STATE LAW TO THE CONTRARY?
EXAMINING POTENTIAL LIMITS ON THE
AUTHORITY OF STATE AND LOCAL LAW
ENFORCEMENT TO ENFORCE FEDERAL
IMMIGRATION LAW

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I. INTRODUCTION

As the Supreme Court recently reaffirmed in Arizona v. United States, 2 it is well-established that the “authority of state officers to make arrests for federal crimes,” including federal immigration law, “is . . . a matter of state law.” 3 This general, universal rule has not yielded consistent results. The circuit courts of appeals have disagreed as to when state and local law enforcement can invoke this “implicit authority” and enforce federal immigration law. 4 On one end of the spectrum stands the Ninth Circuit view that state and local law enforcement only have such authority if affirmatively authorized by the state. 5 On the other, the broader view of enforcement authority, adopted by the Tenth Circuit, is that state and local law enforcement have

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4 U.S. v. Santana Garcia, 264 F.3d 1188 (10th Cir. 2001); Gonzales v. Peoria, 722 F.2d 468 (9th Cir. 1983).

5 Gonzales, 722 F.2d at 475.
the authority to enforce federal immigration law unless “state law exists to the contrary.” This article will examine the ways in which state law limits the authority of state and local law enforcement to enforce federal immigration law.

An example

On July 9, 2010, Ramon Eduardo Dorado Mendoza was driving his younger sister to school, when he was stopped for speeding by the City of Albuquerque Aviation Police. Born in Mexico, Mr. Mendoza was brought to the United States illegally when he was five years old. He had lived in Albuquerque, New Mexico, for approximately fifteen years prior to the incident.

The law enforcement officer approached the vehicle, asked for Mr. Mendoza’s license, registration, and proof of insurance, which Mr. Mendoza provided. The officer returned to his vehicle with the documents. Shortly thereafter, another officer arrived on scene and the first officer requested that the second officer check Mr. Mendoza’s driver’s license on the computer in his vehicle. The second officer did so and stated that there was a question regarding Mr. Mendoza’s social security number.  

The first officer went back to the stopped vehicle and asked Mr. Mendoza to get out of it. The officers then asked a series of questions in an attempt to ascertain Mendoza’s immigration status, including:

“How long have you had your driver’s license?”

“Do you have a social security card?”

“Do you know your social security number?”

Santana-Garcia, 264 F.3d at 1194.

As discussed below, New Mexico does not require proof of citizenship to obtain a driver’s license. See Section IV, infra.
“Where were you born?”

“Are you a legal citizen?”

In response, Mr. Mendoza admitted that he was an undocumented immigrant, and was told to go back to his vehicle. While Mr. Mendoza remained detained, the officers contacted U.S. Immigration and Customs Enforcement (“ICE”). Border Patrol agents ultimately arrived on the scene and took Mr. Mendoza into custody. Mr. Mendoza was taken to an Albuquerque ICE facility and then to El Paso where he was detained overnight. He was finally taken to Juarez, Mexico, the next day and released. Thus, a nineteen year old who lived at home and went to school was separated from his family and deported to a country that he did not know.  

A number of scholars have explored the reasons why state and local governments should not enforce federal immigration law and touched upon some of the limits to such action. The

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8 The interaction between Mr. Mendoza and law enforcement was video-recorded by law enforcement and produced in response to a public records request submitted by the American Civil Liberties Union if New Mexico.

question explored herein is whether state and local law enforcement have the authority to initiate the process of enforcement, particularly in light of strong state misdemeanor arrest laws and state public policy statements to the contrary.

Authority to enforce immigration law by state and local law enforcement is limited in two main areas. Some states adhere to the “misdemeanor arrest rule” that prohibits a state or local officer from investigating misdemeanors that were not committed in their presence.10 Under federal immigration law, illegal entry into the United States is a misdemeanor and illegal presence is only a civil violation.11 Accordingly, in states adhering to the misdemeanor arrest rule, state law prohibits enforcement of federal immigration law by state and local officers.

Second, in certain states, a well-defined public policy runs counter to any argument that an “implicit authority”12 of local officers to enforce federal immigration law exists. This public policy is demonstrated by state statutes that provide driver’s licenses to immigrants without proof of citizenship. In these states, enforcement of federal immigration law is inconsistent with the protections that these statutes provide. Further evidence of public policy can be found in the refusal of certain states to follow Arizona’s approach of requiring state and local law enforcement to enforce federal immigration law. And some states have an established tradition of granting broader protection from searches and seizures under their state constitutions. This tradition sets up state constitutional barriers to enforcement of federal immigration laws. Finally, certain states, through gubernatorial executive orders, have acted to provide protections for undocumented immigrants that weigh against any argument that local or state officers have

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10 See footnote 86.


12 Santana-Garcia, 264 F.3d at 1194.
authority to enforce federal immigration law. In states where statutes and common law result in an ambiguity regarding the authority of state and local law enforcement officers, these public policy statements may serve as a statement “to the contrary” of the “implicit authority” doctrine.

In Section II, this article will examine the Supreme Court’s well-established precedent confirming that the contours of law enforcement authority are to be decided by state law. Section III will discuss state misdemeanor arrest rules as limits to that authority. Finally, Section IV explores state public policies that may limit the authority of state and local law enforcement to enforce federal immigration law.

II. THE AUTHORITY OF STATE AND LOCAL OFFICERS TO ENFORCE FEDERAL IMMIGRATION LAW IS A MATTER OF STATE LAW.

The Fourth Amendment to the U.S Constitution protects against unreasonable searches and seizures.\(^{13}\) A strong preference in the law exists for detention or arrests conducted with a warrant.\(^{14}\) That said, generally, law enforcement officers may detain an individual, without a warrant, if the officer has reasonable suspicion to believe that the individual has committed a crime. Additionally, they may arrest, without a warrant, an individual if the officer has probable cause to believe that the individual has committed a crime.\(^{15}\) In order to detain, an officer must

\(^{13}\) U.S. Const. amend. IV.


\(^{15}\) Terry v. Ohio, 392 U.S. 1, 27-30 (1968); U.S. v. Williams 876 F.2d 1521, 1523-24 (11th Cir. 1989) citing Terry for the proposition that “the police may stop and briefly detain a person to investigate a reasonable suspicion that he is involved in criminal activity, even though probable cause [for arrest] is lacking.”
have “particularized suspicion” that the specific subject has committed a crime.\textsuperscript{16} However, setting aside the constitutional strictures, the power of state and local law enforcement officers to detain \textit{at all} is a matter determined by state laws that provide the exact contours of authority for law enforcement officers within their state. For example, in Washington, law enforcement officers are given the authority to detain and arrest an individual believed to have committed a felony, or “a misdemeanor committed in the presence of an officer.”\textsuperscript{17} State statutory or common law “misdemeanor arrest” rules may limit the authority of law enforcement officers to make arrests in situations where the individual is believed to have committed a felony, or the individual has committed a misdemeanor in the officer’s presence. Short of that, the officer does not have the power to detain or arrest without a warrant.

\textit{Authority to enforce is a matter of state law.}

The first question in the analysis of a state or local officer’s authority is: what law determines whether an officer has authority to detain and arrest for \textit{federal} crimes? In \textit{U.S. v. Di Re},\textsuperscript{18} the United States Supreme Court directed that state law answers that question.

