2016

"Breaking the ICE: Reforming State and Local Government Compliance with ICE Detainer Requests"

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I. **Introduction**:

In November 2008, Ernesto Galarza, a U.S. citizen of Puerto Rican heritage, was arrested by the Allentown Police Department in a series of drug arrests aimed at the construction contractor for whom he worked.[1] Galarza was ultimately acquitted by a jury of any drug-related conspiracy charges, but was initially taken into custody and detained along with the other arrestees.[2] At the time of his arrest, he had his Social Security Card and a Pennsylvania driver's license in his wallet, and told local officials that he was born in Perth Amboy, NJ.[3] Nonetheless, an Allentown police investigator called Immigration and Customs Enforcement (ICE)—pursuant to Allentown's policy of contacting ICE whenever someone is "suspected" of being an "alien subject to deportation"—and reported that Galarza might be an undocumented immigrant.[4] Based on this tip, ICE issued an immigration detainer, asking prison officials to hold Galarza while ICE investigated his immigration status.[5]

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[1] Galarza v. Szalczyk, 745 F.3d 634, 636 (3d Cir. 2014).
[2] *Id*. at 637-38
[3] *Id*. at 637
[4] *Id*.
[5] *Id*. Immigration detainers are used as an enforcement mechanism in what was formerly known as the Secure Communities Program (SCP). *Secure Communities*, U.S. Immigr. & Customs Enforcement, http://www.ice.gov/secure-communities (last visited Aug. 11, 2015). The SCP functioned as an information-sharing program between the Federal Bureau of Investigation (FBI) and ICE. *ICE Detainers: Frequently Asked Questions*, U.S. Immigr. & Customs Enforcement, https://www.ice.gov/news/library/factsheets/detainer-faqs.htm) (last visited Aug. 11, 2015). Traditionally, when someone is arrested in a state or local jail, the jail takes the arrestee's fingerprints, and the fingerprints are then sent to an FBI database. *Id*. Under the SCP, the fingerprints are then forwarded to ICE. *Id*. ICE uses the fingerprints to investigate the individual's immigration status. *Id*. If – upon completion of its investigation – ICE suspects that the individual is violating civil immigration law, it can issue a detainer to the state or local jail; requesting that the individual be detained until ICE agents arrive to assume custody of the arrestee. *Id*. The individual can remain in detention at the state or local jail even after he/she is scheduled for release by the jail. *Id*. ICE – once it has custody of the individual – can initiate deportation proceedings. *Id*. In November 2014, the Obama Administration altered the SCP; the changes were announced in a memorandum issued by ICE Secretary, Jeh Charles Johnson. Jeh Charles Johnson, *Secure Communities*, U.S. DEP'T OF HOMELAND SECURITY, at 2-3, (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf. The memorandum announced that the SCP would be renamed the Priorities Enforcement Program (PEP), and that the program's focus would shift from a broad-based detention of all suspected immigration violators – including non-violent offenders – to a more limited detention, focusing only on those individuals with serious criminal records. *Id*. The memorandum cited several factors that made such changes necessary, including a deficient of trust between immigrant communities and Law Enforcement, pushback from state and local governments refusing to honor detainer requests or limiting compliance therewith, increasing litigation revolving around ICE detainers, and

Despite posting his $15,000 bail the day after his arrest, Galarza was not released from Lehigh County Prison because of the ICE detainer.[6] Instead, he remained in jail for the next three days, without a warrant or an explanation for his continued detention.[7] He was eventually released after ICE agents arrived to interrogate him and confirmed his U.S. citizenship.[8] Galarza filed a lawsuit against the Allentown Police Department of Lehigh County and ICE seeking damages for losing his part-time job and lost wages.[9] In April 2012, the District Court granted in-part and denied in-part the defendants' motion to dismiss.[10] In May 2014, the Third Circuit Court of Appeals ruled in Galarza's favor, holding that compliance with ICE detainers is not mandatory and that Lehigh County was free to release Galarza after he posted bail. The case was eventually settled and Galarza was awarded a total of $105,000 in damages and attorney's fees.[11] Soon thereafter, "the Lehigh County Board of Commissions voted unanimously to end the County's policy of imprisoning people on ICE detainers."[12]

The Obama Administration has deported a record number of individuals.[13] Because of the SCP, the Obama Administration has deported over 2.3 million people. Before the Obama

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decisions by federal courts rejecting the authority of state and local governments to issue detainers. *Id*. Accordingly, the secretary directed ICE to only issue detainers for those aliens who have been convicted of a serious offense or who otherwise pose a danger to national security. *Id*.

[6] *Galarza*, 745 F.3d at 637.

[7] *Id*.

[8] *Id*.

[9] *Id*. at 638.

[10] *Id*. "[T]he District Court dismissed the Fourth Amendment and procedural due process claims against Lehigh County on the ground that neither of the policies identified in the plaintiff's Amended Complain is unconstitutional because both are consistent with federal statutes and regulation." (internal quotation marks omitted and formatting altered).

[11] ACLU, *Galarza v. Szalczyk*, (June 18, 2014), https://www.aclu.org/immigrants-rights/galarza-v-szalczyk

[12] *Id*.

[13] Julia Preston, *Republicans Resist Obama's Move to Dismantle Apparatus of Deportation*, N.Y. TIMES, (Jan 15, 2015) (noting that the secure communities program has lead to the deportation of 2.3 million people under the Obama Administration) http://www.nytimes.com/2015/01/16/us/secure-communities-immigration-program-battle.html?hp&action=click&pgtype=Homepage&module=photo-spot-region&region=top-news&WT.nav=top-news; *see* CLINIC, *State and Localities That Limit Compliance with ICE Detainer Requests*, CATHOLIC LEGAL IMMIGRATION NETWORK (Nov. 2014). https://cliniclegal.org/resources/articles-clinic/states-and-localities-limit-compliance-ice-detainer-requests-jan-2014 (Estimating that the Obama Administration deported nearly 1.5 million during the first term).

Administration overhauled the SCP, many states and municipalities – as a result of increased litigation – began to alter the scope of compliance with ICE detainers. Many municipalities began refusing to honor ICE detainers all together. And, some states began passing legislation limiting the scope of state compliance with ICE detainers. Recently, the Obama Administration overhauled the SCP; renaming it the "Priorities Enforcement Program" (PEP)[14] and shifting the program's focus to target individuals with serious criminal records.

