Insecure Communities: Examining Local Government Participation in U.S. Immigration and Customs Enforcement’s “Secure Communities” Program

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Suffering global economies, war, ethnic and racial tensions, natural disasters, and other exigencies have led to a steady stream of immigrants to the United States. They seek jobs, refuge, asylum, and better opportunities. In fiscal year 2010, the United States Immigration and Customs Enforcement (“ICE”) removed a record-setting 392,000 undocumented immigrants, half of which were convicted criminals.¹ Yet, a careful look behind this impressive number would undoubtedly reveal families torn apart by the removals of undocumented spouses, parents, siblings, and children convicted only of non-violent crimes, traffic violations, or other minor infractions.² ICE’s own data shows that 79% of people deported through its “Secure Communities” (“S-Comm”) program are non-criminals, or were detained for lower level offenses such as traffic violations.³ Try as it might, the United States Government has not yet found a successful way to deter illegal immigration, nor has it developed satisfactory immigration reform. S-Comm is just one of many initiatives designed to identify and deport people in the U.S. without legal permission, specifically those convicted of crimes.

This Article considers ICE’s S-Comm program, options for local law enforcement agencies and local governments to resist complying with it, and way to implement the program less stringently in cases involving non-criminal undocumented immigrants. In this consideration, this Article explores the potential and actual problems that arise with S-Comm, as well as the legal framework for local enforcement of federal immigration laws. This Article includes specific examples of immigration enforcement and non-compliance in several counties in California, including Los Angeles, Santa Clara, and San Francisco. Finally, this Article suggests improvements the Federal Government should make to S-Comm to ensure that the program is just and constitutional.


³ See American Civil Liberties Union (“ACLU”), Statement on Secure Communities (Nov. 10, 2010), available at http://www.aclu.org/immigrants-rights/aclu-statement-secure-communities (describing the dangers associated with S-Comm and stating, “Because it targets people at the time of arrest, S-Comm captures people who will never be charged with a state crime—including crime victims, witnesses, and individuals subjected to unconstitutional arrests.”).
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INTRODUCTION

Historically, immigration enforcement in the United States has primarily been the task of the Federal Government. Criminal law enforcement, on the other hand, has been state governments’ responsibility. Though this division of enforcement remained intact for many years, it is changing. Since the mid-1990s, state and local governments have become much more engaged in immigration enforcement. 287(g) agreements, state and local law enforcement cooperation with immigration authorities, and legislation such as Arizona S.B. 1070 break down the traditional division between immigration enforcement and criminal law enforcement. U.S. Immigration and Customs Enforcement’s (“ICE”) “Secure Communities” program (“S-Comm”) is part of the breakdown of this division of enforcement.

This Article examines S-Comm and its effects on local law enforcement agencies (“LLEAs”), local governments, and immigrant communities, and calls for changes to the program that should be made if it is to be implemented nationwide. Part I describes the steps involved in the S-Comm information-sharing process. Part II discusses S-Comm’s potential and actual effects on public safety, family unity, and civil rights. Part III examines the question of whether S-Comm exceeds the powers of the Federal Government. Part IV looks at Sanctuary Cities and other methods of resistance to S-Comm. This Article concludes with suggestions for reforming S-Comm to reduce its detrimental effects.

I. THE SECURE COMMUNITIES INFORMATION-SHARING PROCESS

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

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5 Congress passed Section 287(g) of the Immigration and Nationality Act (8 U.S.C.A. § 1357(g)) in 1995, enabling state and local law enforcement agencies to enter into agreements with the Federal Government such that they may enforce immigration laws. See infra p.15.


7 See supra note 4; infra Part III.


more than 62,000 undocumented immigrants convicted of crimes. This number includes more than 12,200 “criminal aliens” convicted of serious crimes, and over 29,500 “criminal aliens” convicted of less serious crimes. According to ICE, “criminal aliens” are undocumented immigrants convicted of a crime. However, undocumented immigrants charged with crimes, but not yet convicted, are not considered to be “criminal aliens.”

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

Though ICE hopes to implement S-Comm nationwide by 2013, the agency is focusing first on “criminal aliens in locations where analysis determines they are most likely to reside.” As of March 1, 2011, S-Comm was in place in 1,074 jurisdictions in thirty-nine states. For example, only 3% of jurisdictions in Iowa, 2% of jurisdictions in Kansas, and 1% of jurisdictions in Kentucky had been activated as of March 7, 2011. No jurisdictions in Alabama, Alaska, Indiana, Maine, Minnesota, New Hampshire, New Jersey, North Dakota, Rhode Island, Washington, or Vermont had been activated as of that same date. In contrast, 100% of jurisdictions in Arizona, California, Delaware, Florida, New Mexico, Texas, Virginia, West Virginia, and Wisconsin had been activated as of February 25, 2011.

The processes used in S-Comm were designed to build on ICE’s Criminal Alien Program (“CAP”), which identifies and places deportable non-citizens into deportation proceedings.
CAP is currently used in all state and federal prisons.\textsuperscript{22} CAP identifies, processes, and removes criminal aliens incarcerated in federal, state and local prisons and jails throughout the U.S. ICE created to prevent criminal aliens from being released into the general public. The program secures a final removal order, prior to the termination of criminal aliens’ sentences, whenever possible.

S-Comm was intended to increase public safety by prioritizing the identification and removal of undocumented immigrants with criminal convictions. S-Comm seeks to achieve this goal by enlisting LLEAs to submit the fingerprints of arrestees to the State Identification Bureau (“SIB”) at the time of each booking.\textsuperscript{23} ICE requests that LLEAs submit fingerprints electronically to the Integrated Automated Fingerprint Identification System (“IAFIS”) as soon as possible during the booking process.\textsuperscript{24} The SIB then transmits the fingerprints electronically to the FBI Criminal Justice Information Services (“CJIS”) Division.\textsuperscript{25} State participants in the National Fingerprint File Program send fingerprints to the CJIS Division at the time of the individual’s initial arrest.\textsuperscript{26} CJIS’s receipt of the ten fingerprints initiates both IAFIS and US-VISIT Automated Biometric Identification System (“IDENT”) searches.\textsuperscript{27} If an IDENT search matches a fingerprint, CJIS automatically sends an Immigration Alien Query to the ICE Law Enforcement Support Center (“LESC”) in order to verify the individual’s criminal history and immigration status.\textsuperscript{28} LESC then creates and sends an Immigration Alien Response (“IAR”) to the CJIS and the local ICE Detention and Removal Operations (“DRO”) Office within four hours of fingerprint submission to IAFIS and IDENT.\textsuperscript{29}

After receiving the IAR from the LESC, ICE determines whether to issue a detainer. If ICE concludes that a non-citizen is charged with a Level 1 offense or if he or she has a Level 1 conviction that could result in removal, ICE files an Immigration Detainer. ICE files Detainers at the time the undocumented immigrant is booked with the LLEA with custody of the individual.\textsuperscript{30} Although ICE claims that S-Comm “prioritizes enforcement action toward the greatest threats to public safety” through the removal of “criminal aliens” convicted of crimes such as homicide, kidnapping, rape, and threatening national security (Level 1 offenders), the program permits ICE discretion regarding processing of Level 2 and 3 offenders.\textsuperscript{31} This