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\textsuperscript{16} \textit{U.S. v. Cortez}, 449 U.S. 411, 418 (1981)(“The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all the circumstances. . . . The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing.”).

\textsuperscript{17} RCW \textsection 10.31.100

\textsuperscript{18} 332 U.S. 581 (1947).
\end{flushleft}
In 1947, Michael Di Re was arrested, without a warrant, for possessing counterfeit gasoline rationing coupons. Di Re was arrested after being in a car with two other men who were obviously in possession of the counterfeit rationing coupons.\textsuperscript{19} When questioned, Di Re disclosed two counterfeit rationing coupons; when searched, a hundred more were found on him.\textsuperscript{20} Di Re challenged the arrest on several grounds, including that the arresting state officer did not have authority to arrest him for violation of federal law.\textsuperscript{21}

The Supreme Court first explored whether any federal law authorized the state officer to arrest without a warrant for federal offenses.\textsuperscript{22} The Court stated that, “in absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity.” Finding that no federal law provided the authority for an arrest by a state officer, the

\textsuperscript{19} Id. at 583.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} Di Re is a 1947 decision rendered half a century before the revival of the Tenth Amendment. Today, in light of this late 20\textsuperscript{th} Century revival set forth in cases such as New York v. United States, 505 U.S. 144 (1992) and Printz v. United States, 521 U.S. 898 (1997), it is unlikely that this part of the analysis is necessary at all. New York and Printz establish that the Tenth Amendment prohibits the federal government from “commandeering” the legislative or executive branches of state government for federal purposes. That is, after New York and Printz, the scope of the authority of state and local law enforcement officers is undoubtedly a matter of state law. At any rate, as discussed herein, even before the reinvigoration of the Tenth Amendment, the Supreme Court concluded that that the scope of authority was one to be determined by state law.
Court decided that “[t]herefore the New York statute provides the standard by which this arrest must stand or fall.”

The pertinent section of the New York criminal code at the time provided that:

A peace officer may, without a warrant, arrest a person,
1. For a crime, committed or attempted in his presence;
2. When the person arrested has committed a felony, although not in his presence;
3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it.²³

The Supreme Court resolved the question of authority under New York law in a way that illuminates the current question of whether state and local law enforcement can enforce federal immigration law and the application of the misdemeanor arrest rule. Under the federal law at the time, possessing the rationing coupons was a misdemeanor, while selling them was a felony.²⁴

The Government conceded “that the only person who committed a possible misdemeanor in the open presence of the officer was” the individual in the car who was found visibly possessing the coupons.²⁵ As to the third defendant, the officers had reasonable cause to believe he was going to sell coupons [a felony], based on informant information.²⁶ However, the government had no such information about De Ri, who was merely found in the car with the other two gentlemen. His mere presence was not enough under New York law to provide cause to arrest for a misdemeanor or a felony.²⁷

We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and

²³ Di Re, 332 U.S. at 589.
²⁴ Id., at 591-92.
²⁵ Id., at 592.
²⁶ Id.
²⁷ Id., at 593-94.
searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them.\textsuperscript{28}

Ten years later in \textit{Miller v. U.S.},\textsuperscript{29} the Supreme Court re-affirmed that the scope of state and local law enforcement officers’ authority to arrest is determined by state law. \textit{Miller} involved an incident where local officers broke down a door and executed a warrantless arrest of the defendant for violation of federal law. Relying in part in \textit{Di Re}, the Court noted that in “an arrest for violation of federal law by state peace officers, that the lawfulness of the arrest without warrant is to be determined by reference to state law.”\textsuperscript{30} The Court then examined the arrest under the law of the District of Columbia at the time.\textsuperscript{31}

\textbf{Affirmative Authorization v. Contrary State Law}

As the question of authority is a matter of state law according to the Supreme Court, the natural question that arises is \textit{when} does state law permit enforcement of federal law by state and

\textsuperscript{28} Id. at 595.

\textsuperscript{29} 357 U.S. 301 (1958).

\textsuperscript{30} Id. at 305, citing \textit{Di Re}, 332 U.S. at 589; Johnson v. United States, 333 U.S. 10, 15 and n. 5 (1949) (“State law determines the validity of arrests without warrant,” citing \textit{Di Re}).

\textsuperscript{31} See also, Arizona v. United States, 132 S.Ct. 2528 (2012), Alito, J., concurring in part and dissenting in part (“It is well established that state and local officers generally have authority to make stops and arrests for violations of federal criminal law.”) citing Miller, 357 U.S. at 305 and \textit{Di Re}, 332 U.S. at 589.
local officers. The Ninth and Tenth Circuits have examined this issue and taken different approaches, while a few other circuits have touched upon it only in passing.

The Ninth Circuit in *Gonzales v. City of Peoria* 32 addressed whether local police in Peoria, Arizona, had authority to arrest for federal immigration violations. The plaintiffs alleged that the city police had engaged in a pattern of stopping people of Mexican descent without reasonable suspicion or probable cause that they had committed any crime. 33 The City of Peoria had developed a policy that stated “state law enforcement officers have the authority to make arrests for federal violations,” explicitly citing *Di Re*. The policy permitted officers to arrest and jail violators of federal immigration law, until they were turned over to federal authorities. 34

After the Ninth Circuit concluded that state and local law enforcement were not preempted by federal law, the Court “considered whether state law grants Peoria police the affirmative authority to make arrests under those statutes.” 35 The Ninth Circuit held that, when looking to state law, the court must discern whether it affirmatively authorizes state or local enforcement of federal law. The Ninth Circuit concluded that it did. 36

The Tenth Circuit took a different approach. In *U.S. v. Santana-Garcia*, a Utah state trooper stopped a vehicle after it rolled through a stop sign. 37 The driver did not have a driver’s

32 722 F.2d 468 (9th Cir. 1983) overruled on other grounds, Hodgers-Durgin v. de la Vina, 199 F.3d 1037 (1999) (en banc).

33 Id. at 472.

34 Id.

35 Id. at 475 (emphasis added).

36 Id. This is discussed below in Section III.

37 Santana-Garcia, 264 F.3d at 1190.
license and instead presented the officer with a Mexican voter card. The passenger, Santana-Garcia, presented the officer with an Oregon driver’s license. \(^{38}\) The trooper returned to his patrol car to request the assistance of a Spanish-speaking officer and to call in a computer check on Santana-Garcia’s driver’s license and the vehicle’s license plate. Dispatch reported that Santana-Garcia’s driver’s license was valid and that an Omar Garcia-Garcia was the registered owner of the vehicle. The vehicle was not listed as stolen and the driver and passenger had no outstanding warrants against them.\(^{39}\)

The trooper returned to the vehicle and asked about the vehicle’s owner and travel plans. At one point during the conversation, Santana-Garcia appeared to indicate that they were traveling from Mexico to Colorado. This response prompted the trooper to ask them if they were “legal.”\(^{40}\) Both stated they were not legal. The state trooper next requested the vehicle’s registration. Santana-Garcia provided the registration, which listed Omar Garcia-Garcia as the vehicle’s owner. The trooper next asked for proof of insurance. Mr. Santana-Garcia indicated that he knew nothing about the vehicle’s insurance.\(^{41}\) Shortly thereafter, another trooper arrived. This trooper asked permission to search the vehicle, and the men inside agreed. A search of the vehicle found hidden packages of cocaine and methamphetamine.\(^{42}\) At the district court level, the men moved to suppress the drugs on the grounds that, although the initial stop was valid, the

\(^{38}\) Id. at 1190.