In light of certain legal and public policy considerations, state and local governments should either refuse to honor ICE detainer requests altogether or follow in the footsteps of Connecticut and California and pass laws similar to the Transparency and Responsibility Using State Tools ("Trust") Act, which limits the scope of compliance with ICE detainers. Although the Obama Administration reformed the SCP, the new program continues to rely on ICE detainers as the primary enforcement mechanism, and will, therefore, continue to raise serious legal issues for state and local governments.[15] Additionally, there is no guarantee that the new changes will remain.[16]

The Trust Act limits state and local law enforcement's ability to prolong detention based on Immigration and Customs Enforcement (ICE) detainer requests.[17] The legal and public policy reasons weigh heavily in favor of states adopting similar policies, and might even go as far as to warrant that local Law Enforcement Agencies (LEA) across the country voluntarily refuse to

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[14] *See supra*, footnote 5.
[15] Aura Bogado, *Goodbye, Secure Communities. Hello, Priority Enforcement Program*, COLORLINES, Nov. 21, 2014, http://colorlines.com/archives/2014/11/goodbye_secure_communities_hello_priority_enforcement_program.html
[16] *See infra*, section II(A)(3)(iii).
[17] Recent Legislation, *Immigration Law - Criminal Justice and Immigration Enforcement - California Limits Local Entities' Compliance with Immigration and Customs Enforcement Detainer Requests. - Trust Act, 2013 Cal. Stat. 4650 (Codified at Cal. Gov't Code §§7282-7282.5 (West Supp. 2014))*., 127 Harv. L. Rev. 2593, 2593 (2014).

honor ICE detainer requests, as many have already done. Several public policy reasons militate against willful and unrestrained enforcement of detainer requests. First, recent cases have made it clear that detainer requests are not warrants, and so prolonged detention of a legal person, in violation of her Fourth Amendment rights, can result in significant liability for local LEAs. Second, statutes and case law make it clear that local LEAs are not required to comply with detainer requests. Third, the cost of enforcing detainer requests can burden local LEAs, especially because the federal government does not compensate them for prolonging the detention of prisoners in local jails on suspected violations of federal immigration law. Fourth, recent studies show that the Secure Communities Program, in which immigration detainers play a significant role, does not lower crime rates, and in fact, may even negatively impact law enforcement.

Part II will examine the historical development of detainer requests and its current state in the context of the Secure Communities Program, a general trend that developed among LEAs refusing to honor detainer requests, and the passage of the TRUST Act. Part III will consider the legal and public policy issues implicated by detainer requests as well as the legal issues implicated by State laws seeking to regulate detainer requests. Part IV will conclude that in light of the legal problems that arise from detainers, the liability that municipalities may incur, the cost of enforcing detainers, the failure of detainers to lower crime rates, and the lack of legal obstacles in the way of legislation that significantly curtails the scope of detainer requests every state should either adopt a version of California's Trust Act or local municipalities should consider not honoring detainer requests all together.

II. Background/Overview

This section will discuss the historical development of detainer requests as a deportation mechanism and its modern development within the context of the Secure Communities Program. I will also discuss a general trend that developed among local LEA refusing to honor detainer requests, the eventual passage of the TRUST Act, and recent actions taken by the Obama Administration in overhauling the Secure Communities Program.

A. Historical Development of ICE Detainer Requests

1. What is an Immigration Detainer and how does it work?

Immigration detainers are used by "ICE and other Department of Homeland Security (DHS) officials to identify potentially deportable individuals who are housed in local jails or prisons. . . ."[18] Detainers are requests, not commands; they are not warrants and do not provide probable cause. Additionally, they are not indicative of a person's immigration status, nor are they capable of initiating deportation proceedings.[19] Unlike a Notice to Appear (NTA), which is an official civil-immigration filing that commences a removal proceeding against an individual, an immigration detainer merely states that "an investigation has been initiated to determine whether this person is subject to removal from the United States"[20] Any authorized immigration official or local police officer designated to act as an immigration official can issue a detainer to any other federal, state, or local LEA.[21] Functionally, "[a] detainer notifies the LEA that ICE intends to assume custody of an arrestee, requests information about the arrestee's pending release, and requests that the LEA 'maintain custody of an alien who would otherwise be

[18] Immigration Policy Center, *Immigration Detainers A Comprehensive Look*, (Feb 17, 2010), http://immigrationpolicy.org/just-facts/immigration-detainers-comprehensive-look
[19] *Id*.
[20] *Id*.
[21] *Id*. *see* 8 C.F.R §§ 287.7(a),(b); *see also* 8 C.F.R § 287(g).

released for a period not to exceed 48 hours (excluding Saturdays, Sundays, and holidays) to provide ICE time to assume custody."[22]

2. History and Development of Immigration Detainers

Historically, "[d]etainers have long been used by federal immigration officials."[23] Before 1987, immigration detainers only served to notify jail or prison officials that federal immigration officials were interested in a particular prisoner, and to request that federal immigration officials be notified before the release of the prisoner in question.[24] In 1987, however, the Executive Branch enacted federal legislation requiring agencies receiving an immigration detainer to maintain custody of the prisoner of interest for up to 48 hours after his or her release date, to allow time for immigration officials to arrive and take custody.[25] The importance of detainers increased dramatically after the federal government launched the "Secure Communities" program.[26] The program was implemented with the goal of deporting immigrants who committed serious crimes. Particularly, the program was interested in "prisoners who were awaiting trial or serving sentences for local, state, or federal crimes."[27]

Before the Secure Communities program, the process of identifying and interviewing those suspected of immigration violations was labor intensive, timely, costly, and inefficient.[28] The Secure Communities program, however, fused traditional arrest procedures with

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[22] Recent Legislation, *supra* note 15, at 2594 (citing *ICE Detainers: Frequently Asked Questions*, U.S. Immigr. & Customs Enforcement, https://www.ice.gov/news/library/factsheets/detainer-faqs.htm) (last visited Sept. 19, 2014).
[23] Christopher N. Lasch, *Preempting Immigration Detainer Enforcement Under Arizona v. United States*, 3 Wake Forest J.L. & Pol'y 281, 286 (2013).
[24] *Id*.
[25] *Id*.
[26] *Id*.
[27] *Id*.
[28] Thomas J. Miles and Adam B. Cox, *Does Immigration Enforcement Reduce Crime? Evidence From "Secure Communities"*, J.L. & ECON. (forthcoming) "Federal personnel conducted these screenings in less than 15 percent of local jails and prisons, and local officials were authorized to do the screenings themselves in only about two percent of the nation's counties."

technological innovation to create "a system of universal and automated screening such that *every single person* arrested by a local enforcement official *anywhere in the country* would be screened by the federal government for immigration status and deportability eligibility."[29] Normally, when someone is arrested and booked by a LEA, "his fingerprints are taken and forwarded electronically to the Federal Bureau of Investigation (FBI), which conducts a criminal background check and sends the results to the LEA."[30] Under the Secure Communities program, the fingerprints received by the FBI are automatically and electronically forwarded to the DHS.[31] "DHS then compares the fingerprints against its Automated Biometric Identification System (IDENT), a database which stores biometric and biographical information on persons encountered by the agency in the course of its immigration-related or other activities."[32]

The database contains fingerprints of three different categories of foreign-born individuals: (1) Non-Citizens currently in the U.S. in contravention of immigration law, such as person who were previously deported or overstayed their visas; (2) noncitizens who are lawfully in the U.S. but are arrested and might become deportable if they are convicted of the crime for which they have been arrested; (3) citizens who naturalized at some point after their fingerprints were included in the database.[33] If the fingerprints received by the DHS match a set in its database, DHS personnel evaluate the person's immigration status and determine whether to place a "detainer" on him/her.[34] The detainer requests that the local LEA hold the person for 48 hours beyond the scheduled release to facilitate the person's transfer by ICE into federal custody,