\textsuperscript{22} ICE-SIB AGREEMENT, supra note 11.
\textsuperscript{24} Id. at 7. IAFIS, the “largest biometric database in the world,” is a national system available twenty-four hours a day to help solve and prevent crime through fingerprint searches, criminal history, alias, and image databases, and electronic exchange of fingerprints. Integrated Automated Fingerprint Identification System, FED. B. INVESTIG., http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis (last visited Nov. 19, 2010).
\textsuperscript{25} SOP, supra note 23, at 3.
\textsuperscript{26} Id.
\textsuperscript{27} Id. at 3.
\textsuperscript{28} Id.
\textsuperscript{29} Id. at 7, § 3.1.6.
\textsuperscript{30} Id. at 5. § 2.1.5.
\textsuperscript{31} Id. at 7, § 3.2.
discretion may result in ICE unnecessarily detaining and removing undocumented immigrants with only minor convictions or even no convictions at all.\textsuperscript{32}

Under S-Comm, only ICE determines the individual’s “alienage” and removability after a detainer is issued. ICE makes that determination based on an interview it conducts in person or via telephone or video teleconference.\textsuperscript{33} However, an ICE field office will issue detainers, as deemed “appropriate,” with the LLEA.\textsuperscript{34} If the undocumented immigrant is released before ICE issues a detainer, ICE may request information about the individual’s location and identification from the LLEA.\textsuperscript{35} Pursuant to the Immigration Detainer, ICE should assume custody of the undocumented immigrant within forty-eight hours (not counting Saturdays, Sundays, or federal holidays) of notification of an immigrant’s release. After taking undocumented immigrants convicted of serious criminal offenses into custody, ICE will take “immediate action” to remove them.\textsuperscript{36}

According to ICE, “The biometric information sharing capability [involved in S-Comm] takes place at a federal level and happens automatically when a subject’s fingerprints are submitted upon booking. This automatic process requires no change to law enforcement’s daily operations.”\textsuperscript{37} Further, ICE’s Memorandum of Agreement (“MOA”) between DHS/United States Immigration and Citizenship and Immigration Services (“USCIS”) and SIBs states:

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

Despite the MOA, ICE requests LLEAs abide by conditions stated in the Immigration Detainer. These conditions include not detaining an undocumented immigrant for a period exceeding forty-eight hours, informing ICE if the subject is transferred or released, filing the detainer in the subject’s record or file, allowing ICE Officers and Agents access to detainees, assisting ICE in acquiring booking and/or detention information about detainees, complying with CJIS and United States Visitor and Immigrant Status Indicator Technology rules, and including S-Comm


\textsuperscript{33} SOP, supra note 23, at 8, § 3.2.1.

\textsuperscript{34} Id. at 8, § 3.1.7.

\textsuperscript{35} Id. at 5, § 2.1.5.

\textsuperscript{36} Id. at 8, § 3.2.4. “Normally, ICE will not remove an alien until pending criminal charges are adjudicated. If ICE wishes to remove an alien whose charges have not been adjudicated, ICE will make all efforts to inform the local LEA, the prosecutor and the court with jurisdiction over the criminal offense on the status of the subject’s removal proceedings.” Id. at § 3.2.5.


\textsuperscript{38} ICE-SIB AGREEMENT, supra note 11.
in community policing and other outreach activities. In fact, in order to take part in S-Comm and provide DHS with fingerprint data, LLEAs must make changes to their current technology or install new fingerprinting equipment.

Despite detailed instructions, ICE’s S-Comm SOP does not cover all local implementation issues. For example, the SOP does not define what a “Law Enforcement Agency” is, which is problematic because cities have varying arrest policies. This is just one of the many problems that arose with S-Comm’s execution. Part II below expounds upon these consequences, both intended and unintended.

II. A NATION OF “SECURE” COMMUNITIES: THE EFFECTS OF S-COMM

In 2008, the year S-Comm began, ICE implemented the program in just fourteen jurisdictions. As of March 1, 2011, 1,074 jurisdictions in thirty-nine states employed the program, and DHS is on track to expand the program to all LLEAs across the country by 2013. Fiscal year (“FY”) 2010 statistics show a 70% increase in removal of “criminal aliens” compared to FY 2008. In 2010, S-Comm’s implementation resulted in the arrest of 21,000 Level 1 offenders, and more than 59,000 “convicted criminal aliens” total. However, ICE’s own data suggest many detainers issued through S-Comm were to non-criminal individuals, or those convicted of Level 2 or 3 crimes. S-Comm has been widely criticized by politicians, attorneys, and law enforcement, as well as immigrant, human rights, and domestic violence victim advocates across the country. Some immigrants’ rights advocates analogize S-Comm to a nationwide version of Arizona’s SB 1070, putting benign offenders (those who miss a stop sign, for example) at risk for deportation.

In February 2010, the Center for Constitutional Rights (“CCR”), the National Day Laborer Organizing Network (“NDLON”), and the Benjamin Cardozo Immigration Justice Clinic filed a Freedom of Information Act (“FOIA”) request for ICE documents concerning S-Comm. In April 2010 the three groups filed a lawsuit in the Southern District of New York “due to the

39 Id.; SOP, supra note 23, at 6, § 2.2.1-8.
41 NATIONWIDE ACTIVATED JURISDICTIONS, supra note 18.
42 Id.
43 Secure Communities Deployment, supra note 17.
urgent public need for the requested records.” 47 ICE responded by releasing many important records, including cumulative data about S-Comm. Information released in response to CCR, NDLON, and Cardozo’s FOIA request revealed that 79% of those deported under S-Comm had no criminal record or had been arrested or detained for low-level offenses. 48 Thirty-two percent of individuals given over to ICE custody as of June 30, 2010 via S-Comm were non-criminals, up from 22% in FY 2009. 49 According to the information ICE released, 26% of S-Comm deportees had no criminal records. 50 However, this number varied greatly by county and by state. For example, 82% of individuals in Travis County, Texas and 54% of individuals deported through S-Comm in Maricopa County, Arizona had no criminal records. 51

Detention and deportation of non-criminal undocumented immigrants are just two of the risks posed by S-Comm’s implementation. Described below are a number of other concerns.

A. Reduction in the Reporting of Crimes

S-Comm is a “source of anxiety” 52 for LLEAs, cities, and counties wanting to maintain a clear distinction between federal immigration enforcement and local law enforcement. Because S-Comm has only recently been deployed on a large scale, it remains unclear what the impact on local law enforcement practices is and will be. Any negative impact in communities with large immigrant populations is of particular concern. If local law enforcement officers are viewed by immigrant communities as enforcers of immigration law, LLEAs may lose the confidence of immigrants. 53 Law enforcement agencies rely on this confidence in order to receive compliance in law enforcement and criminal proceedings. If LEAs expand their duties to include immigration matters, undocumented immigrants will likely feel uncomfortable reporting crime, “thus encouraging criminals to further victimize [immigrant] communities and spread into the community at large.” 54 Criminals may target undocumented immigrants if they know that, as victims, those immigrants and their families and friends are unlikely to cooperate with police who are known to be involved in informing immigration officials of undocumented immigrants. 55 Further, immigrant communities are closely-knit. Once information circulates