\(^{39}\) Id.

\(^{40}\) Id.

\(^{41}\) Id. at 1190-91.

\(^{42}\) Id.
detention thereafter was not. The district court granted the motion to suppress.\textsuperscript{43} The Tenth Circuit reversed.

In reversing, the Tenth Circuit re-affirmed its precedent, holding that law enforcement officers had “general investigatory authority to inquire into possible immigration violations.”\textsuperscript{44} It then rejected the defendants’ argument that state law must affirmatively authorize officers to detain and arrest for violations of federal law. Rather than looking to see if state law “affirmatively authorized” state and local law enforcement to enforce federal law,\textsuperscript{45} the Tenth Circuit emphasized that “state and local police officers had implicit authority within their respective jurisdictions ‘to investigate and make arrests for violations of federal law, including immigration laws.’”\textsuperscript{46} It added, however that, “This, of course, \textit{presumes no state or local law to the contrary}.” \textsuperscript{47}

\textsuperscript{43} Id. at 1192 (“[T]he district court concluded that Trooper Wright could not have formed the requisite reasonable suspicion of criminal activity to justify Defendants’ continuing detention beyond the purpose for the initial stop. The court further concluded that Defendants’ illegal detention tainted their subsequent consent to search the vehicle.”).

\textsuperscript{44} Id. at 1193, quoting United States v. Salinas–Calderon, 728 F.2d 1298, 1301–02 & n. 3 (10th Cir.1984).

\textsuperscript{45} Gonzales, 722 F.2d at 475.

\textsuperscript{46} Santana-Garcia, 264 F.3d at 1193, quoting United States v. Vasquez–Alvarez, 176 F.3d 1294, 1296, 1299 n. 4, 1300 (10th Cir.1999).

\textsuperscript{47} Santana-Garcia, 264 F.3d at 1194, citing Jay T. Jorgensen, The Practical Power of State and Local Governments to Enforce Federal Immigration Laws, 1997 B.Y.U.L.Rev. 899, 910. n. 65 (emphasis added). The Court went on to note that it believed Utah law affirmatively authorized
Three other Circuits have addressed the issue, but not directly. The Seventh Circuit confronted a challenge to a Chicago officer’s warrantless arrest for a federal crime in *U.S. v. Janik*.48 “[N]o Illinois statute explicitly authorize[d] an Illinois officer to arrest for a federal crime without a warrant.”49 In dicta, the Seventh Circuit stated that there was “implicit authority” to make such an arrest, partly construing the definition of “offense” under state law broadly.50 The Fifth Circuit appears to have taken a similar approach, albeit also in dicta and in a case where the alleged crime was a felony.51 Most recently, the First Circuit, without addressing the question directly, held that a state officer’s detention of individuals did not violate the Fourth Amendment because he had reasonable belief that they “had committed immigration violations.”52

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48 723 F.2d 537 (7th Cir. 1983)
49 Id. at 548.
50 Id.
51 U.S. v. Bowdach, 561 F.2d 1160, 1168 (5th Cir. 1977) (“It would indeed be an illogical conclusion if we were to hold, as the defendant wishes us to do, that a state police officer must let a suspect go free when he has knowledge that the suspect is the subject of a federal arrest warrant, but that officer may arrest the suspect if he has knowledge of the crime but no warrant has been issued.”).
52 Estrada v. Rhode Island, 594 F.3d 56 (1st Cir. 2010).
Thus, the most exhaustive approach to the issue of state and local law enforcement authority is found in Gonzales and in Santana-Garcia. In short, the Gonzales/Santana-Garcia approach requires an examination of state law, and under the Tenth Circuit’s broader view of the law enforcement authority, whether any state law stands as contrary to the notion of “implicit authority.”\(^{53}\) The question that approach begs is: “What constitutes state law to the contrary?” Certainly, a state statute explicitly prohibiting enforcement of federal laws would be the clearest example of “state law” to the contrary. But only one such law exists.\(^ {54}\) Instead, as discussed herein, what limits the general authority of state and local law enforcement is state statutory and common law defining the contours of misdemeanor arrest authority and state public policy. The clearest of these potential limits on authority is found in state misdemeanor arrest laws.

### III. “MISDEMEANOR ARREST” LAWS AS LIMITS ON “IMPLICIT AUTHORITY”

**Statutory law**

In determining when state law stands as contrary to the “general investigatory authority,”\(^ {55}\) one first examines the statutory grant of authority. In Santana-Garcia, the Tenth Circuit, after emphasizing that state and local law enforcement’s “implicit authority” existed unless state law stood to the contrary, noted that the state law at issue, a Utah statute, authorized the detention by the state officer, because of the broad language of the statute.

In any event, we read the expansive language of Utah Code Ann. § 77–7–2 to empower Utah state troopers to make arrests for suspected violations of federal law, at least until the Utah state courts tell us otherwise. Utah law authorizes a state law enforcement

\(^{53}\) Santana-Garcia, 264 F.3d at 1194.

\(^{54}\) See Section IV, infra.

\(^{55}\) Santana-Garcia, 264 F.3d at 1193, quoting United States v. Salinas–Calderon, 728 F.2d 1298, 1301–02 & n. 3 (10th Cir. 1984).
officer to make a warrantless arrest for “any public offense,” where the offense is committed or attempted in the officer's presence, or where the officer has reasonable cause to believe the suspect committed a public offense and may be a flight risk.\textsuperscript{56}

The “expansive”\textsuperscript{57} nature of Utah law removed any doubt that there may be a limit to the “general investigatory authority” of the state law enforcement officers to enforce federal law in \textit{Santana-Garcia}.\textsuperscript{58}

In \textit{Gonzales v. City of Peoria}, the Ninth Circuit also looked to the Arizona statute setting forth the authority of state and local law enforcement officers. In \textit{Gonzales}, after determining that a state must \textit{affirmatively authorize} state and local law enforcement of federal immigration law, the Ninth Circuit explored the common-law misdemeanor rule. Noting that illegal entry (without evidence of prior illegal entry) under 8 U.S.C. §1325 was just a misdemeanor, the Ninth Circuit first discussed the common law misdemeanor rule and alluded to former Arizona statutes that adhered to it.\textsuperscript{59} “Under the common law rule, an officer could execute a warrantless arrest for a misdemeanor only when it was committed in the officer’s presence.”\textsuperscript{60} However, the Court went on to explain that the Arizona statute in effect at the time of the detention of Gonzales did, in fact, authorize misdemeanor arrests in two circumstances:

\textsuperscript{56} \textit{Santana-Garcia}, 264 F.3d at 1194.

\textsuperscript{57} Id. at 1194, n. 8.

\textsuperscript{58} See also id., n. 7 (“Unnecessary to our decision in \textit{Vasquez–Alvarez}, but nonetheless noteworthy, was Defendant’s acknowledgment that applicable state law specifically authorized local law enforcement officials to make arrests for violations of federal law.”) citing \textit{Vasquez-Alvarez}, 176 F.3d at 1296-97 (in turn citing 11 Okla. Op. Att’y Gen. 345 (1997)).

\textsuperscript{59} \textit{Gonzales}, 722 F.2d at 475.

A peace officer may, without a warrant, arrest a person:

....

2. When he has probable cause to believe a misdemeanor has been committed in his presence and probable cause to believe the person to be arrested has committed the offense.