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[29] *Id*. (emphasis in original).
[30] *ICE Detainers: Frequently Asked Questions*, U.S. Immigr. & Customs Enforcement, https://www.ice.gov/news/library/factsheets/detainer-faqs.htm) (last visited Aug. 11, 2015).
[31] *Id*.
[32] *Id*.
[33] *Id*.
[34] Miles & Cox, *supra* note 23, at 18.

and to initiate deportation proceedings thereafter.[35] Thus, the detainer allows the federal government to readily apprehend and place in deportation proceedings a noncitizen who would otherwise be released by the local LEA.[36]

Fully implementing the program took nearly four years.[37] "Beginning on October 27, 2008 the federal government rolled out the program on a county-by-county basis."[38] In the spring of 2012, the Secure Communities program was functioning in all but a handful of counties.[39] By January 2013, it was completely implemented nationwide, in 3,181 jurisdictions.[40] The program has led to more than 300,000 deportations since 2008.[41]

3. State and Local Governments Respond to Detainer Requests

Currently, a movement is underway whereby state governments, local governments, and federal courts are challenging the enforcement of ICE detainers. At first, it was unclear whether compliance with Secure Communities was mandatory.[42] The DHS has since made it clear that compliance with detainers is not mandatory because they are merely "requests" and not "commands."[43] Initially, the only way a local LEA could prevent DHS's immigration checks

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[35] 8 CFR 287.7
[36] *See id*.
[37] Miles & Cox, *supra* note 23, at 19.
[38] *Id*.
[39] *Id*.
[40] Elise Foley & Roque Planas, *Trust Act Signed In California To Limit Deportation Program*, HUFFINGTON POST, (Oct. 5, 2013, 4:414). http://www.huffingtonpost.com/2013/10/05/trust-act-signed_n_4050168.html
[41] *AP Report: California Immigrant Deportations Plummet After TRUST Act*, CBS SF BAY AREA, (April 6, 2014), http://sanfrancisco.cbslocal.com/2014/04/06/immigration-deportation-trust-act/
[42] Miles and Cox, *supra* note 26, at n.14; *see* 8 C.F.R. § 287(d) ("Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency *shall maintain custody* of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department." (emphasis added)).
[43] ACLU, *Sample Letter Issued to Local Counties Urging Reform in ICE Detainer Compliance*, (July 15, 2014) https://www.aclu-nj.org/files/2514/0552/4157/2014_07_16_ICE.pdf. "In a brief filed in a 2013 case challenging ICE detainers, government attorneys representing the Department of Homeland Security acknowledged that 'ICE detainers issued pursuant to 8 C.F.R. § 287.7 are voluntary requests.'. . . ICE detainers . . . do not impose a requirement upon state or local law enforcement agencies." "On February 25, 2014, David Ragsdale, then-Acting Director of ICE . . . confirmed that ICE detainers 'are not mandatory as a matter of law.'"

from taking place would be to stop fingerprinting arrestees altogether.[44] However, when it became clear that ICE detainers were not mandatory, many jurisdictions simply refused to honor them.[45]

i. Local Counties Refusing to Honor ICE Detainers

In 2013, the city of Newark, New Jersey issued a policy refusing to honor ICE detainers that was among the most expansive in the nation "because it has no exception for particularly serious offenses."[46] Other state and local governments continued this trend in 2014, "following a decision by a federal court in Oregon concluding that some detainers violate arrestees' Fourth Amendment Rights."[47] To date, three states, the District of Columbia, at least twenty five cities, and over two-hundred counties have officially restricted the extent which law enforcement may continue to detain individuals to hand over to ICE.[48]

Recently, in Colorado—a state where ICE issued more than 8,700 detainers in two years—all of the state's 64 Sherriffs announced that they will no longer honor ICE detainers.[49] And in September 2014, the Long Island Sherriff's Department announced that it would no longer honor ICE detainers "unless federal officials produce warrants from a judge"—citing concerns over civil rights lawsuits.[50] Lastly, on October 22, 2014, the New York City Council passed legislation that limits City compliance with detainer requests only where those detainers

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[44] Miles & Cox, *supra* note 26, at 20.
[45] *Id*. at 34.
[46] Rutgers School of Law, *A Brick City Victory: Newark Police Refuse to Honor ICE Detainers*, CLINIC NEWS, at 6-7, (Fall Edition, 2014 - No.1) https://law.newark.rutgers.edu/files/ClinicNewsFall2014.pdf
[47] *Id*.; see Miranda-Olivares v. Clackamas Cnty, 2014 U.S. Dist. LEXIS 503040 (D. ORE. APR. 11, 2014).
[48] CLINIC, *supra* note 13; Julia Preston, *Republicans Resist Obama's Move to Dismantle Apparatus of Deportation*, N.Y. TIMES, (Jan 15, 2015) http://www.nytimes.com/2015/01/16/us/secure-communities-immigration-program-battle.html?hp&action=click&pgtype=Homepage&module=photo-spot-region&region=top-news&WT.nav=top-news
[49] Keith Coffman, *All county sheriffs in Colorado halt federal immigration holds: ACLU*, REUTERS, (Sept. 18, 2014, 6:43pm) http://www.reuters.com/article/2014/09/18/us-usa-colorado-immigration-idUSKBN0HD2PI20140918
[50] Kristin Thorne, *LONG ISLAND SHERIFFS WON'T CONTINUE IMMIGRANT DETENTIONS*, EYE WITNESS NEWS ABC 7, (Sept. 18, 2014) http://7online.com/politics/long-island-sheriffs-saying-no-to-immigrant-detentions/314121/.

are accompanied by a warrant from a judge and "the subject of the warrant was convicted within the last five years of a violent or serious crime, or is a possible match on the terrorism watch list."[51] In total, nearly 270 jurisdictions are refusing to issue ICE detainers.[52]

ii. The TRUST ACT: States' Attempt to Limit the Scope of Compliance with ICE Detainers

In 2013, Connecticut – soon followed by California – passed legislation that significantly curtailed the scope of detainer requests. On October 5, 2013 California Governor Jerry Brown signed the Trust Act into law.[53] "The Trust Act limits local discretion to enforce detainers."[54] Essentially, local LEAs can only enforce a detainer if the prisoner in question has ever been convicted of one of a defined range of crimes.[55] To be sure, the range of crimes is extensive in the California bill, "encompassing obstruction of justice, unlawful possession or use of a weapon, or any state felony, among other crimes."[56] The Connecticut law, in contrast, only honors ICE detainers if the person has been convicted of a serious or violent felony.[57] Governor Brown signed the Trust Act after he vetoed an earlier version of the bill, calling it "fatally flawed" because it barred the state from detaining individuals on behalf of ICE "even when the individual is charged with or convicted of significant crimes, including offenses such as child

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[51] Jillian Jorgensen, *Council Passes Bill to Stop Cooperation With Federal Immigration Detainers*, NEW YORK OBSERVER, (Oct. 22, 2014, 3:45pm) http://observer.com/2014/10/council-passes-bills-to-stop-cooperation-with-federal-immigration-detainers/

[52] Julia Preston, *Republicans Resist Obama's Move to Dismantle Apparatus of Deportation*, N.Y. TIMES, (Jan 15, 2015) http://www.nytimes.com/2015/01/16/us/secure-communities-immigration-program-battle.html?hp&action=click&pgtype=Homepage&module=photo-spot-region&region=top-news&WT.nav=top-news

[53] Recent Legislation, *supra* note 15, at 2593

[54] *Id*. at page 3.