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47 Id.
48 Id.
49 Id.
50 Id.
51 Id. Maricopa’s high number may have been a result of the county’s sheriff, who “is notorious for staging indiscriminate immigration raids.” Editorial, Immigration Bait and Switch, N.Y. TIMES, Aug. 18, 2010, at A22, available at http://www.nytimes.com/2010/08/18/opinion/18wed3.html.
53 Interview with Kevin Johnson, Dean, UC Davis School of Law, in Davis, Cal. (Oct. 13, 2010) [hereinafter Dean Johnson Interview].
that arrest, even without conviction, can lead to deportation, there may be a rise in resistance to or evasion of arrest, and an imposition of “new layers of fear and isolation” on immigrants.\(^{56}\)

**B. Explicit or Implicit Racism**

According to ICE, S-Comm reduces ethnic and racial profiling.\(^{57}\) However, data obtained via the CCR/NDLON/Cardozo FOIA request suggests that S-Comm actually contributes to and conceals racial profiling.\(^{58}\) S-Comm enables willing state and local law enforcement officials to stop and arrest individuals based upon their appearance. Those suspected to be undocumented can be arrested and deported.\(^{59}\) Because S-Comm sends fingerprints to ICE at the booking stage, rather than at charging or conviction, ICE is notified almost instantaneously after a law enforcement official arrests an undocumented immigrant. This facet of the program may encourage LLEAs to arrest individuals they deem “foreign-looking” in order to send their fingerprints to ICE.\(^{60}\)

Though officers’ motivations may not be entirely clear, the following story illustrates the possibility that officers performing stops might do so based on someone’s appearance. Felipe, a 29-year-old Mexican national who has lived in the United States since he was four years old, was almost deported for a crime he did not commit.\(^{61}\) He has no ability to become a United States citizen unless he marries one. One afternoon in early 2010, two police officers pulled him over while he was driving home from work in Santa Barbara. Felipe was not speeding. When he asked the officers why he had been stopped, they did not answer his question.

After asking for Felipe’s license and registration, the officers learned that the car was insured, but Felipe did not have a driver’s license, which is not a statutorily deportable offense. He had with him a Mexican driver’s license and a passport. Stating that both the license and passport were clearly fake, the officers then arrested Felipe for felony possession of fraudulent documents. When Felipe asked the officers if he could call someone to get another form of identification they refused to let him. The officers also said that they had received a report of a

\(^{56}\) Confusion over Secure Communities, supra note 52; see also, Chandler, supra note 55.


\(^{58}\) CCR, Briefing Guide to “Secure Communities,” supra note 46. See also Kevin R. Johnson, How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering 98 GEO. L.J. 1005, 1076 (April 2010) (discussing the long-standing use of racial profiling by law enforcement and two Supreme Court cases that permit, in effect, such profiling. “Unfortunately, the events of September 11, 2001, noticeably slowed the movement to end racial profiling. To the contrary, the U.S. government relied heavily on racial, national origin, and religious profiles in the newly proclaimed ‘war on terror.’ The comeback of racial profiling and its subsequent retrenchment reveals the difficulties of racial minorities relying on the political process in pursuit of social justice and suggests the need for different minority groups to work together politically in order to eliminate racial profiling.”).

\(^{59}\) CCR, Briefing Guide to “Secure Communities,” supra note 46.


\(^{61}\) This story is from an interview on February 22, 2011 with an immigration advocate who prefers to remain anonymous. Names and other details have been changed in order to protect anonymity.
Felipe’s account of his arrest and detention illustrate what may have been a racially- or ethnically-motivated stop. He would have been deported for a non-violent crime. Unfortunately, Felipe’s story is not unique.

C. Deportation of Individuals Convicted of Non-violent Crimes

As stated above, S-Comm leaves the fates of Level 2 and Level 3 offenders up to the discretion of ICE officials, and ICE statistics show that the majority of individuals deported under S-Comm were arrested for allegedly committing non-violent crimes.\(^62\) For example, in Travis, Texas, 82% of S-Comm deportations are of non-criminals, while in San Diego, California, the figure is 63%.\(^63\) If S-Comm’s stated goal is deporting “criminal aliens,” these numbers suggest that the ICE is not implementing the program in ways that meet the stated goal.

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\(^62\) CCR, Briefing Guide to “Secure Communities,” supra note 46; see also Teresa A. Miller, Lessons Learned, Lessons Lost: Immigration Enforcement's Failed Experiment with Penal Severity, 38 FORDHAM URB. L.J. 217 (2010) (exploring how immigration enforcement followed the “tough on crime” movement in the criminal justice system and contributed to the over-incarceration of immigrants).

\(^63\) CCR, Briefing Guide to “Secure Communities,” supra note 46.
D. Wrongful Deportation

ICE files tens of thousands of cases in Immigration Courts each year. Over the past five years, immigration court judges ("IJ")s terminated almost 95,000 cases because there were no grounds for removal. IJs granted relief in over 150,000 cases during that same period of time. In total, nearly 250,000 individuals were affected by futile ICE filings in the FY 2006-2010 period, and nearly 31% of ICE requests for deportation were rejected during the last quarter of FY 2010, up from roughly 25% the previous year. In FY 2010, Immigration Courts in Los Angeles, Miami, New York City, and Philadelphia turned down more than half of ICE removal requests. These statistics demonstrate that governmental efforts to remove undocumented immigrants are often ineffective. Some failures result from poorly designed immigration reform programs like S-Comm. In fact, such programs may undermine public faith in the government’s ability to implement effective reform.

E. Impact on Domestic Violence Victims

Past repercussions of local immigration enforcement on non-citizen domestic violence victims, suggest that S-Comm will also have a severely detrimental effect on this vulnerable population. The negative impacts of local immigration enforcement on victims of domestic violence may manifest in several ways. Most significantly, victims of domestic violence are occasionally arrested wrongfully as the “primary aggressor” in a relationship, or through dual arrests. These victims, already traumatized, may then be detained by ICE. Secondly, domestic violence offenders often report or threaten to report victims to ICE or the police as a method of further victimization. Offenders separate or threaten to separate victims from their children

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64 See TRAC IMMIGRATION, TRAC REPORTS, INC., ICE SEeks to Deport the Wrong People (Nov. 9, 2010), http://trac.syr.edu/immigration/reports/243/.
65 Id.
66 Id.
67 Id.
68 Id.
70 Colo. Coal. Against Dom. Violence, Secure Communities Program Fact Sheet (Sept. 2010) (on file with author); Fact Sheet: Intersection of Domestic Violence and the Secure Communities Program (Sept. 2010) (on file with author); see also Pendleton, supra note 54.
72 See Pruitt, Place Matters, supra note 71.
through deportation or arrest, leaving children in the abusers’ custody, which may be physically or emotionally harmful to them.\textsuperscript{73} S-Comm provides an easy method for offenders to do so.

