

82. *See* LARRY M. EIG, CONG. RESEARCH SERV., 96-644A, DEPORTATION OF CRIMINAL ALIENS AFTER P.L. 104-132, THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT: EXPANDED DETENTION AND RESTRICTION "212(C)" RELIEF 1 (1996) (stating that the AEDPA eliminated the existing exceptions for lawful permanent residents regarding mandatory detention and instead applied these provisions to all noncitizens convicted of certain crimes); *see also* HUMAN RIGHTS WATCH, *supra* note 17, at 2 (finding that twenty-two percent of noncitizens who were deported from the United States between 1997 and 2007 were lawfully in the country); Sandra Guerra Thompson, *Latinas and Their Families in Detention: The Growing Intersection of Immigration Law and Criminal Law*, 14 WM. & MARY J. WOMEN & L. 225, 229–30 (2008) (indicating that members of the Latino community are fearful of the increased rise of deportations after federal law enforcement "rounded up" members of their community and deported them because of their criminal histories).

83. *See* Jennifer M. Chacón, *Unsecured Borders: Immigration Restriction, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1830–31 (2007) (noting that certain immigration administration functions were identified as important national security priorities after 9/11).

84. Pub. L. No. 107-296, 116 Stat. 2135 (2002).

85. *Id.* § 101(b)(1).

86. *Overview*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/about/overview (last visited Sept. 23, 2014) [hereinafter *Overview*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT].

87. *See supra* note 24 and accompanying text (noting that the ICE ACCESS program enables local law enforcement agencies to partner with ICE in multiple ways and providing examples of several partnership programs).

88. *See Proposals to Reduce Illegal Immigration and Control Costs to Taxpayers: Hearing Before the S. Comm. on the Judiciary*, 104th Cong. 19 (1995) (statement of Janet Reno, Att'y Gen. of the United States) (identifying "aggressively pursuing criminal aliens" as the second of four prongs in the federal government's then-strategy to fight illegal immigration). *See generally Empowering Local Law Enforcement to Combat Illegal Immigration: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human*

laws regarding restrictions on different classes of immigrants,[89] DHS has created two programs that specifically target noncitizens who are or have been involved with the criminal justice system: 287(g) and Secure Communities. Both of these programs utilize immigration detainers, and both have been the source of great controversy.

*1. 287(g)*

The 287(g) program, which permits voluntary agreements between local law enforcement and ICE, is one way that the federal government has allowed local law enforcement to opt in to assisting with immigration enforcement.[90] The program provides three possible models for LEAs to partner with federal immigration agents: (1) the "jail model," which allows correctional officers in state prisons or local jails to access federal immigration databases to screen those arrested or convicted of crimes; (2) the "task force model," which allows law enforcement officers in criminal task forces to screen arrested individuals by accessing federal immigration databases; and (3) the "joint model," which allows agencies to implement the jail and task force models at the same time.[91] Through 287(g) agreements, ICE trains local officers to perform certain immigration enforcement functions, and under the jail model and joint model, these officers may issue immigration detainers.[92] Data from 2010 shows that, in a ten-month period, the jail model accounted for ninety percent of the detainers issued by local law enforcement officers trained under the 287(g) program.[93]

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*Res. of the H. Comm. on Gov't Reform*, 109th Cong. 1–2 (2006) (statement of Rep. Mark E. Souder, Chairman, Subcomm. on Criminal Justice, Drug Policy, & Human Res.) (characterizing noncitizens with criminal convictions as a "problem" compared to other noncitizens who "would prefer to quietly find work and earn money" and documenting ICE's efforts to partner with state and local police agencies to deport noncitizens with criminal convictions). Although ICE has over 20,000 employees, *see Overview*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, *supra* note 86, an estimated 11.5 million unauthorized noncitizens live in the United States, *see supra* note 7 and accompanying text.

89. *See, e.g.*, HAZLETON, PA., ORDINANCE 2006-10 § 5 (2006) (imposing civil sanctions on property owners who rent or lease to undocumented immigrants).

90. *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/287g (last visited Oct. 6, 2014) [hereinafter *Section 287(g) Delegation of Authority*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT].

91. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-109, BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS 8 (2009), *available at* http://www.gao.gov/assets/290/285583.pdf [hereinafter GAO, BETTER CONTROLS].

92. *Section 287(g) Delegation of Authority*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, *supra* note 90.

93. CAPPS ET AL., *supra* note 34, at 2.

At "its peak," around sixty local agencies had 287(g) agreements with ICE,[94] but that number has since decreased by nearly half.[95] The program has been heavily criticized for its lack of oversight and accountability.[96] In a number of jurisdictions that have 287(g) agreements, local law enforcement officers take advantage of their power as immigration agents to target low-level offenders and noncitizens who they view as undesirable.[97] In some areas, deputizing local law enforcement as immigration agents only led to a disproportionate increase in arrests of Latinos, particularly for low-level offenses.[98] For example, the U.S. Department of Justice sued Maricopa County, Arizona and its sheriff, Joseph Arpaio, asserting that the county had abused 287(g) to target Latinos in the community and had violated Latino individuals' civil rights.[99] As a

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94. *See* Alan Gomez, *Immigration Enforcement Program to Be Shut Down*, USA TODAY (Feb. 17, 2012, 3:25 PM), http://usatoday30.usatoday.com/news/nation/story/2012-02-17/immigration-enforcement-program/53134284/1 (adding that only eight additional agencies have signed up for the program during the Obama Administration).

95. As of October 5, 2014, thirty-five law enforcement agencies have current 287(g) agreements. *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/news/library/factsheets/287g.htm (last visited Oct. 5, 2014).

96. GAO, BETTER CONTROLS, *supra* note 91, at 13 (finding that 287(g) agreements in certain jurisdictions failed to specify under what circumstances an individual can be interrogated regarding her immigration status and that only individuals with a conviction for a state or federal felony offense should be processed for possible removal).

97. *See* Elliot Ozment, *287(g) and Secured Communities: Some of the Dangers of Delegating Federal Powers*, 9 TENN. J.L. & POL'Y 120, 124–25 (2013) (explaining that the Nashville Sheriff's Department implemented its 287(g) program to target any potentially deportable noncitizen, even those who had committed low-level nonviolent offenses like driving without a driver's license); *see also* AM. CIVIL LIBERTIES UNION OF TENN., CONSEQUENCES & COSTS: LESSONS LEARNED FROM DAVIDSON COUNTY, TENNESSEE'S JAIL MODEL 287(G) PROGRAM 6 (2012) ("[T]he top five charges immigrants faced as a gateway to deportation under Davidson County, Tennessee's 287(g) program continued to be traffic violations or minor crimes."). In 2008 in North Carolina, 3,000 noncitizens were placed in removal proceedings because of the 287(g) agreement; twenty-three percent of them were charged with driving while intoxicated, and thirty-three percent were charged with other motor vehicle violations. Vázquez, *supra* note 62, at 662.

98. *See* TREVOR GARDNER II & AARTI KHOLI, UNIV. OF CAL., THE CHIEF JUSTICE EARL WARREN INSTITUTE ON RACE, ETHNICITY & DIVERSITY, THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM 1 (2009), *available at* http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf (finding that in Irving, Texas, twenty-four hour access to ICE via phone and video immediately increased the rate of discretionary arrests of Latinos, particularly for traffic offenses).

99. Complaint at 5, United States v. Maricopa Cnty., 915 F. Supp. 2d 1073 (D. Ariz. 2012) (No. 12-cv-00981-LOA). The American Civil Liberties Union (ACLU) also sued the infamous Sheriff Joseph Arpaio alleging that, under the sheriff's watch, law enforcement targeted and detained people because of their race. Melendres v. Arpaio, 598 F. Supp. 2d 1025, 1029 (D. Ariz. 2009); *see also* William Finnegan, *Sheriff Joe*, THE NEW YORKER (July 20, 2009), http://www.newyorker.com/reporting/2009/07/20/090720fa_fact_finnegan?currentPage=3 (providing an exposé on Sheriff Arpaio's tenure in Maricopa County). In a detailed opinion, the U.S. District Court for the District of Arizona held that the Maricopa County's law enforcement

result, in 2012, DHS revoked 287(g) agreements with seven counties in Arizona.[100] The Obama Administration has decided to phase out 287(g) agreements in favor of using the Secure Communities program.[101]

*2. Secure Communities*

Announced in 2008, the Secure Communities program permits local LEAs and ICE to indirectly share information about criminal detainees in state or local custody.[102] Like other programs, DHS created Secure Communities to target high-level criminal offenders.[103] Under the program, local law enforcement first provides criminal detainees' fingerprint information to the Federal Bureau of Investigation (FBI), a step already in place in the booking process for criminal suspects.[104] Next, the FBI releases the information to ICE with or without the agreement of local law enforcement.[105] When ICE first introduced Secure Communities, state and local jurisdictions believed that it was a voluntary program, and as a result, various jurisdictions refused to participate.[106] ICE

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policy of detaining individuals believed to be unlawfully present in the United States and then waiting for ICE to inform law enforcement how to proceed with the individuals resulted in unreasonable seizures in violation of the Fourth Amendment. Melendres, v. Arpaio, 989 F. Supp. 2d 822, 827–28 (D. Ariz.), *adhered to by* No. CV–07-02513-PHX-GMS, 2013 WL 5498218 (D. Ariz. Oct. 2, 2013).

100. *See* Jeremy Duda, *Homeland Security Revokes 287(g) Agreements in Arizona*, ARIZ. CAPITOL TIMES (June 25, 2012, 4:37 PM), http://azcapitoltimes.com/news/2012/06/25/homeland-security-revokes-287g-immigration-check-agreements-in-arizona (adding that DHS also announced its agents would not respond to local law enforcement requests to take custody of an undocumented noncitizen unless the noncitizen met specific criteria under DHS's immigration enforcement priorities).

101. *See* U.S. DEP'T OF HOMELAND SECURITY, FY 2013 BUDGET IN BRIEF 16 (2012), *available at* http://www.dhs.gov/xlibrary/assets/mgmt/dhs-budget-in-brief-fy2013.pdf (seeking to reduce the 287(g) program's budget by $17 million). Nonetheless, DHS continues to provide funding for existing 287(g) programs. U.S. DEP'T OF HOMELAND SECURITY, BUDGET-IN-BRIEF: FISCAL YEAR 2015 14 (2014), *available at* http://www.dhs.gov/sites/default/files/publications/FY15BIB.pdf (allocating $24 million to sustain the 287(g) program at then-existing operating levels).

102. *See* 8 U.S.C. § 1644 (2012) (declaring that local government entities are not prohibited or restricted from exchanging information about an individual's immigration status with federal immigration enforcement irrespective of existing state or local laws).

103. *See* U.S. DEP'T OF HOMELAND SECURITY, BUDGET-IN-BRIEF FISCAL YEAR: 2014 23 (2013), *available at* http://www.dhs.gov/sites/default/files/publications/MGMT/FY%202014%20BIB%20-%20FINAL%20-508%20Formatted%20%284%29.pdf (stating that the purpose of Secure Communities is to focus resources on individuals who pose a threat to public safety or national security).

104. *See Secure Communities*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities (last visited Oct. 6, 2014) (explaining that Secure Communities does not place a burden on local law enforcement because, for decades, local jurisdictions have shared fingerprinting information of individuals who are arrested or booked into custody with the FBI to determine if they have criminal records).

105. *Id.*

106. *See* Julia Preston, *States Resisting Program Central to Obama's Immigration Strategy*, N.Y. TIMES (May 5, 2011) http://www.nytimes.com/2011/05/06/us/06immigration.

then announced that the program was mandatory and that jurisdictions could not opt out of participating in it.[107] In 2013, concerns about Secure Communities intensified after ICE extended the program to every jurisdiction in the United States.[108]

To understand how Secure Communities works, consider the story of a Mexican noncitizen named Chel who lived in the United States for eleven years and had two U.S.-citizen children.[109] One day, a police officer pulled over Chel, who was driving in his car with a Latino passenger.[110] When the officer asked him for identification, Chel could produce only an expired driver's license, so the officer arrested Chel for driving with an expired license.[111] During the booking process, the FBI submitted Chel's fingerprint information to ICE via Secure Communities, and ICE issued a detainer; shortly thereafter, ICE initiated removal proceedings against him.[112]

Much like the reality of deportation generally, Secure Communities captures low-level offenders like Chel more frequently than its target, dangerous offenders.[113] Further, although recordkeeping is essential

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html?_r=0 (identifying Illinois, Massachusetts, and California as three states that considered not implementing or limiting the Secure Communities program).

107. *Secure Communities: Get the Facts*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/get-the-facts.htm (last visited Oct. 6, 2014); *see* Paloma Esquivel, *Federal Immigration Enforcement Is Mandatory, Memo Says*, L.A. TIMES (Jan. 8, 2012), http://articles.latimes.com/2012/jan/08/local/la-me-ice-foia-20120109 (reporting on the controversy surrounding the federal government's change in position concerning the mandatory nature of Secure Communities).

108. *See* Gretchen Gavett, *Controversial "Secure Communities" Immigration Program Will Be Mandatory by 2013*, PBS (Jan. 9, 2012, 3:01 PM), http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/controversial-secure-communities-immigration-program-will-be-mandatory-by-2013 (reporting on various local government leaders' negative reaction to an October 2010 memo that revealed the Obama Administration's plans to make Secure Communities mandatory in 2013); Julia Preston, *Despite Opposition, Immigration Agency to Expand Fingerprint Program*, N.Y. TIMES (May 11, 2012), http://www.nytimes.com/2012/05/12/us/ice-to-expand-secure-communities-program-in-mass-and-ny.html (detailing how two Democratic politicians decided to oppose President Obama on implementing the Secure Communities program). The mandatory nature of the program confused and frustrated immigrants' rights advocates and law enforcement officials. Julia Preston & Kirk Simple, *Taking a Hard Line: Immigrants and Crime*, N.Y. TIMES (Feb. 17, 2011) http://www.nytimes.com/2011/02/18/us/18immigration.html?_r=0.

109. ALEX STEPICK ET AL., AMERICANS FOR IMMIGRANT JUSTICE, FALSE PROMISES: THE FAILURE OF SECURE COMMUNITIES IN MIAMI-DADE COUNTY 19–20 (2013), *available at* http://d3n8a8pro7vhmx.cloudfront.net/aijustice/legacy_url/147/False-Promises_-The-Failure-of-Secure-Communities-in-Miami-Dade-County.pdf?1376961031.

110. *Id.* at 20.

111. *Id.*

112. *Id.*

113. *See Hearing: Is Secure Communities Keeping Our Communities Secure?*, *supra* note 63, at 2–3 (statement of Rep. Zoe Lofgren, Member, H. Comm. on the Judiciary) (explaining that, while the Secure Communities program was advertised as a "voluntary, race-neutral, information sharing program," DHS had decided to make the program mandatory and suggesting that the program's mandatory nature could

for determining an individual's status under Secure Communities, ICE has been criticized for its poor recordkeeping practices that may lead to a greater number of incorrect matches and wrongful detentions.[114] Since the program became mandatory in all jurisdictions in 2013, ICE has classified only a small percentage of individuals identified through the program as Level 1 offenders,[115] which has resulted in the removal of over 2,000 Level 1 offenders.[116] Although some may view this number of removals as a success, the numbers do not reflect the cost to the community and to government resources.[117]

*3. Immigration detainers*

The immigration detainer is the practical tool necessary to directly transfer noncitizens from the criminal justice system to detention in ICE custody.[118] This transfer can happen after an arrest or after the individual has completed her criminal sentence for another crime.[119] For example, Mario Cacho completed his sentence for disturbing the peace in New Orleans, but he remained in custody at the Orleans Parish Prison because of an immigration detainer.[120]

Immigration detainers are requests to state and local law enforcement to maintain custody of individuals suspected of being

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lead law enforcement officers to make pretextual arrests purely to check individuals' immigration statuses); *see also* AARTI KOHLI ET AL., SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS, UNIV. OF CAL., THE CHIEF JUSTICE EARL WARREN INSTITUTE ON LAW & SOC. POLICY 3 (2011) (reporting that the majority of noncitizens deported because of Secure Communities either did not have a criminal history or were low-level offenders); STEPICK ET AL., *supra* note 109, at 2 (indicating that sixty-one percent of the individuals placed in removal proceedings in Miami-Dade County, Florida were either low-level offenders or were found not guilty for the crimes for which they were arrested and that only eighteen percent of these individuals were considered high priority removals under ICE's standards).