....

4. When he has probable cause to believe a misdemeanor has been committed and probable cause to believe the person to be arrested has committed the offense. The person so arrested shall be released in conformity with the provisions of § 13–3903.61

The Court then held that the law authorized local and state enforcement of federal immigration crimes.62 The Court “firmly emphasize[d], that the authority under the Arizona extended only to criminal violations”, emphasizing the City of Peoria’s failure to distinguish between federal immigration criminal violations and civil violations.63

There are numerous reasons why a person could be illegally present in the United States without having entered in violation of section 1325. Examples include expiration of a visitor’s visa, change of student status, or acquisition of prohibited employment. Arrest of a person for illegal presence would exceed the authority granted Peoria police by state law.64

Thus, while Arizona’s then-existing statute authorized state and local officers to investigate and enforce federal misdemeanor violations, it did not authorize them to investigate or enforce federal civil violations. As the Ninth Circuit noted in Gonzales, there is often confusion about the difference under the federal statutory scheme.

Many of the problems arising from implementation of the City’s written policies have derived from a failure to distinguish between civil and criminal violations of the Act. Several of the policy statements use the term ‘illegal alien,’ which obscures the distinction between the civil and the criminal violations. In some instances, that term has been used by the City to mean an alien who has illegally entered the country, which is a


62 Id.

63 Gonzales, 722 F.2d at 476.

64 Id. (Emphasis added.)
criminal violation under section 1325. In others, it has meant an alien who is illegally present in the United States, which is only a civil violation.\textsuperscript{65}

Although the Ninth Circuit requires “affirmative authorization”\textsuperscript{66} and the Tenth Circuit looks for “state law to the contrary,”\textsuperscript{67} the approach of both courts in their analysis is similar in structure. First, federal law directs that one look to state law for the answer.\textsuperscript{68} Then, state law is analyzed to ascertain whether it authorizes arrests for federal offenses.\textsuperscript{69} That question is answered by looking to the language of state statutes setting forth state and local law enforcement authority.\textsuperscript{70} In the Utah law at issue in \textit{Santana-Garcia}, the broader nature of the statute indicated that state and local law enforcement could investigate and enforce federal “offenses.”\textsuperscript{71} In \textit{Gonzales}, the more limited statute authorized state and local law enforcement to investigate and enforce the criminal misdemeanor provisions of federal immigration law, but not federal civil violations.\textsuperscript{72}

If a state statute setting forth the contours of enforcement authority is broad and virtually all-encompassing, such as the statute in Utah in \textit{Santana-Garcia}, then it likely serves as no limit.

\textsuperscript{65} See \textit{Gonzales}, 722 F.2d at 476 (“
\textsuperscript{66} \textit{Gonzales}, 722 F.2d at 475.
\textsuperscript{67} \textit{Santana-Garcia}, 264 F.3d at 1194.
\textsuperscript{68} \textit{Gonzales}, 722 F.2d at 474-76; \textit{Santana-Garcia}, 264 F.3d at 1193-94.
\textsuperscript{69} Id.
\textsuperscript{70} \textit{Gonzales}, 722 F.2d at 474-77; \textit{Santana-Garcia}, 264 F.3d at 1193-94.
\textsuperscript{71} \textit{Santana-Garcia}, 264 F.3d at 1194, n. 8.
\textsuperscript{72} \textit{Gonzales}, 722 F.2d at 476-77.
on the “implicit authority” of state and local law enforcement to enforce immigration law. However, the analyses in Gonzales and Santana-Garcia demonstrate that there are two more possible limits on “implicit authority.” First, as in Gonzales, even if an officer has authority to investigate and enforce misdemeanor crimes generally, he may not have the authority to investigate and enforce federal civil violations. Second, although the Arizona statute in Gonzales granted authority for state and local law enforcement to investigate and enforce federal misdemeanor crimes, other states’ statutes do not.

For example, the New Mexico statute addressing the authority of “peace officers” grants only authority “to investigate all violations of the criminal laws of the state which are called to the attention of any such officer or of which he is aware.” Following the analyses of Santana-Garcia and Gonzales, a state or local law enforcement officer in New Mexico would only have authority to investigate and enforce state criminal violations, not federal criminal violations and certainly not federal civil violations.

Another example can be found in Florida’s law setting forth the authority of law enforcement officers, that provides a very long list of the specific violations for which local law enforcement may arrest without a warrant. The list begins with:

(1) The person has committed a felony or misdemeanor or violated a municipal or county ordinance in the presence of the officer. An arrest for the commission of a misdemeanor

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73 See Section IV, infra.

74 Gonzales, 722 F.2d at 476-77.

75 Santana-Garcia, 264 F.3d at 1194, n. 8.


77 Fla. Stat. § 901.15.
or the violation of a municipal or county ordinance shall be made immediately or in fresh pursuit.\textsuperscript{78}

Under the Santana-Garcia/Gonzales approach, a state or local law enforcement officer in Florida can only arrest for a federal misdemeanor (such as illegal entry) “immediately” after it occurred or shortly thereafter, “in fresh pursuit.” The Florida statute does not appear to provide any state or local authority for a federal civil violation such as “illegal presence.” Similarly, Alabama’s statute only permits arrest “[i]f a public offense has been committed . . . in the presence of the officer.”\textsuperscript{79}

\textit{Common law}

Although often now codified in state codes, the misdemeanor arrest rule began as a creature of common law.\textsuperscript{80} In states where the statutory code does not grant the officers specific

\begin{itemize}
\item \textsuperscript{78} Id. (emphasis added).
\item \textsuperscript{79} Ala. Code § 15–10–3(a)(1).
\item \textsuperscript{80} See, generally, Atwater v. Lago Vista, 532 U.S. 318 (2001). In Atwater, the Supreme Court addressed whether the Fourth Amendment prohibited arrest for nonjailable offenses (in that case, a seatbelt violation). The offense in Atwater was committed “in the presence” of the officer and
\end{itemize}
powers to arrest, the common law must also be examined in determining whether there is a limit on the “implicit authority” of state and local law enforcement to investigate and enforce federal law.

A succinct statement of the historic common law misdemeanor arrest rule is found in a New Jersey case:

A policeman, by reason of his official position, cannot arrest people at his pleasure without a warrant, because the policeman suspected that a person was a gangster or undesirable citizen. There can be no arrest without a warrant on mere suspicion or hearsay in case of a misdemeanor. In case of an ordinary misdemeanor a police officer cannot arrest the offender without a warrant unless he is present at the time of the offense.

....

In Webb v. State, 51 N. J. Law, 189, 17 A. 113, Chief Justice Beasley declared that: ‘It has always been, in the common law, the rule that a constable or other peace-officer therefore, did not involve the application of the common-law misdemeanor rule that is the subject of this article. However, in deciding the Fourth Amendment issue and examining the reasonableness of a warrantless misdemeanor arrest for a nonjailable offense, the Court examined in depth the historical contours of the misdemeanor arrest authority. Id. at 326-345.