[55] *Id*.

[56] *Id*. (internal quotation marks omitted)

[57] Amanda Peterson Beadle, *States Work To Improve Immigration Policies As Senate Immigration Bill Debate Begins*, AMERICAN IMMIGRATION COUNCIL: IMMIGRATION IMPACT, (June 7, 2013) http://immigrationimpact.com/2013/06/07/states-work-to-improve-immigration-policies-as-senate-immigration-bill-debate-begins/#sthash.1SLgy5Ps.dpuf

abuse, drug trafficking and gang activity."[58] The current version of the Trust Act alters its predecessor by "making the list of crimes classified as serious offenses more extensive."[59] The number of deportations has declined dramatically since the passage of the Trust Act.[60] Preliminary data on California suggests at least a 44% drop in deportations, from 2,984 to 1,660 since the passage of the Trust Act.[61]

iii. President Obama's Executive Action Reforming the Use of Immigration Detainers

In light of the number of state and local governments taking action to limit the scope of ICE detainers under the Secure Communities Program, President Obama recently issued an Executive Action significantly overhauling the program.[62] The new measure, known as the "Priority Enforcement Program" (PEP), "will continue to rely on finger-print based biometric data submitted during bookings by state and local law enforcement agencies to the [FBI] for criminal background checks."[63] Now, however, ICE will only seek the transfer of custody if the arrestee has been convicted of a serious crime or is a perceived threat to national security.[64] This brings federal law more in line with the rules and policies espoused by the Trust Act.

It is not clear how permanent these new reforms will be. President Obama's actions are being challenged in Congress and in the Courts. Since President Obama announced his Executive Action, twenty-four states – led by Texas– have signed onto a lawsuit challenging these actions.[65] Additionally, President Obama is facing pushback from a Republican-controlled

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[58] Foley & Planas, *supra* note 37
[59] *Id*.
[60] Coffman, *supra* note 46
[61] *Id*.
[62] Preston, *supra* note 49
[63] Jeh Charles Johnson, *Secure Communities*, U.S. DEP'T OF HOMELAND SECURITY, at 2-3, (Nov. 20, 2014) http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf
[64] *Id*. at 2.
[65] Ashley Killough, *24 states now suing Obama over immigration*, CNN, (Dec. 10, 2014) http://www.cnn.com/2014/12/10/politics/immigration-lawsuit/

Congress.[66] Recently, the House of Representatives passed a bill that would restore the Secure Communities Program.[67] For now, President Obama has vowed to veto the measure.[68] But, with the 2016 presidential elections on the horizon – if Republicans gain control of the presidency – it is possible that the Secure Communities Program will be restored. Therefore, in light of challenges by Congress, the Courts, and a potential shift in the White House, state and local governments should continue passing affirmative policies that regulate interactions between federal immigration officials and prisoners housed in state and local jails.

III. Legal and Public Policy Issues Implicated by Detainer Requests Require that State and Local Governments Reform How They Use Them

The use of immigration detainers raises several legal challenges, especially where LEAs detain persons with legal immigration status. The Fourth Amendment is implicated because detainers are not warrants; therefore, continued detention based on their issuance raises Fourth Amendment concerns.[69] Immigration detainers also raise potential Equal Protection problems because initial determinations about detaining someone "suspected" of violating immigration laws is often made based on race, ethnicity, or national origin.[70] Moreover, the Tenth Amendment is also implicated because, should the federal government move to compel LEAs to detain certain individuals, it would impermissibly coerce and conscript state and local government functions.[71]

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[66] Preston, *supra* note 49

[67] *Id*. ("[T]he House passed a Homeland Security funding bill that would cancel his programs protecting illegal immigrants. The measure would restore Secure Communities and increase its funding, while taking away the president's authority to set priorities for deportation. Mr. Obama said [] that he would veto the measure, which now goes to the Senate.").

[68] *Id*.

[69] U.S. CONST. amend. IV.

[70] U.S. CONST. amend. XIV.

[71] U.S. CONST. amend. X.

Several public policy issues raise additional concerns for immigration detainers. First, detainer requests burden municipalities with extended jail time expenses and with the legal fees needed to defend their actions under an immigration detainer. Second, with respect to law enforcement, detainers have had little to no effect on crime reduction.[72] In fact, detainers may exacerbate crime rates by obstructing community policing.[73]

A. Legal Problems and Municipal Liability

As discussed, immigration detainers can result in litigation on issues related to the Fourth Amendment, the Fourteenth Amendment, and the Tenth Amendment, respectively.

1. Fourth Amendment

The Fourth Amendment protects against unreasonable searches and seizures by requiring the issuance of a warrant with probable cause before a place is searched or a person or thing is seized.[74] Hence, under the Fourth Amendment, arrests must be either based on a warrant or supported by probable cause to believe that the person has committed the violation in question.[75] Furthermore, "[t]he Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest."[76] For this reason, detainers raise serious Fourth Amendment concerns because there is "no requirement of probable cause prior to prolonged detention pursuant to a detainer."[77] As a result, "[t]he absence of a probable cause

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[72] *See generally* Miles & Cox, *supra* note 26
[73] Recent Legislation, *supra* note 15, at 2599
[74] U.S. CONST. amend. IV
[75] Ker v. California, 374 U.S. 23, 34-35 (1963) ("The lawfulness of the arrest without warrant, in turn, must be based upon probable cause, which exists where the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.") (citation and quotation marks omitted); *but see* Keil v. Triveline, 661 F.3d 981, 985 (8th Cir. 2011) ("Officers may be entitled to qualified immunity if they arrest a suspect under the mistaken belief that they have probable cause to do so, provided that the mistake is objectively reasonable").
[76] United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975) (internal citations omitted).
[77] Christopher N. Lasch, *Federal Immigration Detainers After Arizona v. United States*, 46 Loy. L.A. L. Rev. 695, 634 (2013)

requirement routinely appears to result in warrantless investigatory arrests pursuant to immigration detainers."[78]

Another problem is the lack of procedural safeguards in the issuance of detainers. Typically, ICE lodges a detainer against a suspected immigration violator by faxing the Form I-247 detainer to the prison or jail.[79] Under most circumstances, a detainer is then issued based solely on the fact that an investigation has been "initiated."[80] The initiation of an investigation, however, does not sufficiently establish probable cause, because the Fourth Amendment does not permit seizures for mere investigations.[81] In *Arizona v. United States*,[82] Justice Alito highlighted this issue with a hypothetical.[83] Justice Alito imagines that a police officer, during a traffic-stop for a non-immigration violation such as speeding, "acquires reasonable suspicion to believe that the driver entered the country illegally."[84] Justice Alito points out that, absent reasonable suspicion, the traffic stop could "become unlawful if . . . prolonged beyond the time reasonably required to complete the mission."[85] Justice Alto explains that the officer's reasonable suspicion "that [the driver] committed a different crime" would justify extending the detention "for a reasonable time to verify or dispel that suspicion."[86]

Accordingly, Justice Alito warns that the "length and nature" of the additional investigation must be reasonable under the Fourth Amendment, because if prolonged, it can become an arrest requiring probable cause.[87] He notes that "the line between detention and arrest

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[78] *Id*. at 696
[79] *Id*.
[80] *Id*.
[81] Arizona v. United States, 132 S. Ct. 2492, 2509 (2012) ("Detaining individuals solely to verify their immigration status would raise constitutional concerns").
[82] *Arizona*, 132 S. Ct. at 2492.
[83] *Id*. at 2528 (Alito, J., concurring in part and dissenting in part).
[84] *Id*.
[85] *Id*. at 2528-29
[86] *Id*.
[87] *Id*. at 2529

is crossed when the police, without probable cause or warrant, forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes."[88] Analogizing this holding to the use of ICE detainers, detaining an individual after she has been cleared for release from jail is akin to "forcibly removing" her from a place where she is entitled to be, and would therefore be deemed an arrest requiring probable cause or a warrant.