Battered women are already a vulnerable population, with considerable inhibitions about calling law enforcement in the first place.\textsuperscript{74} If the community thinks police are ICE agents, abused or battered immigrants will hesitate to call the police to notify them of the abuse.\textsuperscript{75} This will also inhibit domestic violence victims from taking advantage of protective provisions like the Violence Against Women Act (“VAWA”)\textsuperscript{76} that might provide them independence from their abusers.\textsuperscript{77} Additionally, immigrant domestic violence victims may not wish to report abuse if they believe that their abusers someone will turn their abusers in to ICE.\textsuperscript{78} S-Comm currently has no protections in place for domestic violence arrestees, thus providing no safety net for victims.\textsuperscript{79} Without such protections, law enforcement cannot adequately responding to all domestic violence crimes.\textsuperscript{80}

\textbf{F. Detention for More than Forty–Eight Hours}

An ICE detainer allows an LLEA to maintain custody of an individual after local jurisdiction ends.\textsuperscript{81} After ICE issues a detainer, transfer of custody from LLEAs to ICE is not instantaneous. In theory, once ICE issues a detainer, a locality should not hold an individual for more than forty–eight hours before he or she is transferred to ICE.\textsuperscript{82} In practice, however, LLEAs often unlawfully detain individuals for more than forty-eight hours (i.e. after the detainer expires).\textsuperscript{83} Unfortunately, unlike in criminal case, indigent individuals do not have a recognized right to government-funded counsel.\textsuperscript{84} Many individuals held on detainers are not aware that they have

\begin{footnotesize}
\textsuperscript{73} Id.
\textsuperscript{74} See Tom Lininger, \textit{The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims}, 87 TEX. L. REV. 857, 870 (2009) (“The reluctance of victims to report and testify about domestic violence makes domestic violence one of the hardest crimes to prosecute.”).
\textsuperscript{75} See Idilbi, supra note 32, at 1729-33; supra note 71.
\textsuperscript{76} 18 U.S.C.A. § 2261 (West).
\textsuperscript{77} See Pendleton, supra note 54.
\textsuperscript{78} See Decasas, supra note 71.
\textsuperscript{79} For suggested protections, see infra p.25.
\textsuperscript{81} “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.” 8 CFR § 287.7 (2010).
\textsuperscript{82} Id.
\textsuperscript{83} In Sacramento County, for example, ICE sometimes takes more than forty-eight hours to pick up detainees. In fact, one individual in a Sacramento detention facility has been detained since September, as of March 2011, due to a pending ICE hold. \textit{See} Telephone Interview with Jason Ramos, Deputy, Media Relations, Sacramento County Sheriff (Feb. 16, 2011) [hereinafter Ramos Interview].
\end{footnotesize}
recourse for wrongful detention, or even that LLEAs are detaining them unlawfully.\textsuperscript{85} ICE detainers also place administrative burdens on LLEAs and expose them to potential civil liability for illegal arrests or for detaining individuals for unlawful periods.

\textbf{G. Inadequate Training}

Dealing with immigration “crime” is a matter distinct from detecting traffic violations or handling serious crimes. Most regulations governing traditional law enforcement are significantly less complex than immigration laws.\textsuperscript{86} State law enforcement officials are not likely to receive special training in immigration enforcement, which puts legal immigrants at risk for being mistaken as undocumented.\textsuperscript{87} Further, when LLEAs take on the burden of immigration enforcement, resources traditionally available for normal LLEA crime prevention are no longer at LLEAs’ disposal.\textsuperscript{88}

Neither DHS nor Congress oversees S-Comm’s implementation satisfactorily.\textsuperscript{89} In 2010, the ACLU requested that the DHS Office of Inspector General audit the program for racial profiling and other abuses, as well as compliance with ICE’s priorities.\textsuperscript{90} While greater Federal Government oversight might address some of the detrimental effects of S-Comm, the Federal Government may not have the authority to enforce the program. The next Part considers the appropriate roles of federal and local governments in immigration regulation and enforcement and whether the Federal Government has that authority.

\textbf{III. Federalism and the Authority to Implement and Enforce Immigration Reform: Is Immigration No Longer an Exclusively Federal Issue?}

The Tenth Amendment of the U.S. Constitution reserves powers not delegated to the Federal Government for the States.\textsuperscript{91} Although the power to regulate immigration does not appear explicitly in the Constitution, it is generally understood that this power is reserved for the Federal Government under the “Naturalization Clause” — Article I, Section 8, Clause 4 of the Constitution.\textsuperscript{92} Because immigration regulation and enforcement is a power reserved for the

\textsuperscript{86} \textit{See} Chandler, \textit{supra} note 55 at 233.
\textsuperscript{87} \textit{See id.}
\textsuperscript{88} \textit{See} Petition by Nat’l Day Laborer Org. Network to Sec’y Napolitano, Dep’t of Homeland Sec., \url{http://action.altoarizona.com/p/ dia/action/public?action_KEY=4383} (last visited Nov. 20, 2010).
\textsuperscript{89} \textit{See ACLU Statement on Secure Communities}, ACLU.ORG, \textit{supra} note 3.
\textsuperscript{90} \textit{See id.}
\textsuperscript{91} “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.
\textsuperscript{92} The clause states, “[t]he Congress shall have Power...To establish a uniform Rule of Naturalization.” U.S. CONST. art. I § 8, cl. 4. This clause is problematic because federal immigration law addresses much more than
Federal Government, the Federal Government cannot co-opt state resources for enforcement. Further, *Printz v. United States* prohibits the Federal Government from ordering state and local governments to perform certain tasks.93

In 1993, Congress enacted the Brady Handgun Violence Prevention Act (“Brady Act”),94 amending the 1968 Gun Control Act.95 The Brady Act called for interim provisions that instructed local law enforcement officials to participate in background checks required under the Gun Control Act.96 The Federal Government enlisted chief law enforcement officials (“CLEOs”) in administering federal laws, a responsibility that belongs to the executive branch.97 On certiorari, the United States Supreme Court found the Brady Act’s imposition of a background check requirement on CLEOs unconstitutional. The Court held that the law improperly co-opted state officers to enforce federal regulations and eroded the system of “dual sovereignty,” undermining the separation of powers.98 This dual sovereignty enables states to retain autonomy, even though many powers are reserved to the Federal Government.99

In *Printz*, the Government’s description of the Executive Branch’s historical use of state executive officers to administer federal programs noted that the first Congresses enacted statutes requiring state courts to record citizenship applications, register aliens pursuing naturalization, issue certificates of registry, and send to the Secretary of State summaries of such applications and other naturalization records.100 *Printz*’s progeny stated that the Executive Branch imposed these obligations with the States’ consent and could not be enforced without it.101 Judges may enforce federal law; Congress, however, is bound by the Constitution and cannot force state officers to carry out federal mandates, even for “limited, non-policymaking help in enforcing [such] law[s].”102

In the majority opinion in *Printz*, Justice Scalia cites *New York v. United States* for the proposition that Congress cannot require states to enforce or enact a federal regulatory

naturalization. See Chandler, *supra* note 55, at 210. Another potential call for state and local immigration enforcement may be INA § 103(a)(10). That regulation grants the Attorney General (“AG”) the power to authorize, but not to compel, state and local officers to enforce immigration law if he or she determines that an “actual or imminent mass influx of aliens arriving […] presents urgent circumstances requiring an immediate Federal response.” 8 U.S.C.S. § 110 (2010). If the AG concludes that there is such an influx, he or she “may authorize any State or local law enforcement officer, with the consent of the head of the department, agency, or establishment under whose jurisdiction the individual is serving, to perform or exercise any of the powers, privileges, or duties conferred or imposed by this Act or regulations issued thereunder upon officers or employees of the Service.” *Id.* For a history of immigration in North America, see James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 Va. L. Rev. 35 (2010).