114. *See* GAO, SECURE COMMUNITIES, *supra* note 32, at 14 (reporting on large gaps in ICE's data related to noncitizens processed through Secure Communities); Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105, 1136 (2013) (stating that immigration authorities have been criticized for maintaining unreliable and inaccurate records).

115. *E.g.*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, SECURE COMMUNITIES: MONTHLY STATISTICS THROUGH SEPTEMBER 30, 2013 4 (2013), *available at* http://www.ice.gov/doclib/foia/sc-stats/nationwide_interop_stats-fy2013-to-date.pdf [hereinafter ICE, SECURE COMMUNITIES: MONTHLY STATISTICS]. Level 1 offenders include those convicted of any aggravated felony as defined under section 101(a)(43) of the INA or those convicted of two or more crimes punishable by more than one year in prison. GAO, SECURE COMMUNITIES, *supra* note 32, at 10 tbl.1.

116. *E.g.*, ICE, SECURE COMMUNITIES: MONTHLY STATISTICS, *supra* note 115, at 4.

117. *See infra* Part III.A.1 (assessing the community costs when police officers act as immigration agents).

118. *ICE Detainers: Frequently Asked Questions*, *supra* note 2.

119. *See id.* (stating that one purpose of immigration detainers is to notify ICE of a noncitizen's impending release).

120. *Supra* notes 1–5 and accompanying text (detailing Mario Cacho's detention).

deportable until ICE can take custody of those individuals and commence removal proceedings.[121] Federal regulations define immigration detainers as "request[s] that such agency advise [DHS], prior to release of the alien, in order for [DHS] to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible."[122] Immigration detainers serve three key functions: (1) to notify a local LEA that ICE intends to take custody of a noncitizen once she is no longer in the LEA's custody; (2) to request information about the noncitizen's impending release from the LEA's custody so ICE can assume custody before the noncitizen's release; and (3) to request that the LEA maintain custody of the noncitizen for up to forty-eight hours "(excluding Saturdays, Sundays, and holidays) to provide ICE time to assume custody."[123] In December 2012, ICE issued new guidelines related to immigration detainer enforcement that clarified that ICE officers should only issue detainers in circumstances consistent with ICE's priorities to target violent or dangerous criminal offenders.[124]

By statute, immigration detainers can be issued only for controlled substance offenses.[125] Federal regulations, however, do not explicitly state the offenses for which immigration officers may issue a detainer.[126] Because the statute only permits detainers for controlled substance offenses, some have argued that issuing detainers for other offenses oversteps DHS's power granted by the statute.[127] Nonetheless, courts have upheld the power to issue immigration detainers for any criminal offense because of the federal government's broad power to enforce immigration laws.[128] While the

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121. ICE issues a detainer before removal proceedings formally begin; removal proceedings begin when ICE issues a Notice to Appear. 8 U.S.C. § 1229(a)(1) (2012). The actual immigration detainer form sent to the LEAs is the DHS Form I-247. *Department of Homeland Security Immigration Detainer Form - Notice of Action*, DEP'T OF HOMELAND SECURITY 1 (Dec. 2012), http://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf.

122. 8 C.F.R. § 287.7(a) (2014).

123. *ICE Detainers: Frequently Asked Questions*, *supra* note 2.

124. *See* December 2012 Morton Memo, *supra* note 6, at 1 (emphasizing the importance of maintaining uniformity and transparency regarding ICE's priorities).

125. 8 U.S.C. § 1357(d).

126. 8 C.F.R. § 287.7(a). Under 8 U.S.C. § 1103(a)(3), the Secretary of Homeland Security "shall establish regulations . . . and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter." 8 U.S.C. § 1103(a)(3).

127. *Cf.* Lasch, *Enforcing the Limits*, *supra* note 26, at 186–87 (arguing that the scope of the DHS's power under the detainer regulations is broader than under the statute).

128. *E.g.*, Comm. for Immigrant Rights of Sonoma Cnty. v. Cnty. of Sonoma, 644 F. Supp. 2d 1177, 1198 (N.D. Cal. 2009) (stating that detainers could be enforced under DHS's broad power to enforce anything immigration-related and that the regulations were not inconsistent with congressional intent); *see also* Uroza v. Salt

regulation's scope remains controversial, immigration detainers are clearly issued for a broad range of offenses.[129]

Furthermore, the regulation suggests that the LEA must maintain custody of the noncitizen under an immigration detainer because of its language stating that the LEA "shall" maintain custody of the noncitizen for a forty-eight hour period, excluding weekends and holidays.[130] The use of the word "shall" has created confusion among LEAs about the mandatory nature of detainers.[131] However, no circuit court has interpreted immigration detainers as mandatory orders to maintain custody; rather, courts that have addressed the issue have determined that immigration detainers are voluntary requests and that state and local law enforcement can choose not to enforce them.[132]

### *C. Constitutional Protections Applicable to Individuals Held Under Immigration Detainers*

Significant constitutional protections apply to noncitizens, including protections under the Fourth and Fourteenth Amendments.[133]

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Lake Cnty., No. 2:11CV713DAK, 2013 WL 653968, at *1, *3 (D. Utah Feb. 21, 2013) (citing 8 U.S.C. §§ 1226, 1357, and finding that federal agents who issued a detainer against a college student detained by an LEA for thirty-six days were not acting outside of the scope of their statutory power).

129. *See* TRAC, *ICE Detainers*, *supra* note 30 (determining that the three most frequent criminal convictions for which detainers were issued were driving under the influence of alcohol, ordinary traffic offenses, and simple marijuana possession).

130. 8 C.F.R. § 287.7(d).

131. *See* Morales v. Chadbourne, 996 F. Supp. 2d 19, 38 (D.R.I. 2014) (criticizing the state correctional facility's policy to enforce all immigration detainers when such detainers are not mandatory to enforce, as well as, in the instant case, because the detainer was "facially invalid"); *see also* AM. CIVIL LIBERTIES UNION OF MD., RESTORING TRUST: HOW IMMIGRATION DETAINERS IN MARYLAND UNDERMINE PUBLIC SAFETY THROUGH UNNECESSARY ENFORCEMENT 10–11 (2013), https://immigrantjustice.org/sites/immigrantjustice.org/files/ACLU%20Maryland—Detainer%20Report.pdf (explaining the distinctions between immigration detainers and criminal warrants, administrative warrants, and criminal detainers).

132. *See* Galarza v. Szalczyk, 745 F.3d 634, 640 (3d Cir. 2014) (concluding that the use of "shall" does not change the entire meaning of the relevant regulation that identifies detainers as "requests"); Ortega v. U.S. Immigration & Customs Enforcement, 737 F.3d 435, 438 (6th Cir. 2013) (explaining that detainers require ICE to "ask[] the LEA to keep a person in custody); Liranzo v. United States, 690 F.3d 78, 82 (2d Cir. 2012) (defining detainers as "request[s]"); United States v. Trujillo-Alvarez, 900 F. Supp. 2d 1167, 1175 (D. Or. 2012) (concluding that there was no legal requirement to continue to hold the defendant in custody under an immigration detainer after he had been released on his own recognizance by a magistrate judge); *see also* Letter from Daniel H. Ragsdale, Acting Dir., U.S. Immigration & Customs Enforcement, to Mike Thompson, Member, U.S. House of Representatives (Feb. 25, 2014) (stating that immigration detainers are "not mandatory as a matter of law").

133. *See* David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 369 (2003) ("[F]oreign nationals are generally entitled to the equal protection of the laws, to political freedoms of speech and

Individuals held under immigration detainers encounter Fourth Amendment protections both when the detainer is issued and following the forty-eight hour period.[134] The Due Process Clause of the Fourteenth Amendment also protects noncitizens in custody if they are held for a prolonged period under a detainer.[135]

*1. Fourth Amendment protections*

The Fourth Amendment protects both citizens and noncitizens against unreasonable searches and seizures.[136] In the criminal context, a police officer must have reasonable suspicion that an individual is involved in criminal activity in order to stop the individual for questioning.[137] After this initial, brief seizure, the Fourth Amendment requires probable cause to justify an extended restraint of liberty.[138] Probable cause has been defined in terms of "facts and circumstances sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense."[139] The test for probable cause is a totality of the circumstances assessment.[140] While such a determination deals with probabilities rather than certainties, probable cause must be based on a particular suspicion that warrants stopping or detaining an individual; mere suspicion does not fulfill the probable cause

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association, and to due process requirements of fair procedure where their lives, liberty, or property are at stake.").

134. *See* Pierce v. Multnomah Cnty., 76 F.3d 1032, 1043 (9th Cir. 1996) (applying the Fourth Amendment "to assess the constitutionality of the duration of or legal justification for a prolonged warrantless, post-arrest, pre-arraignment custody" (emphasis omitted)).

135. *See* Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.").

136. *E.g.*, Muehler v. Mena, 544 U.S. 93, 95, 101–02 (2005) (concluding that officers' questioning of an individual concerning her immigration status while she was detained in handcuffs was reasonable and did not constitute a Fourth Amendment violation because the questioning did not increase the amount of time that the individual was detained); Orhorhaghe v. Immigration & Naturalization Serv., 38 F.3d 488, 496–97 (9th Cir. 1994) (holding that immigration agents' decision to arrest a noncitizen with lawful status because of his "Nigerian-sounding name" constituted a seizure under the Fourth Amendment).

137. Terry v. Ohio, 392 U.S. 1, 27, 31–32 (1968) (explaining that the officer must draw "reasonable inferences . . . from the facts in light of his experience").

138. Dunaway v. New York, 442 U.S. 200, 213 (1979); Gerstein v. Pugh, 420 U.S. 103, 125 (1975).

139. *Gerstein*, 420 U.S. at 111 (alteration in original) (internal quotation marks omitted).

140. *See* Illinois v. Gates, 462 U.S. 213, 230–31 (1983) (reasoning that a totality of the circumstances approach avoids the challenges of applying the "rigid" tests previously used to determine probable cause).

requirement.[141] Prolonged detention solely for investigatory purposes does not satisfy probable cause and is therefore unconstitutional.[142]

By contrast, warrantless arrests in the immigration context require an officer to have a "reason to believe" that an individual has violated immigration law.[143] The "reason to believe" standard has been equated with probable cause.[144] Even so, immigration officers have been granted greater flexibility with regards to their tactics when questioning and arresting individuals.[145] The federal regulations nonetheless provide that the arresting officer must present the arrested alleged noncitizen before a neutral immigration officer, or in other words, "an officer other than the arresting officer."[146] The Supreme Court has defended these limited protections for noncitizens detained by immigration enforcement by insisting that these interactions are civil in nature and, therefore, do not trigger

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141. Brinegar v. United States, 338 U.S. 160, 177 (1949); *see* United States v. Cortez, 449 U.S. 411, 417–18 (1981) ("Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.").

142. *See* Florida v. Royer, 460 U.S. 491, 501–02 (1983) (permitting only temporary investigative stops that last no longer than needed for officers to dispel or confirm their suspicions); *see also Dunaway*, 442 U.S. at 216 (finding that "detention for custodial interrogation . . . intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest").

143. 8 U.S.C. § 1357(a) (2012). Specifically,

> [a]ny officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant . . . to arrest any alien in the United States, if he has *reason to believe* that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States.

*Id.* § 1357(a)(2) (emphasis added).

144. United States v. Cantu, 519 F.2d 494, 496 (7th Cir. 1975); Lau v. Immigration & Naturalization Serv., 445 F.2d 217, 222 (D.C. Cir. 1971); *see* Tejeda-Mata v. Immigration & Naturalization Serv., 626 F.2d 721, 725 (9th Cir. 1980) (citing cases and finding a sufficient basis for the immigration officer's warrantless arrest under the "reason to believe" standard because the officer had probable cause). The phrase "reason to believe" in other immigration statutes has also been equated with probable cause. *See In re* A-H-, 23 I. & N. Dec. 774, 788–89 (B.I.A. 2005) (noting that the Board of Immigration Appeals has relied on probable cause cases in interpreting the phrase "reasonable ground to believe" under the terrorism and national security grounds in the INA).

145. *See* Muehler v. Mena, 544 U.S. 93, 95 (2005) (determining that an officer did not need to have an independent reasonable suspicion to question the defendant about her immigration status while executing a valid search warrant); Immigration & Naturalization Serv. v. Delgado, 466 U.S. 210, 216 (1984) (holding that immigration officers who questioned individual workers in a factory raid did not seize the workers within the meaning of the Fourth Amendment because "the circumstances of the encounter [were not] so intimidating . . . that a reasonable person would have believed he was not free to leave").

146. 8 C.F.R. § 287.3(a) (2014).

criminal procedural protections.[147] Additionally, although Border Patrol agents have greater flexibility when searching individuals and vehicles at the border,[148] the Supreme Court has held that Border Patrol agents must have probable cause or consent to detain individuals for a prolonged period of time.[149]

Law enforcement must have probable cause if the seizure involves anything more than the brief and narrowly defined intrusion authorized by *Terry v. Ohio*.[150] The Supreme Court has also stated that detaining individuals solely to determine their immigration status would raise constitutional concerns.[151] Furthermore, at least one federal district court has found that the issuance of the immigration detainer is a "new seizure[]."[152] Consequently, the officer must make a new probable cause determination independent of any initial probable cause finding associated with state law charges.[153]

After the initial seizure, the Fourth Amendment requires that a neutral magistrate make a probable cause determination within forty-eight hours of the individual's detention under an immigration detainer.[154] However, if a probable cause determination is not made within forty-eight hours, including intervening weekends or holidays, the burden of proof shifts to the government to demonstrate the

147. *See* Immigration & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) (establishing that the exclusionary rule does not apply in deportation proceedings). The Court further articulated that the "'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred." *Id.* at 1039.

148. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976) (finding no constitutional violation when U.S. Border Patrol officers referred motorists selectively to a secondary inspection area based largely on the motorists' apparent Mexican ancestry); *cf.* Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) (holding that the warrantless search of an automobile without probable cause was not justified as a border search, which requires less justification than probable cause, and therefore violated the petitioner's right to be free from unreasonable searches and seizures).

149. United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975) ("In the context of border area stops, the reasonableness requirement of the Fourth Amendment demands something more than . . . broad and unlimited discretion . . . .").

150. 392 U.S. 1 (1968); *see* Gonzales v. City of Peoria, 722 F.2d 468, 477 (9th Cir. 1983), *overruled on other grounds en banc by* Hodgers-Durgin v. De La Vina, 199 F.3d 1037 (9th Cir. 1999).

151. *See* Arizona v. United States, 132 S. Ct. 2492, 2509 (2012) (finding that a practice of stopping individuals solely to verify their immigration status would require state law enforcement officers to hold noncitizens "without federal direction and supervision").