Additionally, there is no requirement that a person held pursuant to a detainer be taken before a neutral and detached magistrate within 48 hours absent extraordinary circumstances.[89] This practice is especially problematic because it "runs directly counter to the Court's declaration that the Fourth Amendment requires any person subjected to a warrantless arrest be brought before a neutral magistrate for a probable cause determination within forty-eight hours - including weekends and holidays - absent a showing of extraordinary circumstances."[90]

In *Miranda-Olvares*[91], the plaintiff was arrested for violations of state family law, but was not released after posting bail, due to an ICE detainer.[92] The defendant argued that her Fourth Amendment rights were not violated because the Fourth Amendment analysis only applies to allegations that an individual was deprived of liberty prior to the government's determination of legal custody.[93] The court, however, disagreed with the defendant's argument, and asserted that the "continuation of her detention based on the ICE detainer embarked Miranda-Olivares on a subsequent and new 'prolonged warrantless, post-arrest, pre-arraignment

[88] *Arizona*, 132 S. Ct. at 2529 (quoting *Hayes v. Florida*, 470 U.S. 811, 816 (1985)) (internal quotation marks omitted).
[89] Lasch, *supra* note 69, at 695-96.
[90] *Id*.
[91] Miranda-Olivares v. Clackamas Cnty., 2014 WL 1414305 (D. Or. Apr. 11, 2014).
[92] *Id*. at 1
[93] *Id*. at 9

custody.'"[94] The court endorsed the proposition that an arrestee's liberty could not be restricted after "a court has either ordered [her] release or concluded that that the lawful authority to hold them on a case no longer exists . . . ."[95] After such a point, "the court may no longer treat the detainee as a pretrial detainee . . . ."[96] Hence, "any continued detention beyond the period necessary to execute the [court] order [is] analyzed as a new arrest under the Fourth Amendment."[97] The court concluded that, "upon the resolution of her state charges, the County no longer had probable cause to justify her detention."[98]

2. Equal Protection (Fourteenth Amendment)

Detainer enforcement presents a dilemma for officials because, oftentimes, identifying potential deportable individuals requires that government officials make characterizations based on race, ethnicity, or national origin. The Equal Protection clause prohibits discrimination based on race, ethnicity, or national origin, unless such characterization overcomes strict scrutiny.[99] In *Morales v, Chadbourne*,[100] the plaintiff, Ms. Morales, alleged "that ICE officials impermissibly based their decision to issue a detainer solely on her place of birth and/or her Spanish surname."[101] Ms. Morales's encounter with immigration authorities began when she was arrested on state criminal charges for allegedly misrepresenting information on a state public benefits application.[102] At the State Police station, a state official asked Ms. Morales whether she

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[94] *Id*.
[95] *Id*.
[96] *Id*.
[97] *Miranda-Olivares*, 2014 WL 1414305 at 9 (formatting altered).
[98] *Id*. at 10.
[99] McLaughlin v. State of Fla., 379 U.S. 184, 192 (1964) (noting that, in light of the historical development of the Fourteenth Amendment, racial classifications are subject to the "most rigid scrutiny."); Hirabayashi v. United States, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious . . . .").
[100] Morales v. Chadbourne, 996 F. Supp. 2d 19 (D.R.I. 2014).
[101] *Id*. at 35.
[102] *Id*. at 24.

was "legal."[103] Ms. Morales replied that she was born in Guatemala and naturalized in the United States.[104] Following her initial interview, a state official reported Ms. Morales' information to ICE.[105] Searches of ICE's database did not reveal any immigration violations by Ms. Morales.[106] Nevertheless, ICE issued a "Notice of Action" to the State authorities, informing them that Ms. Morales' immigration status was under investigation.[107] During a state court hearing to resolve her criminal charge, the judge withdrew the warrant against Ms. Morales and released her on $10,000 personal recognizance.[108] But, since the immigration detainer was issued against Ms. Morales, she remained in state custody for an additional night.[109] ICE assumed custody of Ms. Morales the following day; she was only released when ICE confirmed her citizenship after subjecting her to several hours of interviews.[110]

Ms. Morales later filed suit to remedy her prolonged detention; she alleged that ICE "assumed without sufficient legal cause" that she was not a U.S. citizen and incorrectly listed her nationality as Guatemalan in the detainer form.[111] She further alleged that ICE officials "made this assumption based on her race ethnicity, and/or national origin."[112] Additionally, she argued that ICE would not have assumed that she was an "alien" without conducting further research, had it not been for her race, ethnicity, and/or national origin.[113]

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[103] *Id*.
[104] *Id*.
[105] *Id*.
[106] *Chadbourne*, 996 F. Supp. 2d at 24.
[107] Id. at 25.
[108] *Id*. at 25.
[109] *Id*.
[110] *Id*.
[111] *Id*.
[112] *Chadbourne*, 996 F. Supp. 2d at 25.
[113] *Id*.

The court agreed with Ms. Morales, asserting that "ICE investigated Ms. Morales simply because she was born in another country."[114] The court explained that, "[u]sing Ms. Morales' nation of birth as a sole permissible basis for her loss of liberty does not pass constitutional muster."[115] The court found this to "particularly true in light of the large number of current United States citizens that were born in another country" because, "[t]o hold otherwise would mean that the approximately 17 million foreign-born United States citizens could automatically be subject to detention and deprivation of their liberty rights."[116] The court observed that, "[s]uch a large number of immediate suspects, based solely on their national origin, cannot be justified under the equal protection clause."[117] Additionally, the court noted that the ICE official "had information in his possession, or readily available to him, that would have permitted him to verify Ms. Morales's status as a United States citizen before issuing the detainer [,]" but nevertheless "categorized Ms. Morales as foreign born and treated her differently than others based on this impermissible characteristic."[118]

3. Tenth Amendment

The sphere of federalism carved out by the Tenth Amendment does not permit the federal government to coerce or conscript state and local government entities.[119] In the context of immigration detainers, the issue arises as to whether or not state and local government compliance with detainer requests is voluntary or mandatory.[120] To date, "[t]here has been