96 *Printz*, 521 U.S. at 904.
97 *Id.*
98 *Id.* at 935.
99 *Id.* at 899.
100 *Id.* at 905–06.
102 *Printz*, 521 U.S. at 927.
program. 103 Printz expanded that prohibition by denying Congress the ability to evade commandeering issues by directly enlisting State officers to enforce or enact federal programs. 104 Justice Scalia writes,

The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty. 105

By denying counties the ability to opt out, is the Government implicitly issuing a directive requiring the States to address the “problem” of immigration? Do USCIS and ICE have the power to make a program like S-Comm mandatory, or the ability to command State officers to enforce or administer such a regulatory program? 106 Because the Federal Government cannot commandeer state actors, courts may have to probe the issues present in Printz as they relate to S-Comm. 107

District of Columbia Council member, Jim Graham (D-Ward 1), expressed his disappointment over localities’ inability to opt out of S-Comm due to the “blurred line” between


In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. As we have seen, the Court has consistently respected this choice. We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. . . . The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

104 Printz, 521 U.S. at 935.

105 Id.

106 Id. In 1996, section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) encouraged information sharing between State and local entities and federal entities, providing:

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

8 U.S.C.A. § 1373 (West 2010). However, § 642(a)'s constitutionality has not been litigated fully. See Chandler, supra note 55.

107 287(g) agreements, however, allow the government and localities to curtail the issue of commandeering by entering into memorandums of understanding. For more on 287(g) agreements, see infra p.15.
activities conducted by the Metropolitan Police Department and immigration officers. Graham and the rest of the Council sponsored a bill in May 2010 to opt out of S-Comm. Graham stated,

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

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

Despite political and social disapproval of S-Comm’s “blurred line,” Courths will not likely find an argument to invalidate S-Comm under Printz convincing. S-Comm may be “yet another example of local and federal agencies working together effectively to keep our communities safe,” and critics of local enforcement of immigration laws may be “too quick to read local actions directed toward immigrants as a subset of the national immigration controversy while ignoring the underlying local issues involved.” Maintaining the belief that only federal reform can solve local immigration problems may unintentionally limit state and local responses.

In light of S-Comm, localities may or may not be mere creatures of the state. If a State opts to implement S-Comm, must localities? Another important concern is whether the Federal Government should subject immigration enforcement to centralized. Centralized control may allow for greater uniformity of law’s substance and enforcement, better oversight, and greater efficiency than decentralized control. In contrast, decentralized control allows localities to better cater to the interests, attitudes, and needs of their communities, while creating a platform

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111 Desoto County News Release, supra note 9.

112 Rick Su, A Localist Reading of Local Immigration Regulations, 86 N.C. L. REV. 1619, 1624 (2008). See id.; see also Peter H. Schuck, Taking Immigration Federalism Seriously, 2007 U. CHI. L.F. 57, 72 (2007) (“For better and for worse, effective federal immigration enforcement often depends upon the extensive participation of state and local officials. This is particularly true regarding enforcement against immigrants who have been convicted of crimes in this country.”); Cristina M. Rodriguez, The Significance of the Local in Immigration Regulation, 106 MICH. L. REV. 567, 609–10 (2008) (discussing roles of all levels of government in immigration enforcement in a “de facto [federal, state, and local] multi-sovereign regime”).


114 See Chandler, supra note 55 at 231.
for experimenting with and evolving enforcement systems.\textsuperscript{116} However, any deference to local judgment should be narrowly tailored for the purpose of opting out of S-Comm. Sweeping deference to local governments could lead to permission for programs like Arizona S.B. 1070\textsuperscript{117} across the country.

A. Do 287(g) Agreements and MOAs Implicitly Allow State and Local Enforcement of Immigration Laws?

Some critics view S-Comm as an expansive version of 287(g) agreements. Section 287(g) of the Immigration and Nationality Act ("INA"), which Congress passed in 1995, permits state and LLEAs to enter into agreements with the Federal Government via MOAs.\textsuperscript{118} These MOAs allow appropriately trained officers to carry out immigration law activities, such as identification, processing, and detention of undocumented immigrants, in addition to their regular work.\textsuperscript{119} The Executive Branch supervises State officers acting under 287(g) agreements, and State employees or officers acting under 287(g) authority shall be considered "to be acting under color of Federal authority" when determining liability and immunity from lawsuits.\textsuperscript{120} Because officers acting pursuant to 287(g) agreements perform their functions as federal actors, arguing that they are being commandeered would be challenging.\textsuperscript{121} However, the U.S. Code states that nothing in the subsection codifying 287(g) should be construed to compel state officials or employees to convey anyone’s immigration status to the Attorney General or to cooperate with the Attorney General in identifying, arresting, or removing undocumented immigrants.\textsuperscript{122}

\textsuperscript{116} See id. While the federalism debate surrounding immigration regulation presents an opportunity for reform, the United States is in need of broader immigration policy reform. The Federal Government should not “dragoon states or localities into enforcement of immigration policies with which they disagree. States and localities should decide for themselves how to weigh the advantages of enforcing federal immigration policy - criminal or civil - against its significant costs. I would be much more trusting of local government's decisions to enforce federal immigration laws if they would give up their qualified immunity for mistakes that occur as a result and would spell out for the citizenry the heightened risks they face when those predisposed to conventional crime can take advantage of immigrant fears of cooperating with law enforcement.” Id. at 242. For an interesting take on immigration reform, see Jennifer Gordon, Workers Without Borders, N.Y. TIMES, March 9, 2009, at A27, available at http://www.nytimes.com/2009/03/10/opinion/10gordon.html. See also Keith Aoki & John Shuford, Welcome to Amerizona-Immigrants Out!: Assessing “Dystopian Dreams” and “Usable Futures” of Immigration Reform, and Considering Whether “Immigration Regionalism” Is an Idea Whose Time Has Come, 38 FORDHAM URB. L.J. 1 (2010) (contemplating the pros and cons of “immigration regionalism” as a form of immigration reform).

\textsuperscript{117} S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

\textsuperscript{118} 8 U.S.C.S. § 1357(g). This law enables states and localities to enforce immigration laws pursuant to a signed agreement with the Attorney General, but cannot be construed to require states or localities to sign such an agreement.

\textsuperscript{119} See id.

\textsuperscript{120} “An officer or employee of a State or political subdivision of a State shall be subject to the directions and supervision of the Attorney General.” 8 U.S.C.S. § 1357(g).

\textsuperscript{121} See McThomas, supra note 45.

\textsuperscript{122} 8 U.S.C.A. § 1357(g). A staff attorney with Southern Coalition for Social Justice (SCSJ) in Durham, North Carolina, coordinates the organization’s immigrant rights work. He believes that the overlapping jurisdiction between 287(g) agreements and S-Comm creates difficulty in determining which of the cases that come to him are a result of 287(g) enforcement and which are S-Comm cases. Telephone Interview with Anonymous Attorney, S.
ICE has not described the extent of its guidance over 287(g), although the law calls for ICE supervision of state and local officials. As a result, ICE field officials have different understandings of the nature and extent of their responsibilities as supervisors. For example, one ICE official stated that the agency does not directly supervise LLEAs in the 287(g) program. In contrast, another ICE official said that ICE supervisors provide “frontline support” for the program.

It remains unclear what capacity LLEAs are acting in when they send fingerprints to IFAIS. Are they state actors or federal actors? Do LLEAs’ acts fall within the doctrine of “concurrent enforcement,” which is authorized only where “state enforcement activities do not impair federal regulatory interests”? Because S-Comm is a federal program and not likely voluntary, this is doubtful. Regardless of what capacity LLEAs act in when participating in S-Comm, the program’s activities must be funded. The next Section discusses who should provide this funding.