The Court addressed whether at common law misdemeanor arrests were limited to circumstances involving a “breach of the peace” committed in an officer’s presence. The Court ultimately concluded that the common law was largely unclear (and riddled with statutory exceptions) as to the authority of officers to arrest when no violence had occurred. Id. at 335. Although the Court did not address the significance of whether the offense was committed in the officer’s presence or not, notably, the historical examples of misdemeanors for which arrests could be made by an officer all involved crimes that would have been committed in the officer’s presence. See, id. at 337-38.
could not take the offender, unless in some instances where the offense had been committed in his presence. This is the principle that has also always prevailed in this state.’ The rule seems also to be one of general observance throughout the states of the Union. In 5 Corpus Juris, 395, it is said that ‘it has always been the rule that except in cases where the public security has demanded it, arrest without a warrant has been deemed to be unlawful,’ citing numerous cases.\textsuperscript{81}

In fact, at least twenty-six states do not have a statutory law that contradicts the common-law misdemeanor arrest rule.\textsuperscript{82} Accordingly, the application of the common-law rule must be examined state by state in order to determine the exact authority of state and local law enforcement officers to enforce federal immigration law. For example, New Mexico follows the common-law misdemeanor arrest rule.\textsuperscript{83} However, New Mexico, both by statute and New Mexico Supreme Court authority, has carved out explicit exceptions to the rule in cases involving domestic violence and driving while intoxicated.\textsuperscript{84} These exceptions actually

\textsuperscript{81} State v. Preiskel, 13 N.J. Misc. 736, 738-739, 180 A. 776, 777 (N.J.Sup. 1935). See also Main v. McCarty, 15 Ill. 441 (holding that the power to arrest without a warrant, “for breaches of the peace or threats to break it, exists in cases where the act was not done or threat uttered in the presence of the officer, when the charge is fresh made, and the officer was required to make the arrest. In all other cases, however, the authorities are uniform, a constable or policeman has no authority to make an arrest without a warrant.”) (Citations omitted.)

\textsuperscript{82} See footnote 87, infra..

\textsuperscript{83} State v. Ochoa, 143 N.M. 749, 753, 182 P.3d 130, 134 (2008).

\textsuperscript{84} Id., citing N.M. Stat. Ann. § 31–1–7(A) (1979) (“Notwithstanding the provisions of any other law to the contrary, a peace officer may arrest a person and take that person into custody without a warrant when the officer is at the scene of a domestic disturbance and has probable cause to believe that the person has committed an assault or a battery upon a household member.”); City
underscore the misdemeanor arrest rule as a limit on enforcement of federal law. The legislature and the courts in New Mexico have explicitly excepted from the application of the rule certain categories of violations; all others remain subject to the rule.

**Misdemeanor arrest rules of each state.**

Varying degrees of authority are set forth in misdemeanor arrest rules within the states and territories of the United States. The broadest permit state and local law enforcement to arrest for any “offense”, thereby arguably posing virtually no limitation on the “implicit authority of law enforcement.”\(^85\) Less than half of the states have such laws. At the other end of the spectrum, the most narrow of statutes permit only arrests for offenses of state law, or misdemeanors or crimes committed in the officer's presence.\(^86\) Because illegal presence is only a


\(^86\) Alaska § 12.25.030 (2010); Colorado § 16-3-102 (1977); Delaware, Title 11, § 1904 (1999); Florida § 901.15 (2009); Indiana § 35-33-1-1; Kansas § 22-2401; La.Code Crim. Proc. Ann., Art. 213(3) (1981); Maine, Title 15, § 704 (1954); Maryland § 2-202; Massachusetts Ch. 276, § 28; Michigan § 764.15; Nebraska § 29-404.02; Nevada § 171.172 (1967); New Hampshire § 614:7 (1996); N.M. Stat. Ann. § 3-13-2 (1988); North Carolina § 15A-401 (2011); Ohio § 2935.03
civil violation and not a crime, in the latter group of states, under the Gonzales/Santana-Garcia approach, barring other statutory authorization, state and local law enforcement do not have authority to investigate and enforce federal immigration law, unless an officer happens to be at the point of entry upon commission of the misdemeanor of illegal entry.

*Is illegal entry a “continuing offense”?*

If a state or local law enforcement officer is limited by the statutory or common law misdemeanor rule to investigating or enforcing misdemeanors committed “in their presence,” another question that arises is whether “illegal entry,” a federal misdemeanor, is completed upon entry, or whether it is a “continuing offense.” If the crime is completed upon entry into the United States, the state or local officer is not able to investigate and enforce under the Gonzales/Santana-Garcia approach, unless the officer was present at the time of the entry. If “illegal entry” is a continuing offense, however, then the officer could investigate and enforce “illegal entry” if the individual is “found” by the officer.

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87 Again, this is assuming that the state misdemeanor arrest rule precludes state and local law enforcement from detaining or arresting to enforce civil immigration laws such as illegal presence.

88 8 U.S.C. § 1325

89 It is worth emphasizing that this discussion presumes that the officer otherwise satisfies the reasonable suspicion or probable cause standard of the Fourth Amendment. Again, the issue discussed in this article is whether state and local law enforcement have the authority to enforce
The Supreme Court commented on the issue (albeit in a footnote) in *U.S. v. Cores*.

The issue in *Cores* was the proper venue for an alien crew member who had overstayed the U.S. Immigration and Naturalizations Service’s order granting him permission to be in the country for up to twenty-nine days.

In deeming the crime of overstaying the order a continuing offense (and thus determining that venue was appropriate in any district where it occurred), the Court distinguished the crime of illegal entry. “The offense here is unlike crimes of illegal entry . . . Those offenses are not continuing ones, as ‘entry’ is limited to a particular locality and hardly suggests continuity.”

Currently, two federal immigration statutes are most relevant in determining whether a state and local law enforcement officer has authority to enforce the federal immigration law prohibiting illegal entry. 8 U.S.C. § 1325 prohibits illegal entry the first time it occurs (a misdemeanor). 8 U.S.C. § 1326 prohibits illegal re-entry into the United States (a felony).

In pertinent part, 8 U.S.C. § 1325 makes it a misdemeanor crime for:

Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact.

8 U.S.C. § 1326 provides:

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*The offense here is unlike crimes of illegal entry . . . Those offenses are not continuing ones, as ‘entry’ is limited to a particular locality and hardly suggests continuity.*

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91 Id., 356 U.S. at 409, n. 6.

92 Id.
Any alien who
(1) has been arrested and deported or excluded and deported, and thereafter
(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior
to his reembarkation at a place outside the United States or his application for admission
from foreign contiguous territory, the Attorney General has expressly consented to such
alien’s reapplying for admission; or (B) with respect to an alien previously excluded and
deported, unless such alien shall establish that he was not required to obtain such advance
consent under this chapter or any prior Act, shall be guilty of a felony, and upon
conviction thereof, be punished by imprisonment of not more than two years, or by a fine
of not more than $1,000, or both.93

Some courts have construed 8 U.S.C. § 1325 to be an offense completed upon entry, and
have relied upon the “found in” language of 8 U.S.C. § 1326 to deem a violation a continuing
offense.94 The Third Circuit, however, has relied on the Supreme Court’s comment in Cores to
conclude that neither statute constituted a “continuing offense.”95 Illegal entry is a misdemeanor,

93 Emphasis added.

94 See United States v. Rincon-Jiminez, 595 F.2d 1192, 1194 (9th Cir. 1979) (“illegal entry is not
a ‘continuing offense’”); U.S. v. Ramirez-Rodriguez 11 Fed.Appx. 894, 896 (9th Cir. 2001)
(“The crime of being ‘found in’ the United States is a continuing offense that begins with the
illegal entry and is completed when the “alien is discovered and identified by the immigration
authorities.””) quoting Ruelas-Arreguin, 219 F.3d at 1061, in turn quoting United States v.
Hernandez, 189 F.3d 785, 791 (9th Cir.1999); U.S. v. Reyes-Nava, 169 F.3d 278, 280 (5th Cir.
1999) (“As a continuing offense, the illegal entry [under 8 U.S.C. § 1326] was not completed
until the INS found Reyes in 1997.”).