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[114] *Id*.
[115] *Id*. at 35 (citing Diaz-Bernal v. Meyers, 758 F. Supp. 2d 106, 135 (D. Conn 2010) "seizing a person "solely on the basis of race or national origin . . . violate[s] clearly established constitutional rights")).
[116] *Id*. at 15.
[117] *Id*.
[118] *Id*. at 36.
[119] New York v. United States, 505 U.S. 144, 161 (1992) ("[c]ongress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.") (internal citations and quotation marks omitted).
[120] Lasch, *supra* note 69, at 695-96.

considerable debate and confusion over whether immigration detainers act as a federal request or as a command to state or local officials."[121] The language of the regulation purports to command state and local law enforcement agencies receiving an immigration detainer to continue holding the target of the detainer in custody.[122]

It would seem, however, that modern Tenth Amendment jurisprudence would forbid the federal government from mandating state and local government compliance with ICE detainers. In *New York v. United States*,[123] the Supreme Court held that a federal law that "created a statutory duty for states to provide safe disposal of radioactive waste generated within their borders" violated the Tenth Amendment.[124] Additionally, "the law provided that states would 'take title' to any waste within their borders that were not properly disposed of . . . and then would 'be liable for all damages directly incurred.'"[125] According to the majority, "[f]orcing states to accept ownership of radioactive wastes would impermissibly 'commandeer' state governments, and *requiring state compliance with federal regulatory statutes would impermissibly impose on states a requirement to implement federal legislation*."[126] The court decreed that the Tenth Amendment limits the scope of Congress's power under Article I, and as a result, "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."[127]

Later, in *Printz v. United States*,[128] the Court struck down a federal statute requiring that state and local law enforcement officers conduct background checks on prospective handgun

[121] *Id*. at 698.
[122] *Id*. at 698-99.
[123] *New York*, 505 U.S. 144.
[124] *Id*.
[125] *Id*.
[126] *Id*. (emphasis added); s*ee* New York v. United States, 505 U.S. 144, 176 (1992).
[127] *Id*. (quoting New York v. United States, 505 U.S. 144, 188 (1992)).
[128] Printz v. United States, 521 U.S. 898 (1997).

purchasers.[129] The court held that "Congress cannot . . . conscript[] the States' officers directly. . . [s]uch commands are fundamentally incompatible with our constitutional system of dual sovereignty."[130] Writing for the majority, Justice Scalia explained that an original understanding of the constitution and the framers' intent leads only to the conclusion that the federal government can only recommend certain regulations to the states, and cannot, by law, compel them to act in any particular way.[131] Justice Scalia drives his point home by referencing a historical statute that sought to hold federal prisoners in state jail, providing a striking analogy to the modern immigration detainers:

> Not only do the enactments of the early Congresses, as far as we are aware, contain no evidence of an assumption that the Federal Government may command the States' executive power in the absence of a particularized constitutional authorization, they contain some indication of precisely the opposite assumption. On September 23, 1789-the day before its proposal of the Bill of Rights, the First Congress enacted a law aimed at obtaining state assistance of the most rudimentary and necessary sort for the enforcement of the new Government's laws: the holding of federal prisoners in state jails at federal expense. Significantly, the law issued not a command to the States' executive, but a recommendation to their legislatures. Congress "recommended to the legislatures of the several States to pass laws, making it expressly the duty of the keepers of their goals, to receive and safe keep therein all prisoners committed under the authority of the United States," and offered to pay 50 cents per month for each prisoner. Moreover, when Georgia refused to comply with the request, Congress's only reaction was a law authorizing the marshal in any State that failed to comply with the Recommendation of September 23, 1789, to rent a temporary jail until provision for a permanent one could be made.[132]

Justice Scalia also pointed out that the statute violated the separation of powers because the constitution vests all executive power in the president, and Congress, as a result, cannot grant executive authority to state and local governments.[133]

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[129] Lasch, *supra* note 69, at 699.
[130] *Id*.
[131] *Printz*, 521 U.S. at 922-23
[132] *Id*. at 909-10 (internal citations omitted).
[133] *Id*. at 909

> The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, "shall take Care that the Laws be faithfully executed," . . . The Brady Act

In light of the realities of Tenth Amendment jurisprudence, "Congress appears to have taken care to avoid Tenth Amendment issues . . . ." in crafting the immigration statute.[134]

> In the case of an alien who is arrested by a Federal, State, or local law enforcement official for a violation of any law relating to controlled substances . . . the officer or employee of the Service shall promptly determine *whether or not* to issue such a detainer.[135]

If Congress had written INA § 287(d) in a manner that required, rather than permitted, local law enforcement officials to report those arrested for violating controlled substance laws and who are suspected of being immigration violators, and if it required them to request immigration officials to "determine promptly whether or not to issue a detainer," the facts would be very similar in nature to the one at issue in *Printz*."[136]

However, the language of the detainer regulation is more problematic in terms of compatibility with the Tenth Amendment.[137] The regulation reads as follows:

> (d) *Temporary detention at Department Request*. Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency *shall maintain custody* of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.[138]

Thus, if the regulation is interpreted in a manner that requires local LEAs to comply with detainer requests, it will surely be regarded as unconstitutional. The Third Circuit Court of Appeals dealt with this issue in *Galarza v. Szalczyk*, noting that "[I]t is clear to us that reading §

> effectively transfers this responsibility to thousands of CLEOs in the 50 States, who are left to implement the program without meaningful Presidential control . . . The insistence of the Framers upon unity in the Federal Executive-to ensure both vigor and accountability-is well known . . . That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.

[134] Lasch, *supra* note 69, at 700

[135] Immigration and Nationality Act, §287(d)(3), 66 Stat. 233 (1952) (codified as amended 8 U.S.C. §1357(d)(3) (2006)).

[136] Lasch, *supra* note 69, at 700.

[137] 8 C.F.R. § 287.7(d)

[138] *Id*.

287.7 that a federal detainer filed with a state or local LEA is a command to detain an individual on behalf of the federal government, would violate the anti-commandeering doctrine of the Tenth Amendment."[139] The court asserts that "[b]ecause of this constitutional problem, and because Congress has made no mention in the INA that it intends for DHS to issue mandatory detainers . . . we must read the regulation as authorizing only permissive requests that local LEAs keep suspected aliens subject to deportation in custody."[140]

4. State and Local Government Liability in Detainer-Related Suits

Consistent with the aforementioned legal issues, state and local governments can be liable in detainer-related suits, especially because compliance with ICE detainers is not mandatory. The following cases illustrate the potential liability faced by local governments for detaining individuals pursuant to ICE detainers.

i. *Galarza v. Szalcyk*:

The facts of Galarza are discussed above.[141] In *Galarza*, the Third Circuit ruled in Galarza's favor, holding that states and municipalities are not required to hold people based on ICE detainers.[142] The court recognized that ICE detainers are requests, not commands, and as a result, Lehigh County was free to disregard the ICE detainer.[143] For that reason, it shared responsibility for violating Galarza's Fourth Amendment and due process rights.[144] The case has since settled.[145] Together, the United States and the City of Allentown paid Galarza $50,000, and Lehigh County paid $95,000 in damages and attorney's fees.[146]