B. Should the State, Local, or Federal Government Bear the Cost of Implementing S-Comm?

ICE planned to spend 1.4 billion dollars of Congressional allowances in FY 2009 on “criminal alien enforcement,” but it is unclear how much of this funding localities would have received specifically for implementing S-Comm. Though ICE budgeted $200 million for “Secure Communities/Comprehensive Identification and Removal of Criminal Aliens (SC/CIRCA)” in 2010, their enacted budget does not detail specifically how it will allocate those funds. The budget does state that $43.5 million of new funding was allocated to S-Comm and forty-six full-time employees.

Even though the Federal Government claims that S-Comm does not impose costs on localities and that local sheriffs are just agreeing to hold individuals until ICE can pick them up, the individuals held by LLEAs pursuant to detainers are not actually in ICE custody. While these individuals remain in LLEA custody, those LLEAs must use their resources to detain them. According to Anjali Bhargava, Deputy County Counsel at the Santa Clara County Counsel’s

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124 Id. For more information regarding the effectiveness of 287(g), see IMMIGR. POLICY CTR., AM. IMMIGR. COUNCIL, GIVING FACTS A FIGHTING CHANCE: ANSWERS TO THE TOUGHEST IMMIGRATION QUESTIONS (2010), available at http://www.immigrationpolicy.org/sites/default/files/docs/Giving_Facts_a_Fighting_Chance_100710.pdf.
125 Lozano v. City of Hazelton, 620 F.3d 170, 218 (3d Cir. 2010).
126 Gonzales v. Peoria, 722 F.2d 468, 474 (9th Cir.), overruled on other grounds by Hodgers-Durgin v. de la Vina, 199 F.3d 1037 (9th Cir. 1999) (en banc).
Office, ICE provides no “trickle down” funding specifically for communities implementing S-Comm.\(^{129}\) LLEAs may nevertheless be able to recuperate some of their expenses via the State Criminal Alien Assistance Program (“SCAAP”).\(^{130}\) SCAAP provides federal reimbursements to states and localities that bore costs for detaining undocumented immigrants with at least one state or local felony conviction or two misdemeanor convictions for at least four or more consecutive days.\(^{131}\)

LLEAs incur greater costs as the number of detainers they must comply with increases. Over time, an increasing amount of LLEAs’ resources will be devoted to detaining undocumented individuals.\(^{132}\) While reimbursement may be secured through SCAAP, localities may have to advance the money and hope for repayment in the future. Additionally, jurisdictions typically request more in reimbursements than SCAAP is able to pay.\(^{133}\) The Government Accountability Office found that SCAAP payments to the four states with the highest number of SCAAP undocumented immigrants in FY 2003 covered less than 25% of the approximate cost to detain those individuals.\(^{134}\) In FY 2003, SCAAP payments covered just 12% of estimated detention costs for California, 14% for Arizona, 17% for Florida, and 24% for New York.\(^{135}\)

Given that the Federal Government may not adequately cover expenses LLEAs incur due to implementing S-Comm at the local level, LLEAs might look to their state governments for funding. Unfortunately, funding disparities are also present at the state level. For example, California’s constitution requires that the State reimburse local governments for expenditures they incur in implementing legislative- or state–agency-mandated programs.\(^{136}\) Because S-Comm is a federal program, however, the State may not be constitutionally required to fund it.\(^{137}\)

\(^{129}\) Telephone Interview with Anjali Bhargava, Deputy Cnty Counsel, Santa Clara Cnty Counsel’s Office (Oct. 5, 2010).


\(^{131}\) Id.

\(^{132}\) For more information on the economic ramifications of immigration enforcement at the local level, see Huyen Pham & Pham Hoang Van, The Economic Impact of Local Immigration Regulation: An Empirical Analysis, 32 CARDOZO L. REV. 485, 518 (2010).


\(^{134}\) Id.

\(^{135}\) Id.

\(^{136}\) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service [with the exception of] (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.


\(^{137}\) See Cnty of Los Angeles v. Comm’n on State Mandates, 2 Cal. Rptr. 3d 419 (Ct. App. 2003); Cnty of Los Angeles v. Comm’n on State Mandates, 38 Cal. Rptr. 2d 304 (Ct. App. 1995), holding modified sub nom. Dep’t of Fin. v. Comm’n on State Mandates, 122 Cal. Rptr. 2d 447 (Ct. App. 2002); Hayes v. Comm’n on State Mandates, 15 Cal. Rptr. 2d 547 (Ct. App. 1992).
California’s constitution only mandates funding when the State adopts a regulation pursuant to a federal mandate and has no choice in the manner of its execution. 138  Because of the mixed messages regarding whether S-Comm is, in fact, a federal mandate, this constitutional provision may or may not apply.  If California’s constitutional provision does apply, California counties would be able to appeal to the Commission of State Mandates to request funding.  As it stands, California counties do not receive state funding for implementation of S-Comm and, as mentioned above, SCAAP reimbursement fails to cover the entire cost of detaining undocumented immigrants at the LLEA level.

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

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

In the 1980s, many U.S. cities adopted “sanctuary city” policies or designations designed to protect undocumented immigrants. 139  During that time, churches across the U.S. sheltered Central Americans escaping civil wars in their home countries. 140  The term “sanctuary city” may describe municipalities that have adopted “sanctuary, non-cooperation, or confidentiality policies for undocumented residents, which may be viewed as inclusionary types of laws.” 141  Such policies may be de jure or de facto and may be manifested by prohibiting use of municipal funds for enforcing federal immigration laws or for requiring municipal employees to inquire about an individual’s immigration status. 142  When LLEAs refuse to enforce immigration laws, are they enforcing a “sanctuary” policy, or are they simply refusing to take on a task performed historically by the Federal Government?  Though the answer varies, sanctuary cities like San Francisco may have a stronger argument for opting out of programs like S-Comm.

A. San Francisco’s “Sanctuary”

The San Francisco Board of Supervisors first declared the city a “sanctuary city” in 1989, prohibiting City employees from assisting ICE with arrests or immigration investigations unless required by warrant or state or federal law. 143  Representing one of the governments that “have

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142 Some critics believe that sanctuary city efforts may have inadvertently helped open the door for states and localities to enforce immigration.  The idea of sanctuary cities may have been better packaged as a public safety initiative: by agreeing not to participate in activities such as assisting ICE with arrests or immigration investigations, undocumented immigrants will likely be more willing to provide information to police and comply with local law enforcement investigations. See Dean Johnson Interview, supra note 53.
143 S.F., CAL., ADMIN. CODE ch. 12H.
stood firmly against repressive immigration proposals in Congress and immigration raids that separate families,” Mayor Gavin Newsom issued an Executive Order in February 2007 asking City departments to develop training and procedures on the city’s Sanctuary Ordinance.144

San Francisco’s Sanctuary Ordinance prohibits any San Francisco City or County agency, commission, department, employee, or officer from using any City funds or resources to assist in the enforcement of federal immigration law or disseminating or gathering information about the immigration status of persons in the City or County unless required by state or federal regulation, statute, or court decision.145 Such assistance includes cooperating or assisting, in an individual’s official capacity, with any USCIS detention, investigation, or arrest procedure dealing with alleged violations of civil federal immigration law provisions.146