95 U.S. v. DiSantillo, 615 F.2d 128, 136 -137 (3d Cir. 1980). The Court also concluded
that the “the INS actively sought a specific venue provision for the offense described in § 1326
because it assumed that the offense was not continuing[,]” and noted the addition of 8 U.S.C. §
1329, which provides in relevant part that “(n)otwithstanding any other law, such prosecutions or
while illegal *reentry* is a felony punishable by up to two years (depending on the reason for the underlying removal). Accordingly, while a state or local law enforcement officer subject to the misdemeanor arrest rule arguably would have authority to investigate for the crime of *reentry*, he or she would not have the authority to investigate an initial unlawful entry into the United States, since the latter would amount to a misdemeanor completed upon entry and that was not committed in the officer’s presence. The former, however, would require particularized suspicion of “reentry,” which is unlikely to arise in a manner that would distinguish it from mere investigation of initial entry.

**IV.** ESTABLISHED AND WELL-DEFINED STATE PUBLIC POLICIES AS LIMITS ON AUTHORITY TO ENFORCE IMMIGRATION LAWS.

In addition to the misdemeanor arrest rule, another determinant of whether a state law that is “contrary” to the implicit authority exists is whether there is “established and well-defined” public policy in a state. The analysis is the same as under the misdemeanor arrest rule.

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suits may be instituted at any place in the United States at which the violation may occur or at which the person charged with a violation under section 1325 or 1326 of this title may be apprehended.” The Court construed §§ 1325 and 1326 against the backdrop of §1329 to hold that the venue statute meant that the offenses were not continuing, but rather complete at the time of entry. Therefore, the specific venue statute was necessary in order to commence an action under the statutes prohibiting illegal entry or re-entry. Id. at 136-37 and n. 10.

96 See, e.g., Burk v. K-Mart Corp., 770 P.2d 20, 29 (Okla. 1989) (defining the tort of wrongful discharge as protecting an employee “who is discharged for refusing to act in violation of an established and well-defined public policy or for performing an act consistent with a clear and compelling public policy.”); United Paperworkers Int’l v. Misco, Inc., 484 U.S. 29, (1987) and
First, federal law directs one to state law to determine whether state and local law enforcement have authority to enforce federal immigration law.\textsuperscript{97} In turning to state law, separate from the application of a misdemeanor arrest rule is whether the state has developed “established and well-defined public policy” that impliedly prohibits its state and local law enforcement officers from enforcing federal immigration laws. Evidence of such public policies must be found in statutes, case law, and administrative decisions.\textsuperscript{98} Among those, the strongest demonstrations of public policies that limit the authority of state and local law enforcement officers are: a) explicit prohibitions on enforcement of federal immigration laws; b) state laws providing that driver’s licenses may be obtained without proof of citizenship; c) a state’s refusal to enter into a memorandum of agreement pursuant to 8 U.S.C. § 1357(g) (“287(g)” agreements); d) state constitutional provisions that provide broader search and seizure protections; and e) executive orders providing protections to undocumented immigrants and restraining state and local law enforcement from enforcing federal immigration laws.

\textit{Oregon’s explicit prohibition on collaboration.}

Only one state has explicitly adopted legislation prohibiting the expenditure of state resources on enforcement of federal immigration law.\textsuperscript{99} Oregon has prohibited state and local

\begin{quote}
\end{quote}

\textsuperscript{97} See Section II, supra.


\textsuperscript{99} O.R.S. § 181.850. Enforcement of federal immigration laws
law enforcement from using state resources to pursue undocumented immigrants.\textsuperscript{100} This statement of public policy satisfies the “established and well-defined” public policy test. In addition, since Oregon falls within the jurisdiction of the Ninth Circuit, which requires that a state “affirmatively authorize” state and local law enforcement officers to enforce federal immigration law,\textsuperscript{101} there can be little doubt that Oregon law enforcement is prohibited from enforcing such laws. The statutory statement likely even satisfies the “state law to the contrary” test of \textit{Santana-Garcia}.\textsuperscript{102}

\begin{flushleft}
(1) No law enforcement agency of the State of Oregon or of any political subdivision of the state shall use agency moneys, equipment or personnel for the purpose of detecting or apprehending persons whose only violation of law is that they are persons of foreign citizenship present in the United States in violation of federal immigration laws. [Last amended 2003]
\end{flushleft}

The Legislatures of Alaska and Montana have passed non-binding resolutions:

Alaska House Joint Resolution 22, 23d Legislature, 1\textsuperscript{st} session (2003):

FURTHER RESOLVED that an agency or instrumentality of the state may not, (1) use state resources or institutions for the enforcement of federal immigration matters, which are the responsibility of the federal government

Montana Senate Joint Resolution No. 19, 59\textsuperscript{th} Legislature, Regular Session (2005):

BE IT FURTHER RESOLVED, that the 59th Montana Legislature admonishes every agency and instrumentality of the state to not:(1) use state resources or institutions for the enforcement of federal immigration matters that are the responsibility of the federal government

\textsuperscript{100} Steve Salvi, The Original list of Sanctuary Cities, USA, www.ojppac.org/sanctuary.asp.

\textsuperscript{101} Gonzales, 722 F.2d at 475.

\textsuperscript{102} Santana-Garcia, 264 F.3d at 1194.
Driver's license statutes as limits on authority to enforce federal law

Three states -- Washington, Utah, and New Mexico -- do not require proof of citizenship to obtain a driver’s licenses. In these states, the authority to enforce federal immigration law is curbed for two reasons. First, permitting immigrants to obtain driver’s licenses is in itself an “established and well-defined public policy” that limits the authority of state and local law enforcement to enforce federal immigration violations. Second, in the context of an initial traffic stop, the reasonableness of the inquiry is more limited, given that a driver’s license can be obtained without proof of citizenship. Take the incident set forth in the introduction of this article involving Ramon Eduardo Dorado Mendoza as an example. Mr. Mendoza provided the Albuquerque Aviation Police with all the necessary paperwork (i.e., driver’s license, registration, proof of insurance) in order to satisfy the requisite law enforcement inquiry of an initial stop for speeding. Under settled Fourth Amendment precedent, Mr. Mendoza should have been issued a citation for speeding and released. Further detention of Mr. Mendoza to investigate his immigration status was unreasonable under the Fourth Amendment, even if the Aviation police computer showed a discrepancy with his social security number, because a social security number is not necessary to obtain a driver’s license in New Mexico.