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[139] *Galarza*, 745 F.3d at 644.
[140] *Id*.
[141] *See supra*, part I.
[142] ACLU, *supra* note 11.
[143] *Id*.
[144] *Id*.
[145] *Id*.
[146] *Id*.

ii. *Morales v. Chadbourne*:

Ada Morales was born in Guatemala and became a United States citizen in 1995.[147] In May 2009, she was arrested by Rhode Island police on state charges related to alleged misrepresentations on a state public benefits application.[148] At some point, a state official reported Ms. Morales' name to the local ICE office. Shortly thereafter, ICE lodged a detainer against her.[149] During that time, a judge ordered Ms. Morales released, but Rhode Island officials continued to hold her in custody for an additional 24 hours because of the ICE detainer.[150] Ms. Morales protested to the officials that she was indeed a U.S. citizen, and even offered to show them her passport, but her complaints fell on deaf ears.[151] She was finally released "after ICE agents took her into federal custody, transported her to their office, and interviewed her."[152] This was not the first time Ms. Morales had been wrongfully detained, in fact, she was detained five years earlier under similar circumstances.[153]

In April 2012, Ms. Morales filed a lawsuit against federal and state defendants, alleging violations of her Fourth Amendment and due process rights and her rights under state law.[154] The district court ruled that Morales alleged sufficient facts to support government violations of her rights based on the Fourth Amendment, the Equal Protection Clause, and Procedural Due Process.[155]

ii. *Miranda-Olivares v. Clackamas Cnt'y*:

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[147] *Chadbourne*, 996 F. Supp. 2d at 24.
[148] *Id*.
[149] *Id*. at 25.
[150] *Id*. at 24.
[151] *Id*.
[152] *Id*.
[153] *Chadbourne*, 996 F. Supp. 2d 19 at 25.
[154] *Id*., at 24.
[155] *Id*. at 24.

On March 14, 2012, Miranda-Olivares was arrested for violating a domestic violence restraining order and was sent to jail.[156] The jail did not know Miranda-Olivares's immigration status, but it had a policy of notifying ICE when a foreign-born person is brought to the Jail on a warrant or probable cause charge.[157] The following morning, the jail received an immigration detainer, issued by ICE, for Miranda-Olivares.[158] The detainer simply stated that DHS had "initiated an investigation" to determine whether Miranda-Olivares was subject to removal from the United States.[159]

The same day, a judge set Miranda-Olivares's bail at $5,000, and in order to post bail, Miranda-Olivares was required to post $500.[160] Family members were prepared to post the $500 bail, but jail officials, on multiple occasions, warned that posting bail would not result in release because the jail would keep Miranda-Olivares in custody as a result of the detainer.[161] After two weeks, Miranda-Olivares's criminal case was resolved, and was given a sentence of time-served.[162] But, rather than release Miranda-Olivares, the jail kept her in custody an additional day, until ICE assumed custody.[163]

Miranda-Olivares sued Clackamas County for violating her civil rights.[164] The court rejected the County's claim that it was legally required to comply with the detainer.[165] Ultimately, the court ruled in favor Miranda-Olivares; holding that the County violated her Fourth Amendment rights by detaining in spite a court order authorizing her release.[166]

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156 Miranda-Olivares v. Clackamas Cnty., 2014 WL 1414305, at 1 (D. Or. Apr. 11, 2014).
157 *Id*.
158 *Id*.
159 *Id*.
160 *Id*. at 2.
161 Id.
162 *Miranda-Olivares*, 2014 WL 1414305 at 3.
163 *Id*.
164 *Id*. at 1.
165 *Id*. at 4-8.
166 *Id*. at 1.

B. State Regulation: The TRUST ACT

When passing laws related to immigration law, states must be especially careful to avoid issues of preemption, because immigration law is traditionally regulated by the Federal Government.

1. Is the TRUST ACT Preempted by Federal Regulation?

i. Preemption Jurisprudence

In *Arizona v. United States,* the court illustrates how modern preemption doctrine plays out in the context of state laws regulating immigration.[167] The court explains that the preemption dilemma with respect to immigration regulation arises from the principle of federalism, which entails that "both the National and State Governments have elements of sovereignty the other is bound to respect.[168] The court observes that, "[f]rom the existence of two sovereigns follows the possibility that laws can be in conflict or at cross-purposes."[169] Yet, under our constitutional design, [t]he Supremacy Clause provides a clear rule that federal law shall be the supreme Law of the Land."[170] Pursuant to this principle, "Congress has the power to preempt state law."[171]

The court outlines three situations where federal law preempts state law. The first is where Congress passes a bill containing a provision that "expressly preempts" state regulation.[172] The second, is where "the States are precluded from regulating conduct in a field that Congress . . . has determined must be regulated by its exclusive governance." [173] Generally, "[t]he intent to displace state law altogether can be inferred from a framework of regulation so pervasive that Congress left no room for the States to supplement it [or] where there is a federal interest so

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[167] *Arizona*, 132 S. Ct. 2492, at 2500.
[168] *Id*. at 2500.
[169] *Id*.
[170] *Id*. (citing U.S. CONST. ART VI, CL. 2.) (internal quotation marks omitted).
[171] *Id*.
[172] *Id*. at 2500-01
[173] *Arizona*, 132 S. Ct. at 2501 (citations omitted).

dominant that the federal system will be assumed to preclude enforcement of state law on the same subject."[174] Third, state laws are preempted when they conflict with federal law.[175] Conflict preemption includes those cases where it is impossible to comply with both federal and state law and those situations where state law "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of congress."[176]

In *Arizona*, the court examined an Arizona law, Senate Bill (S.B.) 1070, against the above-mentioned preemption framework. The court examined four sections of the bill. Section 3 – which makes it a crime for someone to be in the United States without proper authorization – was preempted because Congress left no room for states to regulate in that field or enhance federal prohibitions.[177] Section 5(C) – which makes it a crime for undocumented immigrants to apply for a job or work in Arizona – was also preempted because it stood as an obstacle to the federal regulatory regime.[178] Section 6 – which authorizes state law enforcement officials to arrest any individual otherwise lawfully in the country – was preempted because whether and when to arrest someone for being unlawfully in the country was a question solely for the federal government.[179]

ii. TRUST Act is Not Preempted

[174] *Id*. (citations and quotation marks omitted).
[175] *Id*. (citations omitted).
[176] *Id*. (citations and quotation marks omitted).
[177] *Id*. at 2502 ("with respect to the subject of alien registration, Congress intended to preclude States from complementing the federal law, or enforcing additional or auxiliary regulations . . . Section 3 is preempted by federal law.") (quotation marks omitted and formatting altered).
[178] *Id*. at 2505 ("The correct instruction to draw from the text, structure, and history of IRCA is that Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment. It follows that a state law to the contrary is an obstacle to the regulatory system Congress chose.")
[179] *Arizona*, 132 S. Ct. at 2507. ("Congress has put in place a system in which state officers may not make warrantless arrests of aliens based on possible removability except in specific, limited circumstances. By nonetheless authorizing state and local officers to engage in these enforcement activities as a general mater, § 6 creates an obstacle to the full purpose and objectives of Congress . . . Section 6 is preempted by federal law").