The Ordinance, however, does not prohibit (nor should it be construed as prohibiting) law enforcement officers from identifying and reporting persons pursuant to federal or state regulation or law who, after being booked for the alleged commission of a felony, are in custody and suspected of violating civil provisions of immigration laws.147 Further, the Ordinance does not preclude San Francisco County or City actors148 from reporting arrests of previously convicted felons to USCIS, cooperating with USCIS requests for information about convicted felons, or reporting information as per federal or state statute, court decision, or regulation.149 Perhaps the most important protection that the ordinance provides is its prohibition against County or City employees, officers, or law enforcement agencies stopping, questioning, detaining, or arresting individuals exclusively because of their immigration status or national origin.150

Long-time San Francisco Sheriff Michael Hennessey has consistently been outspoken in his criticism of San Francisco’s potential implementation of S-Comm. In May 2010, Hennessey

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145 S.F., CAL., ADMIN. CODE ch. 12H § 2.
146 Id. Such assistance also includes, but is not limited to:

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

Id.
147 Id.
148 Defined as “department, agency, commission, officer or employee[s].” Id.
149 Id.
150 Id.
wrote a letter to Attorney General Jerry Brown requesting assistance in opting out of S-Comm.\textsuperscript{151} Hennessey’s concern was that S-Comm conflicts with San Francisco’s Sanctuary Ordinance.\textsuperscript{152} He stated that his department has “delivered” more than 3,100 people to ICE, and that he intends to continue reporting “foreign-born individuals” charged with felonies or having a felony or “previous ICE contact in their criminal histories” directly to ICE.\textsuperscript{153} However, after a meeting on November 9, 2010 with ICE officials, San Francisco would not opt out of S-Comm, due to ICE’s explanation that counties cannot prevent the data sharing necessary for S-Comm’s implementation.\textsuperscript{154} At the same meeting, ICE’s S-Comm director, David Venturella, reportedly stated that LLEAs are not required to respond to detainers.\textsuperscript{155} Eileen Hirst, a spokeswoman from the San Francisco Sheriff’s office said that Sheriff Hennessey could decide that his department would not honor ICE-issued detainers.\textsuperscript{156}

\textbf{B. Congressional Restriction on Sanctuary Cities}

In 1996, Congress enacted a law stating that state and local government entities may not be prohibited from sending information to or receiving information from the INS (now USCIS) regarding individuals’ immigration statuses.\textsuperscript{157} The “clear target” of provisions like this was non-enforcement attempts by localities like San Francisco’s Sanctuary Ordinance.\textsuperscript{158} The City of New York challenged Congress’s “anti-sanctuary measure” shortly after it was enacted.\textsuperscript{159} The court in \textit{City of New York v. United States} held that Section 434 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“Welfare Reform Act”) and Section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”)\textsuperscript{160} did not force state or local governments to administer federal program in violation of the Tenth Amendment. According to the court, New York City’s sovereignty argument asked the court to

\[\text{[T]urn the Tenth Amendment’s shield against the federal government’s using state and local governments to enact and administer federal programs into a sword allowing states and localities to engage in passive resistance that frustrates federal}\]

\begin{footnotesize}
\textsuperscript{152} Id.
\textsuperscript{153} Id. According to the U.S. Census Bureau, 36.8% of San Francisco County residents in the year 2000 were foreign born. \textit{State and County QuickFacts}, U.S. CENSUS BUREAU, available at http://quickfacts.census.gov/qfd/states/06/06075.html (last visited Mar. 10, 2011).
\textsuperscript{155} Id.
\textsuperscript{156} Foley, supra note 154.
\textsuperscript{157} 8 U.S.C.A. § 1644 (West 2010).
\textsuperscript{159} See Rick Su, supra note 158.
\textsuperscript{160} Both acts prohibited state and local governments from restricting employees from voluntarily providing information about individuals’ immigration status to INS.
\end{footnotesize}
programs. If Congress may not forbid states from outlawing even voluntary cooperation with federal programs by state and local officials, states will at times have the power to frustrate effectuation of some programs. Absent any cooperation at all from local officials, some federal programs may fail or fall short of their goals unless federal officials resort to legal processes in every routine or trivial matter, often a practical impossibility.\(^{161}\)

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

**C. Los Angeles’ Special Order Number 40**

In 1979 the Board of Police Commissioners adopted a policy that lead to Special Order Number 40, which states that Los Angeles Police Department Officers shall not “initiate police action with the objective of discerning the alien status of a person. Officers shall not arrest or book person for [illegal entry].”\(^ {162}\) In *Sturgeon v. Bratton*, a California Court of Appeal found Special Order 40 did not conflict with 8 U.S.C. § 1373, which addresses “voluntary” exchange of information between any government entity or official and federal immigration enforcement agencies.\(^ {163}\)

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

**V. SHOULD CITIES AND LOCAL LAW ENFORCEMENT AGENCIES BE ABLE TO OPT OUT OF S-COMM?**

Over the past year, states and localities have had difficulty determining ICE’s stance on whether they can opt out of S-Comm. On September 7, 2010, Homeland Security Secretary Janet Napolitano sent a letter to Zoe Lofgren, Member of the U.S. House of Representatives (D-CA) and Chair of the House Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law, stating the conditions under which a LLEA may opt out of S-Comm.\(^ {164}\) Napolitano’s letter stated that,

> [A] local law enforcement agency that does not wish to participate in the Secure Communities deployment plan must formally notify the Assistant Director for the Secure Communities program, David Venturella . . . The agency must also notify

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\(^ {161}\) City of New York v. United States, 179 F.3d 29, 35 (2d Cir. 1999).


the appropriate state identification bureau by mail, facsimile, or e-mail. If a local law enforcement agency chooses not to be activated in the Secure Communities deployment plan, it will be the responsibility of that agency to notify its local ICE field office of suspected criminal aliens.\textsuperscript{165}

ICE described a similar opt-out procedure in a memo released in late August of 2010.\textsuperscript{166} On September 8, 2010, Assistant U.S. Attorney General Ronald Weich responded to a letter from Lofgren asking for a “clear explanation of how local law enforcement agencies may opt out of Secure Communities by having the fingerprints they collect and submit to the SIBs checked against criminal, but not immigration, databases.” Weich’s letter echoed Napolitano’s instructions.\textsuperscript{167}

Despite these official responses, local jurisdictions are finding that they cannot opt out of S-Comm.\textsuperscript{168} An anonymous senior ICE official stated that, “Secure Communities is not based on state or local cooperation in federal law enforcement. The program’s foundation is information sharing between FBI and ICE. State and local law enforcement agencies are going to continue to fingerprint people and those fingerprints are forwarded to FBI for criminal checks. ICE will take immigration action appropriately.”\textsuperscript{169} As a result, the only route a local jurisdiction could use to opt out of S-Comm is if the state declined to send fingerprints to the FBI, thus withholding them from ICE.\textsuperscript{170} Because prosecutors and law enforcement need to know the criminal histories of arrestees, this method is unrealistic. The ICE official said that municipalities could, however, opt out of learning why immigration authorities wanted someone detained, but they would still be required to detain the individual.\textsuperscript{171}

In October 2010, CCR, NDLO, and the Kathryn O. Greenberg Immigration Justice Clinic of the Cardozo School of Law filed suit in federal court alleging ICE’s noncompliance with a FOIA request and seeking a writ of mandamus ordering ICE to release documents explaining


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

\textit{Id.}

\textsuperscript{167} Letter from Janet Napolitano, \textsuperscript{164} supra note 164.