A New Mexico law, passed by the state legislature in 2003 and signed into law by then-Governor Richardson, mandates the issuance of a driver’s license to foreign nationals, who may provide “a taxpayer identification number as a substitute for a social security number regardless

103 Oregon’s governor recently announced an effort to adopt a similar law.

http://www.oregonlive.com/politics/index.ssf/2012/05/gov_kitzhaber_promises_action.html

104 Terry v. Ohio, 392 U.S. 1, 27-30 (1968); see also Section II, supra.

of immigration status.” 106 Similarly, Utah’s law provides that an individual may obtain a driver’s “privilege” without a social security number. 107 However, Utah has also adopted legislation similar to Arizona’s SB 1070. 108 Accordingly, the “public policy” limit of Utah’s driver’s license law stands significantly weakened and has little effect as a limit on law enforcement authority. Finally, Washington provides that the Department of Motor Vehicles may waive requirements for documents that would prove citizenship, “if it finds that other documentation clearly establishes the identity of the applicant.” 109

New Mexico and Washington have articulated an established and well-defined public policy of permitting undocumented immigrants to obtain driver’s licenses. Because the policy runs counter to an argument for authority of state and local law enforcement to enforce federal immigration law, and limit the reasonableness inquiry in the context of a traffic stop, these statements must be read as additional limits on the enforcement of federal law by state and local actors.

106 Id.
107 U.C.A. § 53-3-207.
109 RCW 46.20.035 Proof of Identity:
The department may not issue an identicard or a Washington state driver’s license that is valid for identification purposes unless the applicant meets the identification requirements of subsection (1), (2), or (3) of this section.

. . . .

(3) A person unable to provide identifying documentation as specified in subsection (1) or (2) of this section may request that the department review other available documentation in order to ascertain identity. The department may waive the requirement if it finds that other documentation clearly establishes the identity of the applicant. Notwithstanding the requirements in subsection (2) of this section, the department shall issue an identicard to an applicant for whom it receives documentation pursuant to RCW 74.13.283.

. . . .
Refusal to enter into 287(g) agreements

The Immigration and Naturalization Act was amended in 1997 to include “287(g) agreements.” A 287 (g) agreement “allows a state and local law enforcement entity to enter

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110 INA Section 287(g) is codified at 8 U.S.C. § 1357(g) and provides

g) Performance of immigration officer functions by State officers and employees

(1) Notwithstanding section 1342 of Title 31, the Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.

(2) An agreement under this subsection shall require that an officer or employee of a State or political subdivision of a State performing a function under the agreement shall have knowledge of, and adhere to, Federal law relating to the function, and shall contain a written certification that the officers or employees performing the function under the agreement have received adequate training regarding the enforcement of relevant Federal immigration laws.

(3) In performing a function under this subsection, an officer or employee of a State or political subdivision of a State shall be subject to the direction and supervision of the Attorney General.

(4) In performing a function under this subsection, an officer or employee of a State or political subdivision of a State may use Federal property or facilities, as provided in a written agreement between the Attorney General and the State or subdivision.

(5) With respect to each officer or employee of a State or political subdivision who is authorized to perform a function under this subsection, the specific powers and duties that may be, or are required to be, exercised or performed by the individual, the duration of the authority of the individual, and the position of the agency of the Attorney General who is required to supervise and direct the individual, shall be set forth in a written agreement between the Attorney General and the State or political subdivision.

(6) The Attorney General may not accept a service under this subsection if the service will be used to displace any Federal employee.

(7) Except as provided in paragraph (8), an officer or employee of a State or political subdivision of a State performing functions under this subsection shall not be treated as a Federal employee for any purpose other than for purposes of chapter 81 of Title 5 (relating to compensation for injury) and sections 2671 through 2680 of Title 28 (relating to tort claims).
into a partnership with ICE, under a joint Memorandum of Agreement (MOA), in order to receive delegated authority for immigration enforcement within their jurisdictions.”

Only a minority of state law enforcement agencies have entered into them. According to ICE, only the states of Alabama, Arizona, Colorado, Florida, Georgia, and Tennessee have 287(g) agreements between the state’s department of public safety and ICE. To a limited extent, this supports an argument that public policy of certain states stand to the contrary given the affirmative

(8) An officer or employee of a State or political subdivision of a State acting under color of authority under this subsection, or any agreement entered into under this subsection, shall be considered to be acting under color of Federal authority for purposes of determining the liability, and immunity from suit, of the officer or employee in a civil action brought under Federal or State law.

(9) Nothing in this subsection shall be construed to require any State or political subdivision of a State to enter into an agreement with the Attorney General under this subsection.

(10) Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State--

(A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or

(B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.


112 http://www.ice.gov/news/library/factsheets/287g.htm#signed-moa

113 Municipalities and state agencies are able to enter into 287(g) agreements as well. For example, various correction departments have 287(g) agreements with ICE, even in states with the state law enforcement agency does not. Id.
pronouncements with regard to other federal law enforcement collaborations.\textsuperscript{114} However, the strength of this refusal as an affirmative public policy statement is weakened by the various reasons for declining to enter into 287(g) agreements by state and local officials, including a reluctance by local officials to heed federal priorities in enforcement, as well as supervision and detention costs.\textsuperscript{115} These reasons do not, however, necessarily demonstrate a general reluctance to engage state and local law enforcement in federal immigration enforcement.

\textit{State constitutional search and seizure provisions provide broader protections that limit the authority.}

Further evidence that certain states do not authorize their officers to enforce federal immigration misdemeanors or civil violations can be found in state constitutional departures from federal Fourth Amendment precedent. Most pertinent to the issue at hand is the approach to warrantless arrests to nonjailable offenses addressed in the United States Supreme Court case of

\textsuperscript{114} Certainly, when state legislatures decide they do want to collaborate with federal law enforcement, they are able to do so. Furthering strengthening the significance of the refusal to enter into 287(g) agreements is the existence of other state/federal collaborations in certain states. See, e.g. N.M. Stat. 29-1-10 [Law enforcement agencies, state and local; participation in federal programs]: “All state and local law enforcement agencies are hereby authorized to participate in the Federal Law Enforcement Assistance Act of 1965.”

Atwater v. City of Lago Vista,116 which several states have rejected on state constitutional grounds.

In a 5 to 4 decision, the United States Supreme Court in Atwater held that a warrantless arrest for a nonjailable offense (in that case, a seatbelt violation) did not violate the Fourth Amendment. In dissent, Justice O’Connor criticized the majority’s analysis in Atwater as having “mint[ed] a new rule … that is not only unsupported by our precedent, but runs contrary to the principles that lie at the core of the Fourth Amendment” that mandated a balancing of the interests in order to ensure that reasonableness accompanied probable cause.117

Several states have rejected the Supreme Court’s approach in Atwater and have instead adopted Justice O’Connor’s dissent in interpreting their respective state constitutions.118 Among

117 Atwater, 532 U.S. at 361, (O’Connor, J., dissenting).
118 State v. Bauer, 307 Mont. 105, 111, 36 P.3d 892, 897 (Mont. 2001) (“We hold that under Article II, Section 10 and Section 11, of the Montana Constitution, it is unreasonable for a police officer to effect an arrest and detention for a non-jailable offense when there are no circumstances to justify an immediate arrest.”); State v. Brown, 2001 WL 1657828, 2001-Ohio-7073 (Ohio App. 2 Dist. Dec 28, 2001) (No. 18972) (“Ohio’s state constitutional search and seizure jurisprudence need not track the federal jurisprudence so long as it affords no less protection than Fourth Amendment jurisprudence . . . We are far from convinced that the supreme court would overrule [its precedent], on the strength of Atwater, a 5-4 decision.); State v. Harris, 916 So.2d 284 (La.App. 5 Cir. Aug 26, 2005) (“Considering Louisiana cases, we conclude that an officer’s exercise of the discretion to arrest for a minor misdemeanor offense must be reasonable rather than arbitrary. Accordingly, the trial judge must find that in addition to
these cases, *State v. Askerooth*, a Minnesota case, provides insight into why broad state constitutional search and seizure protections stand as contrary to the authority of state and local law enforcement to investigate and enforce federal immigration law. In *Askerooth*, the driver was stopped for failing to obey a stop sign.