Following from this framework, it does not appear that federal law preempts the TRUST Act. An important distinction must be made between Arizona's S.B. 1070 and the TRUST Act. The former is a form of *affirmative* legislation that seeks to create a regime of immigration law separate and distinct from existing federal regulations, while the latter is merely a form of qualified-compliance with federal requests. This follows from the fact that compliance with ICE detainers is not mandatory, and that ICE detainers serve merely as requests. Recently, the DHS acknowledged that "detainers issued pursuant to 8 C.F.R. § 287.7 are voluntary requests."[180] Thus, the TRUST Act might have raised preemption issues if Congress intended to mandate state compliance with ICE detainers. It is not clear, however, Congress intended to mandate state compliance with ICE detainers, given the Tenth Amendment implications of doing so. Additionally, the Executive Action initiated by the Obama Administration, overhauling portions of the secure communities program, puts the TRUST Act more in line with the policies of federal law, greatly reducing the risk of preemption.

C. Public Policy Concerns Raised by Detainer Requests

In addition to the legal issues raised by ICE detainers, several public policy concerns arise as well. Among the public policy concerns raised by detainer enforcement is the cost to state and local governments of enforcing ICE detainers and evidence that ICE detainers – and the Secure Communities Program – have had no effect on crime, and may actually be an obstacle to effective law enforcement.

1. The Cost of Enforcing Detainer Requests:

[180] Recent Legislation, *supra* note 15, at 2596 (citing Defendants' Memorandum in Support of Motion for Partial Judgment on the Pleadings at 9, Moreno v. Napolitano, No. 11-CV-05452, 2013 WL 4014240 (N.D. Ill. Aug. 2, 2013)).

The cost to state and local governments of enforcing detainers requests is amplified by the fact that the federal government does not contribute to the costs incurred by state and local governments in enforcing ICE detainers. According to 8 C.F.R. 287(e), the federal government is not responsible for any such costs:

> **(e)** ***Financial responsibility for detention.*** No detainer issued as a result of a determination made under this chapter I shall incur any fiscal obligation on the part of the Department, until actual assumption of custody by the Department, except as provided in paragraph (d) of this section.[181]

This is problematic because the cost of jailing people is significant and burdensome for state and local governments. The cost of keeping an inmate in prison per day is about $460 in New York, $145 in Chicago, and $128.94 in Los Angeles. In the aggregate, these costs are significant. Between 2008 and 2012, ICE placed approximately 29,323 detainers on legal permanent residents and U.S. citizens.[182]

Additionally, state and local governments risk significant litigation costs if they continue enforcing ICE detainers because they are liable in cases where an arrestees rights have been violated due to detention pursuant to an ICE detainer.[183] Recently a number of jurisdictions have incurred significant costs to do detainer-related suits[184]: In *Galarza v. Szalcyk*, the City of Allentown paid Galarza $50,000, and Lehigh County paid $95,000 in damages and attorney's fees;[185] Jefferson County Colorado paid $40,000 for unjustifiably holding Luis Quezada on an ICE detainer;[186] Spokane County, Washington agreed to pay $40,000 to a man who was wrongly

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[181] 8 C.F.R. 287.7(e)
[182] TRAC, *ICE Detainers Placed on U.S. Citizens and Legal Permanent Residents*, (Feb. 20, 2013), http://trac.syr.edu/immigration/reports/311/
[183] *See supra*, Part (III)(A)
[184] http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/enforcement-detainers
[185] ACLU, *supra* note 11
[186] LEGAL ACTION CENTER, *ENFORCEMENT, DETAINERS: Challenging the Use of ICE Immigration Detainers*, (last viewed Jan. 30, 2015) http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/enforcement-detainers

held without bail for 20 days because of an ICE detainer;[187] and New York City paid $145,000 to settle a lawsuit where a man was wrongly held by an ICE detainer requests.[188]

In light of these fiscal realities, refusing to honor ICE requests or passing a law similar to the Trust Act would significantly reduce the chances of wrongfully detaining someone pursuant to a detainer request. Consequently, this would allow states and municipalities to significantly reduce litigation and settlement costs that would otherwise arise. Hence, from a public policy perspective, there is a financial incentive for state and local governments to reform their compliance with federal ICE detainers.

2. Effect on Crime

According to the Transactional Records Access Clearinghouse at Syracuse University (TRAC), "data from Immigration and Customs Enforcement (ICE) show that no more than 14 percent of the 'detainers' issued by the government in FY 2012 and the first four months of FY 2013 met the agency's stated goal of targeting individuals who pose a serious threat to public safety or national security."[189] Indeed, statistics show that "roughly half of the 347,691 individuals subject to an ICE detainer (47.7 percent) had no record of a criminal conviction, not even a minor traffic violation."[190] Interestingly, "[t]his thoroughly-documented government enforcement effort sharply contrasts with the multiple press releases and official statements issued by the agency."[191] Moreover, according to Miles & Cox, the Secure Communities Program in general has "had no effect on the FBI index crime rate . . . [n]or did the program reduce rates of violent crimes—of murder, rape, arson, or aggravated assault."[192]

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[187] *Id*.
[188] *Id*.
[189] TRAC, *Few ICE Detainers Target Serious Criminals*, (Sept. 17, 2013) http://trac.syr.edu/immigration/reports/330/
[190] *Id*.
[191] *Id*.
[192] Miles & Cox, *supra* note 26, at 4.

Moreover, detainer enforcement significantly hinders community policing. Immigrant residents who are victims or witnesses to crime, including domestic violence, are less likely to report crime or cooperate with law enforcement when any contact with law enforcement could result in deportation.[193] A recent study found that Latinos, documented and undocumented, often fear even minimal contact with the police, including for interactions as benign as reporting crime or cooperating with a criminal investigation, as a result of fears due to potential immigration consequences for themselves or their loved ones.[194] Therefore, by eliminating or constraining compliance with ICE detainers, state and local governments can better improve relations between law enforcement and certain minority communities – which makes for more effective policing.

Given the fact that ICE detainers have little to no effect on reducing crime rates and the fact that detainer enforcement strains relations between minority communities and the authorities, public policy weighs heavily in favor of either eliminating compliance with ICE detainers or restricting compliance to those cases involving serious crime (this would ensure that the detainers issued are actually having a positive impact on the rate of crime).

IV. Conclusion:

ICE detainers raise several issues. Among them are: legal and constitutional challenges; liability incurred by municipalities; high enforcement costs; and an inability to lower crime rates. Notably, there are no legal obstacles in the way of legislation seeking to significantly curtail the scope of detainer requests. Therefore, states should follow the path of Connecticut and California and pass legislation that significantly limits the scope of compliance with ICE

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[193] *Id*.

[194] Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Communities*, (May. 2013) http://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF

detainers. In addition, local municipalities should consider refusing to honor detainers altogether. While President Obama's Executive Action overhauling the SCP altogether is a step in the right direction, his actions are by no means permanent. The Executive Action is facing challenges in Congress and the Courts; and could potentially be reversed following the 2016 presidential elections. Given the extent of the problems raised by ICE detainers, state and local governments ought to take the lead in governing the relationship between inmates in state and local jails and federal immigration officials; either by passing their own version of the Trust Act, or by refusing to honor ICE detainers generally.