152. Miranda-Olivares v. Clackamas Cnty., No. 3:12-cv-02317-ST, 2014 WL 1414305, at *9 (D. Or. Apr. 11, 2014).

153. *See id.* at *9–10 (finding that the local jail violated the plaintiff's Fourth Amendment rights because it enforced an immigration detainer that was not supported by probable cause).

154. Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

existence of a bona fide emergency or other extraordinary circumstance to continue to hold the individual.[155]

Although there is no requirement to go before a neutral magistrate in order to make a probable cause determination in the immigration context,[156] immigration officers must issue the noncitizen a Notice to Appear (NTA) within forty-eight hours after the arrest.[157] An NTA not only communicates the charges to the noncitizen in removal proceedings, but it also serves to inform the noncitizen that she may seek counsel.[158] Federal regulation and ICE's implementing guidelines permit a great deal of flexibility when enforcing this forty-eight hour rule by providing an exception for an emergency or extraordinary circumstances.[159]

*2. Due process protections*

Due process protects individuals held beyond forty-eight hours because they are deprived of their liberty for a prolonged period.[160] The Supreme Court has clearly established that the Due Process Clause of the Fourteenth Amendment applies to noncitizens.[161] Just as they have for Fourth Amendment protections, courts have articulated different due process standards in the immigration

155. *Id.* at 57.
156. Salgado v. Scannel, 561 F.2d 1211, 1212 (5th Cir. 1977) (per curiam).
157. 8 C.F.R. § 287.3(d).
158. Removal proceedings must be initiated with written notice to the respondent that specifies, *inter alia*, the nature of the proceedings, the acts or conduct alleged to be in violation of the law, the charges against the noncitizen, and the statutory provisions the noncitizen allegedly violated. 8 U.S.C. § 1229(a)(1) (2012).
159. 8 C.F.R. § 287.3(d); *see* Memorandum from Asa Hutchinson, Undersecretary, Border & Transp. Security, U.S. Dep't of Homeland Security, to Michael J. Garcia, Assistant Sec'y, U.S. Immigration & Customs Enforcement, and Robert Bonner, Comm'r, U.S. Customs & Border Prot. 3 (Mar. 30, 2004) (defining "emergency or other extraordinary circumstance" to mean "a significant infrastructure or logistical disruption," "a compelling law enforcement need," or "[i]ndividual facts or circumstances unique to the [noncitizen]," like the need for medical care); *see also* Shoba Sivaprasad Wadhia, *Under Arrest: Immigrants' Rights and the Rule of Law*, 38 U. MEM. L. REV. 853, 874–76 (2008) (criticizing ICE guidelines for creating a loophole in its own policy by providing an overly broad definition of emergency or extraordinary circumstances).
160. *See* Villanova v. Abrams, 972 F.2d 792, 797 (7th Cir. 1992) ("[T]he Fourth Amendment governs the period of confinement between arrest without a warrant and the preliminary hearing at which a determination of probable cause is made, while due process regulates the period of confinement after the initial determination of probable cause.").
161. *See* Zadvydas v. Davis, 533 U.S. 678, 693–94 (2001) (holding that noncitizens in deportation proceedings are entitled to due process); The Japanese Immigrant Case, 189 U.S. 86, 101 (1902) (establishing that noncitizens have a right to due process before deportation, regardless of what their immigration status is in the United States); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (determining that the Fourteenth Amendment applies to noncitizens because it uses the word "person" instead of the word "citizen").

context. For example, a person subject to criminal charges is afforded the right to counsel,[162] among other protections, but noncitizens have no such rights in removal proceedings.[163]

Prior to 2003, the Supreme Court recognized significant limitations on preventive detention of noncitizens.[164] However, following the Court's ruling in *Demore v. Kim*,[165] due process protections for noncitizens have been severely limited.[166] In *Kim*, the Supreme Court held that the mandatory detention of noncitizens without individualized determinations regarding their detention while removal proceedings were pending did not violate their constitutional rights.[167] Mr. Kim challenged the constitutionality of a statutory provision in the INA that establishes mandatory detention of noncitizens who have committed certain criminal offenses.[168] The Court in *Kim* noted that this provision applies only to certain classes

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162. *See* Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (establishing that criminal defendants must be provided "the guiding hand of counsel at every step in the [criminal] proceedings" (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)).

163. *E.g.*, Immigration & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) (holding that the exclusionary rule does not apply in deportation proceedings); *see also* Pauw, *supra* note 41, at 309–10 (discussing constitutional safeguards that apply in criminal proceedings that do not apply in deportation proceedings, such as the right to a trial by jury and limitations under the Double Jeopardy Clause).

164. *See Zadvydas*, 533 U.S. at 690–91 ("[W]e have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections.").

165. 538 U.S. 510 (2003).

166. Shalini Bhargava, *Detaining Due Process: The Need for Procedural Reform in "Joseph" Hearings After* Demore v. Kim, 31 N.Y.U. REV. L. & SOC. CHANGE 51, 54–55 (2006) (advocating for stronger protections for potentially deportable noncitizens during *Joseph* hearings after the Supreme Court severely limited the due process rights of noncitizens who had conceded deportability). *Joseph* hearings provide noncitizens in removal proceedings the opportunity to contest the classification of their criminal convictions as aggravated felonies or crimes involving moral turpitude, which in effect challenges their placement in mandatory detention. *In re* Joseph, 22 I. & N. Dec. 799, 805 (B.I.A. 1999).

167. *Kim*, 538 U.S. at 531.

168. *Id.* The provision—8 U.S.C. § 1226(c)—is especially harsh because it encompasses individuals who have committed "crimes involving moral turpitude," a dubious categorization that has led to a great deal of litigation surrounding its application to certain crimes. 8 U.S.C. § 1226(c)(1)(B)–(C) (2012); *see, e.g.*, Jean-Louis v. Attorney Gen., 582 F.3d 462, 464, 482 (3d Cir. 2009) (concluding that simple assault against a child under twelve years old was not a crime involving moral turpitude); Marmolejo-Campos v. Holder, 558 F.3d 903, 917 (9th Cir. 2009) (en banc) (finding that a violation of an aggravated driving under the influence statute was a crime involving moral turpitude). The consequences of *Kim* become even more troubling considering that, since 2009, ICE has had a mandate to keep 34,000 beds in immigrant detention facilities full each day, a problematic aspect of immigration detention beyond the scope of this Comment. *See* Ted Robbins, *Little Known Immigration Mandate Keeps Detention Beds Full*, NPR (Nov. 19, 2013, 3:05 AM), http://www.npr.org/2013/11/19/245968601/little-known-immigration-mandate-keeps-detention-beds-full (explaining the enormous costs of immigration detention and suggesting alternatives to detention).

of noncitizens convicted of crimes *pending* removal proceedings, which suggests that this section does not apply if proceedings have not yet been initiated with the issuance of an NTA.[169]

For those who have not had removal proceedings initiated against them, such as individuals held under immigration detainers, their continued detention raises questions about their entitlement to procedural due process. In *Mathews v. Eldridge*,[170] the Supreme Court established a balancing test to determine what procedural safeguards the Due Process Clause requires to ensure that a civil proceeding is fundamentally fair.[171] This analysis applies to noncitizens who have entered the country.[172] Under the *Mathews* test, courts weigh the following factors: (1) the private interests at stake; (2) the risk of erroneous deprivation of that interest without additional procedural safeguards; and (3) the nature of any countervailing interest in not providing additional procedural safeguards.[173] To find a violation of due process, the private interest and erroneous deprivation of that interest must outweigh the countervailing government interests.[174] In balancing these interests, courts must simply determine whether the procedures meet the essential standard of fairness under the Due Process Clause rather than impose procedures that displace congressional policy choices.[175]

Finally, as a mechanism to challenge their prolonged pretrial detention and violations of their due process rights, individuals held under immigration detainers may file habeas corpus petitions demanding their release from custody.[176] Habeas petitions have long been vehicles for immigrant detainees to challenge their detention, and such petitions are critical to allowing detained individuals to seek

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169. *Kim*, 538 U.S. at 527–28. 8 U.S.C. § 1229(a)(1) provides that ICE must initiate removal proceedings by providing written notice to a noncitizen in the form of an NTA. 8 U.S.C. § 1229(a)(1).

170. 424 U.S. 319 (1976).

171. *Id.* at 335.

172. *See* Landon v. Plasencia, 459 U.S. 21, 32, 35 (1982) (establishing that a noncitizen, upon returning to the United States, can invoke the Due Process Clause in deportation proceedings, but limiting the judiciary's role to an assessment of whether the procedures meet "the essential standard of fairness").

173. *Mathews*, 424 U.S. at 335.

174. *See* Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011) (concluding that the due process rights of the petitioner, who was held in civil contempt for failing to pay child support, were violated when he was not provided various procedural protections, such as notice regarding his ability to pay as a primary issue in his civil contempt hearing and an opportunity to provide information about his financial circumstances).

175. *See Plasencia*, 459 U.S. at 34–35 (requiring that courts evaluate the particular circumstances of each case when performing the balancing test).

176. *See, e.g.*, Immigration & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 305 (2001) ("The writ of habeas corpus has always been available to review the legality of Executive detention.").

their release.[177] Petitioners must direct the habeas petitions to the agencies that are detaining them.[178] Consequently, an essential aspect of determining whether to release petitioners wrongfully held under immigration detainers is determining which agency, either at the federal or the state level, has custody of them.

Because case law on immigration detainers is somewhat limited and largely inconsistent, courts have not clarified what entity has custody of an individual held under an immigration detainer.[179] Some courts have held that individuals detained as a result of a detainer are not in ICE custody.[180] By contrast, at least one court has found that in certain circumstances, an immigration detainer may signify that the detainee is in ICE custody.[181] In determining what agency is liable for prolonged detention of an individual under an ICE detainer, courts have analyzed the specific factual circumstances under which the detainer was issued.[182] A determination regarding what agency has custody is significant in advancing habeas petitions and targeting the appropriate wrongdoer for prolonged detention.[183]

*3. Criminal procedural protections when criminal cases are still pending*

In circumstances where individuals with pending criminal cases also have an immigration detainer initiated against them, the local LEA has a clear alternative to enforcing the immigration detainer: enforcing the pretrial detention order issued by the magistrate judge.

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177. *Id.* at 305–06 (acknowledging the historical practice in immigration law of filing writs of habeas corpus to challenge the legality of executive detention).

178. 28 U.S.C. § 2243 (2012).

179. *See* KATE M. MANUEL, CONG. RESEARCH SERV., R42690, IMMIGRATION DETAINERS: LEGAL ISSUES 15–18 (2012) (commenting on cases that have considered the issue of custody as it relates to immigration detainers and their differing results).

180. *See* Campos v. Immigration & Naturalization Serv., 62 F.3d 311, 314 (9th Cir. 1995) (holding that an immigration detainer alone does not mean an individual is in ICE custody and, thus, an individual with a detainer cannot file a writ of habeas corpus); Orozco v. Immigration & Naturalization Serv., 911 F.2d 539, 541 (11th Cir. 1990) (per curiam) (same); Campillo v. Sullivan, 853 F.2d 593, 595 (8th Cir. 1988) (same).

181. *See* Galaviz-Medina v. Wooten, 27 F.3d 487, 493 (10th Cir. 1994) (concluding that the appellant was in immigration custody because he had a detainer plus a final order of deportation against him).

182. *See, e.g.*, Galarza v. Szalczyk, 745 F.3d 634, 637, 645 (3d Cir. 2014) (noting that the immigration detainer issued for the plaintiff was not accompanied by a warrant, an affidavit of probable cause, or a removal order and concluding that Lehigh County, Pennsylvania may be liable for the plaintiff's prolonged detention because it could have disregarded the detainer); Uroza v. Salt Lake Cnty., No. 2:11CV713DAK, 2013 WL 653968, at *7 (D. Utah Feb. 21, 2013) (finding that federal government actors might be held liable for the prolonged detention of the plaintiff in the county jail because he remained detained after ICE issued an immigration detainer for him).

183. *See* 28 U.S.C. § 2243 (requiring that the writ be directed at the person who has custody over the individual).

In criminal cases, defendants have important protections surrounding pretrial, preventive detention.[184] Under federal law, the Bail Reform Act of 1984 (BRA)[185] provides that a pretrial detainee may be detained further if she poses a flight risk or a public safety risk.[186] Under the BRA, if a judicial officer[187] has determined that a criminal defendant does not pose a risk of flight or danger to the community, then "the Executive Branch may no longer keep that person in physical custody."[188] The Supreme Court upheld the BRA in *United States v. Salerno*[189] because it determined that this form of pretrial detention did not amount to punishment before trial in violation of the Due Process Clause; rather, such detention was purely regulatory.[190]

In cases where a noncitizen has a pending criminal case and an immigration detainer, some federal courts have decided to enforce pretrial detention determinations that were made in the noncitizen's pending criminal case rather than enforce the immigration detainer.[191] In *United States v. Trujillo-Alvarez*,[192] the U.S. District Court for the District of Oregon ordered ICE to release the defendant, who faced charges of illegal reentry, from custody after a magistrate judge had released him from physical custody because he did not present a

184. *See* United States v. Salerno, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.").

185. Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended at 18 U.S.C. §§ 3141–3156).

186. 18 U.S.C. § 3142(g). The BRA is not without its critics. *See Salerno*, 481 U.S. at 762–63 (Marshall, J., dissenting) ("[T]he very pith and purpose of this statute is an abhorrent limitation of the presumption of innocence."); *see also* Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 505 (2012) (noting that the definition of "danger" has been criticized as overbroad or vague in federal and state bail statutes).

187. *See* 18 U.S.C. § 3156(a)(1) (defining a "judicial officer" as a "person or court authorized . . . to detain or release a person before trial or sentencing or pending appeal in a court of the United States, and any judge of the Superior Court of the District of Columbia").

188. United States v. Trujillo-Alvarez, 900 F. Supp. 2d 1167, 1170 (D. Or. 2012).

189. 481 U.S. 739 (1987).

190. *Id.* at 748.

191. *E.g.*, United States v. Xulam, 84 F.3d 441, 442–43 (D.C. Cir. 1996) (per curiam) (overturning a detention order against the defendant who had been issued an immigration detainer because the defendant was a "prime candidate for release" under all BRA categories); *Trujillo-Alvarez*, 900 F. Supp. 2d at 1179 (concluding that the defendant should be released consistent with the magistrate judge's determination even though an immigration detainer was placed against him because there was no statutory support for barring all noncitizens with immigration detainers from release); United States v. Chavez-Rivas, 536 F. Supp. 2d 962, 968–69 (E.D. Wis. 2008) (denying the government's motion to revoke the defendant's release where he did not pose a flight risk or danger to the community).