After making the stop, the officer learned that Askerooth did not have a driver's license. The officer asked Askerooth to get out of his van, conducted a pat-down search for weapons, and then confined Askerooth in the back seat of the officer's squad car. After identifying Askerooth, the officer asked for and received consent to search the van. He searched the van with the assistance of two other officers who arrived at the scene. Following the search, the officer issued citations for the driving offenses, after which he permitted Askerooth to leave on foot. The officer then searched his squad car and discovered a film canister containing methamphetamine.

Askerooth was charged with fifth-degree possession of a controlled substance. He moved to suppress the methamphetamine on the ground that it was discovered as the result of an unreasonable seizure.

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119 State v. Askerooth, 681 N.W.2d 353 (Minn. 2004).

120 Askerooth, 681 N.W.2d at 357.
Though noting that it would not “cavalierly” depart from federal precedent, the Minnesota Supreme Court held that following *Atwater* “would threaten the integrity and coherence” of the search and seizure provisions of the state constitution.

Schmidt’s confinement of Askerooth in the squad car was not reasonably related to the investigation of Askerooth’s failure to obey a stop sign, nor was it reasonably related or necessary to Schmidt’s investigation of Askerooth’s statement that he did not have a driver’s license.

Little distinction exists between the lack of reasonableness in detaining someone for a minor, nonjailable traffic violation and detaining them to make inquiry into a misdemeanor illegal entry or an civil immigration violation such as illegal presence. In states where the courts have interpreted their state constitution in a way that rejects *Atwater*, there exists another argument for the limit on the ability of state and local law enforcement to investigate and enforce federal immigration law. Although this limit, unlike the pure application of the misdemeanor arrest rule, is based on a question of reasonableness tested in the context of specific facts, that does not preclude application of the principle as a limit on the authority of state and local law enforcement officers. Indeed, a statement such as the Minnesota Supreme Court’s in *Askerooth* satisfies the “established and well-defined” test for public policy.

As set forth above, New Mexico law does not require proof of citizenship to obtain a driver’s license. Thus the check of Mr. Mendoza’s social security number, even if it did not constitute a Fourth Amendment violation, would result in an unreasonable detention in violation of the Minnesota state constitution’s analog discussed in *Askerooth*. The same is true in other

121 Id. at 362, citing State v. Fuller, 374 N.W.2d 722, 726-27 (Minn.1985)

122 *Askerooth*, 681 N.W.2d at 363.

123 *Askerooth*, 681 N.W.2d at 369-70.
states where search and seizure provisions are interpreted in the manner articulated in *Askerooth*, where the “reasonableness inquiry” is much more focused.

*Executive orders*

Further evidence of public policy can be found in executive orders issued by state governors. Typically, executive orders addressing immigration either direct state agencies not to enforce federal immigration laws or declare the state a “sanctuary” for undocumented immigrants. Executive orders stand as the most unreliable example of public policy, since they are the most subject to change. For example, in 1986, then-New Mexico Governor Toney Anaya declared the state a “sanctuary” for refugees from Nicaragua and Guatemala. Subsequently, his successor, Governor Gary Carruthers, rescinded Governor Anaya’s Executive Order in 1987. In 2005, then-Governor Bill Richardson of New Mexico issued Executive Order 2005-019:

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125 http://www.apnewsarchive.com/1986/Governor-Declares-New-Mexico-a-State-of-Sanctuary/id-d7a423dd40562bb6757b516693d89243

126 http://www.apnewsarchive.com/1987/Carruthers-Rescinds-Anaya-Sanctuary-Proclamation/id-37a6f953fc99fb510c8f0dc61eb4baa0?SearchText=;Display_
Now therefore, I, Bill Richardson, Governor of the State of New Mexico, by the authority vested in me by the Constitution and the Laws of the State of New Mexico do hereby order that: 1) State Law Enforcement officers shall not inquire about a person’s immigration status for the sole purpose of determining whether that person is present in the United States in violation of federal civil immigration law; and 2) State Law Enforcement officers shall not inquire about the immigration status of crime victims, witnesses, or others who call or approach the police seeking assistance.

Subsequently, New Mexico Governor Susana Martinez rescinded it. Nonetheless, current executive orders may provide evidence of “established and well-defined public policy.”

Rhode Island Governor Lincoln Chafee rescinded a 2008 Executive Order that directed state departments and vendors to use the federal E-Verify database to check the legal status of new hires and that required state police to enter an agreement with federal immigration authorities. In 2004, Governor John E. Balducci of Maine issued an Executive Order that “All State agencies with law enforcement, investigative or prosecutorial authority shall not inquire about a person’s immigration status unless investigating or prosecuting illegal activity other than mere status as an undocumented alien.” Again, although weakened by the ease with which

127 New Mexico Executive Order 2011-009: Rescinding and Superseding Prior Executive Order Providing Sanctuary for Individuals Arrested for Crimes Other than Violation of Immigration Laws

128 See footnote 125.


b. All State agencies with law enforcement, investigative or prosecutorial authority shall not inquire about a person’s immigration status unless investigating or prosecuting illegal activity other than mere status as an undocumented alien.
they may be revoked by successors in office, such orders can constitute support for an argument that a specific state’s public policy prohibits state and local law enforcement of federal immigration law.

c. It shall be the policy of all State agencies with law enforcement, investigative or prosecutorial authority not to inquire about the immigration status of crime victims, witnesses, or others who call or approach these agencies seeking assistance.


In 2011, the Mayor of the District of Columbia issued Mayor’s Memorandum 2011-174 (D.C. 2011):

II. Disclosure of Immigration Status. B. Policy and Procedures:
   4. No person shall be detained solely on the belief that he or she is not present legally in the United States or that he or she has committed a civil immigration violation. The Department of Corrections shall not send lists of foreign-born inmates to the Department of Homeland Security.
   5. Law enforcement officers shall not make arrests solely based on administrative warrants for arrest or removal entered by ICE into the National Crime Information Center database of the Federal Bureau of Investigation, including administrative immigration warrants for persons with outstanding removal, deportation, or exclusion orders. Enforcement of the civil provisions of United States immigration law is the responsibility of federal immigration officials.

Finally, Vermont Attorney General William Sorrell has asked police in Vermont to adopt a “don't ask, don't tell” approach to immigration status. Police departments in Vermont will get a copy of the request but are not required to adopt the attorney general’s policy. Steve Salvi, http://www.ojjpac.org/sanctuary.asp.
V. CONCLUSION

In holding that state and local enforcement are not preempted by federal law when making inquiry into immigration status, the Supreme Court in Arizona has once again directed the focus of enforcement of immigration law to an unusual place, to wit: state law. Unless and until federal action is taken to engage in comprehensive reform of the United States’ approach to immigration, state experimentation is likely to reoccur. Advocates on both sides will ask the courts to examine what limits exist on state authority, and whether state misdemeanor arrest laws and state public policies curb the ability of local actors to enforce federal immigration law. Courts should heed these potential limits on the “implicit authority” doctrine to ensure that a state’s chosen approach to immigration enforcement is fully understood and honored.

August 20, 2012

131 132 S.Ct. at 2509.