\textsuperscript{168} Vedantam, \textsuperscript{108} supra note 108.

\textsuperscript{169} \textit{Id.}

\textsuperscript{170} \textit{Id.}

\textsuperscript{171} \textit{Id.}
how communities can opt out of S-Comm. At that time, Arlington, Virginia and Santa Clara and San Francisco, California had all submitted formal requests to opt out of the program. In February 2011, CCR, NDLON, and the Justice Clinic released S-Comm documents they obtained through the FOIA suit. Their guide to the documents, and the documents themselves, chronicle the confusion regarding opting out of S-Comm, and reiterate that, although ICE publicly announced that S-Comm is a “mandatory” program, the agency remains unclear about a legal basis for mandatory implementation.

A. Affirmative Actions for Non-Complying Cities

Due to the murkiness of opt-out procedures, it is unclear how much a locality can do to affirmatively resist participation. Passively, a city can decline to arrest undocumented immigrants and sheriffs can refuse to issue ICE detainers, but these options give rise to complications. If a locality has a sanctuary policy, it may be able to decline compliance with detainers due to S-Comm’s conflict with the policy. Although localities have the legal authority to decide when to hold an individual subject to an ICE detainer, because S-Comm shares data between two federal departments (DHS and the FBI), the only way a jurisdiction can avoid taking part in S-Comm is by refusing to send fingerprints to the federal criminal justice system. As stated above, this option would seriously undermine crime-fighting functions of LLEAs. LLEAs that decline to share fingerprints with the Justice Department will lose access to state and federal criminal databases. LLEAs do have the power to elect whether to review the information DHS returns in response to the fingerprints. However, this still leaves localities with little control: ICE maintains the ability to initiate deportation of individuals in question, regardless of an LLEA’s position on the matter. Alternatively, because states can enter into MOAs with ICE to implement S-Comm, those states can also request to edit the MOAs so that the agreements are better aligned with local priorities.


175 See supra Part IV.

176 Memorandum from Immigr. Justice Clinic, Benjamin N. Cardozo School of Law on Local Discretion to Not Hold Detainees Subject to Immigration Detainers (April 16, 2010).

177 See Confusion over Secure Communities, supra note 52.

178 Id.


180 See id.

181 See id.
Some activists would choose a more court-based method of protest. They believe that government trial attorneys are not enforcing their stated priorities, and that immigration courts should weigh in. One possible method for bringing issues with S-Comm to DHS’s attention is to file complaints in all cases that are not in response to Level 1 or Level 2 criminals. This would place a large burden on the court and force DHS to implement more than just the policy directive that is currently S-Comm.182

In May 2009, the California Department of Justice entered into a MOA with ICE regarding implementation of S-Comm in the State. Since then, S-Comm has been activated in all 58 jurisdictions, including Santa Clara County. When Santa Clara County received information from ICE in October 2009, the County understood the program as voluntary and did not take action or return a questionnaire about current County jail booking practices.183

ICE notified Santa Clara County in April 2010 of its plan to activate S-Comm in the jurisdiction. Although the Board of Supervisors had not approved participation, ICE activated S-Comm in the county in May 2010, stating that approval from the Board was not required.184 Despite a unanimous decision by the Board to opt out of the program, S-Comm in Santa Clara County led to 523 individuals arrested or booked into ICE custody from the beginning of May until the end of September.185 One hundred and thirty-three of those individuals had no criminal record.186 Implementation in Santa Clara County also led to 241 people removed from the United States, eighty-one of whom had no criminal record.187

Despite statements that localities may not opt out of S-Comm, Santa Clara and several other counties are looking for ways to minimize the effects of the program. For example, Santa Clara County Counsel presented a report to the Santa Clara County Board of Supervisors’ Public Safety and Justice Committee suggesting that the Board direct the County Administration to make certain that no County funds are used to “provide unreimbursed assistance to U.S. Immigration and Customs Enforcement, including assistance requested through immigration detainers,” except as prescribed by law.188 Taking the report into account, the Committee instructed the County Counsel and other County departments to collaborate to develop a recommendation about complying with detainers that also considers public safety.189

182 See Interview with SCSJ Attorney, supra note 53.
184 See id.
185 Id.
186 Id.
187 Id.
189 Email from Anjali Bhargava, Deputy County Counsel, Santa Clara County Counsel’s Office (Feb. 17, 2010, 12:37 PM) (on file with author).
While counties like Santa Clara continue to explore ways to work around or avoid S-Comm, the Federal Government should implement reforms to the program. The next Part details suggested reforms, including the ability for localities like Santa Clara to opt out.

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

Unfortunately for many immigrants, S-Comm will likely be a nationwide reality in the very near future. Though communities should make their own adjustments to the program, S-Comm on the whole would benefit from a number of changes in order to make the program more cost-effective and less detrimental to immigrants and their families.\textsuperscript{190}

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

DHS should provide clear procedures and guidelines for options available to states and counties firmly opposed to S-Comm so that those jurisdictions may comply or decline to comply with the program in ways that are both constitutional and consistent with local public policy. DHS should clarify that immigration detainers authorize detention of a subject for no more than forty-eight hours, excluding weekends and holidays, so that individuals are not held unconstitutionally. Further, all participating jurisdictions should also be trained on illegal racial or ethnic profiling in an effort to avoid discriminatory police practices.\textsuperscript{191} Quarterly data collection and analysis made available to the public should be required of ICE in order to determine the actual effects and efficacy of S-Comm.\textsuperscript{192} If those safeguards and oversight are not implemented, S-Comm will continue to threaten the civil liberties and safety of immigrants and U.S. citizens alike, especially people of color.\textsuperscript{193}

Most importantly, the Federal Government should explicitly allow local governments, (especially sanctuary cities), and LLEAs to opt out of S-Comm. By doing so, the Federal Government would appropriately respect the judgment of local authorities.\textsuperscript{194} Once a locality

\textsuperscript{190} These particular changes were suggested by a non-profit organization working tirelessly for immigrants’ rights. The organization prefers to remain anonymous.


\textsuperscript{192} For instance, the information could include the number of searches localities conducted using S-Comm databases, the number and level of “hits” obtained through S-Comm disaggregated by the number of hits where charges were not filed, where charges were later dismissed, and where this is no conviction, as well as the number of incorrect “hits.”

\textsuperscript{193} See Statement on Secure Communities, supra note 3.

\textsuperscript{194} See Aoki & Shuford, supra note 116.
opts out, the FBI should not share fingerprints from that locality with ICE. Respecting local judgment is not inconsistent with DHS’s stated goals for S-Comm, i.e. deporting criminals, especially in regard to Level 1 offenders who ICE will deport regardless.

CONCLUSION

Through S-Comm, ICE requests that local governments participate in the historically federally regulated area of immigration. Whether S-Comm exceeds the power of the Federal Government, it is clear that the repercussions of the program are far reaching and that many of them are negative. In order to avoid some of the devastating consequences on LLEAs, families, employers, and state and local governments the Federal Government must make changes to S-Comm and defer to local governments’ judgment by allowing them to opt out.