192. 900 F. Supp. 2d 1167 (D. Or. 2012).

public safety or flight risk.[193] The court recognized that while an ICE detainer may be a factor in the risk determination, it is but one factor balanced against others.[194] In determining that it should not enforce the detainer, the court added that there was neither a legal nor a practical requirement that it detain the defendant to remove and deport him before the conclusion of his criminal proceeding.[195] Other courts have reached similar conclusions and have refused to overturn careful pretrial detention determinations based solely on the issuance of an immigration detainer, thereby releasing the noncitizen from ICE custody.[196]

### *D. Federalism Concerns*

While the practical enforcement of immigration detainers clearly implicates constitutional protections, state and local law enforcement's decision to enforce immigration detainers also implicates federalism concerns. Two significant issues arise in the context of immigration detainers: preemption and anti-commandeering. Anti-commandeering concerns federal intrusion upon the states' domain, while federal preemption concerns the reverse: it serves to prevent states from intruding upon an area that is controlled by the federal government.[197]

Under the Tenth Amendment, "[t]he 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."[198] This provision rests upon a system of dual sovereignty that recognizes that states retain certain powers, even though the states surrendered many of their powers to the federal government when the Constitution was enacted.[199] Under a system of dual sovereignty, the federal government cannot command states to administer federal regulatory

193. *Id.* at 1170 (explaining that if the Executive Branch chose not to release the defendant, it would need to abandon criminal prosecution and only proceed with removal and deportation).
194. *Id.* at 1173.
195. *Id.* at 1175.
196. *See, e.g.*, United States v. Barrera-Omana, 638 F. Supp. 2d 1108, 1111 (D. Minn. 2009) (stating that permitting the pretrial detention of an individual under solely an immigration detainer would be inconsistent with congressional intent); United States v. Montoya-Vasquez, No. 4:08CR3174, 2009 WL 103596, at *5 (D. Neb. Jan. 13, 2009) ("If Congress wanted to bar aliens with immigration detainers from eligibility for release, it could readily have said so, but did not.").
197. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000) ("A fundamental principle of the Constitution is that Congress has the power to preempt state law.").
198. U.S. CONST. amend. X.
199. Printz v. United States, 521 U.S. 898, 918–19 (1997).

programs.[200] One of the most significant anti-commandeering cases, *Printz v. United States*,[201] challenged a provision in the Brady Handgun Violence Prevention Act that required state and local law enforcement to perform background checks on individuals who attempted to buy handguns.[202] The Supreme Court struck down the provision on anti-commandeering grounds and stated that the federal government "may neither issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program. . . . [S]uch commands are fundamentally incompatible with our constitutional system of dual sovereignty."[203] The Court articulated two additional problems with delegating this authority to state and local governments: (1) it forced state governments to absorb the costs of the federal program, and (2) it put state governments in the position of taking the blame for the additional burden or other related problems.[204]

Two years after *Printz*, the U.S. Court of Appeals for the Second Circuit in *City of New York v. United States*[205] analyzed a New York City ordinance that forbade city officials from transmitting information about any individual's immigration status to the federal government unless it was required for a specified reason.[206] The federal directives at issue forbade the localities from restricting the voluntary exchange of immigration information with immigration authorities, but they did not compel the localities to perform any specific action.[207] In a prima facie challenge to these federal directives brought by the City of New York, the court held that states could not forbid all voluntary cooperation with federal programs under the Tenth Amendment.[208] Thus, if a program is voluntary or if it requires state governments to perform certain tasks to receive funding,[209] the enlistment of state or local agencies is not unconstitutional under anti-commandeering principles.

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200. City of New York v. United States, 179 F.3d 29, 33 (2d Cir. 1999).
201. 521 U.S. 898 (1997).
202. *Id.* at 902.
203. *Id.* at 935.
204. *Id.* at 930.
205. 179 F.3d 29 (2d Cir. 1999).
206. *Id.* at 31.
207. *Id.* at 35.
208. *Id.*
209. *See* Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 289 (1980) (upholding the constitutionality of a federal environmental statute because it did not compel the state to comply with the statute's provisions, to use any state funds, or to even participate in the federal program); Kansas v. United States, 214 F.3d 1196, 1197, 1203–04 (10th Cir. 2000) (concluding that conditions placed on states that accepted federal Temporary Assistance for Needy Families (TANF) funds

For decades, courts have held that Congress has the power to expel or exclude noncitizens and that its exercise of this power is largely immune from judicial control.[210] Accordingly, preemption has been used to strike down various state immigration laws.[211] Even though federal law clearly commands immigration issues, the Supreme Court has upheld state statutes that are consistent with federal immigration policy and do not expand, conflict, or hinder such policies.[212] The most notable recent preemption case related to immigration is *Arizona v. United States*,[213] which involved a challenge to Arizona's law, Support Our Law Enforcement and Safe Neighborhoods Act, known as S.B. 1070.[214] Federal law preempted three sections of S.B. 1070, which criminalized behavior that was not criminalized under federal law.[215] Section 2(B) required that state officers reasonably attempt to determine an individual's immigration status if there was reasonable suspicion that the person was a noncitizen or unlawfully present.[216] The Court determined that section 2(B) would survive preemption if

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did not implicate the anti-commandeering principle because states could refuse the money and thus the conditions imposed by the statute).

210. *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (noting that admission to the United States is a privilege rather than a right and is therefore subject to the procedure that the United States provides); Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893) (stating that a nation has an "absolute and unqualified" right to expel and deport foreigners).

211. *E.g.*, United States v. Alabama, 691 F.3d 1269, 1301 (11th Cir. 2012) (sympathizing with the State of Alabama's concerns associated with a large influx of undocumented immigrants but holding ultimately that federal law preempted various sections of the state statute), *cert. denied*, 133 S. Ct. 2022 (2013). There are three types of preemption: (1) express preemption, which requires a federal law that expressly demonstrates Congress' pre-emptive intent; (2) field preemption, which means that Congress has occupied a field for its exclusive governance; and (3) conflict preemption, which occurs when state laws create an obstacle to accomplishing fully the federal law. *E.g.*, Arizona v. United States, 132 S. Ct. 2492, 2500–01 (2012).

212. *E.g.*, *Arizona*, 132 S. Ct. at 2509–10 (holding that section 2(B) of Arizona's law was not preempted because it could be implemented in a way that did not conflict with federal law); Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1987 (2011) (holding that an Arizona law that allowed suspension and revocation of business licenses for employing unauthorized immigrant workers and that required every employer to verify employment eligibility of hired employees through a specific Internet-based system was not preempted because it did not conflict with the federal scheme and was consistent with federal policy related to immigrants working without authorization).

213. 132 S. Ct. 2492 (2012).

214. *Id.* at 2497.

215. The Court struck down section 3, which made failure to comply with federal alien-registration requirements a state misdemeanor; section 5(C), which made it a misdemeanor for an unauthorized noncitizen to seek or engage in work in the state; and section 6, which authorized officers to arrest, without a warrant, any person who the officer had probable cause to believe had committed any public offense that made the person removable from the United States. *Id.* at 2501–07.

216. *Id.* at 2509.

it required state officers to perform a status check during a lawful, authorized detention.[217]

While courts have yet to take up this issue, scholars and advocates from both sides of the immigration enforcement debate have considered preemption in the immigration detainer context. Those who support enforcing detainers have argued that states' refusal to enforce detainers is preempted.[218] Consistent with this view, at least one court has held that an LEA's enforcement of certain immigration laws is likewise not preempted.[219] On the other hand, those who oppose enforcement of immigration detainers have argued that state compliance with federal detainers is preempted.[220] The question of preemption as it relates to immigration detainers is significant because a growing number of localities refuse to enforce immigration detainers.[221]

## II. ANALYSIS

The enforcement of immigration detainers in practice has led to constitutional violations at two distinct periods in time: when the detainer is issued and at the conclusion of the forty-eight hour period. As discussed below, ICE and local agents deputized by ICE frequently issue immigration detainers without probable cause, and local LEAs hold individuals under detainers for a period beyond that which is permissible.[222] The potential that detainers and detainer enforcement will violate individuals' constitutional rights drives a

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217. *Id.*

218. *E.g.*, Complaint in Chancery for Mandamus & Declaratory Relief at 4, McCann v. Dart, No. 2013CH10583 (Cir. Ct. Cook Cnty. Apr. 22, 2013) (alleging that Cook County, Illinois has a legal duty to enforce immigration detainers because the federal government has ultimate authority over immigration matters); CAL. SENATE PUB. SAFETY COMM., STATE GOVERNMENT: FEDERAL IMMIGRATION POLICY ENFORCEMENT, AB 4, at 7 (2013) (questioning whether a proposed California bill to limit immigration detainer enforcement would be unconstitutional because it "would permit a local policy to trump federal law").

219. *E.g.*, United States v. Vasquez-Alvarez, 176 F.3d 1294, 1300 (10th Cir. 1999) (rejecting the plaintiff's claim that allowing state and local law enforcement to arrest undocumented noncitizens would interfere with Congress's intent regarding immigration enforcement).

220. *E.g.*, Christopher N. Lasch, *Preempting Immigration Detainer Enforcement Under* Arizona v. United States, 3 WAKE FOREST J.L. & POL'Y 281, 293–300 (2013) [hereinafter Lasch, *Preempting Immigration Detainer Enforcement*] (arguing that Congress has clearly delineated circumstances under which immigration officers may make immigration arrests and noting that immigration detainers are not among those enumerated circumstances).

221. *See infra* text accompanying notes 337–48 (providing examples of jurisdictions that have adopted rules to limit local enforcement of detainers, in whole or in part).

222. *See infra* Part II.A–B (analyzing the constitutional violations that result from the enforcement of immigration detainers).

need to establish greater procedural protections for them, such as additional safeguards to ensure the release of detainees after forty-eight hours and reliance on individualized determinations made by judicial officers in the detainees' criminal cases.

### *A. Local Law Enforcement and ICE Violate the Fourth Amendment when They Issue and Enforce Detainers Without Probable Cause*

The Fourth Amendment protects all persons, both citizens and noncitizens, against unreasonable searches and seizures.[223] Although a police officer can seize an individual based on reasonable suspicion, any extended detention must be supported by probable cause.[224] Probable cause is a common-sense determination based on the totality of the circumstances and requires a certain level of particularity.[225] Significantly, the "reason to believe" standard in the immigration context has been interpreted to be equivalent to probable cause.[226] Although federal law does not require immigration officers to have an independent reasonable suspicion to question an individual's immigration status when she is arrested or seized for criminal violations,[227] officers must provide an independent probable cause determination to detain an individual.[228] Furthermore, at least one U.S. district court has held that enforcement of an immigration detainer constitutes a new seizure, thus requiring the LEA enforcing the immigration detainer to provide a new probable cause determination.[229]

An immigration officer may issue an immigration detainer against an individual for any one of four reasons. On the Department of Homeland Security's Immigration Detainer - Notice of Action form,

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223. CONST. amend. IV; *e.g.*, Muehler v. Mena, 544 U.S. 93, 96–97 (2005) (applying Fourth Amendment analysis to the seizure of a lawful permanent resident).

224. *See* Dunaway v. New York, 442 U.S. 200, 208–09 (1979) (explaining that *Terry* provided one narrow exception that seizures must be based on probable cause for "a brief, on-the-spot stop on the street and a frisk for weapons").

225. Illinois v. Gates, 462 U.S. 213, 230–31 (1983); *see* Maryland v. Pringle, 540 U.S. 366, 371 (2003) (defining probable cause as a reasonable ground for belief of guilt that must be "particularized with respect to the person to be searched or seized").

226. *See* cases cited *supra* note 144.

227. *See Muehler*, 544 U.S. at 101 (finding that the officers did not need independent reasonable suspicion to question the individual about her place of birth and immigration status because the questioning was not a "seizure" within the meaning of the Fourth Amendment).

228. United States v. Brignoni-Ponce, 422 U.S. 873, 881–82 (1975).

229. Miranda-Olivares v. Clackamas Cnty., No. 3:12-cv-02317-ST, 2014 WL 1414305, at *11 (D. Or. Apr. 11, 2014) (holding that the county violated the plaintiff's Fourth Amendment rights by continuing to hold her under the immigration detainer at two distinct moments: after she was eligible for pre-trial release by posting bail and after her release from state charges).

DHS Form I-247, three of the fields pertain to immigration charges,[230] and the final field indicates that DHS has a "reason to believe" that the individual is a noncitizen subject to removal from the United States, and one or more of the following conditions apply: the individual (1) was previously convicted of a felony; (2) was previously convicted of three or more misdemeanor offenses; (3) was previously convicted of or charged with one or more enumerated misdemeanor offenses; (4) was previously convicted of illegal entry; (5) reentered the United States illegally after being removed from the country; (6) was "found by an immigration officer or an immigration judge to have knowingly committed immigration fraud"; or (7) "poses a significant risk to national security, border security, or public safety."[231] Based on the fields provided in this form, if an individual is held solely for immigration charges, then the local LEA has no particular reason to suspect the individual of criminal activity;[232] rather, the LEA chooses to hold the individual based on an ICE officer's belief concerning the individual's immigration status.[233]

Before 2012, the officer issuing the detainer could mark a field on the DHS Form I-247 that indicated that ICE had initiated an investigation concerning the individual's immigration status.[234] The use of this field as the sole justification for issuing the immigration detainer led to a spate of lawsuits.[235] The extended detention of

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230. The fields related to solely immigration charges are: (1) "[i]nitiated removal proceedings and served a Notice to Appear or other charging document"; (2) "[s]erved a warrant of arrest for removal proceedings"; and (3) "[o]btained an order of deportation or removal from the United States for this person." *Department of Homeland Security Immigration Detainer Form - Notice of Action*, *supra* note 121, at 1.

231. *Id.* (footnotes omitted); *see also* December 2012 Morton Memo, *supra* note 6, at 1–2 (stating that enforcement of immigration detainers in the delineated circumstances is consistent with ICE's enforcement priorities).

232. As courts have noted on various occasions, mere presence in the United States without documentation is not a crime. *E.g.*, Arizona v. United States, 132 S. Ct. 2492, 2505 (2012); Martinez-Medina v. Holder, 673 F.3d 1029, 1036 (9th Cir. 2011) (stating that federal law does not criminalize unlawful presence).

233. *See* Morales v. Chadbourne, 996 F. Supp. 2d 19, 39 (D.R.I. 2014) (permitting a Fourth Amendment violation claim to proceed where a correctional facility should have recognized that an immigration detainer issued for the defendant was facially invalid).

234. IMMIGRANT LEGAL RES. CTR., UNDERSTANDING IMMIGRATION DETAINERS: AN OVERVIEW FOR STATE DEFENSE COUNSEL III. app. B (2011), *available at* http://www.ilrc.org/ files/documents/pa_understanding_immigration_detainers_05-2011.pdf.

235. *See, e.g.*, *Chadbourne*, 996 F. Supp. 2d at 29 (citing *Arizona*, 132 S. Ct. at 2509) (holding that an investigation initiated by ICE was "not enough to establish probable cause because the Fourth Amendment does not permit seizures for mere investigations"); Uroza v. Salt Lake Cnty., No. 2:11CV713DAK, 2013 WL 653968, at *5 (D. Utah Feb. 21, 2013) (finding that the plaintiff had a sufficient constitutional claim that he was held without probable cause after the ICE officer issued a detainer that indicated that ICE had initiated an investigation into the plaintiff's deportability); Complaint for Injunctive & Declaratory Relief & Petition for Writ of Habeas Corpus at 2, Moreno v. Napolitano, No. 11-cv-05452 (N.D. Ill. Aug. 11, 2011)

someone solely for investigative purposes violates the Fourth Amendment.[236] Thus, the change in the immigration detainer form appears to have ameliorated this particular Fourth Amendment violation—namely, issuing a detainer merely to investigate further.

Even with these changes, however, the Transactional Records Access Clearinghouse (TRAC) has reported that the changes have not necessarily improved how ICE issues detainers.[237] In one recent study, for example, TRAC reported that ICE issued only fourteen percent of the immigration detainers against individuals who posed a threat to public safety or national security.[238] TRAC found that in nearly half of the detainers issued, no threat level was indicated because the individual subject to the detainer had no prior criminal convictions.[239] Therefore, it is impossible that any of the criminal deportation categories on the I-247 detainer form would apply to these individuals because the categories all require a prior conviction.[240] The officer enforcing the detainer has no information to rely upon other than the information provided in the detainer itself—namely, information related to the individual's immigration status.[241] But, a decision to enforce the detainer based solely on

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(alleging that the immigration detainer was issued based solely on ICE's initiation of an investigation and that the plaintiffs were not provided with notice or an administrative arrest warrant).

236. Brown v. Illinois, 422 U.S. 590, 605 (1975). The Supreme Court has also warned that detention for the sole purpose of determining an individual's immigration status raises constitutional concerns. *Arizona*, 132 S. Ct. at 2509; *see also* Christopher N. Lasch, *Federal Immigration Detainers after* Arizona v. United States, 46 LOY. L.A. L. REV. 629, 675 (2013) [hereinafter Lasch, *Detainers after* Arizona] (applying the Supreme Court's Fourth Amendment discussion to detainer regulations and concluding that the regulations are invalid insofar as they "raise[] these substantial constitutional issues").

237. *See New ICE Detainer Guidelines Have Little Impact*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Oct. 1, 2013), http://trac.syr.edu/immigration/reports/333 (reporting that six months after ICE issued its new guidelines, nearly ninety percent of detainers issued were not issued for people suspected of posing risks to public safety or national security, as the guidelines required). *See generally* TRAC, *Ice Detainers*, *supra* note 30 (describing TRAC).

238. TRAC, *ICE Detainers*, *supra* note 30.

239. *Id.* Data related to actual deportations supports this finding that the majority of noncitizens caught by ICE have been convicted of minor crimes or do not have a criminal record. *See* Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Data Shows*, N.Y. TIMES (Apr. 6, 2014), http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html?_r=0 (reporting that only twenty percent of deportations since 2008 involved noncitizens who had been convicted of serious crimes).

240. *See* text accompanying *supra* note 231 (listing the conditions under which an immigration detainer may be issued when the individual has not been charged with an immigration-related offense).

241. Some state and local correctional facilities have blanket policies to enforce all immigration detainers, regardless of the factual circumstances of each case. *E.g.*, Galarza v. Szalczyk, 745 F.3d 634, 639 (3d Cir. 2014) (alleging that Lehigh County,

immigration status is insufficient for probable cause.[242] Furthermore, the individual's detention under the detainer constitutes a new seizure and therefore necessitates a new probable cause justification, separate from that provided for the state allegations.[243] Because probable cause is required for prolonged seizures, using immigration detainers to detain individuals without probable cause violates the Fourth Amendment.[244]

### *B. Detention Beyond Forty-Eight Hours Violates the Fourth Amendment and Due Process*

#### *1. Unlawfully prolonged detention*

The Fourth Amendment permits detention after a warrantless arrest for only forty-eight hours, including weekends and holidays.[245] This forty-eight hour window provides law enforcement with time to address paperwork delays and logistical problems and is consistent with the prohibition against detaining individuals for an extended period of time after they have been arrested without probable cause.[246] Following the forty-eight hour period, the detainee must be taken before a neutral body for a probable cause determination.[247]

The forty-eight hour limitation also applies in the immigration context. Within forty-eight hours of a warrantless arrest, an immigration officer must determine whether the arrested individual is subject to deportation.[248] The enforcement of an immigration detainer always constitutes a warrantless seizure because a detainer is merely a request, not a warrant.[249] Immigration detainer regulations

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Pennsylvania had a policy to enforce all immigration detainers, even those lodged against individuals without probable cause); Ortega v. U.S. Customs & Immigration Enforcement, 737 F.3d 435, 437 (6th Cir. 2013) (stating that the local correctional facility's policy was to incarcerate anyone with an immigration detainer).

242. *See* Melendres v. Arpaio, 989 F. Supp. 2d 822, 893 (D. Ariz. 2013) ("[A]ny stop or detention based only on a reasonable suspicion that a person is in the country without authorization, without more facts, is not lawful."), *adhered to by* No. CV–07–02513–PHX–GMS, 2013 WL 5498218 (D. Ariz. Oct. 2, 2013).

243. Miranda-Olivares v. Clackamas Cnty., No. 3:12-cv-02317-ST, 2014 WL 1414305, at *9 (D. Or. Apr. 11, 2014).

244. Gonzales v. City of Peoria, 722 F.2d 468, 477 (9th Cir. 1983), *overruled on other grounds by* Hodgers-Durgin v. De La Vina, 199 F.3d 1037 (9th Cir. 1999).

245. Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) (requiring a probable cause determination within forty-eight hours, not including intervening weekends, unless extraordinary circumstances arise).

246. *Id.* at 55.

247. Gerstein v. Pugh, 420 U.S. 103, 124–25 (1975).

248. 8 C.F.R. § 287.3(d) (2014).

249. *Id.* § 287.3(a); *see* Morales v. Chadbourne, 996 F. Supp. 2d 19, 39 (D.R.I. 2014) (analyzing the detainee's prolonged seizure as a result of officers attempting to use an immigration detainer as a warrant after the court concluded that

permit LEAs to hold an individual for forty-eight hours, excluding weekends and holidays.[250] In *County of Riverside v. McLaughlin*,[251] the Supreme Court weighed different concerns, including possible logistical and paperwork delays, when it determined that a probable cause determination for a warrantless arrest must be provided within forty-eight hours, which includes weekends and holidays.[252] Because local LEAs hold individuals under solely immigration detainers, which are not warrants, the *County of Riverside* analysis pertinent to warrantless arrests applies here. Therefore, by holding an individual beyond forty-eight hours under an immigration detainer without a probable cause determination from a neutral immigration officer or judge, local law enforcement violates the noncitizens' Fourth Amendment rights.[253]

Holding an individual under an immigration detainer beyond the forty-eight hour period violates due process for two reasons: (1) the Constitution prohibits local law enforcement from holding individuals beyond forty-eight hours without a probable cause determination,[254] and (2) the detained individuals have not been provided with procedural safeguards to ensure their immediate release following the forty-eight hour period.[255]

Although ICE does not authorize local LEAs to hold an individual beyond forty-eight hours under an immigration detainer,[256] many of

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detainers and warrants are very different); Buquer v. City of Indianapolis, 797 F. Supp. 2d 905, 911 (S.D. Ind. 2011) ("A detainer is not a criminal warrant, but rather a voluntary request . . . .").

250. 8 C.F.R. § 287.7(d); *see Cnty. of Riverside*, 500 U.S. at 56 (holding that probable cause determinations made within forty-eight hours of a warrantless arrest comply with the *Gerstein v. Pugh* "promptness requirement").

251. 500 U.S. 44 (1991).

252. *Id.* at 55–56.

253. *Cf.* Salgado v. Scannel, 561 F.2d 1211, 1212 (5th Cir. 1977) (per curiam) (finding that it is not necessary to take a deportable noncitizen before a magistrate as long as officers comply fully with immigration procedures outlined in the federal regulations); *see also* Lasch, *Detainers after* Arizona, *supra* note 236, at 698 (arguing that the federal regulation that permits detention for forty-eight hours excluding holidays and weekends violates the Fourth Amendment because the Supreme Court in *County of Riverside* declared expressly that the Fourth Amendment requires a probable cause determination by a neutral magistrate within forty-eight hours of an arrest "*including* weekends and holidays").

254. Gerstein v. Pugh, 420 U.S. 103, 124–25 (1975); *see also Department of Homeland Security Immigration Detainer Form - Notice of Action*, *supra* note 121, at 1 (instructing local law enforcement that they "are not authorized to hold the subject beyond . . . [forty-eight] hours").

255. *See Department of Homeland Security Immigration Detainer Form - Notice of Action*, *supra* note 121, at 2 (providing that detained individuals should contact the LEA if they are not released within forty-eight hours, not including weekends or holidays).

256. *See* Rivas v. Martin, 781 F. Supp. 2d 775, 782–83 (N.D. Ind. 2011) (distinguishing the detention of an individual pursuant to an expired immigration detainer, which may violate the Constitution, from the detention of an individual

the individuals held solely under an immigration detainer are in custody for more than forty-eight hours.[257] Some state and local LEAs do not understand that detention beyond this period is not permitted and that prolonged detention of an individual exposes them to liability.[258] In their current form, immigration detainers notify immigrant detainees that they cannot be held beyond forty-eight hours and place the burden upon the detainees to alert law enforcement if the period has expired.[259] Instead, LEAs should promulgate clear guidelines requiring the release of individuals immediately after forty-eight hours.[260]

*2. Procedural due process under* Mathews v. Eldridge

Detained individuals are entitled to procedural due process because their liberty is at stake.[261] In determining whether a particular procedure in civil proceedings meets the standard of fairness under the Due Process Clause, the procedure must satisfy the

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under a valid warrant); Ochoa v. Bass, 181 P.3d 727, 733 (Okla. Crim. App. 2008) (finding that the State of Oklahoma lacked authority to continue to hold the defendants following the expiration of the immigration detainers without further action by ICE).

257. While data is not available that demonstrates the frequency of this practice, individuals who have been held beyond the forty-eight hour period have sued LEAs in several U.S. district courts. *See, e.g.*, Complaint for Injunctive & Declaratory Relief & Damages at 3–4, Roy v. Cnty. of L.A., No. 2:12-cv-9012-RGK-FFM (C.D. Cal. Oct. 19, 2012) (alleging the Los Angeles County jails unlawfully detained individuals subject to immigration detainers for periods ranging from six to eighty-nine days); Petition for Writ of Habeas Corpus & Complaint for Declaratory & Injunctive Relief at 4, Brizuela v. Feliciano, No. 3:12-cv-00226-JBA (D. Conn. Feb. 13, 2012) (stating that individuals held under immigration detainers in Connecticut have been detained for up to five days before being taken into ICE custody); Plaintiff's Original Complaint, *supra* note 1, at 4–5 (complaining that Orleans Parish Prison unlawfully held one plaintiff for 164 days and another plaintiff for ninety-one days); Complaint & Jury Demand at 1, 5, Quezada v. Mink, No. 1:10-00879-WJM-KLM (D. Colo. Apr. 21, 2010) (noting the Jefferson County, Colorado jail held the plaintiff for forty-seven days).

258. *E.g.*, Morales v. Chadbourne, 996 F. Supp. 2d 19, 39 (D.R.I. 2014) (permitting a claim of a Fourth Amendment violation against the State of Rhode Island to proceed against the state because the correctional facility should have recognized that the immigration detainer was facially invalid).

259. *Department of Homeland Security Immigration Detainer Form - Notice of Action*, *supra* note 121, at 2.

260. *E.g.*, Settlement Agreement & Stipulation of Dismissal Upon Termination of Agreement at 12–13, Brizuela v. Feliciano, No. 3:12-cv-00226 (D. Conn. Feb. 19, 2013) (explaining that the Connecticut Department of Corrections agreed to develop a procedure to inform its internal staff and detainees about immigration detainers and to provide the procedure to all inmates subject to detainers).

261. *See* Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (characterizing the "root requirement" of due process as providing an individual an opportunity for a hearing before depriving the individual of a liberty or a property interest (internal quotation marks omitted)).

*Mathews* balancing test.[262] The first *Mathews* factor—the private interest affected by official action—is substantial in this context because individuals subject to immigration detainers are held in custody and thus deprived of their liberty at the most basic level.[263] The Supreme Court has recognized the severity of depriving an individual of her liberty, especially in the pretrial context.[264] Such deprivation is considerable with immigration detainers. LEAs frequently hold individuals under detainers for extended periods of time without any indication of the charges that they face; some individuals have been held for months solely under an immigration detainer.[265]

In addition to the deprivation of liberty, the enforcement of immigration detainers also places other liberty interests at stake. In some jurisdictions, individuals held under immigration detainers are categorically ineligible for bond in criminal proceedings.[266] Consequently, individuals held under immigration detainers are subject to lengthier stays in pretrial detention as a result of their criminal cases than are those not subject to immigration detainers.[267] In addition, noncitizens may have other concerns related to the nature of their detention, like remaining in a minimum security facility, because individuals held under immigration detainers are sometimes placed in medium security facilities.[268] Their liberty

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262. Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976); *see supra* notes 170–75 and accompanying text (discussing the *Mathews* test).

263. *See Matthews*, 424 U.S. at 335; *see also* Addington v. Texas, 441 U.S. 418, 425 (1979) (requiring due process protections for all civil commitments).

264. *See* United States v. Salerno, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."); Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (recognizing the serious consequences of prolonged pretrial detention, such as job loss, interruption in income, and impairment of family relationships).

265. *See supra* note 257 (listing multiple complaints that alleged that law enforcement violated due process rights by holding noncitizens under immigration detainers for more than forty-eight hours).

266. *See* KATE M. MANUEL, *supra* note 179, at 19 n.128 (clarifying that even if a jurisdiction does not categorically refuse bond hearings to immigration detainees, the presence of the detainer may nonetheless influence their bail determinations). This prohibition is especially problematic when the individual is charged with a minor offense because the individual is probably not subject to mandatory detention and may be eligible for bond under 8 U.S.C. § 1226(a)(2). *See* 8 U.S.C. § 1226(a)(2) (2012) (granting the Attorney General discretion to determine whether to detain noncitizens in removal proceedings or to release them on bond).

267. *See, e.g.*, GUTTIN, *supra* note 34, at 7–8 (reporting that noncitizens held under immigration detainers spend more time in criminal pretrial detention because they are less likely to be released on bail); *see also* Complaint for Injunctive & Declaratory Relief & Damages at 6, Roy v. Cnty. of L.A., No. 2:12-cv-9012-RGK-FFM (C.D. Cal. Oct. 19, 2012) (alleging that inmates in Los Angeles County jail with immigration detainers are typically held 20.6 days longer than inmates without detainers).

268. *Cf.* Franklin v. Barry, 909 F. Supp. 21, 29 (D.D.C. 1995) (determining that the entitlement to a minimum security transfer is not a protected liberty interest and that

interests are further implicated because they may not be able to seek assistance for their pending criminal cases while they are detained.[269] Because immigration detainers emerge in a variety of contexts and may lead to different outcomes, the analysis regarding the private interests at stake will vary based on the circumstances.

The second *Mathews* factor—the comparative risk of an erroneous deprivation of an individual's private liberty interest with and without additional or substitute procedural safeguards—also weighs heavily in favor of the detained noncitizens. The erroneous deprivation of the noncitizen's liberty interest is great, and a failure to provide any procedural protections has led to the detention of U.S. citizens[270] and noncitizens for well over 100 days solely under immigration detainers.[271] The erroneous enforcement of immigration detainers has also burdened immigrant communities—particularly Latino communities—because they lose trust in local law enforcement, a consequence that can negatively impact public safety.[272] Implementing specific safeguards,[273] such as training LEAs to recognize invalid detainers or to release individuals immediately after forty-eight hours, would significantly diminish the risk of erroneous or prolonged deprivation of liberty.

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plaintiffs' equal protection rights were not violated because all individuals with any type of detainer are denied transfers to minimum security facilities).

269. *See* United States v. Trujillo-Alvarez, 900 F. Supp. 2d 1167, 1180 (D. Or. 2012) (recognizing that by sending the petitioner to a detention facility in another part of the state, ICE deprived him of the support of his family and friends and also deprived the petitioner's court-appointed counsel of the ability to prepare a defense in the petitioner's criminal case); *see also* SEJAL ZOTA & JOHN RUBIN, IMMIGRATION CONSEQUENCES OF A CRIMINAL CONVICTION IN NORTH CAROLINA 84 (John Rubin ed., 2008), *available at* http://www.ncids.org/Other%20Manuals/Immigration%20Manual/Text.htm (implying that indigent defense counsel often have difficulty communicating with their clients when they are transferred to an immigration detention center).

270. *See, e.g.*, Galarza v. Szalczyk, 745 F.3d 634, 636 (3d Cir. 2014) (detailing the detention of a U.S. citizen under an immigration detainer who had a U.S. Social Security card, a driver's license, and a debit card in his wallet during booking); Uroza v. Salt Lake Cnty., No. 2:11CV713DAK, 2014 WL 4457300, at *5 (D. Utah Sept. 10, 2014) (stating that ICE issued detainers for more than 800 U.S. citizens between 2008 and 2012); *see also* Julia Preston, *Immigration Crackdown Also Snares Americans*, N.Y. TIMES (Dec. 13, 2011), http://www.nytimes.com/2011/12/14/us/measures-to-capture-illegal-aliens-nab-citizens.html?pagewanted=all&_r=0 (documenting instances in which federal immigration agents erroneously instructed local law enforcement agencies to hold U.S. citizens for possible deportation).

271. *See* sources cited *supra* note 257 (providing examples of individuals who have sued LEAs for holding them for more than the allowable forty-eight hour period).

272. *See infra* Part III.A (discussing the consequences for immigrant communities of merging local law enforcement's traditional responsibilities with federal immigration authorities' responsibilities).

273. The current procedure does not include safeguards in excess of those included on DHS Form I-247. The form only instructs the local agency holding the subject of the detainer to release the individual after forty-eight hours. *Department of Homeland Security Immigration Detainer Form - Notice of Action*, *supra* note 121, at 1.

The final factor under the *Mathews* analysis—the countervailing interest—is the government's interest in efficiently gaining custody over noncitizens who may be deportable and in keeping potentially deportable noncitizens who may be dangerous in custody.[274] In *Demore v. Kim*, the Supreme Court articulated a concern for increased rates of criminal activity committed by noncitizens.[275] In that case, the Court's concern for recidivism of potentially deportable noncitizens was so significant that the Court rejected arguments about the need to provide an individualized determination of flight risk for noncitizens detained under the statutory provision at issue, 8 U.S.C. § 1226(c).[276] Noncitizens held under immigration detainers, however, would not fall under the provision analyzed in *Kim* because that section applies only when removal proceedings are pending.[277] However, removal proceedings begin with the issuance of an NTA,[278] and individuals held under immigration detainers have not usually been issued an NTA. Thus, the mandatory detention provisions are not triggered when an individual is held under an ICE detainer.

Additionally, most individuals held under immigration detainers are nonviolent offenders, so the Supreme Court's fear of dangerous deportable criminals is unwarranted.[279] The Supreme Court in *Kim* permitted the mandatory detention of noncitizens convicted of certain serious crimes, but classifying noncitizens' criminal convictions under these immigration provisions is extremely challenging.[280] An ICE officer who issued the detainer, or the local

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

275. *See* Demore v. Kim, 538 U.S. 510, 518 (2003) (citing a 1986 study that found seventy-seven percent of deportable individuals were arrested at least one more time and that forty-five percent were arrested more than once before the start of their deportation proceedings).

276. *Id.* at 525–26. *But see* Whitney Chelgren, *Preventive Detention Distorted: Why It Is Unconstitutional to Detain Immigrants Without Procedural Protections*, 44 LOY. L.A. L. REV. 1477, 1503–07 (2011) (arguing that detaining persons in ICE custody without individualized hearings is unconstitutional because "the system essentially presupposes that every immigrant who is subject to mandatory detention is either dangerous or a flight risk, or both").

277. *Kim*, 538 U.S. at 527–28. .

278. *See* 8 U.S.C. § 1229(a)(1) (2012) (providing the substantive requirements for an NTA).

279. *See* TRAC, *ICE Detainers*, *supra* note 30 (indicating that almost half of the individuals held under immigration detainers had no criminal record); *see also* Thompson & Cohen, *supra* note 239 (reporting that two-thirds of the nearly two million deportations that have taken place during the Obama Administration were of people who had no criminal record or who had committed minor infractions, such as traffic violations).

280. Recent Supreme Court case law illustrates the challenges of classifying criminal convictions for immigration purposes. *See, e.g.*, Moncrieffe v. Holder, 133 S. Ct. 1678, 1693–94 (2013) (noting that for the third time in seven years the Court considered whether a low-level drug offense should be classified as an aggravated

official who decided to enforce the detainer, is likely not in a position to determine whether the individual would be subject to mandatory detention when transferred to ICE custody.[281] Consequently, the government's interest in detaining dangerous noncitizens is not effectively addressed by immigration detainer enforcement.

The remaining government interest—the efficient adjudication of potentially deportable noncitizens—is also not particularly weighty in this context. Although immigration detainers may relieve the federal government of the burden of tracking down individuals who may be deportable, the state government's interest actually weighs in favor of greater procedural protections because a state pays the cost of holding an individual under an immigration detainer.[282] Therefore, the government's interest in efficient deportation proceedings, along with the government's interest in keeping potentially dangerous individuals in custody, is relatively minor compared to the substantial risk of prolonged detention of any individual charged with a nonviolent offense, such as a minor traffic offense.[283]

Because the private liberty interest greatly outweighs the government's interests in efficient adjudication of deportation proceedings or detention of supposed dangerous noncitizens, due process requires that those subject to immigration detainers be provided stronger procedural protections, even if they fall short of more robust protections like a right to counsel.[284] Form I-247 states that detention is "not to exceed 48 hours;" however ICE then places the burden on the noncitizen to ask the LEA to be released from

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felony and clarifying that certain state drug offenses with no remuneration do not qualify as aggravated felonies).

281. For example, adjudicators and courts have diverged regarding which test to apply to determine if a crime involves moral turpitude, which under some circumstances may trigger mandatory detention. *Compare* Matter of Silva-Trevino, 24 I. & N. Dec. 687, 690 (B.I.A. 2008) (permitting adjudicators to examine documents related to the criminal charge outside of the record of conviction), *with* Prudencio v. Holder, 669 F.3d 472, 486 (4th Cir. 2012) (rejecting the *Silva-Trevino* framework and finding that the conviction for contributing to the delinquency of a minor was not a crime involving moral turpitude).

282. 8 C.F.R. § 287.7(e) (2014).

283. *See* Zadvydas v. Davis, 533 U.S. 678, 696 (2001) (recognizing a liberty interest of a noncitizen who was ordered removed but could not practically be deported).

284. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010) (establishing that criminal defense attorneys must inform their clients if a guilty plea carries a clear risk of deportation). In other civil proceedings, the Supreme Court has determined that alternative procedural protections are necessary to ensure fairness of the proceeding, even where the petitioner is not entitled to right to counsel. *See* Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011) (holding that the petitioner's due process rights were violated because he was not afforded alternative procedural protections to ensure fundamental fairness of a proceeding for failure to pay child support).

custody.[285] Regulations require immigration officers to inform individuals arrested without a warrant of the immigration charges pending against them and their right to counsel at their own expense,[286] but the only procedure for enforcing the detainer requires that the LEA provide a copy of the detainer to the noncitizen against whom the detainer is issued.[287] Because procedural steps are already in place to inform noncitizens arrested without a warrant, procedural steps in the detainer context would impose a minimal burden. Additionally, immigration officers should clearly communicate to the local LEA detaining the individual that ICE does not intend to take custody of the detainee so that the LEA releases the individual immediately after the forty-eight hour period. These procedural steps, while relatively minor, will likely prevent the prolonged detention of individuals held under detainers. These measures are both significant and minimally burdensome, and they would protect the liberty interest of individuals held under immigration detainers so as to satisfy due process.

### *C. Local Law Enforcement Should Rely on Individualized Determinations Rather than Automatically Enforce Immigration Detainers*

Instead of enforcing immigration detainers, local law enforcement should respect the assessment of danger and flight risk made in the noncitizen's criminal case. Because individuals subject to detainers have often been arrested on unrelated criminal charges, they frequently have pending criminal cases. In some circumstances, the criminal court judge may release the individuals on bond or on their own recognizance.[288] In the case of Mr. Alvarez-Trujillo, who had criminal charges pending against him, a magistrate judge issued an order of conditional release based on his strong family ties, including three U.S.-citizen children, stable employment, and presence in the United States for a long period of time.[289] In cases like Mr. Alvarez-

285. DHS Form I-247 provides that an individual subject to the detainer cannot be held beyond forty-eight hours, but nothing else indicates to local law enforcement that the person *must* be released after forty-eight hours. *Department of Homeland Security Immigration Detainer Form - Notice of Action*, *supra* note 121, at 1 (including a field on the form where the officer issuing the detainer may instruct the LEA enforcing the detainer to provide a form to the detained individual).

286. 8 C.F.R. § 287.3(c).

287. *Department of Homeland Security Immigration Detainer Form - Notice of Action*, *supra* note 121, at 1.

288. *E.g.*, Galarza v. Szalczyk, 745 F.3d 634, 637 (3d Cir. 2014) (assessing the claim of a criminal defendant who was released on bond but held three additional days pursuant to an immigration detainer).

289. United States v. Trujillo-Alvarez, 900 F. Supp. 2d 1167, 1172 (D. Or. 2012) (citation omitted).

Trujillo's, ICE issues an immigration detainer to hold individuals even after they have been released on bond or on their own recognizance.[290] Even if ICE has probable cause to issue that detainer, case law, common sense, and fundamental fairness support the release of the defendant pending a criminal proceeding.[291]

In the criminal context, factors such as flight risk and a criminal defendant's potential dangerousness are sufficient to maintain custody of a criminal defendant before trial.[292] Accordingly, state and local law enforcement should enforce the custody orders of the individualized judicial determinations made in a noncitizen's pending criminal case, as opposed to relying solely on the immigration detainer to justify a noncitizen's continued detention. Courts have recognized that an ICE detainer may be a factor in the risk determination, but it is one factor balanced against others.[293] Courts have also found that the immigration detainer cannot trump determinations made under the Bail Reform Act because it would undo Congress's carefully constructed scheme that has been implemented to determine if a criminal defendant should be placed in pretrial detention.[294] In Mr. Alvarez-Trujillo's case, he was even in

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290. *Id.*; *see also* Miranda-Olivares v. Clackamas Cnty., No. 3:12-cv-02317-ST, 2014 WL 1414305, at *2 (D. Or. Apr. 11, 2014) (articulating the local jail's practice of holding individuals subject to ICE detainers in custody, even when their underlying state criminal charges are resolved or bail is posted).

291. *See, e.g.*, *Trujillo-Alvarez*, 900 F. Supp. 2d at 1175 (finding that there was no practical necessity or legal requirement that an individual remain in custody under an immigration detainer when he had pending criminal charges and a magistrate judge had determined he could be released pending those charges). In *Trujillo-Alvarez*, the U.S. District Court for the District of Oregon added that detaining Mr. Alvarez-Trujillo in an ICE facility outside of the jurisdiction where his criminal case was pending deprived him of his family and friends' support and of the ability to meet with his court-appointed counsel to prepare his defense at trial, thus jeopardizing his constitutional rights. *Id.* at 1180.

292. *See* United States v. Salerno, 481 U.S. 739, 749 (1987) (stating that the government's interest in detaining potentially dangerous individuals sometimes outweighs an individual's liberty interest).

293. *E.g.*, United States v. Chavez-Rivas, 536 F. Supp. 2d 962, 968–69 (E.D. Wis. 2008) (balancing the defendant's immigration status with other factors, such as family ties and stable employment, and concluding that he did not pose a flight risk).

294. *See, e.g.*, United States v. Blas, No. CRIM. 13-0178-WS-C, 2013 WL 5317228, at *6 (S.D. Ala. Sept. 20, 2013) (declining to recognize an immigration detainer exception to the Bail Reform Act); United States v. Barrera-Omana, 638 F. Supp. 2d 1108, 1111 (D. Minn. 2009) (rejecting the notion that all the factors weighed in the BRA, including danger and flight risk, are completely "swallowed by an ICE detainer"). Individuals held under immigration detainers have been treated as pretrial detainees in other contexts as well. *See* Villegas v. Metro. Gov't, 709 F.3d 563, 568 (6th Cir. 2013) (analyzing an Eight Amendment claim of a woman held under an immigration detainer under the same standards as a pretrial detainee); Porro v. Barnes, 624 F.3d 1322, 1326 (10th Cir. 2010) (analyzing the Fifth and Fourteenth Amendment protections for immigration detainees identically to those of pretrial detainees).

ICE custody,[295] a significant fact that demonstrates even more strongly that if ICE cannot detain an individual who has been otherwise released under a detainer, then surely local law enforcement lacks authority to further hold someone on immigration charges.

Even though *Trujillo-Alvarez* related to the BRA, a federal statute, state criminal procedural codes also base pretrial custody determinations on specific factors, such as flight risk and the potential danger that the defendant poses to the community.[296] These individualized judicial determinations rely upon an established framework and should be enforced instead of immigration detainers, which are often based on less than probable cause.[297] While local law enforcement may believe that a federal request should overcome a state or local determination to release the person, state and local agencies are not required to enforce immigration detainers.[298] As the court found in *Trujillo-Alvarez*, there is neither a legal requirement nor a practical requirement that the detainer be enforced because a judge has already determined that the person released on bond or on her own recognizance will most likely return to court.[299] In both federal and state pretrial detention determinations, the individual would certainly be released but for the immigration detainer.[300] Following individualized judicial determinations of flight risk as opposed to immigration detainers protects state and local agencies from potential constitutional violations, and it is also consistent with federal immigration policies.[301]

Although these protections borrowed from criminal procedure may be useful in releasing noncitizens who would otherwise be held under an immigration detainer, advocating for such protections also

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295. *Trujillo-Alvarez*, 900 F. Supp. 2d at 1171.

296. *See, e.g.*, FLA. STAT. § 903.046(2)(d) (2014) ("[A] court shall consider . . . [t]he defendant's past and present conduct, including any record of convictions, previous flight to avoid prosecution, or failure to appear at court proceedings."); WASH. REV. CODE § 10.21.050(3)(c) (2014) (including the "seriousness of the danger to any person or the community that would be posed by the defendant's release" as a factor judicial officers must consider when deciding whether to release an individual from custody).

297. *See supra* Part II.A (analyzing how the enforcement of immigration detainers violates the Fourth Amendment).

298. *See supra* note 132 and accompanying text.

299. *Trujillo-Alvarez*, 900 F. Supp. 2d at 1170.

300. *See* United States v. Barrera-Omana, 638 F. Supp. 2d 1108, 1112 (D. Minn. 2009) (asserting that the "presence of an ICE detainer" should not be dispositive in pretrial detention determinations because "[a]bsent this detainer, there would be no question: the defendant should be released pending trial").

301. *See* December 2012 Morton Memo, *supra* note 6, at 2 (revising the ICE detainer policy to target only individuals convicted of certain criminal offenses or subject to specific immigration offenses).

further entrenches immigration enforcement in criminal law and procedure.[302] Even in the case of pretrial criminal detention, however, the Supreme Court upheld the BRA, the federal statute governing individualized determinations, as a regulatory rather than a punitive measure.[303] Consequently, even if advocates were to successfully frame removal proceedings as quasi-criminal and deportation as a form of punishment, the challenge of fair assessments regarding pretrial detention would remain.

## III. ADDITIONAL STATE AND LOCAL INTERESTS AND POSSIBLE SOLUTIONS

In addition to the significant constitutional problems immigration detainers present, states and localities should also be concerned with three important policy considerations: (1) the trust of immigrant communities in law enforcement; (2) the effect of police officers' implicit biases on their decisions to arrest; and (3) the significant costs of immigration detainers. These important concerns, combined with the potential for serious constitutional violations, illustrate that state and local law enforcement can and should implement policies that refuse to enforce immigration detainers.[304]

### *A. Additional State Interests*

#### *1. Immigrant communities' trust in law enforcement*

State and local agencies should be concerned about the loss of immigrant communities' trust in law enforcement and its negative effects on public safety. With the enforcement of immigration detainers, individuals equate interactions with the police and the criminal justice system with immigration enforcement because local jails funnel noncitizens directly into ICE custody. When members of an immigrant community perceive police officers as ICE agents, they

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302. *See* McLeod, *supra* note 42, at 170 ("An immigration procedural rights revolution may have the unintended consequence of legitimizing the increasingly harsh substantive immigration law by offering, in principle, a panoply of robust procedural protections seldom enjoyed by defendants in practice and against which harsh substantive laws can be defended.").

303. *See* United States v. Salerno, 481 U.S. 739, 748–49 (1987) (relying, ironically, on the lack of an "absolute constitutional barrier to detention of potentially dangerous resident aliens pending deportation proceedings" to justify the pretrial detention of criminal defendants based on a finding of potential dangerousness under the Bail Reform Act).

304. For example, the District of Columbia has limited enforcement of immigration detainers to only when the federal government reimburses the District for costs of detaining individuals and decreased the period of time that an individual will be held from forty-eight hours to twenty-four hours. D.C. CODE § 24-211.07(a)–(b) (2013).

begin to believe that any interaction with police, even to report a crime, may result in deportation.[305] Studies have shown that immigrants are afraid they may be deported for relatively minor acts like driving without a license; this concern that makes it difficult for some of them to get to work.[306] Such anxiety also leads noncitizens, particularly those living in the United States without documentation, to withdraw from the community and from public spaces.[307] Both advocates and the Homeland Security Advisory Council (HSAC) have recognized this problem. HSAC suggested that ICE withhold enforcement action of any kind against low-level offenders.[308]

Furthermore, overall community safety suffers when immigrant communities perceive local police officers to be ICE agents.[309] If certain populations are afraid to interact with police officers, they are less likely to report crimes or to provide law enforcement with information related to crimes.[310] For domestic violence survivors who are already afraid to contact police to report their abuse, blurring the line of local police and immigration enforcement only magnifies their fears.[311] They may be reluctant to call the police because of fear

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305. *See, e.g.*, METRO. KING CNTY. COUNCIL, SIGNATURE REPORT, No. 2013-0285.3, at 2 (2013) (finding that the threat of deportation was very strong in the local immigrant community such that members of the community feared they would be separated from their families if they reported crimes to law enforcement); *see also* George Gascón, *Feds' Immigration-hold Policy Misguided*, SF GATE (Sept. 10, 2013, 4:59 pm), http://www.sfgate.com/opinion/openforum/article/Feds-immigration-hold-policy-misguided-4803416.php (highlighting the story of a domestic violence survivor who was afraid to report her abuse to law enforcement and who was arrested but not charged for immigration violations when she ultimately did contact police about the abuse).

306. *See* AM. CIVIL LIBERTIES UNION OF GA., TERROR AND ISOLATION IN COBB: HOW UNCHECKED POLICE POWER UNDER 287(G) HAS TORN FAMILIES APART AND THREATENED PUBLIC SAFETY 10–14 (Azadeh Shahshahani ed., 2009), *available at* http://www.acluga.org/download_file/view_inline/1505/392 (documenting fears of immigrant residents of Cobb County, Georgia about racial profiling by police officers, especially during traffic stops); Jacqueline Hagan et al., *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives*, 88 N. C. L. REV. 1799, 1815 (2010) (explaining that immigrant communities have begun to advertise for licensed drivers in response to the well-founded deportation concerns).

307. Hagan et al., *supra* note 306, at 1815–16.

308. HOMELAND SECURITY ADVISORY COMM., TASK FORCE ON SECURE COMMUNITIES FINDINGS AND RECOMMENDATIONS 21–22 (2011), *available at* http://www.dhs.gov/xlibrary/assets/hsac-task-force-on-secure-communities-findings-and-recommendations- report.pdf (describing the limits of ICE enforcement action in cases of minor traffic offenses).

309. *See* NIK THEODORE, INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT 6 (2013), *available at* https://greatcities.uic.edu/wp-content/uploads/2014/05/Insecure_Communities_Report_FINAL.pdf (reporting the results of a study of immigrants' views of law enforcement and stating that forty-five percent of Latinos reported that the increased police involvement in immigration enforcement has made them less likely to voluntarily provide information about a crime or to report a crime to police than they were before).

310. *Id.*

311. *See* Maria Fernanda Parra-Chico, *An Up-Close Perspective: The Enforcement of Federal Immigration Laws by State and Local Police*, 7 SEATTLE J. SOC. JUST. 321, 337–38

that their abusers may be deported, an outcome that may harm their family if they are financially dependent upon their abusers.[312] Thus, one result of immigration detainer enforcement—the perception that law enforcement equals ICE—negatively impacts community cohesion and undermines immigrant communities' trust in law enforcement.

*2. Protection against police officers' implicit biases*

Because interactions with local law enforcement may lead to immigration enforcement, local LEAs' policies must curb police officers' implicit biases. Police officers have a great deal of discretion in determining whom to arrest, and, therefore, discretion over whom to screen to determine their immigration status.[313] Reports illustrate certain state and local agencies have clear biases against immigrant communities, particularly Latino immigrant communities.[314] Although some agencies may explicitly target Latino populations,[315] it is also likely that local agents are acting according to implicit biases towards the Latino community.

Implicit bias is a growing field of psychological research that greatly implicates various aspects of the law. The basic concept is that, although individuals may not consciously express biases based on race or other traits, they still may hold implicit, unconscious biases or beliefs that affect their attitude and impact their behavior towards certain groups.[316] Legal scholars have examined the role of implicit bias in many aspects of the law, including police officers' behavior,[317]

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(2008) (noting that abusers may use a domestic violence survivor's immigration status to discourage her from reporting the abuse to the police).

312. AM. CIVIL LIBERTIES UNION OF MD., *supra* note 131, at 18.

313. *See* Adam B. Cox & Eric A. Posner, *Delegation in Immigration Law*, 79 U. CHI. L. REV. 1285, 1347 (2012) (noting that discretion regarding arrest authority allows local agents who favor greater immigration enforcement more opportunities to seek such enforcement); Kalhan, *supra* note 114, at 1152 (asserting that recent changes in immigration enforcement have transformed routine police activities into moments that potentially lead to immigration policing and status determinations).

314. *See* GAO, BETTER CONTROLS, *supra* note 91, at 11 (explaining that some jurisdictions with 287(g) agreements have implemented universal models that target all types of offenders who may have immigration violations); *see also* Ozment, *supra* note 97, at 126 (revealing that arrests of Latinos for driving without a license increased from 23.6% before Nashville, Tennessee implemented a 287(g) program to 49.4% after the city implemented the program).

315. *See* Melendres v. Arpaio, 989 F. Supp. 2d 822, 826 (D. Ariz. 2013) (detailing constitutional violations committed by Maricopa County police officers against individuals of Latino descent who the officers suspected were undocumented noncitizens), *adhered to by* No. CV–07-02513-PHX-GMS, 2013 WL 5498218 (D. Ariz. Oct. 2, 2013).

316. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1132 (2012).

317. *See* L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2053 (2011) (describing the concept in the context of some officers' biases towards black individuals and explaining that, once the officers pay attention

prosecutorial discretion,[318] employment discrimination,[319] and landlords' treatment of immigrant tenants.[320] Implicit biases can affect police officers' behavior in three ways: it can make police officers (1) more suspicious of some individuals based on their racial appearance, (2) evaluate "ambiguous behavior" differently based on racial appearance, and (3) treat different racial groups disparately.[321]

The analysis of implicit bias by police officers is especially relevant in the context of immigration detainers because police officers have discretion to arrest individuals under certain circumstances, including for traffic stops.[322] They also have discretion to determine whether to honor an immigration detainer.[323] Officers may assume that a person is not authorized to be in the United States based on the person's ethnic identity or appearance.[324] Applying the three

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to such individuals, the officers may interpret behavior as violent or suspicious when they would not interpret the same behavior by a white individual as violent or suspicious).

318. *E.g.*, Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 806–22 (2012) (arguing that racial bias permeates multiple phases of prosecutorial discretion—from whether to charge a suspect, to whether to offer a charged defendant a plea bargain, to selecting a jury for a defendant who goes to trial).

319. *E.g.*, Nancy Gertner & Melissa Hart, *Implicit Bias in Employment Litigation*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 80, 80–94 (Justin D. Levinson & Robert J. Smith eds., 2012) (discussing evidence of continued discrimination based on implicit bias in the workplace despite the federal prohibition on workplace discrimination).

320. *E.g.*, Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55, 72–81 (2009) (noting that while there are "Anti-Illegal Immigration (AII)" ordinances enacted to prevent housing discrimination, pre-conceived stereotypes lead to "discrimination slippage," a phenomenon where large number of individuals who are not targets of AII ordinances are still victims of discrimination).

321. Richardson, *supra* note 317, at 2043–44.

322. *See* David A. Harris, "*Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 546 (1997) (stating that police officers use traffic laws "to stop a hugely disproportionate number of African American[] and Hispanic[]" drivers); Nirej S. Sekhon, *Redistributive Policing*, 101 J. CRIM. L. & CRIMINOLOGY 1171, 1174–78 (2011) (documenting the history of legal scholarship as it relates to police discretion since the 1950s).

323. Galarza v. Szalczyk, 745 F.3d 634, 645 (3d Cir. 2014) (stating that the local LEA was "free to disregard the ICE detainer"). When addressing concerns about racial profiling in Secure Communities, one U.S. representative expressed confusion that such a program enables officers to discriminate. *See Hearing: Is Secure Communities Keeping Our Communities Secure?*, *supra* note 63, at 1–2 (statement of Rep. Elton Gallegly, Chairman, Subcomm. on Immigration Policy & Enforcement) (doubting a computer's ability to racially profile). The representative's comment misses the point that it is police officers' discretion, particularly for low-level offenses, that leads to the arrest in the first place. This initial discretionary decision leads an officer to book the individual, and the act of booking an individual leads law enforcement to send the individual's fingerprint information to Secure Communities—a step that may eventually lead to removal proceedings and deportation.

324. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 886–87 (1975) (permitting one's "Mexican appearance" to be a relevant factor in but not the sole justification for a police officer's decision to stop an individual); *see also* Kevin R. Johnson, *The Case Against Racial Profiling in Immigration Enforcement*, 78 WASH U. L.Q. 675, 677

ways that implicit biases may affect behavior, a police officer may immediately read someone as Latino and thus a noncitizen based on the person's appearance or language. The numerous cases brought on behalf of U.S. citizens of Latino descent who have been wrongfully detained under immigration detainers illustrate this very phenomenon.[325] Additionally, an officer may choose to interpret certain pre-arrest behavior or facts, like lack of valid identification, to mean that a person is undocumented, such as in Chel's case discussed earlier.[326]

With the growing convergence of immigration and criminal law, police officers' broad discretion not only impacts who gets captured by the criminal justice system but also who ultimately gets funneled into immigration enforcement. Data and stories from advocacy organizations demonstrate that Latino individuals are especially vulnerable to arrest for minor traffic violations, such as driving without a license or driving with an expired license.[327] While greater awareness of implicit biases is important, one obvious way to minimize their harmful effects is for LEAs to refuse to enforce immigration detainers, thus severing the link between police officer discretion and immigration enforcement.

*3. Costs of enforcing immigration detainers*

One final but significant local interest is the cost of enforcing immigration detainers. ICE does not incur any of the costs of enforcing immigration detainers; rather, the entire cost falls upon the state or local agency.[328] Jurisdictions that continue to enforce all immigration detainers report the enormous costs of doing so.[329]

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(2000) (explaining that U.S. citizens and lawful permanent residents of Latin American descent "bear the brunt of race-based immigration enforcement").

325. *See, e.g.*, *Galarza*, 745 F.3d at 636, 638 (alleging constitutional violations after the plaintiff, a Latino U.S. citizen, was wrongfully held in custody under an immigration detainer for several days after he posted bail).

326. *See supra* notes 109–12 and accompanying text.

327. Hagan et al., *supra* note 306, at 1815.

328. *See* 8 C.F.R. § 287.7(e) (2014) ("No detainer issued . . . shall incur any fiscal obligation on the part of [DHS], until actual assumption of custody by [DHS] . . . .").

329. *See, e.g.*, KATHY A. WHITE & LUCY DWIGHT, COLO. FISCAL INST., MISPLACED PRIORITIES: SB90 & THE COSTS TO LOCAL COMMUNITIES 1 (2012), *available at* http://www.coloradofiscal.org/wp-content/uploads/2013/05/2013-3-1-v.2-SB90-Misplaced-Priorities-Ed.pdf (stating that the annual cost of supporting immigration enforcement in Colorado exceeds thirteen million dollars); Brandi Grissom, *Dewhurst Urges Obama to Pay Texas for Jailed Immigrants*, TEX. WKLY., http://www.texastribune.org/2013/10/22/texas-jails-spend-millions-undocumented-immigrants (last updated Oct. 22, 2013, 1:45 PM) (reporting that Texas county jails spent more than $156.6 million to detain approximately 131,000 undocumented immigrants in the span of two years).

Jurisdictions that have passed ordinances refusing to enforce immigration detainers have cited to the cost as a significant factor in the law's development.[330]

In addition to the costs of holding individuals under immigration detainers, state and local LEAs also expose themselves to liability for detaining individuals beyond the permitted period and for treating individuals held under immigration detainers poorly. The case of Ms. Villegas illustrates the financial cost of detainers. Ms. Villegas was stopped by a police officer and arrested for driving without a valid license; she was nine months pregnant at the time.[331] A jail employee, working as an ICE agent under the 287(g) program, issued an immigration detainer for Ms. Villegas after inquiring about her immigration status.[332] She was classified as a medium-security inmate and shackled during her labor and her recovery, actions which later led Ms. Villegas to sue Nashville and Davidson County, Tennessee.[333] The Nashville and Davidson County council settled with Ms. Villegas for $490,000.[334]

Local agencies have also been held liable for the prolonged detention of individuals under immigration detainers. For example, Mr. Quezada sued the Sheriff of Jefferson County, Colorado after the county held him under an immigration detainer forty-seven days beyond the county's authority under the detainer.[335] In the settlement, the U.S. government and the county agreed to pay Mr. Quezada $50,000 and $40,000, respectively.[336] These costs are significant and should only further motivate state and local legislatures to adopt policies that refuse to enforce immigration detainers at all or, at least, to enforce them in very limited circumstances.

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330. *See, e.g.*, COOK COUNTY, ILL., POLICY FOR RESPONDING TO ICE DETAINERS, 11-O-73, at 1 (2011) (referencing the costs incurred by local agencies for immigration detainer enforcement); Memorandum from R. A. Cuevas, Jr., Cnty. Att'y, to Rebeca Sosa, Chairwoman, & Members, Bd. of Cnty. Comm'rs 2 (Dec. 3, 2013), *available at* http://www.miamidade.gov/govaction/legistarfiles/Matters/Y2013/132196.pdf [hereinafter Memorandum from R. A. Cuevas, Jr.] (stating that Miami-Dade County, Florida spent $1,002,700 in 2011 to comply with immigration detainers).

331. Villegas v. Metro. Gov't, 709 F.3d 563, 566 (6th Cir. 2013).

332. *Id.*

333. *Id.*

334. Julia Preston, *Settlement for a Shackled Pregnant Woman*, N.Y. TIMES (Oct. 17, 2013), http://www.nytimes.com/2013/10/18/us/settlement-for-a-shackled-pregnant-woman.html?_r=0.

335. Complaint & Jury Demand at 1, Quezada v. Mink, No. 1:10-00879-WJM-KLM (D. Colo. Apr. 21, 2010).

336. Associated Press, *ACLU Says Colo. Immigrant Settles Detention Case*, FOX NEWS (May 17, 2011), http://www.foxnews.com/us/2011/05/17/aclu-says-colo-immigrant-settles-detention-case.

### *B. States Can and Should Pass Legislation To Limit Immigration Detainer Enforcement*

Given the compelling policy reasons for limiting detainer enforcement, including the significant financial burdens placed on state and local governments, state and local LEAs can, and should, refuse to enforce them.[337] One of the first jurisdictions that refused to enforce immigration detainers altogether was Cook County, Illinois.[338] Cook County enacted an ordinance that provides that "[t]he Sheriff of Cook County shall decline ICE detainer requests unless there is a written agreement with the federal government by which all costs incurred by Cook County in complying with the ICE detainer shall be reimbursed."[339] The ordinance also prohibits ICE agents from accessing county jails to conduct interviews.[340] In addition to concerns about the cost of enforcing detainers,[341] other reasons for implementing the ordinance included the concern for increased racial profiling and the creation of distrust of law enforcement among immigrant communities.[342] The Cook County ordinance has received criticism, including from ICE officials.[343]

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337. The I-247 form that informs local law enforcement of the detainer states "[i]t is requested" that local law enforcement perform one of the enumerated actions, such as maintain custody of the individual for up to forty-eight hours. *Department of Homeland Security Immigration Detainer Form - Notice of Action*, *supra* note 121, at 1; *see also* KATE M. MANUEL, *supra* note 179, at 12 (noting that interpreting detainers as requests is consistent with the view that compliance with detainers is a matter of comity between jurisdictions).

338. *See generally* COOK COUNTY, ILL., CODE § 46-37 (2011).

339. *Id.* § 46-37(a).

340. *Id.* § 46-37(b) (providing exceptions for instances where ICE agents have a warrant or the county has a law enforcement purpose unrelated to immigration law enforcement).

341. While cost is one stated concern, the Cook County Board President Toni Preckwinkle has made clear that she is more concerned about preventing unjust immigration enforcement practices. *See* Hal Dardick, *Preckwinkle Ices ICE Proposal: Rejects Call for Working Group to Resolve Issues*, CHIC. TRIB. (Apr. 10, 2012), http://articles.chicagotribune.com/2012-04-10/news/ct-met-toni-preckwinkle-0411-20120411_1_preckwinkle-detainers-immigration-status (quoting Board President Preckwinkle as saying "[e]qual justice before the law is more important to me than the budgetary considerations").

342. COOK COUNTY, ILL., POLICY FOR RESPONDING TO ICE DETAINERS, 11-O-73, at 1–2 (2011).

343. *See* Phil Rogers, *Preckwinkle Blasted for Ignoring ICE Laws*, NBC CHI., http://www.nbcchicago.com/blogs/ward-room/Preckwinkle-ICE-Laws-Cook-County-137188118.html (last updated Jan. 12, 2012, 11:18 PM) (referring to a letter from then-ICE Director John Morton to Cook County Board President Preckwinkle in which Morton argued that Cook County's decision to refuse to enforce immigration detainers violated federal law and also was a dangerous practice because it led criminals to be released back into the community).

Other jurisdictions have passed laws that limit the enforcement of immigration detainers to a narrow set of circumstances.[344] In California, various counties throughout the state have passed legislation to limit the enforcement of immigration detainers.[345] Then, in October 2013, Governor Jerry Brown of California approved the California Trust Act.[346] Unlike the Cook County ordinance, the Trust Act permits the enforcement of immigration detainers in a myriad of circumstances.[347] The purpose of including this range of offenses was to permit the state to enforce detainers against noncitizens who were believed to be dangerous.[348]

Such state laws and local ordinances have received a great deal of support from immigrants' rights groups,[349] but they have also received a lot of opposition. Those who oppose limiting immigration detainer enforcement argue that such refusal to enforce immigration detainers is preempted.[350] Under preemption analysis, there are

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344. *See* sources cited *supra* notes 304–05 (concerning three local provisions); *see also* Memorandum from R. A. Cuevas, Jr., *supra* note 330, at 3 (permitting compliance with immigration detainer requests when the federal government agrees to pay all related costs and when the individual subject to the detainer has been convicted of a forcible felony, as defined by a Florida statute).

345. *See, e.g.*, S.F., CAL., ADMIN. CODE ch. 12I (2013) (adopting a default policy that no immigration detainer will be enforced unless the individual subject of the detainer was convicted of a violent felony in the past seven years and a magistrate has determined that there is probable cause to believe that the individual is guilty of a violent felony); SANTA CLARA, CAL. BD. OF SUPERVISORS POLICY MANUAL § 3.54 (2014) (explaining that Santa Clara County's policy is to comply with detainer requests from ICE on the condition that the federal government reimburse the county for costs incurred in complying with ICE detainers); Paloma Esquivel, *Santa Clara County to Stop Honoring Immigration Detainers for Low-level Offenders*, L.A. TIMES (Oct. 18, 2011, 3:37 PM), http://latimesblogs.latimes.com/lanow/2011/10/santa-clara-county-to-stop-honoring-immigration-detainers-for-low-level-offenders-.html (noting Santa Clara County had voted to only honor immigration detainers for detainees accused of serious and violent felonies).

346. Act of Oct. 5, 2013, AB No. 4, 2013 Cal. Stat. 94 (codified at CAL. GOV'T CODE § 7282.5 (West 2014)).

347. The statute lists thirty-one crimes for which immigration detainers will be enforced; they range from bribery and felony possession of a controlled substance, to violent offenses like assault or kidnapping. CAL. GOV'T CODE § 7282.5(a)(3).

348. *See* Damian Dovarganes, *California Governor Brown Vetoes Bill That Allowed Towns to Release Undocumented Immigrants*, NBC NEWS (Oct. 1, 2012, 8:22 AM), http://usnews.nbcnews.com/_news/2012/10/01/14170052-california-governor-brown-vetoes-bill-that-allowed-towns-to-release-undocumented-immigrants?lite (stating that California Governor Brown vetoed an earlier version of the Trust Act because it did not allow detainers to be enforced for other serious crimes).

349. Matt Stevens, *Immigration Activists Cheer Trust Act at Hollywood Rally*, L.A. TIMES (Oct. 5, 2013), http://articles.latimes.com/2013/oct/05/local/la-me-ln-immigrant-activists-cheer-trust-act-at-hollywood-rally-20131005.

350. *See* Complaint in Chancery for Mandamus & Declaratory Relief at 1–2, McCann v. Dart, No. 2013CH10583 (Cir. Ct. Cook Cnty. Apr. 22, 2013) (filing a lawsuit against the Cook County Sheriff for the county's policy of refusing to enforce any immigration detainer).

three ways that state legislation could be preempted: express preemption, conflict preemption, or field preemption.[351] Express preemption does not apply here because nothing in the federal statute creating immigration detainers or the relevant regulation provides that states cannot pass legislation refusing to comply with detainers.[352]

Regarding field preemption, there is no doubt that the federal government occupies the field of immigration law.[353] The Supreme Court and the federal circuit courts of appeals have repeatedly struck down state legislation that attempts to replace federal immigrant enforcement measures.[354] However, the Supreme Court has upheld state statutes related to immigration enforcement—for example a statute that penalizes employers who hire unauthorized workers—if they do not conflict with or frustrate federal schemes.[355] Again, it is important to recognize that detainers are merely requests, and the voluntary nature of the requests is part of the federal scheme.[356] Additionally, ICE has communicated that it targets specific types of dangerous criminal offenders,[357] which means

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351. Arizona v. United States, 132 S. Ct. 2492, 2501 (2011); *see supra* note 211 (defining the three types of preemption).

352. *See* 8 C.F.R. § 287.7 (2014) (defining "detainer[s]" as "request[s]").

353. *See Arizona*, 132 S. Ct. at 2498 ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens.").

354. *E.g.*, *id.* at 2510 (concluding that federal law preempted three of the four provisions included in Arizona's immigration law, S.B. 1070); United States v. South Carolina, 720 F.3d 518, 529–32 (4th Cir. 2013) (finding two sections of a South Carolina statute that criminalized certain activities for undocumented noncitizens were preempted by federal law because no analogous federal criminal offense existed). Consistent with this case law, at least one scholar has argued that federal law preempts the enforcement of immigration detainers. *See* Lasch, *Preempting Immigration Detainer Enforcement*, *supra* note 220, at 319–29 (applying recent Supreme Court preemption analysis to conclude that the enforcement of immigration detainers by LEAs should be preempted).

355. *See, e.g.*, *Arizona*, 132 S. Ct. at 2509–10 (holding that section 2(B) of Arizona's law was not preempted because it could be implemented in a way that did not conflict with federal law); Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1987 (2011) (holding that an Arizona law that allowed the state to penalize employers who employ unauthorized immigrant workers by suspending or revoking their business licenses was not preempted because it was consistent with federal policy related to immigrants working without authorization).

356. Galarza v. Szalczyk, 745 F.3d 634, 641–42 (3d Cir. 2014) (holding that immigration detainers are requests and noting that federal immigration enforcement has consistently treated detainers as voluntary requests, not mandatory orders); Miranda-Olivares v. Clackamas Cnty., No. 3:12-cv-02317-ST, 2014 WL 1414305, at *7 (D. Or. Apr. 11, 2014) (stating that the voluntary nature of immigration detainers is consistent "with the general interpretation of the character of INS detainers in other contexts," such as for habeas corpus petitions).

357. December 2012 Morton Memo, *supra* note 6, at 2 (listing, among others, individuals convicted of felonies and individuals with three or more misdemeanor convictions as targets for immigration enforcement but excluding low-level offenders from the list).

that the current immigration enforcement scheme does not prioritize capturing low-level offenders.

Furthermore, enforcement of immigration detainers must be voluntary because mandatory enforcement would violate anti-commandeering principles.[358] Under *Printz*, the Supreme Court struck down a federal program that required state and local law enforcement to perform background checks on individuals who were purchasing handguns.[359] In declaring the statute unconstitutional, the Court articulated two important concerns: (1) the states were required to pay for the costs of the program, and (2) the state and local officials were in a position to take the blame for any problems associated with the program.[360]

Likewise, state and local law enforcement are entirely responsible for the financial costs of immigration detainers.[361] State and local law enforcement also become the face of immigration enforcement when detainers are involved, making them vulnerable to lawsuits[362] and undermining community policing efforts.[363] In addition to these articulated concerns, detainer enforcement clearly compels state and local law enforcement to participate in a federal regulatory scheme.[364] In *City of New York*, the Second Circuit found that a voluntary information-sharing directive was not unconstitutional based on anti-commandeering principles.[365] However, here, when ICE issues a detainer, it asks LEAs to do more than merely share information.[366] On the DHS Form I-247, ICE may request that the LEA perform several potential actions, the most burdensome being maintaining

358. *Galarza*, 745 F.3d at 643 (stating that the anti-commandeering jurisprudence clearly dictates that immigration detainers should be deemed requests).

359. Printz v. United States, 521 U.S. 898, 902, 935 (1997).

360. *Id.* at 930.

361. 8. C.F.R. § 287.7(e) (2014); *see also supra* Part III.A.3 (detailing the significant costs to state and local governments of enforcing immigration detainers and settling lawsuits surrounding the unlawful detention of individuals under immigration detainers).

362. *See, e.g.*, Petition for Writ of Habeas Corpus & Complaint for Declaratory & Injunctive Relief at 1, Brizuela v. Feliciano, No. 3:12-cv-00226-JBA (D. Conn. Feb. 13, 2012) (asserting that the petitioner's detainer and continued detention under the detainer was "unlawful" and violated his Fourth and Tenth Amendment rights).

363. *See supra* Part III.A.1 (describing how the conflation of immigration enforcement and local police undermines trust in law enforcement, especially within immigrant communities).

364. *Cf.* Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 289–90 (1980) (concluding that an environmental regulation statute related to coal mining was not unconstitutional because it did not compel states to participate in a federal regulatory program or to expend any state funds).

365. City of New York v. United States, 179 F.3d 29, 35 (2d Cir. 1999).

366. *See* 8 C.F.R. § 287.7(a) (defining detainers as requests of state and local law enforcement to maintain custody of individuals until ICE assumes custody).

custody for a period not to exceed forty-eight hours.[367] Thus, mandatory enforcement of detainers would be unconstitutional.[368]

Because the federal government cannot compel localities to enforce immigration detainers and enforcement of such detainers presents serious constitutional and policy concerns, state and local LEAs should implement policies restricting detainer enforcement. The Cook County ordinance, which prohibits immigration detainer enforcement under almost any circumstance, and the California Trust Act, which permits immigration enforcement if the individual subject to the detainer has committed any of the offenses enumerated in the statute, illustrate the variation in legislation that currently restricts immigration detainer enforcement in some jurisdictions. Though a significant step in limiting immigration detainer enforcement, the California law still allows detainers to be enforced for thirty-one offenses.[369] Cook County's outright refusal to enforce immigration detainers prevents any possibility of constitutional violations and also advances important policy considerations, like community trust in law enforcement. As more and more jurisdictions continue to pass similar legislation and to implement comparable policies, state and local LEAs demonstrate their commitment to protecting constitutional rights and to restoring immigrant communities' trust in them.[370]

## CONCLUSION

Enforcement of immigration detainers leads to serious constitutional violations in many circumstances. ICE violates the Fourth Amendment rights of those held under immigration detainers when it issues detainers based on less than probable cause, and LEAs subsequently violate the detained individuals' Fourth Amendment rights by enforcing detainers based on less than probable cause. Following the initial issuance of the detainer, detention beyond the forty-eight hour period violates the Fourth Amendment when a neutral officer or judge has not made a probable cause determination. Prolonged detention also violates the detained

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367. *Department of Homeland Security Immigration Detainer Form - Notice of Action*, *supra* note 121, at 1.

368. Galarza v. Szalczyk, 745 F.3d 634, 636 (3d Cir. 2014) (concluding that the regulation concerning immigration detainers must read as authorizing only permissive requests because, otherwise, it would violate anti-commandeering principles).

369. *See supra* note 347 and accompanying text.

370. *See Challenge Unjust Immigration Detainers*, NAT'L IMMIGRANT JUST. CENTER, http://www.immigrantjustice.org/detainers#.UvZ8HLT-r6T (last visited Oct. 6, 2014) (listing all states and localities that have limited cooperation with immigration detainers).

individuals' due process rights because their liberty interest outweighs the government's interest in efficiently adjudicating removal proceedings. In order to protect the liberty interest of noncitizens held under immigration detainers, ICE should notify local LEAs when it does not intend to assume custody of an individual after the detainer has expired. For individuals who have pending criminal cases and who have been issued immigration detainers, state and local LEAs should respect the individualized determinations regarding pretrial detention made in their criminal cases instead of automatically enforcing the immigration detainers.

In addition to these constitutional violations that result from the enforcement of immigration detainers, such practices create a fear of local law enforcement within immigrant communities. Such a fear may be justified, especially when police officers demonstrate patterns of more aggressive policing against individuals they suspect of being undocumented. Not only do detainers threaten community cohesion and public safety, but they also create enormous costs for state and local governments because the financial burden of enforcement falls on state and local agencies rather than on the federal government. Consequently, state and local LEAs should adopt policies that refuse to enforce immigration detainers. If state and local LEAs decline to implement blanket policies, these agencies should at least limit the enforcement of immigration detainers to narrow circumstances, such as for detainers accompanied by federal warrants or those issued against convicted serious offenders, and train state and local officials so that they do not target low-level offenders and so that they release individuals held under an immigration detainer immediately after forty-eight hours.